

# COLOMBIA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Colombia remain on the Watch List in 2021.<sup>1</sup>

**Executive Summary:** Despite Colombia's adoption of law 1955/2019, known as the National Development Plan, which created a set of regulations for copyright and neighboring rights contracts, and the amendment to the Colombian copyright law in 2018, these reforms did not introduce adequate enforcement mechanisms for countering the country's significant online piracy problem. Enforcement actions in 2020 remained largely non-existent. The lack of coordination and expertise among the country's judicial and law enforcement personnel continues to be one of the major obstacles for the protection of copyrighted works in Colombia. To address these enforcement challenges, IIPA urges Colombia to empower the country's Copyright Office (DNDA) to coordinate and train all relevant actors on copyright and enforcement best practices.

IIPA urges Colombia to bring its regime for the protection of Technological Protection Measures (TPMs) into compliance with the provisions of the Colombia-U.S. Trade Promotion Agreement. It would also be helpful for Colombia to reconsider amendments to its copyright law that curtail the freedom of contract of foreign rights holders and local parties, and to avoid legislation seeking to require DNDA's authorization for the operation of digital music platforms in the country.

In October, the National Council for Economic and Social Policy (CONPES), a division of the National Planning Department, launched a public consultation on a proposed update to Colombia's National Intellectual Property Policy. The policy acknowledges the insufficiency of Colombia's institutional capacity to effectively protect and exploit IP rights. CONPES also acknowledges that Colombia has limited mechanisms to address the country's high levels of infringement, and includes proposals for amendments for Colombia's copyright law, enforcement actions and new functions for DNDA. This initiative is promising and IIPA urges Colombia to continue to move towards increased enforcement and a legal framework that fosters the growth of a vibrant creative economy.

## PRIORITY ACTIONS REQUESTED IN 2021

### Enforcement

- Implement a specialized program for judges and law enforcement on copyright protection and enforcement.
- Devote law enforcement and specialized prosecutorial resources to combatting online and physical 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.

Design and implement a coordinated strategy of the National Tax and Customs Directorate, the General Prosecutor's Office (*Fiscalía General de la Nación*), the DNDA, and the Superintendence of Industry and Commerce for the ongoing training of customs officials at the border to identify and seize copyright infringement and circumvention devices.

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<sup>1</sup>For 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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



## Legislation and Regulation

- Implement legislation that regulates the responsibility of Internet service providers (ISPs) to ensure effective remedies against copyright infringing websites, specify that only passive and neutral intermediaries are eligible for the safe harbors from ISP liability, and provide for a legal basis that requires ISPs to cooperate with rights holders.
- Ratify international agreements relevant to copyright protection, including the Beijing Treaty on Audiovisual Performances.
- Clarify, via regulation from the Ministry of Information Technologies and Communications, and DNDA on the implementation of Law 1915 of 2018, that circumvention of a TPM is not permissible for any exception or limitation under the copyright law because that would be inconsistent with the U.S.-Colombia Trade Promotion Agreement (TPA).
- Reconsider Law 1915 of 2018's annual revision of copyright exceptions and limitations through public hearings in the Colombian Congress.
- Amend Article 181 of Law 1955-2019, Colombia's National Development Plan, to preserve contractual freedom for future forms of commercialization.
- Amend the final paragraph of Article 3 of Law 23 of 1982 (Copyright Law) to eliminate the rule that remunerations for neighboring or related rights are limited to 40% of the remuneration corresponding to authors in the same use. The so-called 60/40 rule is a legal barrier to the growth and development of the rights of performers and producers in Colombia. It is also inconsistent with Colombia's obligation under the U.S.-Colombia TPA to ensure no hierarchy is established between the rights of authors, on the one hand, and the rights of performers and producers, on the other hand.<sup>2</sup>
- Provide adequate comment periods of at least 30 days to facilitate stakeholder input on public policy consultations.

## THE COPYRIGHT MARKETPLACE IN COLOMBIA

Online piracy is a significant and largely unaddressed problem in Colombia. According to government figures, Colombia had 7.65 million Internet subscriptions by the end of the first half of 2020.<sup>3</sup> Piracy in Colombia comes in many forms, and the number of visitors to infringing websites and online marketplaces for creative content continues to increase.

There are more than one million illegal pay-television connections, which amount to operator industry losses of more than US\$247 million and government losses due to tax evasion of US\$197 million per year. For music, the predominant form of piracy in Colombia is stream-ripping sites followed by the use of cyberlockers. The most popular stream-ripping sites in Colombia are *y2mate.com* and *savefrom.net*, with each site receiving over 4.6 million and over 4.2 million visits from Colombia, respectively, during the third quarter of 2020. The most popular cyberlockers in Colombia are *1fichier.com* and *zippyshare.com*, with each site having received over 1.9 million and over 1.1 million visits from Colombia, respectively, during the same period. The term "juegos" (games in Spanish) was the 11th most searched word on Google Colombia, a strong indicator of popularity for online gaming content. Following this general trend, there has also been a rise by 10% of audience visits to infringing video game websites in Colombia. These illegal sites are mostly small communities for local users or regional sites with better infrastructure, including links maintenance, game release schedules, and Spanish language support for users. With better technological skills and access to up to date hardware and software, the local audience for illegal game content download is growing in Colombia. The country ranks 23<sup>rd</sup> in the world in terms of the number of peers or people detected in infringing video game swarms or groupings.

Another important channel for illegal digital games, mostly unauthorized digital goods (UDGs), are online marketplaces in Colombia, which are important commercial platforms to infringers, given that in Colombia,

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<sup>2</sup>U.S.-Colombia Trade Promotion Agreement (2012), Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-ipr.pdf>.

<sup>3</sup>Ministerio de Tecnologías de la Información y las Comunicaciones de Colombia, Internet Dedicado, <https://colombiatic.mintic.gov.co/679/w3-propertyvalue-47271.html> (last visited Jan 19, 2021).

entertainment products are among the top two categories of items purchased online. Most of these marketplace users are also gamers at 85% (38% via consoles, 42% via laptop and 67% via mobile devices) while only 11% of gamers play on streaming/cloud platforms. Marketplaces saw an audience increase of 50% during the pandemic. Offers of illegal game products on these platforms also increased by 56% from January to October 2020. Infringing products are also being promoted and sold via social media platforms.

## **COPYRIGHT LAW IN COLOMBIA**

**Copyright Act Amendments:** To fully comply with the U.S.–Colombia TPA, some of Colombia’s 2018 copyright amendments need clarification and reconsideration. IIPA urges Colombia to clarify that (1) the new permanent exemptions to TPMs are subject to review, requiring proponents to offer substantial evidence of actual or likely adverse impact on non-infringing uses; and, (2) a TPM may not be circumvented to exercise any exception or limitation because the TPA establishes that circumvention of TPMs “is a separate civil or criminal offense, independent of any infringement that might occur under the Party’s law on copyright and related rights.” IIPA also asks Colombia to amend the last paragraph in Article 3 to eliminate the rule that remunerations for neighboring or related rights are limited to 40% of the remuneration corresponding to authors in the same use. This so-called 60/40 rule is a legal barrier to the growth and development of the rights of performers and producers in Colombia. It is also inconsistent with Colombia’s obligation under the U.S.-Colombia TPA to ensure no hierarchy is established between the rights of authors, on the one hand, and the rights of performers and producers, on the other hand.<sup>4</sup> In addition, IIPA urges Colombia to reconsider (1) the profit requirement for the crime of retransmission or reception of illegally decrypted satellite signals; and (2) the annual revision of copyright exceptions and limitations through public hearings in the Colombian Congress because such revision creates uncertainty for both enforcement and private investment.

**National Intellectual Property Policy Consultation:** In October, the National Council for Economic and Social Policy (CONPES), a division of the National Planning Department, launched a public consultation on a proposed update to Colombia’s 2008 National Intellectual Property Policy. The proposal acknowledges the insufficiency of Colombia’s institutional capacity to effectively manage, protect and exploit IP rights. Although copyright registration applications increased from 65,138 to 86,250 in the 2014-2019 period, the DNDA needs to improve its technological and data generation capacities to enable public policymaking that is in tune with rapidly changing market and cultural trends. CONPES also acknowledges that Colombia has limited mechanisms to address the country’s high levels of infringement, and includes proposals for amendments for Colombia’s copyright law, enforcement actions and new functions for DNDA. If carried through, the impact is deemed to be significant for the Colombian online piracy landscape, ranging from the regulation of ISP liability and anti-circumvention of TPMs to specialized IPR training programs for judges and legal operators.

Ideally, the final version of the IP Policy would recommend the implementation of strict regulation and auditing of Performance Rights Organizations (PROs) so that they collect and distribute their fees in a manner that is transparent, non-discriminatory and proportional to the use of the works they represent.

**Constitutional Challenge to National Development Plan Article 181:** In May 2019, Colombia adopted law No. 1955-2019, which created the National Development Plan. Article 181 created a set of regulations for copyright and neighboring rights contracts that appear to limit the freedom of foreign rights holders to contract with local parties. For instance, in the absence of a specified term, agreements will last five years; in the absence of specification of a territory, the agreement is limited to the territory in which the contract was signed, and all contracts are limited to the uses specified by parties. In addition, contracts for forms of commercialization unknown at the time a contract is signed are void which could result in a restriction of foreign investment in Colombia. These new legal provisions could also have a negative impact on the ability of phonogram producers to manage their businesses and produce new local talent. On August 13, 2020, the Colombian Supreme Court agreed to hear the lawsuit filed by Pro Musica Colombia

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<sup>4</sup>U.S.-Colombia Trade Promotion Agreement (2012), Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-ipr.pdf>.

challenging both the substance and the approval procedure of this obstacle to the free assignment of copyright rights and neighboring rights. The procedure before the Court may last up to one year.

**Bill # 49-2020 on the “Professionalization, Entrepreneurship and Protection of the Music Industry”** was introduced before the Colombian Senate on October 6, 2020. This bill proposes the creation of a national registry of Colombian artists and musicians, among many other initiatives to promote the education of participants and right holders in the music sector. However, the Bill includes several provisions that could potentially harm the music sector and create obstacles for the development of a healthy digital marketplace for music in Colombia.

For instance, Article 8 requires music platforms to obtain an authorization from DNDA to offer music produced in Colombia. This is not only bad for the wide participation of national and foreign digital services in the sale of music, it also creates a *de facto* discrimination against Colombian musicians, authors and producers who must register before the DNDA in order to exercise their rights. Foreign musicians, authors and producers are not subject to this registration requirement. The proposal is also unprecedented and departs from standard international practice (with the notorious exception of China).

Article 10 requires Digital Music Services (DSPs) to sign contracts with *all* the artists that participated in the music promoted, commercialized, and distributed by such platforms. This proposal is irreconcilable with contractual practices in the music industry around the world, including in Colombia. DSPs are currently the predominant point of access (whether for sale or streaming) of recorded music in Colombia. Recording companies invest to produce talent and sign contracts with artists to make the music that consumers want. When the recorded music reaches the platforms, all necessary contractual arrangements for the clearance of relevant rights have already been made. Otherwise, the platform would not be able to legally offer such music for sale/streaming in Colombia.

Article 11 creates the legal power to block access to DSPs operating in Colombia without authorization from the DNDA. This provision assigns a new power to a “competent authority” to order Internet Service Providers to block access to DSPs “as a preventive measure.” Although well intended, this proposal is unhelpful to the extent it makes the availability of blocking orders dependent on whether a service has been authorized by DNDA rather than on whether a service has been licensed by right holders themselves. This aspect of the proposal should be reconsidered.

## **COPYRIGHT ENFORCEMENT IN COLOMBIA**

**Lack of coordination and expertise:** The lack of coordination among a multiplicity of investigative and judicial proceedings with competing jurisdictions, including civil and administrative authorities, leads to inefficiencies in Colombia’s enforcement of copyright. Additionally, increased resources should be dedicated to the National Police and prosecutors. Unfortunately, the DNDA, the department that is most competent in copyright-related issues, is not legally empowered to coordinate or conduct enforcement actions and the current proposals for entrusting DNDA with some enforcement powers (see Art.11 of the Bill # 49-2020 on the “Professionalization, Entrepreneurship and Protection of the Music Industry”, discussed above) do not go in the right direction. 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. IIPA is encouraged by the March 2020 decision of expanding DNDA’s jurisdictional capabilities to enforce up to 200 civil copyright-related cases yearly. However, it is not clear how this would be applied to unauthorized content distribution online and disruptive measures, including injunctions. Another example of the lack of coordination for enforcement is the several challenges to the DNDA’s authority from ISPs, which are regulated by a different agency. The “Orange Economy” (or creative economy) initiative that the new government is instituting as a major public policy through the National Development Plan needs to have a powerful component to engage authorities to more actively protect IP and the digital economy in Colombia. But again, the DNDA should lead the protection of the creative sector ecosystem and develop a conscious coordination effort.

The proposed National IP Policy identified the lack of knowledge and training in intellectual property rights among its judicial and law enforcement personnel as one of the obstacles for effective copyright enforcement. It is essential for Colombia to implement comprehensive copyright training for all relevant judicial and law enforcement at the local and regional levels.

**ISP Cooperation:** While many ISPs in Colombia are willing to cooperate with rights holders to combat online piracy, such cooperation is limited and there is no cross-industry MOU or government pressure on ISPs to cooperate more. We urge Colombia to hold public/private round tables with all stakeholders to promote cross-industry cooperation to tackle online piracy based on industry best practices and facilitate a cross-industry agreement. Colombia must follow through with legal reform to incentivize and urge cooperation by all intermediaries, including marketplaces and social media platforms, to effectively address online piracy. Specifically, the law should require intermediaries to take action against copyright-infringing websites. The U.S. government should seek high standard remedies that support today's business models of the creative industries.

**BajarYouTube Criminal Case:** In January 2020, IFPI and Pro Musica Colombia filed a criminal complaint before the Criminal Prosecutor #75 (Bogota Section) against the stream-ripping site known as "*BajarYouTube*". The administrator behind the operation of the site is a Colombian national presumably residing in the Bogota area. The case has been delayed because of the pandemic. Recently, the recording industry's local body Pro Musica Colombia urged the prosecutor in charge of the case to complete the criminal investigation.

**Y2mate Competition Case:** In August 2020, IFPI and Pro Musica Colombia filed an action before the Superintendence of Industry and Commerce (SIC) against the stream-ripping site *y2mate*, which has a significant audience in Colombia. Pro Musica is seeking a declaratory judgement and a blocking order based on the fact that *y2mate* is competing unfairly in the music market and violating several intellectual property laws. The competition authority in Colombia ordered in previous cases, the blocking of apps and websites, and its authority on the matter has never been questioned. With this case, the Colombian music industry expects to set a precedent for Colombia and the rest of the Latin American region.

**Video Game Industry Cooperation with Online Marketplace *MercadoLibre.com.co*:** Through the company's headquarters in Buenos Aires, Argentina, the video game industry is able to remove some infringing or illegal content from *Mercado Libre Colombia*, the most relevant e-commerce platform in the country.

**Video Game Industry Cooperation with local Colombian domain registrar, *Nic.co*:** This domain name registrar cooperates on the suspension and/or seizure of domain names that the police reports as used for illegal activities. Local law enforcement authorities have reported and demonstrated to industry representatives that cooperation has been established to tackle illegal online activities via .co domain name seizures and/or suspensions.

## **MARKET ACCESS**

**Law to Increase Visibility of Local Content on Video-on-Demand (VOD) Platforms:** On May 21, the Ministry of Information and Communications Technology released the final decree to regulate Article 154 of the National Development Plan, which aims to increase the visibility of local content on VOD platforms for users in Colombia. Helpfully, the final decree appears to provide a flexible and non-prescriptive approach; i.e., it allows each service provider to comply using virtually any mechanism of the platform's choosing, with no quota, and with a nine month extended timeline for implementation until February 21, 2021. U.S. motion picture industry stakeholders are currently implementing the requirement.

**Implementation of VAT on Digital Services:** Colombia Law 1819 applied 19% VAT to digital services. The law entered into force in October 2018 with a retroactive effect to July 2018. To compensate for the effects of the pandemic on the Colombian economy, the government published several executive decrees in 2020. Executive Decree # 818 of June 4, 2020 established a temporary tax relief for the music sector whereby VAT is reduced from 19% to 4%

for one year for the production of phonograms, the reproduction of sound recordings, and live shows. Colombia's actions regarding the cultural sector and the music industry have been among the best structured in Latin America and should be extended to other industries of the creative sector through the "Orange Economy" in order to generate appropriate and proportional relief effect for the local market stakeholders.