

U.S.-PERU TRADE PROMOTION AGREEMENT INTELLECTUAL PROPERTY RIGHTS

The U.S.-Peru TPA requires high levels of intellectual property protection, consistent with U.S. standards of protection, and will support the growth of trade in valuable digital and other intellectual property-based products. Although Peru has made great strides modernizing intellectual property laws, shortcomings remain in its laws, and effective enforcement continues to be a challenge. Implementation of the commitments made under the U.S.-Peru TPA will reinforce national efforts to strengthen intellectual property law enforcement. Like our other free trade agreements, this Agreement takes into account significant legal and technological developments that have taken place since WTO, TRIPS and NAFTA were implemented. It establishes clear precedents in most key areas of intellectual property protection for future trade liberalization negotiations. The Industry Trade Advisory Committee on Intellectual Property Rights' report to the U.S. Trade Representative on the U.S.-Peru TPA notes, "...the fact that Peru found it in its own interest to significantly increase its levels of IPR protection beyond that required by TRIPS is a testament to the principle that high levels of protection benefit all innovators, including indigenous creators, in the same manner as they do in developed countries."ⁱ

Trademarks

U.S. trademark holders will see much stronger protections in Peru. The U.S.-Peru TPA expands the definition of trademark to include protection for non-visually perceptible marks such as sounds and scents. It also recognizes the principles of priority and exclusivity in the relationship between trademarks and geographical indications.

Peru committed to streamline procedures, to implement an electronic application system and to develop a public on-line database of trademark applications and registrations. This will save U.S. companies time and money and make it easier for them to take the necessary steps to protect their trademarks. Improved transparency provisions will give interested parties the opportunity to oppose and cancel registrations and to know the reason for decisions with respect to registration.

Copyright

The International Intellectual Property Alliance estimates that U.S. companies lost approximately \$98.5 million in Peru in 2007 due to piracy of motion pictures, records and music, business application software, videogames, and books.ⁱⁱ The U.S.-Peru TPA includes many important provisions for stemming these losses and otherwise benefiting U.S. copyright industries. One of the most important provisions is the prohibition on the circumvention of technological protection measures (TPMs) that authors, performers, and producers of phonograms use in the exercise of their rights to prohibit or restrict

Key Intellectual Property Facts

Protection for copyrighted works

- Copyright-based industries are among the fastest growing and most productive of any sector of the U.S. economy. They employ new workers in higher-paying jobs at over three times the rate of the rest of the economy; create new revenue at over two times that rate; and contribute close to \$90 billion to the U.S. economy each year through foreign sales and exports. The industries' principal barrier to trade is the lack of effective protection and enforcement of intellectual property rights.

Stronger protections for patents & trade secrets

- Innovation has historically been a driving force in U.S. industry. Competitive advantage based on innovation needs to be protected and defended. U.S. companies need access to legal tools in all markets across the globe.

Tough penalties for piracy and counterfeiting

- The high level of enforcement required by the U.S.-Peru TPA will benefit industry and set a precedent throughout the region.

unauthorized acts (e.g., unauthorized access to a work or illegal copying). Defined and limited exceptions to the circumvention of TPMs will provide further certainty by bolstering its effective implementation. This prohibition on circumvention of TPMs is an effective tool for addressing the challenges presented in the digital environment.

The protection of encrypted program-carrying satellite signals was included as a direct response to the concerns of U.S. broadcasters and content providers. Peru has also committed to mandating that government agencies use computer software only as authorized by the right holder and to actively regulate the acquisition and management of the software, a high priority for the U.S. software industry. In addition to the needs addressed by the industry-specific challenges, a 20-year increase in the term of protection for copyrighted works (a forty percent increase) will allow a broad range of right holders to increase the value of their intellectual property.

Patents and Data Protection

Peru committed to limiting the grounds on which patents may be revoked and to extending patent protection to new plant varieties. Peru has also agreed to restore patent rights for the term of protection lost due to unreasonable delays in issuing patents with respect to most products, ensuring that patent rights are not diminished by bureaucratic delays. While this patent term restoration obligation is more flexible with respect to pharmaceutical products, Peru commits to making best efforts to expeditiously processing patent and marketing approval applications for drugs. Recognizing the significant investments made by pharmaceutical and agro-chemical companies in compiling test data submitted in connection with marketing approval, Peru has agreed to protect such data from use by third parties. Agricultural chemical test data will be protected for a period of 10 years; for pharmaceuticals, the period of protection will normally be five years, though this period may be shorter if Peru relies on the U.S. Food and Drug Administration's approval of a given drug and certain other conditions are met. Additionally, Peru has committed to putting in place procedures and remedies intended to prevent the marketing of patent-infringing pharmaceuticals.

Improved Transparency and Reduced Corruption

As in other recent free trade agreements, the U.S.-Peru TPA contains an obligation to publicize information on efforts to provide effective enforcement of intellectual property rights. Final judicial decisions or administrative rulings of general applicability pertaining to the enforcement of intellectual property rights must be in writing and must state any relevant findings of fact and the reasoning or the legal basis on which the decisions or rulings are based.

Enforcement

The U.S.-Peru TPA includes measures that should facilitate enforcement of these enhanced intellectual property protections, improving the enforcement environment in Peru. The agreement establishes a framework for determining damages and establishes a system of statutory or "pre-established" damages, offering the right-holder to elect between statutory damages and the often-difficult task of proving actual damages. The agreement also mandates that courts must have the authority to order the infringer and third parties to identify accomplices, suppliers and others involved in the infringement at the risk of sanctions for failure to do so. As Peru's economy grows, its government will have additional resources, including personnel and expertise to wage a more effective campaign against copyright and other intellectual property violations.

i ITAC 15 Report February 1, 2006

ii IIPA 2008 Special 301 submission