

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

PERU

Special 301 Recommendation: IIPA recommends that Peru be elevated to the Priority Watch List in 2008.

EXECUTIVE SUMMARY

In the year leading up to the approval of the U.S.-Peru Trade Promotion Agreement (TPA) was approved, the copyright industries had hoped that 2007 meant that Peruvian agencies were taking strong actions to enforce its current copyright laws to combat widespread piracy. Sadly, that was not, and is not, the case. 2007 presented numerous disturbing enforcement-related developments that undermined the current potential for any effective criminal, administrative and even civil copyright enforcement in Peru. To say 2007 was a very difficult year to obtain effective enforcement would be an understatement. Because of the severity of these problems, Peru should be elevated in the Special 301 process to the Priority Watch List.

In addition, piracy in the Peruvian marketplace continues to be a significant business obstacle. Optical disc piracy and street piracy remain basically uncontained. The government has chosen to issue a fourth postponement in the implement of its program to legalize software within government agencies. Illegal photocopying on university campuses continues. Border control remains weak. More police actions are needed, prosecutors should pursue piracy cases, and judges should impose the deterrent-level sentences permitted in the criminal code. Furthermore, administrative enforcement by INDECOPI (El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual) has deteriorated, and both its court and a constitutional court have issued alarming interpretations that will threaten the viability of effective enforcement, especially for the business software sector that relies on *ex parte* inspections.

IIPA supports free trade agreements and is pleased that both nations have ratified the U.S.-Peru TPA. True, Peru will need to amend its laws to bring its already good copyright laws up to the higher standards of the TPA. Yet the larger test will be whether Peru will take the actions needed--across the board (raids, prosecutions, civil actions, judicial sentencing and review)--to provide adequate and effective copyright enforcement. Actions speak louder than words.

PRIORITY ACTIONS IN 2008

Legislation

- Work with the U.S. Government and copyright industries to prepare and introduce legislation that will fully and properly implement the Trade Promotion Agreement's IPR obligations, including clear notice and take down procedures and ISP liability in cases of internet piracy.

Enforcement

- 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) with enhanced support of the National Police (which should provide more policemen when requested by the Prosecutor) 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.
- Continue to work with local municipalities to revoke licenses granted to vendors selling pirate product and close black-market businesses.

- Perform in-depth investigations directed at closing down illegal replication facilities and warehouses of hard-goods piracy.
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases.
- Continue the training efforts to the judges in the new four specialized IPR courts and new appeal court in Lima.
- Increase the involvement of the tax authorities (SUNAT) in all anti-piracy actions, including software end-user and retailer actions, and coordinating with INDECOPI on border measures.
- Support more administrative enforcement efforts by INDECOPI against piracy of business software, motion pictures (DVD and cable), books, entertainment software and music.
- Instruct the Intellectual Property Chamber of INDECOPI to render deterrent sanctions. The issuance of simple warnings and forgiveness of “due copyrights”, both inadequate remedies, should be stopped.
- Involve INDECOPI, local and regional governments, the National Library and the Ministry of Education to take actions to halt unauthorized photocopying at universities.
- Enforce the 2004 software legalization regulation (which has been extended four times, now until December 31, 2008) against those public agencies that have not complied with the business software inventory requirements and the licensing of such software.
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials (e.g., blank optical media) used in making those products.
- Implement the Importation Register for importers of blank media and recording devices and equipment.
- 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, as well as enhancing financial resources for INDECOPI).

The Trade Promotion Agreement

The U.S. and Peru began free trade agreement negotiations in May 2004. On June 25, 2007, both nations reached agreement on amendments to the TPA to reflect the bipartisan trade agreement between the U.S. Administration and Congressional leadership on May 10, 2007. On December 14, 2007, the Peruvian Congress delegated the power to legislate and issue regulations to implement the TPA to its Executive, and the Peruvian Congress will set up a Committee to review the Executive’s legislative proposals.

With respect to intellectual property, the TPA 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.¹ For the time being, Peru remains a beneficiary country of several U.S. trade programs which contain high IPR standards.²

¹ The final text of the U.S.-Peru TPA IPR Chapter is posted on USTR’s website at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html. Peru also signed four IPR-related Side Letters, including one on ISP liability and another on retransmission issues.

² During the first 11 months of 2007, the following quantities of imports under the Andean preferential trade programs entered the U.S. from Peru: \$1.35 billion under ATPA, \$1.43 billion under ATPDEA and \$223.6 million under GSP. The U.S. Congress is considering extending ATPA benefits which are due to expire February 28, 2008. Last year, IIPA filed comments with the Trade Policy Staff Committee regarding its request as to whether the eligible Andean Trade Preference Act countries (such as Peru) were meeting the trade program’s criteria, see IIPA, Letter to TPSC, March 5, 2007, posted at <http://www.iipa.com/pdf/IIPAAndeanATPACommentsToUSTRdueMarch503052007.pdf>.

PERU
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2003-2007³

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions ⁴	58.5	98%	53.5	98%	66.0	98%	68.0	98%	87.0	98%
Business Software ⁵	40.0	73%	32.0	71%	22.0	73%	22.0	73%	19.0	68%
Motion Pictures ⁶	NA	NA	NA	NA	12.0	63%	4.0	75%	4.0	45%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	9.0	NA	8.5	NA	8.5	NA
TOTALS	98.5		85.5		109.0		102.5		118.5	

COPYRIGHT PIRACY IN PERU

Optical disc piracy and street piracy: Optical disc piracy is a major problem in Peru, harming the markets of almost all the copyright industries. Large numbers of blank media (e.g., CDs, DVDs) are imported into Peru, and these serve as the basis for local pirates' burning copyrighted content. Unchanged are the entrenched black markets such as Polvos Azules, Polvos Rosados, Hueco and Mesa Redonda (which is located one block away from the police and Public Ministry's headquarters) where pirates operate flagrantly during daylight hours.

It is estimated that only 12% of the optical discs entering Peru are destined for the legitimate market. It is no longer possible to reach conclusions on the dimension of piracy based simply on the volume of optical disc imports. According to MPA analysis of data provided by SUNAT (Customs Service), the legal importation of blank discs has dropped in recent years, with 2007 imports being less than 15% of the level of 2005's imports.

Year	Units Imported (Millions)
2005	127,831,010
2006	26,845,050
2007 (up to November)	15,237,665

Another possible reason for the decline in blank media imports might be due to the implementation of the private copy levy placed on optical media. Another interesting effect of this downturn is that the number of blank media units by the leading brand most often used to produce pirate discs locally also fell dramatically.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf. For information on the history of Peru under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission. IIPA's prior country reports on Peru are posted on the IIPA website at <http://www.iipa.com/countryreports.html>.

⁴ 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.

⁵ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Peru, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>), as reflected above.

⁶ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

A very recent development is that the country source for blank media changed in 2007. India has now replaced Taiwan as the main source of legal blank disc imports to Peru, according to SUNAT data.

	2005	2006	2007
Taiwan	54,996,553	11,731,692	2,383,924
China	4,653,438	1,952,409	1,245,586
India	354,276	3,223,228	5,428,566
Malaysia	631,064	1,900	268,660
Japan	379,450	1,647,958	1,314,522
Others	3	565,702	3,000
TOTALS	61,014,784	19,122,889	10,644,258

Of course, none of the above figures account for blank media that entered the county undeclared, falsely declared, or as contraband (smuggled). Thousands of blank tapes and CD-Rs are smuggled into the country each week and then distributed for illegal duplication around the country. Informal calculations indicate that CD-R contraband import increased by 50% during 2007.

With respect to optical media enforcement, an individual believed to be one of the main importers and distributors of blank CDs in Peru, was finally indicted. INDECOPI identified this defendant as the head of an organized group with international connections, including owning businesses and properties in Chile and Bolivia. Also, this defendant reportedly has investments of about US\$300 million, according to tax authorities. For four years, efforts were made to issue indictments against this defendant for IPR infringement and smuggling, but the cases never moved forward. At last, in February 2007, a prosecutor in Lima charged the defendant with money laundering, which is punishable with up to 20 years' imprisonment. So far, the trial has been delayed because the defendant has refused to appear in the court. It is essential for the Peruvian Government to prosecute this case actively and fully.

Internet piracy: The software and film industry reports that Internet-based piracy is not yet widespread in Peru. However, for the music industry it is already a severe problem that is slowly overtaking physical piracy as the most detrimental activity against its companies. Several auction sites (such as Mercado Libre and De remate) do offer infringing copies of films, software and music. In addition, internet cafes serve as important locations for downloading and burning of illegal files. The local music industry reports that internet piracy is becoming a habit for the middle class which were the few consumers buying legitimate physical product. Although current Peruvian legislation has the tools to sanction such unlawful behavior on the Internet, further refinements are needed to clearly specify that the sharing of information between peer-to-peer (P2P) networks and other similar networks constitutes unlawful actions.⁷

Business software piracy: The business software industry reports no major changes in the piracy situation for its products in Peru in 2007. The Business Software Alliance (BSA) confirms that its triad of problems remains: (a) the illegal duplication of business software mostly within small- and medium-sized private sector companies, (b) piracy within government agencies, and (c) high levels of optical disc piracy on the streets and in bazaars. Peruvian government officials indicate that the official rate of piracy among its agencies is below 42%, but BSA estimates it to be almost twice as high, at approximately 80%. The government published these piracy figures in April 2006, but has not provided access to its methodology, nor does it explain which agencies were included, or what kinds of software programs were included in the survey. If the report was based on agency self-reporting, it seems likely that underreporting would occur because officials could be subject to administrative and/or criminal liability. To make matters worse, the government has again delayed the implementation of the Executive Decree first issued in 2004 which required government agencies' legalization of software. The new deadline for implementation is now December 31, 2008 (Supreme Decree N° 002-2007-PCM). Preliminary estimated U.S. trade losses due to business software piracy in Peru for 2007 rose to \$40 million, with an estimated piracy level rising to 73%.

⁷ In particular, Section 48 of the Peruvian Copyright Law should be amended in order to exclude the possibility of considering sharing and use of information as private copy, specifically stipulating that this is not considered a private copy.

Record and music piracy: Over the last few years, the legitimate recording industry in Peru has nearly disappeared because of the high levels of piracy. Piracy of music and sound recordings still remains at one of the highest levels in the world, at approximately 98%. Estimated trade losses due to music and recording piracy in Peru rose to \$58.5 million in 2007. Recorded CD-Rs (imported mainly from Taiwan and burned locally) are the most predominant form of piracy in Peru. Industry estimates that more than 95 million pirate copies recorded CD-Rs are sold every year. No official information is available about the number of MP3 players entering the country, but many local stores offer to sell digital recording devices. Only two retail stores (Phantom and IEMPSA) dedicated to sell legitimate CDs remain in Lima. The rest are some department stores with a small section for CDs. Even the price for the pirate product has been declining over the past year, like because of the massive import of contraband CD-Rs. For example, one set of a dozen of recorded CD-Rs with international repertoire that is sold in El Hueco, Mesa Redonda and other major flea markets can be purchased for US\$3.15. The recording industry's team in Lima started a special lobby campaign to convince municipal authorities around the capital city to revoke licenses to pirate stands and stores. In addition, another municipality (San Juan de Miraflores) agreed to implement a revocation program; three business licenses were revoked in the first raid conducted there. Other municipalities (Santiago de Surco, San Borja, San Miguel and Magdalena) will be included in this effort during 2008.

Audiovisual piracy: The Motion Picture Association (MPA) reports that optical disc piracy of audiovisual content continued to grow in 2007. Pirate optical discs are available even prior to theatrical release in Peru and are distributed via street markets, home delivery, newspaper stands and black market distribution centers. The legitimate home entertainment market has been decreasing dramatically, due to both piracy and the closing of several stores of a major rental chain. The sale of pirate product is further driven by the low prices of image receivers (televisions and DVD players); these items have decreased in price due to tariff reductions, an undervalued dollar, and has facilitated credit terms for lower income consumers. Piracy in the home video/DVD industry has resulted in local distributors significantly reducing their profit margins. Interestingly, the theatrical market in Peru has increased despite the piracy problem. Continuing a four-year trend, both the theatrical and the home entertainment sectors have reported positive results during 2007 as compared to 2006. Exhibitors have made significant investments in new multiplexes both in Lima and in other cities; two new complexes opened in 2007, representing a 7.14% rise in the number of screens over 2006. Despite more screens, piracy has adversely affected the theatrical market as the levels of theater/screen occupancy are on average 25%, which is a low percentage for Peru.

Book piracy: The book and journal publishing industry reports little change in the piracy situation in Peru for 2007. Large-scale photocopying (the most damaging form of piracy) remains at high levels, and unauthorized translations continue as a problem as well. Book fairs (*campos feriales*), including two large ones in Lima, reportedly permit the sale of pirated books. Such widespread piracy over the last decade has devastated the local book industry, causing bookstores to close and interfering with the ability of legitimate publishers to continue doing business; such embedded piracy also sends the wrong signal about the importance of cultural development. This commercial devastation also contradicts the government's declaration about the importance of publishing, as found in the Law of the Book (Law 28086 of 2003), which recognizes the important public need to create and protect books and editorial products.

COPYRIGHT ENFORCEMENT IN PERU

Industry sectors report generally good cooperation with many (not all) Peruvian IPR agencies, but the main problem remains that results (lower piracy and effective deterrence) did not occur in 2007. The National Committee for Fight against Contraband (*Comisión Nacional de Lucha contra el Contrabando y la Piratería*) was formed in 2004, includes 22 members from both the public and private sector. Its authority, which was to have expired at the end of 2007, was extended indefinitely by Law No. 29013 (enacted on May 6, 2007). Unfortunately, the operations unit of this Committee has not yet scheduled or coordinated any enforcement actions. Furthermore, the participation of affected copyright holders as members of the National Committee to Fight against Contraband and Piracy (*Comisión Nacional de Lucha contra el Contrabando y la Piratería*) has been severely limited. Endemic problems with criminal enforcement, rising problems with administrative enforcement and appeals at INDECOPI and weak border enforcement are detailed below.

A. Criminal Enforcement

Police actions and prosecutions: The copyright industries agree that there is a continued need to allocate more 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 and to support the National Police (7th Region) providing troops when large raids are to be conducted in the black markets. For example, the National Police lacks resources to carry out intelligence activities prior to and following raids, and it performs neither intelligence nor follow-up activities. The National Police and the Prosecutor's Office lack adequate warehouses to safely store seized goods. The National Police does not have sufficient personnel to perform counts and prepare findings of their activities, which results in dismissal of cases at the prosecutorial or judicial level. Municipalities and their police forces (Serenazgo) do not assist in raids carried out in their jurisdiction.

Both the recording and film industries have excellent relationships with the Fiscal Police as well as with the specialized prosecutors' offices in Lima. The recording industry confirms that the Fiscal Police conducts 70% of all music raids in Lima. A major deficiency is the lack of raids in the interior of the country because of budget and logistic problems. In fact, the amount of product seized over the last year has decreased by about 75% from a total of 8.6 million units in blank and recorded units to about 2.1 million in 2007. Indictments and convictions also decreased significantly last year. Only 8 people were indicted in 2007, compared to 95 in 2006. There also was a huge drop in the number of raids by two-thirds, from over 3,000 raids in 2006 down to 1,000 in 2007.

MPA reports that the Anti-piracy Crusade has supported intelligence activities and provided logistics for raids carried out by the Fiscal Police. A total of 47 operations were conducted: 29 by the Fiscal Police (DIRPOFIS), 17 by SUNAT and 1 by INDECOPI. MPA indicates that some of its raids during 2007 failed or were called off due to suspicions that raid targets had been notified by the police or others of the impending operations. In 2008, MPA will be reaching out to start work with the prosecutor's offices in the port of Callao.

Actions by the tax authorities: Industries' experience with SUNAT (the tax and customs authority) last year remain mixed. Prior to 2007, all copyright sectors indicated that it had been difficult to get SUNAT actively involved in anti-piracy operations. In 2007, SUNAT created a special group to tackle the street piracy problem. In November 2007, SUNAT conducted a major street raid and seized about 200,000 recorded pirate music CDs and 70,000 blank CD-Rs. Charges for contraband were filed by SUNAT in view of the absence of importation documents. After this raid, the level of cooperation with SUNAT and the music industry has been excellent. All operations conducted by SUNAT were coordinated directly with INDECOPI. In comparison, BSA notes that the SUNAT has been reluctant to consider software piracy a major problem, and as a result has not taken any action against it.

Insufficient criminal prosecutions: Peru has four IPR prosecutors who work with INDECOPI when requested to do so. Unfortunately, these IPR prosecutors have restrictions on their jurisdiction, and the filing of the complaint can take four to six months after the raid has occurred in cases where the infringer was not imprisoned.

There have been two recent cases of interest (in addition to the OD importer charged for money laundering, discussed above). First, MPA reports that on July 28, 2007, two cases of camcording during exhibition of the movie *The Simpsons* were detected. The theater manager set in motion the alert system that the *Asociación de Distribuidores de Cine y Video* (Film and Video Distributors Association) (ADCV) had pre-established for these cases. The camera involved in this case has not yet been analyzed by the police. Depending on the results of this analysis, police will send the results to prosecutors for their action. MPA hopes prosecutions will move forward. Second, an alleged mafia group engaged in the printing of covers for movies, music and other goods has been identified, and is associated with a defendant who is current facing other criminal charges; these defendants are being criminally prosecuted.

Non-deterrent results in the criminal courts: Few criminal cases reach the Peruvian judiciary, and if they do, judges do not impose deterrent sentences. What happens in practice is that the Peruvian Criminal Procedure Code permits sentences of four years or less to be suspended. This sad practice continued even after several positive amendments to the criminal code, including: (a) the 2004 amendments which provided an increase of minimum sentencing to four or more years for copyright infringements;⁸ the creation of four special courts and one special appeal court with national jurisdiction on IPR crimes in November 2006; and (c) amendments made in November 2006 to penalize recidivist offenders with stronger sanctions and establish additional penalties for more crimes.

MPA reports that the level of sanctions ordered by criminal courts is insignificant. Judges tend to be lenient in their sentencing and most sentences of less than four years are suspended. The average 2007 sentence was a three-year suspended sentence and the average 2007 fine was S/1000 (nuevo soles, approximately US\$300). Courts do not order the destruction of goods seized until the conclusion of the proceeding and the destruction of infringing product cannot occur until a designated expert witnesses determines that the goods concerned are infringing. Further, MPA has not been able to reverse court decisions ordering dismissal of proceedings. On a brighter note, provisional imprisonment during the pending state of a criminal IPR action was achieved in one MPA case. However, MPA's request to the expert for permission to destroy infringing product before the trial was denied; MPA made this request to minimize the risk of infringing product finding its way back to the streets.

B. INDECOPi and Administrative Enforcement and Review

INDECOPi's administrative enforcement efforts are ineffective: Many of the copyright sectors continue to experience difficulties in achieving results. Poor results are not caused entirely by limited resources, though the latter is a problem. INDECOPi is supposed to be self-funding from the income it gets from patent and trademark registrations and from the fines that its administrative bodies are permitted to impose. However, significant fiscal restrictions have adversely affected *ex officio* enforcement activities. Additional resources should be allocated to support INDECOPi's enforcement efforts.

BSA notes that, although INDECOPi has been cooperative in hearing the software industry's concerns, this cooperation has not translated into the imposition of deterrent sanctions. Non-deterrent decisions and the failure to collect the fines issued against infringers means no effective deterrence. During 2007, BSA's campaign experienced a high rate of rejections to INDECOPi inspections to gather the evidence of software infringement simply because the targets (end users) simply denied INDECOPi to enter their premises (this happened in about 20% of the BSA cases filed). When this occurs, BSA has to request a second inspection with a search warrant issued by the courts. Getting this second inspection can take a month or more, and in the meantime, the target infringer purchases or deletes the missing or pirated software so when BSA and INDECOPi returns, the evidence is gone. The infringer gets off scot-free and the legal copyright owners do not receive damages or remuneration for illegal software use. Several months later (between three and six months in the Copyright Bureau, plus another six months at INDECOPi's IP Trial Court), INDECOPi may issue a fine for not allowing the inspection, but the fine is so low that the infringer always prefers to close the door rather than allow the inspection. As a result, piracy continues and there is no effective law enforcement.

MPA also reports that its enforcement efforts with INDECOPi were not good at all in 2007. It sees INDECOPi as placing more emphasis on training and education programs, which is important, but not the extent of not taking administrative enforcement actions.

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 should also work jointly with local and regional governments, as well as with the National Library and the Ministry of Education.

⁸ An ESA member company reports that several of its cases remain stagnant within the court system, with some dating back to 2000.

Problems with INDECOPi and its judicial review: BSA reports that difficulties with the Intellectual Property Chamber of INDECOPi's Trial Court are its primary source of difficulties with administrative enforcement. First, all fines for software infringement decisions rendered by the Copyright Bureau (the first step in the administrative procedures) have been reduced by the Intellectual Property Chamber of INDECOPi's Trial at a rate of 66%. Second, the fines that are imposed are too low. This is because they are not calculated correctly. They are calculated to be twice the "market average price of the original software", but this "market average price" is 30% of the actual market price. This is due to a wrong interpretation of the law (Law Decree 822, Article 194). Third, INDECOPi fixes "due copyrights," so-called "*remuneraciones o derechos devengados*," that must be paid by software infringers as part of their penalty. Such due copyrights are some kind of indemnity for the legal holder of the copyright. The problem is that INDECOPi fixes such due copyrights following the same wrong criteria used to fix the fines.

BSA also was surprised by the Intellectual Property Chamber of INDECOPi's Trial Court, which has issued several clearly erroneous decisions removing sanctions that contradict its own case law. In a recent case, the INDECOPi Trial Court has forgiven the infringer the amount of the "due copyrights" that according to the law must be imposed jointly with the fine for the copyright infringement (Decision N° 1700-2006-TPI-INDECOPi dated November 2, 2006). The Court decided to "forgive" the due copyrights because the infringer purchased a legal copy of the software in question after the raid had taken place. However, the applicable case law is clear that, once the evidence of the infraction has been obtained (through the raid), the infringement is considered proven and therefore the Court must require collection of the due copyrights. In the same ruling, INDECOPi did impose the fine: that is a clear contradiction because they can forgive a fine but not the due copyright, which belongs to the copyright holder. In another unexpected decision, the Intellectual Property Chamber of INDECOPi's Trial Court departed from established Peruvian copyright case law, in only admonishing the software infringer (Decision N° 1601-2007-TPI-INDECOPi, dated August 14, 2007). The Court decided to give a simple "warning" because the infringer had allegedly shown "repentance". BSA believes that such rulings by the Intellectual Property Chamber of INDECOPi's Trial Court severely harm copyright enforcement in Peru, and send the wrong message to consumers. If these decisions were followed by others, they would in effect encourage infringers to wait two years for the process at INDECOPi to wind its course, show "repentance" and buy the software before the Court issues its decision, and INDECOPi would issue a warning and withhold the damages due to the copyright holder. Meanwhile the rights holders will have wasted time and resources trying to bring ineffective enforcement actions.

Collections: The recording industry acknowledges that INDECOPi is playing an important role for the consolidation of the industry's collective society (UNIMPRO), and is supporting initiatives for the collection of royalties for performance rights. The recording industry did not file any anti-piracy actions in 2007 with INDECOPi; instead they work with the special IPR prosecutor.

Incorrect interpretation affecting administrative/civil inspections: BSA reports that another recent problem coming out of a decision issued by the Constitutional Trial Court. There has been a sudden increase in the requirements to obtain an inspection in a software end-user case. Before the Court's new interpretation, inspections were issued immediately based on the evidence that the software company had issued a Cease and Desist Letter to the target end user and there was no reply. This method complied with TRIPS Article 43 which states that the copyright owner should present reasonable available evidence sufficient to support his claim, considering the substantial evidence of the infringement is in the hands of the infringer. But the interpretation made by the Constitutional Trial Court, and followed by INDECOPi's Trial Court, now considers such inspections to be "provisional measures." According to Peruvian law, Courts can only order provisional measures if there is evidence that the copyrights are currently being infringed, that the infringement is imminent, and that any delay in issuing the provisional measure could cause an irreparable harm to the copyright owner. BSA's local counsel indicates that it is nearly impossible to satisfy these three requirements because the rightsholder does not have access to such information unless the inspection occurs in the first place. Inspections should not be considered "provisional measures", but rather a legitimate tool to gather evidence.

This new interpretation has caused the nullification of several requests for inspections made by copyright owners as well as the nullification of at least four procedures that did not meet the new standard. It

also has caused severe difficulties getting an inspection mandate due to the new requirements imposed by INDECOPI following the Constitutional Trial Court decision.

C. Border Enforcement

There were no known border raids in 2007, to the best of industry knowledge. According to SUNAT, contraband of optical discs, mostly which enter from Iquique across the border with Chile, amount to over 100 million units per year. At the 8th Annual Peru-Chile Conference in October of 2007, Peruvian authorities discussed with their Chilean counterparts the creation of mechanisms for intelligence exchange. The Chilean Iquique Free Zone borders Peru, making such cooperation on matters of smuggling and piracy essential.

The copyright industries have recommended (in our 2007 301 report and again here) that several steps could be taken to improve this situation:

- 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.
- Customs should 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 shall pay in advance the VAT of the reseller of such merchandise, in addition to its own VAT.
- SUNAT should implement its obligation under the 2004 criminal code amendment to create an Importation Registry where persons or companies importing, producing, or distributing duplicating equipment or blank optical media discs must register.
- 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.

COPYRIGHT LAW AND RELATED ISSUES IN PERU

1996 Copyright Law and TPA implementation: 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 in the Trade Promotion Agreement, Peru will have to make additional reforms to its copyright law in order to fully comply (the TPA does contain transitional periods). Additional reforms to the copyright law will have to include providing: comprehensive protection against the circumvention of technological protection measures and rights management information, statutory damages (ideally in both the courts and before INDECOPI), presumption of ownership, ISP liability and notice and takedown provisions, *ex officio* border measures, and *ex parte* seizure

of infringing products. Problems with the higher standard for INDECOPi inspections in Article 177 of the Copyright Act need to be resolved and clarification regarding private copies need to be rectified.

Government software asset management delayed again: BSA urges the Government to implement the long delayed software guide and the decree as swiftly as possible. The Government should enforce this regulation by punishing public servants that did not comply with the business software inventory requirements and the licensing of such software used in the respective public entity. On February 13, 2003, the Peruvian Government published the Government Software Legalization Decree (Decreto Supremo No. 013-2003-PCM).⁹ INDECOPi published the government guide for software management in 2004. The Government then issued Supreme Decree 037-2005-PCM in May 2005, postponing the enforceability of the agencies' obligations to provide an inventory of their software and to erase all illegal software by December 2006. Then, on January 11, 2007, the Government issued Supreme Decree 002-2007-PCM, postponing the enforceability of Decree 013-2003-PCM until July 31, 2008.

National Committee for Fight against Customs and Piracy Crimes: Law No. 29013 was enacted May 4, 2007 to amend the composition of the *Comisión Nacional de Lucha Contra los Delitos Aduaneros y la Piratería*. Participation of CONTRACOPIA was reduced from 16 members to only 3. This has resulted in the exclusion of the copyright industries and thus in the weakening of the *Comisión*.

Administrative Resolution No. 223-2007-CE-PJ (November 9, 2007): This resolution requires that when tax, customs and intellectual property-related crimes are particularly serious and particularly complex, they are to be heard by Supraprovincial Courts. This development could represent a serious setback in proceedings currently pending before Supraprovincial Courts. These courts, which already existed to hear cases involving terrorism and human rights abuses, were charged with hearing IP cases, when their workload declined with the decline of terror-related acts in Peru. However, it was determined that these courts would only hear IP cases that involved organized crime. It is often difficult to convince the court that a case which seems to involve "small players" actually involves links to much larger groups. There is the risk that many important cases will be turned back to the regular courts. MPA has been involved in training the Supraprovincial Courts' judges so that they will be better prepared to hear IP cases. Judges in these courts are inclined to hand out harsher sentences, due to the other cases that they have heard. There are not specialized IP penal judges in Peru, even in these special courts. Therefore, the training of these judges is very important.

Ordinance No. 217-MSI (November 16, 2007): This ordinance was issued by the Municipality of San Isidro (Lima). It provides for a number of actions against pirate including fines, loss of operating license and penalties the seizure of counterfeit products or products whose sale has been prohibited by law. The most important part of this ordinance is that it clearly prohibits the sale of pirate product.

2004 criminal code amendments increased sanctions: Peru's criminal code was amended in 2004 by Law No. 28,289 which increased criminal sanctions to a minimum of four years of prison and a maximum of eight years of prison for those who commit copyright infringement. The law also restricts judges' powers to suspend criminal sentences.

2006 criminal code amendments (Law No. 28,726 and No. 28,730): These amendments to the Criminal Code penalize recidivist offenders with stronger sanctions and established additional penalties for more crimes.

⁹ 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 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.

Customs and the 2004 criminal code: The 2004 criminal code amendments also included several provisions to address customs crimes and piracy. The law created a permanent commission to fight customs crimes and piracy, designating SUNAT as the secretary of this commission. The law requires Customs officials to give INDECOPI all necessary support to help it fulfill its mission. It 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 supposed to be administered by SUNAT, however SUNAT did not activate such registry during 2006.

New IPR courts in Lima: New Federal Ordinance No. 122/2006 gave federal jurisdiction to some courts to analyze customs and tax crimes against intellectual property. This law also created the four new courts and one special appeals court with national jurisdiction on IPR crimes.

Levy on imported blank media: SUNAT Ordinance No. 224/2005 created a levy ranging from US\$ 0.03 to 0.06 per unit of blank optical media imported. The industries have attempted to collect this levy but with major difficulties. Equipment and blank media Importers have been unwilling to pay. The industries see an apparent increase in contraband to avoid this levy as well as importation related VAT's. The only way to prevent this situation and the loss of tariffs and levies is for Custom agents to take a more aggressive approach to the importation or smuggling of blank media.

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 created an entity known as PROMOLIBRO (*el Consejo Nacional de Democratización del Libro y de Fomento de la Lectura*), within the Ministry of Education.

Digital terrestrial television: In 2006, Peru announced that will adopt and implement a digital terrestrial TV system. Peru has not yet announced which standard it will adopt. MPA calls attention to the need to select a method of protection against unauthorized re-distribution of digital broadcast signals over the Internet, as critical to guaranteeing the future viability of this sector.

MARKET ACCESS DEVELOPMENTS

Duties on Optical Discs: Import duties on optical discs were reduced from 12% to 0%.

Duties on Computers: Computers play a key role in the duplication of pirate discs. The Peruvian government took steps in 2006 and 2007, through legislation, to lower the costs of PCs and laptops. In July 2006, Congress passed Law 28827 which exempted processors, hard drives and PC memory devices from the 19% General Sales Tax. Supreme Decree 211 of 2006, which took effect on January 1, 2007, established a 0% import duty on these items.

Duties on Video Players: Import duties on DVD players have been reduced from 12% to 9%, putting these items within the reach of more consumers, and potential more consumers of pirate products.

Tax on Theatre Tickets: Legislative Decree No. 776P is a Municipal Tax that unduly levies a 10% tax on theater tickets. MPA recommends that this tax be lowered.

IPR TRAINING AND PUBLIC AWARENESS

BSA and MPA participated and/or held several training programs in 2007. BSA sponsored a training seminar in software intellectual property rights for the judiciary on September 17-18, 2007. Speakers from Argentina and Colombia came to share information about international case law and law interpretation. BSA

also collaborated on several training seminars for the Public Prosecutor Bureau and the newly appointed Intellectual Property Rights Judges, to provide them with information about how to recognize a pirated and counterfeit products; these took place on May 8 and October 3, 2007. Another training seminar for the police was held with the co-sponsorship of the Asociación Peruana de Autores y Compositores (APDAYC) on October 15-16, 2007.

MPA also participated in several programs. First, INDECOPI organized two training programs for judges and prosecutors, with participation of the MPA, for criminal judges and prosecutors. Second, MPA representatives were invited by the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) to participate as speakers in the IPR Training Course of the International Law Enforcement Academy (ILEA) that was organized in Lima in July 2007. In addition, the American Embassy held a special program where they invited public prosecutors to visit the U.S. Patent and Trademark Office to understand better practices on intellectual property law enforcement.