

ARGENTINA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Argentina be maintained on the Priority Watch List in 2021.¹

Executive Summary: In 2020, Argentina continued to demonstrate an overall lack of commitment to effective copyright enforcement in the face of a serious piracy problem. The absence of an agenda and strategic enforcement policy and a lack of interagency cooperation remain a major challenge, especially between prosecutors and law enforcement cybercrime experts. Argentina's pandemic lockdown contributed to a spike in demand for creative works, enabling pirate sites to thrive and expand to other Spanish-speaking countries. Satellite and signal piracy also persist in Argentina. Hard goods piracy, linked to organized crime groups, also remains rampant, and market access obstacles persist, including film and television quotas, and high taxes on copyrighted content.

A draft reform to the penal code, presented to the Argentine Congress in March 2019, contained some provisions that, if properly implemented, would improve the enforcement landscape for copyrighted works. However, the bill has stalled in Congress and will lose parliamentary status on February 20, 2021 with little possibility of advancement.

In August 2020, the Fernandez Administration created the Coordination Center to Combat Cybercrime (*Centro de Coordinación de Combate al Cibercrimo*, known as C4) within the Cybercrime Investigations Directorate in the Ministry of Security. The goal of this commission is to monitor the implementation of the National Plan Against Cybercrimes (NPAC), which was initiated in 2019, to coordinate actions among security forces, public-private initiatives and cooperation with international organizations. IIPA urges the Government of Argentina to consider this valuable tool to combat rampant online piracy as well.

To address its significant piracy problems, IIPA urges Argentina to: (1) apply existing Civil and Commercial Code provisions on ISP liability for storing infringing content; (2) host private sector discussions on cross-industry cooperation; (3) create a specialized IP Prosecution Office to promote cross-agency law enforcement cooperation and ensure the diligent investigation and prosecution of copyright infringement cases; (4) undertake routine, *ex officio* inspections and raids of physical markets; (5) actively involve the Argentinean Customs Office (AFIP); and (6) assign adequate legal powers and financial resources to the Ministry of Justice's Copyright Office (*Dirección Nacional del Derecho de Autor*). It would also be helpful for Argentina to bring copyright under federal jurisdiction, as it has done with trademark law. IIPA also urges the removal of all market barriers to ensure a level playing field for U.S. creative industries.

PRIORITY ACTIONS REQUESTED IN 2021

- Increase resources and political backing for a coordinated, long-term antipiracy agenda at the federal and local levels to address online piracy.
- Continue to apply the Civil and Commercial Code to ISP liability cases.
- Host private sector discussions on potential cross-industry cooperation to tackle online piracy more effectively and support the development of the local digital economy.
- Create a specialized IP Prosecution Office and establish federal jurisdiction over copyright crimes.

¹For more details on Argentina's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Argentina's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Undertake routine, *ex officio* actions, such as inspections and raids of physical markets to stop hard goods piracy.
- Monitor discussions regarding ISP liability legislation.
- Remove quotas for motion pictures and television content, and electronic devices, and refrain from extending quotas to over-the-top (OTT) services.
- Engage customs authorities to monitor and perform border operations against counterfeit high value products (such as circumvention devices and modified game consoles) entering the country via airports and land borders.
- Assign adequate legal powers and financial resources to the Ministry of Justice's Copyright Office.

THE NATURE OF PIRACY IN ARGENTINA

Argentina has the highest Internet penetration rate in the region with 35.1 million users, but its prospects for a robust legitimate online content market will remain bleak until the government makes concerted efforts to address the country's rampant and increasing digital piracy via torrent sites, downloading, streaming, stream-ripping and linking sites.

Following a regional trend, Argentina continues to see an increase in the usage of Piracy Devices (PDs), in particular, dedicated Android boxes such as the HTV box and Kodi boxes, which are used to stream illicit copies of films and television content. In recent years, IIPA has also seen an increase in consumption of films and television through piracy mobile apps and add-ons. In 2020, the strict lockdown ordered to contain the spread of the COVID-19 pandemic triggered a significant increase in piracy of motion pictures and video games. According to TorrentFreak, there were over 508,000 daily downloads of pirated content through BitTorrent protocols in Argentina on March 17 (three days before the official lockdown order was issued) and 706,000 daily downloads a week later. During this same period, IP addresses sharing Torrents also increased from 179,000 to 254,000.

The illegal distribution of physical and online video game content continues to grow. According to ESA data, Argentina ranks 7th in the world for peer-to-peer (P2P) piracy for the video game industry, and the country saw a 76% increase in P2P piracy from February to April 2020 in the volume of peers participating in infringing P2P swarms, which coincides with the lockdown period to contain the spread of the COVID-19 pandemic. Infringing linking sites in Spanish—monetized by advertisements—are the most popular piracy channels for video games in Argentina. SimilarWeb also reports that monthly visits to infringing linking sites also grew by 11.5% between January and November 2020 as compared to growth from the previous year. Online marketplaces, such as *Mercado Libre*, remain increasingly popular with providers of unauthorized copies of video games, counterfeit consoles, circumvention devices and modification services. During the lockdown period in Argentina to contain the spread COVID-19 pandemic, the availability of listings on *Mercado Libre* for illegal game titles, unauthorized digital goods (UDGs),² or physical video game products, including counterfeit controllers and modified game consoles, increased overall by 10% on the popular marketplace. Social media platforms enable online pirates of all varieties to attract wider audiences.

The International Federation of the Phonographic Industry's Music Consumer Study for 2019 found that Argentina had the highest music piracy rate in the world, except for India and China. 48.3% of Internet users (and 68.6% of 16-24 year-olds) had pirated music at least once in the previous month. 41.5% of Internet users downloaded pirated music through stream-ripping sites or apps, while 16.6% used cyberlockers or BitTorrent to download music. The most prominent forms of music piracy in Argentina are stream-ripping and the use of cyberlockers. According to Similarweb, the stream-ripping sites with the most visits from Argentina in the third quarter of 2020 were *y2mate.com* (16.4 million visits), *flvto.biz* (8.0 million visits), *savefrom.net* (7.5 million visits), and *mp3-youtube.download* (4.7 million

²Unauthorized digital goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as "cheat software") that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and "cheats", or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software have a negative impact on video game companies and consumers in the following ways: (1) sellers of unauthorized digital goods and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally-delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual "arms race" to update their products and security technology before the sellers can update theirs.

visits). *Y2Mate* is one of the top 100 most popular websites of any kind in Argentina. For the same period, the most popular cyberlockers in Argentina were *1fichier.com* (3.8 million visits), *Uptobox.com* (1.8 million visits) and *Zippyshare.com* (1.9 million visits).

From time to time, there are seminars and forums about the necessity for specific regulation to enable effective enforcement action online in balance with freedom of expression and other fundamental rights on the Internet. For instance, a heated debate on piracy and copyright protection took place in late April 2020, spearheaded by authors and publishers after Virtual Library, a Facebook site with 16,000 followers, published PDF versions of a series of books, without author authorization. Writers that complained of IP theft were the object of online bullying, principally from campaigners for free access to “cultural productions” and knowledge, who leveraged the pandemic to support their opposition to online copyright protection. Creative industries have maintained their position that protection for freedom of speech and copyright are not opposing interests, rather, strengthening copyright protection can strengthen freedom of speech. Despite those debates and discussions, the current government has not adopted a public position on the matter.

Physical piracy continues to be a problem. After 217 days of closure due to the lockdown to contain the COVID-19 pandemic, the notorious market *La Salada* reopened in October with strict protocols all of which were blatantly violated when throngs descended on the market for Christmas shopping in December. Its owner, was released from prison under house arrest in December of last year, and now accuses the former Administration of abuse of power for the closure of his market and illegal interference with his operations.

Camcording. The COVID-19 pandemic, which caused the widespread closure of cinemas in Argentina for much of 2020, has temporarily halted camcording activity. However, as cinemas reopen to moviegoers, rights holders anticipate that this illicit activity will resume and Argentina will continue to be the home to a number of release groups, which source camcorded material from all over the region and resell it online.

COPYRIGHT ENFORCEMENT IN ARGENTINA

The creative industries report that, as in previous years and despite the significant increases in piracy activity due to the COVID-19 pandemic, there were no significant enforcement actions in 2020.

There are no clear sustainable and coordinated policies or actions to promote online IP protections in Argentina. For example, when an online IP crime is reported, both the Federal Police and the State Prosecutor might independently proceed processing the case without communicating or sharing data, with the federal police seeing it as a federal crime and the state prosecutor seeing it as a crime involving a local Argentinean citizen. There are other procedural challenges, such as defaults in evidence chain of custody for cybercrime cases and the characterization of profit and economic benefits from online advertisements.

In a welcome development, in August 2020, the Fernandez Administration created C4 within the Cybercrime Investigations Directorate in the Ministry of Security. The goal of this commission is to monitor the implementation of the NPAC, which was initiated in 2019, to coordinate actions against cybercrime through the collaboration among security forces, public-private initiatives and cooperation with international organizations. This task force is comprised of representatives from four federal security agencies: the Navy, Federal Police, National Gendarmería, and Customs. At the moment, C4 concentrates on crimes such as large-scale money laundering, fraud and crimes against sexual integrity, trafficking and paedophilia. The creation of C4 could be part of a long-awaited solution for enhanced coordination to tackle online IP crimes. It is crucial that the Ministry of Security view rights owners as strategic allies to this important initiative.

Argentinean law enforcement authorities need to be trained to recognize the importance of online IP protections as an important piece of Argentina’s digital economic development and its collateral benefits for public

security policies. Additionally, law enforcement authorities should take further concrete steps to establish an agenda that reflects short and long-term goals for tackling illegal sites and piracy groups operating in the country.

The government's disinterest in enforcement has led rights holders to rely more on cooperation with other actors in the online ecosystem. For instance, the video game industry has increased its cooperation with *Mercado Libre's* regional office, based in Buenos Aires, as a strong partner through which UDGs and other infringing video game items are removed from listings, and to combat commercial game piracy in the entire region. The sound recording industry requests the removal of pirate site through notices sent to registrars and hosting services. In some cases, these notices result in successful site removal. The sound recording industry also sends daily notifications to Google services and YouTube to request the removal of pirate sites from search results and infringing user generated content.

Law enforcement or administrative authorities are not promoting actions by the private sector, nor taking any initiatives to tackle copyright piracy through securing assistance of domain names and registrars. Based on feedback from the criminal enforcement authorities, it is understood that they view any infringing site which makes money through advertising as not making direct profits from copyright infringement, and so, ineligible to be criminally prosecuted. This narrow interpretation of the law is not compatible with the TRIPS Agreement obligation that its parties ensure that criminal enforcement measures are available, at least, against commercial scale copyright infringement.

Despite the successful blocking of *The Pirate Bay* as a landmark case in 2014 (which remains in effect until today), civil litigation for new website blocking remains impracticable in Argentina due to a combination of factors such as the timeframe and coverage of available injunctions, considering the number of sites that need to be blocked to generate impact over the pirate ecosystem. Administrative and criminal site blocking, which would be much less burdensome for right holders, are not available because there is no legal basis for such procedures.

On September 23, 2019, the sound recording industry filed a judicial review action challenging the constitutionality of the Executive Order No. 600/19, which created a single public performance tariff for all hotels and established a governmental control system over tariff rates. The action claims that the Order is an unconstitutional and confiscatory measure because it deprives rights holders of the freedom to set rates according to the nature and specifics of different uses, and to enter into freely negotiated agreements with users' associations. The case is pending for resolution before an administrative lower court in Buenos Aires.

COPYRIGHT AND RELATED LAWS IN ARGENTINA

The Macri Administration's Penal Code Reform Bill (PE-52/19) was sent to the Senate's Justice and Criminal Matters Commission in March 2019, and debate started by June, but stalled after the Macri Administration lost the 2019 Presidential elections. Due to COVID-19, Congress was forced to session remotely and online for most of 2020. The bill will lose parliamentary status on February 28, 2021. As previously reported, if implemented, the bill would partially improve the enforcement landscape for copyrighted works in Argentina. Some of the copyright issues covered by the legislation include: 1) reproduction of copyrighted material and programs from the Internet without proper authorization; 2) manufacturing, storing or selling copyrighted programs without authorization; and 3) circumvention of technological protection measures (TPMs). In addition, the proposal would make theft of IP equivalent to theft of physical objects and would make the incorrect reporting of pay-TV subscriber numbers a penalty under the law. The proposal also presented provisions that would not facilitate enforcement. For instance, legal actions for IP infringement would be prosecuted only upon a complaint from the victim, rather than *ex officio*, as is currently the case.

On September 4, 2020 the House Committee on Systems, Media and Freedom of Expression held a meeting on "Regulation, Co-Regulation And Platform Responsibilities For A Free And Open Internet." Representatives from academia and civil society organizations claiming to represent Internet users' rights and activists presented their views during the meeting. The meeting occurred in the aftermath of Vice President Cristina Kirchner's lawsuit against Google over search results that show a photograph of Kirchner entitled "Thief of the Argentine Nation." The music industry is

monitoring the potential introduction of a Bill seeking to create controls, sanctions, as well as safe harbors, for online platforms.

President Alberto Fernandez issued an Emergency Decree (DECNU 690/2020) on August 23, 2020 pledging to guarantee universal access to telecom services (including mobile, Internet services) rendered “essential public interest services” by the pandemic. The decree excluded satellite television services from the definition of public services. As a result of this Decree, fees for these services remained frozen for the rest of 2020 and approval from telecom regulator, ENACOM, will be required for future tariff increases. A 5% tariff increase was authorized as of January 2021, well below 2020’s 36.1% yearly inflation.

Law 27.588, which implements the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, ratified by Argentina in 2014, was enacted on November 11, 2020.

MARKET ACCESS IN ARGENTINA

Local Content Quotas. Resolution 4773 E/2017, mandating certification of compliance with the screen quota provisions set forth in Section 67 of the 2009 Media Law and accompanying regulation (Decree 1225/10) went into effect on January 1, 2018, but it has never been enforced. The quota regime requires free television licensees to air eight Argentine feature films per calendar year. Likewise, non-national (retransmitted) subscription television services that show primarily fiction programs are required to allocate 0.5% of the previous year’s annual turnover to acquire, prior to filming, the broadcast rights to independent Argentine film and TV movies.

Media Law 26.522 (promulgated through Regulatory Decree 1225/2010), established a registry of national films at the National Film and Audiovisual Arts Institute (INCAA) from which pay-TV programmers select productions to comply with the quotas imposed by Article 67 of Media Law 26.522. The list includes both existing and yet-to-be-filmed productions. Both INCAA and ENACOM have yet to establish compliance procedures for pay-TV programmers. The decree presents several problems, such as whether channels with highly specific content will be able to find suitable content in the registry and whether programmers are subject to fines if they do not broadcast productions that ultimately fail to be completed.

Local filmmakers increased pressure on ENACOM and INCAA to enforce existing quotas and modify Media Law 26.522 to also impose quotas on streaming services. IIPA remains wary of proposals for additional quotas because they negatively impact non-Argentinean content industries.

In July 2018, INCAA published a resolution (Resolution 1050/2018) regulating content quotas for movie theatres, which came into force on July 10, 2018. Domestically produced films must represent 30% of the volume of content shown, for the entirety of one week per quarter where there is a dedicated screen. While that 30% content quota was in effect previously, under the prior regulatory regime, the screen could be shared with another film. Under the new regulation, should the exhibitor share the screen with another movie, it will be considered a partial fulfillment, and the local production must be shown for two weeks (a minimum of one screening per day for at least one additional week) or until the full quota is fulfilled. Also in July 2018, ENACOM announced Resolution 4513 establishing that a 30% local content quota would be enforced on free-to-air TV in urban areas (10-15% for lesser populated markets). IIPA recommends that this quota provision be eliminated, as quotas distort the market, discriminate against U.S. audiovisual content, and are likely to result in increased piracy because Argentine consumers are unable to get sought after U.S. content.

Temporary Services Export and Import Tax. In late 2019, the Fernandez Administration extended the 2019 Temporary Services Export Tax to December 31, 2021, via Decree 99/2019. The decree modifies the Customs Code and includes “services rendered in the country whose use or effective exploitation is carried out abroad” to be included in the concept of “merchandise,” including “copyrights and intellectual property rights.” It also provides that services

can be considered exporters. While the 2019 Decree reduced the tax rate from 12% to 5%, it also eliminated the four-peso-per-dollar cap that had benefited exporters due to the steep depreciation of the peso over the past year. Decree 1034/2020, published on December 20, 2020, reduced the Temporary Services Export Tax to 0% for companies registered to benefit from the Knowledge-Based Economy Law 27.570 (October 26, 2020). The Registry of the Knowledge-Based Economy Promotion Regime Beneficiaries does not exist yet.

Additionally, Argentina assesses customs duties on audiovisual works based on the potential royalty value of the work rather than on the value of the carrier medium. This runs counter to international best practice and is a form of double taxation, as royalties are subject to withholding, income, value-added, and remittance taxes.

In December 2017, the government passed a tax reform law that imposes a 35% customs duty on imported video game consoles, which negatively impacts the video game industry as well as consumers who resort to “unofficial importation” to avoid paying the extra charges. Moreover, the law also imposed a 21% Value Added Tax (VAT) on OTT services as well as on a range of services provided by companies in the “collaborative economy.” Then, in December 2019, the Fernandez Administration imposed a 30% Social Solidarity and Productive Reactivation Tax (PAIS Tax) over OTT services, including video game, music and movie services. The PAIS tax is currently in force and will expire on December 31, 2024. Additionally, on September 19, 2020 Argentina’s Central Bank imposed a 35% fee on foreign credit card charges, which has a negative impact on Internet and streaming services operated in the country from abroad. These laws contradict international norms and should be amended or repealed.

Distribution of Performance Rights. Argentina’s current law, approved in 1974, establishes that collections on behalf of music performers and phonogram producers shall be distributed 66% to performers, 33% to producers and 1% to the National Arts Fund (FNA). We urge Argentina to consider legislation that establishes a more balanced distribution of 50% to performers and 50% to producers.