

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

ECUADOR

Special 301 Recommendation: IIPA recommends that Ecuador remain on the Watch List in 2007.

EXECUTIVE SUMMARY

IIPA has recommended for years that it is essential that Ecuador take immediate steps to improve its ineffective record on enforcement and reducing piracy levels. Those copyright sectors who remain in the Ecuador market indicate that 2006 was a difficult year to obtain effective criminal and civil enforcement. In fact, the software industry pursued only administrative remedies last year. The administrative authority, IEPI, rarely focuses actions outside of Quito and its resources are strained. Border controls remain weak. While IIPA supports the Free Trade Agreement process, negotiations between the U.S. and Ecuador were suspended in May 2006.

PRIORITY ACTIONS IN 2007

Enforcement

- Make copyright protection and enforcement a matter of national policy and improve public awareness.
- Encourage police and administrative authorities to use their *ex officio* authority to investigate and take action against copyright infringers.
- Create special police anti-piracy task forces in Quito, Guayaquil and Cuenca to take anti-piracy enforcement actions against pirate street vendors, distributors and manufacturers.
- Improve border enforcement, especially to track importation of optical media.
- Provide IEPI with the necessary budget and national plan to combat piracy effectively.
- Instruct prosecutors to pursue criminal copyright cases.
- Have the National Judiciary Council appoint specialized judges for intellectual property matters, including criminal cases.
- Educate judges on intellectual property issues until the specialized IPR courts (which would have only civil jurisdiction) are created (the creation of such courts was required under the 1998 Intellectual Property Law).
- Implement and execute the tools and remedies provided in the 1998 copyright law and regulations, such that petitions for *ex parte* civil orders are excluded from the random assignment process.

Legislation

- 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.
- Develop and 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.).

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Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2004-2006 ¹

INDUSTRY	2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Musical Compositions	33.0	98%	26.3	90%	20.0	95%
Business Software ²	16.0	68%	9.0	69%	7.0	70%
Motion Pictures ³	NA	NA	NA	NA	NA	NA
Entertainment Software	NA	NA	NA	NA	NA	NA
Books	2.0	NA	2.5	NA	2.5	NA
TOTALS	51.0		37.8		29.5	

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)—both of which contain standards of intellectual property rights which must be afforded to U.S. copyright owners.⁴ In addition, the FTA negotiation process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards as well as outlining specific enforcement provisions which will aid countries in achieving effective enforcement measures in their criminal, civil, and customs systems.

COPYRIGHT PIRACY IN ECUADOR

The recording industry reports that in 2006, burned CD-Rs remained the preferred format for most pirate products containing sound recordings and music. Music piracy is so widely spread in the country that burned CDs are manufactured and sold not only on streets and flea markets but also in shopping malls in Quito and Guayaquil. No *ex officio* actions are conducted by the police authorities on a regular basis. Guayaquil, the second largest city in the

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Ecuador under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Ecuador, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

³ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

⁴ 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, 2006 at <http://www.iipa.com/pdf/IIPA%20Andean%20USITC%20ATPA%20Investigation%20final%2006082006.pdf>. In terms of trade benefits Ecuador has received, during the first 11 months of 2006, \$65.4 million worth of Ecuadorian goods entered the U.S. under the duty-free GSP code, and \$4.7 billion entered under the ATPA.

country, lost its last standing legitimate music point of sale, becoming a city of almost 100% pirate products. Piracy represents more than 90% of the market in Ecuador, with no signs of improvement. In contrast, the official music market for Ecuador in 2006 was calculated at 400,000 units which represents a decrease of 21% compared to 2005. 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., undervaluation) and other irregularities associated with CD-R importing. 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 amount of blank CD-Rs and DVD-Rs entering the country every year exceed 80 million units and a similar amount enters as contraband.

The Business Software Alliance (BSA) reports that 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) continued to be the major source of software affecting its industry during 2006. End-user piracy rates remain high among Ecuadorian businesses of all sizes, from small family businesses to large financial institutions.

The major form of piracy afflicting the U.S. book publishing industry in the region continues to be commercial photocopying. Photocopy shops near universities often fill requests for illegal reproductions of entire textbooks. Unauthorized translations are also reported.

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 for the software industry: 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 its relationships with IEPI continued to improve during 2006. BSA representatives maintain regular contact with both IEPI and the district attorney in charge of investigations of IP violations. BSA supported efforts by the IEPI to elevate the protection of intellectual property at the national policy level.

BSA reports that in 2006 it successfully conducted five administrative 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. IEPI has no resources and personnel to conduct raids in high traffic areas in Quito and Guayaquil. Due to the magnitude and complexity of the music piracy problem IEPI has

become ineffective. A coordinated action between police, prosecutors, IEPI and municipalities could make a real difference in the situation but there is a lack of political will to combat piracy.

Criminal actions: Efforts developed in 2005, between the recording industry and police authorities, came to a stall in 2006 due to the lack of action from prosecutors and IEPI. The Specialized IPR office conducted only one major raid in Quito against music and audiovisual piracy during the whole year with no significant results and no criminal prosecutions against responsible individuals. Despite the exchange of information between local industry representatives, IEPI and the IPR prosecutor's office on the links between importers or blank media and pirate goods manufacturers/sellers, no investigations were opened in this regard. Finally, no criminal actions were filed in view of the lack of prosecution.

The creation of special anti-piracy task forces in Quito, Guayaquil and Cuenca will improve controls on the 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. So far, no task forces have yet been created.

Need for specialized IP courts: The National Judiciary Council has not yet created specialized courts for intellectual property matters. Delays in the creation of specialized IP courts (which have only civil jurisdiction) continue despite a requirement in the 1998 Intellectual Property 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.

No civil cases: BSA reports that in 2006, it did not use the Ecuadorian civil system, preferring instead to use administrative remedies with IEPI. Back in 2003, BSA reported significant difficulty in obtaining effective civil remedies then and as a result, their campaign in recent years has not included civil litigation. Problems involved the regular rejection by judges of BSA requests for precautionary measures (such as search and seizure) and high bonds being required to be posted before such measures could be issued.

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 copyright, trademark, patent, as well as semiconductor 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 basically 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; it has never received a response.

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.

IPR TRAINING AND PUBLIC AWARENESS

The lack of public awareness about the importance of copyright protection and enforcement in the general public carries over to many law enforcement officials, many of whom view piracy as a social problem, not as an economic crime. BSA provides workshops, seminars, and training programs to different audiences, such as businessmen, universities, and others.