

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

ECUADOR

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Ecuador remain on the Special 301 Watch List.

Overview of Key Problems: Inadequate and ineffective copyright enforcement—in administrative, criminal, and civil cases—is a significant problem adversely affecting those copyright industries doing business in Ecuador. The business software and recording industries continue to confront high piracy levels due to insufficient enforcement by Ecuadorian officials. Delays in the creation of specialized IP courts continue despite a requirement in the 1998 copyright law requiring their creation. The business software industry also reports continuing reluctance by the courts to issue *ex parte* search warrants and high bond requirements. With respect to administrative copyright enforcement, the National Copyright Authority (IEPI) has little presence within the Ecuadorian community, making its enforcement ability very weak. The 1998 copyright law is a relatively strong and comprehensive piece of legislation. However, a provision in a 1999 education law purports to give educational institutions free software licenses, an action which undercuts the exclusive rights of software publishers. Though no such licenses have been issued to date, some educational institutions are, in fact, demanding free software licenses based on this provision.

Ecuador currently participates in Free Trade Agreement (FTA) negotiations between the United States and other Andean region countries (Peru and Colombia). Reports suggest that negotiations on the IPR chapter are nearing completion. While the IPR chapter of the FTA will undoubtedly include high levels of substantive copyright obligations as well as enforcement measures, it is essential that the U.S. demand, and that Ecuador extend, significant and immediate attention to the problem of copyright piracy, and in particular, initiate and sustain criminal actions against those who manufacture, distribute, and sell pirate product.

Actions Which the Government of Ecuador Should Take: To improve IPR enforcement in Ecuador, the government should take the following actions in 2005:

- Create special police anti-piracy task forces in Quito and Guayaquil that will address the problems of pirate street vendors, distributors and manufacturers;
- Request the National Judiciary Council to appoint specialized judges for intellectual property matters as provided by law;
- Implement and execute the tools and remedies provided in the Copyright Law of 1998 and regulations in which the petitions for *ex parte* civil orders are excluded from the random assignment process;
- Educate judges on intellectual property issues until the specialized IPR courts are created;
- Provide IEPI with the necessary budget and national plan to combat piracy effectively;

- Amend the provision of the Education Law of 1999;
- Adopt legislation to establish notice and takedown provisions and create ISP liability;
- Create special police anti-piracy task forces in Quito and Guayaquil that will address the problems of pirate street vendors, distributors and manufacturers; and
- Adopt optical disc legislation.

Bilateral Negotiations and Trade Programs

The U.S. began FTA negotiations with Ecuador in May 2004, as part of the first round of Andean country negotiations which included Colombia and Peru.¹ The negotiating objectives specifically include high levels of copyright protection and effective enforcement measures, including criminal, civil/administrative and border enforcement. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil, and customs contexts. IIPA will be looking for an agreement that achieves the same high standards as were achieved in the recently concluded FTA with Central America.

Ecuador currently receives preferential trade benefits under two U.S. trade programs—The Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA), as amended.² These two programs contain standards of intellectual property rights which must be afforded to U.S. copyright owners.³ It is essential that Ecuador take immediate steps to improve its poor enforcement record, and that it not delay until negotiations are concluded to begin to address this problem.

In last year's Special 301 review, USTR kept Ecuador on the Watch List, noting that enforcement remains a significant problem.⁴

¹ See Press Release 2004-35, Office of the U.S. Trade Representative, "Peru and Ecuador to Join with Colombia in May 18-19 Launch of FTA Negotiations with the United States," May 3, 2004, available at http://www.ustr.gov/Document_Library/Press_Releases/2004/May/Peru_Ecuador_to_Join_With_Colombia_in_May_18-19_Launch_of_FTA_Negotiations_with_the_United_States.html.

² During the first 11 months of 2004, \$42.5 million worth of Ecuadorian goods (or 1.1% of Ecuador's total exports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 3.3% decrease over the same period in the previous year. In the first 11 months of 2004, \$2.5 billion entered under the ATPA, representing a 76.5% increase from the same period in 2003. For more information on the history of Ecuador under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2005SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>) of this submission.

³ See IIPA Comments to the U.S. International Trade Commission regarding the Andean Trade Preferences Act: Effect on the U.S. Economy and on Andean Drug Crop, June 1, 2004 at http://www.iipa.com/rbi/2004_June1_IIPA_ATPA_trade_filing_for_USTIC.pdf.

⁴ See Press Release, Office of the U.S. Trade Representative, "Special 301 Report Finds Continued Progress but Significant Improvements Needed," May 3, 2004, available at http://www.ustr.gov/Document_Library/Press_Releases/2004/May/Special_301_Report_Finds_Continued_Progress_But_Significant_Improvements_Needed.html. See also USTR, Special 301 Report, available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_59_95.pdf ("Ecuador has shown little progress in improving IPR protection over the last year, and although it has a generally adequate IPR law, enforcement of the law remains a significant problem. . . Enforcement of copyrights also remains a significant problem, especially with respect to sound recordings, computer software, and motion pictures, as does enforcement of trademark rights. As a result, there continues to be an active local trade in pirated audio and video recordings, computer software, and counterfeit brand name apparel. Music piracy is rampant in the streets of key cities, yet the local authorities appear to have made no efforts to prevent the sale of pirated music, nor have they investigated the duplication and distribution sources for these products. The Ecuadorian Government has yet to

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End-user piracy and some hard-disk loading (the practice of loading unlicensed software onto computer hardware and selling the entire package to an end-user) continue to plague the business software industry in Ecuador. End-user piracy rates remain high among Ecuadorian businesses of all sizes, from small family businesses to large financial institutions.

The recording industry reports that burned CD-Rs are the preferred format for most pirate music products. Shops produce these CD-Rs for local markets and in some cases also export to Colombia. Estimates are that more than 80 million CD-Rs enter Ecuador every year, most destined for piracy. The government has poor border controls, making it difficult to investigate CD-R importers and their links to pirate organizations. Additionally, there is strong evidence of widespread tax evasion (e.g., under-valuation) and other irregularities associated with CD-R importing. Piracy represents 95% of the total pirate market in Ecuador with no signs of abatement any time soon. Although piracy could be pursued *ex officio* by the authorities, only a few sporadic raids are conducted every year, and the resources dedicated to IEPI's enforcement activities are insufficient. As a result, the majority of international record companies have closed their offices in the country, and two local independent companies are barely managing to stay afloat. This situation prevents recording companies from investing in local acts and jeopardizes the opportunities that Ecuadorian artists have to develop and promote their talents.

The major form of piracy afflicting the U.S. book publishing industry in the region involves commercial photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported in the region. Video piracy remains a consistent problem throughout the Andean region, reaching 90% in Ecuador. The U.S. entertainment software industry suffers from inadequate enforcement by governmental and judicial authorities in the Andean region. Piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game consoles.

establish the specialized intellectual property courts required by the 1998 IPR law. Even though Ecuador's current substantive copyright legislation appears generally in line with its international obligations, the performance of Ecuador's judiciary remains deficient, in that the courts appear unwilling to enforce the law. The United States urges Ecuador to strengthen enforcement of IPR and will closely monitor Ecuador's efforts to address IP-related concerns.”).

ECUADOR Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2000-2004⁵				
INDUSTRY	2004		2003	
	Loss	Level	Loss	Level
Records & Music	20.0	95%	19.0	95%
Business Software ⁶	7.0	69%	7.0	68%
Motion Pictures	NA	NA	NA	95%
Entertainment Software	NA	NA	NA	NA
Books	2.5	NA	2.3	NA
TOTALS	29.5		28.3	

COPYRIGHT ENFORCEMENT

IEPI's anti-piracy enforcement efforts are weak and ineffective

The IEPI was created by the 1998 copyright law to implement the country's intellectual property laws. The 1998 copyright law provides IEPI with its own budget and with autonomy in financial, economic, administrative, and operational matters. Since its creation, IEPI has experienced staff shortages, low salaries and even strikes.

Since IEPI started its operation, it has performed some enforcement activities in Quito, but rarely outside the city. Furthermore, not everyone in Ecuador acknowledges IEPI as the National Copyright Office, and there is no clear understanding of what IEPI's role is with respect to the protection of intellectual property.

With regard to *ex officio* actions, IEPI has not carried out any administrative *ex officio* actions due to its lack of experience and lack of an adequate number of personnel. In order to change this situation, IEPI needs adequate human resources to enforce its responsibilities under the copyright law, to train its officials, and to create a much better salary structure.

BSA has provided leads to IEPI for the purpose of inspections, with IEPI conducting six inspections during 2004. BSA expects IEPI to conduct more inspections during the first quarter of 2005, though IEPI will only be successful if the Ecuadorian government supports it as an autonomous institution with the power to increase the salaries of its staff and provide training.

Music piracy is rampant in the streets of key cities such as Guayaquil and Quito. The local authorities have made no efforts to prevent the sale of pirated music, nor have they investigated the duplication and distribution sources for these products. Due to the lack of enforcement, especially in Quayaquil, vendors of pirate CDs cover flea markets and public spaces. In fact, some CD-burning labs operate openly.

⁵ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁶ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Ecuador, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. The preliminary 2003 losses which had appeared in previously released IIPA charts level (\$11 million) were based on the older methodology, which is why they differ from the 2003 numbers in this report.

Judicial action is still a barrier in effective enforcement.

To date, the National Judiciary Council has not yet created specialized courts for intellectual property matters. Thus the petitions for civil *ex parte* actions are brought before civil courts which have neither the knowledge nor the expertise necessary to attend to these types of petitions. Due to this situation, seizure orders are either not granted, or are delayed.

Judges remain reluctant to grant precautionary measures. For example, before granting a seizure order, judges have required that software copyright owners submit direct evidence of intellectual property infringement, pay high judicial bonds, and file civil *ex parte* actions through a random assignment process despite the fact that the regulation states otherwise. Few copyright infringement cases entered the Ecuadorian judicial system in 2003, therefore no judicial decisions have been issued recently.

In 2001, BSA filed five civil complaints against end users. Since then, some of the experiences that BSA's local counsel has had with the judiciary while filing these petitions include the following:

- Even though the current regulation provides that precautionary measures can be filed directly before a specific judge without going through a random case assignment process, the majority of judges are rejecting the precautionary measures submitted directly to them, stating that such measures should be submitted to the random assignment process;
- Some judges are imposing bonds before granting a seizure order. The problem here is that there are no provisions in the intellectual property law (IPL) that establish how to determine the bond amount; therefore, it is left to the judge's discretion. In general, judges determine the bond amount as the same amount requested as damages by rightholders, which discourages rightholders from pursuing actions;
- According to the IPL, a judge shall grant a precautionary measure (such as a search and seizure raid) when a rightholder considers that a violation of his/her rights may have occurred and the violation is evidenced by an affidavit signed by a private investigator. Despite the clear wording of the law, in one case a judge stated that an affidavit is insufficient evidence and refused to grant a precautionary measure.

During 2002, based on the experience of the previous year, BSA brought some cases before IEPI and a couple before the civil courts. One civil court denied the precautionary measure requested on the grounds that copyright owners need to show direct evidence of a copyright infringement before a seizure order could be granted. Currently, the case is under appeal. The other court still has not made any decision. In August 2002, BSA filed a second petition for civil *ex parte* action; to date the civil court has not granted the precautionary measure. Based on the experience of the previous years, during 2003 and 2004 BSA did not file any cases before civil courts.

COPYRIGHT LAW AND RELATED ISSUES

The Intellectual Property Law of 1998

On May 28, 1998, Ecuador enacted an intellectual property law (IPL), which covers all aspects of intellectual property, from copyrights to trademarks to patents, as well as semi-

conductor chip protection, industrial designs, utility models and unfair competition. The law also addresses procedures, including preliminary enforcement measures, border enforcement, statutory damages, and new criminal offenses, including the criminalization of certain acts regarding technological protection measures against infringement and electronic rights management information. The IPL's provisions relating to computer programs and enforcement are TRIPS-compliant. The IPL also generally incorporates obligations of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms (WPPT). Some amendment to the law will likely be required to fully implement the IPR obligations in the upcoming Andean FTA.

The 1999 Education Law

Ecuador passed its Education Law in 1999 which includes a poorly drafted provision that purports to grant free software licenses to certain educational institutions. The law mandates a broad "educational purposes" license to computer software for universities and technical institutes and requires "distribution" companies (there is no reference to the copyright holder) to donate the corresponding licenses to such educational institutions. This provision, known as Article 78, clearly conflicts with Ecuador's constitution as well as its obligations under the Berne Convention, TRIPS, and Decision 351 of the Andean Community regarding copyright compulsory licenses.

Since the law was issued in 1999, BSA has stated repeatedly that it believes that Article 78 is unconstitutional and should be amended. Due to this provision, BSA member companies have experienced cases in which representatives of educational institutions have argued that they are not obliged to buy software licenses and that the software owner should give its software away free of charge. In light of these experiences, BSA publicly announced its opposition to Article 78 and sent letters to different academic institutions explaining that these institutions are not entitled to free software licenses. In April 2001, BSA petitioned IEPI for a formal opinion regarding the legality of Article 78. However, to date, no opinion has been issued.

Corporations must certify compliance with copyright law in annual reports

In February 2004, the Superintendency of Companies issued a regulation requiring companies to certify, in an annual report, that they were complying with copyright law by using only licensed and non-infringing software in their businesses. BSA is currently working in coordination with the Chamber of Commerce in Quito to educate the business community about the compliance requirements of this new regulation.