

PERU

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Peru remain on the Watch List in 2010.

Executive Summary: Piracy in the Peruvian marketplace continues to be a significant problem, undercutting legitimate business. Hard goods piracy is widespread, with burned optical discs (infringing content on CD-Rs and DVD-Rs) the favored medium of street piracy. There is basically no legitimate music industry left in Peru, as the piracy rate is 98%. Book fairs sell pirated books and street piracy is a problem, along with illegal photocopying of textbooks near university campuses. Piracy of business software applications, including end-user piracy in businesses, continued at basically the same rate as the prior year, but publishers report a recent rise in false or expired licenses being used in the government procurement process. Internet piracy is growing, but it is not yet a major problem in Peru, compared to what is seen in neighboring countries.

The most pressing problem for the copyright industries in Peru continues to be inadequate criminal enforcement and deficient administrative sanction for copyright infringement. Cooperation between rights holders and enforcement entities, both in the criminal and administrative realm, remain generally good. While street actions are taken by the police, they are not enough to address the scope of piracy and the cases rarely go forward through prosecution. Simply, more police actions are needed, prosecutors have to pursue piracy cases, and cases need to proceed to final judgment where judges issue deterrent-level sentences allowed under the criminal code. In charge of administrative enforcement, INDECOPI (El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual) continues to work with the software and music industries on a variety of actions and inspections. INDECOPI could issue more deterrent sanctions in its cases and for declined inspections. Last year also saw more activity by the tax and customs authorities (SUNAT), and that is welcomed. This year, the government must take actions to actually structure and implement its program to legalize software within government agencies, a long overdue obligation under the Trade Promotion Agreement.

The lack of resources dedicated to intellectual property infringement remains a persistent problem (but is in itself not the major impediment) in Peru, and given the current economic climate, it may be unlikely that resources will increase in 2010. 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 U.S.-Peru Trade Promotion Agreement (TPA). IIPA and its members support the TPA that entered into force on February 1, 2009, as it contains a comprehensive intellectual property rights chapter that contains high standards for copyright protection and enforcement.

Priority actions requested to be taken in 2010: 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.
- Continue progress made by INDECOPI to issue deterrent sanctions and to enforce compliance and collection of their fines.



- 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.
- 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, which was markedly improved in 2009, 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.
- Involve INDECOPI, local and regional governments, the National Library and the Ministry of Education to take actions to halt unauthorized photocopying at universities.
- Pursue prosecutions and impose expeditious and deterrent sentences in piracy cases.
- Conduct IPR trainings for judges nationwide, now that the specialized IPR courts have been eliminated.
- 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

- Have INDECOPI change its criteria when it issues fines against businesses that refuse to be investigated or raided by INDECOPI.
- 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.
- 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).

Peru has been the subject of IIPA's Special 301 filings for many years.¹ IIPA supported the passage and effective implementation of the U.S.-Peru Trade Promotion Agreement. IIPA also notes our support the Trans-Pacific Partnership (TPP).² IIPA expects that the U.S. will support the introduction of the high standards already in place in the IPR Chapters that the U.S. has negotiated to date, such as one with Peru.

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. Lima, Arequipa, Trujillo, Chiclayo, Tacna have the most wide-spread hard goods piracy problem. The purchase of pirated and counterfeit hard goods through web sites (Internet piracy) is also reported, but this is not yet widely used.

¹ IIPA's cover letter to this Special 301 submission contains more information on the concerns and issues of the copyright-based industries, see <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>. For more information on Peru's placement on the 301 lists over the years, see Appendix D at <http://www.iipa.com/pdf/2010SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf> of this submission.

² USTR announced on September 22, 2008 that the U.S. will launch negotiations to join the Trans-Pacific Strategic Economic Partnership, a comprehensive Free Trade Agreement (FTA) (then known as "the P4 Agreement") concluded by Brunei Darussalam, Chile, New Zealand and Singapore. This expanded negotiation was later renamed the TPP.

Optical disc piracy is a major problem in Peru where large numbers of blank media (e.g., CDs, DVDs) are imported and then used for burning copyrighted content. It is no longer possible to evaluate the dimension of piracy based simply on the volume of optical disc imports. The decline in 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 in recent years (down to 16.2 million units in 2007, more recent data is not available-). 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 the more popular smuggling routes involving Tacna and Puno (south of Peru border with Chile and Bolivia).

The sound recording industry reports that music piracy remains at a staggering 98% of the total market. The most predominant form of piracy is the burned CDs and DVDs sold in streets and popular flea markets in Lima and other important cities. Street piracy of burned music CD-Rs is decreasing in general terms for two reasons: The bigger availability of Internet Broadband connections and MP-3 players that allows people to download more illegal content using personal computers and the substitution of music for movies as the preferred product for street sales. Flea markets are licensed by local governments but no supervision is exercised on the use of commercial permits for illicit activities such as the sale of pirated goods. The lack of coordination between the competent national agencies and the local municipalities is very disturbing. After the raids are conducted by prosecutors and SUNAT, the inventory of pirate copies is quickly reestablished in these market and operations continue without major interruption.

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. One fair, locally known as Amazonas, is arguably one of the largest in Latin America, and has about 2000 vendors selling used, antiques and pirated volumes. Peruvian author Daniel Alarcón's press story on book piracy documents even pre-release piracy of popular author Paulo Coelho's new novel, "O" (published in English as "The Winner Stands Alone").³ Pirated books printed in Lima are shipped all over the country and exported to Bolivia, Ecuador, Chile and even Argentina. Street vendors of pirated books are very visibly on the streets of the capital or on its sidewalks. Alarcón also reported that street vendors gather in middle and upper class neighborhoods; book piracy is not only aimed at poorer neighborhoods. In addition, 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. This 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.

MPA members saw a decline in camcord piracy sourced to Peruvian theaters in 2009. One camcord capture of an MPA member's film was sourced to a Peruvian theater. As for street piracy, there are thousands of street vendors selling burned DVD-Rs containing the latest Hollywood releases (such as *Avatar* and *The Blind Side*, etc.), available for US\$1.00 each.

Business software piracy, end-user and retail: The business software industry reports that it continued to confront twin problems last year--widespread piracy of infringing copies (usually optical discs) of software in the black markets and end user piracy. Software levels remained basically at the same level in 2009, despite efforts made by the authorities in both matters (black market by the police and company inspections by INDECOP). The Business Software Alliance's (BSA) preliminary estimated piracy level for 2009 is 71%, with \$50 million in preliminary estimated trade losses due to piracy.⁴ This is a slight decrease in piracy levels from 74% in 2008, but a slight increase from the estimated losses of \$41 million in 2008 (this increase being due to a larger hardware base).

³ Daniel Alarcón, "The Book Pirates of Peru," in the U.K. Guardian, January 18, 2010, available on www.guardian.co.uk. Alarcón also reports that for the last 30 years, the budget of the National Library of Peru to acquire new books remained unchanged, at zero.

⁴ BSA's 2009 statistics are preliminary, and represent the U.S. software publishers' share of software piracy losses in Peru, and follow the methodology compiled in the Sixth Annual BSA and IDC *Global Software Piracy Study* (May 2009), available at www.bsa.org. These figures cover, in

The main problem for street piracy of software is found at Av. Garcilazo de la Vega (Wilson) in Lima, with other significant black markets in other cities, such as Galeria Las Pulgas in Chiclayo. In addition, other pirated software products are located close to universities in Lima (UNI and Ricardo Palma). However, the most damaging form of piracy in Peru remains end-user piracy in private corporations (mostly small- and medium-sized businesses) and government agencies. In fact, in the 2008-2009 timeframe, a new kind of software piracy arose. This involves companies taking part in tenders brought by the government to sell software and hardware, and then these companies use "re-used" or "recycled" licenses in order to deceive the purchasers. Efforts should be made by the prosecutors and INDECOPI to take action in impose sanctions against these companies that use fake software licenses and cheat the companies that purchase this product. These acts should be denounced before the Police or Prosecutor's Office and properly communicated to the "Organismo Supervisor de Contrataciones del Estado" ("OSCE") in order to punish the vendor with ineligibility to contract with public entities. Finally, it is imperative that the government take action this year to start implementing its obligations to legalize software in government agencies.

Internet piracy and cooperation with the ISP community: Peru is not a leading country in broadband and personal computers penetration. The software industry continues to report that Internet-based piracy is not yet widespread in Peru. There are 7.6 million Internet users in Peru, representing about 26% of the population (according to www.Internetworldstats.com). For the music industry, Internet piracy is the most pressing concern because it is the only possible market left for this industry. Internet cafés serve as important locations for downloading and burning of illegal files. Free access to peer-to-peer (P2P) networks in Internet cafés and universities has become the major source of illegal downloads in the country. The most popular P2P network is ARES. Keep in mind that the Internet is also used as a source to download and copy, without authorization, content onto other media, such as optical discs (CDs and DVDs), MP3 devices and even cellular phones. Several auction sites (such as Mercado Libre and De remate) offer infringing copies of films, software and music. The music industry reports that there is no voluntary cooperation with the ISPs at this time.

COPYRIGHT ENFORCEMENT IN PERU

Industry sectors report generally good cooperation with the criminal enforcement authorities (police and tax authorities) but some industries report continuing difficulties exist in obtaining prosecutions and administrative measures that result in effective and deterrent sanctions that deter piracy. By contrast, the business software industry reports that it has worked with INDECOPI to carry out effective enforcement actions against end-user piracy of business software.

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 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.

IPR Trainings and Public Awareness: BSA participated in several different seminars in 2009 aimed at training Peruvian authorities, with topics ranging from IP legal protection to software licensing trainings and workshops aimed at identifying fake CDs, boxes and false licenses involving business software. Since the recording industry terminated its anti-piracy campaign in Peru last year, no new trainings are being promoted in this area, except for the events held by INDECOPI on its own initiative.

addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA will report final 2009 data later in 2010.

With respect to training INDECOPI, BSA and its member companies reports that it undertook several trainings in 2009 regarding software licensing, to different INDECOPI personnel such as Appeals Court, the Copyright Office, the Copyright Commission, and the Fiscalization team (Area de Fiscalización del Indecopi, or AFI). Additionally, at the end of 2008 and early in 2009, INDECOPI took part, together with BSA, in an educative campaign addressed to more than 20,000 companies around the nation. Additionally, from October to December 2009, an education campaign was run in the Northern area of the country (Piura, Chiclayo and Trujillo) with the active participation of INDECOPI in the launching and promoting in media. Additionally, INDECOPI has sent informative letters to retailers to duly inform the PC buyers regarding legal software purchasing, preventing to suggest alternatives that are against Copyrights Law. In addition, 11 trainings were given at universities of the country regarding the legal use of software. Additionally, workshops directed to judges and 7 training directed to municipal police took place; all these measures brought by INDECOPI. Additionally training sessions have been made, directed to different mayors of Lima's districts.

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.

The copyright industries' concerns in 2009 generally remain the same as those reported in prior years. First, there is 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 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. The specialized police force lacks resources to develop intelligence plans that would support investigating and discovering large warehouses of clandestine laboratories of pirated goods. They have little logistical resources (vehicles, cell phones) needed to coordinate their field work. The Specialized Prosecutors need more budgetary resources to hire personnel who can follow up on cases after the raids in order to process them swiftly. Currently, 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.

Second, it is important to keep conducting raids in local black markets. In 2009, street actions were taken, but more are needed to begin to reduce their size and increase their economic impact. BSA believes that the main enforcement problem is not connected to the police, the prosecutor office or INDECOPI; the problem in conduct raids in the large black markets is due to the lack of support from the judges in issuing the orders to allow the target locations to be raided. Usually the judges demand too much evidence to grant the appropriate measures, even when the black markets are widely known to flagrantly be involved in the sale and distribution of pirated and counterfeit products. In other cases, they refuse the Prosecutor's request with no basis. BSA reports that the element of surprise is often lost due to leaks. As a result, it seems that rights holders have to target smaller and medium sized markets in order to get past judicial refusals to issue orders in large market cases.

BSA reports the relationship among these authorities is generally good. BSA reports that the Fiscal Police also have been efficient. In addition, BSA's relationship with IP Special Prosecutors is also good. With respect to software actions, BSA reports that six successful raids were made in 2009, and involved the assistant of the IP Specialized Prosecutor's Office and the Fiscal Police. These raids results in the seizures of an average of 20,000 CD-R in each action. BSA reports that, though few in number, the police and customs are taking ex officio actions. The six (6) cases promoted by software industry are pending at the prosecutorial stage, they have not reached the judicial stage, so there are no sentences yet. BSA has no concrete data on ex officio cases.

The music and recording industry reports that just a few actions in El Hueco, Polvos Azules and Mesa Redonda were conducted by National Police and the IP Specialized Prosecutors in capital city area. For its actions, more than 90% of the actions are requested by right holders. During 2009, the (First) Specialized Prosecutor's office in Lima opened 175

new criminal prosecutions against individuals involved in pirate music activities. As a result of these actions a total of 143 people were arrested but not charged (these involved street vendors arrested in flagrant violation of the copyright law, taken to prosecutor's office and released the same day as per Prosecutor's instruction because these cases deserve a very low penalty according to the law). The majority of the cases are dismissed on the grounds that violations are insignificant. These actions resulted in the seizure of 30,124 CDs and DVDs containing illicit recordings of music and movies. The (Second) Specialized Prosecutor's Office in Lima, conducted two major operations in 2009: (1) In "Mesa Redonda" Flea Market on November 17, 2009, a total of 320 stands were raided. 200,000 pirate music CD's were seized along with 40 CD/DVD burners and 5 computers. 400 police officers supported the action lead by Prosecutor Lucila Cabrera. Unfortunately, no arrests were made at the site. (2) At "El Hueco" Flea Market on August 27, 2009, a total 500,000 pirate music CDs and DVDs were seized. Six individuals were arrested and processed for piracy. The (Third) Specialized Prosecutors' Office in Lima did not conduct any big operations in 2009 but did open 36 new files for IPR crimes.

For 2009, Peru's Fiscal Police (responsible for IPR crimes and Customs operations) performed the following operations. The police conducted 139 raids, indicted 87 people, and seized 28,147,800 copies of recorded and blank CD-Rs and DVD-Rs of music and movies. With respect to border operations, there 128 raids were run, 152 people processed and 110 charged, and seizures of 9.5 million blank CD-Rs and DVD-Rs were made.

Third, it remains important to work with local municipalities to revoke licenses granted to vendors selling pirate product and close black-market businesses. Municipalities and their police forces (Serenazgo), other than San Isidro, do not assist in raids carried out in their jurisdiction. No licenses have been revoked in black markets in their jurisdiction.

Last, although current Peruvian legislation has the tools to sanction such unlawful behavior on the Internet, further refinements are needed to fully implement the FTA and also to specify that the sharing of information between peer-to-peer (P2P) networks and other similar networks constitutes unlawful actions.⁵ There is a specialized body in National Police with deals with High Technology crimes, prioritizing Internet-based crimes linked to pedophilia, kidnapping, phishing, and there are only a very few cases focused on intellectual property.

Enforcement by tax authorities: A very positive point in 2009 was that SUNAT increased its cooperation with IP Prosecutors and National Police. SUNAT is providing logistic and legal support in operations in El Hueco and Polvos Rosados. Unfortunately, the resources dedicated to these operations are insufficient. SUNAT has coordinated on many border raids; for example, containers which carried diverse pirate product have been stopped and these measures have increased. However, no further work has been made in connection with tax authority involving in end user software raids and retailer actions.

Few prosecutions: Peru still has four IPR prosecutors who work with INDECOPI when they are requested to do so. BSA reports good cooperation with the specialized IPR prosecutors. Unfortunately, these IPR prosecutors' jurisdiction has restrictions, and filing of the complaint before the judge can take four to six months after the raid has occurred; in fact some delays have taken as long as two years from the raid to get the case before the court. IP prosecutors have brought cases related to raids performed in 2009 and in prior years.

Problems with the judiciary--non-deterrent results and delays: Few criminal cases reach the Peruvian judiciary, and if they do, judges do not impose deterrent sentences. Judges are not sensitive to IP crimes, they do not see this crime as dangerous so sentences are benign, even if the police and prosecutors conduct a raid on a huge clandestine reproduction center of software, music, book, etc. Criminal sentences take between 3-5 years to be issued. BSA notes that prosecutors have brought cases before the court, connected to raids performed prior to 2009; those cases filed in 2009 have not reached the court instance yet, due to the consistent delay of the prosecutors.

⁵ 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.

Furthermore, 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; (b) 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. We believe that the average sentence in 2009 was the same as in 2008, that is, 2 or 3 years conditional imprisonment (suspended sentences), and fines of US\$300.

Judicial issues and restructuring: In April 2009, the Special Courts for Intellectual Property Rights were eliminated by the Peruvian Government (per the Resolucion Administrativa N° 094-2009-CE-PJ of the Board of Directors of the Judiciary System, published in the Official Gazette on April 7, 2009). This means that all intellectual property issues are handled by ordinary courts. Cases that were already underway would continue before the court where the action was taking place. The IPR court judges had better expertise with these issues. It was easier to train those specialists, and now this reorganization in effect means that those industries that support judicial training will have a much greater challenge. We are also concerned about the message of removing the IP courts means as a priority (or not) of the government.

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 collects royalties for the public performance right. INDECOPI is supposed to be self-funded 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.

Software actions with BSA: BSA's relationship with INDECOPI was cordial in 2009, as INDECOPI was a strategic ally to the software industry. Fortunately last year, INDECOPI increased its administrative actions taken for the software industry, taking more than 180 inspections to companies to monitor their software licensing. INDECOPI has revamped its prosecution team, which rapidly answers the requirements made by the right holders. As discussed above, BSA worked with INDECOPI on a variety of trainings regarding software licensing.

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 reports that during 2009 INDECOPI conducted a total of 42 administrative actions for the protection of performance rights in capital city area.

INDECOPI music piracy actions: The recording industry reports that its efforts are being reoriented to the collective licensing of performance rights and away from anti-piracy actions. With respect to physical music piracy, INDECOPI conducted 8 raids against pirate points of sale in Lima in 2009. Also, at an event held as part of the "Intellectual Property week" organized by INDECOPI, a total of 475,000 pirate units (CDs and DVDs) were destroyed. This industry remains concerned that INDECOPI lacks the appropriate resources to do a national anti-piracy campaign.

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.

Increasing deterrent sanctions by INDECOPI: It remains important to 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.

BSA reports that there is good news as some progress was made by INDECOPI in 2009 regarding the timing of sanctions. INDECOPI is ordering immediate fines to companies that do not allow end user inspections. These fines are then confirmed by the Appeal Court. In 2009, BSA reported that INDECOPI made efforts to execute the fines imposed to violator companies. In this period, a recovery of 815,482 Nuevos Soles (approximately US\$286,134) from the companies on fines was derived from software infractions.

However, further amendments should be done to the criteria used by INDECOPI in rendering its decisions in order to raise the amount of fines, based on the size of the companies. Indeed, fines ordered to all companies for denying the raids is 5 Tax Units (around US\$5,500). While this amount may be deterrent for small companies, it does not serve as a deterrent for medium-sized and larger companies. For these larger companies, the fine is so low that the infringer prefers not to admit the raid rather than allowing the inspection. This results in software piracy continuing since it is not an effective measure, because medium and large companies may afford this amount and refuse the inspection. Increasing the amount of fines would make INDECOPI inspections more effective.

Problems with INDECOPI and Appeals Court: BSA reports that difficulties with the Intellectual Property Chamber of INDECOPI's Trial Court are its primary source of difficulties with administrative enforcement.

(1) Incorrect calculation of damages: INDECOPI's Appeals Court is still misinterpreting articles 193 and 194 of the Copyrights Law failing to grant "due copyrights" so-called "remuneraciones o derechos devengados" when the infringer purchases the licenses after the inspection. This interpretation is a direct violation of the law which has been raised in previous IIPA reports. Nonetheless, INDECOPI is still misinterpreting the law and has currently appealed a sentence issued by the Judicial Power's Appeals Court that rejected INDECOPI's criteria and thus granting due copyrights to the rights holders.

(2) Problem with lowering of damages: Likewise, problems with incorrect fixing of damages continue. In fact, INDECOPI's Appeal Court is still reducing the amounts of the fines ordered by the Copyright Commission (first step in administrative procedures) in 66%. This makes that the fine is finally too low, due to their incorrect calculation. These fines are calculated to be twice the "market average price of the original software," but this "average price" is only 30% of the actual market price. This is due to an incorrect interpretation of the law (Law Decree 822, Article 194).

(3) Problems with "Due copyrights": 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.

In prior years BSA has reported problems related to certain troubling issues resulting from the Trial Court's decisions. For example, earlier decisions, if continued, 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. This problem is currently being reviewed by the judiciary, in order to reverse INDECOPI's position. The first instance (in the judiciary) has been favorable; BSA expects the second instance (the Supreme Court) to uphold the reversal of INDECOPI's position.

BSA had also previously reported difficulties in obtaining administrative inspections due to an incorrect interpretation issued by the Constitutional Trial Court.⁶ BSA now reports that there was a change of criteria by INDECOPI issued in 2009. The change in criteria is that inspections are now granted as “provisional measures” instead of “precautionary measures.” “Provisional measures” do not require 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; all that is needed are facts that a cease and desist letter was sent and the target did not reply.

Border Enforcement

In early 2009, no fewer than three new laws and regulations affecting border measures were enacted.⁷ The competent border authorities (INDECOPI and SUNAT) take actions to seize pirated material. 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. Over 100 million units contraband optical discs per year enter Chile, mostly through Iquique. SUNAT also 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).

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. Finally, 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.

COPYRIGHT LAW AND RELATED ISSUES IN PERU

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.⁸ Some of the refinements in these laws should, and must, aid in swifter and more effective enforcement by Peruvian authorities in 2010.

⁶ The problem had been related to a decision issued by the Constitutional Trial Court that increased the requirements necessary 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. 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. 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.

⁷ Decree No. 003-2009 implemented border measures for the protection of copyright and neighboring rights, Resolution No. 043-2009/SUNAT addressed the implementation of border measures initiated by right holders applications, and Law No. 29,316 implemented FTA obligations. See further discussion, below.

⁸ Over the years, Peru has been a beneficiary country of several U.S. trade programs which contain high IPR standards. After the TPA entered into force, tariffs for both countries were lowered, and no longer will Peru be eligible for certain U.S. preferential trade programs (such as GSP). During 2009, the following quantities of Peruvian imports under the various U.S. trade programs entered the U.S.: \$1.37 billion under the Andean Trade Preferences Act (including the ATPDEA) plus \$30.6 million under the Generalized System of Preferences (GSP) program.

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 Trade Promotion Agreement, 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.⁹ 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 contains transition periods for certain elements. 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). This important provision has not yet been met.

Implement government software asset management now: Six years ago, Peru issued its first order on government software legalization¹⁰, and yet the implementation of that order has been continuously delayed, now until 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. Efforts should begin now in order to have the government agencies drafting its inventories and legalizing its software. Also, in order to comply with regulations to guarantee the acquisition of legal software by the government by the new deadline, Article 3 of Supreme Decree N° 002-2007-PCM, which requires that all purchases of personal computers also include licensing of operative system and desktop solutions, should be expanded in order to apply to all acquisitions by public entities in present times.

⁹ 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.

¹⁰ 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 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)

Criminal penalties and procedures: 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, positive amendments to the criminal code were accomplished by this decree, Legislative Decree 29263, published on October 2, 2008.¹¹ Additional refinements to the criminal code were made in Legislative Decree No. 29316, which was published on January 14, 2009.¹²

Copyright law-related implementation: Peru passed several pieces of legislation that implemented various copyright and enforcement measures. Legislative Decree No. 1076, published on June 26, 2008, amended the copyright law in a number of positive ways to implement the TPA, especially with respect to the TPMs and judicial remedies.¹³

One major concern for the recording industry is the interpretation adopted by the Copyright Office of INDECOPI regarding the protection of national sound recording published in Peru before December 17, 1993 (when the Andean Decision No. 351 came into force). According to the opinion ratified several times by the Copyright Office, neither the Andean Decision nor the Peruvian Copyright Law contain any provision to extend the protection retroactively to those national sound recordings published before the above mentioned date. Fortunately, INDECOPI's Tribunal has been rejecting unanimously the Copyright Office's opinion based on the application of Civil Code. However, as new cases are filed with INDECOPI, chances are that the Tribunal may change its criteria in the future. As a final note, the Copyright Office's interpretation only affects sound recordings originally published in Peru, in other words, international catalogues are not in danger of been considered unprotected.

Border measure reform: Legislative Decree 1092 on border measures, adopted in June 2008 and effective upon the TPA's entry into force, implements various border measures for IPR enforcement. This law provides that (1) customs measures cover imports, 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); (3) establishes a proceeding for SUNAT (customs) officials to stop suspected infringing imports officials to inspect and seize suspected products in-transit; (4) requires customs to implement a recordation system for trademarks and copyrights; (5) requires Customs and INDECOPI to implement an electronic system to exchange information; and (6) clarifies definitions for piracy and counterfeiting.

¹¹ This 2008 criminal code amendment accomplished the following TPA implementation, for example: adding 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; empowering judges to order preventative seizures of suspected infringing products and equipment used to make such infringement, as well as the destruction of same; adding, 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; adding the crime of infringement of rights management information; penalizing the reception and distribution of encrypted program carrying satellite signals; penalizing the unauthorized use of computer software manuals and licenses; and prohibiting 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.

¹² These 2009 amendments accomplished the following issues: amended the criminal code to protect against decryption and distribution of program-carrying satellite signals and amended the criminal code to protect against the circumvention of technological protection measures and similarly amended the copyright law on TPMs. It also amended an Andean Community implementation law to allow judicial authorities to order the seizure of suspected infringing products and equipment.

¹³ The 2008 copyright law amendments accomplished the following TPA implementation, for example: 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; and 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). Peru also 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.

INDECOPI reform: Legislative Decree 1033 on INDECOPI, adopted in 2008, consolidates and regulates the functions of INDECOPI 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 still early to evaluate the impact of this reform on INDECOPI's effectiveness. First, it will be important to 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.

Other laws used to enforce IP in Peru

Revocation of licenses: Law 28976 on Licenses for Business Preparations should be amended to include, as grounds for closure and revocation of licenses, the sale of products that violate intellectual property. Unfortunately in 2009, this law was not revised to grant local governments (municipalities) the revocation of license for sale of products that violate intellectual property. Law 28976 only grants local government the ability to close temporarily or permanently a shop or stand in markets and commercial galleries on the ground of infringing administrative norms. This law should be amended in two ways: (1) it should apply to any type of commercial establishment and not only markets and commercial galleries, and (2) the basis should be for any type of law infringement and not only administrative ones.

Local municipality ordinances 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.

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 (2005): 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.