

# ECUADOR

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR retain Ecuador on the Watch List in 2019.<sup>1</sup>

**Executive Summary:** Over the last five years, Ecuador has completed a major revision of its intellectual property law, including copyright law, and unlike anywhere else in Latin America, took the political decision to weaken the protection of IP rights holders across the board. Critical developments in Ecuador's intellectual property regime, the Code of the Social Economy of Knowledge, Creativity, and Innovation (COESCI), call for acute attention to ensure Ecuador improves or at least restores legal protection for copyright holders, which has been reduced compared to prior years. In 2016, the U.S. Government noted strong outstanding concerns with respect to Ecuador's then-draft COESCI. Despite clear messages from governments and rights holders, the law has been adopted, and it contains expansive exceptions and limitations to Intellectual Property Rights (IPR), which will significantly weaken copyright protection in Ecuador. Many of these exceptions exceed the three-step test in the Berne Convention and the WTO TRIPS Agreement. Some will require a close examination to see if there is basis for potential challenges in the near future. With the passage of the new COESCI law, there are now 30 exceptions and limitations on rights (up from 11 in the prior law), including a 5-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. Indeed, the entire COESCI states that public domain is the norm and IP rights, including copyright, are the exception. The Ecuadorian legal system, unlike the United States, is a civil law system and does not follow judicial precedent. Additionally, judges have no experience or training on the doctrine of fair use. This constitutes a fatal flaw for the operation of a fair use doctrine and will likely further undermine copyright protection and the predictability of the legal environment in Ecuador.

COESCI includes several other provisions that will weaken copyright protection. For example, the recording industry is particularly concerned with expansive exceptions to the scope of the exclusive public performance and broadcasting rights attached to sound recordings (introduced through presidential amendment after the National Assembly's vote). The amendments exempt the following acts from authorization or remuneration requirements: (i) the communication to the public (including public performance) of sound recordings by "micro" and "small" enterprises (i.e., medium to small businesses, which account for about 95% of all the businesses in the country); (ii) the communication to the public (including public performance) of sound recordings in public transport vehicles; (iii) broadcasting and communication to the public, including online, by "community radios" (that account for 30% of the total number of stations nationwide); and (iv) reproduction and lending certain works by libraries; and (v) linking, reproduction, and storage by search engines where such actions are necessary for its operation and where no "protected content" is violated. These changes, combined with the general weakening of the level of copyright protection since the COESCI, could significantly damage the market for music licensing royalties and further reduce legal certainty for rights holders. After an outcry from the music community in Ecuador, the government made promises to correct or minimize the impact of those exceptions through implementing regulations to the COESCI. Those regulations were expected to be circulated by the end of 2017, but have yet to materialize. Other troubling provisions would interfere with the ability to contract and freely transfer rights, complicating transactions in the creative industries. Moreover, Articles 129-130, which normalize circumvention of technical protection measures wherever users assert the right to benefit from any of the exceptions under the COESCI, including the open-ended exception, are fatally flawed. The Government of Ecuador should take action to amend the COESCI and reverse its many deficiencies and shortcomings to comply with its international obligations. In particular, rights holders' organizations are expecting an initiative from the government to amend COESCI's biggest deficiencies.

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<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/2019/02/2019SPEC301HISTORICALCHART.pdf>.



The Ecuadorian Government should also direct considerable attention to its enforcement efforts to combat piracy and maintain a legitimate creative marketplace. Although improving slightly, camcording remains an issue, with Ecuador ranking third in the region for camcording, behind Mexico and Peru. Additionally, the largest state-owned cable network in Ecuador, CNT, refuses to pay performance rights royalties to music rights holders. For content creators to have a fair shot at success in Ecuador's market, Ecuador must make large strides in strengthening its copyright protection and enable rights holders to exercise that protection in practice. Finally, SENADI (the national authority in charge of intellectual property matters) should take clear steps in order to put the Ecuadorian government in compliance with national copyright legislation setting the right example for the country.

## **PRIORITY ACTIONS REQUESTED IN 2019**

- Encourage the government to urgently issue implementing decrees to reduce the exceptions and limitations in the COESCI, and, in the longer term, modify primary legislation to reverse this rollback of protection.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theatres, without requiring proof of commercial intent.
- Ensure that state broadcasters and cable operators are not above the law and pay royalties for the music and sound recordings that they use.

## **COPYRIGHT LAW IN ECUADOR**

**Domestic Laws:** In December 2016, Ecuador adopted a new IP law known as the COESCI. The exceptions and limitations to copyright in the COESCI, enumerated in Article 211 ("Fair Use") and Article 212 ("Acts that do not require authorization for use"), are extremely overbroad and risk undermining important protections for rights holders. They also raise serious questions regarding consistency with the three-step test governing exceptions and limitations under Article 9(2) of the Berne Convention and Article 13 of TRIPS and in the WIPO Internet Treaties. The COESCI fair use provision appears to be modeled after Section 107 of the U.S. Copyright Act; however, it is broader than the U.S. provision as it includes reference to five factors—the fifth being "use and enjoyment of other fundamental rights." Simply extracting the U.S. fair use law and implanting that statutory provision (plus an additional criterion) in Ecuador is extremely problematic and risky because U.S. fair use is based on many decades of case law and precedent, which guides the application of Section 107. Ecuador is a civil law country and does not follow the legal principle of stare decisis nor is it bound by judicial precedent in the same way as common law countries. This makes enactment of the fair use provision even more problematic. Moreover, to the extent that precedent is relevant to Ecuador's application of fair use, Ecuador does not have, to our knowledge, any body of case law on fair use to ensure implementation of this provision is compliant with the three-step test. The provision dictates that it is to be applied in line with International Treaties to which Ecuador is a party to, but in light of the issues discussed above, this will almost certainly not be the case. Further, the problems and risks associated with Ecuador's fair use provision are exacerbated by consideration of an additional element not found in Section 107 of the U.S. Copyright Act: "The enjoyment and effective exercise of other fundamental rights." This extra element complicates the application of Ecuador's fair use provision and likely expands it beyond the scope of U.S. law. On the positive side, the fair use provision is explicitly made subject to the three-step test, although given the open-ended and anything but certain scope of the provision, it is difficult to see how it could be rendered compatible with the test.

In addition to the fair use exception under Article 212, the new Ecuadorian copyright law contains a vast and extensive list of exceptions and limitations to copyright protection. This list is one of the most troubling areas of the COESCI. The President of Ecuador, using his presidential veto powers, increased Congress's previous broad and far-reaching catalogue of exceptions and limitations at the last minute. Notably, the added exceptions were included for the benefit of about 95% of all businesses performing music in their stores, about 30% of all radio stations ("community radios") competing in the broadcasting market, and for transport companies with respect to the public performance of sound recordings on public transport. In turn, they act to the detriment of rights holders.

Pursuant to Articles 211 and 212, each provision is meant to be enforced without prejudice to the other. This means that beyond fair use, the law is granting 30 additional ways to limit copyright protection regardless of whether the use would be considered fair. The 30 additional exceptions are overbroad and cover uses that clearly fall outside the scope of the three-step test. Among others, the following exceptions call for specific concern and attention:

Exception 9<sup>2</sup> is one of the more troubling exceptions due to its breadth and far-reaching application. This exception allows libraries and archives to freely reproduce a copyrighted work for three purposes (including to deliver to another library or archive who also has the authority to make another copy of the work once received) and lists an additional eight actions that the library or archive can perform. Those actions include reproducing fragments of works at the request of the library or archive for personal use and creating translations of works, both of which, if the scope is not narrowed, can harm the legitimate market of publishers and copyright owners. Similarly, exception 10<sup>3</sup>, which allows for public lending of an audiovisual work by a video library, cuts into various potential markets for audiovisual rights holders. Permission to reproduce and lend copyrighted works in such broad terms does not align with the internationally accepted standards for exceptions and limitations.

Exception 24<sup>4</sup> creates a troubling exception that operates like a statutory license in favor of an ISP to use any protected content, provided that there is no “violation” of the protected content. This exception represents an example of damagingly-vague drafting given that any “use” of copyrighted content in ways restricted by copyright, by definition, amounts to a “violation” of copyright (unless authorized by rights holders). The exception provides search engines with broad freedom to exploit copyrighted works in ways that will prejudice the rights of copyright holders and harm the legitimate online markets for copyrighted works. This is notwithstanding the attempt at narrowing language in the exception, which is circular and lacks clarity as drafted, allowing ISPs to operate with total impunity in practice. For instance, it is unclear the line at which there is a “violation of protected content,” where a search engine claims that the unauthorized reproduction of protected content (otherwise a violation) is necessary for operation.

Exception 26<sup>5</sup> plainly fails to comply with the three-step test. The exception conflicts with the normal licensing of sound recordings in various venues open to the public and fundamentally undermines rights holders’ legitimate economic interests in 95% of the Ecuadorian market. Given the high number of enterprises falling within the scope of the microenterprise or small enterprise concept, it is inevitable that the exception would not be limited to “certain special cases” and would cause material harm to the economic interests of the rights holders. It is also inconsistent with Ecuador’s current international obligations under the WPPT. This is one of the most damaging exemptions introduced by COESCI and for that reason, a clarification has been sought in the context of the implementation decree, which has been in preparation by the government for more than two years, with no final result in sight.

Exception 27<sup>6</sup> would remove music rights holders’ ability to license to transport companies for the public performance of their works and recordings. This is especially the case with coaches and “*busetas*,” which are popular forms of transportation in the region and a potential market for music rights holders. Public transport is a non-negligible sub-sector of the Ecuadorian economy and constitutes an important market for music licensing. Thus, excepting or carving out this entire market category from the scope of legal protection for music copyright holders would violate the three-step test because the exception would not be “limited” and would clearly conflict with the normal exploitation of rights. As such, it would negatively impact the legitimate interests of music rights holders and further weaken compliance with international treaty obligations.

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<sup>2</sup>Under this exception, the individual reproduction of a work made by a library, archive, or museum is allowed so long as it fits within the long and far-reaching list of acts that a library or archive may perform.

<sup>3</sup>This exception allows individual public lending of an audiovisual work by video library or other collection of audiovisual works, when the corresponding copy is in the repertoire of the video library or collection.

<sup>4</sup>This exception permits search engines to link, reproduce, and store copyrighted works as necessary for their operation, “provided that no violation of protected content is involved.”

<sup>5</sup>This exception permits communication to the public of sound recordings by microenterprises or small enterprises provided that a single, home-style device is used and that the use by enterprises in question is not for the purpose of affecting the ambience of the premises.

<sup>6</sup>This exception permits communication to the public in public transport vehicles that are not intended for tourism or entertainment use.

Lastly, exception 30<sup>7</sup> is incompatible with the three-step test, meaning it also conflicts with Ecuador's obligations pursuant to Article 13 of the TRIPS Agreement. The radios covered by this exception account for about 30% of the radio broadcasts in the country. Therefore, the exception would not be limited or negligible in terms of its impact on the normal licensing and economic interests of rights holders. It is worth noting that the community radios identified in this exception operate as commercial businesses, sell advertising, and compete with other broadcasters. Thus, the introduction of this unwarranted exception based on the not-for-profit status of community radio is 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 is very broad and can encompass any means by which works are made accessible to the public, including through digital mediums.

In addition to the foregoing exceptions to protection that cause concern, there are additional provisions that the IIPA seeks to highlight. A number of provisions provide for various rights and 'default' contractual clauses that would govern contracts within the creative sectors unless expressly excluded and sometimes even despite such an exclusion. Such provisions would frustrate the freedom of contract in the creative industries, significantly increase legal uncertainty, and only serve to complicate rights transfers.

The COESCI replaced the Intellectual Property Code of Ecuador, which was very comprehensive. The COESCI, on the other hand, is a poorly drafted text, full of political statements on public policies. These characteristics contribute to the difficulty in interpreting many of its legal provisions. Some rights holder groups in Ecuador have already called for amendments to the COESCI. Since the Ecuadorian music community pointed out fundamental legal and economic problems with the new law and urged the government to reconsider the fair use and exceptions and limitations provisions, there is an expectation that those problems might be corrected or minimized through implementing regulations. The government was supposed to circulate implementing regulations by the end of 2017, but nothing has been released yet.

**International Treaties:** In December 2016, the Ecuadorian National Assembly approved a report that ratified the country's accession to a trade agreement with the European Union (EU), Peru, and Colombia, which went into force January 1, 2017. The trade agreement's copyright provision requires compliance with the Berne Convention, the Rome Convention, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty (WPPT). It also provides for a minimum level of protection with respect to broadcasting and public performance rights in sound recordings that goes above and beyond the protection in the WPPT. Rights holders in the copyright sector have already pointed out the incompatibility of the various exceptions and limitations introduced in COESCI with the obligations and minimum standards of protection under these international copyright conventions and the FTA with the EU.

## **COPYRIGHT PIRACY AND ENFORCEMENT ISSUES IN ECUADOR**

Despite the attempts to advance copyright legislation in the country, enforcement of IPR in Ecuador remains very weak. Rights holders struggle to enforce their copyright in practice, and attempts to do so through administrative authorities often linger for procedural reasons. A lack of deterrent sentencing and *ex officio* actions continues to hamper effective enforcement and protection against infringing acts.

**Online Piracy:** Popularity of stream-ripping sites and BitTorrent continued to grow during the last year. Most of the sites and tools used by Internet users in Ecuador are foreign infringing music sources, including stream-ripping sites known globally. At the same time, regional Latin Mp3 download sites are popular among local users. For example, *uTorrent* and *2CONV/FLVTO* have recorded an average growth rate of 20% monthly, with *uTorrent* having

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<sup>7</sup>This exception allows public communication, transmission and retransmission provided by a body of community broadcasting, as long as it conforms to the provisions of the relevant legislation. The relevant legislation is the telecommunications law that provides technical requirements for a station to obtain an operating license. It also states that "community radios" are not-for-profit entities. However, in recent years, community radios have started engaging in commercial activities by selling ads just like other commercial broadcasters do.

a monthly rate of over 90% in 2018. During this period there were no operations against infringing websites or platforms by law enforcement agencies in Ecuador. It is alarming that there is no official plan available in the National Police formal agenda for such actions. At the same time, SENADI has the opportunity and power to use the administrative tools available to protect the local innovation ecosystem to promote IP protection and assist development of local culture. Ecuador is the only country in the region where serious piracy is treated as a misdemeanor with fines instead of prison terms. The situation is incompatible with Ecuador's obligations under the TRIPS Agreement and is a result of another unfortunate legal reform passed during the Correa administration. Ecuadorian authors, artists, and producers today are exposed to almost zero enforcement of their rights against piracy, and there is an alarming lack of resources devoted to studying and combatting the copyright piracy problem by the government. SENADI should pay more attention to the problem that is harming the chances of growth for a still incipient digital music market. The number of licensed digital music services in Ecuador (eight), lags behind similar markets in the region (Peru, Columbia, Chile, and Uruguay respectively have 12, 12, 13, and 11 licensed digital music services), and music sales are considerably lower, as well. In sum, online music piracy requires governmental attention, coordination with private sector representatives, and devotion of resources. It should be one of the most important topics in the SENADI's agenda in order to create conditions for a flourishing and prosperous e-commerce market.

**Camcording:** Camcording is a problem in Ecuadorian movie theatres. In 2018, the MPAA reported eight camcords sourced from Ecuador (down from 11 in 2017); also, eight audio-only camcords sourced from Ecuador (down from 11 in 2017). While this represents a slight decrease from the same period in 2017, Ecuador still ranks third in the region after Mexico and Peru for camcording.

**Performance Royalties:** Further, the recording industry reports that it is often impossible to collect performance royalties for music and sound recordings, including from state-owned broadcasters like CNT. The Government of Ecuador should set a good example and promote the fair payment of required license fees, which would support the development of Ecuador's creative industries. Two bad cases are clear examples of the situation. First, phonogram producers and members of the music licensing company (CMO) Soprofon filed numerous administrative actions before SENADI's predecessor against DirecTV based on the unauthorized communication to the public of vast music catalogs. DirecTV lost in all cases and was fined three years ago for more than half million dollars. However, an appeal to all decisions is still pending and DirecTV continues operating with no license or payment to producers and artists. SENADI is responsible for resolving the appeal. Second, Soprofon submitted a claim against state-owned CNT, the biggest cable operator in the country, for its refusal to get a performance rights license from every right holder group or organization in Ecuador. CNT is setting a bad example, thereby causing tremendous damage to the efforts developed by rights holders in Ecuador to license in the cable/satellite mark. The case was submitted to SENADI, which is pending to deliver a technical opinion on the matter to CNT.