

ECUADOR

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR retain Ecuador on the Watch List in 2023.¹

Executive Summary: Six 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. For example, unlike the majority of music markets in the region, which have experienced significant growth in recent years, Ecuador’s music market has languished, primarily because COESCI has proven to be extremely burdensome and full of overly broad exceptions and limitations to copyright that inhibit new investments into the production of Ecuadorian talent as well as market development. 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 license 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 in which courts do not follow judicial precedent, and Ecuadorian judges have no experience or training on the doctrine of fair use, all of which undermine the proper application of the fair use doctrine and create unacceptable legal uncertainty for both rights holders and users.

Unfortunately, the regulatory provisions announced by the *Servicio Nacional de Derechos Intelectuales* (National Service for Intellectual Rights, SENADI) in 2020 do not adequately correct COESCI’s egregious deficiencies and do not bring Ecuador into compliance with its international obligations. IIPA understands 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. IIPA commends SENADI and SENESCYT for undertaking these initiatives and urges 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, IIPA also recommends that Ecuador direct considerable attention and resources to its enforcement efforts. While in 2021 Ecuador undertook several important enforcement reforms, including adding criminal penalties for intellectual property (IP) violations, and SENADI issued several administrative site-blocking orders, Ecuador’s piracy problems remain and require prompt action. For example, the country’s pay-TV penetration has declined in recent years mainly due to the proliferation of illegal streaming websites and illegal Internet protocol TV (IPTV) services piracy, and camcording legislation remains necessary because as theaters reopen Ecuador will likely continue to rank as a top regional provider of camcorded films.

PRIORITY ACTIONS REQUESTED IN 2023

- 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 and to do so in a transparent process that provides relevant stakeholders the opportunity to intervene.

¹ 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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

- SENADI should consider issuing administrative *ex officio* blocking orders against online piracy platforms, notorious stream-ripping sites, and other online infringing services as warranted, by providing more resources and funds.
- Create and train enforcement units dedicated to investigate and raid physical targets of online piracy.
- Enact legislation to provide for deterrent criminal penalties for unauthorized camcording, without requiring proof of commercial intent.
- Ensure that broadcasters and cable operators, including the state-owned cable TV company, pay royalties for the music and sound recordings that they use.

THE COPYRIGHT MARKETPLACE IN ECUADOR

Official government statistics indicate that, for 2022, more than 60% of the population used the Internet and over 50% had a smartphone.² According to the International Federation of the Phonographic Industry's (IFPI's) 2022 Global Music Report, digital revenues in Ecuador amount to 91.2% of total music revenues, with streaming revenues alone making up 91% of total music revenues. There are seven legitimate online music services.³

Stream ripping is the predominant form of music piracy in Ecuador. While the most popular stream-ripping sites were *y2mate.com*, *mp3-youtube.download* (now *mp3y.download*), *flvto.biz*, and *notube.net*, website blocking actions ordered by SENADI against these sites have hurt their popularity, with traffic shifting to other stream-ripping sites, including *ssyoutube.com*, *savefrom.net*, and *mp3y.download*, all of which had a combined number of 10.1 million visits during Q3 of 2022. In addition, online piracy of film and television content, including through illicit streaming devices (ISDs) and infringing IPTV services, has been on the rise due to the current legal framework that prevents proper enforcement of copyrights. While SENADI's site-blocking actions against audiovisual piracy are important, they are insufficient considering the amount of infringement.

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 2020-2021 were exceptional years due to the COVID-19 pandemic, Ecuador is likely to remain a regional provider of camcorded films as movie theaters regain popularity. Legislation is needed to provide for deterrent criminal penalties for unauthorized camcording, without requiring proof of commercial intent.

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 in Article 9(2) of the Berne Convention, Article 13 of the WTO TRIPS Agreement, and the corresponding provisions of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), each in force in Ecuador since 2002.

Unfortunately, SENADI's November 2020 regulations implementing some of COESCI's provisions did not address the creative industries' most serious concerns regarding the overbroad exceptions. Instead, the regulations imposed numerous new obligations on 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. SENESCYT is reportedly working on a legislative proposal to amend some of COESCI's exceptions. IIPA urges SENADI and SENESCYT to reverse the most damaging provisions in COESCI, as laid out below, and to bring the law into compliance with the country's international obligations.

² See Information and Communication Technologies 2020 Summary, NEC (last visited Nov. 8, 2022), available at <https://www.ecuadorencifras.gob.ec/tecnologias-de-la-informacion-y-comunicacion-tic/>.

³ See Legal Music Services Ecuador, PRO MUSIC (last visited Nov. 23, 2021), available at <https://www.pro-music.org/legal-music-services-latin-america.php>.

Fair Use: Ecuador’s attempt to transplant the U.S. fair use provision in the COESCI law creates an unacceptable level of uncertainty and risk in the country’s copyright ecosystem. COESCI’s Article 211 is broader than the U.S. provision on which it is purportedly based, because it adds a fifth factor, described as “use and enjoyment of other fundamental rights.” This factor is essentially a catchall and creates great uncertainty as to what constitutes “other fundamental rights” and how this factor will relate to the other four. Furthermore, while decades of case law and the principle of *stare decisis* enable U.S. courts to appropriately interpret and confine Section 107 of the U.S. Copyright Act, a similar environment does not exist in Ecuador. As a civil law country, its courts are not bound by judicial precedent. Furthermore, no body of case law exists within the legal system in Ecuador to which a judge may refer in evaluating whether the contested use is indeed fair. Also, although Article 211 indicates it is to be applied in accordance with international treaties to which Ecuador is a party, the provision is not in accord with international law due to the broad, unclear fifth factor and the lack of any case law to appropriately confine the exception. Finally, Article 211 may further negatively impact online enforcement in Ecuador because Internet platforms may be less willing to take down infringing content if they construe the fifth factor broadly and decide that unauthorized access to protected works is a fair use pursuant to “enjoyment of other fundamental rights” recognized in Ecuador (e.g., right to practice sports, right to education, right to communication, etc.). Thus, as written, the provision is outside the bounds of the three-step test, the international standard that confines exceptions and limitations to copyright, because it conflicts with the normal exploitation of works, unreasonably prejudices rights holders’ legitimate interests, and is not limited to “certain special cases.”⁴

Making matters worse, Article 211 includes language akin to a fair use savings clause that 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 fair use savings clause applies to each enumerated exception in the law, effectively broadening each exception beyond the scope of the three-step test. In other words, if the use does not meet one of these exceptions, then the fair use savings clause allows the exploiter to try and qualify under the overly broad fair use provision, with all of the problems identified above. Therefore, for all of the reasons discussed above, Article 211 should be removed.

Other Exceptions: COESCI’s list of other exceptions and limitations is extensive. As discussed below, the following exceptions allow widespread uses that clearly fall outside the confines of the three-step test.

Exception 9 for libraries and archives 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 and data 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. Again, this exception is overly broad in violation of the three-step test, especially in that libraries and archives may use the copies created under the exception for lending to users. 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 and go beyond certain special cases.

Exception 11 allows broadcasters to make ephemeral copies for their own transmissions and keep them for a period of five years. This lengthy period of retention makes this exception a *de facto* statutory license to make permanent copies, instead of an exception for ephemeral copy use. This exception prevents music rights holders in

⁴ Berne 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 WTO TRIPS Agreement, Art. 13 (1994); WIPO Copyright Treaty (WCT), Art. 10 (1996); and, WIPO Performances and Phonograms Treaty (WPPT) Art. 16 (1996).

Ecuador from licensing the reproduction rights and unreasonably interferes with rights holders' normal business. The exception should be revised to limit the retention period to a standard term of 30 days.

Exception 24 allows websites, without the permission of rights holders, to reference or link to online sites, as well as to reproduce and store content when necessary for the operation of a search site provided 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 most businesses in Ecuador qualify as "small businesses," the exception is not limited to certain special cases. This exception is one of the most damaging in COESCI because it results in unreasonable harm to the economic interests of copyright and related rights holders. 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, especially coaches and "busetas," which are popular forms of transportation in the region and a non-negligible market for music rights holders. This overbroad, unfair, and unjustified exception is another example of protecting a particular interest of a group of companies against the legitimate interest of copyright and related rights holders.

Exception 30 allows "community radios" to communicate works to the public without permission from rights holders or remuneration. 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 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 problematic COESCI provisions include compulsory licenses and various rights and "default" clauses to govern contracts within the creative sectors, unless those contractual provisions are 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 a conflict exists regarding related rights. Such provisions are discriminatory and do not fulfill their intended purpose of increasing protection for authors and composers. In today's world, copyright owners and related rights holders, including singers and musicians, need equal protection to secure the normal exercise of their rights according to their contributions in the production and distribution chain of music and other protected content.

COPYRIGHT ENFORCEMENT IN ECUADOR

More active and efficient copyright enforcement in Ecuador depends on the urgent modification of its legal framework and appropriate funding. In addition, Ecuador's government should create and train enforcement units dedicated to investigate and raid physical targets of online piracy. In a positive development, in 2021 Ecuador instituted several important enforcement reforms, including introducing IP crimes into the Ecuadorian legal system to punish, with imprisonment, those who violate IP rights. IIPA hopes this reform will address problems with a lack of deterrent sentencing and *ex officio* authority that historically have hampered effective enforcement against infringing acts in

Ecuador.⁵ In addition, important amendments helped alleviate gaps and obstacles to customs regulations and border measures.⁶

In another positive development, in the past three years, SENADI has issued administrative site-blocking orders against pirate sites. In particular, in September 2021, SENADI ordered Ecuadorian Internet service providers (ISPs) to block around 40 infringing online platforms, three of which were responsible for enabling the non-authorized access of more than 50,000 visitors to over 1,000 pay-TV channels. On July 23, 2021, following applications filed by *Sociedad de Productores de Fonogramas* (SOPROFON), a sound recording industry CMO, SENADI issued four precautionary measures ordering all ISPs in the country to implement blocking against the most popular stream-ripping sites in Ecuador: *y2mate.com*, *mp3-youtube.download*, *flvto.biz*, and *notube.net*. Following the blocking, visits to these four sites from Ecuador dropped from 3.79 million in June 2021, the month prior to the blocks, to just 0.85 million in September 2021, a fall of 77.7%. This decline has been maintained during 2022. These orders are the first of their kind in Ecuador against sites dedicated to the infringement of IP rights in sound recordings and music videos of national and international artists and set a positive precedent for copyright enforcement in the online environment.

Despite the impact of this first action, stream ripping remains a key music piracy threat in Ecuador. Blocking four major stream-ripping destinations was successful in stopping the vast majority of visits to the targeted sites, but a wide variety of alternatives remained for users in Ecuador eager to download music illegally through stream ripping. For instance, following the blocking of the four sites mentioned, visits from Ecuador to stream-ripping site *Snappea.com* alone rose from 0.82 million in June 2021 to 5.83 million in September 2021. We urge SENADI to issue blocking orders against other sites that facilitate piracy to foster the growth of Ecuador's creative industries.

Administrative proceedings before SENADI, known as “tutelas,” were 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 related rights.

For example, in 2020, the Judiciary Panel, *Órgano Colegiado de Derechos Intelectuales*, decided 11 administrative appeals against DIRECTV for non-compliance with phonogram producers' and performers' rights. These cases were initiated in 2014 by SOPROFON 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 impinges on 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 to make the process expeditious and effective.

In addition, CNT, the state-owned cable TV company that signed an agreement with SOPROFON in 2019 to settle claims for uses of phonograms from 2011 to 2019, is now at fault again after failing to comply with the licensing agreement that covers the use of sound recordings from 2020 to 2023. This lack of compliance sets a bad precedent

⁵ Pursuant to this reform, intellectual property (IP) crimes will be punished with six months to one year imprisonment, confiscation, and a fine of eight to three hundred unified basic salaries (currently US\$ 3,200 – US\$ 120,000). For companies that commit criminal IP crimes, punishments include the confiscation of the offending assets, and a fine, regardless of the criminal responsibility of the persons involved in the commission of the crime. The judge may order the offending goods to be destroyed or, in cases in which the government determines the seized merchandise may satisfy a social need, the offending IP will be removed and the goods will be distributed, as long as this action does not affect the nature or functionality of the merchandise.

⁶ The amendments require mandatory communication between the IP authority (SENADI) and the customs authority (SENAE) because both institutions will interconnect their systems and records. SENAE must inform the owner of the registered IP right that it discovered merchandise that would allegedly violate their rights. If SENADI determines an IP infringement occurs, the offender will be punished with a fine of between 1.5 to 142 unified basic salaries (currently between US\$ 600 – US\$56,800), in addition to other precautionary measures.

for the rest of the pay-TV market in Ecuador, and thus, the Ecuadorian government should instruct CNT to honor its licensing agreement with SOPROFON and make the corresponding payments. Further, SENADI should call the attention of CNT's board of directors to this situation, noting that the unauthorized communication to the public of sound recordings is a crime penalized in the Ecuadorian Criminal Code with prison time and fines.