

# PERU

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Peru remain on the Watch List in 2017.

**Executive Summary:** The U.S.-Peru Trade Promotion Agreement (TPA) entered into force on February 1, 2009, and as a result, trade with Peru has almost doubled. However, while Peru made promising steps initially to implement the comprehensive Intellectual Property Rights (IPR) chapter of the TPA, which contains high standards for copyright protection and enforcement, it has yet to complete implementation. Notably lacking are Internet Service Provider (ISP) limited liability provisions and statutory damages for civil copyright infringement. These provisions should be implemented expeditiously. Piracy continues to be a large problem in Peru, both online and on the streets. Peru is also one of the largest sources of unauthorized camcords in the world: between 2012 and 2016, 94 unauthorized camcords were sourced from Peru, including 29 in 2016. Copies of these camcorded films were traded by local brokers and found online. Criminal prohibitions against camcording, without a need to prove a profit intent, should be enacted to facilitate enforcement against this form of piracy. In addition, Peru has become a safe haven for web piracy. In the last two years, several illegal websites launched operations from Peru, offering thousands of music tracks for users in and out of the country for both downloads and streaming. Some of these websites offer interactive functionalities, allow access from mobile devices and compete with legitimate services in the music market. The online piracy website market doubled in the past year and its impact is affecting not only Peru but other countries in the region, where those websites attract hundreds of thousands, and for some countries, millions of visitors.

### PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2017

The copyright industries recommend that the following actions be taken expeditiously in order to improve the adequate and effective protection of copyrighted materials:

- Pass legislation to address secondary liability principles for online copyright infringement, implement provisions creating powers for judges to disable access to infringing sites, establish obligations for ISPs to apply preventive technical measures to combat digital piracy, and provide for statutory damages for copyright infringement, in part to satisfy FTA obligations.
- Devote significantly more resources to combatting digital piracy.
- Take action, through the agency charged with promoting and defending intellectual property rights, *El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI), against administrators of piracy websites, who currently find Peru to be a safe haven.
- Pass legislation criminalizing unauthorized camcording of films without the need to prove profit intent.
- Improve the efficiency and effectiveness of the judicial system.

### COPYRIGHT PIRACY IN PERU

#### Internet Piracy

Internet-based piracy is increasingly widespread in Peru. While Peru is not a leading country in broadband penetration, the number of Internet users is steadily increasing. At present, there are approximately 13 million Internet users in Peru,<sup>1</sup> representing about 45% of the population, and 50% in the urban areas.<sup>2</sup> 57% of Internet

<sup>1</sup>See [www.Internetworldstats.com](http://www.Internetworldstats.com).

<sup>2</sup>This data is from early 2016, based on GfK analysis. See [http://www.gfk.com/fileadmin/user\\_upload/dyna\\_content/PE/GfK\\_OP\\_Octubre.2015\\_-\\_Uso\\_de\\_Internet\\_2.pdf](http://www.gfk.com/fileadmin/user_upload/dyna_content/PE/GfK_OP_Octubre.2015_-_Uso_de_Internet_2.pdf) and [http://www.gfk.com/fileadmin/user\\_upload/dyna\\_content/PE/GfK\\_OP\\_Diciembre.2015\\_-\\_Compras\\_por\\_Internet\\_3.pdf](http://www.gfk.com/fileadmin/user_upload/dyna_content/PE/GfK_OP_Diciembre.2015_-_Compras_por_Internet_3.pdf).



users are considered heavy users. The majority of Peru's Internet population is from the upper economic groups, and young, between 18 to 24 years (70%). A growing base of Internet users are adopting e-commerce, and music is one of the top products purchased online, representing 7% of all e-commerce transactions. Mobile broadband penetration is increasing rapidly. In 2015 there were 36.7 active mobile broadband subscriptions per 100 inhabitants, up from 28.5 the previous year.<sup>3</sup> Fixed broadband is not nearly as prevalent, with only 6.4 fixed broadband subscriptions per 100 inhabitants (up from 5.7 in 2014).<sup>4</sup>

Streaming of pirated audiovisual content is prevalent in Peru. The 108 top pirate Spanish-language audiovisual content websites received 133 million visits from Peru from December 2015 through June 2016, and an estimated 300 million visits from January through December, 2016. Two websites identified by MPAA as notorious markets in its 2016 out-of-cycle review filing receive a high volume of traffic from Peru. Both sites are streaming linking sites, which make content available through framing or embedding a player in the website, and also provide one or more active links so users can stream the content in a video-on-demand format. Many streaming linking sites also frame or embed video players from third-party websites, reducing the number of clicks needed to get to content for a more seamless user experience. These sites are monetized through advertising served by a large number of national and international ad networks. *Repells.tv* is a popular streaming linking site that offers more than 150,000 links to more than 10,000 illegally reproduced titles including movies and television series. The website has been active since December 2013, and its *Peru Alexa* rank is 70. *Pelís24.com* is another popular streaming linking site, which currently offers more than 80,000 links to more than 8,000 illegally reproduced titles including films and television series. The site has been active since February 2008 and has a *Peru Alexa* rank of 112. While the site is currently hosted in Seychelles, *Pelís24.com's* operators live in Peru, which is also home to the operators of the other largest Spanish-language illegal audiovisual content websites in Latin America, including *yaske.ro* (formerly *yaske.cc*). These sites affect the legitimate market in the entire region.

Peru's music market, like most other countries in the region, saw a significant increase in digital sales in the last year (+30%) with almost all growth coming from streaming platforms (+80%). Today, eleven online legitimate services compete for consumers in the Peruvian market. However, a big portion of the market potential is lost because of the unfair competition of pirate websites openly operating and offering millions of illegal music tracks to consumers mainly via mobile devices. The top 40 notorious infringing music websites operating in Peru have more than 30 million monthly visits, according to SimilarWeb. These sites are exclusively dedicated to distributing infringing music content, and usually provide for interactive streaming for mobile users as well as file downloading, directly and unfairly competing against legitimate music platforms. Their revenue is based mostly on advertisements. These websites, among many others, are well known in Peru, including to the authorities.

## Hard Goods Piracy

While online infringement has increased, hard goods piracy is still relevant 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, and Tacna have the most wide-spread hard goods piracy problem. The purchase of pirate and counterfeit hard goods through web sites and online marketplaces is becoming more popular as Peruvians embrace e-commerce. For example, *mercadolibre.com.pe* hosts listings of hacked game consoles that come installed with infringing games, as well as listings of circumvention devices bundled with infringing games. In addition to advertising listings on *Mercado Libre*, many top sellers also run their own proprietary e-commerce sites where they traffic in video game circumvention devices and services. Optical disc piracy is a major problem in Peru where large numbers

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<sup>3</sup>Data from International Telecommunication Union, *Measuring the Information Society Report 2016*, p. 246.

<sup>4</sup>Id.

of blank media (e.g., CDs, DVDs) are imported and then used for burning copyrighted content, which is then sold in street markets and over the Internet. As for street piracy, there are thousands of street vendors selling burned DVD-Rs containing the latest Hollywood releases, available for US\$1.00 each. 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 the country.

**Camcording:** Camcording as “source piracy” has grown exponentially over the last few years in Latin America, along with camcorder technology, which makes detection difficult and copies nearly perfect. Peru is now one of the leading sources of unauthorized camcords in the world. Twenty-nine unauthorized camcords were traced to Peru in 2016, and 14 professional “cammers” were arrested between 2012 through 2016. Unfortunately, none of these individuals have been convicted. Professional cammers feel safe to conduct this activity in Peru because criminal convictions require proof that the recording was made with an economic intent, which in practice makes it virtually impossible to obtain a conviction. The main regions where these illegal camcordings take place are in the cities of Lima, Trujillo and Chimbote.

## COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

The TPA entered into force on February 1, 2009.<sup>5</sup> As part of the TPA, Peru also signed IPR-related Side Letters, including one on ISP liability and another on retransmission issues. While Peru acted expeditiously to implement many IPR provisions of the TPA,<sup>6</sup> it still has not implemented legislation addressing other important issues, including secondary liability principles or statutory damages. Since entry into force of the TPA, total trade between Peru and the U.S. has expanded from US\$9.1 billion to US\$16.1 billion.<sup>7</sup> Peru has benefitted greatly from the TPA, and should complete its obligation to implement all provisions of the TPA.

**No ISP Liability Provisions:** TPA Article 16.11.29 provides for incentives for service providers to comply with notice and takedown procedures for materials that are claimed to be infringing. This provision has not yet been implemented, which poses a significant problem to right holders attempting to get unauthorized copies of their works removed from websites, because ISPs do not risk any liability for copyright infringements otherwise. With no clear liability principles in place, website operators usually do not cooperate with right holders. Industry sectors report that as a result, they do not bother engaging in notice-sending. While it is unusual to find massive-piracy websites listed in Peru because of high costs and connectivity limitations, ISPs such as Claro and Telefonica have generally been open and cooperative with industry, although no concrete collaboration effort has been tried so far. INDECOPI should encourage engagement in larger cooperation discussions between right holders and ISPs, as well as other key Internet intermediaries, in addition to supporting clear provisions on liability principles.<sup>8</sup>

**No Statutory Damages:** Also outstanding is Peru’s obligation to provide for pre-established damages (statutory damages) in civil judicial proceedings (TPA Article 16.11.8). This long-overdue reform is needed to provide deterrence and encourage settlement of civil claims of infringement.

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<sup>5</sup>The final text of the U.S.-Peru Trade Promotion Agreement (TPA) Intellectual Property Rights (IPR) Chapter is posted on USTR’s website at <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

<sup>6</sup>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 technological protection measures (TPMs) and judicial remedies.

<sup>7</sup>See <https://www.state.gov/e/eb/rls/othr/ics/2015/241704.htm>.

<sup>8</sup>If exemptions from liability are being considered, it should be made clear that such provisions should only apply to ISPs that perform technical, passive, and neutral activities.

## OTHER COPYRIGHT LAW AND RELATED ISSUES

**Camcording Legislation:** Anti-camcording legislation is necessary to address the rapid increase in camcording. Peru should adopt a legislative framework specifically criminalizing illicit camcording in theaters without requiring proof of profit motive. The lack of anti-camcord laws to criminalize unauthorized movie recording makes it difficult to obtain cooperation from law enforcement and prosecutors.

**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. 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 infringement of any type of law (including civil and criminal) and not only administrative ones.

## COPYRIGHT ENFORCEMENT IN PERU

Enforcement against piracy, whether criminal, civil, or administrative, is hampered by a distinct lack of resources devoted to combatting both hard-goods piracy and online piracy. Industry sectors report generally good cooperation with the criminal enforcement authorities (prosecution offices, police and tax authorities) handling hard goods piracy, but continuing difficulties exist in obtaining prosecutions and administrative measures that result in effective and deterrent sanctions that deter piracy. Peru has a cross-commission established by law, *Comisión de Lucha contra los Delitos Aduaneros y la Piratería*, to "fight against border-control infringements and piracy."<sup>9</sup> This committee should focus on establishing priority enforcement targets from each affected industry to make combatting piracy a governmental priority and draw focus from judges, prosecutors and the police.

### **Criminal Anti-Piracy Enforcement in Peru**

**Police actions and prosecutions:** The copyright industries have excellent relationships with the Fiscal Police as well as with the specialized prosecution division in Lima for Intellectual Property and Border Enforcement (*Fiscalía Especializada en Delitos Aduaneros y Contra la Propiedad Intelectual*). However, this specialized prosecution division has very limited geographic jurisdiction, which limits its effectiveness. Enforcement actions conducted by the specialized IP prosecution division should continue, and in particular should focus on the large suppliers of burned discs to the market. Otherwise, the police do not take *ex officio* actions against piracy.

The U.S. Secret Service agency deployed to Lima has conducted trainings and assisted local police efforts against organized crime, which is usually related to the large and organized distributors of pirated media content. In the longer term, this effort should counteract piracy and counterfeiting activity in Peru. Additionally, the deployment of a Department of Justice Law Enforcement Coordinator (IPLEC) to Latin America should help coordinate training efforts across the territory.

There is a continued need to allocate more public resources to support the special IPR unit of the Fiscal Police (*División de Investigación de Delitos contra los Derechos Intelectuales*) in order to conduct effective anti-piracy investigations, to support the National Police (7<sup>th</sup> Region), and to provide troops when large raids are conducted in the black markets. Because the National Police lacks resources to carry out intelligence activities prior to and following raids, it performs neither intelligence nor follow-up activities. The specialized police force lacks

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<sup>9</sup>The commission is comprised of the Ministry of Production; the Ministry of Economy and Finance; the Ministry of Trade and Tourism; the Ministry of Internal Affairs; the Ministry of Defense; the Commissioner of Tax Administration; a representative of the General Prosecution Office; the President of *El Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (INDECOPI); and representatives of the National Association of Industries, the Finance Intelligence Unit of Peru, the National Group of Commerce Chambers, Small and Medium Company Associations, the Association of Border Agents of Peru, the Association of Exporters, the State Governments, the Committee to Fight Against Piracy (*Contracopia*), the Peruvian Books Chamber, the Association of Phonographic Producers, the Association of Cities of Peru, the National Association of Authors and Composers (APDAYC), and the National Council of Cinema (CONACINE).

resources to develop intelligence plans that would support investigating and discovering large warehouses of clandestine laboratories of pirated goods. They have few 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.

Although current Peruvian legislation provides the tools to sanction unlawful behavior on the Internet, further refinements are needed to fully implement the TPA and also to specify that the sharing of information between peer-to-peer (P2P) networks and other similar networks constitutes unlawful actions.<sup>10</sup> A specialized body in the National Police deals with High Technology crimes, prioritizing Internet-based crimes linked to pedophilia, kidnapping, and phishing; as a result, it investigates very few cases focused on intellectual property.

INDECOPI is empowered to open *ex-officio* actions and investigations against Internet Piracy. INDECOPI, in consultation with relevant stakeholders, should develop an effective campaign to impose sanctions on administrators of notorious pirate websites openly operating in Peru that have registered companies and domiciles in Cusco and other locations associated with them. It is also hoped that INDECOPI will implement urgent measures to disable access to those sites, impose fines on the administrators, and suspend the domain names of those registered at NIC Peru. INDECOPI has the capacity and legal powers to accomplish these actions, however, it is underfunded, especially in light of its self-funding role, discussed below.

**Few prosecutions:** The four IPR prosecutors in Lima's special prosecution division work with INDECOPI when they are requested to do so. Despite limited resources, INDECOPI can play an important role in disrupting mass online infringement in Peru. Unfortunately, these IPR prosecutors' jurisdiction is restricted, and filing of a complaint before a judge can take four to six months after the raid has occurred; in fact, some cases have seen delays as long as two years from the raid before getting to court.

**Problems with the judiciary—non-deterrent results and delays:** Few criminal IPR cases reach the Peruvian judiciary, and if they do, judges do not impose deterrent sentences. Judges are not sensitive to IP crimes, as they do not perceive the importance of IPR or see IPR crimes as dangerous; as a result, sentences are nondeterrent. Criminal sentences take between 3-5 years to be issued, and cases often languish even longer. For example, there is a criminal case involving circumvention devices that was filed in 2011, and has been continually delayed due to excessive bureaucracy and appeals.

Furthermore, the Peruvian Criminal Procedure Code permits sentences of four years or less to be suspended. This has continued even after several positive amendments to the criminal code, including: the 2004 amendments, which provided an increase of minimum sentencing to four or more years for copyright infringements; and amendments made in November 2006 to penalize recidivist offenders with stronger sanctions and establish additional penalties for more crimes.

## 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, and collects royalties for the public performance right. INDECOPI is supposed to be self-funded through its income 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.

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<sup>10</sup>In particular, Section 48 of the Peruvian Copyright Law, Legislative Decree No. 822, should be amended in order to exclude the possibility of considering peer-to-peer (P2P) sharing and the use of information as a private copy.

**Increasing deterrent sanctions:** It remains important to issue regulations to 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. To increase and support enforcement against piracy, IIPA suggests that regulations be issued increasing and establishing fines, which would also help fund INDECOPI's actions.