

ECUADOR

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR retain Ecuador on the Watch List in 2021.¹

Executive Summary: Four years since the enactment of Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación (Code of the Social Economy of Knowledge, Creativity, and Innovation, COESCI), Ecuador's creative sector has stagnated due to COESCI's dramatic weakening of the country's copyright protection.

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), many of which clearly exceed the three-step test in the Berne Convention and the WTO TRIPS Agreement, and interfere with rights holders' ability to contract and freely transfer rights. In addition, COESCI includes 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 create unacceptable legal uncertainty for both rights holders and users.

In November, Ecuador implemented regulations of some of COESCI's provisions. Unfortunately, the regulatory provisions announced by the *Servicio Nacional de Derechos Intelectuales* (National Service for Intellectual Rights, SENADI) do not adequately correct COESCI's egregious deficiencies and do not bring Ecuador into compliance with its international obligations. We understand that the *Secretaría Nacional de Educación Superior, Ciencia, Tecnología e Innovación* (National Secretariat for Higher Education, Science, Technology and Innovation, SENESCYT) is working on a legislative proposal to amend some of COESCI's exceptions. We commend SENADI and SENESCYT for undertaking these initiatives and urge them to engage in consultation with all relevant stakeholders to ensure that both regulations and amendments to the law meet the country's treaty obligations and best practices for copyright protection.

To foster a vibrant, legitimate creative marketplace, we also recommend that Ecuador direct considerable attention and resources to its enforcement efforts. We commend SENADI's issuance of administrative site blocking orders against pirate sites. This is a step in the right direction. However, Ecuador's piracy problems remain and need prompt action. For instance, the country's pay-TV penetration has declined in recent years due to piracy. Camcording legislation is still necessary because, once the COVID-19 pandemic ends, Ecuador will likely continue to rank as a top regional provider of camcorded films.

PRIORITY ACTIONS REQUESTED IN 2021

- Urgently amend COESCI and its regulations to bring Ecuador's framework for copyright protection and enforcement in compliance with its treaty obligations and international best practices.
- Encourage SENADI to continue issuing administrative blocking orders against online piracy platforms, as warranted, by providing more resources and funds.

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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording, without requiring proof of commercial intent.
- Ensure that broadcasters and cable operators pay royalties for the music and sound recordings that they use.

THE COPYRIGHT MARKETPLACE IN ECUADOR

Official government statistics indicate that, for 2019, more than 59% of the population uses the Internet and over 76% has a smartphone.² According to the International Federation of the Phonographic Industry's (IFPI's) 2020 Global Music Report, in Ecuador, digital revenues amount to 81.1% of total music revenues and streaming sales make up 80% of total music sales. There are nine legitimate online music services.³

Stream-ripping is the predominant form of music piracy in Ecuador. The most popular stream-ripping sites are *y2mate.com*, *savefrom.net* and *flvto.biz*, with each site respectively receiving over 1.8 million, over 1.3 million and over 720,000 visits from Ecuador during the third quarter of 2020. In addition, online piracy of film and television content, including through infringing streaming devices (ISDs), has been on the rise during the COVID-19 pandemic in 2020.

Camcording is a persistent problem in Ecuadorian movie theatres. In 2019, the MPA reported 16 camcords sourced from Ecuador, which makes it the third largest source of movie theater piracy in Latin America, behind Mexico and Brazil. Although 2020 was an exceptional year due to the COVID-19 pandemic, Ecuador is likely to remain a major regional provider of camcorded films once movie theaters re-open.

COPYRIGHT LAW IN ECUADOR

Ecuador's 2016 COESCI established 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 entered into force January 1, 2017.

Unfortunately, SENADI's November 2020 regulations implementing some of COESCI's provisions did not address the creative industries' most serious concerns. We understand that SENESCYT is working on a legislative proposal to amend some of COESCI's exceptions. We urge SENADI and SENESCYT to fulfill the promise of the Moreno administration to reverse the most damaging provisions in COESCI and bring the law into compliance with the country's treaty obligations. Instead of addressing the most urgent concerns regarding the overbroad exceptions, the November regulations imposed a number of new obligations to Collective Management Organizations (CMOs) that go beyond the regional standards and, in practice, mandate CMOs to invest significant time and resources on attending multiple requests and inquiries from SENADI.

Fair Use: Transplanting the U.S. fair use provision alone in the COESCI law 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

²See <https://www.ecuadorencifras.gob.ec/tecnologias-de-la-informacion-y-comunicacion-tic/>.

³See <https://www.pro-music.org/legal-music-services-latin-america.php>.

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. Moreover, it includes language akin to a fair use savings clause which suggests that if a use that is generally regulated by a specific exception does not meet the requirements of such exception, it may still be considered under the fair use provision. 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 the three-step test that is enshrined in the international copyright treaties and that establishes the international standard for the scope and application of exceptions and limitations to copyright:⁴

Exception 9 for libraries and archives is broader than U.S. law in important respects and contravenes the parameters of the three-step test. It allows libraries and archives to 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 to its users or preserving the copy it received; and (2) replace the lost or destroyed copy of the requesting library or archive. The provision also provides for eight further acts that a library or archive may undertake without authorization or payment, including text mining, and the translation of works originally written in a foreign language if, after three years from publication, they have not been translated into Spanish or other local languages. Unfortunately, Article 64 of SENADI's regulation does not correct the overbroad scope of this provision. For instance, the regulation allows libraries, archives and museums to reproduce a work "in the amount necessary" and to rely on third parties for the reproduction of a work for preservation purposes. As drafted, these library exceptions and their regulations can harm publishers' legitimate market.

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, without the permission from rights holders, to reference or link to online sites, as well as for the reproduction and storage of content when necessary for the operation of a search site provided that there is no "violation" of the protected content. This exception is contradictory because any "use" of copyrighted content in ways restricted by copyright, unless authorized by rights holders, is itself 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 public performance market.

Exception 27 eliminates music rights holders' ability to license to private transportation 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. This is another example of an unfair and an unjustified exception, protecting a particular interest of a group of companies against the legitimate interest of copyright and neighboring rights holders.

Exception 30 allows "community radios" to communicate works to the public. Radios covered by this exception account for 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

⁴Berne Convention, Art. 9 ("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."); see also Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Art. 13 (1994); WIPO Copyright Treaty (WCT), Art. 10 (1996); and, WIPO Performances and Phonograms Treaty (WPPT) Art. 16 (1996).

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 compulsory licenses, various rights and ‘default’ clauses to govern contracts within the creative sectors unless expressly excluded and sometimes even despite such an exclusion. For instance, Article 217 establishes a compulsory license for the translation of literary works that are not available in Spanish or other local languages in the national market. Articles 69 and 70 of SENADI’s regulations insufficiently narrow the scope of this provision by requiring a seven year period of unavailability and that the party who seeks the license show there is a need for the work among “the general public or for school or university teaching.” COESCI’s Article 221 imposes a mandatory interpretation of the law in favor of the author if there is a conflict regarding neighboring rights. Such provisions frustrate the freedom of contract in the creative industries, significantly increase legal uncertainty, and complicate rights transfers.

Camcording legislation: SENADI is working on a legislative proposal to amend Article 208A of Ecuador’s Penal Code, which establishes penalties for piracy and counterfeiting, to penalize camcording.

COPYRIGHT ENFORCEMENT IN ECUADOR

More active and efficient copyright enforcement in Ecuador depends on the urgent modification of its legal framework and appropriate funding. 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 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 the past two years, SENADI has issued administrative site-blocking orders against pirate sites. We urge SENADI to continue this type of action to foster the growth of Ecuador’s creative industries.

Administrative proceedings before SENADI, known as “tutelas,” were originally designed to provide a faster and less expensive alternative to civil litigation. However, the music industry’s experience has been the opposite. A single administrative action is subject to four instances of review before a final ruling and, at that point, the alleged infringer has the option to challenge the administrative decision before the judiciary. Additionally, SENADI’s section in charge of deciding these cases, known as the *Órgano Colegiado de Derechos Intelectuales*, has an erratic record in decisions about neighboring rights. In July 2020, SENADI decided 11 administrative appeals against DIRECTV for non-compliance with phonogram producers’ and performers’ rights. These cases were initiated in 2014 by SOPROFON, a sound recording industry CMO, when SENADI (then known as IEPI) ruled in favor of SOPROFON and imposed fines to DIRECTV for about half a million USD for the unauthorized communication to the public of sound recordings. Despite the favorable 2020 decisions, DIRECTV’s fines were reduced to about half of their initial value. Additionally, DIRECTV has paid no fine because every administrative ruling triggers another automatic review of the case, known as a “reposition.” This situation plays against the effective protection of phonogram producers’ rights in Ecuador and is a major obstacle for the industry’s business development. Ecuador should conduct a comprehensive review of the administrative procedure for copyright infringement cases in the context of the COESCI amendments process in order to make the process expeditious and effective.