

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

PERU

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Peru remain on the Special 301 Watch List in 2004.

Overview of key problems/achievements: Bilateral Free Trade Agreement (FTA) negotiations between the U.S. and Peru will commence in mid-2004. At present, Peru's copyright regime is completely inadequate, and inconsistent with the standards that the US should expect of its most trusted trading partners. While the IPR chapter of the FTA will undoubtedly include high levels of substantive copyright obligations as well as enforcement measures, it is essential that the U.S. demand, and that Peru extend, significant and immediate attention to the problem of copyright piracy, and in particular, initiate and sustain criminal actions against those who manufacture, distribute and sell pirate product.

Copyright piracy levels in Peru are still extraordinarily high. In particular, the legitimate recording industry in Peru has all but disappeared because of the high levels of piracy, including the growth of CD-R piracy, and totally ineffective enforcement. Optical disc piracy is on the rise, and adversely affects almost all the copyright industries. Effective enforcement—on both the administrative and the criminal levels—remains the copyright industries' primary concern in Peru. In general, 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.

Peru also needs to improve its border controls to halt the importation of pirate materials. Cooperation improved between motion picture anti-piracy personnel and INDECOPI, in coordinating with Peruvian police on major raids in 2003 and early 2004. Notwithstanding the 2003 Government Software Legalization Decree requiring all public government entities to use legal software and establish effective controls to ensure such legal use before March 31, 2005, the government has not yet approved the government guide for software management.

Actions which the Peruvian government should take in 2004

- Make anti-piracy an issue of national priority;
- 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. Attention should also be given to Miraflores, San Isidro, and other middle class neighborhoods;
- Pursue prosecutions and issue expeditious and deterrent sentences in piracy cases (almost all criminal sentences are suspended);
- Increase the level of sanctions in piracy cases to restrict the power of judges to suspend criminal sentences;
- 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);

- Support more administrative enforcement efforts by INDECOPI in business software, entertainment software, video/cable piracy, and music piracy;
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials used in making those products;
- Have customs officials establish a system to track the importation of blank media and polycarbonate;
- 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);
- Approve the government guide for software management as required by the 2003 Government Software Legalization Decree.

PERU
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003 ¹

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	87.0	98%	70.2	98%	57.8	97%	55.0	96%	50.0	85%
Business Software Applications ²	NA	NA	14.7	60%	11.2	60%	12.6	61%	22.2	63%
Motion Pictures	4.0	45%	4.0	50%	4.0	50%	4.0	75%	4.0	65%
Entertainment Software	NA	NA	NA	NA	NA	NA	3.8	70%	NA	NA
Books	8.5	NA	8.5	NA	9.0	NA	9.5	NA	10.0	NA
TOTALS ³	NA		97.4		82.0		84.9		86.2	

In November 2003, Ambassador Robert Zoellick notified the U.S. Congress that the Bush administration intends to begin Free Trade Agreement (FTA) negotiations with the Andean nations,

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>. For more information on the history of Peru under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. In IIPA's February 2003 Special 301 filing, BSA's 2002 estimated losses of \$10.3 million and levels of 58% were identified as preliminary. BSA's revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. business software publishers in Peru, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in Peru (including U.S. publishers) and (b) losses to local distributors and retailers in Peru.

³ In IIPA's 2003 Special 301 submission, IIPA estimated that total 2002 losses to the U.S. copyright-based industries in Peru were \$93.0 million. IIPA's revised 2002 loss figures are reflected above.

starting with Peru and Colombia in the second quarter of 2004.⁴ The negotiating objectives specifically include high levels of copyright protection and effective enforcement measures, including criminal, civil/administrative and border enforcement. 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. Presently, 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).⁵ These two programs contain standards of intellectual property rights which must be afforded to U.S. copyright owners.⁶ There is little doubt but that Peru's present copyright regime fails to afford adequate and effective protection to U.S. copyrighted materials as contemplated under these statutes. It is essential that Peru take immediate steps to improve its poor enforcement record (especially exemplified in the case of recorded music), and that it not wait until negotiations are concluded to begin to address this problem. The absence of significant improvements in advance of the conclusion of negotiations will greatly prejudice the political environment for Congressional consideration of the FTA, and we hope that the Government of Peru will turn its attention to this critical issue without delay.

COPYRIGHT PIRACY IN PERU

Piracy of sound recordings in Peru is severe; the estimated piracy level is now at 98%, one of the highest music piracy rates in the world. The entire legitimate record industry in Peru has almost disappeared over the last three years. Another local independent company, Discos Independientes, ceased most of its operations during 2003. Pirate audio product in Peru appears in all formats—cassettes, CDs and now mostly CD-Rs (recordable CDs). 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. In recent years, many recording companies have closed because they could not compete with the overwhelming levels of piracy. Customs figures have indicated 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

⁴ See Press Release 2003-74, Office of the U.S. Trade Representative, "USTR Notifies Congress of Intent to Initiate Free Trade Talks with Andean Countries," November 18, 2003, at <http://www.ustr.gov/releases/2003/11/03-74.pdf>; and President Bush's Letter to Congress, November 18, 2003, at http://www.ustr.gov/new/fta/Andean/2003-11-18-notification_letter.pdf.

⁵ During the first 11 months of 2003, \$100.3 million worth of Peruvian goods (or 4.7% of Peru's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing an increase of 36% over the same period in 2002. During this same time frame, an additional \$1.1 billion worth of Peruvian goods entered the U.S. under ATPA, representing a 271% increase in ATPA benefits from the same period in 2002.

⁶ See IIPA Comments to the International Trade Commission regarding the Andean Trade Preferences Act: Effect on the U.S. Economy and on Andean Drug Crop, May 21, 2003, at http://www.iipa.com/rbi/2003_May21_ATPA_ITC.pdf. In 2002, 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. See 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, at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf. Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Peru. There, 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 was informed that Peru made general commitments (a) to reduce piracy and (b) implement a software legalization decree by February 28, 2003.

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.

The key challenge for the business software industry continues to be the illegal duplication of business software within larger Peruvian private sector companies as well as small and medium-sized organizations. Reseller piracy remains a very significant problem, too; illegal bazaars operate openly in high-traffic areas like Avenida Wilson, with virtual impunity. The day after a raid, the same individuals continue selling illegal software from the same stalls and stores.

Book publishers report little change in the piracy problem over the last year. The most damaging forms of piracy—commercial book piracy and large-scale photocopying—remain at high levels. In addition, trade books of U.S. origin now appear as pirated translations. Publishers also report pirated translations of college texts. Estimated trade losses due to book piracy in Peru stayed constant at \$8.5 million in 2003.

Optical disc piracy (CD-R and DVD-R) has almost completely replaced VHS in pirate distribution systems, according to the Motion Picture Association of America (MPAA). This pirate product, of varying quality, is distributed in street markets, newspaper stands and in large black market distribution centers. The main cause for concern is the large black markets, such as Polvos Azules, Polvos Rosadas and Mesa Redonda, where optical disc piracy grew significantly in 2003. The black-market distribution centers are especially difficult to control because of their political leverage and their tendency to resort to violence to counteract police raids. The black market merchants of Polvos Azules, for example, fought off 150 police on September 29, 2003. Despite the use of tear gas and riot control tactics, police were unable to enter the center for search and seizure of pirate product. (A similar incident occurred on June 29, 2003.) The piracy situation in street markets is so pervasive that thousands of pirate discs are sold in the street market one block away from the police headquarters. In addition to street sales, 80% of Peru's estimated 800 video stores rent pirate videos and are beginning to rent pirate DVD-R. Annual losses to the U.S. motion picture industry due to audiovisual piracy in Peru continue to be estimated at be \$4 million in 2003.

The Entertainment Software Association (ESA) 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

In Peru, criminal and administrative anti-piracy actions can be filed simultaneously. However, enforcement difficulties remain serious. On November 28, 2001, the Public Ministry and INDECOPI created a Special IP Prosecutor's Office, and appointed two special prosecutors. In June 2003, the Attorney General created a new Intellectual Property and Contraband Prosecutors Unit. This unit, along with the National Police, has recently cooperated with INDECOPI to take effective action against optical disc piracy. However, in November 2003, the Attorney General removed this specific designation and funding for this function, leaving the Special IP Prosecutor's office undefined as to its specialized function in 2004. This could result in the disbanding of this important office by mid-2004.

The Director of the Copyright Office (Oficina de Derecho de Autor) leads a campaign called "Cruzada Antipirateria" encouraging the IP industries to work together on public relations matters

and raids against centers of production and distribution of counterfeit products. In 2003, the audiovisual sector, in a coordinated effort of theatrical and video companies, joined INDECOPI's "Cruzada Antipirateria" to take actions against black market piracy with other copyright sectors.

Police actions: 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). 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. The copyright 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.

MPA reports that on January 17, 2004, Peru's Federal Police raided a DVD-R reproduction lab in Lima on Saturday, seizing 28 burners, 3,000 recorded DVD-Rs, about 25,000 unrecorded DVD-Rs and arrested two people. The 3,000 recorded DVD-Rs seized were, according to the arrested individuals, the daily production set for delivery to the markets (which would correspond to an annual production output of over 1 million DVD-Rs). This was done by INDECOPI coordinating with the Attorney General, federal police and tax authorities (SUNAT). This lab — located one block from the office of the Peruvian President — was a major supplier to the organized street markets. Since mid-2003, MPA, its local video association, and INDECOPI have been working together, and this cooperation has been very positive.

During the course of 2003, the local recording industry's anti-piracy unit cooperated in seizing 2.3 million pre-recorded music CD-Rs and 305,000 blank CD-Rs, and produced 7 sentences, all with no effective jail time. This level of activity hardly makes an impact when faced with a pirate market of over 20 million units being distributed through an aggressive network of street vendors and flea markets. The recording industry does not bring administrative enforcement cases in Peru.

INDECOPI and motion picture actions: MPA reports positive developments in INDECOPI's efforts to combat piracy, specifically the effort of Martin Moscoso, head of INDECOPI's Copyright Office, to coordinate raids on black market piracy. Mr. Moscoso has been able to coordinate INDECOPI inspectors, federal police and prosecutors and SUNAT in several significant actions. For example, MPA reports that in the third and fourth quarters of 2003, INDECOPI organized six raids against large black market distribution points, including Polvos Rosadas and Mesa Redonda, and has continued to organize raids in the first quarter of 2004, including a significant raid in February on Mesa Redonda. This effort by INDECOPI has resulted in more effective action in the last several months than MPA has seen in the last several years. If the Attorney General cooperates with INDECOPI and investigates and prosecutes aggressively, this effort may be the most effective effort Peru has made in many years. If there is no effective prosecution, however, than MPA fears that INDECOPI's efforts will not result in deterrence. Nevertheless, the audiovisual sector, both through MPA and the local video and theatrical companies, is committed to supporting INDECOPI's efforts.

INDECOPI continues to work on business software activities: INDECOPI has given constant support to special business software campaigns to fight piracy. INDECOPI drafted the government guide for software management and it is now seeking approval by the government agency. The business software industry has relied significantly on administrative actions by INDECOPI against end users, since civil and criminal actions can last for years without having any deterrent impact on the market for pirate copyrighted products. Notwithstanding its positive results, INDECOPI has no authority to force an inspection when the defendant denies access to INDECOPI.

As an administrative entity, INDECOPi needs express authorization from a court to enter in the face of such a denial. This lack of authority has encouraged some defendant to deny access to INDECOPi, with the expectation that the amount of the fine to be imposed by INDECOPi for such denial would be smaller than the compensation and fines faced had the inspection occurred. INDECOPi must impose deterrent sanction to avoid this conduct in the future. INDECOPi has been effective in imposing fines on end-users that first reached a settlement with BSA but later chose not to comply with the settlement terms.

Criminal prosecutions still rare: Prosecutors have been unable to move copyright cases along and judges have issued only few, non-deterrent sentences. As always, once the prosecutors have done their initial work conducting raids and doing preliminary investigation, courts take years to issue final resolutions. In January 2003, a new special intellectual property rights prosecutor was appointed. 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 very limited resources. Furthermore, the special prosecutor only gets involved during the investigation stage. Once the process has moved into the indictment phase, a regular prosecutor without special expertise in intellectual property laws handles the case.

Non-deterrent results in the criminal courts: Few criminal cases reach the Peruvian judiciary. When they do, judges do not impose deterrent sentences. Cases simply 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.⁷ 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). Some bills have been introduced in Congress to increase the level of sanctions in piracy cases in order to restrict the power of judges to suspend criminal sentences

Customs: Border measures in Peru are inadequate to stop the flow of pirated material into the country. Interventions by customs authorities to seize suspect shipments are few. There are several actions which Peru could take to strengthen its borders from the entry of pirated products. 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.

⁷ 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.

SUNAT (National Tax Authority): SUNAT, which has tax and customs jurisdictions, can and should be a major player in anti-piracy efforts, in prosecuting tax evasion and contraband activity by pirates. During 2003, BSA tried to get SUNAT involved in the fight against piracy, but SUNAT has resisted participation. SUNAT has been working jointly with INDECOPI to take action on the ground to interdict and hold suspect merchandise. MPA expresses disappointment, however, that SUNAT appears reluctant to exercise its jurisdiction and acts only in actions coordinated by INDECOPI and then only with a minimal participation and insufficient follow-up.

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 (1993). Peru's copyright law contains a broad scope of economic rights, as well as some of the highest levels of criminal penalties in Latin America. However, it is not without some provisions which fall below international consensus, especially with respect to the WIPO Internet treaties. Peru already has deposited its instruments of accession to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Given the higher standards of copyright obligations and enforcement measures contemplated in a U.S.-Peru FTA, Peru should be on notice that some additional reforms will be needed to its copyright law to comply fully with the comprehensive obligations found in U.S. FTAs.

Performers Law: In mid-2003, President Toledo properly vetoed legislation called "The Artists' Bill" which would have introduced a private copying levy, eliminate contractual freedoms between recording companies and artists, and require collections for public performance and broadcasting of sound recordings and music to be achieved through separate organizations. The "Artists and Performers Law" was published on December 19, 2003, and has to be within 90 days from its publication. This law establishes moral and economic rights for artists and performers, creates a private copy levy on blank media, and requires collections for public performance, broadcasting and rental of music included in audiovisual works and sound recordings.

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. INDECOPI has drafted the government guide for software management, but has not been able to get it approved by the appropriate agency. BSA urges the government to approve and implement the software guide and the other provisions contained in the decree.

⁸ A year ago there was some preliminary discussion among the Andean Community copyright office directors regarding a possible modification of Decision 351 to make it TRIPS and WIPO treaties-compatible, but at last report there was no progress.

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