

COLOMBIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Colombia remain on the Watch List in 2024.¹

Executive Summary: With the recent growth of Colombia’s creative economy, there is a critical need for the Colombian government to direct resources towards the enforcement of intellectual property rights (IPR). Unfortunately, Colombia’s enforcement framework is not up to the challenge of the country’s online piracy problems. 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. 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 Trade Promotion Agreement (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 2024

Enforcement

- Implement a specialized training program for judges and law enforcement on copyright and industrial property protection and enforcement.
- Devote law enforcement and specialized prosecutorial resources to combatting online and physical piracy, with coordinated operations and actions to adequately protect intellectual property (IP).
- Ensure Internet service providers (ISPs) are incentivized to cooperate with rights holders to address online piracy.
- Encourage the Colombian Copyright Office (DNDA) to take effective action against notorious piracy and stream-ripping sites.

Legal Reforms

- Reject proposed Bill #PL-189-2022C (Ley de la Música).
- Repeal Articles 3 and 183 of the Colombian Copyright Law.
- Draft legislation that allows rights holders to file actions against unidentified infringers.
- Clarify that TPM circumvention is not permissible for any exception or limitation under the copyright law.
- Reconsider profit requirements for retransmission, annual revisions of exceptions and limitations, and statutory damages through public hearings in the Colombian Congress.

ENFORCEMENT

- **Implement a specialized training program for judges and law enforcement on copyright and industrial property protection and enforcement.**

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.² It is essential for Colombia to implement comprehensive copyright training for all relevant judicial and law enforcement personnel at

¹ 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/2024/01/Appendix-B-2024.pdf>.

² 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.

the local and regional levels, as well as training of customs officials at the border to identify and seize illegal streaming devices (ISDs).

- **Devote law enforcement and specialized prosecutorial resources to combatting online and physical piracy, with coordinated operations and actions to adequately protect intellectual property (IP).**

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. For example, in 2023, Colombia ranked 30th in the world for the number of connections by peers participating in the unauthorized file-sharing of Entertainment Software Association (ESA) member video game titles on public peer-to-peer (P2P) networks. By the same metric, Colombia ranked 11th in the world for unauthorized file-sharing of mobile games.

The lack of coordination between criminal, civil, and administrative enforcement authorities throughout the country leads to inefficiencies in Colombia's enforcement of copyright. The National Police and prosecutors need increased dedicated resources, because IP cases are not currently a priority. The special cybercrime unit, *Dirección de Investigación Criminal e Interpol* (Department of Criminal Investigations and Interpol, DIJIN), focuses its enforcement actions mostly on narrow areas such as online fraud (ransomware and phishing) without pursuing broader protections for the digital economy such as IPR cases. The police and its dedicated cybercrime department, *Centro Cibernético Virtual* (CAI Virtual),³ should have a specific channel to assist rights holders or 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 empowers DNDA's mission less than if it were situated under the Minister of Science, Technology, and Innovation, or another Cabinet position. 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 improved organization of government authorities to combat digital piracy and enforce Colombia's IP laws.

- **Ensure ISPs are incentivized to cooperate with rights holders to address online piracy.**

Since the COVID-19 pandemic, online piracy has grown significantly. 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 memorandum of understanding (MOU) or government pressure on ISPs to improve cooperation.⁴ 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 Colombia – rather than introducing safe harbors – ensure

³ See *Centro Cibernético Policial*, available at <https://caivirtual.policia.gov.co> (in Spanish).

⁴ In 2022, the Motion Picture Association (MPA) began conversations with the main Colombian ISPs in hopes of implementing site-blocking measures.

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 its own site-blocking measures. Furthermore, any proposals should provide adequate incentives for ISPs to cooperate with rights holders to combat piracy. Any safe harbors should also be available only to passive and neutral intermediaries that do not contribute to infringing activities. Moreover, Colombia should provide measures demonstrated effective in preventing or restraining infringement and require marketplaces and other online platforms to encourage all relevant intermediaries to implement "know your business customers" (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.

IIPA specifically commends Amazon and Mercado Libre for their cooperation in minimizing the advertisement and sale of counterfeited goods through their networks in the Colombian marketplace.

- **Encourage the Colombian Copyright Office (DNDA) to take effective action against notorious piracy and stream-ripping sites.**

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 pursue any additional actions or initiatives to combat Colombia's digital piracy problem. Despite DNDA's legal authority to order injunctions against 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,⁵ which illegally broadcasted pay-tv signals. The order, which was renewed in 2023, was the first blocking order imposed against online piracy in DNDA's history. IIPA urges the new administration to ensure that the National Development Plan includes a powerful component to engage authorities to protect IP more actively in the digital environment, including a leadership role for the DNDA to coordinate the protection of the creative sector ecosystem.

In the second quarter of 2023 alone, SimilarWeb recorded 24.4 million visits to *Y2mate.com*, 5.5 million visits to *ssyoutube.com*, and 10.6 million visits to *Mega.nz* from Colombian users. DNDA should implement an effective campaign against digital piracy, including issuing blocking orders against major stream-ripping services, piracy streaming sites, and cyberlockers that specifically target the Colombian marketplace. This type of recourse via administrative enforcement mechanisms is fully consistent with Article 16.11.14 of the TPA.

LEGAL REFORMS

- **Reject proposed Bill #PL-189-2022C (Ley de la Música).**

On September 7, 2022, Bill # PL-189-2022C, "*La Ley de la Musica*" (The Music Law) was submitted to the House of Representatives. This 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, which has since been removed, and (iii) funds pending at all collective management organizations (CMOs) for non-identified works and unclaimed distributions. The scope of these fiscal contributions has changed as The Music Law has evolved through the legislative process, including the removal of the contribution requirement from DSPs.

⁵ 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-primera-medida-cautelar-contra-pirateria-online-en-la-historia-de-colombia-3136271> (in Spanish).

The Colombian government should reject The Music Law 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.

- **Repeal Articles 3 and 183 of the Colombian Copyright Law.**

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.⁶ This provision mandates 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.⁷ Thus, Colombia should amend Article 3(d) of the Copyright Law to eliminate the 60% remuneration floor for authors.

This rule amounts to a limitation of producers' and performers' public performance right that does not meet obligations of the longstanding three-step test, incorporated in Article 16.7.8 of the TPA, governing the scope of exceptions and limitations to copyright protection. Due to the 40% limitation on producers' and performers' remuneration rights, normal exploitation of a phonogram or performance is unreasonably prejudiced, thus violating the test.

Article 183 of the Copyright Law is also highly problematic as it provides a set of limitations to contractual assignments of copyright and neighboring rights, which may have a negative impact on the ability of phonogram producers to manage their business and produce new local talent. While a constitutional challenge filed against Article 183 was dismissed by the Supreme Court on formal grounds, further actions against the provision are being considered. This limitation should be repealed as it is out of step with Article 16.7.3(a) of the U.S.-Colombia TPA, which clearly establishes that, “... for copyright and related rights, any person acquiring or holding any economic right in a work, performance, or phonogram... may freely and separately transfer that right by contract.”⁸

- **Draft legislation that allows rights holders to file actions against unidentified infringers.**

Currently, Colombia requires identification of the infringer by name and domicile in order to successfully petition the courts in cases of copyright infringement. This undermines effective enforcement in the digital age because pirates can easily obfuscate their identities. Colombia should amend Article 82(2) of the General Procedural Code to allow intellectual property rights holders to bring actions against anonymous or unidentifiable sources of infringement. Providing adequate enforcement against anonymous online infringers will improve Colombia's legitimate digital marketplace.

⁶ See Article 3(d) of Law 23 of 1982, available at <https://www.wipo.int/wipolex/en/text/584747> (in Spanish).

⁷ U.S.-Colombia TPA, Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-iplr.pdf>.

⁸ See *id.*

- **Clarify that TPM circumvention is not permissible for any exception or limitation under the copyright law.**

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 the Government of 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;⁹ and (2) a TPM may not be circumvented to exercise any exception or limitation.¹⁰

- **Reconsider profit requirements for retransmission, annual revisions of exceptions and limitations, and statutory damages through public hearings in the Colombian Congress.**

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.¹¹ Colombia also still must adopt statutory damages for copyright infringement, which is a key TPA obligation. Statutory damages were the subject of a 2019 draft Bill from the DNDA, but this legislation shows no signs of progress.

⁹ See U.S.-Colombia Trade Promotion Agreement (TPA)(2012), Article 16.7(4)(f) available at <https://ustr.gov/sites/default/files/col-ijr.pdf>.

¹⁰ 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."

¹¹ DNDA is again this year considering holding a public hearing to determine whether more exceptions and limitations should be added to the law.