

COLOMBIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Colombia remain on the Watch List in 2019.

Executive Summary:¹ In 2018, Colombia took necessary steps to update its copyright law and significantly improved copyright protection through its legislative reform. However, these reforms did not introduce enforcement mechanisms for countering online copyright piracy and ineffective enforcement continues to stifle the legitimate online market for creative content in the country. For example, while legitimate music services have been operating in the Colombian market, their growth rate, while high, could have been much higher were it not for the prevalence of pirated material. In the Medellin and Bogota areas, illegal camcords continue to occur in Colombian cinemas and notorious physical markets, street markets, and illegal fairs are still prevalent. Yet, there is no evidence that Colombian law enforcement has put forth a serious effort to prosecute administrators and owners of websites, stream-ripping services, forum sites, and digital and physical marketplaces involved in the distribution of illegal content. Operations should be coordinated by the cybercrime unit on multiple fronts, including a centralized nationwide initiative. Another serious concern is the “Pepe Sanchez” Law, which is an arbitrary and unfair interference with the freedom to contract agreements relating to audiovisual works. With a new government, there is an opportunity to re-establish the necessary enforcement of IPR in Colombia and promote a stronger agenda for law enforcement on IP protection online, including effective remedies for dealing with foreign infringing websites and services, which would enable a safer environment for investors and entrepreneurs.

PRIORITY ACTIONS REQUESTED IN 2019

- Ensure effective enforcement of Colombia's new copyright law and offer effective remedies against copyright infringing websites operated from outside the jurisdiction.
- Organize trainings for the judiciary and the law enforcement agencies to increase their awareness of the online piracy problem and the legal tools at the authorities' disposal.
- Devote law enforcement and specialized prosecutorial resources to combatting online piracy with coordinated operations and actions for a sustainable agenda of IP protection.
- Convene and facilitate public/private round tables with all stakeholders to promote cross industry cooperation to tackle online piracy based on MOUs and industry best practices.
- Increase police enforcement and initiate coordinated actions and investigations of physical notorious markets.

COPYRIGHT PIRACY IN COLOMBIA

Online piracy is a growing problem in Colombia, with Internet penetration over 61% and the number of active smartphones in the country almost on par with the population size; yet, the problem has gone unaddressed by the Colombian Government, despite the existence of legal and investigative resources available to cybercrime police, judges, and prosecutors. Piracy in Colombia comes in many forms, and the audience to infringing websites and online marketplaces for creative content continues on an upward trend, with torrent traffic growing over 12% annually. Online marketplaces are extremely popular in Colombia and a constant focus of e-commerce infringement and fraud. Pirated video games, movies, TV series and paid-TV channels are accessed via Piracy Devices (PDs). Illegal music streaming and music stream-ripping websites and services are popular (the top three most popular sites in the country are driving over 72 million visits yearly). Additionally, direct download sites, peer-to-peer (P2P)

¹For more details on Colombia's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Colombia's Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



protocols, and the distribution of illegal links to cyberlockers via social networks, forums, blogs and hosted sites are prevalent. Repeat infringers are also becoming a major question to be addressed, as many physical notorious markets vendors migrated to these online platforms.

While the legitimate digital music market in Colombia is growing, Internet piracy occupies the vast majority of the total digital music market in the country. Stream-ripping of music videos from online platforms like YouTube is increasingly prevalent. One of the most popular stream-ripping websites in the Latin American region, *Bajaryoutube.com* (and its mirror *descargaryoutube.com*), are operated by a Colombian company and counts for more than 190 million visits yearly. The video game industry also reports that digital account resales, both primary and secondary video game accounts, are becoming a growing trend in Colombia. It is estimated that this illegal business model accounts for 50% of all game titles available on local online marketplaces, specifically *Mercado Libre*. They are also available on local infringing websites in the Colombia video game space. The motion picture industry reports that in 2017, the top 180 Spanish-language audiovisual piracy websites received 525 million visits from Colombia. Meanwhile, physical piracy continues to plague the *San Andresitos* flea markets, where vendors sell burned CD-Rs and DVD-Rs on the streets, and distribution hubs supply pirate products for the rest of the country. Individuals also utilize social media to promote and sell infringing copies of movies in Colombia. In 2018, three video camcords and four audio camcords of MPAA member films were traced to Colombian theaters.

The Colombian Government has not acted to protect new legitimate markets and the emerging digital economy from unfair competition by pirate operators. One problem is the absence of a national anti-piracy campaign that recognizes the importance of copyright protection in the context of the country's economy and culture. Moreover, although most of the online notorious markets are hosted and operated outside of Colombia, numerous pirate websites (mostly stream-ripping and MP3 download sites) have ".co" top level domain names and are administered by a company called Neustar INC., operating in Colombia as .CO INTERNET SAS, which is appointed by the Colombian Government via a concession contract with the Ministry of Technology and Information. The Colombian Government should require its top level domain registrars to adopt and apply due diligence policies and cooperate with rights holders in tackling IPR violations by their customers.

COPYRIGHT LAW IN COLOMBIA

Copyright Act Amendment: In early July 2018, Colombia's legislature amended the copyright law that updates Colombia's copyright framework. The law contains some helpful provisions, including: an extension of copyright term to 70 years for sound recordings and corporate rights holders; a making available right; a civil liability rule for circumvention of TPMs; a statutory damages provision for copyright violations and circumvention measures; and authorization to destroy seized infringing goods. However, the law contains anti-circumvention exceptions and copyright limitations that may harm rights holders. Further, while it criminalizes the retransmission or reception of illegally decrypted satellite signals, a profit requirement may complicate enforcement.

Other International Treaties: On June 15, 2017, the Colombian Congress voted to ratify the Beijing Treaty (signed by Colombia in 2012), making Colombia the third country in the region to ratify the instrument after El Salvador and Chile. However, the main treaty obligations are already a part of Colombia law. Back in 2000, Colombia ratified the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Colombia still needs to fully implement the WPPT and WCT.

Arbitrary Interference with Freedom to Contract: In June 2017, the Colombian Congress passed the "Pepe Sanchez" Law (No. 1835-Jun 9-2017). The legislation creates a remuneration right for directors, screenwriters, composers, and other creators involved in the production of audiovisual works for the communication to the public, the making available of the works, and the rent of audiovisual works. The remuneration is collectively managed and applies to all audiovisual productions regardless of any contractual transfer of such rights, including agreements signed before the law came into force. The law amounts to an unfair intervention in the parties' freedom of contract and creates an obstacle to the development of the digital content market in Colombia. This legislation is primarily

problematic for the audiovisual sector where remuneration rights for creative participants in U.S. works are highly regulated and satisfied by contract. Mandatory remuneration rights unnecessarily interfere with negotiated agreements that already generate remuneration to creative participants—including authors, directors, and performers—driven by proceeds from the exploitation of U.S. works in every medium and in every world market. Imposition of a collectively licensed additional royalty chills the market for consumers (by increasing exploitation costs) and results in potential double payments for creative participants in U.S. works. Moreover, this legislation could be also problematic for the music industry insofar as it could be applied to cover music videos as audiovisual works. *Asociación para la Protección de los Derechos Intelectuales sobre Fonogramas y Videogramas Musicales* (APDIF), a Colombian trade association that represents phonogram and music video producers, has been advocating for an amendment that would confirm the carve out for music videos from the scope of this law. The law also includes a new exception for public performance of audiovisual works that allows businesses to use audiovisual works on their premises for the entertainment of their employees. APDIF has also been fighting for withdrawal of this exception on the basis of non-compliance with the three-step test.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Due to the lack of coordinated actions to tackle online and physical piracy and to enforce the existing legal protections for copyright, enforcement actions in Colombia have become more difficult and local consumers find few hurdles in purchasing or locating illegal content. The cybercrime unit of the Colombian police, the Directorate of Criminal Investigations and Interpol (DIJIN), and the Cyber Police Center (CAIVirtual) report a 28% increase in the volume of online frauds last year (a total of 6,372 cases) and indicate that 55% of all online crimes reported to the police by citizens are related to problems with e-commerce. Sixty percent of those (3,846 cases) are directly related to problems with online shopping. The cyber police have a strong framework and have applied effective strategies against cybercrime in the country, however, similar efforts are needed in the copyright infringement area. Moreover, law enforcement agencies, including the DIJIN and CAIVirtual units, provide rights holders with access to important tools to enforce copyright protection and to fight online piracy and have initiated a promising exchange of information to analyze some high profile cases. Still, the problem remains.

Poor enforcement may be a result of Colombia's lack of a national anti-piracy campaign to address piracy and the belief that online piracy is either not a problem or is one that only affects foreign interests. The Attorney General's Office established the National Unit Specialized in Prosecuting Crimes against Intellectual Property Rights and Telecommunications, responsible for investigating and prosecuting Internet piracy and crimes against intellectual property rights. However, coordination among police officers, prosecutors, and judges to combat online piracy needs to significantly improve, and increased resources should be dedicated to the National Police and prosecutors. This National Unit is not prosecuting any music piracy cases. The sole creation of the National Unit will not make any difference on the piracy problem unless resources and proper training are present. The Copyright Office ("Dirección Nacional del Derecho de Autor" (DNDA)) should play a coordination role on the education and training activities for governmental offices in Colombia. However, the DNDA is not playing any role in that regard.

Further, the Attorney General's specialized unit for IP crimes should increase its focus on a broader range of anti-piracy cases. Unfortunately, the DNDA, the department that is most competent in copyright-related issues, is not legally empowered to conduct enforcement actions. The DNDA operates under the jurisdiction of the Ministry of the Interior, which makes its role in the government less relevant. Many proposals to move the DNDA's functions under the jurisdiction of the Ministry of Commerce, Industry, and Tourism (as is the case in other countries in the region) have failed, mainly because of the lack of political will to prioritize the copyright sector. The "orange economy" (or creative economy) initiative that the new government is instituting as a major public policy may be a powerful hook to engage authorities to more actively protect IP and the digital economy in Colombia.

ISP Cooperation: While many ISPs in Colombia are willing to cooperate with rights holders to combat online piracy, such cooperation is limited due to flaws in the underlying law and a lack of an MOU in place. The government should hold public/private round tables with all stakeholders to promote cross industry cooperation to

tackle online piracy based on industry best practices and effectuate an MOU. Another possible negative influence on ISPs is the former Colombian president's failure to sign the national anti-piracy agreement, which effectively downgraded the weight attached to anti-piracy enforcement by civil servants and the public. Hopefully the new president will sign this agreement and shift the perception on the importance of an anti-piracy campaign. Colombia must follow through with legal reform to incentivize and compel cooperation by all intermediaries to effectively combat and end online piracy. To do so, it must modernize copyright enforcement avenues to provide for a legal basis that requires ISPs to take action against copyright-infringing websites.

MARKET ACCESS

Actors Bill: In 2016 and 2017, an Actors Bill was proposed in Colombia's Congress. If passed, the Bill would have the effect of increasing production costs for film and television made in Colombia by imposing (i) excessive burdens on producers of audiovisual works in terms of costs and production schedules; (ii) limitations on talent engagement; and (iii) a set of compensations and encumbrances that curtail the legitimate ability to commercially exploit audiovisual works. In sum, this Bill would significantly raise costs for producers, render local production unviable, and make Colombia less competitive as a location for audiovisual production. The Bill was reintroduced in March 2018 and passed in the House on April 19, 2018. The Bill is still pending approval in the Senate, and due to its local popularity, is likely to move forward in 2019.

Implementation of VAT on Digital Services: Colombia Law 1819 applied the 19% VAT to digital services. The law was supposed to take effect in July 2018, but the tax authority published the implementation resolution (Resolution 51) on October 19, 2018. The Law is, however, retroactive to July 1, 2018.