

COLOMBIA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Colombia remain on the Watch List in 2022.¹

Executive Summary: After more than a year of struggle, the Colombian economy is showing signs of recovery and the country's governmental agenda is getting back on track. However, as most commercial and industrial activities in the country have resumed, there is now a renewed need for the Colombian government to direct resources towards the enforcement of intellectual property rights (IPRs). No national anti-piracy efforts have been conducted by National Police or the Attorney General's Office. The Copyright Office (DNDA) took one recent action against an online platform providing illegally broadcasted pay-tv signals, but more coordinated and significant action to design and implement an anti-piracy national campaign is needed. This enforcement component is the missing part of President Duque's plan to support the "Orange Economy," or creative economy, that was central to his campaign² and that still remains a priority of his administration. IIPA urges Colombia, through the National Council for Economic and Social Policy (CONPES)'s implementation of a new National Intellectual Property Policy, to continue to move towards increased enforcement and a legal framework that fosters the growth of a vibrant creative economy.

Legal reforms of the past several years in Colombia failed to introduce adequate protection and enforcement mechanisms to counter the country's significant online piracy problem. The current National Planning Council, responsible for evaluating the progress of implementation of the National Development Plan, failed to mention in its updated report for 2021 any new recommendations to promote IPR protection and development, indicating the low priority it holds for intellectual property (IP) enforcement in the country.³ The lack of coordination and expertise among the country's judicial and law enforcement personnel is a major obstacle for the protection of copyrighted works in Colombia. To address these enforcement challenges, IIPA urges Colombia to empower the DNDA to coordinate and train all relevant actors on copyright and enforcement best practices. IIPA also urges Colombia to bring its regime for the protection of technological protection measures (TPMs) into compliance with the provisions of the U.S.-Colombia Trade Promotion Agreement (TPA). Colombia should reconsider amendments to its copyright law that curtail the freedom of contract of foreign rights holders and local parties, and should avoid legislation that would require DNDA's authorization for the operation of digital music platforms in the country.

PRIORITY ACTIONS REQUESTED IN 2022

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 against 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

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/2021/01/2021SPEC301HISTORICALCHART.pdf>.

²The President's plan is available at <https://idm.presidencia.gov.co/prensa/unesco-resalta-labor-de-colombia-en-la-economia-naranja-201117>.

³See <https://www.cnp.gov.co/Documents/Informe-PND.pdf>.



and circumvention devices.

- Encourage the DNDA to act expeditiously on pending filings against notorious stream-ripping sites.

Legislation and Regulation

- 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 through DNDA's implementation of Law 1915 of 2018, that TPM circumvention is not permissible for any exception or limitation under the copyright law because that would be inconsistent with the U.S.-Colombia 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.⁴
- 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, showing no improvement in the past year. According to government figures, Colombia had 7.65 million Internet subscriptions by the end of the first half of 2020.⁵ Internet usage and data traffic during the last year in Colombia increased by 30% in March 2020 and 51% in April 2020, according to local ISP's data.⁶ The Internet penetration increased to 68% of the population (from 65% in the previous year). Piracy in Colombia comes in many forms, and the number of visitors to infringing websites and online marketplaces for creative content continues to increase.

Online piracy in Colombia greatly increased due to the COVID-19 pandemic, as consumers gravitated to the online environment for video game content, including illegal e-commerce dedicated to video game products. The term "juegos" (games in Spanish) was the 14th most searched word on Google Colombia, a strong indicator of popularity for online gaming content. The audience for Spanish language infringing video game download/link sites in Colombia increased by 13% during the last year. An important piracy channel for digital video games remains the online marketplaces in Colombia, which are responsible for providing powerful commercial platforms to infringers and had an increase during the pandemic, with some platforms reporting a 26% increase in the volume of listings (products announced by users) and an increase of more than 60% in local revenue in Colombia. Online markets have become the most concerning environment for illegal activities given their replacement of physical markets and their broader coverage in the country, popularizing the purchasing of illegal products in the video game community. At the same time, the proportion of the total video game content traffic on the BitTorrent network in Colombia increased over the year, from 11% to 14%, despite a decrease in the number of users of the major torrent sites dedicated to infringing

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

⁵Ministerio 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).

⁶More information available at: <http://www.scielo.org.co/pdf/ecei/v14n28/1909-8367-ecei-14-28-26.pdf>.

video games. Additionally, the illegal video game cyberlocker landscape is much more fragmented, with major platforms and services losing audience numbers to multiple smaller services gaining traction due to their agility in evading enforcement. Colombian National Police report that online crime overall has increased by 89% since January 2021. Concurrently, in the past year, online video game piracy has increased in Colombia as the methods for accessing and commercializing illegal game products and titles become more diversified, and the lack of coordinated law enforcement efforts persists.

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. According to studies from Ether City⁷, Colombia represented 4% of Latin America's searches for pirate websites, and almost one in every four online offers for movie and television titles directed the user to illegal content and services in 2020. Piracy involving illegal streaming services for audiovisual content (TV shows and movies) is more frequent than piracy regarding live events (such as sports and news content) or torrent files. It is estimated that there are over 4 million users of illegal subscription services in Colombia.⁸

For music, the predominant forms of piracy in Colombia are stream-ripping sites and cyberlocker downloads. The most popular stream-ripping sites in Colombia are *y2mate.com* and *savefrom.net*, with each site receiving over 17.0 million visits and 8.9 million visits from Colombia, respectively, during the third quarter of 2021. (*Snapea.com* was popular during Q3 2021 but has since disabled the 'ripping' functionality on the site itself and instead encourages users to download their app). The most popular cyberlockers in Colombia are *Mega.nz*, *1fichier.com*, and *zippyshare.com*, with each site having received over 11.5 million visits, 3.4 million visits, and 1.3 million visits from Colombia, respectively, during the same period.

COPYRIGHT LAW IN COLOMBIA

Recent changes in Colombia's legal regime fall short of the tools needed to adequately protect and enforce IPRs in the face of the country's significant online piracy problem, but there is some movement in a positive direction for overall coordination. Several copyright law revisions are needed to bring Colombia into compliance with its TPA obligations. Proposed legislation in 2021 raises serious concerns for effective collection and distribution of performance rights, compounded by limitations under the Copyright Law that discriminate against holders of neighboring or related rights. IIPA encourages USTR to closely monitor proposed amendments to the Consumer Protection Act for development of useful online enforcement tools, as well as Colombia's implementation of the newly approved National Policy on Intellectual Property, which shows some promise as a possible vehicle to coordinate needed law enforcement resources.

Compliance With U.S.-Colombia TPA Obligations: 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."

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. Colombia also still must adopt statutory damages for copyright infringement as a key TPA obligation, which was the subject of a draft Bill from the DNDA in 2019 but shows no signs of progress.

⁷More information available at: <https://cet.la/estudios/cet-la/dimension-e-impacto-de-la-pirateria-online-de-contenidos-audiovisuales-en-america-latina/>.

⁸More information available at: <https://www.rcnradio.com/colombia/mas-de-cuatro-millones-de-colombianos-usan-ilegalmente-servicios-de-tv>

Regulation of performance rights and Copyright Management Organizations (CMOs): In July 2021, Bill # 153/2021 was submitted to the House of Representatives with a series of problematic provisions regarding performance rights and Copyright Management Organizations (CMOs):

- Article 40 establishes mandatory recognition by the Copyright Office of all “parallel” CMOs operating in Colombia. For many years the Colombian performance rights market has been plagued by multiple organizations acting with no transparency and no real representation of right holders, who compete unfairly in the licensing market with fully authorized CMOs. These “parallel” organizations have created confusion and misinformation in the market. In many cases, these informal organizations mislead users into making payments for the use of repertoire that is not represented.
- Article 44 prevents CMOs from setting their own tariffs and their own distribution rules and, instead, proposes to empower the Minister of Interior and Minister of Culture to conduct such fundamental tasks. This proposal is detrimental to the collective management system and to the exercise of rights by right holders that decide to become members of a collective management organization.
- Article 44(5) empowers the Government to determine collection policies and “parameters and mechanisms” for collection and distribution of rights. In practical terms, this proposal will transfer total control of CMOs to the Government, depriving rights holders of the ability to govern their own organizations.

It is imperative that the Colombian Government set a clear position against this initiative which has the potential to create significant obstacles for the development of a healthy music market in the country.

In August 2021, the Constitutional Court agreed to hear the case filed by Pro Musica Colombia (on behalf of the recording industry) against Article 3 of the Copyright Law. This provision imposes a mandatory 60-40 rule for the distribution of performance rights, limiting remunerations to 40% for owners of neighboring rights in the communication to the public of works and phonograms, while 60% of remunerations go to copyright holders for the same use. The lawsuit received a great number of supportive submissions, including submissions from the International Federation of the Phonographic Industry (IFPI), performers organizations, and the Attorney General, all of whom generally agree that the provision is not found in any other copyright law in the region and is clearly discriminatory against artists, performers, and phonogram producers without justification. IIPA also asks Colombia to amend the last paragraph in Article 3 of the 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. 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.⁹

National Intellectual Property Policy Consultation: In October 2020, the National Council for Economic and Social Policy (CONPES), a division of the National Planning Department, launched a public consultation on a proposed National Policy on Intellectual Property (*Política Nacional de Propiedad Intelectual*). The proposal acknowledges the insufficiency of Colombia’s institutional capacity to effectively manage, protect, and exploit IP rights. Colombia’s Copyright Office (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. The CONPES proposal 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. The National Planning Department approved the final document in December 2021 and it is now in force. Rights

⁹U.S.-Colombia Trade Promotion Agreement (2012), Article 16.7(1), available at <https://ustr.gov/sites/default/files/col-ipr.pdf>.

holders expect the Colombian government to begin to implement its recommendations in 2022, and to carry out implementation over the next ten years. Rights holders expect a significant impact on the Colombian online piracy landscape, ranging from anti-circumvention of TPMs to specialized IPR training programs for judges and legal operators.

Proposed Amendments to the Consumer Protection Act. Colombian lawmakers are considering a draft legal reform, number 284 of 2020,¹⁰ intended to update the Consumer Protection Act from 2011 (law n.1480) to extend the existing consumer protections and regulations for e-commerce. The draft legal reform does not mention any specific market but would provide general rules for consumer right protections that already exist but would be applied to the online environment, such as the right to accurate publicity and clear product and service information; the right to consumer privacy protection established by article 5 of the bill; and the “right to be forgotten” established by article 3 and 4 of the bill, which allows for the withdrawal from a contract within seven days and receipt of a full refund of any payments made. These reforms might help to level the playing field for legitimate content providers against certain illegal services, by providing additional legal enforcement resources to authorities. For example, consumer protection regulations would apply to the e-commerce environment in order to tackle illegal sites and marketplace users, by targeting absent or incorrect information about sellers’ identification and tax ID numbers, products’ security standards, as well as the “right to be forgotten.” Additionally, the reform would require consumer protection authority contact information on each transaction and e-commerce site, another administrative tool with the potential to expose illegal activities.

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. The Colombian Supreme Court dismissed the 2020 lawsuit filed by Pro Musica Colombia challenging this obstacle to the free assignment of copyright rights and neighboring rights. A similar challenge by the audiovisual industry is still pending.

COPYRIGHT ENFORCEMENT IN COLOMBIA

Lack of coordination and expertise: To date, Colombia’s law enforcement authorities have not developed methods to stop the widespread availability of illegal content to Colombian Internet users and ensure compliance with copyright laws and regulations. Despite the available rights and remedies in the law, enforcement levels remain low, demonstrating a tolerance for the continued operation of an illegal online market. 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. The National Police and prosecutors need increased dedicated resources. The special cybercrime unit, DIJIN (Department of Criminal Investigations and Interpol/*Dirección de Investigación Criminla e Interpol*), focuses its enforcement actions mostly on areas such as online fraud (ransomware and phishing) without pursuing further coordination to promote greater protections for the digital economy or IPR. The police and its dedicated cybercrime department, *Centro Cibernetico Virtual / CAI Virtual*¹¹, should have a specific channel to provide assistance to businesses affected by cybercrimes and to coordinate efforts. The DIJIN and CAI Virtual have an appropriate structure and skill set to handle such cases and achieve a deterrent impact in the illegal online ecosystem.

¹⁰See <http://leyes.senado.gov.co/proyectos/index.php/textos-radicados-senado/p-ley-2020-2021/2065-proyecto-de-ley-284-de-2020>.

¹¹See <https://caivirtual.policia.gov.co>.

Unfortunately, Colombia's Copyright Office (DNDA), the department that is most competent in copyright-related issues, is not legally empowered to coordinate or 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. IIPA is encouraged by the March 2020 decision to expand DNDA's jurisdictional capabilities to enforce up to 200 civil copyright-related cases yearly. However, it is still unclear how this authority will be applied in practice, and the jurisdictional panel inside DNDA has very limited resources, causing serious delays. IIPA urges the Colombian government to increase DNDA's capacity through its implementation of the National IP Policy, which recommends a better organization of government authorities to fight piracy and enforce Colombia's IP laws.

In March 2021, DNDA blocked the Internet signal from IPTV Colombia Premium,¹² which illegally broadcasted pay-tv signals. It was the first precautionary measure imposed against online piracy in DNDA's history. The government's "Orange Economy" (or creative economy) initiative 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, including a leadership role for the DNDA to coordinate the protection of the creative sector ecosystem.

The proposed National IP Policy identified the lack of knowledge and training in IPRs 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, as well as training of customs officials at the border to identify and seize illegal streaming devices (ISDs).

Internet Service Provider (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.

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.

MARKET ACCESS

Proposed Tax on Digital Services and Platforms. The DIAN – *Dirección de Impuestos y Aduanas Nacionales* (National Tax and Customs Directorate) – recently presented to congress Bill 594/2022C, a new tax reform measure¹³ that may directly affect the digital economy ecosystem by raising taxes over digital services, including game platforms. The tax reform is currently under discussion in congress but it is expected to be finalized before end of 2021 and implemented in 2022, as a recovery measure and an aid to sustain social programs provided by the government after the COVID-19 pandemic.

¹²More information available at: <https://www.asuntoslegales.com.co/actualidad/se-impuso-primer-medida-cautelar-contra-pirateria-online-en-la-historia-de-colombia-3136271>.

¹³More information available at: <http://leyes.senado.gov.co/proyectos/images/documentos/Textos%20Radicados/proyectos%20de%20ley/2020%20-%202021/PL%20439-21S%20-%20594-21C%20Reforma.pdf>.

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.