

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

ECUADOR

EXECUTIVE SUMMARY

Special 301 recommendation: IIPA recommends that Ecuador be added to the Special 301 Watch List due to the government's continued inability to achieve effective copyright enforcement (in administrative, criminal and civil cases) along with a dangerous provision in a 1999 education law which purportedly grants unwarranted licenses for software. Ecuador currently does not appear on any 301 lists, but has fluctuated between no-listing, the Watch List and the Priority Watch List since 1992.

Overview of key problems: The copyright industries continue to confront high piracy levels in Ecuador due to insufficient IPR enforcement in the country. Estimated 2002 trade losses due to piracy were approximately \$25.8 million. Some of the problems that the copyright industries face in Ecuador include:

- Dramatic decreases in IPR enforcement since 2001.
- Delays in the creation of specialized IP courts despite the requirement in the 1998 law mandating its creation.
- Reluctance by the courts to issue *ex parte* warrant searches, requiring the aggrieved party to submit direct evidence of intellectual property infringement.
- High judicial bonds or the lack of criteria for posting bonds before granting a seizure order creating disincentives for rightsholders to seek judicial action.
- Courts have recently required copyright owners to file their petitions for civil *ex parte* action through the random assignment process despite the fact that current regulations provide otherwise (in addition, the random assignment process presents problems with leaking of information).
- Regarding administrative copyright enforcement, the National Copyright Authority (IEPI) has little or no presence within the Ecuadorian community, making its enforcement ability very weak.
- The software industry is very 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.
- The recorded music market is 90 percent pirate.
- The lack of any type of enforcement promotes local piracy and also exports to neighboring Colombia.

Actions which the government of Ecuador should take: To improve IPR enforcement in Ecuador, the government should take the following actions in 2003:

- Request the National Judiciary Council to appoint specialized judges for intellectual property matters as provided by law.

- Implement and execute the tools and remedies provided in the Copyright Law of 1998 and regulations in which the petitions for *ex parte* civil orders are excluded from the random assignment process.
- Educate judges on intellectual property issues until the specialized IPR courts are created.
- Urge IEPI to have and maintain adequate human resources to enforce its responsibilities under the copyright law, to train its officials, and to create a better salary structure.
- Amend the provision of the Education Law of 1999.
- Create special police anti-piracy task forces in Quito and Guayaquil that will address the problems of pirate street vendors, distributors and manufacturers.

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ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 – 2002¹

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software Applications ²	5.5	59%	6.9	62%	8.2	65%	20.5	71%	12.7	73%
Records & Music	18.0	90%	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%	N/A	95%
Entertainment Software	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Books	2.3	N/A	2.3	N/A	N/A	N/A	N/A	N/A	N/A	N/A
TOTALS	25.8		27.2		N/A		N/A		N/A	

Although Ecuador currently does not appear on any of the Special 301 lists, it does receive preferential trade benefits under two U.S. trade programs, both of which contain IPR

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2003spec301methodology.pdf.

² BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$9.5 million at 68% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

standards.³ Responding to the U.S. government's request for comments regarding countries' eligibility for ATPDEA benefits, IIPA reported that Ecuador had failed to provide adequate and effective protection for U.S. copyright owners, especially under the enhanced standards outlined in the ATPDEA.⁴ Given this failure to meet the standards established in the statute, IIPA indicated that it would be appropriate to deny eligibility status to Ecuador. Realizing, however, that the U.S. government may choose to serve U.S. interests by extending ATPDEA benefits, IIPA requested that the U.S. government obtain written commitments on Bolivia's actions to meet the IPR standards of the ATPDEA *before* designation was officially conferred. One of the key discretionary criteria of these programs is that Ecuador provide "adequate and effective" protection of intellectual property rights to U.S. rightsholders.

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 \$5.5 million in 2002, with an estimated piracy level of 59%.

The music industry contacted police authorities in Quito and Guayaquil to organize a campaign against piracy. Unfortunately, nothing was done during the course of the year and piracy continues to strangle the local market, with estimated trade losses due to music recording amounting to \$18 million. In addition, Ecuador also serves as a base to replicate and export pirate product to Colombia. Local customs authorities have shown no interest in developing border measures to prevent exports of illegal product.

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, as well as semiconductor chip protection, 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

³ For the first 11 months of 2002, \$69.6 million worth of Ecuadorian goods (or 3.7% of Ecuador's total imports to the U.S. from January to November) entered the U.S. under the duty-free GSP code, representing a 181.7% increase over the same time period in 2001. In the first 11 months of 2002, \$69.3 million entered under the ATPA, representing a 67.6% decrease from the same period in 2001.

⁴ IIPA's September 16, 2002 Comments to the Trade Policy Staff Committee regarding the Designation of Eligible Countries as Andean Trade Promotion and Drug Eradication Act Beneficiary Countries are available on the IIPA website at http://www.iipa.com/rbi/2002_Sep16_ATPDEA.pdf.

certain acts regarding technological protection measures against infringement and electronic rights management information. The IPL's provisions relating to computer programs and enforcement are TRIPS-compliant. The IPL also generally incorporates obligations of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and creates a set of enforcement mechanisms.

Finally, the IPL declares that the protection and enforcement of IP rights is in the public interest, and 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.

Even though Ecuador's current substantive copyright legislation meets its bilateral (the IPR agreement with the U.S.), multilateral (TRIPS) and regional (Andean Pact Decision 351) obligations, the performance of Ecuador's judiciary remains deficient, in that the courts continue to interpret the law in such a way as to not enforce it. This, in turn, creates an environment of uncertainty for rightsholders.

The 1999 Education Law

Ecuador passed its Education Law in 1999 which includes a poorly drafted provision that purports to grant free software licenses to high 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 unconstitutional 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 publicly announced its opposition to Article 78 and 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. However, to date, no opinion has been issued.

COPYRIGHT ENFORCEMENT IN ECUADOR

IEPI's anti-piracy enforcement efforts are weak and must improve.

The IEPI was created by the 1998 copyright law to implement the country's intellectual property laws. The 1998 copyright law provides IEPI with its own budget and with autonomy in financial, economic, administrative and operational matters. Since its creation, IEPI has been functioning with a small staff whose average income is lower than comparable entities. IEPI's

administrative structure to raise salaries is deficient and during the last two years, IEPI employees have not received salary increases. During 2002, IEPI employees decided to go on strike in order to put pressure on the government. The government has not yet resolved IEPI employees' petitions. Even though IEPI employees resumed work after two months, it is still possible that another strike could take place in the near future.

Since IEPI started its operation, it has performed some enforcement activities in Quito, but rarely outside the city. 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 *ex officio* actions, IEPI has not carried out any administrative *ex officio* actions due to its lack of experience and lack of an adequate number of personnel. In order to change this situation, IEPI needs adequate human resources to enforce its responsibilities under the copyright law, to train its officials, and to create a much better salary structure.

Due to IEPI's lack of knowledge about software piracy issues, BSA has worked with IEPI, mainly in the area of education. BSA organized a two-day seminar which addressed software piracy and ways to identify counterfeit software products; during the second half of 2002 BSA organized an International Seminar on Intellectual Property issues with the sponsorship of USPTO. On the enforcement side, BSA has provided leads to IEPI for inspections. IEPI has conducted only a couple of inspections during 2002. A few others were not conducted due to its employees' strike. BSA expects IEPI to conduct more inspections during the first quarter of 2003. BSA believes that IEPI will only be successful if the Ecuadorian government supports IEPI as an autonomous institution with the power to increase the salaries of its staff and provide training.

Judicial action is still a barrier in effective enforcement.

The IPL provides for specialized courts for intellectual property matters; however, to date, due to operative, political and financial reasons, the National Judiciary Council has not yet created them. Thus the petitions for civil *ex parte* actions are brought before civil courts which have neither the knowledge nor the expertise necessary to attend these types of petitions. Due to this situation, seizure orders are either not granted, or are delayed.

An effective judicial system is necessary for adequate and effective copyright protection in Ecuador. During 2001 a few judges consistently applied the IPL in enforcement procedures with good results; however, during 2002 the situation worsened dramatically and enforcement remains a serious problem. Due to generalized court corruption, lack of knowledge of intellectual property matters by the Civil Courts 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. Thus, before granting a seizure order, judges have required that copyright owners submit direct evidence of intellectual property infringement, pay high judicial bonds, and file civil *ex parte* actions through a random assignment process despite the fact that the regulation states otherwise. Few copyright infringement cases made it through the Ecuadorian judicial system last year and therefore no judicial decisions have been issued recently.

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

- Even though the current regulation 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 here 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. In general, judges determine the bond amount as the same amount requested as damages by rightsholders, which discourages rightsholders to pursue the actions.
- According to the IPL, a judge shall grant a precautionary measure (such as a search and seizure raid) when a rightholder 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.

During 2002, based on the experience of the previous year, BSA brought some cases before IEPI and a couple before the civil courts. One civil court denied the precautionary measure requested on the grounds that copyright owners need to show direct evidence of a copyright infringement before a seizure order could be granted. Currently, the case is under appeal. The other court still has not made any decision. In August 2002, BSA filed a second petition for civil *ex parte action*; to date the civil court has not granted the precautionary measure.

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. Due to the current situation, it is a high priority for BSA to keep working on the education of the civil judges on intellectual property issues until the specialized courts are created.

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

COPYRIGHT AND REGIONAL TRADE NEGOTIATIONS

The negotiation of bilateral and regional free trade agreements (FTAs) is assuming increasing importance in overall U.S. trade policy. These negotiations offer an important opportunity to persuade our trading partners to modernize their copyright law regimes so they can maximize their participation in the new e-commerce environment, and to improve enforcement procedures. The FTA negotiations process offers a vital tool for encouraging compliance with other evolving international trends in copyright standards (such as fully implementing WIPO treaties obligations and extending copyright terms of protection beyond the minimum levels guaranteed by TRIPS) as well as outlining specific enforcement provisions

which will aid countries in achieving effective enforcement measures in their criminal, civil and customs contexts.

IIPA believes that the IPR chapter in the Free Trade Area of the Americas (FTAA) must be forward-looking, technologically neutral documents that set out modern copyright obligations. They should not be summary recitations of already existing multilateral obligations (like TRIPS). As the forms of piracy continue to shift from hard goods and more toward digital media, the challenges faced by the copyright industries and national governments to enforce copyright laws grow exponentially. The Internet has transformed copyright piracy from a local phenomenon to a global wildfire. CD-R burning is fast becoming a pirate's tool of choice throughout this region. Without a modern legal and enforcement infrastructure, including effective criminal and civil justice systems and strong border controls, we will certainly see piracy rates and losses greatly increasing in this region, thus jeopardizing more American jobs and slowing the growth of the copyright sectors both in the U.S. and the local markets.

Therefore, the IPR chapter in the FTAA should contain the highest levels of substantive protection and enforcement provisions possible. At a minimum, the IPR chapter should: (a) be TRIPS- and NAFTA-plus, (b) include—and clarify—on a technologically neutral basis, the obligations in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WCT and WPPT), and (c) include modern and effective enforcement provisions that respond to today's digital and Internet piracy realities. Despite the existence of these international obligations, many countries in the Western Hemisphere region fail to comply with the TRIPS enforcement obligations, both in their legislation and in practice. It is in the area of enforcement that some of the greatest gains for U.S. and local copyright creators can be achieved.