

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

PERU

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Peru stay on the Special 301 Watch List in 2002 due to high piracy levels harming the legitimate copyright sectors. We request that the U.S. government continue high-level bilateral engagement contacts with Peru on copyright issues.

Overview of key problems: Effective enforcement—on both the administrative and the criminal levels—remains the copyright industries' primary concern in Peru. Estimated trade losses due to piracy of U.S. copyrighted materials in Peru were \$93 million in 2002. For the recording industry, piracy has devastated the market such that, in effect, no legitimate record businesses are operating in Peru. More police actions are needed, prosecutors must actively pursue piracy cases, and judges must impose deterrent sentences for Peru to meet its multilateral and bilateral copyright obligations. Administrative end-user actions should be INDECOPI's primary focus and such actions need to be improved so that deterrent fines are issued and collected. Peru also needs to improve its border controls. Progress is being made on the government's legalization of computer software; the Government Software Legalization Decree was published on February 13, 2003, and requires all public government entities to use legal software and establish effective controls to ensure such legal use between now and March 31, 2005.

Actions which the Peruvian government should take in 2003: To better enforce copyrights, the Peruvian government should:

- Make anti-piracy an issue of national priority;
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials used in making those products;
- Pursue prosecutions and issue expeditious and deterrent sentences in piracy cases (almost all criminal sentences are suspended);
- Dedicate significantly more resources to criminal IPR enforcement (e.g., budget reallocation, 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);
- Conduct regular and concerted anti-piracy actions on the streets of high-traffic areas for piracy in Lima, specifically Mesa Redonda, Avenida Wilson, Galerías Garcilaso de la Vega, el Hueco, Polvos Azules and Polvos Rosados;
- Increase the involvement of the tax authorities (SUNAT) in all anti-piracy actions, including retailer actions;
- Have SUNAT work jointly with other government entities to fight piracy in corporate settings (e.g., SUNAT could request companies to provide information about licensing and software when it conducts its own inspections, and send such information to INDECOPI if it believes that a copyright violation has been committed);
- Improve the prosecution of software end-user actions by INDECOPI.

PERU
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 - 2002¹

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level								
Records & Music	70.2	98%	57.8	97%	55.0	96%	50.0	85%	50.0	85%
Business Software Applications ²	10.3	58%	11.2	60%	12.6	61%	22.2	63%	30.5	64%
Motion Pictures	4.0	50%	4.0	50%	4.0	75%	4.0	65%	4.0	50%
Entertainment Software	NA	NA	NA	NA	3.8	70%	NA	NA	NA	NA
Books	8.5	NA	9.0	NA	9.5	NA	10.0	NA	10.0	NA
TOTALS	93.0		82.0		84.9		86.2		94.5	

Peru is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA), and the recently adopted Andean Trade Promotion and Drug Eradication Act (ATPDEA).³ These programs have standards of intellectual property rights which must be afforded to U.S. copyright owners. Responding to the U.S. government’s request for comments regarding countries’ eligibility for ATPDEA benefits, IIPA reported that Peru had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.⁴ Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Peru. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Peru’s actions to meet the IPR standards of the ATPDEA before designation was officially conferred. IIPA understands that Peru indeed made general commitments (a) to reduce piracy and (b) implement a software legalization decree by February 28, 2003.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2003 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2003spec301methodology.pdf.

² BSA’s estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA’s February 2002 Special 301 filing, BSA’s 2001 estimates of \$13.5 million at 59% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA’s trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA’s trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

³ For the first 11 months of 2002, \$157 million worth of Peruvian goods (or 9% of Peru’s total imports) entered the U.S. under the duty-free GSP code, representing an increase of 154.3% over the same period in 2001. During this same 2002 time period, an additional \$309.1 million worth of Peruvian goods entered the U.S. under ATPA, representing a 54.4% decrease from the same time period in 2001. For more information on the history of Peru’s status on Special 301, please see Appendices D and E of this submission.

⁴ IIPA Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries, September 16, 2002; available on the IIPA website at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf.

COPYRIGHT PIRACY IN PERU

The legitimate record industry in Peru has almost entirely vanished in the last two years. The estimated piracy level is now at 98%, one of the highest music piracy rates in the world. Pirate audio product in Peru appears in all formats—cassettes, CDs and now mostly CD-Rs (recordable CDs). Estimated trade losses due to record piracy in Peru rose to \$70.2 million in 2002. In recent years, many recording companies have closed because they could not compete with the overwhelming levels of piracy. Customs figures have indicate that there were more than 10 blank CD-Rs legally imported into the country for every single CD sold in the country. Record 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 produced locally. APDIF PERU also works with COPERF, the Peruvian Recording Industry Association, and continues to run an anti-piracy campaign which results in police raids and the seizures of pirate product.

For the business software industry, the major challenge remains illegal duplication of business software within larger Peruvian private sector companies. The Business Software Alliance (BSA) reports that this problem of corporate copying has declined over the past five years, but it continues to be a serious problem, particularly within small and medium-sized organizations. Unfortunately, during the last seven months, INDECOPi's priority has shifted towards channel actions. INDECOPi should refocus its administrative enforcement priorities on end user piracy. To be sure, reseller piracy remains a very significant problem as well. Despite an impressive number of raids by the criminal justice authorities, pirate business software and other copyrighted products are openly available in commercial centers such as Galerías Garcilazo and Wilson, in Lima. Pirates frequently move their production facilities around Galerías Garcilazo and Wilson to evade police raids. The level of illegal use of business software in Peru was 58% in 2002, with losses due to the piracy of U.S. business software estimated to be \$10.3 million. These stable levels are due to the industry's effective anti-piracy program, despite only modest growth in the market for legitimate software.

Video and optical disk piracy is the most significant audiovisual piracy problem in Peru and is rampant in both video stores and street vendors, according to the Motion Picture Association of America (MPAA). The piracy situation in street markets is so pervasive that thousands of pirate videos and optical disks are sold in the street market one block away from the police headquarters. In addition to street sales, 80% of all video stores, estimated at 800, rent pirate videos. The piracy level continues at a high 50% level. Pirate videos and optical disks sell for approximately US\$2.00. Small-scale pirate duplication laboratories supply both video stores and street markets, and there is also a high incidence of back-to-back copying in video stores. Sales of optical disc pirated materials over the Internet has significantly increased. It has become usual to receive e-mails offering home deliveries of pirated material with increasingly high quality. DVD parallel imports have been also detected. Cable operators in the provinces generally use satellite TV decoders to steal signals and distribute protected audiovisual copyrighted programming via cable. Finally, pirate exhibitors use videos and optical disks for unauthorized exhibitions, damaging the theatrical distribution. Cease and desist letters have been sent, even to the public universities, with limited success. Losses to the U.S. motion picture industry due to audiovisual piracy in Peru are estimated to be \$4 million in 2002.

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 \$8.5 million in 2002 due to the difficult economy, not because of a decline in book piracy.

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.

COPYRIGHT ENFORCEMENT IN PERU

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. Unfortunately, the criminal and administrative enforcement systems simply fail to deter piracy.

Criminal Enforcement

Deterrent criminal penalties and effective enforcement action by the police, prosecutors, and the administrative and judicial system remain essential, and much improvement in these areas is needed.

Police actions: Unfortunately, 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 is full of all kinds of pirate product. The IPR industries agree that there is a strong need to allocate public resources to support the special IPR unit of the Fiscal Police (*Division de Investigacion de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations.

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).

Prosecutions: Prosecutors have been unable to move copyright cases along and judges have issued only few, non-deterrent sentences. In January 2003, a new special intellectual property rights prosecutor was appointed (Dr. Fredy Santiago Irigoyen) to replace the previous prosecutor. The new prosecutor's jurisdiction is still limited to metropolitan Lima and the northern suburbs, but it excludes the Province of Del Callao, which comprises the port and six other areas, and north Lima, which includes several of the most populated areas of Lima. The prosecutor handles matters of intellectual property rights exclusively; he seems willing to pursue copyright infringement cases, but is overwhelmed by a large caseload and budget cuts.

On November 28, 2001, the Public Ministry and INDECOPI created a Special IP Prosecutor's Office, and appointed two special prosecutors. Nevertheless, this office lacks effective

public budget support and will face severe problems in improving criminal enforcement.

The courts: Few criminal cases reach the Peruvian judiciary. When they 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 adequate penalties.⁵ Under Article 57 of the Peruvian Criminal Procedures Code, sentences of four years or less are suspendable; the amendments made to the Criminal Code in 2002 did not change this. As a result, the courts usually 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 suspended if the defendant files an appeal).

During 2002, MPA conducted two raids in Peru. One of them was a criminal action filed in August 2002. The raid has been conducted by the special prosecutor's office in the street market of Las Malvinas, seizing over 7,000 illegal videos. MPA obtained 19 sentences of 1-2 years of imprisonment from older cases during this year. All of them were suspended. As such, the industry has no confidence in the judicial system.

In 2002, BSA commenced nine criminal actions through the public prosecutor against resellers suspected of software piracy. In addition, the police self-initiated more than 30 raids to reduce piracy in pirate bazaars such as Galerías Garcilazo and Wilson, Lima. Regarding the 2001 pending criminal cases, the court issued three decisions, two of which included prison sentences of two years and the third one included a prison term of one year. However, the prison terms were suspended because, under Peruvian law, only prison terms of four years or more are actually imposed.

SUNAT (National Tax Authority)

For the first time ever, SUNAT participated in several criminal copyright infringement cases in 2002. On April 29, SUNAT and INDECOPI raided 178 stands at Galerías Wilson, a shopping center known for the sale of counterfeit products. 700 policemen and 12 prosecutors conducted the raid, seizing 25 tons of software and computer equipment. Since no invoices were produced to justify the software found at the various stands, SUNAT ruled that the crime of tax evasion had occurred. This was the largest series of computer software piracy raids in Peruvian history. Despite this breakthrough, SUNAT has since been reluctant to take further action.

INDECOPI

Over the last three years (2000-2002), the BSA and INDECOPI have participated in successful, jointly branded software legalization campaigns in Peru, including joint publicity bearing the INDECOPI and BSA logos. The business software industry also continues to work with INDECOPI on many of its end-user actions. Despite being an effective entity, INDECOPI charges a discriminatory case fee to carry out inspections in software piracy cases, alleging that it needs to charge in order to pay the fees of the experts that accompany such case. The case fee is 60%

⁵ 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 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.

higher than the one imposed on other copyright industries. Additionally, INDECOPi fails to compel collection of the fines it assesses.

A few years ago, the film industry began 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. In some cases, fines issued against pirates amounted to \$2 per infringing tape; the cost of a pirate tape is \$2, so this administrative fine can hardly be seen as a compelling deterrence to video piracy. In September 2002, MPA filed an administrative complaint with INDECOPi to support the new head of the Copyright Office (Dr. Martin Moscoso) in its efforts to conduct a joint industries raid in Arequipa, the second biggest city in Peru. The Copyright Office seized over 3,000 videos, among other illegal products.

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

The entertainment software industry had some success working with INDECOPi in 2001, with respect to the seizure of counterfeit goods being shipped into the country. In November 2001, INDECOPi along with customs officials, seized 12 containers full of counterfeit *Nintendo* and *Pokemon* products. Although INDECOPi conducted a hearing into the seized items in February 2002, none of the importers showed up. The seized products are being held for destruction pending INDECOPi's investigation.

Overlapping jurisdiction with police in 2002: During the last six months of 2002, the jurisdiction of INDECOPi's Copyright Office overlapped with the IP prosecutor (Fiscalía) in filing cases against resellers. This new issue has caused some delays in conducting software end-user cases. End-user piracy continues to be the greatest problem and BSA's main focus because entities frequently load copies of software onto more PCs than authorized by license. End-user piracy is present in both academic and commercial environments throughout the country.

Case resolutions in software actions and fine collections: The business software industry, unlike the audiovisual and the recording industries, has relied significantly on administrative actions by INDECOPi against end-users, and the level of success achieved over the years has been improving, although there are still some problems, mainly with the Copyright Office.

BSA prefers INDECOPi enforcement because its administrative proceedings continue to be faster than criminal proceedings, which seldom reach indictment and trial.⁶ In 2002, INDECOPi's Tribunal finally decided all BSA cases still pending before the Tribunal, some of them pending since 1998. In 2002, BSA commenced 28 end-user administrative actions through INDECOPi. Presently, INDECOPi has six cases awaiting decision.

In 2002, INDECOPi started imposing deterrent fines against end-users that first reached a settlement with BSA but later chose not to comply with the settlement terms. The fine imposed is 50% of the amount due under the settlement, with the possibility of higher fines for non-compliance. Despite this improvement, the Copyright Office continues to fail to collect the fines once imposed, so the end-user has little incentive to comply with the decision. This is precisely what happened in the Municipalidad del Callao, Cepeban and Transamerica cases. The Copyright Office also fails to

⁶ 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.

assess and collect the fines when the end-user refuses the inspection, such as with Mensajería El Rayo and Redesin. A further example of INDECOPI's surprising lack of recent cooperation is the CESCA case, where the defendant, CESCA, entered into a settlement agreement with BSA, under the auspices of INDECOPI. When CESCA's check failed to clear, BSA asked that CESCA pay by wire transfer. CESCA refused to do so, and INDECOPI refused to require the company to meet the payment stipulated in the settlement agreement, or indeed even to hold another meeting, claiming the matter had been resolved. BSA will now have to seek payment through the slow and inefficient civil court system.

Customs

Border measures in Peru are inadequate to stop the flow of pirated material into the country. Interventions by customs authorities SUNAT (formerly known as SUNAD) to seize suspect shipments are few. SUNAT has been working jointly with INDECOPI to take action on the ground to interdict 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.

On a slightly positive note, an IDSA member company, in cooperation with the Peruvian Customs Office, was able to seize a huge shipping container of counterfeit videogame products belonging to a Lima importer. The confiscated merchandise included a variety of products including educational computers, keyboards, joysticks and video games. A total of 5,500 video game systems with built-in Nintendo video games were seized. The products were all exported from China.

COPYRIGHT LAW AND RELATED ISSUES

1996 Copyright Law

Peru's copyright law (Legislative Decree No. 822) 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 351.⁷ 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

⁷ 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 civil and criminal enforcement standards found in NAFTA and TRIPS.

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.

WIPO Treaties

Peru separately deposited its instruments of accession to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Both WIPO treaties provide the basic framework for the transmission of content in e-commerce. Peru needs to review its laws to ensure the effective implementation of the WIPO treaties' obligations. One of the copyright industries' challenges in substantive laws is to elevate the levels of protection to account for changes in the digital environment. The Internet fundamentally transforms copyright piracy from a mostly local phenomenon to a global problem. Modern copyright laws must respond to this fundamental change by providing that creators have the basic property right to control distribution of copies of their creations. Copyright owners must be able to control delivery of their works, regardless of the specific technological means employed. While the Peruvian law is quite good, several refinements would strengthen its protections, especially in the area of technological protection measures and rights management information, both key elements of the WIPO treaties.

Government Software Asset Management

On February 13, 2003, the Peruvian government published the Government Software Legalization Decree, Decreto Supremo No. 013-2003-PCM. The Decree states that all public entities should use legal software and, to that end, these entities must establish effective controls to ensure legal use of software. The Decree specifies that government agencies must budget sufficient funds for the procurement of legal software. The Decree also sets a deadline of March 31, 2005, for government agencies to provide an inventory of their software and to erase all illegal software. The Decree also delineates clear lines of responsibility and mechanisms for ensuring compliance with its provisions: the chief technology officer or other designated official must certify compliance. The Decree also provides for education campaigns aimed at public employees to inform them about licensing provisions and the content of the Legalization Decree, and further requires INDECOPI to publish a guide to ensure efficient software administration in the public sector. This is a major step forward that demonstrates the government's increased awareness of the value of managing its software assets in a systematic and thorough manner.

COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be

forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.