

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2005 SPECIAL 301 REPORT

### PERU

#### **EXECUTIVE SUMMARY**

**Special 301 Recommendation:** IIPA recommends that Peru remain on the Special 301 Watch List in 2005.

**Overview of Key Achievements/Problems:** Copyright piracy and inadequate enforcement are the major challenges adversely affecting the copyright industries in Peru. Over the last few years, the legitimate recording industry in Peru has nearly disappeared because of the high levels of piracy. Optical disc piracy is on the rise, and adversely affects almost all the copyright industries. Illegal photocopying on university campuses continues to plague the book publishing industry. 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. Peru also needs to improve its border controls to halt the importation of pirate materials. Following the software legalization decree of February 2003, the Peruvian government approved the governmental software management guide on March 17, 2004, which should help ensure effective and legal software administration in the public sector.

Bilateral Free Trade Agreement (FTA) negotiations between the U.S. and the Andean nations, including Peru, started in mid-2004. Reports suggest that negotiations on the IPR chapter are nearing completion. While the IPR chapter of the FTA will undoubtedly include high levels of substantive copyright and enforcement obligations, 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.

#### **Actions Which the Peruvian Government Should Take in 2005**

- Conduct regular and concerted anti-piracy actions on the different black markets in Lima, specifically Mesa Redonda, Avenida Wilson, Galerías Garcilaso de la Vega, el Hueco, Polvos Azules and Polvos Rosados;
- Conduct regular and concerted anti-piracy actions on the streets of high-traffic areas. Attention should also be given to Miraflores, San Isidro, and other middle class neighborhoods as well as other key cities in the rest of the country;
- Perform in-depth investigations directed at closing down illegal replication facilities and warehouses;
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases (almost all criminal sentences are suspended);
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials used in making those products;
- Increase the involvement of the tax authorities (SUNAT) in all anti-piracy actions, including retailer actions;

- Support more administrative enforcement efforts by INDECOPI against business software, entertainment software, video/cable, and music piracy;
- Support SUNAT, working jointly with other government entities to fight piracy in corporate settings (such cooperation has begun with INDECOPI);
- Create a specialized IPR court which handles both civil and criminal copyright infringement cases;
- 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 specializing in IPR issues).

<b>PERU</b> <b>Estimated Trade Losses Due to Copyright Piracy</b> <b>(in millions of U.S. dollars)</b> <b>and Levels of Piracy: 2000-2004<sup>1</sup></b>										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Records &amp; Music<sup>2</sup></b>	68.0	98%	87.0	98%	70.2	98%	57.8	97%	55.0	96%
<b>Business Software<sup>3</sup></b>	18.0	67%	19.0	68%	14.7	60%	11.2	60%	12.6	61%
<b>Motion Pictures</b>	4.0	75%	4.0	45%	4.0	50%	4.0	50%	4.0	75%
<b>Entertainment Software<sup>4</sup></b>	NA	NA	NA	NA	NA	NA	NA	NA	3.8	70%
<b>Books</b>	8.5	NA	8.5	NA	8.5	NA	9.0	NA	9.5	NA
<b>TOTALS</b>	98.5		118.5		97.4		82.0		84.9	

The U.S. began FTA negotiations with Peru in May 2004, as part of the first round of Andean country negotiations which included Colombia and Ecuador.<sup>5</sup> 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)

<sup>1</sup> 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 [www.iipa.com/pdf/2005/spec301methodology.pdf](http://www.iipa.com/pdf/2005/spec301methodology.pdf). For more information on the history of Peru under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>2</sup> The lower loss amount is due to the fact that the average sale price per legitimate CD is lower; the number of pirate units remains unchanged from last year.

<sup>3</sup> BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Peru, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$31 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

<sup>4</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

<sup>5</sup> See Press Release 2004-35, Office of the U.S. Trade Representative, "Peru and Ecuador to Join with Colombia in May 18-19 Launch of FTA Negotiations with the United States," May 3, 2004, available at [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2004/May/Peru\\_Ecuador\\_to\\_Join\\_With\\_Colombia\\_in\\_May\\_18-19\\_Launch\\_of\\_FTA\\_Negotiations\\_with\\_the\\_United\\_States.html](http://www.ustr.gov/Document_Library/Press_Releases/2004/May/Peru_Ecuador_to_Join_With_Colombia_in_May_18-19_Launch_of_FTA_Negotiations_with_the_United_States.html).

as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in the criminal, civil and customs context.

Peru also is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA), as amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA).<sup>6</sup> These programs contain intellectual property protection standards which must be afforded to U.S. copyright owners.<sup>7</sup> It is essential that Peru take immediate steps to improve its poor enforcement record (exemplified in the case of recorded music), and that it not wait until negotiations are concluded to begin to address this problem.

## **COPYRIGHT PIRACY**

The audiovisual industry reports tremendous growth in pirate optical discs over the last year, with the estimated piracy level (combined video and optical disc) now at 75%, a result of the overwhelming surge in optical disc piracy in Peru. Pre-theatrical release pirate product in Peru is distributed in street markets, street vendors, home delivery, newspaper stands, and black market distribution centers. The main concern is the large black markets such as Polvos Azules, which are especially difficult to address because of their political protection they receive and their tendency to resort to violence in raids. The piracy situation in street markets and in local galleries is so pervasive that thousands of pirate discs are being sold. Local video distributors report that, in addition to street sales, 80% of Peru's estimated 800 video stores rent pirate videos and are beginning to rent pirate DVD-Rs. Cable TV piracy (including operators' and subscribers' piracy) in cities outside of Lima is rampant too. Losses to the U.S. motion picture industry due to audiovisual piracy in Peru are estimated to be \$4 million in 2004. However, this figure is very conservative, not taking into account Internet piracy and other forms of piracy.

Piracy of sound recordings in Peru is an especially severe problem. In 2004, the estimated piracy level was an astronomical 98%, one of the highest music piracy rates in the world, resulting in the near total collapsed of the legitimate recording industry in that country. In fact, Sony Music and Warner Music essentially closed operations during 2004. 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. Customs figures have indicated that there were more than ten blank CD-Rs legally imported into the country for every single CD sold. Thousands of blank tapes and CD-Rs are smuggled into the country through Tacna in Chile (Iquique-Arica) each week and then distributed for illegal duplication around the country. COPERF, the Peruvian Recording Industry Association, continues to run an anti-piracy campaign which results in some police raids and the seizures of pirate product. However, these isolated actions are not sufficient to serve as real deterrents against piracy, or to restore the market.

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<sup>6</sup>During the first 11 months of 2004, \$96 million worth of Peruvian goods (or 3% of Peru's total exports to the U.S. from January to November) entered the U.S. under duty-free GSP code, representing a decrease of 4.3% over the same period in 2003. During this same time frame, an additional \$1.4 billion worth of Peruvian goods entered the U.S. under ATPA, representing a 25.6% increase in ATPA benefits from the same period in 2003.

<sup>7</sup> See IIPA Comments to the U.S. International Trade Commission regarding the Andean Trade Preferences Act: Effect on the U.S. Economy and on Andean Drug Crop, June 1, 2004 at [http://www.iipa.com/rbi/2004\\_June1\\_IIPA\\_ATPA\\_trade\\_filing\\_for\\_USTIC.pdf](http://www.iipa.com/rbi/2004_June1_IIPA_ATPA_trade_filing_for_USTIC.pdf).

The business software industry continues to report problems with illegal duplication of business software within Peruvian private sector companies of all sizes. Additionally, reseller piracy remains a very significant problem. 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.

Little has changed over the last year with respect to book piracy. Large scale photocopying (the most damaging form of piracy) remains at high levels. Furthermore, trade books of U.S. origin now appear in pirated translations. Estimated trade losses due to book piracy in Peru stayed constant at \$8.5 million in 2004.

The Entertainment Software Association (ESA) reports that piracy of entertainment software (including videogame CDs and cartridges, personal computer CDs, and multimedia products) is also widespread in Peru.

## **COPYRIGHT ENFORCEMENT**

Enforcement difficulties remain serious. In June 2003, the Attorney General created an Intellectual Property and Contraband Prosecutors Unit. This unit, along with the National Police, has cooperated with INDECOPI to take effective action against optical disc piracy. However, in November 2003, the Attorney General removed the specific designation and funding for this unit until March 2004. At that time, the unit was appointed an "ad hoc" Prosecutor's Office for Intellectual Property and partially recovered its specialized function. Reportedly, two special prosecutors operate today in Lima, with sufficient funds to maintain their offices.

The Director of the Copyright Office (*Oficina de Derecho de Autor*) continues to lead a campaign (*Cruzada Antipirateria*) which encourages the IP industries to work together on public relations matters and raids against centers of production and distribution of counterfeit products. The audiovisual sector, recording industry, and business software industry, participated in the *Cruzada Antipirateria* in 2004.

**Police actions:** The copyright industries continue to report that the Peruvian police still 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 has an active campaign in Peru. While the greatest cooperation and coordination comes through the *Cruzada Antipirateria* initiative with INDECOPI, the Federal Police in an independent action in May 2004 seized two trailers filled with 750,000 blank DVD-Rs which had entered Peru as contraband from Taiwan. These trailers passed almost 20 checkpoints from northern Peru and almost entered Lima.

During 2004, the local recording industry's anti-piracy unit cooperated in seizing 5.3 million pre-recorded music CD-Rs, 5 million blank CD-Rs, and produced 8 sentences, all with no deterrent jail time. Some of these actions have taken place with the support of INDECOPI.

Although the level of seizures increased, it is still not sufficient to discourage pirate sales. Close to 20 million units of pirate CDs continue to be sold in Peru. The recording industry does not bring administrative enforcement cases in Peru.

**INDECOPI and motion picture actions:** MPA continues to report positive anti-piracy developments in cooperation with INDECOPI. In 2004, for example, MPA reports that INDECOPI organized 41 raids against large black market distribution points, including Polvos Azules, Polvos Rosados, El Hueco and Mesa Redonda, resulting in the seizure of counterfeit goods worth an estimated \$20 million. 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 (19 cases were still pending at the end of 2004), however, then 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 and educational activities:** BSA reports that INDECOPI has given steadfast support to special business software campaigns to fight end user and reseller piracy. Furthermore, during 2004, BSA participated with INDECOPI in educational activities addressed at judges and prosecutors. INDECOPI also drafted the government guide for software management that was approved by the government on March 17, 2004. 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. The recording industry reports that it likewise worked with INDECOPI on anti-piracy activities in 2004.

Notwithstanding some positive results, INDECOPI has no authority to force an inspection when the defendant denies it access. 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 defendants to deny access to INDECOPI, with the expectation that the amount of the fine to be imposed for such denial would be smaller than the compensation and fines faced had the inspection occurred. INDECOPI must impose deterrent sanctions to avoid this conduct in the future. Some deterrence has resulted from INDECOPI imposing fines on end-users that failed to comply with their settlement agreements with BSA.

**Criminal prosecutions still rare:** Prosecutors have been unable to move copyright cases along and judges have issued only a small number of non-deterrent sentences. For example, in June 2004, a judge in Lima released the head of the largest pirate blank CD operation soon after it was raided.

**Non-deterrent results in the criminal courts, and the hope of a specialized IPR court:** Few criminal cases reach the Peruvian judiciary. When they do, judges do not impose deterrent sentences; most are suspended. No copyright pirate has received a deterrent sentence for criminal copyright infringement in Peru, despite the fact that the copyright law contains adequate penalties.<sup>8</sup> Before mid-2004, the Criminal Procedures

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<sup>8</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 in jail and fines of 60 to 100 average daily income wages. While these on-the-books provisions are strict, they were not actually imposed as a matter of practice by Peruvian judges.

Code permitted sentences of four years or less to be suspended. As a result, the courts usually suspended the defendant's sentence in copyright cases.

In 2004, amendments were made to the criminal code which provided an increase of minimum sentencing to four or more years for copyright infringements (see discussion below). This is a clear message to judges that they will have to consider copyright infringements serious crimes, and therefore issue deterrent sentences, rather than suspend them. Recently, judges have issued orders to detain some suspects involved in piracy cases. Sixteen people are currently in jail awaiting trial, some have been detained for over five months. We hope this change marks a new beginning for the Peruvian judiciary in the fight against piracy.

**Customs:** Some industry participants indicate that border measures have improved somewhat over the last few months and Customs now checks imports of blank CD-Rs coming into the country. The inspections include verifying correct amounts and prices. Local industries will work with Customs to ensure that the invoices being processed are also legitimate. Unfortunately, these actions still don't prevent the smuggling of many products that ultimately become pirate goods on the streets of Lima. Some participants suggest that Customs has not improved as much as it could, pointing to the fact that currently, Customs coordinates primarily with INDECOPI as opposed to the police or other criminal enforcement authorities. Law No. 28,289 which amended the criminal code in 2004 (see comments below) also contains provisions dealing with customs crimes and piracy.

**Cooperation between INDECOPI and SUNAT:** INDECOPI and SUNAT (Superintendency of National Tax Authority), (which has jurisdiction over tax and customs issues) signed an agreement of mutual cooperation and support on August 18, 2004. Both agencies agreed to coordinate actions to enable customs authorities to identify infringing products more efficiently and to prepare joint anti-piracy media campaigns. The Copyright Office reports that the agreement is being implemented and should help to get information on pirated goods imports to rightholders. Unfortunately, this agreement was never made public and therefore, and, as a result, its implementation cannot be supervised by the private sector.

## **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). The Peruvian law contains a broad scope of economic rights, as well as some of the highest levels of criminal penalties in Latin America. However, it does not contain certain provisions which would fully comply with the WIPO Internet Treaties (e.g., treatment of temporary copies, technological protection measures). 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 the FTA, Peru should be on notice that additional reforms will be needed to its copyright law in order to fully comply with these treaties. Additional reforms to the copyright law should also include statutory damages, ISP liability, and notice and takedown provisions, and provisions against the removal or alteration of Electronic Rights Management Information (ERMI).

**Criminal code amendments and customs provisions in 2004:** Peru's criminal code was amended by Law No. 28,289 which took effect in July 2004. Sanctions were

increased to a minimum of four years of prison and a maximum of eight years of prison for those who commit copyright infringement (e.g., unauthorized reproduction or distribution of a copyrighted work) when the value of the work(s) infringed exceeds a commercial value of U.S. \$1,800. The law seeks to provide deterrent sanctions in copyright cases and to restrict the power of judges to suspend criminal sentences.

The criminal code also contains several provisions to address customs crimes and piracy. First, the law created a permanent commission to fight customs crimes and piracy, designating SUNAT as the secretary of this commission. Some of the commission's goals are: the creation of a national plan to fight customs crimes and piracy; the coordination of actions and recommendations to fight customs crimes and piracy; and the recommendation of new provisions to improve the law and sanction these crimes. In addition, Law No. 28,289 orders Customs officials to give INDECOPI all necessary support to help it fulfill its mission. Finally, the Law created an Importation Registry where persons or companies importing, producing, or distributing duplicating equipment or blank optical media discs must register. The registry is administered by SUNAT. Copyright industries will monitor the effects of these provisions during 2005.

Copyright industries report that although penalties have not been imposed under the new criminal code, a judge has ordered detention for the head of an organization, raided in August 2004, which was illegally distributing movies. Since then, more than ten individuals have been prosecuted with detention orders.

**High level multi-sector commission against contraband and piracy:** In July 2004, this commission, operating under the direction of the Production Ministry, and with IP enforcement as part of its mission, oversaw two major anti-piracy raids—one in Arequipa and the other in Lima (Polvos Azules district).

**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, establish effective controls to ensure such legal use. 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, giving an organization's chief technology officer or other designated official responsibility for certifying 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. Under the decree, INDECOPI is required to publish a guide to ensure efficient software administration in the public sector. INDECOPI drafted the government guide for software management, and, on March 17, 2004, the Peruvian government approved the guide to ensure effective and legal software administration in the public sector.

Finally, in September 2004, the *Contraloría General de la República* (the national budget office) approved a guideline to compel its audit units, located in various public administration entities, to carry out an obligatory software licensing audit in 2005.

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