

PERU

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Peru remain on the Watch List in 2009.

Executive Summary: IIPA and its members support free trade agreements and are pleased that the U.S.-Peru Trade Promotion Agreement (TPA) entered into force on February 1, 2009. This agreement contains a comprehensive intellectual property rights chapter that contains high standards for copyright protection and enforcement, many of which were implemented prior to or upon entry into force. IIPA and its members look forward to Peru's practical implementation in 2009 of these measures. To be clear, in recent years the most pressing problem for the copyright industries in Peru has been inadequate criminal enforcement and deficient administrative remedies regarding copyright infringement. Peru's laws prior to TPA implementation were generally solid but were simply not effectively enforced. The continuing test will be whether Peru will take the actions needed--across the board (raids, prosecutions, administrative and civil actions, and judicial sentencing)--to provide adequate and effective copyright enforcement required by the TPA. Piracy in the Peruvian marketplace continues to be a significant business obstacle. Hard goods piracy is rampant, with burned optical discs (infringing content on CD-Rs and DVD-Rs) the favored medium of street piracy. Internet piracy is growing, and already has seriously threatened the viability of the music industry. The government has again postponed (until 2011 -- a six-year delay) the implementation of its program to legalize software within government agencies. Print piracy of a variety of published materials and illegal photocopying of textbooks near university campuses continue to plague book publishers. More police actions are needed, prosecutors should pursue piracy cases, and judges should impose the deterrent-level sentences allowed under the criminal code. Moreover, administrative enforcement by INDECOPI (El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual) for business software piracy deteriorated in 2008, with various courts having issued dangerous interpretations, especially against the business software sector that relies on *ex parte* inspections as well as for music industry issues involving the collective management of rights and royalty payments. INDECOPI has done a lot of valuable work on public awareness but that has not been enough to reduce piracy. The lack of resources dedicated to intellectual property infringement remains a persistent problem in Peru, and given other national priorities and the current economic climate, it is unlikely that resources will increase in 2009.

Priority actions requested to be taken in 2009: The copyright industries recommend that the following actions be taken in the near term in Peru in order to improve the adequate and effective protection of copyrighted materials there:

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.
- Instruct INDECOPI to issue deterrent sanctions -- simple warnings and forgiveness of copyright damages are both inadequate remedies, and to enforce compliance with their own decisions (e.g. violators who have been issued fines simply refuse to pay and INDECOPI does not take action to enforce payment).
- Require government agencies and ministries that have not complied with the business software inventory requirements and the licensing of such software to take actions now. The implementation of the original 2004 software legalization regulation has been delayed numerous times and now has a deadline of December 31, 2011. The lack of progress on this important initiative continues to cause economic harm to the legitimate software sector.
- Support more administrative enforcement efforts by INDECOPI against piracy of business software, books, motion pictures (DVD and cable), entertainment software and music.
- 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.



- Work with local municipalities to revoke licenses granted to vendors selling pirate product and close black-market businesses.
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases.
- Continue the training efforts to the judges in the four specialized IPR courts and appeals court in Lima.
- Involve INDECOPI, local and regional governments, the National Library and the Ministry of Education to take actions to halt unauthorized photocopying at universities.
- Improve border enforcement to seize suspicious copyrighted products as well as raw materials (e.g., blank optical media) used in making those products.
- Fully 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, supporting the special IPR unit of the Fiscal Police) as well as enhancing financial resources for INDECOPI.

Legislation

- Draft and pass legislation that gives the judiciary the authority to enforce INDECOPI's decisions if INDECOPI refuses to execute and enforce their own decisions.
- Issue regulations that would increase the level of fines that could be issued against businesses that refuse to be investigated or raided by INDECOPI. Through Legislative Decree No. 807, INDECOPI already has the authority to level fines against individuals or businesses that refuse to be investigated. Article 28 of this law stipulates that if an individual or business is served with an injunction or receives a fine from INDECOPI and fails to comply, the maximum allowable penalty for the violation will be imposed. If the non-compliance persists, then INDECOPI may impose a new fine, the amount of which will be doubled at established intervals. INDECOPI can file a criminal complaint with the Office of the Public Prosecutor.
- Work, in a transparent manner, with the U.S. Government and copyright industries to develop and prepare legislation to implement those provisions that are subject to the transitions provisions permitted in the Trade Promotion Agreement's IPR Chapter (e.g. such as statutory damages and provisions on ISP liability).
- Consideration should be given for further refinements to the Peruvian Copyright Law. For example, Article 48 should be amended in order to exclude the possibility of considering sharing and use of information as a private copy, and problems with the higher standard for INCECOPI inspections in Article 177 should be resolved.
- Amend Law 28976 on Licenses for Business Preparations to include, as grounds for closure and revocation of licenses, the sale of products that violate intellectual property.

PERU Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Level
Sound Recordings & Musical Compositions ²	58.5	98%	58.5	98%	53.5	98%	66.0	98%	68.0	98%
Business Software ³	52.0	74%	41.0	71%	32.0	71%	22.0	73%	22.0	73%
Motion Pictures ⁴	NA	NA	NA	NA	NA	NA	12.0	63%	4.0	75%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Books	NA	NA	NA	NA	NA	NA	9.0	NA	8.5	NA
TOTALS	110.5		99.5		85.5		109.0		102.5	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For 301 information on Peru, see Appendix D at <http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf> of this submission. To read IIPA's cover letter to this Special 301 submission, go to <http://www.iipa.com/pdf/2009SPEC301COVERLETTER.pdf>.

² 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.

³ BSA's 2008 statistics are preliminary, and represent the U.S. software publishers' share of software piracy losses in Peru, and follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at www.bsa.org. 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.

⁴ MPAA's 2005 estimates used a methodology that analyzed both physical/"hard goods" and Internet piracy.

COPYRIGHT LAW AND RELATED ISSUES IN PERU

In recent years, the copyright industries' most pressing issues in Peru have involved the inadequacy of its enforcement – criminal, administrative and civil measures. This section summarizes the changes made to the copyright and enforcement-related laws in 2008 and early 2009, all which were necessary in order for the U.S.-Peru Trade Promotion Agreement (TPA) to enter into force in Peru.⁵ Some of the refinements in these laws should, and must, aid in swifter and more effective enforcement by Peruvian authorities in 2009.

A. Legislative implementation of copyright and enforcement issues under the IPR Chapter of the TPA

Given the higher standards of copyright obligations and enforcement measures in the TPA, both the Peruvian and U.S. governments anticipated that Peru would have to make some changes in its law to bring certain provisions up to the obligations of the TPA.⁶ Even before the TPA, Peru's copyright law contained a broad scope of economic rights as well as some of the highest levels of criminal penalties in Latin America.

The TPA's IPR Chapter does contain transition periods for certain elements, described immediately below. Peru has chosen to implement most, but not all, of the TPA's provisions, without transition. For example, ahead of the transition deadlines, Peru amended its legislation to:

- Provide protection and remedies against the circumvention of technological protection measures (TPMs) (this has been done in advance of the 3 years transition to implement TPA Article 16.7.4).
- Provide for protection of rights management information (RMI) (done in advance of the 18 months transition for TPA Article 16.7.5a).
- Provide criminal sanctions regarding encrypted program-carrying satellite signals (done in advance of the 18 months transition for TPA Article 15.8.1.b).

Two issues with transition periods are still to be implemented:

- One important element that Peru will still have to implement is its obligation to provide for pre-established damages (statutory damages) in civil judicial proceedings (18 months transition for TPA Article 16.11.8). This remedy is particularly important to the business software sector. BSA recommends that both the courts and INDECOPI should have a statutory damage remedy and be able to impose those damages. As legislation develops to implement this particular TPA requirement, it is important that the process be transparent and involve the copyright industries because they have the expertise in using this remedy in other markets.
- Another critical issue involves provisions affecting the limitation on liability for service providers and notice and takedown procedures (1 year transition for TPA Article 16.11.29).

Criminal penalties and procedures in Legislative Decree 29263: Peru's criminal code was amended in 2004 to increase 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. Further amendments in 2006 penalized recidivist offenders with stronger sanctions and established additional penalties for more crimes. As part of TPA implementation, additional amendments to the criminal code were accomplished by this decree, published on October 2, 2008, such as:

⁵ After the TPA enters into force, tariffs for both countries will be lowered, and no longer will Peru be eligible for certain U.S. preferential trade programs. Peru has been a beneficiary country of several U.S. trade programs which contain high IPR standards. During 2008, the following quantities of Peruvian imports under the various U.S. trade programs entered the U.S.: \$3.16 billion under the Andean Trade Preferences Act (including the ATPDEA) plus \$271 million under the Generalized System of Preferences (GSP) program.

⁶ 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 Congress set up a Committee to review the Executive's legislative proposals. The U.S. certified Peru's compliance with the FTA on January 16, 2009, and the TPA entered into force in Peru on February 1, 2009. 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. As part of the TPA, Peru also signed four IPR-related Side Letters, including one on ISP liability and another on retransmission issues.

- Adds the right of communication to the public to the list of exclusive rights subject to infringement under Article 217 of the Criminal Code, and included more infringements subject to aggravated penalties in Article 218;
- Empowers judges to order preventative seizures of suspected infringing products and equipment used to make such infringement, as well as the destruction of same;
- Adds, as crimes, the unauthorized circumvention of technological protection measures (products, copy controls and access controls) plus the importation and commercialization of devices and offering of services for these purposes;
- Adds the crime of infringement of rights management information;
- Penalizes the reception and distribution of encrypted program carrying satellite signals;
- Penalizes the unauthorized use of computer software manuals and licenses.
- Prohibits the production, distribution or storage of pirated material, as well as the production of printed material used for falsely identifying and packing unauthorized copies of copyrighted films, music and computer software.

Copyright-related implementation: Peru passed several pieces of legislation that implemented various copyright and enforcement measures. First, amendments to the copyright law were adopted in June 2008, when it was thought the TPA would enter into force that summer. Legislative Decree No. 1076, published on June 26, 2008, amended the copyright law in the following ways:

- Added definitions of technological protection measures (TPMs) and rights management information (RMI);
- Added the right of making available to the public for producers of phonograms (an TPA and WPPT requirement);
- Included several provisions regarding the ability of rights holders and their authorized licensees to take actions to enforce their rights;
- Added explicit provisions on RMIs and TPM protection and the exceptions provided in the TPA;
- Added provisions regarding the ability of judicial authorities to destroy goods at the request of the rights holder and to provide information about the suspect to the rights holder.
- Provided civil remedies, including seizures, actual damages, court costs and fees, and destruction of devices and products (the TPA allowed 3 years' transition for these elements found in TPA Article 16.11.15).

Additional refinements were included in Legislative Decree No. 29316, which was published on January 14, 2009, accomplishing the following:

- Amended the criminal code to protect against decryption and distribution of program-carrying satellite signals;
- Amended the criminal code to protect against the circumvention of technological protection measures and similarly amended the copyright law on TPMs;
- Amended an Andean Community implementation law to allow judicial authorities to order the seizure of suspected infringing products and equipment.

Peru enacted a partial amendment of the copyright law that practically solved the problem with the hierarchy between authors and neighboring rights. It is too early to say how judges will interpret these new provisions.

Government software asset management delayed until 2011: Six years ago, Peru issued its first order on government software legalization⁷, and yet the implementation of that order has been continuously delayed, now until

⁷ On February 13, 2003, the Peruvian Government published the Government Software Legalization Decree (Decreto Supremo No. 013-2003-PCM). The 2003 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. 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. That date came and went, and

December 30, 2011. The FTA requires that the government software legalization obligation be in effect upon the FTA's entry into force. BSA urges the Peruvian Government to implement the long delayed software guide and the decree as swiftly as possible.

Legislative Decree 1092 on border measures: This law, adopted in June 2008 and effective upon the TPA's entry into force, implements various border measures for IPR enforcement. Importantly, this law provides customs , exports or in-transit goods; (2) allows customs ex officio authority, as required by the TPA (Peru implemented this element in advance of the 1 year transition allowed per TPA Article. 16.11.23). In addition, this law: (1) establishes a proceeding for SUNAT (customs) officials to stop suspected infringing imports officials to inspect and seize suspected products in-transit; (3) requires customs to implement a recordation system for trademarks and copyrights; (4) requires Customs and INDECOPI to implement an electronic system to exchange information; and (5) clarifies definitions for piracy and counterfeiting.

Legislative Decree 1033 on INDECOPI: This law consolidates and regulates the functions of INDECOPI (Institute for the Defense of Free Competition and Protection of Intellectual Property), strengthens its autonomy and reorganizes its internal structure. This law calls for the creation of specialized committees to address infringements of intellectual property rights instead of the former Bureaus (Oficinas). It is too early to evaluate the impact of this reform on INDECOPI's effectiveness. First, it will be important ensure that INDECOPI's processing of infringement cases does not slow down. There will be a shift of decision-making authority for specific cases from a single individual -- the head of the Bureau --to a collegial body, a panel in charge of each case. Second, BSA notes that it is also important that incentives for companies using illegal software to legalize their operations should be preserved.

B. Other laws used to enforce IP in Peru

National Committee for Fight against Contraband and Piracy: Law No. 29013 was enacted May 4, 2007, to amend the composition of the *Comisión Nacional de Lucha Contra Contrabando y la Piratería*. Participation of CONTRACOPIA has been reduced from 16 members to only 3. This has resulted in the exclusion of the copyright industry representatives (like MPA) and has weakened the Commission. The Antipiracy Crusade is a separate and distinct public-private partnership that works in coordination with this Commission and is focused principally on the promotion of legitimate entertainment.

Special courts and IP jurisdiction: In 2006, 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 ("supranational courts"). In 2007, an administration resolution (Administrative Resolution No. 223-2007-CE-PJ of November 9, 2007) was issued that requires that when tax, customs and intellectual property-related crimes are particularly serious and particularly complex, they are to be heard by Supraprovincial Courts. These courts, which already existed to hear cases involving terrorism and human rights abuses, were charged with hearing IP cases. 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. 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, and the copyright industries have been involved in judicial trainings in 2008.

Local municipality against street piracy: Ordinance No. 217-MSI (November 16, 2007) was issued by the Municipality of San Isidro (Lima). It provides for a number of actions against pirates 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. In 2008, Antipiracy Crusade supported the Municipality of San Isidro (Lima) in three raids against small stalls in market fairs and street vendors and plans to work again this year with this and other municipalities.

Customs registry and the 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

yet another delay has pushed the deadline for software legalization in government ministries to December 30, 2011 (Supreme Decree No. 77-2008-PCM, published November 27, 2008)

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, but at last report it has not 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 created an entity known as PROMOLIBRO (*el Consejo Nacional de Democratización del Libro y de Fomento de la Lectura*) within the Ministry of Education.

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 VATs. 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. In 2008, SUNAT was responsible for most of the anti-contraband actions. More than 20 such actions detected the presence of contraband blank discs. SUNAT expects to conduct a greater number of such actions in 2009.

Digital terrestrial television: In 2006, Peru announced that it 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. Discussion still ensues on the standard to be adopted.

COPYRIGHT PIRACY IN PERU

Hard goods piracy: Hard goods piracy remains the most prevalent and visible form of piracy in the Peruvian market. In the notorious 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), pirates operate during daylight hours. There are also some popular shopping galleries and arcades that sell pirate products. The sale of pirate discs through street vendors and small stores and stands located in informal discount retail centers continues to be the main channel of pirate commerce and the one that most affects the audiovisual industry. "Delivery" systems are another channel of distribution to consumers; however, these systems are not yet widespread. Lima, Arequipa, Trujillo, Chiclayo, Tacna have the most wide-spread hard goods piracy problem. The purchase of products through web sites (Internet piracy) is also reported, but this is not widely used due to risks involved in transactions and payments.

Optical disc piracy is a major problem, where large numbers of blank media (e.g., CDs, DVDs) are imported into Peru, and used for burning copyrighted content. It is estimated that only 12% of the optical discs entering Peru are destined for the legitimate market. The legal importation of blank discs has dropped in recent years, with 2007 imports being less than 15% of the 2005 level (16.2 million units down from 127.8 million units) (IIPA does not have 2008 data.) It is no longer possible to evaluate the dimension of piracy based simply on the volume of optical disc imports. The decline in the number of reported imports of blank media in recent years does not necessarily mean that the amount of blank CDs and DVDs used by pirates has decreased. Peru has implemented a levy on each unit of raw blank media, so blank media is now being smuggled into Peru. Smuggled blank media is estimated at approximately 100 million units annually, with most sourced from India. Popular smuggling routes mostly involve Tacna and Puno (south of Peru border with Chile and Bolivia).

Business software piracy, end-user and retail: The business software industry reports that its major piracy problem in Peru remains end user piracy in private corporations (mostly small- and medium-sized businesses) and government agencies. 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 delayed deadline is now December 31, 2008. The Business Software Alliance (BSA) also confronts problems involving high levels of optical disc piracy on the streets and in bazaars. The information technology market is growing at a 16% annual rate, which means that there are more computers in the market that use software, but local purchases of legitimate product do not seem to match that amount of growth.

Audiovisual piracy: The Motion Picture Association (MPA) reports that optical disc piracy of audiovisual content continued to grow in 2008. 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. Illegal camcording emerged as a problem in 2008 with Peruvian sourced camcords found in the United States and Chile. Several cases of camcording have been interrupted by cinema employees. Piracy in the home video/DVD industry has resulted in local distributors significantly reducing their profit margins. Continuing a five-year trend, both the theatrical and the home entertainment sectors have reported positive results in 2008.

Record and music piracy: The distribution of legitimate music products has been reduced to a couple of points sale in capital city area. Last year the sale of legal CDs only reached the 200 thousand units, meanwhile the estimated amount of pirate music recordings sold is for about 9.8 million. The main problem is the uncontrolled contraband of blank media entering into the market. The contraband produce a double effect in the Peruvian economy harming not only the tax and duty collections but also destroying all chances for legitimate business to survive. No further cooperation from local governments was obtained and INDECOPi does not have enough resources to combat the piracy problem.

Book piracy: The book and journal publishing industry reports that Peru is one of the region's worst print piracy havens. 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. Large-scale photocopying continues to affect the academic sector particularly, and more should be done to ensure use of legitimate academic materials on Peru's school and university campuses.

Internet piracy and cooperation with the ISP community: Notwithstanding the growth in Internet access, Internet-based piracy is still not yet widespread, but it does affect the industries to different degrees. For the music industry, Internet piracy is the most pressing concern because it is the only possible market left for this industry, given that the physical market is totally pirate. The software and film industries continue to report that Internet-based piracy is not yet widespread in Peru. Several auction sites (such as Mercado Libre and De remate) do offer infringing copies of films, software and music. Internet cafes serve as important locations for downloading and burning of illegal files. There are 7.6 million Internet users, representing about 26% of the population (according to www.internetworldstats.com).

Peruvian Internet Service Providers (ISPs) are responsible for the content on Web pages and cooperate significantly with authorities when required. 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. In particular, Section 48 of the Peruvian Copyright Law, Legislative Decree No. 822, should be amended in order to exclude the possibility of considering P2P sharing and the use of information as a private copy.

COPYRIGHT ENFORCEMENT IN PERU

Industry sectors report generally good cooperation with the criminal enforcement authorities (police and tax authorities) but continuing difficulties exist in obtaining prosecutions that result in effective and deterrent sanctions that deter piracy. Problems worsened with administrative enforcement with INDECOPi enforcement and appeals during 2008.

A. Criminal Anti-Piracy Enforcement in Peru

Police actions and prosecutions: The copyright industries indicated that they have excellent relationships with the Fiscal Police as well as with the specialized prosecutors' offices in Lima. MPA reports that the police do take *ex officio* actions; in contrast, BSA indicates that such *ex officio* actions in software cases were rare in 2008 (BSA was only notified of two actions, both of which involved software seized along with audiovisual products).

The copyright industries' concerns in 2009 remain the same as those reported in prior years. They 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. The National Police lacks resources to carry out intelligence activities prior to and following raids, and it performs neither intelligence nor follow-up activities. They do not have sufficient personnel to fully prepare findings of their activities, which results in dismissal of cases at prosecutor or court levels. 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. Municipalities in the Province of Lima are non-reactive in their approach to the sale of pirate products. To date, authorities have neither ordered closure of any stores nor cancelled operating licenses.

Peru has four IPR prosecutors who work with INDECOPI when they are 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.

MPA reports that the Anti-piracy Crusade supported various intelligence activities in 2008 and provided logistics for raids carried out by the Fiscal Police, Public Attorney and INDECOPI. MPA works to help prepare the necessary instructions for the IP Police to optimize their work (the preparation of "Statements") in order to minimize rejections by the judicial authorities. The most important raids included: (a) the Polvos Azules Operative on April 4, 2008; (b) Lima's North Cone Operative (San Martin, Carabayllo, Comas, Los Olivos) on May 5, 2008; (c) the Centro Comercial Mesa Redonda Operative on March 31, 2008; (d) the SUNAT Operative in the North of the Country on January 07, 2008; (e) various Print Shops and Labs (January, February, March and April 2008); (f) actions in El Hueco on September 5 and October 18, 2008; and, (g) Polvos Rosados on July 24, 2008). MPA reports the following for 2008 50 raids against burner labs, street vendors, and OD distributors with seizures of 882,966 burned discs, 1,423,900 blank media, 89 burners, 12 computers, 4 printers, and 26,304 art inlays.

MPA reports that criminal actions were filed against 200 retailers with 30 convictions. Judges tend to be lenient in their sentencing and most sentences of less than four years are suspended. MPA did not pursue civil or administrative actions in 2007 or 2008.

The recording industry conducted 286 raids during 2008 mostly in the well known market of Polvos Azules and other similar locations that lead to the seizure of 889,000 recorded CD-Rs and 184 burners. In addition, some operations were more focused in neighborhood markets such as San Isidro and Miraflores.

Enforcement by tax authorities: MPA reports that SUNAT (the Peruvian Tax and Customs Authority) is extremely cooperative and effective. SUNAT regularly carries out enforcement actions at borders, inspects transportation trucks, conducts warehouse raids, and, in general, participates in market raids involving smuggled, counterfeit and pirate products (such as El Hueco, Polvos Azules, Mesa Redonda, etc). In 2007, SUNAT created a special group to tackle the street piracy problem. In 2008, SUNAT carried out approximately 20 raids that detected of blank discs being illegally imported into the country, and participated in raids with INDECOPI and public prosecutors in Lima and other large cities. These operations resulted in the seizure of more than 1,261,400 optical discs (both burned and blank). 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.

Organized crime element: There is an organized crime element involved in many piratical activities, and this has captured the attention of the Attorney General, the courts, INDECOPI and SUNAT. For example, there was a 2004 case involving an individual who tried to import more than 3 million optical discs (during that same year, this defendant's companies imported more than 107 million blank optical discs). Furthermore, INDECOPI intercepted seven containers in the Port of Callao which contained cases of CDs and DVDs. This defendant has been charged with drug trafficking and money laundering activities, and at the moment is a fugitive of Peruvian justice.

Anti-camcording efforts started in 2008: MPA reports that distributors and exhibitors met in May 2008 to coordinate with and train movie theater personnel to detect and confront possible camcording activity inside movie theaters. To complement this effort, industry (1) placed posters at ticket booths, movie theater entrances, and visible places, as well as slides about the prohibition of entering the theater with cameras; (2) contracted with a security company to provide undercover

personnel to visit movie theaters; (3) purchased night vision visors; (4) worked with police to discuss this type of piracy and request their assistance; and, (5) established lines of communications between movie theatre personnel, distributors, lawyers and local police. In cases involving arrests, local legal counsel for the film companies will go to the theater or police station to support any necessary legal actions. This initiative has shown delivered some positive results.

Problems with the judiciary -- non-deterrent results, problems with destruction: 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.

The average 2008 sentence was a three-year suspended sentence and the average 2008 fine was S/1000 (nuevo soles, approximately US\$300). MPA has appeared at judicial proceedings related to film piracy, and has managed to stop the judiciary from terminating proceedings, citing incomplete information. MPA actively attempts to prevent this from occurring and appeals some decisions .

Courts do not order the destruction of goods seized until the conclusion of the proceeding and after a designated expert witness determines that the goods concerned are infringing. Legislative Decree 1076 provides that judicial authorities are to provide for the destruction of infringing materials. In 2009, it is expected that expert witnesses will still be required to make a determination before a destruction can be ordered. Further, judges will still be able to make independent decisions on destruction.

Court restructuring: The Peruvian judiciary is in the process of being reformed. On November 9, 2006, intellectual property crimes were redirected to fall within the jurisdiction of four Supraprovincial Courts which handle terrorism and human rights cases (discussed above), which was very encouraging. However, a year later, on November 9, 2007, an Administrative Resolution was published specifying that the Supraprovincial Courts would only hear particularly serious, complex or large-scale tax, customs and intellectual property cases, insofar as they had a national impact or involved criminal organizations. The issuance of this 2007 resolution caused the Supraprovincial Courts to refrain from handling many proceedings relating to IPR, especially those that did not meet the new requirements of severity and complexity. As a result, many IPR cases are being sent back to the ordinary criminal courts. The Judiciary Executive Council established a Provisional System whereby cases already pending before Supraprovincial Courts would continue there until their conclusion and all new cases would be sent to the ordinary Criminal Courts. The Judiciary Executive Council should adopt measures to return all IPR cases back to the specialized courts.

B. INDECOPi and Administrative Enforcement

INDECOPi serves as an administrative enforcement agency for the copyright sector. It has been active in public awareness and educational campaigns. It also serves a role in collecting royalties for the public performance right. 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.

On a positive note, BSA indicates that in 2008, INDECOPi has been supportive of many training initiatives offered for various Peruvian enforcement officials and agencies. Also, INDECOPi participated with BSA in a direct mailing campaigns to end users at the end of 2008. Furthermore, the councils of San Borja, San Isidro, Santiago de Surco, Magdalena, the Molina, San Miguel (Lima), have subscribed agreements with INDECOPi for the execution of operations directed to reduce the street supply of pirate products. INDECOPi has contributed to various trainee programs to the personnel of citizen security of the indicated municipalities.

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

INDECOPi's administrative enforcement efforts are ineffective in software actions: During 2008, the business software sector was the only copyright industry that used administrative remedies to combat piracy. And unfortunately, BSA's overall experience with administrative enforcement in 2008 was worse than 2007. In brief, there are three major areas of no progress. First, the government failed to raise the level of sanctions and fines to those companies targeted in end user actions that simply reject INDECOPi entry to their premises to audit their installed software. Any fines issued are so low that the businesses can easily pay them and not change their infringing behavior. Second, INDECOPi merely issues simple warnings and forgives the payment of certain copyright payments. All these gaps result in inadequate and ineffective enforcement of computer software. Third, INDECOPi failed to pass regulations that would strengthen software enforcement, such as establishing the INDECOPi decisions could be enforced by the judiciary in an executive procedure.

BSA notes that, although INDECOPi has been cooperative in several public campaigns as well as administrative raids, 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, software piracy continues and there is no effective law enforcement.

Problems with INDECOPi and its incorrect calculation of damages: 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 an incorrect 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. For example, two years ago the INDECOPi Trial Court forgave 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). There 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. To make matters worse, in 2008 three more decisions were issued using this wrong criteria. 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 2006 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.

Incorrect interpretation affecting administrative inspections: BSA reports on 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." 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 rights holder 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.

Collections of public performance royalties: 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 worked with the special IPR prosecutor. The recording industry reports that in 2009, its efforts will be reoriented to the collective licensing of performance rights and away from anti-piracy actions.

INDECOPI should work with others on book 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 should also work jointly with local and regional governments, as well as with the National Library and the Ministry of Education, to ensure that significant steps are taken to curb illegal photocopying of academic materials. Such a focus should concentrate on both university photocopying/printing and commercial book piracy.

C. Border Enforcement

Peruvian customs should take actions 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). There is a significant amount of contraband optical discs, most of which enters from Iquique across the border with Chile, and amount to over 100 million units per year. INDECOPI and SUNAT have made inspections and seizures in terminals of customs storage, with the participation of the inspector hired by INDECOPI. (INDECOPI cannot act without a formal complaint, unless there is proof that the discs are destined to the pirate market.)

Peruvian Customs has *ex officio* authority. The copyright industries believe that pirated goods are being exported from Peru to Bolivia, Ecuador and Chile. The copyright industries have recommended (in our 2008 301 report and again here) that several steps could be taken to improve this situation:

- 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. According to 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 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. Given the recent amendments to Peru's customs laws, it is expected that such cooperation should improve in 2009.

- 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. Recent Supreme Court Decree 003-2009 requires the establishment of a new type of registry to be kept at Customs offices, in which rights holders are required to register the properties they hold rights to.

D. IPR TRAINING AND PUBLIC AWARENESS

BSA and MPA have participated and/or held several training programs in 2008. Targeted audiences include police and SUNAT officers, prosecutors, magistrates, customs officials and judges. Seminar topics have covered many issues such as, identification of pirated goods, copyright law issues, border enforcement, and Trade Promotion Agreement obligations. The recording industry has participated in many trainings with enforcement officials to increase expertise on anti-piracy matters. In addition to government outreach, MPA trained 34 theatre personnel on anti-camcording enforcement. The copyright sectors also supported public awareness activities related to Copyright Week 2008, including lectures, awards, destruction ceremonies and related educational efforts and actively support the Anti-Piracy Crusade. In October 2008, MPA awarded INDECOPI's Copyright Director an award in recognition of his work to defend IPR and to raise public awareness about copyright and piracy.