

ECUADOR

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR retain Ecuador on the Watch List in 2018.¹

Executive Summary: Critical developments in Ecuador's intellectual property regime call for acute attention to ensure Ecuador improves or at least restores legal protection for copyright holders, which has been reduced compared to prior years. In 2016, the U.S. Government noted strong outstanding concerns with respect to Ecuador's draft Code of the Social Economy of Knowledge, Creativity, and Innovation (COESCI). Despite clear messages from governments and rights holders, the final text of the draft contains expansive exceptions and limitations to Intellectual Property Rights (IPR), which will significantly weaken copyright protection in Ecuador. Many of these exceptions exceed the three-step test in the Berne Convention and the WTO TRIPS Agreement. With the passage of the new COESCI law, there are now 30 exceptions and limitations on rights (up from 11 in the prior law), including a "fair use" clause. The Ecuadorian legal system, unlike the United States, is a civil law system and does not follow judicial precedent. Additionally, judges have no experience or training on the doctrine of fair use. This constitutes a fatal flaw for the operation of a fair use doctrine and will likely further undermine copyright protection and the predictability of the legal environment in Ecuador.

COESCI includes several other provisions that will weaken copyright protection. For example, the recording industry is particularly concerned with very damaging exceptions to the scope of the exclusive public performance and broadcasting rights attached to sound recordings (introduced through presidential amendment after the National Assembly's vote). The amendments exempt the following acts from authorization or remuneration requirements: (i) the communication to the public (including public performance) of sound recordings by "micro" and "small" enterprises (i.e., medium to small businesses, which account for about 95% of all the businesses in the country); (ii) the communication to the public (including public performance) of sound recordings in public transport vehicles; and (iii) broadcasting and communication to the public, including online, by "community radios" (that account for 30% of the total number of stations nationwide). These changes alone could significantly damage the market for music licensing royalties and further reduce legal certainty for rights holders. After an outcry from the music community in Ecuador, the government made promises to correct or minimize the impact of those exceptions through implementing regulations to the COESCI. Those regulations were expected to be circulated by the end of 2017, but have yet to materialize. The Government of Ecuador should take action to correct the COESCI deficiencies and shortcomings to comply with its international obligations.

The Ecuadorian Government should also direct considerable attention to its enforcement efforts to combat piracy and maintain a legitimate creative marketplace. Although improving slightly, camcording remains an issue, with Ecuador ranking third in the region for camcording, behind Mexico and Peru. Additionally, the largest, state-owned cable network in Ecuador, CNT, refuses to pay performance rights royalties to music rights holders. For content creators to have a fair shot at success in Ecuador's market, Ecuador must make large strides in strengthening its copyright protection and enable rights holders to exercise that protection in practice.

PRIORITY ACTIONS REQUESTED IN 2018

- Encourage the government to urgently issue implementing decrees to reduce the exceptions and limitations in the COESCI, and, in the longer term, modify primary legislation to reverse this rollback of protection.

¹For more details on Ecuador's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Ecuador's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theatres, without requiring any proof of commercial intent.
- Ensure that state broadcasters are not above the law and actually pay royalties for the music and sound recordings that they use.

COPYRIGHT LAW IN ECUADOR

Domestic Laws: In December 2016, Ecuador adopted a new IP law known as the COESCI. The exceptions and limitations to copyright in the COESCI, enumerated in Article 211 (“Fair Use”) and Article 212 (“Acts that do not require authorization for use”), are extremely overbroad and risk undermining important protections for rights holders. They also raise serious questions regarding consistency with the three-step test governing exceptions and limitations under Article 9(2) of the Berne Convention and Article 13 of TRIPS. The COESCI fair use provision appears to be modeled after Section 107 of the U.S. Copyright Act. Simply extracting the U.S. fair use law and implanting it in Ecuador is extremely problematic and risky because U.S. fair use is based on many decades of case law and precedent, which guides the application of Section 107. Ecuador is a civil law country and does not follow the legal principle of *stare decisis* nor is bound by judicial precedent in the same way as common law countries. This makes enactment of the fair use provision even more problematic. Moreover, to the extent that precedent is relevant to Ecuador’s application of fair use, Ecuador does not have, to our knowledge, an extensive body of case law on fair use to ensure implementation of this provision is compliant with the three-step test. The provision dictates that it is to be applied in line with International Treaties to which Ecuador is a party to, but in light of the issues discussed above, this will almost certainly not be the case. The problems and risks associated with Ecuador’s fair use provision are further exacerbated by the following additional element (not found in Section 107 of the U.S. Copyright Act): “The enjoyment and effective exercise of other fundamental rights.” This additional element complicates the application of Ecuador’s fair use provision and likely expands it beyond the scope of U.S. law.

This legislation introduced the concept of an open-ended fair use (“uso justo”) exception for the first time in Latin America. In addition to the fair use exception under Article 212, the new Ecuadorian copyright law contains a vast and extensive list of exceptions and limitations to copyright protection. This list is one of the most troubling areas of the COESCI. The President of Ecuador, using his presidential veto powers, increased Congress’s previous broad and far-reaching catalogue of exceptions and limitations at the last minute. Notably, the added exceptions were included for the benefit of about 95% of all businesses performing music in their stores, about 30% of all radio stations (“community radios”) competing in the broadcasting market, and for transport companies with respect to the public performance of sound recordings on public transport.

Pursuant to Articles 211 and 212, each provision is meant to be enforced without prejudice to the other. This means that beyond fair use, the law is granting 30 additional ways to limit copyright protection regardless of whether the use would be considered fair. The 30 additional exceptions are overbroad and cover uses that clearly fall outside the scope of the three-step test. Among others, the following exceptions call for specific concern and attention.

Exception 9² is one of the more troubling exceptions due to its breadth and far-reaching application. This exception allows libraries and archives to freely reproduce a copyrighted work for three purposes (including to deliver to another library or archive who also has the authority to make another copy of the work once received) and lists an additional eight actions that the library or archive can perform. Those actions include reproducing fragments of works at the request of the library or archive for personal use and creating translations of works, both of which, if the scope is not narrowed, can harm the legitimate market of publishers and copyright owners. Similarly, exception 10³, which allows for public lending of an audiovisual work by a video library, cuts into various potential markets for audiovisual

²Under this exception, the individual reproduction of a work made by a library, archive, or museum is allowed so long as it fits within the long and far-reaching list of acts that a library or archive may perform.

³This exception allows individual public lending of an audiovisual work by video library or other collection of audiovisual works, when the corresponding copy is in the repertoire of the video library or collection.

rights holders. Permission to reproduce and lend copyrighted works in such broad terms does not align with the internationally accepted standards for exceptions and limitations.

Exception 26⁴ plainly fails to comply with the three-step test. The exception conflicts with the normal licensing of sound recordings in various venues open to the public and fundamentally undermines rights holders' legitimate economic interests in 95% of the Ecuadorian market. Given the high number of enterprises falling within the scope of the microenterprise or small enterprise concept, it is inevitable that the exception would not be limited to "certain special cases" and would cause material harm to the economic interests of the rights holders.

As in the case of Colombia in 2016, exception 27⁵ would remove music rights holders' ability to license to transport companies for the public performance of their works and recordings. This is especially the case with coaches and "busetas," which are popular forms of transportation in the region and a potential market for music rights holders. Public transport is a non-negligible sub-sector of the Ecuadorian economy and constitutes an important market for music licensing. Thus, excepting or carving out this entire market category from the scope of legal protection for music copyright holders would violate the three-step test because the exception would not be "limited" and would clearly conflict with the normal exploitation of rights. As such, it would negatively impact the legitimate interests of music rights holders.

Lastly, exception 30⁶ is incompatible with the three-step test, meaning it also conflicts with Ecuador's obligations pursuant to Article 13 of the TRIPS Agreement. The radios covered by this exception account for about 30% of the radio broadcasts in the country. Therefore, the exception would not be limited or negligible in terms of its impact on the normal licensing and economic interests of rights holders. It is worth noting that the community radios operate as commercial businesses, sell advertising, and compete with other broadcasters. Thus, the introduction of this unwarranted exception is prejudicial not only to the music sector as content producers, but also to the competitive position of the various broadcasters and other licensors. Moreover, the exemption allows for "public communication," which is very broad and can encompass any means by which works are made accessible to the public, including through digital mediums.

The COESCI replaced the Intellectual Property Code of Ecuador, which was very comprehensive. The COESCI, on the other hand, is a chaotic text, full of political statements on public policies. These characteristics contribute to the difficulty in interpreting many of its legal provisions. Some rights holder groups in Ecuador have already called for amendments to the COESCI. Since the Ecuadorian music community pointed out fundamental legal and economic problems with the new law and urged the government to reconsider the fair use and exceptions and limitations provisions, there is an expectation that those problems might be corrected or minimized through implementing regulations. The government was supposed to circulate implementing regulations by the end of 2017, but nothing has been released yet.

International Treaties: In December 2016, the Ecuadorian National Assembly approved a report that ratified the country's accession to a trade agreement with the European Union (EU), Peru, and Colombia, which went into force January 1, 2017. The trade agreement's copyright provision requires compliance with the Berne Convention, the Rome Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty (WPPT). It also provides for a minimum level of protection with respect to broadcasting and public performance rights in sound recordings that goes above and beyond the protection in the WPPT. Rights holders in the copyright sector have already pointed out the incompatibility of the various exceptions and limitations introduced

⁴This exception permits communication to the public of sound recordings by microenterprises or small enterprises provided that a single, home-style device is used and that the use by enterprises in question is not for the purpose of affecting the ambience of the premises.

⁵This exception permits communication to the public in public transport vehicles that are not intended for tourism or entertainment use.

⁶This exception allows public communication, transmission and retransmission provided by a body of community broadcasting, as long as it conforms to the provisions of the relevant legislation. The relevant legislation is the telecommunications law that provides technical requirements for a station to obtain an operating license. It also states that "community radios" are not-for-profit entities. However, in recent years, community radios have started engaging in commercial activities by selling ads just like other commercial broadcasters do.

in COESCI with the obligations and minimum standards of protection under these international copyright conventions and the FTA with the EU.

COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN ECUADOR

Despite the attempts to advance copyright legislation in the country, enforcement of IPR in Ecuador remains very weak. Rights holders struggle to enforce their copyright in practice, and attempts to do so through administrative authorities often linger for procedural reasons. A lack of deterrent sentencing and *ex officio* actions continues to hamper effective enforcement and protection against infringing acts.

Camcording: Camcording is a problem in Ecuadorian movie theatres. In 2017, 22 illegal camcords of MPAA member films were traced to cinemas in Ecuador, down from 28 in 2016. This represents a slight decrease from the same period in 2016, but Ecuador still ranks third in the region after Mexico and Peru for camcording.

Performance Royalties: Further, the recording industry reports that it is often impossible to collect performance royalties for music and sound recordings, including from state-owned broadcasters like CNT. The Government of Ecuador should set a good example and promote the fair payment of required license fees, which would support the development of Ecuador's creative industries.