

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2006 SPECIAL 301 REPORT

### ECUADOR

#### **EXECUTIVE SUMMARY**

**Special 301 Recommendation:** IIPA recommends that Ecuador remain on the Special 301 Watch List in 2006.

IIPA supports the Free Trade Agreement process. The U.S. began FTA negotiations with Ecuador and other Andean countries in May 2004; the negotiations with Ecuador continue in early 2006. 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 has recommended for years that it is essential that Ecuador take immediate steps to improve its poor enforcement record. 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)<sup>1</sup> — both of which contain standards of intellectual property rights which must be afforded to U.S. copyright owners

#### **Actions Which the Government of Ecuador Should Take in 2006:**

- Create special police anti-piracy task forces in Quito and Guayaquil and Cuenca to take anti-piracy enforcement actions against pirate street vendors, distributors and manufacturers;
- Implement and execute the tools and remedies provided in the Copyright Law of 1998 and regulations, such that petitions for *ex parte* civil orders are excluded from the random assignment process;
- Have the National Judiciary Council appoint specialized judges for intellectual property matters;
- Educate judges on intellectual property issues until the specialized IPR courts are created (the creation of such courts were required under the 1998 Copyright Law);
- Provide IEPI with the necessary budget and national plan to combat piracy effectively;

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<sup>1</sup> 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 8, 2005 at <http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20Final%2006082005.pdf>. During the first 11 months of 2005, \$51.2 million worth of Ecuadorian goods (or 1.0% 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 20.6% increase over the same period in the previous year. Also during this same 2005 time frame, \$3.5 billion entered under the ATPA, representing a 44.8% increase from the same period in 2004.

- Amend Article 78 of the Education Law of 1999 to clearly eliminate overbroad provisions which suggest a compulsory licensing scheme for software in educational institutions;
- Adopt copyright legislation to establish notice and takedown provisions and create ISP liability (obligations which will be included in any FTA with the U.S.);
- Improve border enforcement, especially to track importation of optical media.

<p style="text-align: center;"><b>ECUADOR</b>  <b>Estimated Trade Losses Due to Copyright Piracy</b>  <i>(in millions of U.S. dollars)</i>  <b>and Levels of Piracy: 2003-2005</b><sup>2</sup></p>						
INDUSTRY	2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level
Records & Music	26.3	90%	20.0	95%	19.0	95%
Business Software <sup>3</sup>	7.9	70%	7.0	70%	7.0	68%
Motion Pictures <sup>4</sup>	NA	NA	NA	NA	NA	95%
Entertainment Software <sup>5</sup>	NA	NA	NA	NA	NA	NA
Books	2.5	NA	2.5	NA	2.3	NA
<b>TOTALS</b>	<b>36.7+</b>		<b>29.5</b>		<b>28.3</b>	

## COPYRIGHT PIRACY IN ECUADOR

The Business Software Alliance (BSA) reports that for 2005, 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 in 2005, burned CD-Rs remained 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. In contrast, the official market for Ecuador in 2004 was calculated at 500 thousand units. 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 at least 90% of the total pirate market in Ecuador, with no signs of improvement. Although piracy could be pursued *ex officio* by the

<sup>2</sup> 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](http://www.iipa.com/pdf/2005spec301methodology.pdf).

<sup>3</sup> BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Bolivia, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 piracy level data has been revised and is reflected above.

<sup>4</sup> MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

<sup>5</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

authorities, only a few sporadic raids are conducted every year, and the resources dedicated to IEPI's enforcement activities are insufficient. In 2004, the majority of international record companies closed their offices in the country, and two local independent companies are barely managing to stay afloat. The market has decreased by approximately 60% since 2003. 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 continues to be commercial photocopying piracy. Photocopying shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported. Video piracy remains a consistent problem throughout the Andean region, reaching 90% in Ecuador (MPAA does not have an anti-piracy presence in Ecuador). The U.S. entertainment software industry suffers from piracy and counterfeiting affects all platforms for playing videogames, including cartridges, personal computer CD-ROMs, and game consoles.

## **COPYRIGHT ENFORCEMENT IN ECUADOR**

**IEPI's anti-piracy enforcement efforts remained ineffective in 2005.** The IEPI was created by the 1998 copyright law to implement the country's intellectual property laws. IEPI can impose various administrative remedies, including inspections, requests for information, and fines. However, since its creation, IEPI has experienced staff shortages, low salaries and even strikes. IEPI, despite having national jurisdiction, usually performs its enforcement activities in Quito, rarely outside the city. IEPI has only a few well-trained personnel on intellectual property issues.

BSA reports that in 2005, its relationship with local enforcement authorities (IEPI) has improved, and they have been satisfied with most of the goals achieved in the cases run in 2005. BSA conducted five actions in 2005. However, a problem remains with the limited support or lack of awareness from local authorities in the municipalities. These local jurisdictions simply do not see piracy as a legal problem but rather a social problem, and do not engage in anti-piracy actions.

With respect to *ex officio* actions, BSA reports that IEPI still 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.

**Criminal actions are also ineffective and not deterrent.** The recording industry reports that isolated prosecutors and custom agents have shown an interest in the piracy problem as a result of ongoing requests by the recording industry to take action. In view of this interest, IFPI organized an anti-piracy training seminar during mid-November, 2005 in Quito for 16 prosecutors and 16 high ranking police officers interested in the subject. Following the seminar, these authorities, with support from the local industry, carried out a brief holiday campaign that included 5 raids and the seizure of 59 thousand pirate units and 2 burners in Quito. Prior to these actions, Customs had also started taking an interest in music piracy and in September seized 300,000 units of pirate product. While these operations are grossly insufficient to have an effect on piracy, the local industry views them as a good start.

The creation of special anti-piracy task forces in Quito, Guayaquil and Cuenca will improve controls on streets, distributors, and manufacturers. Music piracy is rampant in the streets of 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.

BSA reports that in 2005, the Attorney General Office, IEPI and the Police conducted three actions in the city of Quito, mainly in shopping centers, to seize pirate CDs and DVDs. As a result of these actions, approximately 300,000 CDs and DVDs were confiscated. No prosecutions were initiated.

**Civil cases:** BSA reports that in 2005, it had no experience with the Ecuadorian courts. BSA did file some cases in 2001, and again in 2002 and 2003, but experienced so many difficulties that it did not file any cases before the courts in 2004 and 2005. Below is an illustrative list of the problems BSA's local counsel has experienced in filing civil cases:

- Even though the current law 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.

**Judicial inaction remains pervasive, and specialized IP courts still have not been established.** 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. BSA anticipates testing this system in 2006.

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. BSA did not initiate any action in 2005, in part because of an upheaval in the court system (the entire membership of the Supreme Court was removed in December 2004 and not replaced until December 2005).

Delays in the creation of specialized IP courts (which have only civil jurisdiction) continue despite a requirement in the 1998 copyright law requiring their creation.

**Poor Border Controls:** There is a serious need to improve customs control regarding the importation of blank optical discs. Possible solutions include limiting the ports of entry for optical media products (including blank media). More formalized working relationships with industry representatives — for example, the recording industry — would help inform customs officials. The recording industry believes that some exported pirated music is going to Colombia.

**Training:** BSA reports that it provides workshops, seminars, and training programs to different audiences, such as businessmen, universities, and others. BSA has conducted trainings for enforcement officials and the recording industry also organized an anti-piracy training seminar in Quito for 16 prosecutors and 16 high ranking police officers.

## **COPYRIGHT LAW AND RELATED ISSUES IN ECUADOR**

**The Intellectual Property Law of 1998:** Ecuador enacted a comprehensive intellectual property law (IPL) on May 28, 1998, 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, and also incorporate some of the obligations of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms (WPPT). Amendments to the copyright law will be required to fully implement the IPR obligations in any Free Trade Agreement with the United States.

**The 1999 Education Law:** Ecuador passed an 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, Article 78, conflicts with Ecuador's constitution as well as its obligations under the Berne Convention, TRIPS, and Decision 351 of the Andean Community. Since the law was issued in 1999, BSA has stated repeatedly that it believes that Article 78 is unconstitutional and should be amended. Because of 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; as of early 2006, no opinion has yet been issued.

**Corporations must certify compliance with copyright law in annual reports.** In March 2004, the Superintendency of Companies issued a regulation (No. 04-Q-IJ) 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. The BSA has been working in coordination with the Chamber of Commerce in Quito to educate the business community about the compliance requirements of this new regulation. BSA reports that this resolution has had a positive effect, persuading an important group of medium-sized and large corporations to improve their management of IP and information technology matters.

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