

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2002 SPECIAL 301 REPORT

# PERU

### EXECUTIVE SUMMARY

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Effective enforcement – on both the administrative and the criminal levels – remains the copyright industries’ primary concern in Peru. Positive progress continues with Peru’s administrative agency, INDECOPI, for those few copyright industries which use this agency as an enforcement mechanism. However, Peru must improve its efforts and results in criminal enforcement. More police actions are needed, prosecutors must actively pursue piracy cases, and judges must impose deterrent sentences in order for Peru to meet its bilateral and multilateral copyright obligations. Some copyright pirates have received sentences with a jail term of two years, but all have been suspended (which happens with prison sentences of less than four years). Peru also needs to improve its border controls.

Peru has deposited its instrument of accession to the WIPO Copyright Treaty, but ratification of the WIPO Performances and Phonograms Treaty has not yet been achieved. The WPPT is a key element in establishing an adequate legal framework for the protection of sound recordings in a digital environment, and Peru should immediately ratify the WPPT. For the recording industry, the proportion of the Peru’s market for pirated audio products – 95% – rivals countries like China and Paraguay. Estimated trade losses due to piracy of U.S. copyrighted materials in Peru was \$84 million in 2001. IIPA recommends that Peru stay on the Special 301 Watch List in 2002 and requests continued, aggressive bilateral engagement on copyright issues.

**PERU: ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1996 - 2001**

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	4.0	50%	4.0	75%	4.0	65%	4.0	50%	5.0	60%	4.0	60%
Sound Recordings / Musical Compositions	57.8	97%	55.0	96%	50.0	85%	50.0	85%	40.0	80%	NA	NA
Business Software Applications <sup>1</sup>	13.5	59%	12.6	61%	22.2	63%	30.5	64%	25.0	66%	29.4	79%
Entertainment Software	NA	NA	3.8	70%	NA	NA	NA	NA	5.2	NA	NA	NA
Books	9.0	NA	9.5	NA	10.0	NA	10.0	NA	10.0	NA	10.0	NA
<b>TOTALS</b>	<b>84.3</b>		<b>84.9</b>		<b>86.2</b>		<b>94.5</b>		<b>85.2</b>		<b>43.4</b>	

<sup>1</sup> BSA loss numbers for 2001 are preliminary. In IIPA’s February 2001 Special 301 filing, BSA’s 2000 estimates of \$21.5 million at 61% were identified as preliminary. BSA finalized its 2000 numbers in mid-2001, and those revised figures are reflected above.

## BILATERAL COPYRIGHT ISSUES WITH PERU

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IIPA requested in June 1999 that USTR initiate a review of Peru's eligibility as a beneficiary country under the Generalized Systems of Preferences (GSP) program and the Andean Trade Preferences Act (ATPA) for its failure to provide adequate and effective copyright protection to U.S. copyright owners, and particularly difficulties related to obtaining effective criminal, administrative and border enforcement in that country.<sup>2</sup> In early 2000, Peru developed a plan of action for IPR issues which led IIPA to withdraw its GSP/ATPA petition on February 7, 2000. In our Special 301 filing last year, IIPA identified several actions to enforce copyright and promote economic development which the Peruvian government could take to implement its general commitment to the U.S. government, including:

- making the anti-piracy problem an issue of national priority;
- dedicating additional resources to criminal IPR enforcement (e.g., adding at least one additional special prosecutor, making the appropriate arrangements with the responsible judicial bodies to create a judicial court which focuses on IPR issues). It is critical that the criminal justice system work effectively such that deterrent criminal penalties are actually imposed; this will require effective police action, effective prosecutions and the timely issuance of judicial judgments with deterrent sentences;
- having INDECOPI impose deterrent-level penalties in all cases. And in those cases involving the calculation of *derechos devengados* (the rightholder's share of damages), the penalties issued must exceed the value of legitimate copyrighted products infringed;
- improving border enforcement. Customs' efforts at seizing suspicious copyrighted products as well as raw materials used in making those products should be considered a government priority; and
- ensuring that the Peruvian government not infringe the rights of copyright holders in its use of copyrighted products, particularly business software, in its ministries and agencies. The Executive should issue a decree to ensure legal use of business software.

During 2001, willingness by Peruvian officials, particularly at the executive and administrative levels, to address copyright issues continued. However, much more improvement on specific results in enforcement needs to be made. Many of the elements in the five-point plan above have not yet been satisfied. IIPA requests that continued high-level bilateral contacts on these issues continue in 2002, as well as on the critical issue of ensuring that Peru ratifies the WPPT, the companion treaty to the WCT which Peru has already ratified.

## COPYRIGHT PIRACY IN PERU

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<sup>2</sup> In 2000, \$45.1 million in Peru's imports to the United States benefited from the GSP program, accounting for nearly 2.3% of its total imports to the U.S. An additional \$846 million of Peruvian products benefited from the Andean Trade Preferences Act (ATPA) in 2000, accounting for 42.6% of total imports to the United States. For the first 11 months of 2001, \$61.7 million of Peruvian goods (or 3.7% of Peru's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 52.2% over the same period last year. In the first 11 months of 2001, an additional \$677.6 million of Peruvian goods entered the U.S. under ATPA, representing a 12.7% decrease in ATPA benefits over the same time period last year. For more historical information about Peru's placement on Special 301, see appendices D and E of IIPA's 2002 Special 301 report.

The recording industry reports that Peru continues to have one of the highest levels of audio piracy in the world – approximately 97%. Pirate audio product in Peru appears in all formats – cassettes, CDs and now mostly CD-Rs (recordable CDs). The legitimate market for sound recordings has virtually disappeared in a sea of piracy. During 2001, the legitimate industry sold only 884,000 units, compared to the 5.6 million units sold in 1987. In 2001, the market decreased by 44 percent from 1.6 millions units sold in 2000. Customs figures indicate that there were more than 10 blank CD-Rs legally imported into the country for every CD sold in the country. In addition, industry investigations show that every week thousands of blank tapes and CD-Rs are smuggled into the country through Tacna in Chile (Iquique-Arica) and then are distributed for illegal duplication around the country. Replication of the music is accomplished locally.

Estimated trade losses due to record piracy in Peru were \$57 million in 2001, reflecting a slight increase over the prior year. Over recent years, many recording companies (at least 10) closed because they could not compete with the overwhelming levels of piracy. In addition, over 350 businesses that sold legitimate recordings have closed because there is, in effect, no market for legitimate recordings. In the summer of 2000, the recording industry established a new presence by opening APDIF PERU in Lima. This reinvigoration of the international industry's (IFPI) program reflects a concerted effort to improve relations with the government of Peru, which has historically challenged the recording industry's explanations and descriptions of the scope of the piracy problem in Peru. APDIF PERU also works with COPERF, the Peruvian Recording Industry Association, on this campaign. APDIF PERU worked with local authorities to perform some raids during 2001, but they proved to be insufficient to deter the increase in music piracy.

Video piracy is the most significant piracy problem in Peru, and is rampant both in video clubs and with street vendors. The Motion Picture Association (MPA) estimates the 2001 video piracy level in Peru at 50%, an improvement over the prior year. Nevertheless, the piracy situation in street markets remain pervasive that thousands of pirate videos are sold in the street market one block away from police headquarters. In addition to street sales, 80% of all video stores, estimated at 800, rent pirate videos. Well organized pirate duplication laboratories and pirate distribution systems supply both video stores and street markets. Cable television piracy by signal theft has become a large problem in Peru, mainly due to the lack of government control over local cable systems. The problem is increasing, since successful pirate cable operators expand their systems into many cities of the province. In Lima and in the rural areas, cable operations use satellite DTH decoders to broadcast premium movie channels without any royalty payment. Estimated trade losses due to motion picture piracy in Peru remain at \$4 million in 2001.

The Business Software Alliance (BSA) reports that illegal duplication of business software within larger Peruvian private sector companies has declined significantly over the past five years, but remains a serious problem inside small and medium-sized organizations. Despite an impressive number of raids by the criminal justice authorities, pirate business software and other copyrighted products are flagrantly available in commercial centers such as Galerías Garcilazo and Wilson, in Lima. Recent investigations have demonstrated that pirates frequently move their production facilities around Galerías Garcilazo and Wilson, so they can evade police raids. The level of illegal use of business software in Peru was 59% in 2001, with estimated losses due to the piracy of U.S. business software placed at \$13.5 million. These stable levels are due to the industry's effective anti-piracy program, despite only modest growth in the market for legitimate software. It is important to keep in mind that more than half of the programs used on new systems in Peru last year were illegal.

Book publishers report little change in the piracy problem over the last year. The more

damaging forms of piracy – commercial book piracy and photocopying – still remain at high levels. Trade books of U.S. origin now appear as pirated translations. There continue to be pirated translations of college texts, which have resulted in cheaper pirated editions. The economic crisis in Peru adversely affected sales of legitimate books over the past two years. Estimated trade losses due to book piracy in Peru dropped slightly to \$9.0 million in 2001.

The Interactive Digital Software Association (IDSA) reports that piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) is widespread in Peru, with estimated piracy levels for entertainment software in the range of 70% (2000). Estimated 2001 trade levels and losses due to videogame piracy are not available.

## **COPYRIGHT ENFORCEMENT IN PERU**

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Peru's 1996 copyright law covers a broad range of economic rights in favor of the author/producer, as well as some of the highest levels of criminal penalties in Latin America. Criminal and administrative actions can be filed at the same time. Some of the copyright industries, primarily the recording and motion picture industries, prefer to use criminal procedures through the Public Ministry.

In April 2000, many copyright industry associations in Peru joined with several Peruvian governmental entities in establishing a special commission called the Comisión contra la Adulteración, Falsificación y Piratería (CONTRACOPIA). Functions of this commission include analyzing the problems of each industry sector, proposing solutions to combat piracy, conducting economic studies on the extent of piracy and counterfeiting, reviewing current legislation and proposing public education campaigns. So far, this commission has sponsored an informal forum for the exchange of ideas between the government and industries on intellectual property rights initiatives. The commission has introduced a bill to modify the criminal code to increase penalties imposed for intellectual property crimes; the bill proposes sanctions as high as the ones imposed in the copyright law. Colleagues inform IIPA that they cannot estimate this bill's likelihood of success. CONTRACOPIA also helped expedite the nomination of the Special Prosecutor. Other than that, it did not take much action in 2001.

INDECOPI restructured its intellectual property division in February 2001; a new leader should be permanently assigned in the coming few months. The business software industry continues to work with INDECOPI effectively on many of its end-user actions. Despite being an effective entity, INDECOPI charges a discriminatory case fee to initiate all software piracy cases, alleging that it needs to finance the fees of the experts that accompany such case. The case fee is twice as high as the one imposed on other copyright industries. Recently, the film industry has begun to work with INDECOPI to conduct raids against operators of illegal cable television systems. However, INDECOPI has proven generally ineffective in enforcement against video piracy as well as other cases involving the production, distribution and sale of pirate materials. The recording industry does not bring administrative enforcement cases in Peru.

### **Peru's Criminal Enforcement System Fails to Deter Piracy**

Deterrent criminal penalties and effective enforcement action by the police, prosecutors, and the judiciary are essential. Sadly, the special police unit trained in IPR enforcement matters is

ineffective in handling street piracy, and only of limited effectiveness in fighting piracy in video clubs. For example, the Mesa Redonda neighborhood of Peru remains flooded with all kinds of pirate product. The IPR industries agree that there is a strong need to create a special IPR unit in the police in order to conduct effective anti-piracy investigations.

## **More police actions are needed**

A special police unit was created in May 1997 to fight piracy and other economic crimes, and this unit was trained in IPR enforcement issues.

The piracy problem for the recording industry is severe. For example, thousands of pirated audiocassettes and illegal music CDs are sold in the neighborhood of Mesa Redonda, located one block away from the police and Public Ministry's headquarters. The Peruvian police continue to protect the pirates of Mesa Redonda (an area similar in its level of lawlessness to the Mexican district of Tepito and the Paraguayan city of Ciudad del Este). The recording industry was able to conduct 251 raids in 2001, confiscating 2.7 million pirate units. It is important to note that Dr. Maria Jessica Leon Yarango, a prosecutor with the Public Ministry, has been a key player in investigations of all these cases which the recording industry has filed recently, and the record industry wishes to publicly acknowledge her for her efforts in these impossible circumstances. In June 2001, the Peruvian national police, working on information provided by APDIF, raided the El Hueco market and seized more than 1 million CD-Rs, almost 100,000 cassettes, 76,000 jewel boxes, 2 million inlay cards, and over 24,000 pirated music videos. No one was arrested. The case is with the intellectual property special prosecutor unit pending further process. These raids are conducted between 3:00 and 5:00 a.m. to prevent confrontation with market vendors, which limits the potential for arrests of suspects.

In 2001, the BSA commenced eight criminal actions through the Public Prosecutor (Fiscal de Prevención del Delito) against resellers suspected of software piracy. In addition, the police self-initiated 30 raids to reduce piracy in pirate bazaars such as Galerías Garcilazo and Wilson, Lima. Regarding the 2000 and 1999 pending criminal cases, the court issued five decisions, which are currently under appeal. In all five cases, the court sentenced the pirates to two years in prison. However, the prison term was suspended because, under Peruvian law, only prison terms of four years or more are actually imposed.

## **Prosecutors have been unable to move copyright cases along and judges have issued only few, nondeterrent sentences**

In January 2001, a new special intellectual property rights prosecutor was appointed to replace the previous prosecutor. Although the new prosecutor's jurisdiction is still limited to the city of Lima, she handles matters of intellectual property rights exclusively, while her predecessor had concurrent jurisdiction to handle other matters as well. She seems willing to pursue copyright infringement cases, but is overwhelmed with a large caseload.

On November 28, 2001, the Public Ministry and INDECOPI created a Special IP Prosecutor's Office, and appointed two special prosecutors. It is still early to assess whether these new positions will improve criminal enforcement.

Few criminal cases reach the Peruvian judiciary. Of those that do, judges do not impose deterrent sentences. Most cases result in suspended sentences. No copyright pirate has received deterrent sentences for criminal copyright infringements in Peru, despite the fact that the law contains high levels of penalties.<sup>3</sup> Under Article 57 of the Peruvian Criminal Procedures Code, sentences of four years or less are

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<sup>3</sup> Article 217 of the 1996 copyright law provides for a penalty of not less than two years or more than six years in jail, and a fine of 30 to 90 times the average daily income for most infringements. Other articles provide even higher penalties. For acts involving commercial purposes, Article 218(d) specifies that the sanction is not fewer than two years or more than eight years

suspendable. The results in these cases have been that the courts suspend the defendant's sentence. The only deterrent factor is that the defendant is prohibited from leaving the country and from committing the same crime again (and even this deterrent is suspected if the defendant files an appeal).

During 2001, the recording industry reports that few arrests were made and the defendants were always released immediately. APDIF Peru opened 251 cases and obtained 4 sentences, all of which were suspended.

## **The Administrative Enforcement System in Peru Is Starting to Provide Effective, But Limited, Copyright Protection and Enforcement for Certain Kinds of Infringing Activities**

### **The INDECOPI Copyright Office has been relatively effective in investigating business software cases and starting cable television piracy cases in 2001**

The business software industry (led by BSA), unlike the audiovisual and the recording industries, has relied significantly on administrative actions taken by INDECOPI, and the level of success achieved over the years has been improving. The business software industry prefers INDECOPI enforcement, because their proceedings through the INDECOPI Copyright Office (the administrative court of first instance) continue to be faster than criminal proceedings, which seldom reach indictment and trial.<sup>4</sup> Requests for administrative inspections have generally been approved in a timely manner by the Copyright Office, and BSA has successfully coordinated the timetable of these inspections with INDECOPI officials. BSA has maintained consistently that INDECOPI's Copyright Office has done a reasonably good job in bringing software cases. It acts upon complaints filed quickly (one to two weeks), and resolves the cases in three to six months. In 2001, BSA commenced 35 end-user administrative actions through INDECOPI and was able to settle most of the cases. Presently, INDECOPI has 18 cases pending decision.

As for entertainment software actions, Nintendo has commenced several criminal and civil actions over the years, and has met with moderate success working with INDECOPI. In December 1999, a large container arrived through customs containing a large number of 8-bit video game hardware as well as videogame software; the case is currently pending with INDECOPI. To date, there has been no progress made on this case. Copyright holders have experienced some frustration with Peru's customs procedures. Generally, when containers suspected of carrying counterfeit products enter the country, the rightholder can immobilize the shipment. However, before the contents can be verified, the Customs bureau requires the importer to realize a payment for customs clearance. In many cases, the importer will not claim the container or pay for its clearance. Thus, the containers are held at the customs warehouse for weeks (even months) without the rightholder being able to formally verify the legitimacy of the goods, and seize them should they turn out to be pirate products. In addition, despite the seizure of thousands of counterfeit and pirate products, there have not been sufficient deterrent penalties imposed on any of the defendants to cause them to stop their illegal activities.

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in jail and fines of 60 to 100 average daily income wages. While these on-the-books provisions are strict, they are not actually imposed as a matter of practice by Peruvian judges.

<sup>4</sup> This also reflects the fact that the defendants in the business software cases are generally otherwise legitimate businesses or establishments that are using unauthorized software, and such cases are substantially distinct from the problems encountered by the audio and audio visual industries—i.e., the commercial manufacture, distribution and sale of piratical materials.

The recording industry does not bring administrative enforcement cases in Peru.

### **The INDECOPI Tribunal is re-evaluating its methodology regarding the level of fines and damages to be paid to rightholders of business software**

Under the 1996 copyright law, 100% of the administrative fines go to INDECOPI. Additional compensation (known as *derechos devengados*, or “rightholder’s share”) can be awarded to the copyright owners. And in those cases involving the calculation of fines paid to the rightholders, the penalties issued must exceed the value of legitimate copyrighted products infringed upon. This has not been the result in years of administrative cases brought by BSA member companies. The INDECOPI Appellate Tribunal (*La Sala de Propiedad Intelectual*) in most cases slashed the amounts of fines that would go to the rightholders, the affected BSA member companies (while sometimes raising the fines that go to the state).

However, during the past two years, INDECOPI’s institutional attitude towards the business software industries has improved dramatically. The ODA (Oficina de Derechos de Autor, the administrative court of first instance) recently began adding a paragraph to most copyright decisions expressly awarding a fine in favor of the rightholder equal to 100% of the full value of the license. Traditionally, the INDECOPI Tribunal has reduced the level of additional compensation awarded by the INDECOPI Copyright Office to be paid to the rightholders. The overall levels of fines issued plus the *derechos devengados* have not deterred the unlawful use of software. Even though there are no minimum or maximum amounts established by the applicable law (Decreto 822), the Tribunal’s application of Decreto 822 has been very restrictive. It has consistently maintained that the copyright owner should only be entitled to 20% of the value of an infringed software package instead of the full value of the license because this amount represents the net profit for the author, based absurdly on book publishing precedents. Despite this consistently wrong application of Decreto 822, the Tribunal’s president has stated that INDECOPI will issue a report that will reconsider its methodology for calculation of damages. It is also encouraging that in January 2001, the intellectual property judges at the INDECOPI Tribunal were replaced.

One possible solution to clarifying the interpretation of the Decreto 822 regarding this damages problem is to consider implementing and imposing statutory damages which would streamline enforcement and save INDECOPI from the tortuous process of trying to determine the value of the fines and *derechos devengados*. Statutory damages, which prescribe that a court may use a fixed sum or multiple to determine damages in lieu of determining actual damages, are a feature of copyright legislation in a growing number of countries.

### **Peruvian Border Measures Must be Improved to Halt Suspect Shipments and to Track Shipments of Copyrighted Products and Materials with Underdeclared Values**

Border measures in Peru are inadequate to stop the flow of pirated material into the country. Interventions by customs authorities (SUNAD, the Superintendencia Nacional de Aduanas) to seize suspect shipments are few. Authorities must take action on the ground to stop and hold suspect merchandise. First, Peruvian customs, by an internal directive or some regulatory means, should impose strict controls to check the legitimacy of IP goods entering and leaving Peru (e.g., music CDs, videos, business software, videogame software on all platforms, including CD-ROMs, personal computer CD-

ROMs and multimedia entertainment products). Customs can consult with industry associations and local representatives about suspect shipments. Many of the copyright industries have participated in training aimed at Peruvian customs officials. Second, customs should also pay special attention to the value of the goods that are used as raw materials for the production of copyrighted products, such as recordable CDs, blank tapes, blank videos, etc., that enter Peru with what appear to be under declared values.

## **COPYRIGHT LAW AND RELATED ISSUES**

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### **WIPO Treaties**

On July 31, 2001, Peru deposited its instrument of accession to the WIPO Copyright Treaty (WCT) with WIPO in Geneva. Unfortunately, the legislation to ratify the WIPO Performances and Phonograms Treaty (WPPT) still has not received legislative approval. Peru's failure to ratify this companion treaty is cause for concern, and Peru should move as quickly as possible during 2002 to cure this anomaly by ratifying the WPPT. IIPA understands that the Executive Branch and the Copyright Office have been supportive of WPPT ratification. Both WIPO treaties provide the basic framework for the transmission of content in e-commerce. Their effective implementation will promote efforts to raise minimum standards of copyright protection, particularly with respect to network-based delivery of copyrighted materials.

### **1996 Copyright Law**

Peru passed a copyright law (Legislative Decree No. 822) which entered into force on May 24, 1996. This comprehensive legislation raised the level of protection toward the standards of both TRIPS and the Andean Community Decision 351.<sup>5</sup> The law contains a broad scope of economic rights, as well as some of the highest levels of criminal penalties in Latin America. Some preliminary discussion has taken place regarding the modification of Decision 351 to make it TRIPS and WIPO treaties-compatible. At last report, no specific action on this matter has been taken by the Andean Community Copyright Office directors.

### **Government Software Management**

During 2000 and 2001, the BSA and INDECOPI participated in a jointly branded software legalization campaign in Peru, including joint publicity bearing the INDECOPI and BSA logos. After the campaigns ended in July, BSA and INDECOPI continued carrying out joint activities, such as joint educational programs and enforcement actions through the end of the year.

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<sup>5</sup> On December 17, 1993, the Andean Community countries (Bolivia, Colombia, Ecuador, Peru and Venezuela) adopted Decision 351, which established a common regime on copyright and neighboring rights. This decision set up rudimentary enforcement mechanisms, including injunctive relief, seizure and confiscation of unlawful copies and devices, and damages, many of which need to be implemented into national legislation. There are several drawbacks to Decision 351, including its failure to provide protection against parallel imports, and to meet the specific civil and criminal enforcement standards found in NAFTA and TRIPS.