

*Open letter from civil society regarding the computer crimes bill under discussion
in the Congress of the Republic of Peru*

Lima, July 30, 2012

*Mr.(s).
Honorable Member of Congress
Congress of the Republic of Peru*

To whom it may concern:

Along with welcoming you, in our capacity as international experts and civic organizations focused on protecting human and civil rights on the Internet, we write to express our concerns over what we see as the advance in the Peruvian Congress of dangerous legislative initiatives that look to update the list of computer crimes in the current Penal Code, but that could also affect the fundamental rights of Peruvian citizens, and, as a result, violate international human rights.

While we understand well and share the Congress of Peru's concern over reviewing and updating various legal standards in light of technological advances and the development of the Internet, we also believe that modifying the Penal Code requires particular attention and care, as criminal penalties are the most extreme legal tool and carry the certain possibility of restricting citizens' liberty. For this reason, the creation of new crimes that are not sufficiently clear and narrowly applied can affect citizens' constitutional rights to legal due process, privacy, and freedom of expression, among others.

Human Rights Council Resolution 20/8, named the "Promotion, Protection and Enjoyment of Human Rights on the Internet,"

reaffirms that people enjoy the same human rights, particularly freedom of expression, as much in the offline world as online. The State of Peru not only approved, but also proposed and endorsed the resolution, emphasizing its commitment to fully respect human rights on the Internet. We expect that said commitment is also reflected in Peru's legislative agenda.

As stated above, our concern fundamentally centers in the proposed laws 34/2011-CR and 307/2011-CR, presented on August 11 and October 5, 2011, respectively, to the Congressional Justice and Human Rights Commission, whose Final Opinion was formally presented to Congress last July 20. In that respect, we express the following worries and concerns, in a constructive way to be considered in the debate over these measures:

- 1. We appreciate the concern about updating the criminal law provisions to the development of new technologies, determining by strict, written, prior law, the behaviors deserving of criminal sanction and the sanctions imposed on them.*
- 2. We reject that, despite having included a warrant requirement in the Final Opinion, electronic communications are excluded from the constitutional protection of the secrecy of communications and, at the same time, telecommunications and Internet companies are forced to provide information to law enforcement and prosecutors, which is a contradiction and goes against the existing constitutional order. In no case should such an exclusion be considered, let alone without the corresponding judicial guarantee.*
- 3. We strongly recommend applying the principle of regulatory neutrality and not punishing behaviors in the online environment that are lawful in the offline environment, or imposing more serious sanctions to the first than the latter. In this regard, we appreciate the refusal to establish a special aggravating criminal liability that increased the penalty by 50 percent for the simple fact of using technology.*
- 4. We recall that the technologies are still new to a large segment of our population, who may inadvertently engage in practices criminally punishable*

by law. In this regard, we call for the inclusion of normative and subjective elements in the crimes, in an effort to limit sanctions to those who act outside the framework of the law, intentionally or knowingly, and not through mere negligence or happenstance.

- 5. We urge you to reconsider the current wording of certain offenses such as: possession of technologies, which is not harmful itself, but also can serve legitimate purposes; the unauthorized use of works, admitting that the Peruvian law (Legislative Decree No. 822) also allows certain uses through exceptions and limitations to copyright; and, not to criminalize the modification of data, where such modification does not require consent of the person concerned, as permitted by law, among other reasons.*
- 6. We urge you not to criminalize conduct such as theft of time, marketing and distribution of databases, particularly in cases where the wrongdoers can be effectively combatted through civil liabilities.*
- 7. We call for a strict construction of criminal offenses, avoiding ambiguities in their wording. For example, there is vagueness about who must give authorization for the crime of computer intrusion, since the current text admits it is a private entity and not the legislature who determines that criminal behavior, through a simple contractual term. The same applies to criminalizing the production, possession, acquisition, distribution, shipping, design and development of tools that have dual uses, since for these crimes it is essential to discern the true motivations of those who employ the tools.*
- 8. We appeal to preserve the proportionality of sentencing, an effort undertaken in various international instruments on human rights. From this point of view, it seems disproportionate that actions that violate property rights do not have graded penalties based on the amount stolen, defrauded, or damaged, or that certain crimes receive an excessive rebuke in relation to others, including that the fraudulent use of electronic means of payment is punishable by 5 to 10 years in prison, while today the crime of child pornography production is assigned a sentence of 4 to 6 years imprisonment.*

9. We call attention to the impact that the legislative initiatives under analysis may have on the competitiveness of local industry and Peru's progress, but especially on individual rights and fundamental liberties.

By taking on such a sensitive and complex topic, which has the potential to affect the lives of millions of internet users, Congress has the obligation to set incontrovertible examples of transparency and openness for the exchange of opinion on these projects. Approving a bill without convening a prior dialogue with all sectors involved in the Internet ecosystem could be highly risky, and could even generate more risks than the lack of regulation.

For the reasons explained, we request that the Peruvian Congress, through your work, postpone the voting on these bills referred and, prior to any decision regarding them, generate the necessary spaces for open and democratic debate over these computer crimes, in which civil society may communicate their points of view and bring suggestions for improvements. Those who subscribe to this letter offer their unconditional support with this legislative initiative.

Sincerely Yours,

Regional Organizations

Alfa-Redi - Peru

Asociación por los Derechos Civiles (ADC) - Argentina

Asociación Pro Derechos Humanos - Peru

Colnodo - Colombia

EsLaRed - Venezuela

Fundação Getulio Vargas' Centro de Tecnologia e Sociedade (FGV/CTS) - Brasil

Instituto Núcleo de Pesquisas, Estudos e Formação (NUPEF) - Brasil

Instituto Prensa y Sociedad - Peru

ONG Derechos Digitales - Chile

Red Científica Peruana (RCP) - Peru

International Organizations

Access

Association for Progressive Communications (APC)

Foundation for Media Alternatives

Human Rights Foundation

Individuals

Renata Avila

Abogada e Investigadora - Guatemala

Eduardo Bertoni

Centro de Estudios en Libertad de Expresión y Acceso a la Información

Universidad de Palermo - Argentina

Carolina Botero

Fundación Karisma - Colombia

Alberto Cerda Silva

Profesor Asistente de Derecho Informático

Facultad de Derecho de la Universidad de Chile

León Felipe Sánchez

Abogado - Mexico

Erick Iriarte

Alfa-Redi, Iriarte & Associates - Peru

Hiram Melendez Juarbe

Catedrático Asociado

Escuela de Derecho de la Universidad de Puerto Rico

Private Sector

IdentidadRobada.Com - Argentina

Iriarte & Associates - Peru