

# COLOMBIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** With recent growth of Colombia's economy, there is a critical need for the Colombian government to direct resources towards the enforcement of intellectual property rights (IPR). Colombia's newly elected President, Gustavo Petro, has stated that intellectual property (IP) will continue to be protected. However, no major national anti-piracy efforts have been conducted by the National Police or the Attorney General's Office in the last year. While the Copyright Office (DNDA) took action in 2021 against an online platform providing illegally broadcasted pay-tv signals, Colombia's enforcement framework is not up to the challenge of its online piracy problems. This enforcement component was the missing piece of past President Duque's plan to support the "Orange Economy," or creative economy, and thus should be a priority of the new administration.

The approval (in late 2021) of the National Council for Economic and Social Policy's (CONPES's) National Intellectual Property Policy, which will guide the development of public policies on the subject up to 2031, was a significant advancement for copyright protection in the country. The implementation of this policy should help increase enforcement and improve the legal framework to foster the growth of a vibrant creative economy.

Legal reforms of the past several years in Colombia failed to introduce adequate protection and enforcement mechanisms to counter the country's significant online piracy problem. Moreover, while a new National Development Plan will be developed for the 2023-2026 period, it remains to be seen how much emphasis will be placed on protecting IP. The lack of coordination and expertise among the country's judicial and law enforcement personnel is a major obstacle for the protection of copyrighted works in Colombia. To address these enforcement challenges, IIPA urges Colombia to empower the DNDA to coordinate and train all relevant actors on copyright and enforcement best practices, with the work of INDECOPI in Peru serving as a good example of an administrative authority in the Andean Community that is playing an active role in copyright enforcement. IIPA also urges Colombia to bring its regime for the protection of technological protection measures (TPMs) into compliance with the provisions of the U.S.-Colombia TPA and to reconsider amendments to its copyright law that curtail the freedom of contract of foreign rights holders and local parties.

## **PRIORITY ACTIONS REQUESTED IN 2023**

### **Enforcement**

- Implement a specialized program for judges and law enforcement on copyright protection and enforcement.
- Devote law enforcement and specialized prosecutorial resources to combatting online and physical piracy, with coordinated operations and actions for a sustainable agenda of IP protection.
- Convene and facilitate public/private round tables with all stakeholders to promote cross-industry cooperation against online piracy, based on MOUs and industry best practices.
- Encourage the DNDA to take action against notorious stream-ripping sites.

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<sup>1</sup> For more details on Colombia's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Colombia's Special 301 placement, see <https://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## Legislation and Regulation

- Clarify, via regulation from the Ministry of Information Technologies and Communications and through DNDA's implementation of Law 1915 of 2018, that TPM circumvention is not permissible for any exception or limitation under the copyright law because that would be inconsistent with the U.S.-Colombia TPA.
- Reconsider Law 1915 of 2018's annual revision of copyright exceptions and limitations through public hearings in the Colombian Congress.
- Amend Article 181 of Law 1955 of 2019, Colombia's National Development Plan, to preserve contractual freedom for future forms of commercialization.
- Amend paragraph (d) of Article 3 of Law 23 of 1982 (Copyright Law) to eliminate the so-called 60/40 rule, which is a legal barrier to the growth and development of the rights of performers and producers in Colombia and is inconsistent with Columbia's obligations under the U.S.-Colombia TPA.
- Urge the Colombian government to implement the new tax reform in a manner that provides clear rules for foreign companies and aligns with ongoing multilateral tax discussions at the OECD.
- Urge the Colombian government to pause consideration of its "Ley de la Música" bill and launch a broad consultation with impacted stakeholders, including local and multinational companies doing business in Colombia.

## THE COPYRIGHT MARKETPLACE IN COLOMBIA

While Colombia recently amended its Copyright Law, implemented a National Development Plan (2019-2022) that involves IPR protection, and attempted to tackle online piracy through administrative site-blocking orders, online piracy continues to be a significant and largely unaddressed problem in Colombia, showing no improvement in the past year. As of January 2022, Colombia had 35.5 million Internet users, and Internet penetration increased to 69.1% of the population (from 68% in the previous year).<sup>2</sup> Piracy in Colombia comes in many forms, and the number of visitors to infringing websites and online marketplaces for creative content continues to increase.<sup>3</sup>

Online piracy in Colombia greatly increased due to the COVID-19 pandemic, as consumers gravitated to the online environment for movie and video game content, including illegal video game products offered on e-commerce platforms. The video game industry notes that the term "juegos" (games in Spanish) was the 14th most searched word on Google Colombia, a strong indicator of popularity for online gaming content. The audience for Spanish language infringing video game download and link sites in Colombia increased by 13% during the last year. An important piracy channel for digital video games remains the online marketplaces in Colombia, which are responsible for providing powerful commercial platforms to infringers.<sup>4</sup> Activity on these platforms increased during the pandemic, with some platforms reporting a 26% increase in the volume of listings (products announced by users) and an increase of more than 60% in local revenue in Colombia. Online markets have become the most concerning environment for infringing video game activity given their replacement of physical markets and their broader coverage in the country, popularizing the purchase of illegal products in the video game community. At the same time, the proportion of the total video game content traffic on the BitTorrent network in Colombia increased over the year, from 11% to 14%, despite a decrease in the number of users of the major torrent sites dedicated to infringing video games. Additionally, the illegal video game cyberlocker landscape is much more fragmented, with major platforms and services losing audience numbers to multiple smaller services, which have gained traction due to their agility in evading enforcement. Colombian National Police report that online crime overall has increased by 89% since January 2021. Concurrently, in the past year, online video game piracy increased in Colombia, spurred by increasingly more diversified methods for accessing and commercializing illegal game products and titles and a persistent lack of coordinated law enforcement. Bearing this in

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<sup>2</sup> See Simon Kemp, Datareportal, *Digital 2022: Colombia*, February 15, 2022, available at <https://datareportal.com/reports/digital-2022-colombia>.

<sup>3</sup> The lack of awareness of the impacts of piracy is a problem in Colombia. The IP authorities organize effective public educational sessions on IP and infringement, but these programs do not start at the high school or university levels to explain what infringement is and how it affects rights holders.

<sup>4</sup> On a positive note, the video game industry reports that by working with *Mercado Libre*'s headquarters in Buenos Aires, Argentina, it is able to remove some infringing or illegal content from *Mercado Libre Colombia*, the most relevant e-commerce platform in the country.

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There are more than one million illegal pay-tv connections, which amount to operator industry losses of more than US\$247 million per year and government losses due to tax evasion of US\$197 million per year. According to studies from Ether City, Colombia represented 4% of Latin America's searches for pirate websites, and almost one in every four online offerings for movie and television titles directed the user to infringing content and services in 2020.<sup>5</sup>

For music, the predominant forms of piracy in Colombia are stream-ripping sites and cyberlockers. SimilarWeb data shows the most popular stream-ripping sites in the third quarter of 2022 were *y2mate.com* (with 24 million visits), *ssyoutube.net* (with 5.2 million visits), and *mp3y.download* (with 570,000 visits). The most popular cyberlockers in the third quarter of 2022 were *Mega.nz* (with 6.9 million visits), *1fichier.com* (with 2.4 million visits), and *Zippyshare.com* (with 940,000 visits). The recording industry also reports that locally run infringing download sites such as *simp3s.net* (with 100,000 visits from Colombian users in 2022) and *mp3cielo.co* (with 36,500 visits from Colombian users in 2022) are very popular among Internet users in Colombia. Further, mobile app piracy has become a growing concern for the recording industry considering the high volume of infringing music apps that are available and used in Colombia.

## **COPYRIGHT LAW IN COLOMBIA**

Recent changes in Colombia's legal regime fall short of providing the necessary tools to adequately protect and enforce IPR in the face of the country's significant online piracy problem, although there has been some positive movement to improve overall enforcement coordination. Additional copyright law revisions are needed to bring Colombia into compliance with its TPA obligations. Proposed legislation in 2022 raises serious concerns for the effective collection and distribution of performance rights, compounded by limitations under the Copyright Law that discriminate against holders of related rights. IIPA encourages USTR to closely monitor proposed amendments to the Consumer Protection Act (CPA) for development of useful online enforcement tools, as well as Colombia's implementation of the newly approved National Policy on Intellectual Property Policy, which shows some promise as a possible vehicle to coordinate needed law enforcement resources.

**Compliance With U.S.-Colombia TPA Obligations:** To fully comply with the U.S.-Colombia TPA, some of the copyright amendments to Colombia's Law 1915 of 2018 need clarification and reconsideration. IIPA urges Colombia to clarify that: (1) the new permanent exemptions to TPMs are subject to review, requiring proponents to offer substantial evidence of actual or likely adverse impact on non-infringing uses;<sup>6</sup> and (2) a TPM may not be circumvented to exercise any exception or limitation.<sup>7</sup>

In addition, IIPA continues to urge Colombia to reconsider: (1) the profit requirement for the crime of retransmission or reception of illegally decrypted satellite signals; and (2) the annual revision of copyright exceptions and limitations through public hearings in the Colombian Congress, because such revision creates uncertainty for both enforcement and private investment.<sup>8</sup> Colombia also still must adopt statutory damages for copyright infringement as a key TPA obligation. Statutory damages were the subject of a 2019 draft Bill from the DNDA, but it shows no signs of progress.

**Regulation of Performance Rights and Collective Management Organizations (CMOs):** On September 7, 2022, Bill # PL-189-2022C, "*La Ley de la Musica*" (The Music Law) was submitted to the House of Representatives.

<sup>5</sup> Ether City, *Dimensión e impacto de la Piratería online de contenidos audiovisuales en América Latina*, December 10, 2023. available at: <https://cet.la/estudios/cet-la/dimension-e-impacto-de-la-pirateria-online-de-contenidos-audiovisuales-en-america-latina/>.

<sup>6</sup> See U.S.-Colombia Trade Promotion Agreement (TPA)(2012), Article 16.7(4)(f) available at <https://ustr.gov/sites/default/files/col-ipr.pdf>.

<sup>7</sup> See U.S. Colombia TPA, Article 16.7(4)(d) which establishes that circumvention of TPMs "is a separate civil or criminal offense, independent of any infringement that might occur under the Party's law on copyright and related rights."

<sup>8</sup> DNDA is again this year considering holding a public hearing to determine whether more exceptions and limitations should be added to the law.

The Bill would create a national fund for the promotion of national talent and music-related activities that includes several new fiscal contributions such as: (i) a 2% contribution on advertisement income of all digital service providers (DSPs), (ii) a 1% contribution on subscription payments to all DSPs, and (iii) funds pending at all CMOs for non-identified works and unclaimed distributions. The Colombian government should reject this Bill because it contains provisions that are highly damaging for digital platforms and CMOs in Colombia and that could create significant obstacles for the development of a healthy music market in the country.

In August 2021, the Constitutional Court agreed to hear the case filed by *ProMúsica Colombia* (on behalf of the recording industry) against Article 3(d) of the Copyright Law.<sup>9</sup> This provision imposes that authors receive at least 60% of remunerations collected from performance rights, *de facto* limiting remunerations to 40% for owners of neighboring rights in the communication to the public of works and phonograms, while 60% of remunerations go to copyright holders for the same use. The lawsuit received many supportive submissions, including from the International Federation of the Phonographic Industry (IFPI), performers organizations, and the Attorney General, all of whom generally agree that the provision is not found in any other copyright law in the region and is clearly discriminatory against artists, performers, and phonogram producers without justification.

On March 16, 2022, the Supreme Court dismissed *ProMúsica Colombia*'s Article 3(d) challenge on the basis that the 60-40 rule was justified by the “essential” nature of the creative works. While the Court clarified that Article 3(d) applies only by default when parties do not already have an agreement in place, the 60-40 rule remains a legal barrier to the growth and development of the rights of performers and producers in Colombia. It is also inconsistent with Colombia's obligation under the U.S.-Colombia TPA to ensure no hierarchy is established between the rights of authors, on the one hand, and the rights of performers and producers, on the other hand.<sup>10</sup> Thus, Colombia should amend Article 3(d) of the Copyright Law to eliminate the 60% remuneration floor for authors.

**National Intellectual Property Policy Consultation:** In October 2020, CONPES, a division of the National Planning Department, launched a public consultation on a proposed National Policy on Intellectual Property (*Política Nacional de Propiedad Intelectual*). The proposal acknowledges the insufficiency of Colombia's institutional capacity to effectively manage, protect, and exploit IP rights. For example, DNDA needs to improve its technological and data generation capacities to enable public policymaking that is in tune with rapidly changing market and cultural trends. The CONPES' proposal also acknowledges that Colombia has limited mechanisms to address the country's high levels of infringement and includes proposals for amendments for Colombia's copyright law, enforcement actions, and new functions for DNDA. The National Planning Department approved the final document in November 2021, and it is now in force. Rights holders expect the Colombian government to implement the recommendations beginning in 2023 through 2031. Rights holders expect implementation will have a positive impact on enforcement against online piracy in Colombia, ranging from improved enforcement against circumvention of TPMs to specialized IPR training programs for judges and legal operators.

**Proposed Amendments to the Consumer Protection Act (CPA):** Colombian lawmakers are considering a draft legal reform, number 284 of 2020,<sup>11</sup> intended to update the CPA from 2011 (law number 1480) to extend the existing consumer protections and regulations for e-commerce. The draft CPA amendment does not mention any specific market. Instead, it would provide general rules for consumer protections that already exist to be applied to the online environment, such as the right to accurate publicity and clear product and service information; the right to consumer privacy protection established by article 5 of the bill; and the “right to be forgotten” established by article 3 and 4 of the bill, which allows for the withdrawal from a contract within seven days and receipt of a full refund of any payments made. These reforms could provide authorities with additional legal enforcement resources to help level the

<sup>9</sup> See Article 3(d) of Law 23 of 1982, available at [https://propiedadintelectual.unal.edu.co/fileadmin/recursos/innovacion/docs/normatividad\\_pi/ley23\\_1982.pdf](https://propiedadintelectual.unal.edu.co/fileadmin/recursos/innovacion/docs/normatividad_pi/ley23_1982.pdf) (in Spanish).

<sup>10</sup> U.S.-Colombia TPA, Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-ipr.pdf>.

<sup>11</sup> See Senate Bill 284 of 2020, available at <http://leyes.senado.gov.co/proyectos/index.php/textos- radicados-senado/p-ley-2020-2021/2065-proyecto-de-ley-284-de-2020> (in Spanish).

playing field for legitimate content providers against certain illegal services. The draft legal reform is now being discussed by the House of the Representatives under number 291/2021, but it has not yet been approved.<sup>12</sup>

**Constitutional Challenge to National Development Plan Article 181:** In May 2019, Colombia adopted law No. 1955-2019, which created the National Development Plan and is updated every four years (National Development Plan for 2023-2026 is still in development).<sup>13</sup> Article 181 created a set of regulations for copyright and related rights contracts that appear to limit the freedom of foreign rights holders to contract with local parties. For instance, in the absence of a specified term, agreements will last five years; in the absence of specification of a territory, the agreement is limited to the territory in which the contract was signed; and all contracts are limited to the uses specified by parties. In addition, contracts for forms of commercialization unknown at the time a contract is signed are void, which could result in a restriction of foreign investment in Colombia. These new legal provisions could also have a negative impact on the ability of phonogram producers to manage their businesses and produce new local talent. The Colombian Supreme Court dismissed the 2020 lawsuit filed by *ProMúsica Colombia* challenging this obstacle to the free assignment of copyright rights and neighboring rights. A similar challenge by the audiovisual industry is still pending.

## COPYRIGHT ENFORCEMENT IN COLOMBIA

**Lack of Coordination and Expertise:** To date, Colombia's law enforcement authorities have not developed methods to stop the widespread availability of infringing content to Colombian Internet users and ensure compliance with copyright laws and regulations. Despite the available rights and remedies in the law, enforcement levels remain low, demonstrating a tolerance for the continued operation of an illegal online market. The lack of coordination among a multiplicity of investigative and judicial proceedings with competing jurisdictions, including civil and administrative authorities, leads to inefficiencies in Colombia's enforcement of copyright. The National Police and prosecutors need increased dedicated resources, considering that IP cases have not been a priority when it comes to investing time and resources in their investigation. The special cybercrime unit, *Dirección de Investigación Criminal e Interpol* (Department of Criminal Investigations and Interpol or DIJIN), focuses its enforcement actions mostly on areas such as online fraud (ransomware and phishing) without pursuing further coordination to promote greater protections for the digital economy or IPR. The police and its dedicated cybercrime department, *Centro Cibernético Virtual* (CAI Virtual),<sup>14</sup> should have a specific channel to provide assistance to businesses affected by cybercrimes and to coordinate efforts. The DIJIN and CAI Virtual have an appropriate structure and skill set to handle such cases and achieve a deterrent impact in the illegal online ecosystem.

The DNDA is the department that is most competent in copyright-related issues, but it operates under the jurisdiction of the Ministry of the Interior, which makes its role in the government less relevant. Many proposals to move the DNDA's functions under the jurisdiction of the Ministry of Commerce, Industry, and Tourism (as is the case in other countries in the region) have failed, mainly because of the lack of political will to prioritize the copyright sector. IIPA is encouraged by the March 2020 decision to expand DNDA's jurisdictional capabilities to enforce up to 200 civil copyright-related cases yearly. However, it is still unclear how this authority will be applied in practice, and the jurisdictional panel inside DNDA has very limited resources, causing serious delays. IIPA urges the Colombian government to increase DNDA's capacity through its implementation of the National IP Policy, which recommends a better organization of government authorities to combat digital piracy and enforce Colombia's IP laws.

In 2022, *ProMúsica Colombia* filed a pilot case asking for a blocking order against popular stream-ripping site *Y2Mate.com*. DNDA dismissed the case based on legal technicalities – and failed to take any additional actions or initiatives to combat Colombia's digital piracy problem. Despite DNDA's legal authority to order injunctions against

<sup>12</sup> House of Representatives Bill 291 of 2021, available at <https://www.camara.gov.co/proteccion-al-consumidor> (in Spanish).

<sup>13</sup> *Documento de seguimiento, Plan Nacional de Desarrollo 2018-2022*, October 31, 2020, available at <https://www.cnp.gov.co/Documents/Informe-PND.pdf> (in Spanish).

<sup>14</sup> See *Centro Cibernético Policial*, available at <https://caivirtual.policia.gov.co> (in Spanish).

relevant cases of digital piracy, such powers have rarely been exercised. As a result, Colombia currently has some of the highest traffic to stream-ripping sites throughout the entire Latin American region.

In March 2021, DNDA ordered ISPs to block the Internet signal from IPTV Colombia Premium,<sup>15</sup> which illegally broadcasted pay-tv signals. It was the first precautionary measure imposed against online piracy in DNDA's history. The new administration needs to ensure that the National Development Plan includes a powerful component to engage authorities to more actively protect IP in the digital environment, including a leadership role for the DNDA to coordinate the protection of the creative sector ecosystem.

The proposed National Intellectual Property Policy identified the lack of knowledge and training in IPR among its judicial and law enforcement personnel as one of the obstacles for effective copyright enforcement.<sup>16</sup> It is essential for Colombia to implement comprehensive copyright training for all relevant judicial and law enforcement at the local and regional levels, as well as training of customs officials at the border to identify and seize illegal streaming devices (ISDs).

**Internet Service Provider (ISP) Cooperation:** Since the COVID-19 pandemic, online piracy has significantly grown. Unfortunately, Colombia lacks sufficient ISP liability provisions to ensure ISPs are incentivized to cooperate with rights holders to address online piracy. Colombia also lacks specific regulations requiring ISPs to disable access to infringing content. Furthermore, remedies for copyright infringement are inadequate and unclear, which is why many rights holders do not pursue cases or actions against infringing sites.

While many ISPs in Colombia are willing to cooperate with rights holders to combat online piracy, such cooperation is limited and there is no cross-industry MOU or government pressure on ISPs to cooperate more.<sup>17</sup> One reason ISPs may be hesitant to move forward with an MOU is because the government is currently considering (i) implementing a notice and take down procedure and (ii) creating safe harbor provisions. IIPA would, in the first instance, recommend that – rather than introducing safe harbors – ensure there is a clear legal basis for the liability of active online services and greater responsibilities on intermediaries to take action against infringing content. If, however, proposals are put forward to introduce safe harbor provisions, these measures should not interfere with an ISP's capacity to deploy their own site-blocking measures. Furthermore, any proposals for notice and takedown and safe harbors should provide for adequate incentives for ISPs to cooperate with rights holders to combat piracy. They should also be available only to ISPs that remove infringing content expeditiously and implement effective repeat infringer policies. Moreover, Colombia should provide measures demonstrated effective in preventing or restraining infringement and encourage ISPs to implement “know your business customer” (KYBC) policies to ensure they keep up to date and accurate information about their customers and to allow rights holders to obtain accurate information to protect their rights against direct infringers. IIPA also urges Colombia to hold public/private round tables with all stakeholders to promote cross-industry cooperation to tackle online piracy based on industry best practices and facilitate a cross-industry agreement.

## **MARKET ACCESS**

**New Tax on Digital Services and Platforms:** In November 2022, Colombia's legislature finalized a Tax Reform that will change the status quo of Colombian taxable nexus from having a corporate residence or physical presence in Colombia to one based on “significant economic presence.” The result is that the new law will require virtually all U.S. companies to choose either (1) to pay Colombian income tax through a 10% withholding tax at source; or (2) pay a 3% tax on all gross income from the sale of goods and the provision of digital services from abroad to

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<sup>15</sup> Juan Francisco Campuzano Velez, *Asuntos: Legales, Se impuso primera medida cautelar contra piratería online en la historia de Colombia*, March 9, 2021, available at: <https://www.asuntoslegales.com.co/actualidad/se-impuso-primer-medida-cautelar-contra-pirateria-online-en-la-historia-de-colombia-3136271> (in Spanish).

<sup>16</sup> The entertainment software industry, in connection with the Interamerican Association of Intellectual Property (ASIFI), has reported that in the past year it has held different educational sessions on devoting law enforcement and specialized prosecutorial resources to combatting online and physical piracy.

<sup>17</sup> In 2022, the Motion Picture Association (MPA) began conversations with the main Colombian ISPs in hopes of implementing site-blocking measures.

users located in Colombia. Helpfully, the law preserves successful programs that have, in recent years, incentivized historic levels of investment in local audiovisual production. The new tax rules, set to take effect in January 2024, will require regulations to implement the withholding and declaration obligations and the tax collection mechanisms. IIPA encourages the Colombian government to implement the tax reform in a manner that provides clear rules for foreign companies and aligns with ongoing multilateral discussions at the OECD.

**Implementation of VAT on Digital Services:** Colombia Law 1819 applied 19% VAT to digital services. The law entered into force in October 2018 with a retroactive effect to July 2018. To compensate for the effects of the pandemic on the Colombian economy, the government published several executive decrees in 2020. Colombia's actions regarding the cultural sector and the music industry have been among the best structured in Latin America and should be extended to other industries of the creative sector to generate appropriate and proportional relief for local market stakeholders.