

PERU

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Peru remains on the Watch List in 2024.¹

Executive Summary: Notwithstanding a major private enforcement action in 2023 in Peru that took down *Cuevana3*, the largest pirate streaming provider in Spanish-speaking Latin America, 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. Unfortunately, the overall piracy situation in Peru is worsening. Peruvian authorities, especially the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (National Institute for the Defense of Competition and the Protection of Intellectual Property, INDECOPI) and the courts, have made highly commendable efforts to improve enforcement against several major infringers through mechanisms that ensure Internet Service Providers (ISPs) can impose effective relief to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities. 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 INDECOPI of this power. 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. Moreover, the Peruvian government should give INDECOPI 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.

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. Moreover, the Government of Peru should reject legislation that weakens copyright protection, and instead pass legislation that strengthens copyright protection and enforcement, such as legislation to criminalize the unauthorized camcording of films without the need to prove an intent to profit. 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, Peru should serve as an example of the importance of respecting copyright.

PRIORITY ACTIONS REQUESTED IN 2024

Enforcement

- Devote significantly more resources and political support to combat digital piracy, and specifically, increase INDECOPI's funding so that it can build upon the recent positive examples of IP enforcement.
- INDECOPI should cease to interpret that synchronization licenses include the right to communicate the licensed works to the public.

Legal Reforms

- Reject problematic provisions in the General Internet Bill (*Proyecto de Ley 878/2021-CR*).
- Reject the proposed amendments presented by OSIPTEL to the Net Neutrality Regulation, which would undermine INDECOPI's enforcement efforts.

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/2024/01/Appendix-B-2024.pdf>.

- Reject erroneous interpretations of Article 41(b) of the Copyright Act and ensure state-owned or state-funded operators set a clear example by obtaining necessary copyright or related rights licenses.
- Pass legislation criminalizing the unauthorized camcording of films without the need to prove an intent to profit.
- Delete Articles 18 and 45 of the Performer's Law, or at the very least reject the rewording of the articles proposed by Bills 3310/2022-CR and 6293/2023-CR.
- Reject Bill No. 2900/2022-CR that allows the Peruvian government to engage in collective rights management and control all collections and distributions and undermines the possibility to set tariffs that reflect the economic value of rights in trade.
- Clarify that Peru provides sound recording producers with exclusive rights for broadcasting and communication to the public.
- Reject Bill 4627/2022 that proposes that copies made in the cloud be subject to the private copying exception.

Market Access

- Repeal Article 45 of the Performer's Law, or at the very least reject the rewording of the article proposed by Bills 3310/2022-CR and 6293/2023-CR.
- Reject Bill 807/2021-CR (*Ley del Música*).

ENFORCEMENT

- **Devote significantly more resources and political support to combat digital piracy, and specifically, increase INDECOPi's funding so that it can build upon the recent positive examples of IP enforcement.**

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. Unfortunately, the overall piracy situation in Peru is worsening. Individuals based in Peru operate many websites that profit from selling advertising and user data and offer vast unlicensed 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 up to millions of visitors. The most relevant form of piracy in Peru is stream ripping. Stream-ripping sites allow users to permanently download music licensed only for streaming and then listen to it offline. The proliferation of illegal Internet Protocol Television (IPTV) services in the region is also a concern.

INDECOPi and the courts have made evident efforts to improve enforcement against several major local sites infringing copyrights, but the Government of Peru generally needs to devote significantly more resources and political support to the fight to combat digital piracy. INDECOPi has engaged in effective enforcement efforts, which is one of the few positive developments related to enforcement in Peru. In June 2022, INDECOPi ordered ISPs to block their customers' access to 147 illicit websites that illegally provided copyrighted content.² It is also clear that mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities, work in Peru. Since 2019, INDECOPi has also developed an agreement with *La Liga* to identify infringing websites and to prevent the illegal transmission of sports events.³

Latin America's most notorious illegal streaming service *Cuevana3* was shut down as the result of private enforcement efforts after its operator was identified in the Piura District of Peru. *Cuevana3*, formerly known as *cuevana3.io*, is the largest Spanish-language piracy streaming service in the Latin American region and ranked number one for website traffic over the past four years, according to data analytics company SimilarWeb. *Cuevana* gained notoriety as an online piracy brand, spawning numerous copycat operations. Its network of more than 20 domains

² 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>.

³ 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-grupo-internacional-renuevan-convenio-para-luchar-contra-la-pirateria-digital>.

attracted more than 800 million visits in two years and made a vast library of infringing film and television content available in multiple formats.

IIPA urges the Government of 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 IP rights, 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. Additionally, the Special Prosecutor's Unit for IP on online and digital related cases needs to be more engaged in enforcement actions, including joint operations with INDECOPI to tackle local infringing sites.

- **INDECOPI should cease to interpret that synchronization licenses include the right to communicate the licensed works to the public.**

The authors' collective management organization (CMO) APDAYC initiated two pending appeals against resolutions published by INDECOPI on musical works synchronized into movies and other audiovisual productions. These resolutions are based on a controversial legal theory developed by INDECOPI in 2018 that once a musical work is synchronized into a movie, then all rights – including the music performance rights – are *ipso facto* presumed to have been assigned to the movie producer. INDECOPI has applied this theory to conclude that CMOs representing copyright owners in pre-existing musical works and incidental music would have no right to license public performance uses. Substantial evidence of industry practice (especially regarding synchronization into movies produced in the United States) was submitted in both cases but was ignored. This included statements and affidavits submitted by the composers and movie studios clarifying that public performance rights on music created or used in a movie are not transferred to the movie producer as part of a synchronization contract. The situation is not only affecting authors' collections in Peru, but there is a potential “domino effect” to other CMOs such as UNIMPRO.

INDECOPI's interpretation is contrary to the Berne Convention, of which Peru is a member, and with which the U.S.-Peru TPA requires Peru to comply. The Berne Convention clearly identifies the right of reproduction and right of communication to the public as independent rights.⁴ These cases are still pending for resolution before an Administrative Appeals Court in Lima.

LEGAL REFORMS

- **Reject problematic provisions in the General Internet Bill (*Proyecto de Ley 878/2021-CR*).**

The General Internet Bill introduces damaging changes to the current legal framework in Peru. 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 51⁵ 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, online service providers (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 enforcement 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 due process to any involved party via the ability to appeal to its internal commission and to a civil court. IIPA urges the Government of Peru to retain the current legal basis for mechanisms that ensure ISPs can impose effective relief to remove infringement, including,

⁴ See Berne Convention for the Protection of Literary and Artistic Works, Articles 9 and 11.

⁵ Note that on June 9, 2022, the Parliamentary Committee on Transport and Communications published an opinion proposing amendments and a different numbering of the articles of the bill. Here, we refer to the original text and article numbering of the bill.

where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.

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.

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 disable access to it. 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. The creative industries send millions of notices per year to remove user-generated content (UGC).

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 IP rights, 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" take down 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."⁶ 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.⁷ 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

⁶ 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%20June%2007.pdf>.

⁷ 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.

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, access to the Internet is currently not recognized as a fundamental right in the Political Constitution of Peru, but 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, as well as the sheer volume of notices that rights holders send for takedown of UGC content. Such an approach 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 that Peru retain the current legal basis for mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities. 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.

- **Reject the proposed amendments presented by OSIPTEL to the Net Neutrality Regulation, which would undermine INDECOPi's enforcement efforts.**

OSIPTEL has also presented amendments to the Net Neutrality Regulation with the same goal: preventing mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities, 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. IIPA urges the Government of Peru to reject these proposed amendments and any efforts that would undermine INDECOPi's enforcement efforts.

- **Reject erroneous interpretations of Article 41(b) of the Copyright Act and ensure state-owned or state-funded operators set a clear example by obtaining necessary copyright or related rights licenses.**

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 nation-wide television 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, and the Peruvian government should reject erroneous interpretations of Article 41(b) of the Copyright Act and ensure state-owned or state-funded operators set a clear example by obtaining necessary copyright or related rights licenses.

- **Pass legislation criminalizing the unauthorized camcording of films without the need to prove an intent to profit.**

Unauthorized camcording is a persistent challenge for rights holders in Latin America. 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.

- **Delete Articles 18 and 45 of the Performer's Law, or at the very least reject the rewording of the articles proposed by Bills 3310/2022-CR and 6293/2023-CR.**

Peru currently regulates performers' rights through two overlapping laws: the Copyright Law (*Ley sobre el Derecho de Autor*⁸) and the Performer's Law (*Ley del Artista Intérprete y Ejecutante*⁹). Article 18 of the Performer's Act provides for unwaivable author and performer remuneration rights and imposes mandatory collective management for those rights. Mandatory collective rights management has profoundly negative impacts on U.S. exports in the audiovisual sector, with knock-on effects on collectively bargained compensation payable to creative talent in U.S. audiovisual works, through the imposition of additional, unjustified increases in distribution and licensing costs. This results in confusion in the marketplace for rights clearance as well as erosion of market value for all stakeholders. IIPA urges the Government of Peru to repeal this measure.

Article 18 of the Performer's Law provides for a remuneration right to the benefit of performers for the broadcasting or communication to the public of their performances, to be shared with the phonogram or videogram producer, as the case may be. This right overlaps with the ones provided for by Articles 133 (for performers) and 137 (for phonogram producers) of the Copyright Act, generating legal uncertainty. This uncertainty would be increased if two similar bills (Bills 3310/2022-CR and 6293/2023-CR), proposed in October 2022 and November 2023, amending the Performer's Law are enacted. Both include similar problematic provisions rewording Article 18.1 of the Performer's Law and establishing the act of communication to the public in a way that may be inconsistent with the definition provided by Article 2(5) of the Copyright Act.

Finally, these two Bills propose deleting the current Article 18.2 of the Performer's Law, which includes the obligation that the remuneration be shared with the phonogram or videogram producer. Article 15(1) of the WIPO Performances and Phonograms Treaty provides that “[p]erformers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for

⁸ Decreto Legislativo N°822.

⁹ Ley N° 28131.

broadcasting or for any communication to the public.”¹⁰ IIPA recommends that Article 18 of the Performer’s Law be deleted altogether to provide certainty and compatibility with the Copyright Act, but at the very least, the rewording of the article proposed by Bills 3310/2022-CR and 6293/2023-CR should be rejected.

- **Reject Bill No. 2900/2022-CR that allows the Peruvian government to engage in collective rights management and control all collections and distributions and undermines the possibility to set tariffs that reflect the economic value of rights in trade.**

On August 24, 2022, Bill No. 2900/2022-CR was submitted to Congress. The Bill establishes a mandate to create a one-stop-shop agency for the collection of performance rights of all rights holders’ CMOs. Moreover, the Bill empowers the Executive to manage the agency and to assume control of collections and distributions. Such a practice is inconsistent with international best practices as it effectively deprives CMOs, established and controlled by rights holders, of their main roles. It also raises concerns about good governance and transparency, and how it may ultimately affect rights holders’ revenue. In addition, the voluntary nature of CMO membership is essential to the proper functioning of collective rights management and is enshrined in Article 16.7.7 of the U.S.-Peru TPA. IIPA urges the Government of Peru to reject the Bill or, at the very least, it should ensure that collective rights management remains under the control of rights holders.

Additionally, the Bill proposes a provision that would not allow for tariffs to be based on the income generated by the user of the repertoire, as is the international standard, and imposes deductions on tariffs for uses made by legal persons for non-profit purposes and to the benefit of not-for-profit cultural organizations. Such provisions are not in keeping with international standards, and they also prevent the tariffs from reflecting the economic value of rights in trade.

- **Clarify that Peru provides sound recording producers with exclusive rights for broadcasting and communication to the public.**

Peru should clarify that it provides sound recording producers with exclusive rights for broadcasting and communication to the public. Exclusive rights enable record companies to negotiate commercial terms for the public performance and broadcast of sound recordings.

- **Reject Bill 4627/2022 that proposes that copies made in the cloud be subject to the private copying exception.**

Bill 4627/2022 proposes that copies made in the cloud be subject to the private copying exception. Such a proposal is unfortunate because these services can be licensed by rights holders, and this exception would open the door to abuses by pirates. IIPA urges that the bill be rejected.

MARKET ACCESS

- **Repeal Article 45 of the Performer’s Law, or at the very least reject the rewording of the article proposed by Bills 3310/2022-CR and 6293/2023-CR.**

Article 45 of the Performer’s Law provides for an obligation for broadcasters to dedicate 10% of their daily programming to local content. Bills 3310/2022-CR and 6293/2023 propose increasing that percentage to up to 50%. Article 45 is a clear market barrier, which these bills worsen. IIPA urges that Article 45 of the Performer’s Law be deleted, or at the very least that the quota is not increased.

¹⁰ WIPO Performances and Phonograms Treaty (WPPT), Article 15(1), available at <https://www.wipo.int/wipolex/en/text/295578>; see also, Mihály Ficsor, WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO*, November 2003, available at https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf.

- **Reject Bill 807/2021-CR (*Ley del Música*).**

As indicated above, there are serious overlaps between the Copyright Law and the Performer's Law. Bill 807/2021-CR would introduce a new separate law – the Musician's Law – that would introduce additional overlaps, increasing the legal uncertainty. Also, the wording of the law is confusing as it would seem to impose that record deals be subject to labor law, that the transfer of the making available right be subject to collective bargaining, and that a minimum percentage of performers' compensation be paid to local performers. This would introduce unnecessary market access barriers and make the Peruvian market less attractive. Therefore, IIPA urges that the bill be rejected.