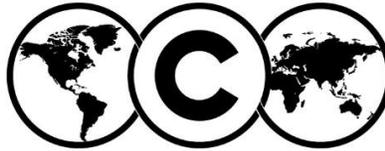


INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



1818 N STREET, NW, 8TH FLOOR · WASHINGTON, DC 20036 · TEL (202) 355-7924 · FAX (202) 355-7899 · WWW.IIPA.COM · EMAIL: INFO@IIPA.COM

September 4, 2012

VIA ELECTRONIC SUBMISSION
USTR-2012-0014

Mr. Douglas Bell
Chair, Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: Participation of Mexico in the Trans-Pacific Partnership Trade Negotiations

Dear Mr. Bell:

The International Intellectual Property Alliance (IIPA) hereby submits this Request to Appear at the September 21, 2012 public hearing on Mexico's participation in the ongoing negotiations of a Trans-Pacific Partnership (TPP) trade agreement.

Attached to this letter is IIPA's submission commenting on IPR negotiating objectives with respect to Mexico's participation in the TPP.

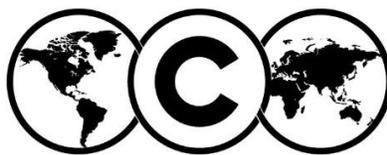
The IIPA witness will be:

Eric J. Schwartz
Counsel, International Intellectual Property Alliance
1818 N. Street, N.W., Suite 800
Washington, D.C. 20036
Tel: (202) 355-7903; Fax: (202) 355-7899
Email: ejs@msk.com

Sincerely,

Eric J. Schwartz
Counsel, International Intellectual Property Alliance

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



1818 N STREET, NW, 8TH FLOOR · WASHINGTON, DC 20036 · TEL (202) 355-7924 · FAX (202) 355-7899 · WWW.IIPA.COM · EMAIL: INFO@IIPA.COM

Testimony of the International Intellectual Property Alliance Participation of Mexico in the Trans-Pacific Partnership Trade Negotiations USTR-2012-0014, Mexico September 21, 2012 Public Hearing

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to provide the Trade Policy Subcommittee Chair with comments addressing issues relating to Mexico's participation in the proposed Trans-Pacific Partnership Trade Agreement (TPP).

Our comments focus on copyright issues relevant to Mexico's participation in the TPP negotiations, in response to the request for comments in the Federal Register notice 77 FR 43134 (July 23, 2012) on "[r]elevant trade-related intellectual property rights issues that should be addressed in the negotiations." Additionally, the Federal Register notice requests comments on "new approaches designed to promote innovation and competitiveness, [and that] encourage new technologies..." In response to this latter request, we note generally, that strong copyright laws, paired with effective enforcement (including technological protections), contribute to the development of robust and competitive marketplaces for copyright materials. This in turn facilitates the public access to more works, including more works in multiple formats and on new and developing platforms.

IIPA endorses Mexico's participation in the TPP negotiations. Mexico has demonstrated leadership at the international level in promoting modern and effective protection of intellectual property, and we look forward to its continued leadership in the TPP, as well as in other *fora*.

At the same time, we note that Mexico's current legal and enforcement structures are in need of urgent improvement, and do not, at present, afford the level of protection for copyrighted works that we would expect from a TPP partner. Thus, to enhance the commercial benefits of Mexico's TPP participation, it is important that the U.S. Government work with the Government of Mexico to significantly improve Mexico's copyright legal and enforcement regime to meet the higher standards of intellectual property rights (IPR) protections that we expect to be embodied in the TPP. As with any new party to the negotiations, it is imperative that Mexico's participation not impede progress in the ongoing TPP IP negotiations or weaken the Agreement's IP disciplines. An improved Mexican IPR regime, along with its participation in a TPP with strong IPR provisions, would greatly benefit the U.S. and Mexican economies as a whole, and, in particular, the critical sectors of our economies that depend on copyright protections.

IIPA has been a strong supporter of the concept of a TPP Free Trade Agreement (FTA) since its inception. The FTAs currently in force contain strengthened copyright protection and enforcement standards that enhance international disciplines in the IPR arena. They also contain important market access provisions that enable increased exports and foreign sales of products

and services protected by copyright. The U.S. economy has already reaped significant benefits in key export markets from implementation of these strengthened standards and market access commitments. Those benefits will be further enhanced by the recent coming into force of the Colombia, Panama and Korea FTAs. Further benefits can be expected from the adoption and implementation of enhanced copyright standards, consistent and coextensive with those already featured in existing FTAs, in markets of our current TPP negotiating partners, such as Vietnam, New Zealand, Malaysia, and Brunei Darussalem. In addition to addressing inadequate legal protections and insufficient enforcement policies against widespread copyright infringement that are significant barriers to full access by the U.S. copyright industries to these markets, the TPP negotiating process also offers the prospect for lowering other onerous market access barriers in some of these markets.¹

Mexico's Participation in the TPP

Mexico is a very important export and foreign sales market for all the U.S. copyright industries. However, this market is severely hampered due to high levels of piracy of copyrighted works, including: various forms of Internet piracy; CD-R and DVD-R burning of music, audiovisual and videogame discs; unauthorized camcording in theaters; unlicensed use of software by enterprises; unauthorized photocopying at universities; and widespread sale of all hard copy material in street markets. The Mexican authorities, notably the Attorney General's Office (the PGR – responsible for federal criminal enforcement), the Mexican Institute of Industrial Property (IMPI – responsible for administrative actions under the Copyright Law) and INDAUTOR (the author's rights institute responsible for registering copyrights, as well as enforcement), have worked well with rights holders, including IIPA members, but these authorities need increased resources and training, and are hampered by a number of statutory deficiencies in dealing with the size and scope of the problem.

As a result of these problems, the copyright industries recommend several legal reform and enforcement steps for the Government of Mexico to take in order to improve its IPR regime. Taking these steps would significantly improve market conditions for U.S. and Mexican rightsholders. These reforms include:

- Fully implementing the WIPO digital treaties – in the Copyright, Industrial Property, Criminal and Criminal Procedural Codes.
- Developing legislation calling for ISPs' cooperation to effectively address online piracy following the direction of the Coalition for the Legal Access to Culture (CALC) initiative, and including notice and takedown procedures.
- Ensuring that all relevant right holders are entitled in law and practice to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.

¹ For a further summary of IIPA's views on the TPP process in general, see the comments filed in January 2010 in response to a Federal Register notice on the TPP, at <http://www.iipa.com/pdf/IIPAWrittenStatementonProposedTransPacFTA012510.pdf>

- Taking administrative/regulatory steps to facilitate the collection of relevant tariffs by collecting bodies representing performers and record companies, as well as enforcement actions against commercial entities using music without paying the required remuneration to performers and producers.
- Passing legislation to impose criminal penalties for the unauthorized camcording of films in theaters without linkage to an intent to distribute.
- Amending the Criminal Code and the Copyright Law to facilitate the imposition of criminal sanctions for the distribution and importation of devices used for the unauthorized circumvention of technological protection measures (TPMs).
- Enacting and enforcing decrees to ensure the procurement and use of legal computer software in governmental agencies at all levels, including state and municipal agencies.
- Strengthening administrative enforcement by: (1) providing tax crime prosecution of copyright infringement when the infringement impacts tax liability; and (2) increasing administrative sanctions.
- Implementing legislation to create a centralized customs registration database to assist with identification of infringing shipments (in a positive step, efforts to establish the database are commencing).
- Adopting legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks or platforms, including *inter alia*: (i) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (ii) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights; and (iii) injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders.
- Ensuring that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.
- Providing Customs authorities with *ex officio* authority to seize in-transit shipments of infringing and counterfeit goods.

In addition to these key legal reforms, Mexico needs to undertake significant improvements in its criminal enforcement activities, including raids, prosecutions and deterrent sentences. It also needs these same improvements in its administrative enforcement mechanisms, and in its prosecutions by the courts where adjudication of copyright infringement faces significant delays, and last, to provide sufficient resources to undertake all of these enforcement efforts. IIPA and its members have set out numerous enforcement recommendations in the past; we recommend that these be implemented to meet the high

standards of the TPP. For a fuller discussion of these enforcement recommendations, see the IIPA's 2012 Special 301 filing which is attached.

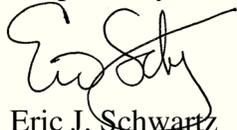
Finally, given the importance of online delivery of copyrighted works, we also urge that relevant electronic commerce issues be addressed in the negotiations: in the context of cloud computing and other online delivery of content and services it is critically important to secure the freedom to transfer and exchange data among data centers that are located in different TPP countries. Laws and regulations concerning data privacy and data security, for example, must not be permitted to prevent the flow of data across international boundaries. Export control regulations can also curtail the growth of cloud computing by impeding the flow of data from customers in one country to data centers in another one, or from a data center in one country to some other data center in another one. TPP countries should cooperate on finding ways to ensure that such regulations do not burden trade unnecessarily.

In sum, IIPA supports Mexico's active participation in the TPP and looks forward to using this as an opportunity to work with the Mexican government to make urgently needed improvements to its IPR legal and enforcement regime that will benefit our respective countries.

About IIPA

The IIPA is a private sector coalition of seven trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA's seven member associations (listed below) represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software, including business applications software and entertainment software (such as videogame discs and cartridges, personal computer CD-ROMs, and multimedia products); theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. The members of the IIPA are: the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA), and the Recording Industry Association of America (RIAA).

Respectfully submitted,



Eric J. Schwartz

Counsel, International Intellectual Property Alliance

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be retained on the Watch List in 2012.¹ Even though cooperation with enforcement officials is good, absent substantial enforcement progress resulting in an improved marketplace in 2012, some IIPA members will recommend an elevation to the Priority Watch List next year.

Executive Summary: In 2011, hard copy piracy remained at about the same level as it has been for the past several years for most of the copyright industries. However, Internet piracy has grown considerably in Mexico, (with some industries, such as the motion picture industry, recording a 300% increase from 2010); the increase is due, in part, to increased broadband penetration across Mexico, but also as the result of ineffective enforcement. Piracy in Mexico is widespread, including: hard copy; various forms of Internet piracy; CD-R and DVD-R burning of music, audiovisual and videogame discs; unauthorized camcording in theaters; unlicensed use of software in corporate and government settings; unauthorized photocopying at universities; and widespread sale of all hard copy material in street markets.

IIPA members report an enforcement environment that mixes good government cooperation in some key sectors pertaining to hard copy piracy, with disappointing results, especially against Internet piracy. The weaknesses with regard to digital piracy (and hard copy piracy) enforcement are the result of ineffective criminal and customs procedures. Additionally, the Government of Mexico has been very slow to work on resolving a cornerstone of Internet enforcement, namely a cooperative agreement between rights holders and Internet Service Providers (ISPs). It has been four years since the commencement of an attempt to reach agreement between an initial coalition of rights holders and ISPs, under the auspices of the Mexican communications ministry; the process broke down due to opposition from the Communications Secretary and the Federal Commission of Telecommunications (COFETEL). Then, three years ago, 37 civil organizations representing copyright industries, other rights holders and collecting societies formally established the “Coalition for the Legal Access to Culture” (CALC), to re-start those efforts. In addition to the other challenges, effective enforcement is hampered by a lengthy list of legal deficiencies, including the need to fully implement the WIPO digital treaties. If Mexico is serious about membership in a future Trans-Pacific Partnership (TPP) agreement, which would almost certainly include baseline protections for digital works, Mexico needs to quickly and properly implement the digital treaty obligations, especially pertaining to technological protection measures (TPMs), as well as the other key components of digital protection and enforcement.

Mexican authorities, notably the Attorney General’s Office (the PGR – responsible for federal criminal enforcement), the Mexican Institute of Industrial Property (IMPI – responsible for administrative actions under the Copyright Law) and INDAUTOR (the author’s rights institute, which also has enforcement responsibilities), have worked well with rights holders over the years, including IIPA members. However, these authorities need to coordinate their efforts, and to increase their resources and training. Even though cooperation with the federal authorities is good, state and municipal government anti-piracy efforts continue to be weak, with few of these local entities working at all on combating illegal trade and piracy. One key recommendation is for the government to develop a high-level national anti-piracy plan that both enhances and coordinates federal, state and municipal enforcement activities, and address Internet piracy.

¹For more details on Mexico’s Special 301 history, see IIPA’s “History” appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years’ reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA’s 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2012

The copyright industries recommend the following enforcement and legal reform priority steps to the Government of Mexico:

Criminal Actions, Raids and Prosecutions

- Develop a national “*ex officio*” anti-piracy campaign to address well-known street markets and distribution centers responsible for the sale of vast quantities of pirated goods, including cooperation with municipal authorities to revoke operational licenses, and to focus on enterprise end-users of unlicensed software and other materials.
- Coordinate the various police agencies (the federal police (PFP), the fiscal police (SAT), as well as state and local police) to identify and target individuals responsible for the large-scale distribution and importation of pirated goods.
- The government should set goals and augment the tax authorities’ (SAT’s) anti-piracy actions, including inspecting enterprises for software license compliance. In addition, SAT should act expeditiously on the numerous cases IMPI referred to SAT pertaining to unlicensed software use by enterprises.
- Create a fully empowered IP Intergovernmental Committee with authority to coordinate the various enforcement bodies including police and prosecutors, and to implement a national plan, including coordination with the PGR’s Organized Crime Division to act against major organized crime syndicates engaged in large-scale IP piracy operations.
- Address illegal photocopying by copyshops on or near major university campuses, and engage university administrations to encourage the use of legal materials by students and lecturers.
- Provide Customs with adequate resources and *ex officio* authority (to independently make seizures) to improve effectiveness in seizing infringing goods and components (including procedures to address changes in the size and frequency of shipments, and to deal with falsified documents). Re-launch the inspection program (by Customs) and adopt a maximum quota on blank media importations used for the pirate market.
- Ensure that seized goods in criminal and administrative actions are destroyed in a timely manner to prevent the reentry of infringing product into the market. Relevant rights holders should be notified of the destruction of infringing goods.

Administrative Enforcement

- Provide IMPI with additional resources (including personnel) to conduct inspections, and allow IMPI’s regional officers to become enforcement inspectors to conduct raids in their localities (in light of the 2011 reorganization of IMPI). Encourage IMPI to expeditiously issue its decisions; and, to waive right holder deposit fees in instances of “obvious” piracy.
- Provide INDAUTOR with more resources and facilities to increase its mediation capabilities, particularly by providing more mediators and mediation rooms, and requiring more expeditious notices to rights holders.
- Require the Secretary of Education to instruct INDAUTOR to expedite the publication of tariff rates for the public performance of sound recordings by TV and radio stations in Mexico (such rates are required in

accordance with the Copyright Act and Mexico's international obligations; this action has been "pending" for eight years).

Prosecutions, Judges and Courts

- Encourage prosecutors to take *ex officio* actions against all forms of piracy, to focus on prosecuting individuals arrested in such actions, and to seek deterrent sentences, including jail time. Also have the Supreme Court issue an advisory on this point to criminal judges nationwide. Encourage judges to act expeditiously on applications for search warrants in civil cases.
- Implement *ex parte* remedies (especially injunctive relief) for civil IPR infringement cases in order to fulfill Mexico's TRIPS obligations. On August 30, 2011, the Civil Code was amended to permit these remedies, but they have not yet been implemented.
- Create specialized IP courts for criminal matters. Continue to provide, and expand on, IPR enforcement training for law enforcement officials, prosecutors and judges. Provide sufficient resources for the IP magistrates within the Tax Court.
- Allow civil damages to be additionally awarded to plaintiffs in administrative and criminal cases.

Legal Reforms

- Fully implement the WIPO digital treaties – in the Copyright, Industrial Property, Criminal and Criminal Procedural Codes.
- Develop legislation calling for ISPs' cooperation to address online piracy following the direction of the CALC initiative, and including notice and takedown procedures.
- Ensure that all relevant right holders are entitled in law and practice to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.
- Pass legislation to impose criminal penalties for the unauthorized camcording of films in theaters.
- Amend the Criminal Code and the Copyright Law to facilitate the imposition of criminal sanctions for the distribution and importation of devices used for the unauthorized circumvention of technological protection measures (TPMs).
- Enact and enforce decrees to ensure the procurement and use of legal computer software in governmental agencies, especially at the state and municipal levels.
- Strengthen administrative enforcement by: (1) providing tax crime prosecution authority; and (2) increasing administrative sanctions.
- Enact pending (Senate) legislation to create a centralized customs registration database to assist with identification of infringing shipments.
- Adopt legal norms that create incentives for Internet Service Providers (ISPs) to cooperate with right holders in fighting infringement taking place over their networks or platforms, including *inter alia*: (i) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (ii) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights;

and (iii) injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders.

- Ensure that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage.

COPYRIGHT PIRACY IN MEXICO

Here is a snapshot of the nature of piracy and ongoing enforcement problems in the past year:

Internet piracy: Internet piracy is growing, as Internet use grows in Mexico: there are now an estimated 34.9 million Internet users in Mexico, representing 30.7% of the population; in 2000, only 2.7% of the population had Internet access (according to www.Internetworldstats.com). Mexico has no clear secondary (ISP) liability law in place, and no formal notice and takedown procedures; either would substantially improve enforcement, if properly implemented.

The most prevalent platforms for unauthorized downloads are peer-to-peer (P2P) file sharing, sites dedicated to providing links to infringing hosted content, illegal distribution hubs (also known as cyberlockers), forums and social networks, BitTorrent index sites and blogs. Many sites are hosted mainly in the U.S. and Europe but administered in Mexico, such as demonoid.me.

With the migration of customers from hard copy to downloading and mobile phone usage, peer-to-peer is the most prevalent source of music piracy, with ARES, Gnutella and BitTorrent dominating, as well as “linked” piracy on blogs and forum sites. “Blogspot,” a Google service, has been widely used; Google Mexico has been blocking links in response to takedown notices sent by rights holders (although their takedown procedure has proven to be very time consuming, and, thus not a very effective remedy). The most prevalent sites in Mexico for unauthorized music are peer-to-peer and BitTorrent sites (e.g., Megaupload, Fourshare and Rapidshare). The Motion Picture Association (MPA) undertook a study in 2010 (IPSOS survey) which found a three-fold increase in Internet piracy from the previous year, including 96 million illegal movie downloads, 28 million television program downloads, and 5.7 billion illegal music files downloaded in Mexico in 2010. Internet piracy is directly related to “source” piracy – the camcording of films that are then uploaded onto the Internet and available by all means (a bill to address this problem was introduced in December 2011). Independent film producers (IFTA members) are especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services – harming consumers and rights holders alike. Revenue from these platforms and services, which are licensed country-by-country, is critical to financing the development of new creative works worldwide, since piracy in one territory harms other markets instantly. Thus, Internet piracy is impacting the financing and distribution of independent content because “minimum guarantees” for license fees are being hurt by piracy, namely theatrical, DVD and television rights.

Hard goods piracy: Focused enforcement efforts are needed against the manufacturing and distribution networks, and on street and market sales. The main distribution centers for optical disc piracy (CDs and DVDs) – of music, film, entertainment and business software – remain as follows: Tepito, Lomas Verdes, Pericoapa, Salto del Agua, Plaza Meave, and Plaza de la Computación in Mexico City; La Cuchilla in Puebla; Las Pulgas in Monterrey; and San Juan de Dios and El Parián in Guadalajara. Tepito, San Juan de Dios and La Cuchilla are the dominant sources for manufacturing and sale, along with growing problems at Plaza de la Computación and Plaza Meave. IIPA continues to recommend focusing enforcement on these five locales, with a more systematic approach to identifying and prosecuting the criminal organizations operating in these (and the other) markets.

In 2006, the film and music industries combined their anti-piracy operations into the Association for the Protection of Film and Music (APCM). APCM reports that hard goods piracy for 2011 in the film industry remained at the same rate as in 2010, or at about 85%, and at about 71% for music. Flea market piracy remained at a constant

level, and is especially problematic in Mexico City, Guadalajara, Puebla, Cuernavaca (Morelos) and Monterrey. There remain at least 80 very large, very well-known, "black markets" in Mexico, many of which are well organized and continue to be politically protected. In some street locations, consumers can exchange previously purchased pirated product. Vendors also make available infringing copies of any catalog product or TV series, often with a 24-hour turnaround time.

Almost all of the pirated disc product in Mexican markets is locally manufactured, so controlling blank optical media imports is very important. Mexico imports much of its blank media from Taiwan and China; the main ports of entrance are Manzanillo, Matamoros, Reynosa, and Laredo. The street markets have discrete distribution chains and often involve organized criminal syndicates.

For years, hard goods piracy has been the most damaging form of piracy for the entertainment software industry, as evidenced by the enormous quantities of burned optical discs and counterfeit cartridges (and memory sticks) found in the major markets (cited above), particularly Tepito, Pericoapa, Plaza Meave and San Juan de Dios. Most of the pirated games available for purchase in Mexico are burned domestically, either burned on demand or sourced from local production points and wholesale distribution centers. Industry enforcement efforts have uncovered multiple burning labs in Tepito and Plaza Meave capable of producing hundreds of thousands of pirated games. Additionally, counterfeit cartridges continue to be imported from Asia, often in component pieces which are then assembled in Mexico. Circumvention activity continues to be a significant problem for the Entertainment Software Association (ESA), and occurs openly in many markets. The widespread availability of circumvention devices and technologies underpins and facilitates the growing problem of online piracy of entertainment software in Mexico. Circumvention is accomplished by the installation of "modification chips" in consoles, which bypass the technological protections embedded in the hardware and enable the play of pirated games, or by modifying the game platform's operating system to facilitate the play of pirated games (so-called "soft modding"). Enforcement against distributors of circumvention devices is unavailable, because Mexican criminal law prohibits only the manufacture of such devices, but not the distribution or sale thereof. Increasingly, consumers in Mexico source their circumvention devices from online auction sites. Vendors sell circumvention devices for approximately 290 Pesos (US\$21.50), often with memory cards containing up to 400 unauthorized copies of games as part of the sale.

The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with the pirates and report that piracy in Mexico has reached disastrous levels. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with the same quality viewing experience as a DVD. Unable to compete with free, legitimate distributors cannot commit to distribution agreements, or alternatively, they offer drastically lower license fees which are inadequate to assist in financing of independent productions. As a result, piracy is undermining and may permanently damage legitimate distribution networks essential to reaching the consumer and leaves little confidence for investment in intellectual property in Mexico. The independent film production sector cannot shift easily to new business practices that might otherwise limit piracy. For example, worldwide same day release (referred to as "day and date" release) may prove an effective method to curb or delay piracy for the major studio producers, who control their own worldwide distribution; but for independents, whose national distributors release on their own schedule, this technique is impossible.

Enterprise end-user software piracy: The primary concern for the business software industry remains the unlicensed use of software by enterprises (end-user piracy). The Business Software Alliance (BSA), in its annual study prepared by market research firm IDC, reported that the personal computer software piracy rate in Mexico dropped to 58% in 2010 (a 2% point improvement from 2009), with an estimated commercial value of unlicensed software of US\$1.2 billion (up from US\$1.056 billion in 2009). BSA will release its 2011 piracy data in May 2012. Illegal software is available at street markets (by "carpeteros"), on line auction sites, specialized download sites and

file sharing sites. In addition, "white box" vendors (small local assemblers or non-brand name vendors of computer hardware) continue to be a considerable source of software piracy, usually hard disk loading.

Camcord piracy: The illegal recording of films in Mexican theaters continues to cause significant harm to the U.S. motion picture industry. In 2011, 29 films were stolen from Mexican theaters. In 2011, four professional individuals (camcorders) were apprehended in Mexico; three are currently in jail. It is estimated that these individuals were responsible for over half of the material identified from Mexico. One of these individuals ("Banana"), was also a broker and leader of a major online and hard goods release group, with ties to one of the largest distributors of DVD masters in Tepito. He was responsible for brokering or releasing 17 unique sources (seven audios and ten full camcords) from Mexico and Latin America during the first six months of 2011. On December 6, 2011, federal agents raided four locations, arresting Banana and seizing 70 disc burners, approximately 1.9 million inlay cards and DVD covers, 300 film DVD masters, and approximately 59,000 illegal discs containing approximately 700 films. This underscores the organized and profit-driven nature of this crime. As major blockbuster theatrical release dates in Mexico and the U.S. begin to coincide, Mexico has become a source of Spanish-dubbed camcords which are then made available online. The enforcement challenge in Mexico remains the same: the police cannot arrest an individual camcording unless there is also evidence of a distribution. To sustain a successful prosecution under the current law requiring proof of intent to distribute, investigators have to watch the thieves actually camcord the movie, walk out of the theater, hand it over to the people who hired them, and then wait for the film to be widely distributed; by that time, grievous harm has resulted. This is a terribly inefficient use of government resources, has little deterrent effect, and is causing grave economic damage, which is why legislative fixes are necessary.

Book and journal piracy: Unauthorized photocopying of academic materials at copy shops in and around university campuses remains of concern. The production of unauthorized compilations or course packs consisting of unlicensed content from a variety of publishers is also commonplace. In some cases, materials taken from U.S. books are posted on the institution's intranet for faculty and student use, without permission and without payment to the publishers. Enforcement officials and education/university officials should take a more active role in addressing the problem of unauthorized reproduction, especially activity occurring on campus or using campus facilities. Universities should implement appropriate use and copyright policies that promote respect for copyright and raise awareness among personnel, faculty and students, and that discourages infringing behavior. The use of only legitimate materials should be required at institutions of higher learning, and appropriate sanctions meted out to those found engaging in infringing behavior. The local reprographic rights organization, CEMPRO (Centro Mexicano de Protección y Fomento a los Derechos de Autor), established in mid-1998, has "licensing" agreements with a number of university libraries and a few legitimate copy shops (such as Office Max and Office Depot). However, the royalties collected are largely symbolic, and are not a significant source of revenue for legitimate companies.

COPYRIGHT ENFORCEMENT IN MEXICO

Criminal Enforcement

Structural reforms and jurisdictional issues: There are several "structural" reforms or agency actions that could improve criminal enforcement. First, effective coordination and communication among the municipal, state, and federal governments could greatly improve criminal enforcement. Only four of Mexico's 32 state governments cooperate on IPR enforcement – the State of Mexico, the Federal District, Jalisco and Puebla. Mexico has 2,400 municipal governments, and about 190 of them have populations of over 100,000 inhabitants. Each one of these municipalities has regulations related to commercial establishments, markets and street vendors; but even with such regulations, few local anti-piracy actions have been taken. Priority states for coordinated federal-"local" efforts include: the Federal District, Nuevo Leon, Jalisco, Mexico State, Puebla, Morelos, Baja California Norte, Veracruz and Michoacán.

A second goal is further improving the activities of the PGR (the Attorney General's) criminal actions. In 2010, in a very positive development, legislation was enacted giving PGR the authority to take *ex officio* actions

against copyright infringement, and BSA and MPAA reported in 2011 that PGR is using this authority effectively. BSA reports an increase in the number of arrest warrants and convictions. The copyright industries are also applying the "Ley Federal de Extinción de Dominio" (Federal Law for Property Forfeiture) to piracy cases. The PGR anti-piracy coordinating committees are proving effective in several states, including Nuevo Leon, Morelos and Puebla. One particularly severe problem facing IIPA members is piracy undertaken by organized crime syndicates which are increasingly responsible for piracy in Mexico the past few years. The PGR has a special piracy unit, the "Subprocuraduría" Specialized in Investigation of Federal Crimes (SEIDF), which has worked effectively with industries and achieved significant results in some key markets (including in digital piracy cases). However, this unit is under-resourced to effectively dismantle the organized crime networks. There is also a PGR Organized Crime Investigative Division (PGR-SIEDO) with excellent investigators and attorneys and resources that the other divisions do not have – including paid informants, wire-tapping authority and witness-protection programs. IIPA members recommend better coordination between PGR-SIEDO and PGR-SEIDF. Criminal prosecutions remain a major concern for APCM Mexico because criminal sentences are rare, given the number of raids and cases commenced; additionally, more resources and training are needed.

The Mexican Tax Administration (SAT) is encouraged to use its inspection power to review companies for their use of legal software; this would serve as a powerful deterrent to unlicensed software use by business enterprises. BSA reports that in 2011, IMPI referred to SAT 99 cases of companies for investigation into whether they were infringing software copyrights and violating tax law; IIPA urges SAT to act on this information. SAT did work very effectively with other Mexican and U.S. enforcement officials in December 2011 ("Operation Holiday Hoax"), at which time over US\$80 million in counterfeit items were seized in the U.S. and Mexico; Mexican enforcement authorities executed 160 search warrants and seized 23.8 million counterfeit and pirated pieces, including pirated DVDs. The film and music industries reported a total of 3,046 search warrants executed in 2011. The Scientific Police of the Secretaria de Seguridad Publica have also assisted rights holders by providing information on illegal software websites.

One problem that undermines the effectiveness of raids by PGR is seized goods finding their way back into the black market because they are not expeditiously destroyed. IIPA continues to recommend that PGR adopt a policy to expeditiously destroy infringing goods as Customs, IMPI and PGR lack clear procedures on how to handle and destroy confiscated goods. In 2011, PGR did work with rights holders (MPAA and RIAA, in particular) on some actions to destroy a large number of seized goods; on February 8, 2012, PGR did undertake a massive destruction (20 million items) of infringing product. However, some rights holders continue to report problems. Article 70 of the Federal Law for the Administration and Alienation of Public Sector Goods (FLAAPSG) governs the regulation of seized or abandoned goods relating to IP crimes. However, Article 75 of FLAAPSG requires a final court order to destroy goods (if they are not "abandoned") which means that while there is some cooperation (more recently), prosecutors need to wait 90 days to declare goods "abandoned" under current law in order to destroy them. IIPA recommends both clarity in the law, and more cooperation with rights holders to ensure that illegal materials do not get returned into the stream of commerce.

Another enforcement mechanism is to have the Federal Bureau of Consumer Interests (PROFECO) use its *ex officio* powers for consumer protection to stop street market piracy. Unfortunately, PROFECO lacks the human and financial resources to properly conduct raids, and needs police assistance to protect its personnel during raids. There have been training programs undertaken by industry (BSA, in particular) so it is recommended that the PROFECO be properly resourced to undertake action against street markets.

Summary of some criminal actions in 2011: In 2011, APCM reported good ongoing cooperation with PGR on film and music actions. There were 3,046 criminal actions conducted across Mexico against physical piracy, directed at 162 laboratories, 1,013 warehouses, and 1,011 street and 800 cyber-café actions. In 2011, APCM reported 3,524 actions executed, consisting of 1,169 street actions, 164 actions against laboratories, 1,049 against warehouses, 177 against discotheques, bars, video clubs and jukeboxes, and 960 against cybercafés. In total, this resulted in 3,718 street sale points being dismantled, and 3,108 (recorded music) burners being seized. Against

digital music piracy, APCM reported 882,402 actions, consisting of 1,388 cease and desist letters to webpages; 108,008 for blogspots; three for virtual auctions; 719,138 against cyberlocker links; 4,121 against streaming links; 25,687 against forum posts; 3,183 for peer-to-peer links; 19,048 for link protectors; four against social network profiles; and 1,836 for pre-release links. APCM reports that during the first six months of 2011, 135,479 online actions were taken against film piracy, which included the takedown of 135,020 cyberlocker links, 17 hosted web pages, and 377 permalinks. Additionally, APCM issued 65 cease and desist letters for films (alone), and 934 letters for movies (and music); it worked to takedown thirteen hosted web pages; 109,149 blog post permalinks; over 8 million peer-to-peer links; 1.6 million illegal distribution hub links; and 203,016 forum posts.

In total, there were 196 arrests and 24 sentences in 2011 (and 32 individuals currently in prison for IPR violations; over 24 defendants have received sentences of over four years). IMPI carried out 960 inspection visits, and 891 *ex officio* raids. The totals seized in police raids were: 6.1 million CD-Rs and 7.67 million DVD-Rs (motion pictures). BSA reported on twenty criminal cases commenced in 2011, with five arrest warrants and two convictions. MPAA and RIAA reported 171 arrests, 88 indictments, and 21 sentences. One very significant criminal action of note: the case against demonoid.me, which resulted in the imprisonment of the main operator of that service (though he was later released), and the seizure of materials used by the service.

Unfortunately, the ESA's anti-piracy enforcement program did not see a sufficiently high level of activity from PGR in 2011, which was very discouraging after a strong year in 2010. In February 2011, action was taken against three targets in Tepito, in which 4,450 pirated games were found; unfortunately, after that there was no other actions undertaken by PGR against ESA identified targets for six months, when in August an action was conducted against pirate game sellers in the Bazar de la Computacion y el Video Juego; that resulted in PGR confiscating over 14,000 discs containing pirated games. This was the last action that PGR took in 2011 targeting piracy games. While ESA understands that much of the inactivity during 2011 was attributable to the reforms and reorganization within PGR, this low level of enforcement efforts had a negative impact on the Mexican market for legitimate game products, contributing to a rise in the level of pirated game product circulating in the markets. ESA is very concerned that the momentum and progress that was achieved against organized game piracy (in 2010) have been lost. In early 2012, PGR did take action against pirated sellers in the San Juan de Dios market in Guadalajara; ESA is hopeful that PGR will now accelerate its activities. Further, it is hoped that there will be follow-up investigations directed at supply chains, followed by effective criminal prosecutions (especially given the high rates of recidivism).

Judicial issues: One continuing weak spot in Mexican IPR enforcement is the judiciary – the need for improved IPR expertise by judges (re-enforcing the need for special IP judges and courts), the non-deterrent sentencing in many or most cases, and persistent problems with civil litigation.

While cooperation between rights holders and the PGR is very solid, IPR prosecution is being hampered by a lack of proper resources, training (despite many programs), and a shortage of deterrent sentences. The number of cases is still far below what is needed to have any significant effect on the marketplace (as APCM reported in 2010, only 24 sentences were handed down). In 2011, only 21 sentences were issued. IIPA recommends that Mexico consider the adoption of mandatory sentencing regulations for criminal copyright cases, and/or that the Supreme Court issue its own recommended guidelines to assist judges with the imposition of deterrent sentences.

Mexico's three-tiered civil procedure system, involving actions in the first and second instance, plus the Amparo hearing makes civil litigation more complicated, time consuming, and costly for rights holders. Another concern is the delays in resolving cases. There have been some recent improvements: for example, Mexican law grants full validity to electronic documents and discovery, although, some judges are still not yet familiar with these rules. On August 30, 2011, Mexico amended the Civil Code to provide *ex parte* measures to avoid the destruction of evidence; however, those provisions have not yet been implemented. The other major impediment is that damages can only be collected after an infringement decision has become *res judicata*. This can mean an eight-to ten-year process of litigation in IMPI, the Tax Court and the circuit courts, with an additional two years to claim damages after

res judicata, in a civil court. This *res judicata* prerequisite for copyright infringement damages was set by the Supreme Court in 2008.

Administrative Enforcement

There are two administrative agencies that work on copyright matters in Mexico: IMPI and INDAUTOR; both are also very actively engaged in public awareness campaigns.

IMPI: In 2011, IMPI undertook 1,250 actions against enterprises infringing software licenses (891 *ex officio* actions and 339 *ex parte* raids, also known as “full raids”) – an increase from 2010 (and, with good results overall). BSA and other right holder groups continued to report significant cooperation and coordination with IMPI on enforcement actions, resulting in more and higher fines. BSA and other IIPA members welcomed the positive news of the enactment of the law in December 2011 (in force, January 1, 2012) to enhance IMPI’s authority providing for increased penalties and the establishment of a presumption of infringement in cases where enterprises refuse entry to IMPI inspectors (so-called “door closures”). IIPA members hope that IMPI will quickly use this new authority for even more effective enforcement. Additionally, IIPA recommends that investigations be conducted more rapidly, and evidence preserved immediately upon discovery of a presumptive infringement (including evidence discovered by the authorities during inspections, even if that evidence is not listed on the inspection order).

The music industry reports that IMPI continued its actions against cyber cafés offering access to peer-to-peer networks in Mexico City, Guadalajara and other important locations. In 2007, AMPROFON and IMPI signed an agreement to conduct 80 administrative procedures every month against the illegal downloading on cyber cafés, mainly in the capital city area; this agreement remains in force and continues to be successful.

In 2011, the Motion Picture Association (MPA) launched the final phase of an anti-piracy campaign with CANACINE, to release anti-piracy public service announcements in theaters (that air before screenings). In 2011, APCM held a training for criminal, administrative and civil judges on procedural matters. This training will continue in 2012, along with a variety of other industry training programs for enforcement officials to improve IPR enforcement.

INDAUTOR: IIPA members continue to recommend additional training for INDAUTOR staff on key copyright matters, and, that public awareness initiatives should continue to issue general information about the importance of copyright to the local culture and economy.

INDAUTOR also is responsible for supervising the collecting societies in Mexico. This includes the authority to issue tariff rates for the broadcasting of sound recordings in TV and radio stations; rates were due by the end of 2009, but have never been issued. A tariff proposal was under consideration two years ago by the Federal Market Commission (COFEMER) responsible to evaluate the impact of the future rates on the Mexican economy, with additional steps necessary before publication of the official tariff. The recording industry continues to work closely with INDAUTOR on this matter and is hopeful for a favorable resolution in 2012. INDAUTOR needs to take steps to complete the procedure, and publish the rate, within a reasonable timeframe.

Online Enforcement

Legal reforms: There are several legal deficiencies hampering effective online enforcement: first, there is no specific Mexican legislation establishing liability principles for ISP’s in piracy cases. It is assumed that ISPs are subject only to the general liability principles contained in the Civil and Criminal Codes. Second, specific provisions in the Telecommunications Law prohibit ISPs from disclosing customer’s personal information to rights holders seeking civil recourse against alleged infringers. The absence of clear law results in a lack of certainty for ISPs on how to react to Internet piracy and to notice and takedown notifications from the copyright industries. Some IIPA members report cooperation with hosted content take downs, but most said there was “no cooperation” or “very little” cooperation. Because ISPs are not allowed to provide information on alleged infringers, rights holders must bring a

criminal action to the PGR to obtain those details. Additionally, ISPs have been reluctant to include clauses in their subscriber agreements to permit terminations if subscribers infringe intellectual property rights.

The film and music industries report that they have received a decent level of cooperation from some Mexican ISPs involving hosted content, such as the removal of illegal music and movie files posted on webpages and forums. Some of the key sites taken down include: "Imperiolatino.net" with over 600 thousand music tracks; viciowarez.com which had attracted over 150,000 users (over 300,000 tracks); and, DARK-VILLE offering over 200,000 music and movie links.

Generally, file-sharing committed through peer-to-peer networks is not considered a serious legal violation by the civil courts. Article 424*bis* of the Criminal Code requires a profit motive as a prerequisite for criminal infringement, and as a result effective prosecutions in peer-to-peer cases are unavailable. APCM reports very few Internet piracy cases filed last year (and none pertaining to peer-to-peer piracy) mainly due to the lack of adequate criminal provisions as described above. For peer-to-peer file-sharing, ISPs (especially Telmex, which has about 70% of the domestic broadband connections in Mexico) have, to date, been reluctant to take any actions. In November 2009, the CALC was formed with 37 founding members to promote and defend copyrights and related rights threatened by physical and online piracy, working with different government entities and federal authorities. The CALC also focused on legislative reforms, including addressing private copy issues and promoting cooperation between right holders and ISPs to address piracy in the online environment, but no legislation was advanced in 2011. IMPI has also been working with ISPs and rights holders to develop "cooperative models" for fast and efficient disabling of infringing websites. There is currently a bill pending to enforce the rights holder's authorization for "making available" (i.e., for the distribution or commercialization of) copyright material on websites.

Border Enforcement

There remain formal, onerous requirements to initiate border actions in Mexico. For example, Customs authorities will not seize infringing product entering the country without an official order from IMPI; this is true even in cases where the product is clearly infringing. Because IMPI does not issue immediate authorizations to seize products which have been identified by Customs as infringing, the suspect merchandise is usually allowed to enter the country; this is because Customs does not have authority to detain a shipment for more than a few hours. IIPA recommends greater cooperation between these two agencies to improve border enforcement, and to expedite the procedures by which Customs may make independent seizures of clearly infringing products. Additionally, the Customs Code needs to be amended to grant customs officers *ex officio* powers.

Five years ago, the PGR established a task force with Customs, the Ministry of the Economy and private sector representatives (music and film), to monitor and develop intelligence on blank media imports. Unfortunately, in 2011, PGR halted its seizure of in-transit containers, claiming a lack of authority. It is expected that this may be corrected in 2012 with a new "protocol" between PGR and Customs officials. The recording industry and others reported the continued production of pirate material locally, but that it was undertaken by using imported raw materials – blank CD-Rs, blank DVD-Rs, jewel boxes and burners. Although these importations are not considered a crime, there have been coordinated administrative actions by the PGR, SAT and APCM resulting in significant seizures of illegal imported raw material. IIPA continues to recommend cooperative efforts between U.S. and Mexican customs authorities to prevent Mexican exports of pirate movies to the U.S. Latin market, but also to control blank media exports from Southeast Asia that pass through the U.S. to Mexico (to avoid Mexican taxes).

Several years ago Customs began an anti-piracy initiative to: (1) conduct regular trainings of Mexican officials at various ports on intellectual property enforcement issues and the identification of various types of pirated product; and (2) hold monthly meetings with industry members to review the results of the trainings and to make improvements in border enforcement. ESA continues to report positive results from ongoing training efforts with Mexican Customs officials, including detention notifications and seizures of pirated game product from diverse ports, in particular, Guadalajara and Monterrey. ESA notes that importers are now reducing the size of their shipments to

avoid detection, making border enforcement even more critical, but more difficult. ESA did report an improvement in the level of support from Customs in dealing with shipments of circumvention devices. BSA reports Customs authorities have undertaken effective seizures in 2011 of imported illegal software and of computers containing illegal software. MPAA reported that trainings are on-going on a periodic basis.

COPYRIGHT AND RELATED LAWS IN MEXICO

Federal Law on Copyright (1996, as amended): Amendments to Mexico's 1996 Copyright Law entered into force on July 24, 2003; regulations to implement these amendments were issued in September 2005. Mexico acceded to both the WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) in 2002, but has yet to publish the WCT and WPPT Agreed Statements. Draft laws that were prepared in 2011, specifically for treaty implementation, would fall far short of proper implementation, on issues relating to technological protection measures, for example, and fail to address third party (ISP) liability at all. There are many remaining deficiencies in the Copyright Law (including long-standing NAFTA and WTO TRIPs obligations), as well as those relating to digital treaty implementation. IIPA has detailed a list of recommended amendments in prior filings; it is available at: <http://www.iipa.com/rbc/2010/2010SPEC301MEXICO.pdf>.

There have been two significant reforms adopted in recent years for which the Government of Mexico should be commended: first, in 2010 was the long-sought enactment of an amendment to the Criminal Code to provide *ex officio* authority in copyright infringement cases (in force, June 28, 2010). Second, was the adoption in December 2011 (in force as of January 30, 2012) of a law, to enhance the enforcement capabilities of IMPI by: (1) providing for increased penalties against enterprises that refuse entry to IMPI inspectors ("door closures"); and (2) establishing a presumption of infringement in such cases. Also, as noted, the Civil Code was amended (in August 2011) to provide *ex parte* search authority, but this has not yet been implemented.

Pending Legislation: A few key legislative reforms needed for effective enforcement (in addition to Copyright Law amendments) include:

- A bill to amend the Criminal Code to punish – with a prison term (3 to 10 years) and fines – the unauthorized camcording of films in theaters. The legislation needs to eliminate any required proof of commercial intent.
- A bill (in the Copyright Law or Criminal Code) to establish criminal sanctions for the distribution or trafficking in devices used for the circumvention of technological protection measures (TPMs). The bill should include "acts" as well as devices, components and services.
- A bill to adopt CALC proposals to promote cooperation between right holders and ISPs.

IPR Training and Public Awareness: IIPA member associations and individual companies continue to conduct training and information seminars for Mexican enforcement officials, and remain ready to continue to do so. In addition to the Customs training programs, and extensive public education programs, previously noted, there have been recent programs for criminal judges (November 2011), and events are planned in 2012 with PGR and the Ministry of Justice for at least four events, along with events with IMPI and the cyber police on Internet piracy matters, all of which include IIPA member participation.