Compulsory licensing in Ecuador's music industry: a daring strategy within the new intellectual property law in order to regulate music piracy

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Abstract
Compulsory licensing is when a government allows someone else to produce the patented product or process without the consent of the patent owner. It is one of the flexibilities on IP rights' protection included in the WTO's (World Trade Organisation) agreement on intellectual property, the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement. This practice is common within the pharmaceutical industry. Motivated by the urgent need to regulate the cultural industries, Ecuador's Government replaced its IPC (Intellectual Property Code) with the COESC+i (Organic Code of the Knowledge's Social Economy and Innovation), branded as Código Ingenios, on October 11, 2016. This new code includes the option for compulsory licensing for copyright protected products. This paper aims to analyse the context and the legal grounds upon which compulsory licensing is being considered as a valid tool to be applied to the Ecuadorian music recording industry (and any other associated legal element) within the Código Ingenios, in order to guarantee its validity. The views of lawmakers and recording industry actors are taken into account as well as the potential implications for the actual content creators and consumers, who in theory, would benefit the most.

Keywords: Intellectual property, compulsory licenses, Código Ingenios, copyright, Ecuador

1 Ecuador and piracy - a historical review

Ecuador is the second smallest country in South America (without taking Guyana and Suriname into account). It has a population of 16 million and in terms of per capita GDP, Ecuador ranks third from last in the region,

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even though its economy has shown robust growth in recent years (World Bank 2015). The US dollar has been the national currency since 2000, a result of an economic crisis marked by uncontrollable inflation, bank closures, and high levels of corruption. Among other problems, this crisis provoked all-time record levels of unemployment (Beckerman & Solimano 2002).

In this context, informal trade and street selling became a common type of work and the most popular goods sold were illegal copies of films, software and music recordings. Easy access to CD-burning technologies made pirated copies a profitable business, with Illegal copies of music albums sold at $1 as opposed to the full market value of $20 for the legal version. This, combined with the worldwide decline in record sales, caused the demise of international franchises such as Tower Records and Blockbuster as well as the local branches of the major labels. By 2013, there were just 24 music record stores across the whole of Ecuador selling original copies and around 2,200 shops selling illegal ones (López 2013: 17).

Initially the police would seize the goods from street vendors in order to destroy them, although such actions not only caused violent confrontation, but also were fruitless since the vendors would restock all the goods the following day (La Hora 2004). In 2011, in order to stop the constant confrontations with the police, 3,000 merchants organized themselves in what became the Ecuadorian Association of Audio-visual Products Traders (ASECOPAC). They went directly to the Ecuadorian Institute of Intellectual Property (IEPI) and asked for their trade to be legalised. According to Omaira Moscoso, a former social media lecturer and now president of ASECOPAC, none of the merchants were aware of intellectual property but they were keen to pay something towards it (Heidel et al. 2014).

At this point, Santiago Cevallos, IEPI's chief director of copyright, expressed the view that Ecuadorian purchasers were motivated solely by price (Heidel et al. 2014). On the other hand, Moscoso (personal communication, June 25, 2015) argued that the market for selling illegal copies

of movies and music was not necessarily created or maintained by economic reasons alone but also existed because of the lack of access to cultural goods. Moscoso herself started trading copies of her own personal art-cinema collection in the early 1990s and became a distributor for the art movies that no one else would provide.

In 2012, ASECOPAC made an important breakthrough by talking directly to local film producers and creating agreements for trading licensed copies of national movies. This move not only gave ASECOPAC leverage to keep pressuring the IEPI to reform the IPC, but also, legitimised its role in consumer's eyes as a serious and legal support agent for the national film industry.

With these developments, IEPI changed its position. For Cevallos (personal communication, June 11, 2015), the IPC operating back then was overprotective. *"Some of the protections go even beyond the international normative that the WTO expects from its members. For example, in most countries, sound recording rights last 50 years after the record's release date. On the current IPC, it lasts 70 years."* Thus, in 2013, with SENESCYT (National Secretariat for Higher Education, Science, Technology, and Innovation), IEPI proposed a radical change to the current IPC under the COESC+i, branded as Código Ingenios.

On October 11, 2016, Código Ingenios was approved with 80 percent support from the National Congress. It is in operation, although many of the policies key to its application, have not yet been officially published. One of the most critical points with regard to the music industry is the possible compulsory licensing of copyright works, which would allow IEPI to license audio-visual or literary works without reference to the exclusive rights owners of music.

2 Código Ingenios - the protection and access crusade

Esteban Argudo (Collecting Society's speech, July 22, 2015), ex IEPI's chief director of copyright, affirmed the philosophy behind Código Ingenios, with regard to content creation, was that the public domain should be the rule and intellectual property the exception. In fact, Ecuador's president

at the time of the Code's creation, Rafael Correa, publicly expressed on many occasions: *"The fundamental principle is that knowledge is universal, it's a common heritage of all the world's people. It cannot, and it should not be privatised"* (2013).

As part of this ideology, Ecuador decriminalised intellectual property rights violations in February 2014 (IIPA 2014). Although, this was welcomed by ASECOPAC, the collecting societies were less than happy. As a result, Ecuador joined Argentina, Chile and Venezuela among South American countries on the 2015 U.S. Trade Representative's Priority Watch List (Froman 2015: 56).

Código Ingenios concerns itself with every aspect of intellectual creation and was built collectively. The first draft was published online in a wiki[2] at the end of 2013, which had many contributions from people in the creative industries. This strategy alone led to a special mention on the 2017 Special 301 Report by the Office of the United States Trade Representative (USTR). That report states: *"Ecuador took a number of positive actions in 2016, including lowering patent fees and conducting an inclusive process during the drafting of the Code of Knowledge, Creativity, and Innovation Social Economy (Ingenuity Code)."* (USTR, 2017). Because of this, Ecuador is still in the Watch List, but it is not in the Priority Watch List anymore.

The approved Código Ingenios is divided into four books. On Book III, Title II refers to performing and mechanical rights and within Title II, section VIII is directly concerned with compulsory licenses. In relation to intellectual property, according to Cevallos (2015), Código Ingenios is the result of reviewing all the flexibilities that the WTO, through the TRIPS Agreement, allows its members. The following graphic explains the reasoning behind the creation of it:

[2] Available at: http://coesc.educacionsuperior.gob.ec/index.php/C%C3%B3digo_Org%C3%A1nico_de_Econom%C3%ADa_Social_del_Conocimiento_e_Innovaci%C3%B3n (March 26, 2018).

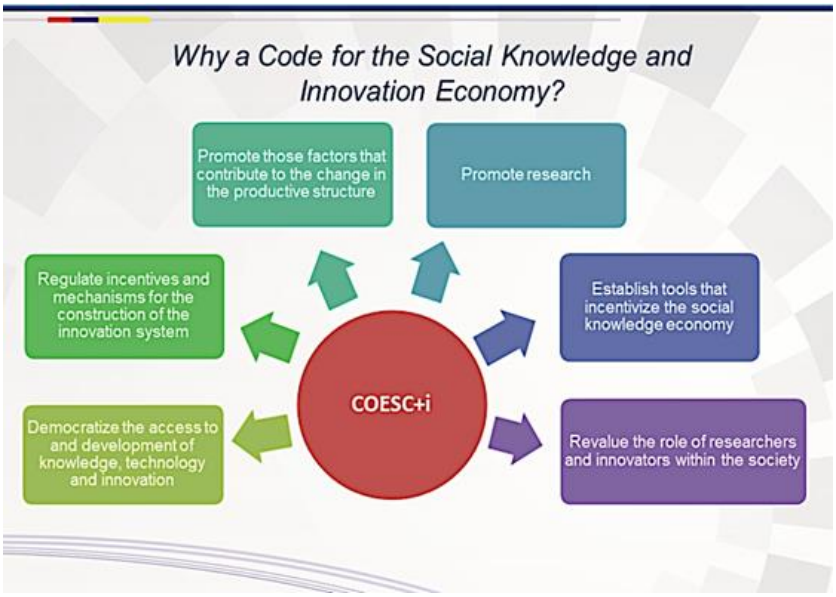

Figure 1: Why a code for the social knowledge and innovation economy? Source: coesc.educacionsuperior.gob.ec

Cevallos (2015) confirmed all existing possible international norms were considered , together with Ecuador's obligations as an adherent of those norms. Then, a catalogue of flexibilities towards intellectual property was produced and translated into different clauses. These clauses focused on two current cultural principles: protection and access. These two principles are an essential part of the National Constitution since 2008. Articles 22 and 23 express:

"Art. 22: People have the right to develop their creative skills, the dignifying and sustainable exercise of cultural and artistic activities, and to benefit from the protection of the moral and economic rights corresponding to the scientific, literary or artistic production of their own. (Protection)

Art. 23. People have the right to access and be part of the public space as scope of deliberation, cultural exchange, social cohesion and the pro-

motion of equality in diversity. The right to disseminate own cultural expressions in public spaces will be exercised without limitations to those established by law, subjected to the constitutional principles. (Access)"

If protection of cultural goods is higher, access is restricted, and vice versa; therefore Código Ingenios pursues a balance between them. Cevallos (2015) thinks that although the flexibilities contemplated within the code have never been used before, it is time to act so a trade-off between access and protection can be achieved; compulsory licensing is one of those flexibilities. The full Articles with regards to compulsory licenses are included in appendix 1.

3 Compulsory licensing – TRIPS, the three-step test & fair use

A compulsory license is an authorisation granted by a government to a third-party (or to the government itself) to produce a patented/licensed product without the rights-holder's consent (Bond & Saggi 2012: 218; Lybecker & Fowler 2009: 223). Compulsory licensing is one of the flexibilities included in Article 31 of the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement in 1994.

Article 31 of the TRIPS Agreement ("Other use without authorisation of the right holder") provides conditions for the use of compulsory licensing by WTO members. The entire Article 31 is included in appendix 2. Exactly when a country can issue a compulsory license is not explicitly addressed by the TRIPS Agreement, although it does mention national emergencies, other circumstances of extreme urgency, and anti-competitive practices, as possible grounds for compulsory licensing (Bond & Saggi 2012: 220).

Nevertheless, since 2004, governments have been allowed to grant licenses for patent use in one of the following situations involving the patent-holder: refusal to deal; non-working or inadequate supply of the market; public interest; abusive and/or anti-competitive practices; government use; dependent or 'blocking' patents (on improvements to prior

inventions); special product regimes, e.g. pharmaceuticals and food; licenses of right, etc. (Lybecker & Fowler 2009: 224).

As applied to international intellectual property rights, it is important to clarify that a compulsory license is not the *"breaking of a patent"* (Cahoy 2011), what is broken is the right of a patent holder to exclude others (Bond & Saggi 2012: 218). When a compulsory license is issued, the most common result is a sharp decrease in price. However, developed nations argue for strong restrictions on compulsory licenses to safeguard their domestic industries (Ford 2000: 946).

Frequently, compulsory licensing operates in copyright law rather than in author rights regimes. For example, compulsory mechanical licensing has operated in USA since 1909 Copyright Act. Within author rights legislations, compulsory licensing has been somehow exclusive to patents. One of the keys points in this discussion is that compulsory licensing within patents are justified since they are inventions, such as medicines, that affect human rights directly, but this would not be the case within author rights, therefore compulsory licensing may not be applied to them.

In response to this, Article 7 of TRIPS lays down a principle of balance between rights and obligations and emphasises the Agreement has the goal of fostering not only economic development, but also social welfare. One may argue that social welfare is intrinsically related with human rights. In fact, the criminalisation of common people trying to make a living by selling goods that are not regulated, affects human rights directly (Cevallos 2015).

Additionally, in the current debate on flexibility in the area of copyright exceptions and limitations (E&Ls), the three-step test has to be taken into account. The first three-step test in international copyright law emerged as Article 9 of the Berne Convention (see full Article in appendix 3). This test is sometimes presented as an obstacle to the adoption of open-ended, flexible provisions at the national level.

However, the three-step test was devised as a flexible framework at the 1967 Stockholm Conference on the revision of the Berne Convention,

within which national legislators would enjoy the freedom of safeguarding national E&Ls and satisfying domestic social, cultural, and econair omic needs. Geiger, Gervais & Senftleben (2013: 44) provide a thorough historical examination of Article 9 and its possible interpretations. One of conclusions of their study is that the three-step test has to be understood as a refined proportionality test. Many national courts have used its abstract criteria *"… in a global balancing exercise"*, and read it in reverse, *"starting with the last, most flexible criterion."*[3]

With regard to the three-step test, European countries operate with an approach of copyright E&Ls that offer a high degree of legal certainty; however, Anglo-American approach contemplates higher flexibility thanks to its concepts of fair use and fair dealing[4]. Within a flexible fair use framework, the courts can broaden and restrict the scope of exceptions and limitations to safeguard copyright's delicate balance between exclusive rights and competing social, cultural, and economic needs (Senftleben 2013).

On the other hand, one of the major concerns shown by supporters of strong intellectual property rights is that countries seeking to use compulsory licensing have some discretion at their disposal. For example, one of the conditions to expedite a compulsory license is that the entity (company or government) applying for one should have been unable to obtain a voluntary license from the rights-holder on "reasonable" commercial terms. However, it is not clear as to what constitutes "reasonable" commercial terms (Bond & Saggi 2012: 219-20).

Similarly, if a compulsory license is issued, adequate remuneration must be paid to all the rights-holders. In this regard, Scherer & Watal (2002) discuss a variety of contexts in which compulsory licensing has

[3] In a more formulaic application of the three-step test, Geiger, Gervais & Senftleben (2013) offered an exhaustive analysis of its interpretation by the WTO panel in the case concerning section 110(5) of the US Copyright Act.

[4] Even though, they are related concepts, they are not synonymous terms. Their meaning and scope are defined by different legal systems. Fair use is a limitation on exclusive rights in works of authorship granted under U.S. copyright law. Fair dealing is an exception to copyright infringement laid out in the copyright statutes of common law jurisdictions such as Great Britain, Canada, Australia and New Zealand.

been used. They note that in most cases, the royalty rates paid to the rights-holders have been quite low, often being under 4.5 percent.

Then as well, according to Article 31 a compulsory license must be granted mainly to supply the domestic market. Yet, the WTO's TRIPS Council in 2003 decided that if a country lacked the ability to manufacture a product locally, it could import it from a third party under a compulsory license (Bond & Saggi 2012: 219).

4 Compulsory licensing and the Berne Convention, Rome Conventions and the World Intellectual Property Organisation (WIPO) Copyright Treaty[5]

While it is true that compulsory licensing has mainly been used within patent law, it should not be assumed that it only affects patents. Interpretations under the TRIPS Agreement, the Berne Convention, the Rome Convention and various WIPO's Treaties, confirm that they can directly affect any copyrighted product, including recorded music.

As in the TRIPS Agreement, compulsory licensing is mentioned in the Berne Convention with conditions. Article 13 is concerned specifically with "mechanical rights". This, to some extent, lays down the condition to modify the general and exclusive right, under Article 9, to reproduce a work. Article 13(1) permits compulsory licenses and provides:

"(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

[5] For this section, I am extremely thankful to Mr. Nicholas Lowe, ex-Director of Legal and International Affairs of the UK Performing Right Society, for his in-depth insights.

Thus, the first condition is that a compulsory license must not be *"... prejudicial to the rights of these authors to obtain equitable remuneration".* A *"competent authority"* can fix that remuneration. Compulsory licensing is also referred to indirectly in Article 11bis (2), which provides:

"(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

The "preceding paragraph" is Article 11bis (1) that provides for an exclusive right for works to be broadcast or communicated to the public. Again, Article 11bis (2) contemplates any compulsory license as long as it is not *"prejudicial to the moral rights of the author, or to his right to obtain equitable remuneration"*. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, mentions compulsory licenses in Article 15(2):

"Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention."

To understand what is "compatible" in the Rome Convention, it is necessary to look at the exceptions to protection and how they are expressed. The principal exception relevant to sound recordings is contained in Article 12, which provides:

"If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by

the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration."

As before, the condition requires the payment of equitable remuneration. As for the WIPO Copyright Treaty (WCT), the limitations are contained in Article 10. Nevertheless, Article 1(4) provides: *"Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention."*

Thus, Articles 11bis (2) and 13(1) (mentioned above) will be covered. However, Article 10(2) of the WCT also provides that:

"Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."

It follows that there is an extra element in the WCT when applying the Berne exceptions, namely, *"certain special cases that do not conflict with a normal exploitation of the work"*. This is part of the conditions of the second criterion of the three-step test (1. in certain special cases; 2. that do not conflict with the normal exploitation of the work; 3. that do not unreasonably prejudice the legitimate interests of the author/rights-holder.) but the words are missing from both Article 11bis (2) and 13(1) of the Berne Convention. It can be concluded that a compulsory license does not technically represent a "normal exploitation" of a work; then, a compulsory license may not be permitted under the WCT. As for the WIPO Performances and Phonograms Treaty (WPPT), the exceptions are dealt with in Article 16 as follows:

"(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram."

Thus, again, there is an extra element of "normal exploitation". However, in paragraph (1) any exceptions must be of the same kind as for literary or artistic works, but in paragraph (2) the normal exploitation is in relation to phonograms. In the Rome Convention, the "normal" exploitation of a phonogram could be considered to be in accordance with the Rome Article 12 and thus the exception (the compulsory license) would not *"unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram"*. It may therefore be that compulsory licenses are permitted under the WPPT in relation to phonograms.

In summary, it can be understood that where a compulsory license is granted, and equitable remuneration is paid to the rights owners in the way that they would if they were able to license themselves, then, in economic terms, a compulsory license is not a bad thing (Lowe, personal email, June 5, 2015).

5 Compulsory licensing and its potential impact upon Ecuador's record industry

According to the International Federation of the Phonographic Industry (IFPI), Ecuador is the 50th recorded music market in the world and ranks 7th in Latin America. Based on its latest data (2016), Ecuador has 0.1% share of the distribution of recorded music industry regional revenue, representing $6.5 million. This represents a market growth of 82.3% from the previous year (IFPI, 2016).

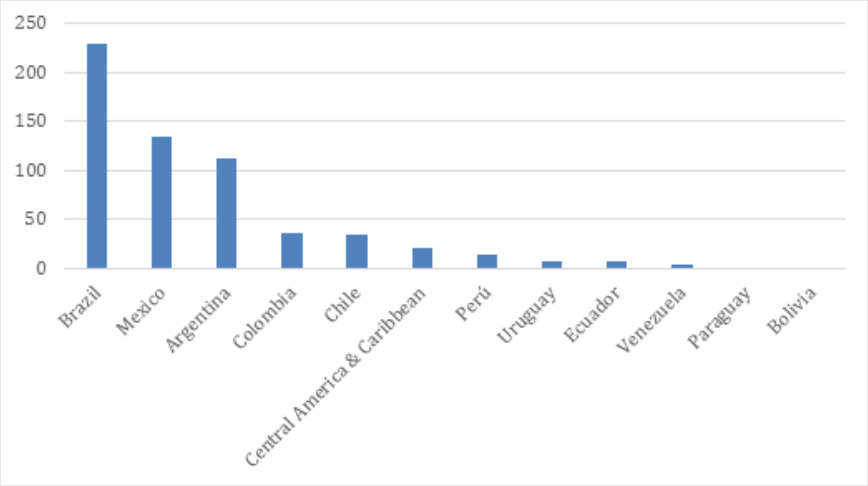

Figure 2: Distribution of recorded music industry revenue in Latin America in 2016, by country. Source: IFPI Global Music Report 2017.

However, according to Ecuador's Ministry of Culture and Heritage (MoCH), these numbers are misleading because they do not take into account the amount of local recording artists who are not members of the IFPI (J. López, ex-MoCH executive, personal communication, August 14, 2015). In 2013, the MoCH performed a large-scale survey, published in the book *Diagnostics and Policies for the Development of the Ecuadorian Phonographic Industry.*

The survey results based on consumption habits revealed the recording industry in Ecuador had a value of $43.7 million per year. People were willing to pay an average of $8 per original album, and $1 per original song. It was difficult to estimate the negative economic impacts of piracy, but according to the collected data, greater regulation of piracy and more consumers buying licensed products, could increase the value of the local recording industry to $221.55 million per year.

Whilst these numbers may seem over-optimistic, there is nevertheless an urgency to regulate piracy and it seems after years of fighting it that the strategy now is to regulate it by licensing it. Nonetheless, Ecuador, as a contracting party to Berne, Rome, the WCT and WPPT, has to

comply with their respective provisions, as described above. As can be seen in Appendix 1, it seems that Ecuador would, indeed, comply with all the provisions. Additionally, as explained, one of the conditions for compulsory licensing is the absence of negotiation with the rights-holders. IFPI, and the major record labels (Warner, Universal and Sony) have representatives in Ecuador; unfortunately, none were accessible to comment on this.

In order to regulate this, *Código Ingenios* provides the conditions to calculate royalties. These conditions establish that in the absence of a contract, a percentage would be recognised as due to the authors and right holders of musical works. This would boost the sector without eliminating the possibility that the parties can freely agree and formalise a relationship.

With regard to how these royalties will be managed, Karín Jaramillo, current National Director of Copyright and Related Rights of IEPI explains that *Código Ingenios "… not only forces the collecting societies to render accounts, but also to train their beneficiaries about their work, encouraging the creative activity of the partners, while the practices inherent in the corporate purpose are adjusted to the national reality"* (Asociarse y hacer cumplir la ley 2016). Jaramillo believes this creates better contractual relationships fundamental for the development of the music industry.

All of this seems to be great news for the local recording industry as all records sold by ASECOPAC members would be licensed, ideally voluntarily but if not, compulsorily. Royalties for creators and authors would be guaranteed through equitable rates, nationally and internationally. Public money would increase through taxation, as the merchants would sell regulated products. For IEPI, access and protection would be balanced. These might be enough reasons for welcoming compulsory licensing with open arms from all the stakeholders within the industry. However, compulsory licensing does not enjoy support from the local industry.

When *Código Ingenios* was being constructed, representatives from the collecting societies (Performing Rights Society (SAYCE), Mechanical Rights Society (SOPROFON), and Recording Artists Society (SARIME)) were part of the process and *"expressed satisfaction with the text"* (SENESCYT,

2014). However, it is now encountering the greatest criticism from them, with directors of SAYCE, SOPROFON and SARIME publicly opposing the law.

David Checa (personal communication, June 19, 2015), Director of the Society of Ecuadorian Authors and Composers (SAYCE), affirmed: *"... Código Ingenios is a complete payasada (charade) and extremely dangerous for authors and composers"*. His argument is based on the inclusion of fair use. For Checa, fair use, until now, was an exclusive concept that the United States has on its copyright legislation and it is an open window that allows for infinite interpretations.

Nevertheless, as already mentioned previously, one of the characteristics of the principle of fair use is flexibility. The second paragraph of the previous section to the compulsory licensing one (Section VII) introduces the concept of *uso justo* (fair use) and this concept is part of the Limitations and Exceptions section. So, although compulsory licensing is actually an exception in all the other treaties and conventions, having the fair use in that particular sections means that it can interpreted as an exception to the exception (The second paragraph has been translated in Appendix 4).

In this context, although *Código Ingenios* represents an opportunity to regulate piracy, the presence of the fair use principle has been received with a lot of distrust by part of the sector, especially, the collecting societies. Jorge Altamirano, Director of the Society for Phonographic Producers (SOPROFON), fears that, because of fair use, compulsory licensing will be *"... an imposed measure regardless of anything"* (personal communication, June 13, 2015).

Apart from *fair use*, another controversial aspect is the fact that compulsory licensing has never been applied to a single individual; it has always been applied to companies or private entities. In Ecuador, most local recording artists own the mechanical rights in their works; therefore, a compulsory license may end up being applied to individuals, not institutions. On this point, Cevallos (2015) claims, *"… the national author is here, so, it is possible to negotiate avoiding the need of a compulsory license."*

Ideally yes, but the *fair use* paragraph can legally force any author to give away his/her rights. *"No other country allows its government, or a third party, to apply compulsory licensing to their authors' works, even worse, with the aggression that Código Ingenios implies. Ecuadorian authors would find themselves in a disadvantaged position compared with authors from neighbouring countries and to the mercy of the Government in turn"* (Checa 2015).

6 Is compulsory licensing the way forward in Ecuador?

As discussed, compulsory licensing of phonograms or artistic works is a flexibility that can be imposed by a government as a valid resource to achieve a trade-off between access and protection. The famous three-steps test seems inconclusive and there are many flexibilities and exceptions contemplated within the main body and/or annexes of the Berne Convention, Rome Convention, WCT and WPPT that allow for compulsory licensing as an option.

Thus, Ecuador has introduced them in *Código Ingenios*, its current law for intellectual property (copyrighted and patented products). This flexibility is enforced based on the competing principles of access and protection. Currently, without compulsory licensing, the average Ecuadorian citizen is forced to access to illegal cultural goods as much because of market issues as the cheaper prices or intentional infringements of intellectual property.

As a consequence, compulsory licensing might guarantee access to protected cultural goods to all Ecuadorian citizens. In addition, there is the potential to increase the value of the local music recording industry up to $221.55 million per year, according to MoCH's data. This is 200 times more than the IFPI recorded figure, or six times more than MoCH's current data. If that figure was reached, Ecuador's music recording industry would attain the same level as Brazil. This makes the MoCH's numbers somewhat suspicious because they are based on the assumption that consumers would buy the same number of licensed products as illegal ones.

By contrast as perceived by some, the concept of *fair use* introduced in *Código Ingenios*, and the lack of specifics in terms of 'equitable remuneration' to creators, might cause the opposite effect. Recording artists, songwriters, producers, or rights-holders, might not see any economic benefit from the new law since it would be open to interpretation and also has the power to exempt the licensees (government or third party) from any payments, causing an unfavourable economic environment for creators, and an even worse situation for musicians and producers in the long run.

There are several problems. Many stakeholders want 'equitable remuneration', as an inherent pre-condition for compulsory licensing phonograms and artistic works, to be clarified in the legislation. According to IEPI, putting *Código Ingenios into practice* would be explained in eleven annexed policies that have yet not been published.

These policies would envisage the parameters under which the pricing of compulsory licenses and original rights-holders remuneration would be handled. These parameters can include GDP, market size, and product nature, amongst others. IEPI hopes that a threat of compulsory licensing might encourage entry and persuade rights-holders to voluntarily license their products. *"We do not want to get to the point of issuing compulsory licensing, rather we would like to see the major labels and rights-holders granting voluntary licenses"* (Cevallos 2015). However, a threat that is not properly explained can actually cause enough confusion to promote disengagement by creators and rights-holders.

Stricter compulsory licensing policy makes it possible for a government to lower the price control under entry, thereby improving consumer access. While the threat of compulsory licensing encourages entry, the use of a price control encourages voluntary licensing. Compulsory licensing and price controls are complementary instruments from the point of view of any government (Bond & Saggi 2012: 226-28).

The most challenging question, from a recorded music consumption behaviour's perspective, is: will consumers buy music recordings (licensed or unlicensed) at all? Spotify, Apple Music, and Deezer are now available in Ecuador and, as it is happening worldwide, streaming has become more

dominant, leaving music ownership behind. A quick visit to any "unlicensed" shop is enough to verify that released albums, in their official editions, are not available at all; unofficial compilations, containing more than a hundred mp3s, are the most popular. A chat with the person selling can tell you a bit more: *"... people are not buying music anymore, not even at $1!*"

In conclusion, the entitlement to use compulsory licenses should not be about legitimising piracy or ignoring the role of certain right-holders; it should be about the strengthening the music industry. In fact, the statutory fee or statutory rate in the United States represents a well-established usage of a compulsory license. This practice, protected by a principle of fair use can allow the music industry to prosper.

Código Ingenios still provokes uncertainty, fuelled by the lack of trust that Ecuadorian society, music creators included, has towards the government and its public institutions. A year after approval and its policies on compulsory licenses have not been published.; there has not been a single case of a person or company applying for one. For shops selling unlicensed goods, the main products are movies and music is no longer a priority for the pirates. It seems even when the law contemplates the use of compulsory licenses, they will never be used, perhaps because they arrived too late.

Nonetheless, *Código Ingenios* has established a precedent on how compulsory licensing can be applied to copyright products, although it is still on paper and not yet proven in practice. Even if it proves to be catastrophic, *Código Ingenios* has challenged our traditional understanding of intellectual property. "*At the end of the day, in light of the need to balance copyright against competing interests, in particular freedom of expression and information, these (any) flexible interpretations may prevail in the future"* (Geiger et al. 2013).

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8 Appendices

8.1 Appendix 1: Compulsory Licensing for Copyrighted Works in the COESC+i

Book III: Of knowledge management
Title II: Of author and related (mechanical and performing) rights
Section VIII: Of compulsory licenses

Article 217. In granting compulsory license - The competent authority on intellectual property rights may grant compulsory licenses over the exclusive rights of a holder, consisting of a literary or artistic, musical or audio-visual works in the following cases:

1. When there are practices that have been declared by the competent authority in terms of control of market power, as contrary to free competition, particularly when they constitute an abuse of the dominant position in the market by the right holder of author or related rights.

2. When the owner of a musical work has granted authorization for the performance or recording to a person and there is no possibility that another authorization for new interpretation or recording by a third party may be obtained. The application of this compulsory license does not apply when there is express refusal of authorization of the holder.

3. When a literary or artistic work is not translated into Spanish, into one of the official languages of intercultural relation, or to the official languages in the respective territories and such translation is not available in the national market.

4. When a literary or artistic work is not available in the national market and has elapsed since its publication in any form: three years in works of scientific or technological content; five years in the

works of general content; and, seven years in works such as novels, poetry and art books.

5. When an audio-visual work, video or other audio-visual fixation is not available or accessible in the national market and one year has elapsed since its diffusion in any medium or format.

Article 218. In granting compulsory licenses - automatically or on request from the competent national authority on intellectual property may grant compulsory licenses for the country not exclusively in the cases and for the types of work listed in Article 202. Such licenses shall not be transferable except in case of transfer of part of the enterprise or goodwill, which permits its operation; the transfer shall be evidenced in writing and registered with the competent authority on intellectual property rights.

The granting of a compulsory license does not relieve the licensee of respect for existing moral rights over the work or modalities that are not covered by the license.

The license may be revoked, subject to the legitimate interests of the licensee, a motivated request of the right holder or if the circumstances that gave rise to it have disappeared and are unlikely to recur.

Article 219. Payment of remuneration when there is a compulsory license. The right holder of a work which is the subject of a compulsory license shall be entitled to equitable remuneration to be fixed by the competent national authority on property intellectual as provided for in the relevant Regulation.

Article 220. Inability to other measures.- The person requesting the granting of a compulsory license for a literary or artistic work may not be subject to other administrative or judicial, with regards to that work, that the payment of equitable compensation for such purposes determined by the competent authority in the field of intellectual property rights in accordance with the procedure applicable to compulsory licenses, to the extent that the person making the reproduction and distribution, comply with the special conditions and requirements specified by the relevant regulations.

8.2 Appendix 2: TRIPS - Article 31: Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use (7) of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(a) Authorization of such use shall be considered on its individual merits;

(b) Such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) The scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) Such use shall be non-exclusive;

(e) Such use shall be non-assignable, except with that part of the enterprise or goodwill, which enjoys such use;

(f) Any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) Authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the authorized persons to be terminated if and when the circumstances, which led to it, cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) The right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) The legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) Any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions, which led to such authorization, are likely to recur;

(l) Where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional

conditions shall apply: (i) The invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent; (ii) The owner of the first patent shall be entitled to a cross-license on reasonable terms to use the invention claimed in the second patent; and (iii) The use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

8.3 Appendix 3: The three-step test (Article 9 of the Berne convention)

Right of Reproduction: 1. Generally; 2. Possible exceptions; 3. Sound and visual recordings - (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

8.4 Appendix 4: Fair use in the COESC+i

Book III: Of knowledge management
Title II: Of performing and mechanical rights
Section VII: Limitations and exceptions to performing rights
Second Paragraph:

Fair use of a work - Fair use of a work shall not constitute a violation of the performing rights over it. To determine whether the usage of the work conforms to this article, the provisions of this Code and all the international treaties to which Ecuador is part of will be taken into account, as well as:

1) if the work is going to be used for non-profit and/or educational purposes;

2) the objectives and nature of the usage;

3) the nature of the work;

4) the amount and relevance of the portion used in relation to the work as a whole; and,

5) the usage effect on the current market value and work potential.