

PARAGUAY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Pending legislation that would weaken copyright protection and enforcement in Paraguay threatens to damage Paraguay's fledgling creative digital marketplace. On August 1, 2022, several members of the *Camara de Diputados*, the lower house of Paraguay's legislature, introduced a problematic proposal to amend Article 123 of Paraguay's Copyright Law, and a similar bill was introduced in May of 2023. Both bills include a proposed unwaivable additional remuneration right for performers for the making available of phonograms and audiovisual works on online platforms, possibly subject to mandatory collective management. Further, passage of these amendments would limit the negotiating power of rights holders and distort the marketplace for consumers. The Paraguayan Copyright Office (DINAPI) does not support these amendments, and two of the original authors of the first bill have subsequently withdrawn their support as well. IIPA urges the Government of Paraguay to reject these amendments.

PRIORITY ACTIONS REQUESTED IN 2024

Legal Reforms

- Reject the proposed legislation to amend Article 123 of the Paraguayan Copyright Law.

LEGAL REFORMS

- **Reject the proposed legislation to amend Article 123 of the Paraguayan Copyright Law.**

On August 1, 2022, a problematic proposal to amend Article 123 of Paraguay's Copyright Law (the 2022 Bill) was introduced in the *Camara de Diputados* and on May 31, 2023 a simplified, but still highly problematic, version of this bill (the 2023 Bill) was introduced without a sponsor by the performers' collective management organization (CMO) (AIE-PARAGUAY). The proposed remuneration right contained in these bills has no sound foundation (legal, economic, or otherwise), is unprecedented, and would significantly hinder the market for audiovisual works and recorded music in Paraguay. If enacted, the proposal would undermine the free exercise of exclusive rights and contractual freedom. The sponsor of the 2022 Bill was not reelected, and the 2022 bill is currently dormant, although it could be revived, while the 2023 Bill remains active.

Article 123 of Paraguay's Copyright Law gives performers the right to authorize or prohibit reproductions of their performances, and to authorize or prohibit unauthorized public performances of their works (unless previously made public or the performance constitutes a broadcast work).² Based on this provision, performers typically negotiate with producers or recording studios to assign the management of these rights and to freely contract related to the issue of remuneration.

This proposed legislation would create an unwaivable additional remuneration right for performers that may be subject to mandatory collective management enforced against third-party users of audiovisual works without any contractual relationship with authors or performers. If enacted, the proposed legislation would undermine the entire

¹For more details on Paraguay's Special 301 history, see previous years' reports at <https://www.iipa.org/reports/reports-by-country/>. For the history of Paraguay's Special 301 placement, see <https://www.iipa.org/files/uploads/2024/01/Appendix-B-2024.pdf>.

² See Law on Copyright and Related Rights (Law No. 1328/1998) (Para.), available at <https://www.wipo.int/wipolex/en/text/129427>.

value chain by adding unquantifiable backend costs and also would negatively affect contractual relationships between all creators in the ecosystem.

The 2022 Bill sets an arbitrary 10% default statutory rate to be collected by CMOs directly from financial institutions. The bill's authors appear to have chosen the 10% remuneration arbitrarily, without any study, justification, or consideration of the typical operations of the creative industries. Moreover, this bill requires that banks and other financial institutions collect this default remuneration from Digital Streaming Platforms (DSPs) and pay amounts collected to the performers' CMO. Direct licensing of copyrighted works and sound recordings by individual rights holders of their exclusive rights should always remain the baseline.

These problems with the legislation were compounded when the 2022 Bill was amended to add that the right of remuneration for performers of copyrighted works is unwaivable, which interferes with rights holders' freedom to contract. Although the 2023 bill removes the set 10% remuneration, the proposal is still highly problematic for the other reasons discussed above, including that the remuneration right in the 2023 Bill remains unwaivable. Ratification of either of these proposals would undermine the entire value chain by adding unquantifiable backend costs. Enacting this legislation would undermine producers' ability to license.

The creation of such an unwaivable right is a cause for concern for several reasons. International norms, as set forth in the Berne Convention, the WTO TRIPS Agreement, the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the Beijing Treaty, support the individual exercise of exclusive rights. Moreover, Article 123(4)(a) and (b) from both bills go too far. Not only are these Articles inconsistent with international copyright agreements and fundamentally out of step with law and practice in markets around the world, including the United States, they are essentially a limitation on an exclusive right, and as such, must be compatible with the three-step test. However, these provisions are not limited to certain special cases, they conflict with a normal exploitation of the work, and they unreasonably prejudice the legitimate interests of the right holder. These proposals put pre-existing contracts and collective bargaining agreements at risk and have the potential to destabilize the marketplace.

A range of stakeholders have voiced concerns with the proposed amendments, citing a lack of consultation and comparative studies.³ In addition, credit card operators and banks have stated that it is impossible for them to withhold percentages of sales related to copyright purchases and subscriptions, thus rendering the proposals as they stand unimplementable.⁴ Furthermore, two of the Deputies who wrote the text of the 2022 Bill have formally withdrawn their support of the amendment.⁵

Spain has implemented a similar remuneration right regarding music streaming services, which, according to data from Spanish performers' CMO AIE, has not been successful. In particular, AIE reported that it was unable to distribute significant portions of revenues. Based on AIE's 2022 Transparency Report, only 54% of the amounts collected in relation to the making available of phonograms exclusively were distributed in 2021.⁶

The Paraguayan digital market operates with very tight margins because of its size and characteristics. This proposal creates an additional cost and administrative burden for the distribution of audiovisual and musical works that would undoubtedly impact the final price to consumers of copyright protected content. Remuneration obligations such

³ See, e.g., Letter from Paraguay Performers' Organization to Chairman Deputy Carlos Maria Lopez (May 31, 2023). This letter includes objections to the bill by stakeholders including but not limited to Association of Intellectual Property Agents, Phonographic Producers Management Society of Paraguay, International Federation of the Phonographic Industry, and the Paraguayan National Intellectual Property Directorate (DINAPI). These stakeholders oppose the bill due to the lack of consultation with stakeholders, the seemingly arbitrary decision-making process that resulted in the 10% fee, the risk of destabilizing the industry by adding on an additional 10% fee, the lack of studies conducted, and the unprecedented nature of such an act. See also Raul Santopietro, *Spotify warns of leaving the country if two articles of the version that make its business "unviable" are not corrected*, EL PAIS (August 22, 2023) available at <https://www.elpais.com.uy/informacion/politica/spotify-alerta-con-dejar-el-pais-si-no-se-corrigen-dos-articulos-de-la-rendicion-que-hacen-inviable-su-negocio>.

⁴ See *id.*

⁵ See Document 102071, under additional background related to Bill D-2268191, available at <http://silpy.congreso.gov.py/expediente/126303>; see also Document 102072, under additional background related to Bill D-2268191, available at <http://silpy.congreso.gov.py/expediente/126303>.

⁶ See *Informe Annual de Transparencia 2022*, AIE, at 34, available at <https://www.aie.es/wp-content/uploads/Informe-de-Transparencia-AIE-2022.pdf>.

as those proposed in Paraguay could create a disincentive for the production of local content. These consequences would penalize local artists and consumers alike. IIPA urges the Paraguayan legislature to reject passage of these amendments as they stand due to impossibility of implementation, lack of comparative studies, lack of consultation with relevant stakeholders, and contradiction with internationally held principles of copyright law.