



Strengths and Weaknesses

Key Areas of Strength

- ✓ New five-year term of RDP defined in new 2016 law *Código Ingenios*
- ✓ Limited re-criminalization of IP rights through 2016 criminal law amendments
- ✓ Signed and acceded to WIPO Internet Treaties

Key Areas of Weakness

- ✗ *Código Ingenios* raises uncertainty about compatibility with current IP laws
- ✗ *Código Ingenios* limits number of renewable periods for trademark registrations, in violation of the TRIPS Agreement
- ✗ *Código Ingenios* imposes new limits on patentability and number of non-patentable subject matter
- ✗ Persistently high levels of piracy

INDICATOR	SCORE	INDICATOR	SCORE
Category 1: Patents, Related Rights, and Limitations			
1. Term of protection	1	19. Frameworks against online sale of counterfeit goods	0.25
2. Patentability requirements	0.5	20. Industrial design term of protection	0.4
3. Patentability of CILs	0	21. Exclusive rights, industrial design rights	0.5
4. Pharmaceutical-related enforcement	0	Category 4: Trade Secrets and Market Access	
5. Legislative criteria and active use of compulsory licensing	0	22. Protection of trade secrets	0.25
6. Pharmaceutical patent term restoration	0	23. Non-barriers to market access	0
7. Regulatory data protection term	0	24. Regulatory and administrative barriers to commercialization	0.25
8. Patent opposition	0.25	Category 5: Enforcement	
Category 2: Copyrights, Related Rights, and Limitations		25. Physical counterfeiting rates	0.39
9. Term of protection	0.73	26. Software piracy rates	0.32
10. Exclusive rights	0.25	27. Civil and procedural remedies	0.25
11. Cooperative action against online piracy	0	28. Pre-established damages	0.25
12. Limitations and exceptions	0.25	29. Criminal standards	0.25
13. Digital rights management	0.25	30. Effective border measures	0.5
14. Government use of licensed software	0	31. Transparency and public reporting by customs	0.25
Category 3: Trademarks, Related Rights, and Limitations		Category 6: Membership and Ratification of International Treaties	
15. Term of protection	1	32. WIPO Internet Treaties	1
16. Limitations on use of brands	1	33. Singapore Treaty on the Law of Trademarks	0
17. Protection of well-known marks	0.25	34. Patent Law Treaty	0
18. Exclusive rights	0.25	35. Post-TRIPS FTA	0
TOTAL: 10.59			

Spotlight on the National IP Environment

Past Editions versus Current Scores

Ecuador's overall score has increased marginally from 29% (8.62 out of 30) in the fourth edition to 30% (10.59 out of 35) in the fifth edition. This change in score reflects a relatively mixed performance on the 5 new indicators added to the fifth edition.

General Comments

In October 2016, Ecuador's National Assembly passed the *Código Orgánico de Economía Social del Conocimiento, la Creatividad y la Innovación (Código Ingenios)*, a law that touches on all facets of IP rights. The law aims to encourage innovation, R&D, and the development of new technologies in Ecuador and contains a strong element of local preferences and discrimination against foreign companies. For example, Article 148 introduces a requirement and order of prioritization for public sector procurement of software. This article stipulates that software should be open source and/or contain a significant amount of local Ecuadorean value added in either its production or the provision of services. Foreign suppliers are discriminated over domestic producers and suppliers. The legislation also contains a number of negative provisions relating to existing patent laws and practices and trademarks. For example, Article 268 increases the number of non-patentable subject matter and Article 274 eliminates any patentability of second use inventions. While the latter is part of Andean Decision 486, this restriction had nevertheless not been codified previously in Ecuador's existing Intellectual Property Law. With regard to the protection of trademarks, the term of protection for trademarks has been amended under Article 365 with renewal periods limited to two renewals. This markedly stands in contrast to TRIPS Article 18, which states that "the registration of a trademark shall be renewable indefinitely." On a positive note, Article 509 contains a defined five-year term of regulatory data protection for biopharmaceutical test data. As noted in previous editions of the Index, the existing Intellectual Property Law contains an article on RDP but does not include a defined term of protection. At the time of research, the legislation had not yet officially become law and it remains unclear the extent to which this new legislation will interact with or override the existing Intellectual Property Law. Consequently, Ecuador's score has not been affected by this legislation for this edition of the Index.

Patents, Related Rights, and Limitations

8. Patent opposition: Under the 2006 Intellectual Property Law and in line with its commitments under Andean Decision 486, Ecuador provides a legal mechanism for challenging the validity of a pending patent. The relevant Articles 142–145 of the law outline what is essentially a pre-grant opposition mechanism. Article 142 states that "within a period of 30 working days following the date of publication, anyone with a legitimate interest may, on one occasion only, file reasoned objections that may nullify the

patentability or ownership of the invention." Unlike Decision 486, Ecuador's Intellectual Property Law does not provide an overall maximum time limit on oppositions, whereas Article 44 of the Andean Decision provides a six-month maximum time limit. There is limited evidence on the practical use of the opposition mechanism in Ecuador and the effect it has on the swift and effective prosecution of patent applications. However, given the long general timelines for patent prosecution in Ecuador—local legal analysis suggests a typical patent takes six to eight years from filing to grant—the current pre-grant opposition format is unlikely to help reduce these timelines.

Enforcement

29. Criminal standards including minimum imprisonment and minimum fines: As noted in previous editions of the Index, 2013 amendments to the Intellectual Property Law removed criminal penalties and sanctions for IP rights infringement; as a result, Ecuador's enforcement environment stood firmly outside international standards. In late 2015, amendments to the Penal Code (*Código Orgánico Integral Penal*) were introduced with new limited sanctions put in place for the commercial infringement of trademarks and copyrights. Specifically, a new Article 208A was inserted to the code that provides minimum and maximum fines for commercial infringement of these IP rights. The new law provides statutory fines that, depending on the scale of commercial infringement, range from a minimum fine of roughly USD20,000 to a maximum fine of over USD100,000. The fines are calculated based on the "*salarios básicos unificados del trabajador en general*," which is a standard salary measurement set annually by the Ecuadorean government. In 2016, this unit was set at USD366 per month. Although reimposing criminal sanctions and fines for trademark and copyright infringement is a positive step for Ecuador, these new sanctions do not include imprisonment and the fines are inversely proportioned to the scale of the infringement, with small-scale infringement receiving a larger fine in proportion to the value of the infringement.