

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

ECUADOR

EXECUTIVE SUMMARY

Despite an improvement in 2000 as the Courts embraced the new Intellectual Property Law (IPL)¹, enforcement activity has dramatically decreased during 2001 in Ecuador. Some Courts are reluctant to issue *ex parte* warrant searches unless the aggrieved party submits direct evidence of intellectual property infringement. In other cases, the lack of criteria for posting bonds before granting a seizure order has made intellectual property rights owners refrain from looking to the courts for protection. On the regulatory side, BSA is seriously 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. Currently, business software piracy levels in Ecuador are still high at 68%, and estimated 2001 losses due to business software piracy are \$9.5 million.

Ecuador recently appeared on the Special 301 Watch List in 1999 and 2000, before being removed from the list in 2001. In June 2000, Ecuador deposited its instruments of ratification to the two WIPO treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

We recommend the return of Ecuador to the Watch List to monitor the implementation and enforcement of Ecuador's copyright legislation in fulfillment of its multilateral obligations and bilateral commitments. If the Ecuadorian government does not take actions to effectively enforce its laws, it will be difficult to stimulate further market entry in Ecuador.

¹ Intellectual Property Law, enacted May 8, 1998, Registro Oficial No. 320, May 19, 1998.

ECUADOR: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2001

INDUSTRY	2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ²	9.5	68%	8.2	65%	20.5	71%	12.7	73%
Sound Recordings Musical Compositions	18.0	90%	N/A	N/A	N/A	N/A	N/A	N/A
Motion Pictures	N/A	95%	N/A	95%	N/A	95%	N/A	95%
Entertainment Software	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Books	2.3	N/A	N/A	N/A	N/A	N/A	N/A	N/A
TOTALS	29.8		N/A		N/A		N/A	

COPYRIGHT PIRACY IN ECUADOR

Computer 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. Estimated trade losses due to business software piracy in Ecuador were \$9.5 million in 2001, with an estimated piracy level of 68%.

Music piracy in key cities like Guayaquil and Quito is rampant. The authorities do nothing to prevent the piracy market even though it is known that organized crime groups are involved. Municipal markets like "La Bahia" are special venues for selling pirate product despite the licensing requirements established by local authorities to set up an operation. Ecuador also serves as a point of exports for CD-Rs to Colombia of international and Latin product. The local industry is small because of the high level of piracy. We estimate the level of piracy at around 90 percent and losses to the industry of \$18 million. With the growth of illegal CD-Rs the tendency is for piracy to take over the whole market.

The publishing industry reports estimated losses due to book piracy in Ecuador amounted to \$2.3 million in 2001.

² BSA loss numbers for 2001 are preliminary.

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. The IPL addresses semiconductor chip protection, plant breeder's rights, 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 technical protections against infringement and electronic rights management information. Finally, the IPL declares that the protection and enforcement of IP rights is in the public interest, and it 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 (NJC).

The IPL provisions relating to software works and enforcement are TRIPS-compliant. The IPL fully incorporates the WIPO 1996 treaties on Copyright and Neighboring rights, and creates a powerful set of enforcement mechanisms.

Even though Ecuador's current copyright legislation meets its bilateral (the IPR Agreement with the U.S.), multilateral (TRIPS) and regional (Andean Pact Decision 351) obligations, Ecuador's judiciary is interpreting the law in such a way as to not enforce it. This, in turn, creates an environment of uncertainty for software rights holders.

The 1999 Education Law

Ecuador passed an Education Law in 1999 which includes a poorly drafted provision that purports to grant free software licenses to 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 illegal 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 has made a public announcement stating its opposition to Article 78 and has 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. To date, no opinion has been issued.

COPYRIGHT ENFORCEMENT IN ECUADOR

IEPI's administrative actions since its creation reflect a lack of support from the Ecuadorian government.

Although the 1998 copyright law created the IEPI (the National Copyright Office) to implement the country's IP laws, the Ecuadorian government has not provided the IEPI with an adequate budget to fully perform its obligations. IEPI has been functioning with a small staff due to its budgetary constraints. 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 enforcement, IEPI's actions are based on *ex officio* actions as well as *ex parte* actions; however, since its creation IEPI has performed very few piracy software raids based on *ex parte* actions and none based on *ex officio* actions. Consequently, IEPI has very little experience in managing raids, and the few raids performed by IEPI are still in their preliminary stages, so no administrative sanctions have been imposed.

Due to IEPI's lack of knowledge about software piracy issues, BSA started working with IEPI in the second half of 2001, mainly in the area of education. For example, BSA organized a two-day seminar which addressed software piracy and ways to identify counterfeit software. On the enforcement side, BSA has provided some leads to IEPI for raids. We expect IEPI to conduct raids during the first quarter of 2002. BSA believes that IEPI will only be successful if the Ecuadorian government gives IEPI the necessary support and resources to conduct its investigations and raids against pirates.

Judicial action is a weak element in effective enforcement.

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.

An effective judicial system is necessary for adequate and effective copyright protection in Ecuador. Even though a few judges have consistently applied the IPL in enforcement procedures with good results, enforcement remains a problem. Since last year, due to generalized court corruption, 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; few copyright infringement cases have made it through the Ecuadorian judicial system.

In general, Ecuadorian judges also have been somewhat slow to grant petitions for civil *ex parte* actions as provided in the IPL. This goes against the rights of intellectual property owners and makes enforcement of the IPL a high priority.

During 2001, BSA filed five civil complaints against end users. Some of the experiences that BSA's local counsel has had with the judiciary while filing these complaints include the following:

- Even though the current IPL 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 with this 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, which, under the current circumstances, discourages judges from granting seizure orders.
- According to the current IPL, a judge shall grant a precautionary measure (such as a search and seizure raid) when a right holder 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.

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