

July 19, 2024

VIA REGULATIONS.GOV-DOCKET USTR-2024-0009

Laura Buffo
Chair of the Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th St NW
Washington, DC 20508

RE: IIPA's Comments Regarding Request for Comments on the Americas Partnership for Economic Prosperity—Trade Track, 89 Fed. Reg. 51935 (June 20, 2024)

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to submit these comments in response to the above-referenced Notice requesting public comments on the Americas Partnership for Economic Prosperity (APEP)-Trade Track. IIPA's comments primarily focus on ensuring adequate and effective protection and enforcement of copyright in the region, which is a critical issue related to trade and investment in the Americas that is consistent with the mission and scope of the Partnership. Finally, IIPA comments on customs and trade facilitation, asking the U.S. government to ensure that APEP members refrain from imposing duties on electronic transmissions, which would significantly harm the creative industries and threaten U.S. jobs.

A. Description of the IIPA and its Members

IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve copyright protection and enforcement abroad and to open foreign markets closed by piracy and other barriers. Members of IIPA include: Association of American Publishers (www.publishers.org), Entertainment Software Association (www.theesa.com), Independent Film & Television Alliance (www.ifta-online.org), Motion Picture Association (www.motionpictures.org), and Recording Industry Association of America (www.riaa.com).

Collectively, IIPA's five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and/or distributed by IIPA-member companies include video games for consoles, handheld devices, personal computers, and online; motion pictures and television programming distributed in all formats (including cinema, television, online, mobile, DVD, etc.); music recorded in all formats (from digital files to CDs and vinyl) for streaming and other online services, as well as broadcasting, public performance, and synchronization in audiovisual materials; and fiction and non-fiction books,

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educational, instructional and assessment materials, and professional and scholarly journals, and databases.

In December 2022, IIPA released the latest update of its comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2022 Report*, prepared by Secretariat Economists (2022 Report). Based on 2018-2021 data, the 2022 report in part shows the impact of the COVID-19 pandemic on the creative industries, which in 2020 had difficulty maintaining previous levels of employment and exports. However, in 2021, the copyright industries helped lead the U.S. economy back into strong economic growth and throughout the entire period covered by the 2022 Report, the copyright industries maintained their important role in generating value and supporting employment in the U.S. economy. According to the 2022 Report, even with the COVID-19 pandemic, in 2021, the “core” copyright industries in the United States: (i) generated over \$1.8 trillion of economic output; (ii) accounted for 7.76% of the entire economy; and (iii) employed approximately 9.6 million workers, which is 4.88% of the entire U.S. workforce and 5.53% of total private employment in the United States.¹ The jobs created by these industries are well-paying jobs; for example, copyright industry workers earn on average 51% higher wages than other U.S. workers.

The report also broke new ground by measuring the copyright industries’ significant contributions to the U.S. digital economy, as that concept was defined by the federal government. In 2021, the core copyright industries accounted for 52.26% of the U.S. digital economy and 48.1% of U.S. digital economy’s employment, even though the government’s digital economy definition does not encompass the full range of the copyright industries’ digital activities. In addition, according to the 2022 Report, the core copyright industries outpaced the U.S. economy, growing at an aggregate annual rate of 6.15% between 2018 and 2021, while the U.S. economy grew by 1.76%. When factoring in other industries that contribute to the copyright economy (which together comprise what the 2022 Report calls the “total” copyright industries), the numbers are even more compelling. Additionally, the 2022 Report highlights the positive contribution of selected copyright sectors to the U.S. overall trade balance. Given the importance of digital delivery to the copyright-based industries, this sector has the potential to multiply its export revenues if our trading partners provide strong copyright-protective environments. In 2021, these sectors contributed \$230.3 billion in foreign sales and exports, exceeding that of

¹ See Secretariat Economists, *Copyright Industries in the U.S. Economy: The 2022 Report* (December 14, 2022) available at <https://iipa.org/reports/copyright-industries-useconomy/>. See also Presidential Proclamation by President Joe R. Biden Jr. on World Intellectual Property Day, 2021, April 26, 2021, stating “When the pandemic hit, singers, songwriters, and artists from all across America used their talents to lift us up, and to inspire us to support one another in these difficult times. Copyright protection rewards them for their creativity and allows them to continue to create”, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/23/a-proclamation-on-world-intellectual-property-day-2021/>; U.S. Patent and Trademark Office’s Office of the Chief Economist Economic Note, *Employment in IP-intensive industries during the COVID-19 pandemic and beyond*, No. 103, March 2023, reporting “The pandemic employment recovery for copyright-intensive industries was notably different. In the first few months of the pandemic, copyright-intensive industries experienced job losses that were slightly larger than those in utility patent-intensive industries, but less than all other groups. During the remainder of 2020, employment in copyright-intensive industries followed the same trend as trademark-intensive and non-IP intensive industries. However, from January 2021 forward, job growth in copyright-intensive industries outpaced all others.” <https://www.uspto.gov/sites/default/files/documents/oce-ip-econ-note-103.pdf>.

many other industry sectors, including chemicals, pharmaceutical and medicines, agricultural products, aerospace products and parts, and food and kindred products.

Studies such as the 2022 Report amply demonstrate the contribution of creators, producers, workers, and the creative industries that support them, to the American economy. They also highlight what is at stake if those creators, producers, workers, and industries face the additional hurdles and costs associated with copyright piracy, other trade barriers, and market access concerns, particularly in the digital environment.

B. The Scope and Mission of APEP Should Include Ensuring Members Provide Adequate and Effective Protection and Enforcement of Copyrights

The Notice cites APEP leaders as identifying several cross-cutting priorities, including strengthening regional competitiveness and integration. Ensuring adequate and effective protection and enforcement of intellectual property rights, including copyrights, is a key element of strengthening regional competitiveness and integration. As the President highlighted in his APEP statement, APEP members represent roughly 90% of the Western Hemisphere’s GDP and nearly two thirds of its people.² APEP represents a critical opportunity to improve copyright protection and enforcement in the region, which would support APEP’s mission by strengthening regional competitiveness and integration and fostering shared prosperity and good governance.

Promoting copyright protection and enforcement has long been a part of U.S. trade and economic diplomacy and remains a critical feature of the U.S. legal, policy, and commercial architecture that such international engagement has prioritized. For example, at the U.S. government’s flagship investment event, the 2024 SelectUSA Investment Summit on June 25, announcing the newly commissioned U.S. Economic Diplomacy Action Group (EDAG), Secretary of State Anthony J. Blinken stated, the United States offers the optimal conditions for foreign investment because it has “a transparent, independent legal system with the strongest intellectual property protections in the world” and that “[w]hen we raise labor standards, when we raise environmental standards, when we take steps to protect intellectual property and create a level playing field, we’re not just supporting U.S. companies and workers. We’re helping every country, every business, every worker that seeks a fair, sustainable, and competitive market.”³

As the U.S. Secretary of State and EDAG members, including the U.S. Trade Representative, recognized, strong protections for copyright and other intellectual property rights are critical for creating a fair, sustainable and competitive market.⁴ Accordingly, advancing the

² See statement by President Joe R. Biden Jr. on the Americas Partnership for Economic Prosperity, January 27, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/27/statement-by-president-joe-biden-on-the-americas-partnership-for-economic-prosperity/>.

³ Remarks of Secretary of State Anthony J. Blinken on Trade at the SelectUSA Investment Summit, June 25, 2024, available at <https://www.state.gov/secretary-antony-j-blinken-at-the-2024-selectusa-investment-summit/>.

⁴ See 2024 Special 301 Report, Office of the United States Trade Representative, Executive Office of the President of the United States, stating “A priority of this Administration is to craft trade policy in service of America’s workers, including those in innovation- and creativity-driven export industries” and “USTR works to protect American innovation and creativity in foreign markets employing all the tools of U.S. trade policy,” available at <https://ustr.gov/sites/default/files/2024%20Special%20301%20Report.pdf>.

stated priority of strengthening regional competitiveness and integration among APEP members must necessarily include ensuring APEP members (i.e., Barbados, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Mexico, Panama, Peru, and Uruguay) provide adequate and effective protection and enforcement of copyrights for both U.S. and local creators and investors.

Furthermore, ensuring adequate and effective protection and enforcement of copyright supports digital trade. The copyright sector, more than any other in the U.S. economy, has moved to meet the demand for content and digitally deliver its products and services across borders, inextricably linking “digital trade” with trade in copyright-protected material. As a result, the U.S. copyright industries, as much as any industry, depend on strong rules and practices for digital trade. To the extent that digital trade discussions are included within the scope of the APEP, the creative industries’ concerns should be at the forefront of any such discussions, and digital piracy is the single-most damaging barrier to digital trade faced by the creative industries.

The adequate and effective protection and enforcement of copyright is the foundation on which both U.S. and local creators and investors base their production and distribution activities in APEP countries. Accordingly, ensuring adequate and effective protection and enforcement of copyright is critical for the growth and sustainability of the creative industries, which already make significant economic contributions to APEP members’ economies.⁵ A 2021 report by the World Intellectual Property Organization (WIPO) summarizing several studies that used a standardized WIPO methodology to measure the economic contribution of the copyright industries in the region highlighted that the copyright related industries accounted for nearly 6% of employment in Colombia, over 4% in Peru, and over 3% in Ecuador.⁶ In Panama, the copyright industries accounted for just over 3% of employment and contributed over 6% of GDP.⁷ In Mexico, the copyright industries accounted for over 10% of employment and just over 4% of GDP.⁸

While the WIPO report found that most economies in Latin America, Central America, and the Caribbean had copyright shares of GDP below the global mean, the report concluded that there was “substantial potential in the copyright industries to support the necessary shift of industrial production into medium- to high-technology capital inputs and catch up with the developed economies.”⁹ In Mexico, the report similarly suggested that “Mexico has substantial underutilized opportunity to increase the share of its copyright industries in GDP to support its

⁵ Recording Industry Association of America, “Year-End 2023 RIAA U.S. Latin Music Revenue Report” reporting “Latin music in the U.S. has increased in popularity and value over the last eight years, outpacing overall recorded music each year across this period of strong growth. In 2023, the genre hit its highest mark yet at \$1.4 billion, representing 16% growth over 2022. Adjusted for inflation, Latin music market revenues in 2023 are now 14% above the previous peak in 2005,” <https://www.riaa.com/reports/year-end-2023-riaa-u-s-latin-music-revenue-report-informe-de-fin-del-ano-2023-de-riaa-sobre-ingresos-de-musica-latina-en-estados-unidos/>.

⁶ https://www.wipo.int/export/sites/www/copyright/en/docs/performance/overview_results_2021.pdf at 57.

⁷ See id.

⁸ See id. at 58.

⁹ See id. at 62.

continuing shift into medium- to high-technology capital goods and bring its economic performance more in line with its North American neighbors.”¹⁰

For the copyright industries to flourish in APEP countries, these countries need to: (i) have copyright laws with high standards of protection; (ii) provide efficient and transparent copyright enforcement and sound legal structures to enable healthy licensing of works and recordings; and (iii) eliminate market access barriers and unfair competitive practices. These standards will help APEP members develop, nurture, and enjoy the fruits of their own cultural and creative output. As a baseline, the U.S. government should ensure that each APEP member joins and fully implements the standards of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (collectively the WIPO Internet Treaties), which set the global minimum standards for providing copyright holders with the full panoply of exclusive rights in the digital networked environment. In addition, several APEP members, including Canada, Chile, Colombia, Costa Rica, Ecuador, Mexico, Panama, and Peru, are signatories to free trade agreements with the United States that include obligations to improve copyright protection and enforcement and eliminate market access barriers. The U.S. government should ensure these members fully meet their obligations to the United States.

Unfortunately, several APEP countries have inadequate copyright and related laws; inadequate and ineffective enforcement of existing copyright and related laws; and market access barriers that inhibit the licensing and dissemination of copyrighted works and sound recordings. These shortcomings enable parties to engage in piracy, some on a commercial scale, because it is a high-profit, low-risk enterprise, unencumbered by the considerable costs associated with either producing and licensing works, or protecting them against theft.¹¹ IIPA highlights below serious concerns with copyright protection and enforcement, and other market access barriers, in the following APEP members: Canada, Chile, Colombia, Ecuador, Mexico, Peru, and Uruguay.

Canada

The digital marketplace for copyrighted content in Canada continues to face challenges in realizing its full potential due to competition from illicit online sources. In 2022, 22.4% of Canadians accessed pirate music services.¹² According to the Government of Canada’s own study published in May 2018, more than one-quarter (26%) of content consumers reported having “consumed” (downloaded or streamed or accessed) illegal online content in the previous three-month period, and movies (36%) and TV shows (34%) were among the forms of content

¹⁰ See *id.*

¹¹ See Alliance for Creativity and Entertainment (ACE) “SimpleTV Joins ACE, Strengthening Fight Against Piracy in Latin America, February 24, 2024; reporting “In 2021, the potential impact of digital piracy on the Latin American economy was an estimated \$733 million USD per year” and “[in 2023], ACE shut down 23 major piracy operations in Latin America, removing 129 domains that collectively attracted nearly 87 million average monthly visits. <https://www.alliance4creativity.com/news/simpletv-joins-ace-strengthening-fight-against-piracy-in-latin-america/>; ACE “ACE Shuts Down Latin America’s Largest Illegal Streaming Service”, July 10, 2023, reporting the shutdown of Peru-based Cuevana3 illegal streaming service whose network “of more than 20 domains attracted more than 800 million visits in two years and made a vast library of infringing film and television content available in multiple formats” <https://www.alliance4creativity.com/news/ace-shuts-down-latin-americas-largest-illegal-streaming-service/>.

¹² See IFPI, 2022 Music Consumer Study.

most likely to be illegally “consumed.”¹³ Canadians made 2.6 billion visits to piracy sites in 2018, and the nature of this piracy continues to evolve.¹⁴ In 2020, 76% of Canadians’ visits to sites used for online piracy were to non-peer-to-peer (P2P) sites, including streaming sites and cyberlocker (host) sites, up from 39% in 2015.¹⁵

Canada’s legitimate digital marketplace for copyright materials remains hampered by widespread infringement, including: stream-ripping services that undermine legitimate music streaming, video-on-demand (VOD), and download offerings; subscription piracy services (infringing paid Internet Protocol Television (IPTV) and VOD services) and the ever-increasing Canadian re-sellers of these services; streaming sites and other online sources for unauthorized movies and TV shows; piracy devices (PDs) and apps, readily available both online and in the retail market, that suppress demand for legitimate digital streaming and VOD services; and the sale of devices and software for circumventing access controls on video game consoles. Canadian upstream piracy providers are also actively engaged in the theft of telecommunication signals that provide content to other subscription piracy services. The country has made some progress in shedding its reputation as an online piracy haven, but too many Canadian Internet businesses allow their services to be abused by pirate operators, highlighting the fact that interindustry cooperation must be a priority. The Canadian government at all levels continues to allocate insufficient resources and strategic priority to the enforcement of copyright laws, especially online, and significant market access barriers continue to impede U.S. film and TV producers and distributors.

The mandated parliamentary review of Canada’s Copyright Act that was initiated in 2017 should have been a vehicle for addressing many of these problems. Instead, urgent and long-standing problems continue, including the decline of the educational publishing market because of the fair-dealing exception for education, lack of effective remedies and legal incentives to combat growing online piracy, an unjustified radio royalty exemption, a wholly ineffective “notice-and-notice” system, a globally anomalous exception for user-generated content (UGC), and weak enforcement. However, the shortcomings in Canada’s current copyright regime remain unaddressed. IIPA is encouraged that despite the absence of specific legislation, Canadian courts have issued and upheld injunctive relief against intermediaries whose services are used to infringe copyright. In addition, Canada should remedy its deficient online copyright liability regime, which lags behind global norms.

Significant market access issues also continue to impede participation by U.S. film and TV producers and distributors in the Canadian market. Unfortunately, Canada has not made progress on certain long-standing market access issues as part of its United States-Mexico-

¹³ See Shifting Paradigms Report of the Standing Committee on Canadian Heritage” (“Heritage Report”), available at https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc_cid=d88779154e&mc_eid=0183856a67.

¹⁴ See id.

¹⁵ April 2018, available at <https://www.sandvine.com/hubfs/downloads/reports/internet-phenomena/sandvine-spotlight-video-piracy-in-canada.pdf>; Sandvine, The State of Affairs: A Spotlight on Video and Television Piracy Worldwide, available at <https://www.sandvine.com/blog/the-state-of-affairs-a-spotlight-on-video-and-television-piracy-worldwide>.

Canada Agreement (USMCA) implementation efforts and is considering additional measures that would discriminate against foreign online digital service providers. Some particularly concerning market access issues include television content quotas, non-Canadian signal and service restrictions, broadcasting investment limitations, restrictions under the Quebec Cinema Act, on-going efforts related to regulating online harmful content, and the implementation of the Online Streaming Act.

Canada committed in the USMCA to provide full national treatment for U.S. sound recordings. IIPA applauds the steps Canada has taken to extend full national treatment to all U.S. repertoire on July 1, 2020, without exceptions, limitations, or reservations. In addition, in response to the United States' adoption of the Music Modernization Act on April 29, 2020, Canada amended the Ministerial Statement of Limitations, removing restrictions on eligibility, making pre-1972 U.S. recordings immediately eligible for Canadian royalties.

However, to ensure adequate and effective protection and enforcement of IP rights, Canada's government should address the following shortcomings in Canada's copyright and enforcement framework:

- Prioritize enforcement against online piracy (including stream ripping), the operation and sale of subscription piracy services, and the trafficking in PDs, apps, and circumvention software tools and modification services.
- Provide the Royal Canadian Mounted Police (RCMP), Crown Prosecutors, and local law enforcement with the resources and training required to implement enforcement priorities.
- Address the crisis in the educational publishing market by clarifying that the fair-dealing exception for "education" does not apply to educational institutions when the work is commercially available.
- Harmonize remedies for collective management organizations (CMOs) under the Copyright Act.
- Counter online piracy in Canada by strengthening legal incentives for Internet service providers (ISPs), hosting providers, and all other intermediaries to cooperate with copyright owners, in accordance with international best practices.
- Ensure that recorded music producers and performers are fully compensated for all forms of radio broadcasting of their recordings, including by eliminating the radio royalty exemption.
- Eliminate, or at least clarify, the UGC exception, in accordance with parliamentary recommendations and Canada's international obligations.
- Swiftly take up recommendations IIPA has noted in several submissions, including avoiding introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing.
- Reject Bills C-244 and C-294 that allow circumvention of a technological protection measure (TPM) in certain circumstances.

- Provide full rights for communication to the public and public performance of sound recordings.
- Ease long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada's USMCA commitments.
- Ensure that the CRTC's implementation of the Online Streaming Act does not impose undue burdens or obligations on non-Canadian digital services.

IIPA's country report on Canada, submitted to USTR as part of IIPA's 2024 Special 301 submission, provides a full description of the deficiencies with Canada's legal and enforcement regimes.¹⁶

Chile

The digital market for creative content in Chile is teeming with infringing materials, a problem exacerbated by a weak legal framework and inadequate dedication and coordination of government resources for online enforcement. Chile's copyright law, which more than ten years ago established what at the time was an experimental notice-and-notice online piracy response system, has utterly failed to deter infringement online. The law was adopted six years after the 2004 entry into force of the U.S.-Chile Free Trade Agreement (FTA), and yet it left important FTA obligations unmet, such as protections against circumvention of TPMs and deterrent remedies against infringement, among other deficiencies.

Chile needs to do more to address its piracy problem, including the reform of its online liability framework, which involves a completely ineffective takedown procedure, and the creation of a centralized authority responsible for all copyright-related matters. Chile should also utilize new enhanced legal powers granted by Law #21,577 and Law #21,595, enacted in June and August 2023 respectively, to prosecute crimes related to organized crime. These laws provide more efficient mechanisms for the prosecution of crimes, such as computer-related crimes and violations against intellectual and industrial property. If used properly, these new laws may assist in prosecuting acts of piracy. The Government of Chile should amend the copyright law to address deficiencies in the U.S.-Chile FTA obligations, as well as other needed amendments. Finally, Chile should avoid enacting legislative proposals on screen quotas that would discriminate against non-Chilean audiovisual works and would contravene the U.S.-Chile FTA.

To ensure adequate and effective protection and enforcement of IP rights, Chile's government should address the following shortcomings in Chile's copyright and enforcement framework:

¹⁶ IIPA's 2024 Special 301 submission is available to the public via www.regulations.gov, as well as our website, at <https://www.iipa.org/reports/special-301-reports/>. The 2024 Canada country report from IIPA's Special 301 submission is available at <https://www.iipa.org/files/uploads/2024/01/CANADA-2024.pdf>.

- Create a centralized copyright authority responsible for all copyright-related matters, such as registration and enforcement, to coordinate the promotion, administrative enforcement, and public policies related to copyrights and neighboring rights.
- Utilize the enhanced legal powers granted by Law #21,577 and Law #21,595 to prosecute crimes related to organized crime and heighten the criminal liability of legal entities in committing criminal offenses.
- Improve and update Chile’s legal framework for ISP liability and online copyright enforcement significantly to foster the development of a healthy digital marketplace.
- Enact amendments to address deficiencies in Chile’s copyright law related to the U.S.-Chile FTA.
- Abandon the pending amendment to Article 24-H of the Telecommunications law, which creates an unlimited net neutrality principle, with no distinction between legal and illegal content.
- Adopt other needed legal reforms to effectively fight piracy in Chile.
- Avoid enacting legislative proposals on screen quotas that would discriminate against non-Chilean audiovisual works and would contravene the U.S.-Chile FTA.
- Protect the successful Chilean collective management system and discourage or withdraw legislative proposals to amend it.
- Refrain from reducing copyright infringement penalties currently provided in the IP Law.
- Ensure that the eventual overhaul of the country’s constitution and other laws adequately ratifies the country’s international, multilateral, and bilateral commitments to strong copyright protection, enforcement, and equitable market access.

IIPA’s country report on Chile, submitted to USTR as part of IIPA’s 2024 Special 301 submission, provides a full description of the deficiencies with Chile’s legal and enforcement regimes.¹⁷

Colombia

With the recent growth of Colombia’s creative economy, there is a critical need for the Colombian government to direct resources towards the enforcement of IP rights. Unfortunately, Colombia’s enforcement framework is not up to the challenge of the country’s online piracy problems. 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. IIPA also urges Colombia to bring its regime for the protection of TPMs into compliance with the provisions of the U.S.-Colombia Trade Promotion Agreement (TPA) and to reconsider amendments to its copyright law that curtail the freedom of contract of foreign rights holders and local parties.

¹⁷ IIPA’s 2024 Special 301 submission is available to the public via www.regulations.gov, as well as our website, at <https://www.iipa.org/reports/special-301-reports/>. The 2024 Chile country report from IIPA’s Special 301 submission is available at <https://www.iipa.org/files/uploads/2024/01/CHILE-2024.pdf>.

To ensure adequate and effective protection and enforcement of IP rights, Colombia’s government should address the following shortcomings in Colombia’s copyright and enforcement framework:

- Implement a specialized training program for judges and law enforcement on copyright and industrial property protection and enforcement.
- Devote law enforcement and specialized prosecutorial resources to combatting online and physical piracy, with coordinated operations and actions to adequately protect IP.
- Ensure ISPs are incentivized to cooperate with rights holders to address online piracy.
- Encourage the Colombian Copyright Office (DNDA) to take effective action against notorious piracy and stream-ripping sites.
- Reject proposed Bill #PL-189-2022C (*Ley de la Música*).
- Repeal Articles 3 and 183 of the Colombian Copyright Law.
- Draft legislation that allows rights holders to file actions in the appropriate authority against unidentified infringers.
- Clarify that TPM circumvention is not permissible for any exception or limitation under the copyright law.
- Reconsider profit requirements for retransmission, annual revisions of exceptions and limitations, and statutory damages through public hearings in the Colombian Congress.

IIPA’s country report on Colombia, submitted to USTR as part of IIPA’s 2024 Special 301 submission, provides a full description of the deficiencies with Colombia’s legal and enforcement regimes.¹⁸

Ecuador

Ecuador’s 2016 *Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación* (Code of the Social Economy of Knowledge, Creativity, and Innovation, COESCI) established numerous exceptions and limitations to copyright, enumerated in Article 211 (“Fair Use”) and Article 212 (“Acts that do not require authorization for use”). These exceptions are unduly broad and undermine important protections for rights holders. They are also inconsistent with the three-step test governing exceptions and limitations in Article 9(2) of the Berne Convention, Article 13 of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the corresponding provisions of the WIPO Internet Treaties, each in force in Ecuador since 2002.

Unfortunately, November 2020 regulations by *Servicio Nacional de Derechos Intelectuales* (National Service for Intellectual Rights, SENADI) implementing some of

¹⁸ IIPA’s 2024 Special 301 submission is available to the public via www.regulations.gov, as well as our website, at <https://www.iipa.org/reports/special-301-reports/>. The 2024 Colombia country report from IIPA’s Special 301 submission is available at <https://www.iipa.org/files/uploads/2024/01/COLOMBIA-2024.pdf>.

COESCI's provisions did not address the creative industries' most serious concerns regarding the overbroad exceptions. Instead, the regulations imposed numerous new obligations on CMOs that go beyond the regional standards and, in practice, mandate CMOs to invest significant time and resources on attending multiple requests and inquiries from SENADI. *Secretaría Nacional de Educación Superior, Ciencia, Tecnología e Innovación* (National Secretariat for Higher Education, Science, Technology, and Innovation, SENESCYT), the umbrella entity overseeing SENADI, is reportedly working on a legislative proposal to amend some of COESCI's exceptions. IIPA urges SENADI and SENESCYT to reverse the most damaging provisions in COESCI and to bring the law into compliance with the country's international obligations. Finally, in addition to the concerns with COESCI, SENADI's decisions, including regarding the use of sound recordings by satellite and cable operators such as the state-owned *Corporación Nacional de Telecomunicaciones* (National Telecommunications Corporation, CNT), are not enforced due to an unnecessarily complicated administrative appeal system that is abused by operators.

Ecuador's attempt to transplant a modified version of the U.S. fair use provision in the COESCI law creates an unacceptable level of uncertainty and risk in the country's copyright ecosystem. COESCI's Article 211 is broader than the U.S. provision on which it is purportedly based, because it adds a fifth factor, described as "use and enjoyment of other fundamental rights." This factor, essentially a catchall, creates great uncertainty because it is not clear what constitutes "other fundamental rights" and how the factor will relate to the other four. Furthermore, while decades of case law and the principle of *stare decisis* enable U.S. courts to appropriately interpret and confine Section 107 of the U.S. Copyright Act, a similar environment does not exist in Ecuador. As a civil law country, its courts are not bound by judicial precedent. Furthermore, no body of case law exists within the legal system in Ecuador to which a judge may refer in evaluating whether the contested use is indeed fair. Also, although Article 211 indicates it is to be applied in accordance with international treaties to which Ecuador is a party, the provision is not in accord with international law due to the broad, unclear fifth factor and the lack of any case law to appropriately confine the exception and all of its factors. Finally, Article 211 may further negatively impact online enforcement in Ecuador because Internet platforms may be less willing to take down infringing content if they construe the fifth factor broadly and decide that unauthorized access to protected works is a fair use pursuant to "enjoyment of other fundamental rights" recognized in Ecuador (e.g., right to practice sports, right to education, right to communication, etc.). Thus, as written, the provision is outside the bounds of the three-step test, the international standard that confines exceptions and limitations to copyright, because it conflicts with the normal exploitation of works, unreasonably prejudices rights holders' legitimate interests, and is not limited to "certain special cases."¹⁹

Making matters worse, Article 211 includes language akin to a fair use savings clause that suggests that if a use that is generally regulated by a specific exception does not meet the requirements of such exception, it may still be considered under the fair use provision. The fair

¹⁹ See Berne Convention, Art. 9 ("Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."); see also WTO TRIPS Agreement, Art. 13 (1994); WIPO Copyright Treaty (WCT), Art. 10 (1996); and, WIPO Performances and Phonograms Treaty (WPPT) Art. 16 (1996)

use savings clause applies to each enumerated exception in the law, effectively broadening each exception beyond the scope of the three-step test. In other words, if the use does not meet one of these exceptions, then the fair use savings clause allows the exploiter to try and qualify under the overly broad fair use provision, with all of the problems identified above. Therefore, for all of the reasons discussed above, Article 211 should be removed.

COESCI's list of other exceptions and limitations is extensive. Several exceptions allow widespread uses that clearly fall outside the confines of the three-step test and are inconsistent with U.S. law, including: exception 9 that allows libraries and archives to reproduce a copyrighted work to: (1) deliver to another library or archive that may, in turn, make its own additional copy for purposes of lending to its users or preserving the copy it received; and (2) replace the lost or destroyed copy of the requesting library or archive; exception 11 allowing broadcasters to make ephemeral copies for their own transmissions and keep them for a period of five years; exception 24 allowing websites, without the permission of rights holders, to reference or link to online sites, as well as to reproduce and store content when necessary for the operation of a search site provided there is no "violation" of the protected content; exception 26 allowing small businesses—a category that due to its broad definition covers the vast majority of businesses open to the public—to freely communicate works to the public; exception 27 eliminating music rights holders' ability to license to private transportation companies for the public performance of their works and recordings, especially coaches and "*busetas*," which are popular forms of transportation in the region and a non-negligible market for music rights holders; and exception 30 allowing "community radios," which in practice operate as commercial radios, to communicate works to the public without permission from rights holders or remuneration.²⁰

In addition to these exceptions, other problematic COESCI provisions include compulsory licenses and various rights and "default" clauses to govern contracts within the creative sectors, unless those contractual provisions are expressly excluded, and sometimes even despite such an exclusion. For instance, Article 217 establishes a compulsory license for the translation of literary works that are not available in Spanish or other local languages in the national market. Although Articles 69 and 70 of SENADI's regulations require a seven-year period of unavailability and that the party who seeks the license show there is a need for the work among "the general public or for school or university teaching," this language is inadequate to appropriately cabin the provision's scope of application. COESCI's Article 221 imposes a mandatory interpretation of the law in favor of the author if a conflict exists regarding related rights. Such provisions are discriminatory and do not fulfill their intended purpose of increasing protection for authors and composers. In today's world, copyright owners and related rights holders, including singers and musicians, need equal protection to secure the normal exercise of their rights according to their contributions in the production and distribution chain of music and other protected content.

²⁰ See the 2023 Ecuador country report from IIPA's 2023 Special 301 submission for more information on COESCI's exceptions and limitations, available at <https://www.iipa.org/files/uploads/2023/01/2023ECUADORSPEC301.pdf>.

Finally, in addition to the concerns with COESCI, SENADI’s decisions, including regarding the use of sound recordings by satellite and cable operators such as the state-owned *Corporación Nacional de Telecomunicaciones* (National Telecommunications Corporation, CNT), are not enforced due to an unnecessarily complicated administrative appeal system that is abused by operators. A full description of the deficiencies with Ecuador’s legal and enforcement regimes can be found in IIPA’s full 2024 Special 301 submission.²¹

Mexico

Since 2020, the Government of Mexico has made significant improvements to the country’s IP regime as part of the government’s endeavors to implement its obligations under the USMCA, which entered into force on July 1, 2020. Two significant 2020 reforms include the addition of protection against the circumvention of TPMs and protection for rights management information (RMI)—key components of the WIPO Internet Treaties that gave rise to content delivery models like streaming and on-demand services. The inclusion of notice and stay down obligations on online service providers was a third important reform introduced in 2020.

These developments are very positive, but insufficient because Mexico is still facing a long-standing problem of lack of adequate application and enforcement of its current laws and regulations, affecting legal certainty and security in the business environment. The lack of proper enforcement of current laws, in the absence of other key updated provisions or implementing regulations, has significantly hampered the growth of the digital marketplace in Mexico. One of the main problems in Mexico is not only the lack of implementing regulations for the 2020 reforms and other needed legislation, but also the lack of the rule of law. Obstacles also remain in compliance with high-level international standards for the recognition and protection of IP rights, particularly those related to the digital environment and enforcement procedures. Moreover, Mexico's implementation of the WIPO Internet Treaties and the USMCA, including reforms to the Federal Copyright Act and the Federal Criminal Code, is endangered by a lack of implementing regulations and three constitutional challenges, which have generated a chilling effect on practical implementation of the reforms. IIPA commends the Mexican Supreme Court decision in May 2024 to uphold the 2020 reforms, including with respect to TPMs and notice and stay down, and urges Mexico to implement those reforms, including to issue necessary regulations, without delay.

Enforcement issues in Mexico are also a concern. For a long time, criminal enforcement activity pertaining to IP infringement in Mexico has been uncoordinated and generally weak, slowed by procedural and structural deficiencies, a lack of prosecutorial initiative, and a lack of adequate resources. Unfortunately, the legal reforms of 2020 did not fully address these deficiencies. In 2023, the prosecutor and agencies responsible for initiating criminal investigations reinstated their previous criteria to reject complaints of IP infringements without proof of direct economic benefit. Civil cases in Mexico are expensive and difficult for rights holders (especially small businesses) to undertake and are slowed by procedural hurdles. The IP

²¹ IIPA’s 2024 Special 301 submission is available to the public via www.regulations.gov, as well as our website, at <https://www.iipa.org/reports/special-301-reports/>.

legal regime in Mexico is still missing some of the basic tools to address online infringements, including cooperation among rights holders, website owners, and service providers. For example, the current law specifies only general liability instead of a clear principle of secondary liability for those inducing or promoting copyright infringement, which would incentivize ISPs to take preventive actions.

To ensure adequate and effective protection and enforcement of IP rights, Mexico's government should address the following shortcomings in Mexico's copyright and enforcement framework:

- Develop and adopt a high-level national anti-piracy plan to target major online piracy and counterfeiting operations and to coordinate federal, state, and municipal enforcement activities, which has been one of IIPA's long recommended enforcement measures.
- Provide the *Instituto Mexicano de la Propiedad Industrial* (Mexican Institute of Industrial Property, IMPI) and *Instituto Nacional del Derecho de Autor* (Mexican Copyright Office, INDAUTOR) with sufficient resources, improved coordination with the Federal Police, and coordinated investigative and other support from the Scientific Police (in the National Guard).
- Encourage prosecutors to take ex officio actions against online piracy and hard copy piracy, focusing on online service operators and seeking deterrent sentences, including incarceration and financial penalties.
- Apply a coherent standard of "commercial scale" based on international practice, permit the initiation of criminal investigations against counterfeiting and piracy, and investigate and prosecute IP infringement cases absent proof of actual lost profits.
- Provide training to improve IP rights expertise in the judiciary.
- Improve enforcement against theatrical camcord piracy.
- Publish the implementing regulations of the 2020 Copyright Act amendments and reject interpretations of those amendments that would impede the positive progress made by them.
- Amend the Copyright Act to address issues not resolved in the 2020 amendments.
- Provide incentives for ISPs to cooperate in enforcement against online copyright infringement, including applying the reform of the 2020 Copyright Law to provide secondary liability for copyright infringement.
- Clarify the scope of the Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities, in a manner that brings greater legal certainty for all stakeholders.
- Reject the Bill to Amend the Federal Copyright Act related to "Literary Translation Contracts."
- Address issues in the General Law of Libraries, such as requiring the delivery of works within 90 calendar days following the date of their commercial distribution.

- Reject amendments to the Copyright Law that would establish a remuneration system through a “Private Copy Levy” (PCL).
- Reject any interpretation of the Copyright Law that would interfere with exclusive rights, including introduction of a making available remuneration right for performers in addition to the already existing and sufficient exclusive right.
- Reject policies proposing Local Content Quotas.
- Reject discriminatory investment obligations in the audiovisual industry.

IIPA’s country report on Mexico, submitted to USTR as part of IIPA’s 2024 Special 301 submission, provides a full description of the deficiencies with Mexico’s legal and enforcement regimes.²²

Peru

Notwithstanding a major private enforcement action in 2023 in Peru that took down Cuevana3, the largest pirate streaming provider in Spanish-speaking Latin America, and where the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (National Institute for the Defense of Competition and the Protection of Intellectual Property, INDECOPI) collaborated in Brazil’s March 2023 Operation 404 taking down 73 infringing websites based in Peru, online and physical piracy continue to be serious problems in Peru that undermine the market for legitimate content in the country and across the region. Peruvian authorities, especially INDECOPI and the courts, have made highly commendable efforts to improve enforcement against several major infringers through mechanisms that ensure ISPs can impose effective relief to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities. However, the proposed *Proyecto de Ley 878/2021-CR* (the General Internet Bill) currently being discussed in the Peruvian Congress, as well as the proposed amendments presented by the Supervisory Body of Telecommunications Private Investment (OSIPTEL) to the Net Neutrality Regulation, risk depriving INDECOPI of this power. In fact, Peru should make more use of its existing judicial and administrative powers to address its evolving piracy problem and to properly protect the legal digital market. Moreover, the Peruvian government should give INDECOPI the necessary human and economic resources to continue with this work so that it conducts even more effective administrative enforcement operations against online infringing sites.

Additionally, the General Internet Bill introduces a safe harbor mechanism that is not in line with international standards nor in keeping with Peru’s international obligations under the U.S.-Peru Trade Promotion Agreement (U.S.-Peru TPA). IIPA urges the Peruvian government to withdraw or, at the very least, clarify the General Internet Bill to ensure that these problems are addressed. Moreover, the Government of Peru should reject legislation that weakens copyright protection, and instead pass legislation that strengthens copyright protection and enforcement, such as legislation to criminalize the unauthorized camcording of films without the need to prove

²² IIPA’s 2024 Special 301 submission is available to the public via www.regulations.gov, as well as our website, at <https://www.iipa.org/reports/special-301-reports/>. The 2024 Mexico country report from IIPA’s Special 301 submission is available at <https://www.iipa.org/files/uploads/2024/01/MEXICO-2024.pdf>.

an intent to profit. Finally, the Government of Peru should not rely on expansive interpretations of exceptions in the Copyright Act to avoid paying for licenses for music. Instead, Peru should serve as an example of the importance of respecting copyright.

To ensure adequate and effective protection and enforcement of IP rights, Peru's government should address the following shortcomings in Peru's copyright and enforcement framework:

- Devote significantly more resources and political support to combat digital piracy, and specifically, increase INDECOPI's funding so that it can build upon the recent positive examples of IP enforcement.
- INDECOPI should cease to interpret that synchronization licenses include the right to communicate the licensed works to the public.
- Ensure the problematic provisions in the General Internet Bill (Proyecto de Ley 878/2021-CR) do not move forward and that similar concerning copyright-related provisions are not included in any future legislation.
- Reject the proposed amendments presented by OSIPTEL to the Net Neutrality Regulation, which would undermine INDECOPI's enforcement efforts.
- Reject erroneous interpretations of Article 41(b) of the Copyright Act and ensure state-owned or state-funded operators set a clear example by obtaining necessary copyright or related rights licenses.
- Pass legislation criminalizing the unauthorized camcording of films without the need to prove an intent to profit.
- Delete Articles 18 and 45 of the Performer's Law, or at the very least reject the rewording of the articles proposed by Bills 3310/2022-CR and 6293/2023-CR.
- Reject Bill No. 2900/2022-CR that allows the Peruvian government to engage in collective rights management and control all collections and distributions and undermines the possibility to set tariffs that reflect the economic value of rights in trade.
- Clarify that Peru provides sound recording producers with exclusive rights for broadcasting and communication to the public.
- Reject Bill 4627/2022 that proposes that copies made in the cloud be subject to the private copying exception.
- Repeal Article 45 of the Performer's Law, or at the very least reject the rewording of the article proposed by Bills 3310/2022-CR and 6293/2023-CR.
- Reject Bill 807/2021-CR (*Ley del Músico*).

IIPA’s country report on Peru, submitted to USTR as part of IIPA’s 2024 Special 301 submission, provides a full description of the deficiencies with Peru’s legal and enforcement regimes.²³

Uruguay

Uruguay’s Budget Bill, introduced in June 2023, contains two provisions that directly relate to the creative industries. The drafters of these provisions did not consult rights holders in the audiovisual and music industries or even the Uruguayan Copyright Council. The legislation calls into question contracts freely negotiated between producers and performers and would allow additional claims to compensation from third-party users who have no contractual relationship with authors or performers. The bill was approved by the Uruguayan Congress and enacted in December 2023. At that time, the enacted law was accompanied by a Presidential Decree that adds further uncertainty and that similarly was enacted without public consultations, notice and comment, or meaningful stakeholder engagement with rights holders. IIPA urges the Uruguayan government to repeal the law and decree, and in the meantime, to ensure that any implementation address the negative impact of this law and decree on the creative industries.

IIPA’s country report on Uruguay, submitted to USTR as part of IIPA’s 2024 Special 301 submission, provides a full description of the deficiencies with Uruguay’s legal and enforcement regimes.²⁴

C. Customs and Trade Facilitation

The WTO established a moratorium prohibiting customs duties on electronic transmissions in a 1998 Declaration on Global Electronic Commerce, which has been periodically renewed ever since. Prohibiting duties on electronic transmissions has been critical to fostering digital trade, including by ensuring that cumbersome customs procedures do not hamper the dynamic online marketplace that is central to the U.S. creative industries’ global competitiveness. IIPA urges the U.S. government to continue to ensure APEP members refrain from imposing duties on electronic transmissions, which would significantly harm the creative industries and threaten U.S. jobs.

D. Conclusion

IIPA appreciates this opportunity to provide the Trade Policy Staff Committee with our views on the importance of including discussions on the adequate protection and enforcement of IP rights in the APEP Trade Track. We look forward to working with you to foster improved copyright protection and enforcement in the Americas as a region.

²³ IIPA’s 2024 Special 301 submission is available to the public via www.regulations.gov, as well as our website, at <https://www.iipa.org/reports/special-301-reports/>. The 2024 Peru country report from IIPA’s Special 301 submission is available at <https://www.iipa.org/files/uploads/2024/01/PERU-2024.pdf>.

²⁴ IIPA’s 2024 Special 301 submission is available to the public via www.regulations.gov, as well as our website, at <https://www.iipa.org/reports/special-301-reports/>. The 2024 Uruguay country report from IIPA’s Special 301 submission is available at <https://www.iipa.org/files/uploads/2024/01/URUGUAY-2024.pdf>.

Respectfully submitted,

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