

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

ECUADOR

EXECUTIVE SUMMARY

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

Overview of key problems: The government of Ecuador continues to be unable to achieve effective copyright enforcement (in administrative, criminal and civil cases). A dangerous provision in a 1999 Education Law which purportedly grants unwarranted licenses for software still remains on the books. In terms of Special 301 placement, Ecuador has fluctuated between no-listing, the Watch List and the Priority Watch List since 1992. The business software industries continue to confront high piracy levels in Ecuador due to insufficient intellectual property rights enforcement in the country. Some of the problems that the business software industries face in Ecuador include:

- Dramatic decreases in IPR enforcement since 2001.
- Practically no enforcement actions directed at pirated music.
- Delays in the creation of specialized IP courts despite the requirement in the 1998 law mandating its creation.
- Reluctance by the courts to issue *ex parte* warrant searches, requiring the aggrieved party to submit direct evidence of intellectual property infringement.
- High judicial bonds or the lack of criteria for posting bonds before granting a seizure order creating disincentives for rightsholders to seek judicial action.
- Courts have recently required software copyright owners to file their petitions for civil *ex parte* action through the random assignment process despite the fact that current regulations provide otherwise (in addition, the random assignment process presents problems with leaking of information).
- Regarding administrative copyright enforcement, the National Copyright Authority (IEPI) has little presence within the Ecuadorian community, making its enforcement ability very weak.
- The software industry is very concerned about a provision in the 1999 education law which purports to give educational institutions free software licenses. The provision is poorly drafted and generates false expectations among educational institutions.
- The lack of any type of enforcement promotes local piracy and also exports to neighboring Colombia.

Actions which the government of Ecuador should take: To improve IPR enforcement in Ecuador, the government should take the following actions in 2004:

- 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.
- Urge IEPI to have and maintain adequate human resources to enforce its responsibilities under the copyright law, to train its officials, and to create a better salary structure.
- Amend the provision of the Education Law of 1999.
- Create special police anti-piracy task forces in Quito and Guayaquil that will address the problems of pirate street vendors, distributors and manufacturers.

Ecuador currently receives preferential trade benefits under two U.S. trade programs, both of which contain IPR standards.¹ Responding to the U.S. government's request for comments regarding countries' eligibility for ATPDEA benefits, IIPA reported that Ecuador had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.² Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Ecuador. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Ecuador's actions to meet the IPR standards of the ATPDEA *before* designation was officially conferred. One of the key discretionary criteria of these programs is that Ecuador provide "adequate and effective" protection of intellectual property rights to U.S. rightsholders.

COPYRIGHT PIRACY IN ECUADOR

Business software piracy in Ecuador consists primarily of end-user piracy and some hard-disk loading. With hard-disk loading, Ecuadorian resellers load unlicensed software onto computer hardware and sell the package to an end user. End users' 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. The industry estimates that piracy represents 95% of the total pirate market

¹ During the first 11 months of 2003, \$44 million worth of Ecuadorian goods (or 1.8% 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 36.9% decrease over the same period in the previous year. In addition, some \$1.4 billion entered under the ATPA during this same 2003 time period, representing a 1,914% increase from the same period in 2002. For more information on the history of Ecuador under Special 301 review, see Appendix D (<http://www.iipa.com/pdf/2004SPEC301USTRHISTORY.pdf>) and Appendix E (<http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² IIPA's September 16, 2002 Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries are available on the IIPA website at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf.

in Ecuador with no signs of abating any time soon. As a result, multinational companies have limited their presence in the country to sales offices and local independent companies struggle 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.

COPYRIGHT LAW IN ECUADOR 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. It also provides for a complete set of 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 creates a set of enforcement mechanisms.

Finally, the IPL declares that the protection and enforcement of IP rights is in the public interest, and creates the Ecuadorian Intellectual Property Institute (IEPI) to administer all IP registration processes and administrative enforcement measures, including border enforcement.

The IPL also provides for specialized IP courts; however, due to operative, political and financial reasons, these courts have not been created yet by the National Judiciary Council.

Even though Ecuador's current substantive copyright legislation meets its bilateral (the IPR agreement with the U.S.), multilateral (TRIPS) and regional (Andean Pact Decision 351) obligations, the performance of Ecuador's judiciary remains deficient, in that the courts continue to interpret the law in such a way as to not enforce it. This, in turn, creates an environment of uncertainty for rightsholders.

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 high 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.

COPYRIGHT ENFORCEMENT IN ECUADOR

IEPI's anti-piracy enforcement efforts are extremely weak and must improve.

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 been functioning with a small staff whose average income is lower than comparable entities. IEPI's administrative structure to raise salaries is deficient and during the last two years, IEPI employees have not received salary increases. During 2002, IEPI employees decided to go on strike in order to put pressure on the government. The government has not yet resolved IEPI employees' petitions. Even though IEPI employees resumed work after two months, it is still possible that another strike could take place in the near future.

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.

Due to IEPI's lack of knowledge about software piracy issues, BSA has worked with IEPI, mainly in the area of education since 2002. BSA organized a two-day seminar which addressed software piracy and ways to identify counterfeit software products; during the second half of 2002 BSA organized an International Seminar on Intellectual Property issues with the sponsorship of USPTO. On the enforcement side, BSA has provided leads to IEPI for inspections. IEPI has conducted 7 inspections during 2003. BSA expects IEPI to conduct more inspections during the first quarter of 2004. BSA believes that IEPI will only be successful if the Ecuadorian government supports IEPI 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 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.

Judicial action is still a barrier in effective enforcement.

The IPL provides for specialized courts for intellectual property matters; however, to date, due to operative, political and financial reasons, the National Judiciary Council has not yet created them. Thus the petitions for civil *ex parte* actions are brought before civil courts which have neither the knowledge nor the expertise necessary to attend these types of petitions. Due to this situation, seizure orders are either not granted, or are delayed.

An effective judicial system is necessary for adequate and effective copyright protection in Ecuador. During 2001 a few judges consistently applied the IPL in enforcement procedures with good results; however, during 2002 the situation worsened dramatically and enforcement remains a serious problem. Due to generalized court corruption, lack of knowledge of intellectual property matters by the Civil Courts and, in part, the perception among judges that intellectual property enforcement usually helps multinational companies to the disadvantage of poor Ecuadorians, judges have become reluctant to grant precautionary measures. Thus, 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 made it through the Ecuadorian judicial system last year and 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 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 rightsholders, which discourages rightsholders to pursue the 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 year, during 2003 BSA has not filed cases before civil courts.

After the enactment of the new intellectual property law in 1998, BSA organized a series of judicial seminars both in Quito and Guayaquil to introduce judges to the provisions of the new law. Due to the current situation, it is a high priority for BSA to keep working on the education of the civil judges on intellectual property issues until the specialized courts are created.

The BSA is very concerned about these trends in the Ecuadorian courts that amount to the arbitrary application and enforcement of the Ecuadorian copyright law.

Copyright and Regional Trade Negotiations

The United States has announced its intention to launch FTA negotiations with Ecuador during 2004.³ IIPA will be looking for an agreement that achieves the same high standards as were achieved in the recently concluded FTA with Central America.

³ See Press Release 2003-74, Office of the U.S. Trade Representative, "USTR Notifies Congress of Intent to Initiate Free Trade Talks with Andean Countries," November 18, 2003, at <http://www.ustr.gov/releases/2003/11/03-74.pdf>; and President Bush's Letter to Congress, November 18, 2003, at http://www.ustr.gov/new/fta/Andean/2003-11-18-notification_letter.pdf.