

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

PERU

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Peru remain on the Special 301 Watch List in 2006. IIPA has long advocated that 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.

IIPA supports the Free Trade Agreement process and looks forward to the prompt and effective implementation of Peru's upcoming obligations under the U.S.-Peru FTA. The U.S. began FTA negotiations with Peru in May 2004, and negotiations concluded in December 2005. On January 6, 2006, President Bush notified the U.S. Congress of his intent to enter into this FTA.¹ The FTA 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.² Peru currently is a beneficiary country of several U.S. trade programs—the Generalized System of Preferences (GSP) and the Andean Trade Preference Act (ATPA), as amended by the Andean Trade Promotion and Drug Eradication Act (ATPDEA)³; both programs have high standards of intellectual property rights.

Actions Which the Peruvian Government Should Take in 2006:

- Conduct regular and concerted anti-piracy actions at the black markets in Lima (specifically, Mesa Redonda, Avenida Wilson, Galerías Garcilaso de la Vega, el Hueco, Polvos Azules and Polvos Rosados) as well as on the streets of high-traffic areas, with particular attention given to Miraflores, San Isidro, and other middle class neighborhoods as well as other targeted cities in the rest of the country;

¹ The President's letter gives Congress at least 90 days' notice before Bush signs the agreement. See Notice of Intention to Enter into a Free Trade Agreement with Peru, 71 Fed. Reg. 1679 (Jan. 10, 2006), at <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/06-261.htm>.

² The preliminary text of the U.S.-Peru FTA IPR Chapter is posted on USTR's website at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file509_8706.pdf.

³ 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 8, 2005 at <http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20Final%2006082005.pdf>. During the first 11 months of 2005, \$159.6 million worth of Peruvian goods (or 3.5% 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 66.4% over the same period in 2004. Also during this same 2005 time frame, an additional \$2 billion worth of Peruvian goods entered the U.S. under ATPA, representing a 44.3% increase in ATPA benefits from the same period in 2004.

- Coordinate efforts between Copyright Office and local municipalities to revoke licenses granted to vendors selling pirate product;
- Perform in-depth investigations directed at closing down illegal replication facilities and warehouses of hard-good piracy;
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials (e.g., blank optical media) 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 piracy of business software, motion pictures (DVD and cable), books, entertainment software, and music;
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases (almost all criminal sentences are suspended);
- 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, supporting the special IPR unit of the Fiscal Police (*Division de Investigacion de Delitos contra los Derechos Intelectuales*), and making the appropriate arrangements with the responsible judicial bodies to create a judicial court specializing in IPR issues).
- Work with the U.S. government and copyright industries to properly implement the FTA IPR obligations and WIPO Treaties to include notice and takedown provisions, ISP liability, statutory damages, comprehensive making available right, and provisions against the removal or alteration of electronic rights management information (ERMI).

PERU
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005⁴

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ⁵	66.0	98%	68.0	98%	87.0	98%	70.2	98%	57.8	97%
Business Software ⁶	23.6	73%	22.0	73%	19.0	68%	14.7	60%	11.2	60%
Motion Pictures ⁷	NA	NA	4.0	75%	4.0	45%	4.0	50%	4.0	50%
Entertainment Software ⁸	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	9.0	NA	8.5	NA	8.5	NA	8.5	NA	9.0	NA
TOTALS	98.6+		102.5		118.5		97.4		82.0	

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006/spec301methodology.pdf. For more information on the history of Peru under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2006SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁵ The lower recording industry loss estimate in 2004 was due to the fact that the average sale price per legitimate CD was lower; the number of pirate units remained unchanged between 2003 and 2004.

⁶ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Peru, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁷ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁸ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

COPYRIGHT PIRACY IN PERU

Overview: 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. Street markets and fairs selling pirate books, along with illegal photocopying on university campuses, continue to plague the book publishing industry.

Record and music piracy: Piracy of music and sound recordings in Peru is still a serious impediment to the legitimate market. In 2005, the estimated piracy level for music and recordings continued to be an astronomical 98%, one of the highest music piracy rates in the world, resulting in the near total collapse of the legitimate recording industry in that country. In fact, Sony Music and Warner Music essentially closed operations in Peru in 2004. In addition, recording activity for local artists is disappearing. 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. Unfortunately, during 2005, seizures decreased dramatically by almost 61% -- from 5.4 million pre-recorded CD-Rs to 1.5 million. In any case, these isolated actions are not sufficient to serve as real deterrents against piracy, or to restore the market.

Business software piracy: The business software industry continues to report that in 2005 its key challenge was the illegal duplication of business software within larger Peruvian private sector companies as well as small and medium-sized organizations. Recent market investigations concluded a significant increase of end-user piracy among these businesses. Reseller piracy remains a very significant problem, too; illegal bazaars operate openly in high-traffic areas in the center of Lima (Galerias Garcilaso de la Vega) with virtual impunity. For example, the day after a raid, the same individuals continue selling illegal software from the same stalls and stores. Preliminary estimated trade losses due to business software piracy in Peru were \$23.6 million in 2005, with a 73% piracy level. If Peru were able to lower business piracy by 10 percentage points, BSA predicts there would be significant growth in the local economy.⁹

Book piracy: Little changed in 2005 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. Book fairs (*campos feriales*), including two large ones in Lima, often permit the sale of pirated books; some estimates place 90% of the books as being piratical. Some of the street sellers are located a block away from the SUNAT; others are located near university campuses. Such widespread piracy over the last decade has devastated the local book

⁹ BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: decreasing Peru's piracy rate from 73% to 63% would add \$286 million to its economy, directly create nearly 1,000 more new jobs, and increase local industry revenues by \$214 million. The aggregate effect could mean an additional \$24 million in tax revenues for Peru's government. See <http://www.bsa.org/idcstudy/pdfs/Peru.pdf>.

industry, causing book stores to close and interfering with the ability for legitimate publishers to continue doing business; such embedded piracy also sends the wrong signal about the importance of cultural development. Some professional pirates have the ability to offer approximately 3,000 titles for sale. This commercial devastation contradicts the government's declaration about the importance of publishing; the Law of the Book (Law 28086 of 2003) recognizes the important public need to create and protect books and editorial products. Peruvian authorities, including INDECOPI and the police, must do much more to protect books, especially from piracy (including unauthorized photocopying as well as reprint piracy). Estimated trade losses due to book piracy in Peru rose to \$9 million in 2005.

Audiovisual piracy: The audiovisual industry reports that optical discs piracy continue to grow tremendously over the last year. Pirate optical discs are available even prior to theatrical release in Peru and are distributed in street markets, home delivery, newspaper stands and black market distribution centers. The main concerns are the large black markets such as Polvos Azules Polvos Rosados y Hueco, which are especially difficult to address because of their political protection 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 90% of the DVDs offered in video rental stores are illegal.

Entertainment software piracy: The Entertainment Software Association (ESA) reports that pirated entertainment software products (videogame CDs and cartridges, and personal computer CDs) remain widely available in Peru.

COPYRIGHT ENFORCEMENT IN PERU

Overview: In July 2004, the High Level Multi-Sectorial Commission against Contraband and Piracy, headed by the Production Ministry, included piracy and IP infringement fight as one of its missions. This commission, a governmental entity which also has private sector participants, focuses primarily on recommending regulations to fight contraband and counterfeit goods. In addition, the *Cruzada Antipirateria* is a private association created by the audiovisual sector, including distributors, exhibitors, video rental stores, etc. (neither the recording industry nor the business software industry participates). The *Cruzada* is one of the members of the Multi-Sectorial Commission. The Copyright Office (Oficina de Derecho de Autor) has begun to have a secondary role in this campaign.

Police actions: The copyright industries continue to report in 2005 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. 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 and participates in the *Cruzada Antipirateria* which works closely with INDECOPI. In 2005, the Federal Police performed 72 raids resulting in the seizure of blank digital media worth an estimated US\$5 million which entered the Peru as contraband from Asia. SUNAT also performed raids and seized blank media from Asia.

During 2005, the local recording industry's anti-piracy unit cooperated in seizing 2.0 million pre-recorded music CD-Rs, 500 thousand blank CD-Rs, and produced 10 sentences, all with no deterrent jail time. Some of these actions have taken place with the support of INDECOPI. This level of enforcement activity does little to contain the sale of close to 20 million units of pirate CDs sold in Peru. The raids executed in the major pirate centers of Mesa Redonda, Polvos Azules and Polvos Rosados have little impact on the level of piracy because the actions are not consistent, the product is quickly replaced and the pirate distributors have no legal exposure. The recording industry does not bring administrative enforcement cases in Peru.

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. Peru has two IPR prosecutors who work with INDECOPI when requested to do so.

INDECOPI works well with some of the copyright industries: Two industry sectors, business software and audiovisual, use the administrative remedies offered by INDECOPI. Industries also report that prosecutors and customs officials have been unwilling to work with INDECOPI.

BSA reports that in 2005, INDECOPI gave constant support to special business software campaigns to fight piracy. INDECOPI drafted the government guide for software management and got it approved in 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 for pirate copyrighted products. Notwithstanding its positive results, INDECOPI still 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 defendants 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 should seek for a solution using its current faculties, for example imposing deterrent sanctions to avoid this conduct in the future and seizing all means used to infringe software companies rights. INDECOPI has been effective in imposing fines on end-users that first reach a settlement with BSA but later chose not to comply with the settlement terms.

MPA continues to report positive anti-piracy developments in cooperation with INDECOPI. In 2005, for example, MPA reports that INDECOPI organized 37 raids against large black markets, including Polvos Azules, Polvos Rosados, El Hueco and Mesa Redonda, resulting in the seizure of over 160,000 counterfeit goods worth an estimated US\$ 400,000. In 2005, as in 2004, the former Attorney General did not cooperate with INDECOPI. However, a new Attorney General was appointed and MPA expects that her office will expend more effort in investigations and prosecutions related to piracy.

The book publishing industry believes it is critical that, in addition to criminal efforts, the administrative agencies of INDECOPI and the Copyright Office initiate investigations and punish those individuals and businesses involved in book piracy. INDECOPI also should work jointly with local and regional governments, as well as with the National Library and the Ministry of Education.

In 2005, an entertainment software company obtained favorable results from an action with INDECOPI. A case involving a 2004 Customs seizure of 1,800 infringing materials resulted in the defendant paying damages to the company in the amount of US\$4,000. The defendant was also ordered to refrain from further infringing activity.

Non-deterrent results in the criminal courts; hopes for a specialized IPR court dashed in 2005: Few criminal cases reach the Peruvian judiciary. When they do, judges do not impose deterrent sentences; cases have simply resulted in suspended sentences. No copyright pirate has received deterrent sentences for criminal copyright infringements in Peru, despite the fact that the copyright law contains adequate penalties. What happens in practice is that the Peruvian Criminal Procedures Code permits sentences of four years or less to be suspended. As a result, the courts usually suspend the defendant's sentence in copyright cases. This sad practice continues even after the 2004 amendments to the criminal code, which provided an increase of minimum sentencing to four or more years for copyright infringements. During 2005, the High Level Multi-Sectorial Commission against Contraband and Piracy filed a petition before the Peruvian judiciary to request that a special criminal intellectual property court for the first instance (trial court) be created; unfortunately, that request was rejected.

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. Some industries estimate that over 100 million units of blank optical media are coming into the country. 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. By a November 2005 resolution, the Customs Authority included blank media in a special regime (withholding of VAT) by which every importer of a listed merchandise shall pay in advance the VAT of the reseller of such merchandise, in addition to its own VAT.

SUNAT (National Tax Authority): SUNAT (Superintendency of National Tax Authority, which has jurisdiction over tax and customs issues) can and should be a major player in anti-piracy efforts, in prosecuting tax evasion and contraband activity by pirates. There have been several efforts to get SUNAT involved in the fight against piracy, but SUNAT has resisted participation.

INDECOPI and SUNAT cooperation: INDECOPI and SUNAT 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. MPA reports that that customs does report to INDECOPI all import operations related to optical discs and other goods that could be used in piracy. INDECOPI has an inspector working with Customs, who is in charge of checking the importation of blank media. That inspector reports to INDECOPI's director any irregular operations, and as necessary, INDECOPI takes administrative action or denounces the irregular activity to the IPR prosecutors.

Trainings: As reported above, many of the copyright industries have participated in training aimed at Peruvian customs officials.

COPYRIGHT LAW AND RELATED ISSUES IN PERU

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. 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 will have to make additional reforms 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).

Government software asset management deadline delayed to December 2006: 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, and set a set 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 published the government guide for software management in 2004. Nevertheless, the Government issued Supreme Decree 037-2005-PCM in May 2005, postponing the enforceability of the obligations of the agencies to provide an inventory of their software and to erase all illegal software until December 2006. BSA urges the Government to implement the software guide and the decree as swiftly as possible.

Criminal code amendments and customs provisions in 2004: First, 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. Second, the criminal code also contains several provisions to address customs crimes and piracy. It 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. The law also 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, and there is some question whether the registry has been activated.

Law of the Book 2003: The Law of Democratization of the Book and the Development of Reading (Law No. 28086) was enacted in October 2003, with the goals of protecting the creation and distribution of books and similar editorial products. The law also has goals of improving access to books, promoting the national library system, and promoting the conditions necessary for the legal production of the books, among others. The law creates a new entity known as PROMOLIBRO (*el Consejo Nacional de Democratización del Libro y de Fomento de la Lectura*), within the Ministry of Education.