

ECUADOR

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR retain Ecuador on the Watch List in 2020.¹

Executive Summary: With the 2016 enactment of the Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación (Code of the Social Economy of Knowledge, Creativity, and Innovation, COESCI), Ecuador dramatically weakened its IPR protection. After efforts by the creative industries have yielded no adequate results, IIPA urges USTR to encourage Ecuador to restore legal protection for copyright holders either through regulations or amendments to COESCI.

In sum, COESCI upends the copyright framework, asserting that public domain is the norm and copyright is the exception. COESCI features 30 copyright exceptions and limitations (up from 11 in the prior law), including a five-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. Ecuador, unlike the United States, has a civil law system and does not follow judicial precedent. Additionally, Ecuadorian judges have no experience or training on the doctrine of fair use. These realities impair the proper application of the fair use doctrine and cause unacceptable legal uncertainty for both rights holders and users.

Many of COESCI’s exceptions clearly exceed the three-step test in the Berne Convention and the WTO TRIPS Agreement. Some may provide a basis for potential challenges in the near future, but mostly, Ecuador’s weakened copyright system is already preventing the growth of many businesses related to the production and distribution of protected content. The recording industry is particularly concerned with expansive exceptions to the exclusive public performance and broadcasting rights attached to sound recordings which exempt “community radios” (operating as commercial radios), medium and small businesses and public transportation vehicles from authorization or remuneration requirements. COESCI also enables libraries to reproduce and lend protected works in ways that conflict with the legitimate economic interests of publishers and other rights holders. The law also allows linking, reproduction, and storage by search engines where such actions are necessary for their operation and where no “protected content” is violated. These exceptions have significantly reduced the market for licensing royalties, especially for the music industry. Other troubling provisions interfere with rights holders’ ability to contract and freely transfer rights, and normalize the circumvention of technical protection measures wherever users assert the right to benefit from any of COESCI’s exceptions.

After the creative community in Ecuador and abroad expressed their deep concerns regarding COESCI, the government promised to correct or minimize the impact of its exceptions through implementing regulations by 2017. Unfortunately, the changes announced by the *Servicio Nacional de Derechos Intelectuales* (National Service for Intellectual Rights, SENADI) in November 2019 fail to adequately correct COESCI’s most egregious deficiencies and do not bring Ecuador into compliance with its international obligations.

The Ecuadorian Government should also direct considerable attention and resources to its enforcement efforts to combat piracy and foster a vibrant legitimate creative marketplace. Ecuador continues to rank third in the region for camcording, behind Mexico and Brazil. 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

¹For 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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



in Ecuador's market, Ecuador must take the appropriate steps to strengthen copyright protection and enable rights holders to exercise and protect their rights in practice.

PRIORITY ACTIONS REQUESTED IN 2020

- Urgently modify COESCI to reverse this rollback of protection and to update copyright protection and enforcement in Ecuador in line with international best practices.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording of films in theatres, without requiring proof of commercial intent.
- Ensure that broadcasters and cable operators are not above the law and pay royalties for the music and sound recordings that they use.

THE COPYRIGHT MARKETPLACE IN ECUADOR

Internet penetration remained steady during 2019, with approximately 13.5 million Internet users in Ecuador, representing about 78% of the population.² Mobile broadband penetration is growing significantly and smartphone penetration is over 38%.³ Internet daily usage is growing fast and in 2019, the active users population surpassed 84%. According to the International Federation of the Phonographic Industry's (IFPI's) 2019 Global Music Report, in Ecuador, digital revenues amount to 85.4% of total music revenues and streaming sales make up 94% of total music sales. There are nine legitimate online music services.⁴

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, such as *y2mate.com*, *flvto.biz* and *mp3-youtube.download*. At the same time, regional Latin Mp3 download sites are popular among local users. For example, in December 2019, *uTorrent* and the stream-ripping sites *2CONV* and *y2mate* recorded an average growth rate of over 30%, and *uTorrent*, a growth rate of over 10%.

Camcording is a persistent problem in Ecuadorian movie theatres. In 2019, the MPA reported 16 camcords sourced from Ecuador, unchanged from 2018. Ecuador is currently the third largest source of movie theater piracy in Latin America behind Mexico and Brazil.

COPYRIGHT LAW IN ECUADOR

Ecuador's 2016 COESCI establishes numerous exceptions and limitations to copyright, enumerated in Article 211 ("Fair Use") and Article 212 ("Acts that do not require authorization for use"). These exceptions are overbroad and undermine important protections for rights holders. They are also inconsistent with the three-step test governing exceptions and limitations under Article 9(2) of the Berne Convention, Article 13 of TRIPS and the WIPO Internet Treaties (in force in Ecuador since 2002). COESCI also fails to meet Ecuador's other copyright protection obligations pursuant to its free trade agreements with the European Union (EU), Peru, and Colombia, which went into force January 1, 2017.

SENADI's November 2019 statements on planned changes to COESCI did not address the creative industries' most serious concerns. Although the government is conducting consultation meetings and workshops with stakeholder organizations and academia, it has not delivered a concrete initiative to amend COESCI. It is necessary for SENADI to fulfill the promise made by President Lenin Moreno's administration to reverse at least the most damaging provisions in COESCI. In the three years since COESCI entered into force, copyright industries in Ecuador have declined, mainly

²See www.Internetworldstats.com.

³Instituto Nacional de Estadística Y Censo (Ecuador), Tecnologías de la Información y Comunicación Encuesta Multipropósito, 23 (2018) - https://www.ecuadorencifras.gob.ec/documentos/web-inec/Estadisticas_Sociales/TIC/2018/201812_Principales_resultados_TIC_Multiproposito.pdf.

⁴<https://www.pro-music.org/legal-music-services-latin-america.php>.

as a result of erroneous regulations, conceived under the bizarre idea that protection of intellectual property rights is no longer a fundamental right. We urge the Government of Ecuador to make the appropriate changes to bring COESCI into compliance with its international obligations.

Fair Use: Transplanting U.S. fair use law alone to COESCI creates an unacceptable level of uncertainty and risk in the copyright ecosystem. While decades of case law and the principle of *stare decisis* enable U.S. courts to appropriately interpret Section 107 of the Copyright Act, a similar environment does not exist in Ecuador. As a civil law country, its courts are not bound by judicial precedent. Furthermore, there is no body of case law to which a judge may refer in evaluating whether the contested use is indeed fair. To make matters worse, COESCI's Article 211 is broader and more uncertain than the U.S. provision on which it is based because it adds a fifth factor, i.e. "use and enjoyment of other fundamental rights." Finally, although Article 211 indicates it is to be applied in accordance with international treaties to which Ecuador is a party, the very letter of the provision and the absence of binding judicial precedent, make such application virtually impossible.

Other Exceptions: COESCI's list of exceptions and limitations is extensive. In addition, COESCI's exceptions and limitations, including fair use, can be enforced without prejudice to the others. This adds to the breadth of the exceptions because a use that does not meet the requirements of a specific exception may still be considered a fair use, and a use that is not deemed to be fair might otherwise qualify as an exception. The following exceptions allow widespread uses that conflict with the normal exploitation of works and unreasonably prejudice rights holders' legitimate interests, in clear contravention of internationally accepted standards for exceptions and limitations:⁵

Exception 9 for libraries and archives is broader than U.S. law in important respects. It allows libraries and archives to freely reproduce a copyrighted work to: (1) deliver to another library or archive that may, in turn, make its own additional copy for purposes of lending and preserving the copy received; and (2) substitute a missing or unusable copy in another library's collection. It also allows libraries to make eight additional uses without authorization or payment, including text and data mining, as well as translating works for research purposes if they have not been translated into Spanish or other local languages after three years from publication. These library exceptions can harm the legitimate market of publishers and copyright owners. Exception 10⁶ similarly cuts into various potential markets for audiovisual rights holders because it allows public lending of audiovisual works by a video library.

Exception 11 allows broadcasters to make ephemeral copies for their own transmissions and keep them for a period of five years. This long period makes this a *de facto* statutory license to make permanent copies, instead of an exception for ephemeral copy use. This exception prevents music right holders in Ecuador from licensing the reproduction rights in their contents and unreasonably interferes with right holders' normal business.

Exception 24 allows websites to freely reference, link, reproduce and store protected content when necessary for the operation of a search site and provided that there is no "violation" of the protected content. This exception enables search engines to exploit copyrighted content to the detriment of rights holders and is unclear because any "use" of copyrighted content in ways restricted by copyright, unless authorized by rights holders, is a "violation" of copyright.

Exception 26 allows small businesses to freely communicate works to the public. Given that the majority of businesses in Ecuador qualify as "small businesses," this is one of the most damaging exceptions in COESCI. It conflicts with the normal licensing of sound recordings in numerous venues across the country and fundamentally undermines rights holders' legitimate economic interests in 95% of the Ecuadorian market.

⁵"Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder." TRIPS, Article 13, Berne Convention Art. 9, WCT/WPPT.

⁶This 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.

Exception 27 removes 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 non-negligible market for music rights holders.

Exception 30 allows "community radios" to communicate works to the public. Radios covered by this exception account for about 30% of the radio broadcasts in the country, operate as commercial businesses, sell advertising, and compete with other broadcasters. This exception is, therefore, 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 can encompass any means by which works are made accessible to the public, including through digital media.

In addition to the foregoing exceptions, other COESCI provisions provide for various rights and 'default' clauses that govern contracts within the creative sectors unless expressly excluded and sometimes even despite such an exclusion. Such provisions frustrate the freedom of contract in the creative industries, significantly increase legal uncertainty, and complicate rights transfers.

COPYRIGHT ENFORCEMENT IN ECUADOR

Despite the attempts to advance copyright legislation in the country, enforcement of IPR in Ecuador remains weak and underfunded. Rights holders struggle to enforce their copyrights in practice, and attempts to do so through administrative authorities can linger for procedural reasons. A lack of deterrent sentencing and *ex officio* actions continue to hamper effective enforcement and protection against infringing acts. IIPA recommends Ecuador develop an official enforcement plan for the National Police formal agenda. Ecuador is the only country in the region where serious piracy is treated as a misdemeanor with fines instead of prison terms, which is yet another violation of Ecuador's obligations under the TRIPS Agreement.

In a positive development, in 2019, SENADI issued a blocking order against notorious pirate site *Roja Directa* for transmitting, without authorization, football matches from the Premier League on the Internet. This order was based on SENADI's administrative power to stop copyright violations. SENADI should continue this type of action to increase the chances of growth for Ecuador's creative industries.

Performance Royalties: The recording industry continues to report significant difficulty in the collection of performance royalties for music and sound recordings, although there was progress in late 2019 with regards to a state-owned broadcaster.

In 2015, phonogram producers and members of the collective management organization (CMO) Soprofon filed numerous administrative actions before SENADI's predecessor against DirecTV for the unauthorized communication to the public of vast music catalogs. DirecTV lost in all cases and was fined three years ago for more than a 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's copyright committee is responsible for resolving these appeals.

In a similar case, Soprofon submitted a claim against state-owned CNT, the biggest cable operator in the country, for its refusal to license performance rights from every rights holder group or organization in Ecuador. The case was submitted to SENADI, which is pending to deliver a technical opinion. In late 2019, the Government of Ecuador paid licensing fees for past uses. Negotiations are ongoing for the licensing of future uses.