

# ECUADOR

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR place Ecuador on the Priority Watch List in 2022.<sup>1</sup>

**Executive Summary:** Five years since the enactment of *Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación* (Code of the Social Economy of Knowledge, Creativity, and Innovation, COESCI), Ecuador's creative sector has stagnated due to COESCI's dramatic weakening of the country's copyright protection. In sum, COESCI upends the copyright framework, asserting that public domain is the norm, and copyright is the exception. COESCI features 30 copyright exceptions and limitations (up from 11 in the prior law), many of which clearly exceed the three-step test in the Berne Convention and the WTO TRIPS Agreement and interfere with rights holders' ability to contract and freely transfer rights. In addition, COESCI includes a five-factor "fair use" clause, which is an unwelcome first for a Latin American country and is broader than the fair use provision found in U.S. law. Ecuador, unlike the United States, has a civil law system in which courts do not follow judicial precedent, and Ecuadorian judges have no experience or training on the doctrine of fair use. These realities impair the proper application of the fair use doctrine and create unacceptable legal uncertainty for both rights holders and users.

In November 2020, Ecuador implemented regulations of some of COESCI's provisions. Unfortunately, the regulatory provisions announced by the *Servicio Nacional de Derechos Intelectuales* (National Service for Intellectual Rights, SENADI) do not adequately correct COESCI's egregious deficiencies and do not bring Ecuador into compliance with its international obligations. IIPA understands that the *Secretaría Nacional de Educación Superior, Ciencia, Tecnología e Innovación* (National Secretariat for Higher Education, Science, Technology, and Innovation, SENESCYT) is working on a legislative proposal to amend some of COESCI's exceptions. IIPA commends SENADI and SENESCYT for undertaking these initiatives and urges them to engage in consultation with all relevant stakeholders to ensure that both regulations and amendments to the law meet the country's treaty obligations and best practices for copyright protection.

To foster a vibrant, legitimate, creative marketplace, IIPA also recommends that Ecuador direct considerable attention and resources to its enforcement efforts. IIPA commends the Ecuadorian National Assembly for introducing intellectual property (IP) crimes into the Ecuadorian legal system in 2021 to punish, with imprisonment, those who violate IP rights. IIPA also commends SENADI's issuance of several administrative site-blocking orders in 2021 against pirate sites. These are steps in the right direction for combatting piracy. However, Ecuador's piracy problems remain and require prompt action. For instance, the country's pay-TV penetration has declined in recent years due to piracy. Camcording legislation is still necessary because, once the COVID-19 pandemic ends, Ecuador will likely continue to rank as a top regional provider of camcordered films.

#### **PRIORITY ACTIONS REQUESTED IN 2022**

- Urgently amend COESCI and its regulations to bring Ecuador's framework for copyright protection and enforcement in compliance with its treaty obligations and international best practices and to do so in a transparent process that provides the private sector and all affected parties the opportunity to intervene.
- Encourage SENADI to continue issuing administrative *ex officio* blocking orders against online piracy platforms, notorious stream-ripping sites, and other online infringing services as warranted, by providing more resources and funds.

<sup>1</sup>For 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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording, without requiring proof of commercial intent.
- Ensure that broadcasters and cable operators, including the state-owned cable TV company, pay royalties for the music and sound recordings that they use.

## **THE COPYRIGHT MARKETPLACE IN ECUADOR**

Official government statistics indicate that, for 2020, more than 70% of the population used the Internet and over 81% had a smartphone.<sup>2</sup> According to the International Federation of the Phonographic Industry's (IFPI's) 2021 Global Music Report, digital revenues in Ecuador amount to 84.7% of total music revenues and streaming sales make up 83.1% of total music sales. There are nine legitimate online music services.<sup>3</sup>

Stream-ripping is the predominant form of music piracy in Ecuador. While the most popular stream-ripping sites were *y2mate.com*, *mp3-youtube.download*, *flvto.biz*, and *notube.net*, with a combined number of 42.6 million visits during the period of March 2020 to February 2021, website blocking actions ordered by SENADI against these sites have meant that their popularity has fluctuated, with traffic shifting to other stream-ripping sites. In addition, online piracy of film and television content, including through illicit streaming devices (ISDs), has been on the rise during the COVID-19 pandemic in 2021.

Camcording is a persistent problem in Ecuadorian movie theatres. In 2019, the MPA reported 16 camcords sourced from Ecuador, which makes it the third largest source of movie theater piracy in Latin America, behind Mexico and Brazil. Although 2021 was an exceptional year due to the COVID-19 pandemic, Ecuador is likely to remain a major regional provider of camcorded films as movie theaters re-open.

## **COPYRIGHT LAW IN ECUADOR**

Ecuador's 2016 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 overbroad and undermine important protections for rights holders. They are also inconsistent with the three-step test governing exceptions and limitations under Article 9(2) of the Berne Convention, Article 13 of the WTO TRIPS Agreement, and the corresponding provisions of the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), each in force in Ecuador since 2002).

Unfortunately, SENADI's November 2020 regulations implementing some of COESCI's provisions did not address the creative industries' most serious concerns regarding the overbroad exceptions. Instead, the November regulations imposed numerous new obligations to Collective Management Organizations (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. SENESCYT 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.

**Fair Use:** Ecuador's attempt to transplant the U.S. fair use provision in the COESCI law creates an unacceptable level of uncertainty and risk in the copyright ecosystem. COESCI's Article 211 is broader and more uncertain than the U.S. provision on which it is purportedly based, because it adds a fifth factor, "use and enjoyment of other fundamental rights." This factor is essentially a catchall and creates great uncertainty as to what constitutes "other fundamental rights" and how this factor will relate to the other four. Furthermore, while decades of case law and the principle

<sup>2</sup>See *Information and Communication Technologies 2020 Summary*, NEC (last visited Nov. 23, 2021), <https://www.ecuadorencifras.gob.ec/tecnologias-de-la-informacion-y-comunicacion-tic/>.

<sup>3</sup>See *Legal Music Services Ecuador*, PRO MUSIC (last visited Nov. 23, 2021), <https://www.pro-music.org/legal-music-services-latin-america.php>.

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, it is clearly overbroad on its face due to the broad, uncertain fifth factor and the lack of any case law to confine the exception. 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 non-authorized access to protected works is a fair use pursuant to “enjoyment of other fundamental rights” (e.g., right to sports, right to education, right to communication, etc.). Thus, as written, the provision conflicts with the normal exploitation of works, unreasonably prejudices rights holders’ legitimate interests, and goes beyond the “special case” required by the three-step test, which establishes the international standard for the scope and application of exceptions and limitations to copyright.<sup>4</sup>

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 use savings clause applies to each enumerated exception in the law, effectively broadening each exception beyond the scope of the three-step test. If the use does not meet one of these exceptions, then the fair use savings clause allows the user to try and qualify under the overly broad fair use provision, with all of the problems identified above.

**Other Exceptions:** COESCI’s list of other exceptions and limitations is extensive. The following exceptions allow widespread uses that conflict with the normal exploitation of works and unreasonably prejudice rights holders’ legitimate interests, also in clear contravention of the three-step test.

Exception 9 for libraries and archives 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. The provision also provides for eight further acts that a library or archive may undertake without authorization or payment, including text and data mining and the translation of works originally written in a foreign language if, after three years from publication, they have not been translated into Spanish or other local languages. Again, this exception is overly broad in violation of the three-step test, especially in that they may use the copies created under the exception for lending to users. Unfortunately, Article 64 of SENADI’s regulation does not correct the overbroad scope of this provision. For instance, the regulation allows libraries, archives, and museums to reproduce a work “in the amount necessary” and to rely on third parties for the reproduction of a work for preservation purposes. As drafted, these library exceptions and their regulations can harm publishers’ legitimate market and go beyond certain special cases.

Exception 11 allows broadcasters to make ephemeral copies for their own transmissions and keep them for a period of five years. This lengthy period of retention makes this exception a *de facto* statutory license to make permanent copies, instead of an exception for ephemeral copy use. This exception prevents music rights holders in Ecuador from licensing the reproduction rights and unreasonably interferes with rights holders’ normal business. Instead, the exception should be limited to a standard term of 30 days.

Exception 24 allows websites, without the permission of rights holders, to reference or link to online sites, as well as for the reproduction and storage of content when necessary for the operation of a search site provided there is no “violation” of the protected content. This exception is contradictory because any “use” of copyrighted content in ways restricted by copyright, unless authorized by rights holders, is itself a “violation” of copyright.

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<sup>4</sup>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 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Art. 13 (1994); WIPO Copyright Treaty (WCT), Art. 10 (1996); and, WIPO Performances and Phonograms Treaty (WPPT) Art. 16 (1996).

Exception 26 allows small businesses to freely communicate works to the public. Given that most businesses in Ecuador qualify as “small businesses,” the exception is not limited to special cases. This exception is one of the most damaging in COESCI as it results in unreasonable harm to the economic interests of copyright and related rights holders. It conflicts with the normal licensing of sound recordings in numerous venues across the country and fundamentally undermines rights holders’ legitimate economic interests in 95% of the Ecuadorian public performance market.

Exception 27 eliminates 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. This overbroad, unfair, and unjustified exception is another example of protecting a particular interest of a group of companies against the legitimate interest of copyright and related rights holders.

Exception 30 allows “community radios” to communicate works to the public without permission from rights holders or remuneration. Radios covered by this exception account for 30% of the radio broadcasts in the country, operate as commercial businesses, sell advertising, and compete with other broadcasters. This exception is, therefore, 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 can encompass any means by which works are made accessible to the public, including through digital media.

In addition to the foregoing exceptions, other problematic COESCI provisions include compulsory licenses and various rights and “default” clauses to govern contracts within the creative sectors, unless 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. Articles 69 and 70 of SENADI’s regulations insufficiently narrow the scope of this provision by requiring 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.” 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 not adequate to fulfill its intended purpose of awarding better 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.

**Camcording legislation:** SENADI is working on a legislative proposal to amend Article 208A of Ecuador’s Penal Code, which establishes penalties for piracy and counterfeiting, to penalize camcording.

## **COPYRIGHT ENFORCEMENT IN ECUADOR**

More active and efficient copyright enforcement in Ecuador depends on the urgent modification of its legal framework and appropriate funding. In a positive development, since August 30, 2021, IP crimes have been introduced into the Ecuadorian legal system to punish, with imprisonment, those who violate IP rights. IIPA hopes the reform, explained in greater detail below, will address problems with a lack of deterrent sentencing and *ex officio* authority that historically have hampered effective enforcement and protection against infringing acts in Ecuador.

As part of the reform, IP crimes will be punished with six months to one year imprisonment, confiscation, and a fine of eight to three hundred unified basic salaries (currently US\$ 3,200 – US\$ 120,000). When a company commits an IP crime, it will be punished with the confiscation of the offending assets, as well as with a fine, regardless of the criminal responsibility of the persons involved in the commission of the crime. The judge may order the offending goods to be destroyed. However, in cases in which the government determines the seized merchandise may satisfy a social need, the offending IP will be removed and the goods will be distributed, as long as this action does not affect the nature or functionality of the merchandise. This use may be highly problematic, however, as the government may

not be in the best position to judge whether distributing such goods is harmful to either users or rights holders.

Further, the reform includes important amendments that help alleviate gaps and obstacles to customs regulations and border measures. There will be mandatory communication between the IP authority (SENADI) and the customs authority (SENAE) because both institutions will interconnect their systems and records. SENAE will inform the owner of the registered IP right that it discovered merchandise that would allegedly violate their rights. If SENADI determines an IP infringement occurs, the offender will be punished with a fine of between 1.5 to 142 unified basic salaries (currently between US\$ 600 – US\$56,800), in addition to other precautionary measures. IIPA commends Ecuador for this reform effort to protect rights holders who continue to struggle to enforce their copyrights in practice.

In another positive development, in the past three years, SENADI has issued administrative site-blocking orders against pirate sites. In particular, in August 2021, SENADI ordered the administrative site-blocking of 40 URLs and over 40 Internet Protocol addresses that illegally transmitted Pay-TV signals. On July 23, 2021, following applications filed by Sociedad de Productores de Fonogramas (SOPROFON), a sound recording industry CMO, SENADI issued four precautionary measures ordering all ISPs in the country to implement blocking against the most popular stream-ripping sites in Ecuador: *y2mate.com*, *mp3-youtube.download*, *flvto.biz*, and *notube.net*. Following the blocking, visits to these four sites from Ecuador dropped from 3.79 million in June 2021, the month prior to the blocks, to just 0.85 million in September 2021, a fall of 77.7%. These orders are the first of its kind in Ecuador against sites dedicated to the infringement of IP rights in sound recordings and music videos of national and international artists and set a positive precedent for copyright enforcement in the online environment.

Despite the impact of this first action, stream-ripping remained a key music piracy threat in Ecuador. Blocking four major stream-ripping destinations was successful in stopping the vast majority of visits to the targeted sites, but a wide variety of alternatives remained for users in Ecuador eager to download music illegally through stream-ripping. For instance, following the blocking of the four sites mentioned, visits from Ecuador to stream-ripping site *Snappea.com* alone rose from 0.82 million in June 2021 to 5.83 million in September 2021. We urge SENADI to continue this type of action with other sites to foster the growth of Ecuador's creative industries.

Administrative proceedings before SENADI, known as “tutelas,” were originally designed to provide a faster and less expensive alternative to civil litigation. However, the music industry's experience has been the opposite. A single administrative action is subject to four instances of review before a final ruling and, at that point, the alleged infringer has the option to challenge the administrative decision before the judiciary. Additionally, SENADI's section in charge of deciding these cases, known as the *Órgano Colegiado de Derechos Intelectuales*, has an erratic record in decisions about related rights.

For example, in 2020, the Judiciary Panel, *Órgano Colegiado de Derechos Intelectuales*, decided 11 administrative appeals against DIRECTV for non-compliance with phonogram producers' and performers' rights. These cases were initiated in 2014 by SOPROFON when SENADI (then known as IEPI) ruled in favor of SOPROFON and imposed fines to DIRECTV for about half a million USD for the unauthorized communication to the public of sound recordings. Despite the favorable 2020 decisions, DIRECTV's fines were reduced to about half of their initial value. Additionally, DIRECTV has paid no fine, because every administrative ruling triggers another automatic review of the case, known as a “reposition.” This situation impinges on the effective protection of phonogram producers' rights in Ecuador and is a major obstacle for the industry's business development. Ecuador should conduct a comprehensive review of the administrative procedure for copyright infringement cases in the context of the COESCI amendments process to make the process expeditious and effective.

In addition, CNT, the state-owned cable TV company that signed an agreement with SOPROFON in 2019 to settle claims for uses of phonograms from 2011 to 2019, is now at fault again after failing to comply with the licensing agreement that covers the use of sound recordings from 2020 to 2023. This lack of compliance sets a bad precedent for the rest of the paid-TV market in Ecuador, and thus, the Ecuadorian government should instruct CNT

to honor its licensing agreement with SOPROFON and make the corresponding payments. Further, SENADI should call the attention of CNT's board of directors to this situation, noting that the unauthorized communication to the public of sound recordings is a crime penalized in the Ecuadorian Criminal Code with prison time and fines.