

PERU

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Peru remain on the Watch List in 2023.¹

Executive Summary: Peruvian authorities, especially the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOP) and the courts, have made highly commendable efforts to improve enforcement against several major infringers by issuing injunctions for Internet service providers (ISPs) to block copyright infringing websites. However, the proposed *Proyecto de Ley 878/2021-CR* (the General Internet Bill) currently being discussed in the Peruvian Congress, as well as the proposed amendments presented by the Supervisory Body of Telecommunications Private Investment (OSIPTEL) to the Net Neutrality Regulation, risk depriving INDECOP of this power. Additionally, the General Internet Bill introduces a safe harbor mechanism that is not in line with international standards nor in keeping with Peru's international obligations under the U.S.-Peru Trade Promotion Agreement (U.S.-Peru TPA). IIPA urges the Peruvian government to withdraw or, at the very least, clarify the General Internet Bill to ensure that these problems are addressed. Online and physical piracy continue to be serious problems in Peru that undermine the market for legitimate content in the country and across the region.

In fact, Peru should make more use of its existing judicial and administrative powers to address its evolving piracy problem and to properly protect the legal digital market. For instance, INDECOP, the agency charged with promoting and defending intellectual property rights (IPR), has proven to be a very efficient entity in the fight against piracy, and IIPA encourages the Government of Peru to give it greater powers and the necessary human and economic resources to continue with this work so that it conducts even more effective administrative enforcement operations against online infringing sites. Moreover, it is essential that the Peruvian Congress reject the provisions from the General Internet Bill, and any other legislation or regulation, that will hinder the administrative site-blocking efforts developed by INDECOP. Additionally, the Peruvian government should create a task force among the multiple prosecutors' offices with jurisdiction over intellectual property (IP). Finally, the Government of Peru should not rely on expansive interpretations of exceptions in the Copyright Act to avoid paying for licenses for music. Instead, it should serve as an example of the importance of respecting copyright.

PRIORITY ACTIONS REQUESTED IN 2023

Enforcement

- Devote significantly more resources and political support to combat digital piracy.
- Increase INDECOP's funding and powers so that it can build upon the recent positive examples of IP enforcement against piracy website operators in the country.
- Pass legislation criminalizing the unauthorized camcording of films without the need to prove an intent to profit.

Legislation

- Retain the current legal basis for no-fault administrative injunctions, including website blocking relief (a currently effective tool to reduce online piracy).

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

- Reject any provisions in the General Internet Bill (*Proyecto de Ley 878/2021-CR*), such as Article 51, that would interfere with administrative site blocking or undermine copyright enforcement in the country.
- Eliminate Articles 48, 49, 50, and 51 of the General Internet Bill, which address online service providers (OSP) liability.
- Ensure Article 57 does not invalidate the vital copyright licenses upon which digital content providers rely to distribute products in Peru.
- Reject the proposed amendments presented by the Supervisory Body of Telecommunications Private Investment (OSIPTEL) to the Net Neutrality Regulation, which would undermine INDECOPI's enforcement efforts.
- Repeal *Decreto Legislativo No. 1391* of September 4, 2018, or, at a minimum, amend the law to remove the "one member, one vote" governance system from collective management organizations (CMOs) that prevents more equitable voting systems based on the amount of distributions to members.
- Pass legislation to introduce clear secondary liability principles for online copyright infringement and establish measures demonstrated effective in preventing or restraining infringement.
- Improve the efficiency and effectiveness of the judicial system, including through raising greater awareness among judges about international best practices on copyright protection and online enforcement.
- Create a task force among the multiple prosecutors' offices with jurisdiction over IP.

THE DIGITAL MARKETPLACE IN PERU

Internet connectivity is growing in Peru. Fixed broadband subscriptions in Peru was reported at 3,044,000 in 2020.² Peru's music market grew by 23.6% in 2021 to US\$31 million, driven mainly from an 86.6% growth in streaming.³ Revenue in the video-on-demand (VOD) market is expected to show an annual growth rate of 6.15%, resulting in a projected market volume of US\$189.90 million by 2027.⁴ The number of VOD users is expected to amount to 7 million users by 2027, and user penetration will be 18.1% in 2022 and is expected to hit 19.9% by 2027.⁵ The video game market will rise with an annual average of 20%, generating US\$147 million by 2023.⁶ While legal means of accessing copyrighted content online are growing, legitimate content is still competing with illegal sources.

Online Piracy: Online and physical piracy continue to be serious problems in Peru that undermine the market for legitimate content in the country and across the region. Individuals based in Peru operate many websites that profit from selling advertising and user data and offer vast movie and music catalogs to stream and/or download. These sites are highly popular in places such as Argentina, Mexico, and Chile, where they attract hundreds of thousands, and for some countries millions, of visitors. The most relevant form of piracy in Peru is via illegal downloading from licensed online streaming platforms, such as YouTube. Seven of the top ten piracy sites in Peru during the second quarter of 2022 were stream-ripping sites and three others were cyberlockers. The most popular stream-ripping sites recorded millions of individual visits, such as *NoTube.site* (13.6 million visits from Peru in Q3 2022), *OnlineVideoConverter.pro* (3.3 million visits), *SaveFrom.net* (2.6 million visits), and *Y2Meta.com* (1.2 million visits). The most popular individual site for piracy was the cyberlocker *Mega.nz* with 11.8 million visits during the third quarter of 2022, but *1fichier.com* (2.0 million visits) and *Zippyshare* (1.1 million visits) were also widely used. Data from *CET.LA* shows that, from 2019 to 2020, the 100 most popular illegal domains in Peru received over 280 million visits, 82% of which were directed to illicit streaming websites.⁷ The illegal websites received 88% more visits than the legal ones.⁸ Illegal Internet protocol

² Trading Economics, *Peru - Fixed Broadband Internet Subscribers*, available at <https://tradingeconomics.com/peru/fixed-broadband-internet-subscribers-wb-data.html>.

³ International Federation of the Phonographic Industry (IFPI), *2022 Global Music Report*, p. 170.

⁴ Statista, *Video Streaming (SVoD) - Peru*, available at <https://www.statista.com/outlook/dmo/digital-media/video-on-demand/video-streaming-svod/peru>.

⁵ *Id.*

⁶ Gaming and Media, *Peru: A promising market for Video Games and Esports*, August 12, 2020, available at <https://g-mnews.com/en/peru-a-promising-market-for-video-games-and-esports/>.

⁷ CET.LA, *Dimension and impact of online piracy of audiovisual content in Latin America*, October 12, 2020, p. 63, available at <https://cet.la/estudios/cet-la/dimension-e-impacto-de-la-pirateria-online-de-contenidos-audiovisuales-en-america-latinal>.

⁸ *Id.*

television (IPTV) offers are also present in Peru, but on a smaller scale: 10% of the e-commerce offers regarded illicit devices, while 90% were licit.⁹

Unauthorized Camcording: Unauthorized camcording is a persistent challenge for rights holders in Latin America. Peru remains one of the leading sources of unauthorized camcords in the region. Fifteen illicit audio and/or video recordings of MPA member films were sourced from Peruvian theaters in 2019, up from ten in 2018. Professional cammers feel safe to conduct this activity in Peru because criminal convictions require proof that the recording was made with an economic intent, which makes it virtually impossible to obtain a conviction. Peru needs to enact legislation that would effectively criminalize unauthorized camcording of films without the need to prove an intent to profit.

COPYRIGHT ENFORCEMENT IN PERU

INDECOPI and the courts have made evident efforts to improve enforcement against several major local sites infringing music and film copyrights. For example, in July 2022, INDECOPI ordered ISPs to block 147 illicit websites that illegally provided copyrighted content.¹⁰ Since 2019, INDECOPI has also developed an agreement with *La Liga* to identify infringing websites and to prevent the illegal transmission of sport events.¹¹ It is also clear that website blocking works in Peru. In November 2020, the most popular stream-ripping site in the country was *Y2Mate*, which received an average of 138,000 visits from Peru each day. The site was then blocked by ISPs in the country starting in December 2020; by March 2021, daily visits from Peru were down to just 22,000, a reduction of 84.1% compared to prior to the blocking. The action also had an impact on overall stream-ripping levels, which were 20.4% lower in February 2021 than in November 2020.

However, the General Internet Bill currently being discussed by the Peruvian Congress could, if approved, halt these successful initiatives as it creates several new requirements and deterrents to online enforcement of copyrights. Moreover, Peru has yet to implement the necessary high standards of copyright protection to meet its international trade obligations and to further develop the country's digital and creative economy. For example, Peru's law lacks a provision that provides statutory damages for civil copyright infringement. In addition to necessary legal reforms, IIPA urges Peru to make more use of its existing judicial and administrative powers to address its evolving piracy problem and to properly protect the legal digital market. For instance, the Government of Peru should increase the funding for INDECOPI, the agency charged with promoting and defending IPR, so that it can expand on its success in administrative enforcement operations against online infringing sites. More personnel are needed in the copyright enforcement area, along with additional support and structure for technical training and inspections.

COPYRIGHT AND RELATED LEGISLATION AND REGULATION IN PERU

General Internet Bill (*Proyecto de Ley 878/2021-CR*): The General Internet Bill proposes to introduce damaging changes to the current framework. These changes would roll back the progress the government has made against piracy, negatively impact the legitimate market for copyrighted content, and severely hamper the ability of rights holders and INDECOPI to enforce copyright in Peru. Specifically, Article 51 is particularly troubling because it appears to require a judicial order to intervene against an Internet access service and services provided on the Internet. As a result, IIPA is concerned that under Article 51, OSPs would not be required to address infringing content unless a court issues a judicial order. Therefore, if approved, this article could put an end to the current administrative site-blocking regime as well as to procedures that allow rights holders and OSPs to remove infringing content in an efficient and timely manner. Currently, the administrative procedure implemented by INDECOPI has full transparency and provides any involved party the ability to appeal to its internal commission and to a civil court.

⁹ Id. at p. 23.

¹⁰ More information available at: <https://www.gob.pe/institucion/indecopi/noticias/630376-golpe-a-la-pirateria-digital-indecopi-bloquea-147-webs-ilegales-que-explotaban-obras-y-producciones-protegidas-por-el-derecho-de-autor>.

¹¹ More information available at: <https://newsletter.laliga.es/global-futbol/laliga-collaborations-bring-down-pirates-in-brazil-and-peru> and <https://newsletter.laliga.es/global-futbol/laliga-reducing-access-to-pirated-content>. See also, <https://www.gob.pe/institucion/indecopi/noticias/627440-el-indecopi-y-laliga-group-internacional-renuevan-convenio-para-luchar-contra-la-pirateria-digital>.

Article 51 also seems to conflict with other provisions contained in the General Internet Bill. Articles 49.2 and 50.2 both mention the possibility that administrative authorities could order the removal of infringing content. This is apparently inconsistent with Article 51's requirement that any intervention is only by judicial order. Additionally, Articles 40 and 71 state that OSPs (including those that provide access, search, and caching in Article 40 and domain rental in Article 71) cannot be held responsible for user-generated content, if, among other things, they did not refuse to comply with a judicial or administrative order requiring removal. Therefore, the General Internet Bill is inconsistent on its face and, if approved in its current form, it will introduce significant uncertainty into Peru's copyright enforcement legal framework.

The General Internet Bill would introduce an inadequate and highly damaging OSP liability framework that appears to require a judicial or administrative order before OSPs can be held liable for and required to remove or disable access to infringing content on their services. According to Articles 49.1 and 50.1, OSPs cannot be held liable for user-generated content if they do not have "effective knowledge" that the content is illegal, or if they have effective knowledge and they act diligently to take it down or block access. Under Articles 49.2 and 50.2, such "effective knowledge" appears to require receiving an order from an administrative or judicial authority to remove or disable access to the illegal content. Conditioning "effective knowledge" on a declaration from a judicial or administrative authority would provide unacceptably inadequate legal incentives for OSPs to cooperate with rights holders to take down infringing content, in violation of Article 29 of the U.S.-Peru TPA, as discussed further below.

IIPA acknowledges that both Articles 49.2 and 50.2 state that the requirements for "effective knowledge" are "without prejudice to the procedures for detecting and removing content that providers apply under voluntary agreements and other means of actual knowledge that could be established." While this indicates that other methods of proving effective knowledge may be possible, that is far from clear. It is also concerning that the General Internet Bill does not include remedies against the abuse of safe harbor provisions. Although Article 42 of the General Internet Bill states that restrictions to OSP services can be made for the purpose of protecting IPR, the article requires either a judicial or a legislative measure to do so. Moreover, Article 42 does not mention administrative measures, which again raises questions regarding the sustainability of the current administrative site-blocking regime.

Because the General Internet Bill appears to require a judicial or administrative order for OSPs to remove or disable access to infringing content on their services, enactment would likely place Peru in violation of the U.S.-Peru TPA. Article 29(b) of the U.S.-Peru TPA requires Peru to implement an effective notice and takedown mechanism that requires OSPs to "expeditiously" takedown infringing content "on obtaining actual knowledge of the infringement or becoming aware of facts or circumstances from which the infringement was apparent, such as through effective notifications of claimed infringement." The General Internet Bill's requirement that rights holders must wait for a judicial or administrative order is clearly inconsistent with this obligation.

In addition, Article 16.29(a) of the U.S.-Peru TPA requires Peru to provide "legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage and transmission of copyrighted materials."¹² To ensure adequate legal incentives for cooperation between service providers and rights holders, Peru should implement secondary liability principles to hold OSPs responsible for infringements carried out by third parties using their services. In U.S. law, secondary civil liability doctrines (under vicarious, contributory, and inducement theories of law) provide the legal incentives for cooperation and are a deterrent to the unauthorized storage and transmission of copyrighted materials.¹³ The General Internet Bill appears to hold OSPs liable for third-party infringements only upon a judicial or administrative order, which provides inadequate legal incentives for cooperation between OSPs and rights holders to combat online piracy. In fact, instead of weakening incentives for OSPs, Peru

¹² U.S.-Peru Trade Promotion Agreement (U.S.-Peru TPA), available at <https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/FTAs/peru/16%20IPR%20Legal.June%2007.pdf>.

¹³ In addition to secondary civil liability, an effective online liability regime should also provide criminal liability for aiding and abetting criminal copyright piracy.

should pass legislation to introduce clear secondary liability principles for online copyright infringement and establish obligations for service providers to apply measures demonstrated effective in preventing or restraining infringement.

Finally, Article 57 creates additional uncertainty for digital content, proposing an inalienable right for consumers to seek a refund for electronic transactions. While the type of transactions covered by the provision is unclear, the provision risks invalidating the vital copyright licenses upon which digital content providers rely to distribute products in Peru.

The General Internet Bill would dramatically weaken protection for creative works and impact the ability of rights holders and INDECOPI to continue their efforts to enforce copyright online, thus effectively depriving rights holders of the fundamental right to copyright protection included in Article 2.8 of the Political Constitution of Peru. The Explanatory Memorandum of the General Internet Bill makes several references to fundamental rights, implying that access to the Internet should be one of them. However, while access to the Internet is currently not recognized as a fundamental right in the Political Constitution of Peru, copyright protection is. The General Internet Bill does not seem to take this into account. These provisions should be withdrawn and reconsidered. Peru should not create a legal framework that would make copyright enforcement on the Internet onerous, as would be the case if these provisions are included in this General Internet Bill.

Ignoring the inconsistencies, the General Internet Bill appears to propose an approach that relies on judicial orders for copyright enforcement. Such an approach would completely congest the judicial system of Peru due to the sheer number of infringing sites that rights holders and enforcement authorities regularly face and would render the copyright enforcement framework completely ineffective. As we have seen in countries that have introduced similar mechanisms, an approach like the one proposed by the General Internet Bill congests the judicial system of a country, rendering the fight against infringing content on the Internet virtually ineffective. It would also prevent rights holders and OSPs from pursuing out of court agreements to monitor and tackle copyright infringement. In the very isolated examples of countries that followed the same approach as proposed in Peru—Spain until the implementation of the Sinde Law in 2014 and, more recently, Chile in 2010—anti-piracy efforts have been dramatically reduced, leading to the proliferation of unlawful activity in the region.

IIPA requests the current legal basis for no-fault administrative injunctions, including website blocking relief (a currently effective tool to reduce online piracy), should be retained and any provisions in the General Internet Bill, such as Article 51, that would interfere with this tool, should be eliminated from the General Internet Bill. Moreover, Articles 48, 49, 50, and 51, which address OSP liability, should be eliminated.

Net Neutrality Regulation: OSIPTEL has also presented amendments to the Net Neutrality Regulation with the same goal: preventing the blocking of copyright infringing websites unless there is a court order. However, the judicial system in Peru is not designed to deal with the ever-changing landscape of online copyright infringements and lacks the efficiency required to mitigate the damages from this type of piracy.

Copyright Act: The scope of substantive copyright protection has remained unchanged over the last two years, but there is one provision in the Peruvian Copyright Act that has been proven to be particularly problematic. IIPA is concerned about the reliance of state-owned or state-funded operators on certain exceptions of the Copyright Act to avoid obtaining licenses for the use of music, which sets a particularly negative example in the market in terms of respect of copyright. For example, Article 41(b) of the Copyright Act allows for the use of “small fragments” of works during official events, without a license or payment, provided that none of the participants receive remuneration for their participation. Yet, local rights holders have seen how state-owned entities, notably state-funded broadcasters and public events organizers, consistently rely on this exception to avoid obtaining a license for the use of music. Among those unlicensed companies, there is one TV nation-wide broadcasting company (Channel 7), a national radio chain (*Radio Nacional*), and many governmental offices and official entities that regularly sponsor music events without any copyright or related rights licenses. These uses clearly exceed the exception of Article 41(b) of the Copyright Act.