

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be placed on the Priority Watch List in 2019.¹

Executive Summary: In 2018, much of the attention on improving the Mexican IPR regime focused on securing legal reform and enforcement obligations in the U.S.–Mexico–Canada Agreement (USMCA). While the now-concluded USMCA IPR chapter will require Mexico to make significant improvements in its current IPR protection and enforcement regime, the problems in Mexico are long-standing, and cannot wait for USMCA ratification and implementation. First, the IPR legal regime is at least two decades behind international norms. Second, the problems of enforcement are procedural and structural, and further exacerbated by a lack of resources, gaps in expertise, and government will power (by prior administrations). This combination of legal and enforcement shortcomings has stifled the growth of the digital marketplace, to the detriment of U.S. and other foreign rights holders.

Mexico has yet to fully implement the 1996 WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), which it ratified in 2002. Nor has it adopted the full panoply of necessary legal provisions and procedures commonplace in most other countries necessary for legitimate digital markets for copyrighted material. The USMCA, when (or if) it is ratified, would require Mexico to fully implement these treaties, which is an important step forward, but it gives Mexico four additional years to do so, while in the meantime, markets are suffering. For example, protection against the circumvention of technological protection measures (TPMs) and rights management information (RMI)—two key components of the digital treaties that allow streaming and on-demand services to function properly—are neither defined nor clearly protected in the current Copyright Law of Mexico.

Civil cases are expensive and difficult for rights holders to undertake, even against clear infringers, because there are no explicit provisions providing compensatory remuneration (e.g., pre-established or additional damages), making damages hard to prove and collect. The USMCA includes pre-established damages, but unfortunately, as a permissive rather than a mandatory obligation of the agreement. Proving copyright ownership, an unnecessary starting point of litigation, is also an obstacle in Mexican civil and criminal cases. Even when prosecutors are willing to commence criminal cases—a difficulty by itself due to a shortage of resources—success depends on proving a “direct economic benefit” to the infringers, instead of showing the harm caused to rights holders by the infringement; this is a difficult hurdle to overcome.

Other hurdles persist for commencing civil cases, such as burdensome presumptions of authorship and procedural formalities for commencing cases—these procedures are far afield from international practices. There was one positive legal reform in 2018. An amendment to the Copyright Law of Mexico (amending Articles 213 and 215) now provides for preliminary injunctions (“precautionary measures”) in civil cases. The absence of these remedies, until 2018, has hindered effective enforcement, especially against pre-release piracy. The 2018 law also permits *ex parte* preliminary injunctions, provided rights holders give infringers 72 hours’ written notice before the order goes into effect.

A long-recommended enforcement step is the development and adoption of a high-level national anti-piracy plan to target major piracy and counterfeiting operations, and to coordinate federal, state and municipal enforcement activities. This would help in many regions of the country where state and municipal government anti-piracy efforts

¹For more details on Mexico’s Special 301 history, see previous years’ reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Mexico’s Special 301 placement, see <https://iipa.org/files/uploads/2019/02/2019SPEC301HISTORICALCHART.pdf>.



continue to be weak overall, including in local entities that rarely work on combating piracy at all. There continues to be no coherent or coordinated plan to address online piracy, as the focus of enforcement efforts continues to be on hard goods piracy. Thus, while the copyright industries report ongoing good cooperation with some of the Mexican federal authorities, there is frustration that enforcement actions and resources have not also been directed to online enforcement, despite two decades of digital piracy, and the actions that are undertaken do not target major distribution networks.

Nationwide budget cuts in recent years in various agencies, including several IPR enforcement agencies, have further hampered enforcement efforts against digital infringement. In 2015, the Government of Mexico created an IP crime sub-unit within the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI), to focus on improving digital enforcement. Unfortunately, the sub-unit was never properly staffed or resourced, and it was disbanded in late 2016. UEIDDAPI overall has also suffered from staffing and resource problems, even though it had pledged to replace the sub-unit with two or three specialized prosecutors dedicated to online cases. Another example is the Institute of Industrial Property (IMPI), the specialized agency for intellectual property, authorized to take administrative actions against infringers, which is severely under-resourced and hampered by outdated procedural rules.

Basic tools for cooperation between rights holders and website owners and service providers are lacking. For example, there are currently no clear principles of third party liability for those inducing or promoting copyright infringement, which would incentivize Internet Service Providers (ISPs) to take preventive actions. There are currently no mandated provisions for notice and takedown of infringing content, and no penalties for non-compliance with such notices even where infringing content is identified.

Additionally, there are administrative provisions for taking down infringing material and blocking infringing sites. However, these remedies are now in limbo after the Supreme Court reversed an agency ruling blocking a clearly infringing site, because the site contained legitimate content (a blog), and the court required very onerous procedures to prove ownership of the infringed material. The music industry commenced a test case (in November 2018) in an attempt to reverse this very harmful ruling, but the site went offline before that case could proceed. The industry plans to file other cases to reverse the Supreme Court ruling.

The USMCA does require Mexico to fix another of its long-standing problems: adopting effective criminal provisions for camcording motion pictures, many of which find their way online. This legal reform cannot be delayed awaiting ratification of the USMCA. That is because Mexico is the number two foreign source for unauthorized camcords (behind Russia) in the world, and the number one source in Latin America. In 2018, 44 American (MPAA-member company) feature films were sourced from illicit camcords in Mexico, plus an additional 54 audio-only recordings (by comparison there were 55 video and 44 audio-only camcords in 2017 of MPAA-member company films). The USMCA also contains strong commitments from Mexico to address cable and satellite signal theft, which once enacted, along with the now-required sanctions against camcording, should significantly improve the market for the film industry.

PRIORITY ACTIONS REQUESTED IN 2019

The copyright industries recommend the following to the Government of Mexico as priority enforcement steps and legal reforms for 2019:

Criminal Actions, Raids and Prosecutions

- Implement a national *ex officio* anti-piracy campaign with a consistent year-round focus on major targets (e.g., online sources of infringing content including suppliers, traffickers and distribution chains), emphasizing coordination of the police and prosecutorial resources, and a strategic approach, with a prominent role for the UEIDDAPI, within the Attorney General's Office (PGR); and, properly resource UEIDDAPI. The PGR also needs

to improve its forensic standards for digital enforcement; and, mandated registration (as a practice, if not a legal requirement) for criminal cases needs to be eliminated.

- Ensure timely destruction of illegal goods seized in criminal and administrative actions to prevent their reentry into the market.
- Address the importation of circumvention devices used in video games that are entering Mexico in small consignments and via courier packages.

Administrative Enforcement

- Provide IMPI with: (i) *ex officio* authority to investigate infringement; (ii) additional resources and political directives to issue decisions more expeditiously, including actions to takedown and block infringing websites; and (iii) allow its regional officers to conduct local raids. Provide INDAUTOR (the National Author's Rights Institute) with more resources to increase and strengthen its mediation capabilities. Improve IMPI's coordination with the Federal Police to allow IMPI to take enforcement actions in difficult or risky areas with police security.
- Support the Coalition for the Legal Access to Culture (CLAC) initiative to spur active cooperation between Internet services and rights holders as a starting point to develop clear third party liability rules, proper injunctive relief, and incentives for an efficient notice and takedown system with ISPs.

Prosecutions, Judges and Courts

- Encourage prosecutors to: take *ex officio* actions against online piracy (as well as hard copy piracy); focus on prosecuting online service operators, repeat infringers, and seek deterrent sentences, including jail time and fines. PGR should be encouraged to reverse its current refusal to investigate and prosecute IPR infringement cases absent proof of actual lost profits, rather than based on the harm to rights holders. PGR also needs to improve its forensic standards—especially for online piracy. Lastly, there needs to be increased prosecutorial training in IPR cases, with a focus on digital enforcement matters.

Legal Reforms

- Fully implement the WIPO Internet Treaties—in the Copyright Law, and the Industrial Property, Criminal and Criminal Procedure Codes (as detailed in this report), including by:
 - (i) adopting definitions and provisions on TPMs, as well as civil and criminal penalties, with criminal sanctions for the importation and distribution of devices used for the unauthorized circumvention TPMs. This should include sanctions for “acts” as well as the distribution, marketing or trafficking in anti-circumvention devices, components and services. Mexico's existing criminal law concerning TPM protection (Penal Code, Article 42) has proven ineffective because it only applies to the domestic manufacture of circumvention devices; more commonly these devices are made abroad and imported into Mexico;
 - (ii) adopting definitions and sanctions for rights management information (RMI);
 - (iii) removing the proof-of-profit (“direct economic benefit”) requirement (and onerous authorization standards) as a prerequisite to criminal liability for large-scale copyright infringements; and, removing any such limitations on the making available right which is barred by the WIPO Internet Treaties;
 - (iv) granting customs inspectors *ex officio* powers to detain and seize infringing imports, and clarifying that PGR and Customs can and will act against so-called “goods in transit.”
- Enact an amendment to Article 189 of the Industrial Property Law allowing IMPI to notify defendants via e-mail for administrative IPR violations online; several legislative proposals to do this have to date failed.
- Enact legislation (now required by the USMCA) to impose criminal penalties for the unauthorized camcording of films in theaters, and eliminate any required proof of commercial intent—making the act itself illegal. The law should mandate a prison term of three to ten years, and fines.
- Enact legislation to provide clear rules establishing third party liability, including for parties contributing, inducing or promoting infringement of copyright and related rights.

COPYRIGHT PIRACY IN MEXICO

Online Market Outlook: In the past two decades, there has been an explosive growth of online access in Mexico, including the use of mobile phones and smartphones. The music industry reports (IPSO Connect Report 2018) that in 2017, 68.8% of recorded music industry revenue in Mexico was from digital music services, including subscription services (as physical format revenue declined significantly). Unfortunately, even though revenue is increasing, the per capita spending on music in Mexico is only US\$1.10 per year, compared with US\$18.11 per capita in the U.S. According to a 2017 study conducted by CLAC, more than 37 million people consumed pirated music in Mexico in 2016.²

Weak enforcement, including by PGR and its experts (*peritos*), and outdated copyright and related laws are stifling the growth of legitimate distribution sites and services; instead, illegal websites and services continue to flourish in Mexico. There are a wide variety of popular pirate services available in Mexico, including cyberlocker services, stream-ripping services, sites offering unauthorized downloading and streaming of music, film and videogames, MP3 search engine sites that provide links to enable the downloading of film, music and video game content hosted on cyberlocker platforms, BitTorrent index sites, and online markets offering video game-related digital goods. Although there are some local websites, many of the infringing sites and services are hosted outside of Mexico (e.g., in Peru, Chile, Columbia and Argentina), but are routinely accessed by individuals in Mexico. Even so, the Mexican authorities can use effective remedies and regulations against large-scale infringers when local or off-shore (with site-blocking and other measures), and they should also direct more attention to mirror sites. For some video game companies, Mexico is now among the top countries for peer-to-peer (P2P) sharing of infringing video game files and in-game digital goods, which has slowed the growth of the legitimate online marketplace in Mexico. In addition, illegal sales of subscriptions, as well as account usernames and passwords, is rampant for video games.

The most common type of music piracy in Mexico is stream-ripping (including music videos posted on YouTube and other similar platforms), as well as “linked” piracy MP3 search engines (indexes). Social networks (including Facebook and Twitter) have also been used to provide links to infringing content, a trend that has been increasing in recent years. These platforms are also very popular distribution channels for pre-release piracy.

The Motion Picture Association (MPA) reports that subscription television piracy and the use of piracy devices are a growing problem in Mexico. Piracy devices are media boxes, set-top boxes or other devices (i.e., illicit streaming devices (ISDs)) that allow users through the use of illegal software applications (apps), to stream, download, or otherwise access unauthorized content from the Internet. The use of hardware devices, and software, to pirate television programming, including subscription streaming services, is getting more sophisticated and more ubiquitous, with these devices becoming widely available in Mexican electronic hardware grey markets. This includes the use of web browsers and video apps to allow playback of files of films and television programming. There are over 170 websites with film and television materials harming the Mexican market, including some with over 13,000 illegally reproduced titles. One site, *pelispedia.tv* has 50,000 links and offers over 8,000 film and television titles; another, *pelisplus.tv*, has 10,000 links and over 1,700 film and television programs. These illegal sites are some of the regions’ most popular for streaming Spanish-language films and television programs, with a huge audience in Mexico. The independent sector of the film and television industry (IFTA) is especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services that provide revenue for financing the development of new creative works worldwide. In 2018, Mexico ranked 11th overall in the world (up from 15th in 2017) in the number of connections by peers participating in unauthorized file sharing of video games on public P2P networks. Mexico ranked third (up from 5th in 2017) in unauthorized file-sharing using consoles, 11th using mobile devices (up from 12th in 2017), and 14th using PCs (up from 18th 2017).

²See: http://docs.wixstatic.com/ugd/5b1d95_00c541f17c1f4af99e3fb21c5d1d90d9.pdf. The study consisted of interviews with 1,200 participants nationwide to get an accurate snapshot of Internet piracy in Mexico.

Hard goods piracy: Hard goods piracy continues in manufacturing and distribution networks on the street and at markets (even as digital piracy far eclipses hard copy piracy). In the last Notorious Markets Report in January 2018, as it has since 2012, the U.S. Government named two Mexican physical markets to its list: (1) Mercado San Juan de Dios in Guadalajara which is the largest indoor market in Latin America with close to 3,000 vendors selling pirated films, music and videogames, and videogame circumvention devices (sold by a majority of the market's vendors); and (2) El Tepito in Mexico City, an open-air 80 square block market in the middle of Mexico City selling video games, modified consoles and game circumvention devices, and which, as the U.S. Government acknowledges, has become too dangerous for rights holders to enforce their rights. In 2018, two facilities (one in Mexico City, one in Puebla) replicating camcorded films, were raided by the PGR, and the merchandise seized by UEIDDAPI officials.

The widespread availability of circumvention devices and technologies in many markets, and, increasingly, from online auction and e-commerce sites, underpins and facilitates the growing problem of mass online infringement 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 video games, or by modifying the video game platform's operating system to facilitate the play of pirated video games (so-called “soft modding”). Circumvention devices are typically manufactured overseas and shipped in component pieces which are then assembled in Mexico. Vendors, and online marketplaces such as Mercado Libre, sell circumvention devices for approximately 350 to 500 Pesos (US\$18 to US\$26), often with memory cards containing up to 400 unauthorized copies of video games as part of the sale. Top sellers on Mercado Libre offer dozens of different mod chips and mod services, and sell thousands of units of each, an indication of their high-volume business. Cheaper offerings are now available for “virtual chip” installation (an alternative version of soft mods) for 150 to 250 Pesos (US\$8 to US\$13) for installation services and pre-loaded games. Enforcement against distributors of circumvention devices is unavailable, because Mexican criminal law prohibits only the domestic manufacture of such devices, but not their distribution or sale—the obligations of the USMCA require Mexico to correct this deficiency. Even when infringing online listings are removed, sellers continue to relist their offerings with little deterrence.

Camcord piracy: Enforcement against camcording has been ineffective for two reasons: (1) the current law is very weak; and (2) that law is rarely utilized—the few criminal convictions that have been successful in recent years were the result of prosecutions based on an array of other crimes, not just camcording. Under the flawed current law, a successful prosecution of a camcorder requires evidence of intent to distribute, that is, proof of a profit motive, which is very difficult to obtain. To do this, investigators have to watch the thieves actually camcord the movie, walk out of the theater, hand a copy to the people who hired them, and then wait for the film to be widely distributed; by that time, grievous harm has resulted. By comparison, in the U.S. or Canada, the laws recognize the act of unauthorized camcording in a cinema as a crime by itself. The USMCA requires Mexico to correct its law, but it must be done properly. A draft bill in 2017 would have amended Article 424 of the Criminal Code for camcording activities; but that bill contained the “for profit” language found elsewhere in the code for IP criminal violations, which would have undermined the efficacy of the law. An alternative 2017 camcording bill would have eliminated the “for profit” requirement, but it did not advance in the Congress.

Other issues: Satellite and signal piracy remain a concern in Mexico. The current Criminal Code (the Federal Penal Code, Article 426) covers only encrypted-program-carrying satellite signal theft. There is no law prohibiting the theft of encrypted program-carrying cable signals. Nor are there current civil remedies for parties harmed by the decryption of encrypted program-carrying satellite signals or its content, or for cable systems. Mexico thus needs to amend its Criminal Code (and the Copyright Law or Civil Code) to cover cable systems, and to eliminate the “for profit” requirement for acts of decryption of satellite and cable systems, as well as to provide criminal and civil remedies in the Criminal Code and the Civil Code, for such activities.

Another major concern, already noted, is the increased availability of piracy devices (i.e., ISDs), including media boxes, set-top boxes or other devices that allow users—through the use of illegal software applications (apps)—to stream, download, or otherwise access unauthorized content from the Internet. These devices are part of

a sophisticated online ecosystem facilitating access to pirated audiovisual materials; they are promoted or advertised as facilitating easy access to remote online sources of unauthorized entertainment content, using these devices with apps. The devices are imported into Mexico either pre-loaded with the apps (prior to shipment, by vendors prior to sale, or as an after-sale service), or users can easily obtain the apps themselves to access infringing content. Enforcement authorities should take criminal actions against vendors and the operators of infringing apps used on these devices.

COPYRIGHT ENFORCEMENT IN MEXICO

Mexico does not have a centralized coordinator for copyright enforcement; instead, there are three federal agencies engaged in copyright enforcement in Mexico. The PGR is responsible for federal criminal enforcement. The Mexican IMPI takes administrative actions under the Industrial Property and Copyright Law. INDAUTOR is responsible for registering copyrights, and can conduct mediation proceedings for aggrieved rights holders.

In addition to these federal-level agencies, the Scientific Police (part of the Federal Police) of the Secretary of the Interior (*Secretaria de Gobernacion*) have also assisted rights holders by providing information on illegal software websites (and have also moved to seize domain names of infringing sites). In 2016, the Scientific Police ordered the Network Information Centre Mexico (NIC.mx), the agency responsible for the .mx top level domain registry, to suspend the domain *kickass.mx*, a popular mirror site for *kickasstorrents* (*kat.cr*), and a criminal case was commenced. In the past, an inter-agency committee (COIDAPI) periodically prepared strategic national enforcement plans, but this process has now been replaced by informal discussions between various IP enforcement agencies and rights holders.

Criminal Enforcement

Mexico transitioned to an adversarial justice system in the past five years; this has required judges to undergo training to improve the adjudication of IPR criminal cases. Under this system, criminal copyright cases are not prosecuted *ex officio*, but only upon the filing of a complaint against an infringer. This transition has resulted in prosecutorial delays of IP related crimes, including at PGR. Good cooperation continues to exist between rights holders and IMPI and PGR, as well as with the Mexican Tax Administration (SAT); some industries also report improved cooperation with INDAUTOR as well. Yet, in spite of this, IPR prosecution at PGR is hampered because it is not a priority, and PGR suffers from outdated procedures, insufficient resources, inadequate training of new agents, long delays (years) for cases to resolve, and the lack of deterrent sentences. And, with the formation of the new government in December 2018, PGR prosecutors and department heads need to be re-appointed, which will further stall any progress. The number of cases is still far below what is needed to have any significant effect on the marketplace. A formal coordination process between the government agencies (PGR, SAT, IMPI, and local police forces) is needed to improve the government's ability to efficiently address the distribution of infringing content.

A complicating element in combatting video game, music, and motion picture piracy in Mexico is the cumbersome requirement (by PGR) that each copy of an infringing game must be accompanied in prosecution files by a physical copy of a legitimate original for comparative examination by experts (*peritos*); this is done as a general practice even though the law does not explicitly require it. Under the existing system, when the comparison involves multiple copies of the same infringing game, music, or film rights holders must submit an equal number of legitimate game, music, and film DVD copies to the experts for comparison. The *peritos'* reports take too long to complete; to compound the problems, the *peritos* are not sufficiently trained in digital issues and are often reluctant to cooperate with investigations and prosecutions. The law should recognize and apply a clear presumption of ownership in civil (and criminal and administrative) matters, based on the copyright notice that appears on a product or on the screen, without the need for a mandatory (and certified) registration. In practice, copyright registration certificates are required by Mexican prosecutors to commence criminal cases.

Structural reforms and jurisdictional issues: IIPA continues to recommend several “structural” reforms or agency actions to improve criminal enforcement. An overarching priority is to implement a national *ex officio* anti-piracy campaign. Such an effort would seek to coordinate the various police agencies (including the Federal Police, the Ministry of the Interior (Gobernación), and SAT, as well as state and local police) that need to be involved in identifying and targeting individuals responsible for large-scale distribution and importation of pirated goods, including the major organized crime syndicates engaged in these operations. The priority should be criminal enforcement directed at digital piracy. It has been over five years since a national IPR enforcement plan was publicly released, and although meetings were held with stakeholders, the plan has never been fully implemented. It needs to be updated and implemented, and preferably given one central authority to direct enforcement. Criminal enforcement needs to be undertaken with a coordinated plan among PGR, SAT, IMPI, Federal Bureau of Consumer Interests (PROFECO) and the Federal Police. SAT remains engaged with PGR in support of enforcement actions related to audiovisual and music piracy, especially in cases of suspected money laundering or tax evasion.

A second recommendation is to significantly improve PGR's criminal enforcement actions against digital piracy, and especially outside of the major cities. Before the adoption of the new (adversarial) criminal system, PGR had the authority to take *ex officio* actions and criminal cases against copyright infringement, but it prioritized raids at laboratories and warehouses. UEIDDAPI needs resources and training (focused on technology) to properly undertake and to focus on criminal investigations on digital piracy. Now that the sub-unit within UEIDDAPI has disbanded (it initially had five public prosecutors from within PGR), the Government of Mexico needs to properly staff UEIDDAPI to address IP cybercrimes, as well as staffing other key IPR enforcement units in PGR and the police. In the first half of 2018, UEIDDAPI filed 348 investigations for copyright-related crimes. PGR can still take *ex officio* actions (e.g., raids), but criminal cases now formally need a complaint to be filed by a rights holder to commence the case.

Organized crime syndicates continue to predominate in hard goods piracy, and increasingly, in digital piracy. PGR has a special deputy attorney general department, the Office of Attorney General for Federal Crime Investigation (SEIDF), which established the UEIDDAPI to work effectively with industries. It has achieved significant results in some key markets. However, this unit is also under-resourced, and thus unable to effectively dismantle 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, as well as additional resources and training.

A third recommendation is to coordinate municipal, state, and federal government criminal enforcement actions. Of Mexico's 32 states (consisting of 2,400 municipal governments), only five of the state governments regularly cooperate on IPR enforcement—the State of Mexico, the Federal District, Jalisco, Queretaro and Puebla. Otherwise, the states and municipalities have ignored copyright offenses in their jurisdictions.

Fourth, enforcement agencies should adopt clear and consistent policies for the expeditious destruction of seized infringing goods. The copyright industries have successfully applied the *Ley Federal de Extinción de Dominio* (Federal Law for Property Forfeiture) in piracy cases, but materials seized in the PGR enforcement raids continue to find their way back into the black market. Some rights holders continue to report problems, although there have been instances where rights holders were notified, and did cooperate in the destruction of confiscated goods. Article 75 of the Federal Law for the Administration and Alienation of Public Sector Goods requires a final court order to destroy goods, unless they are abandoned, and prosecutors need to wait 90 days to declare goods “abandoned” in order to destroy them. IIPA recommends both clarity in the law, and more cooperation with rights holders to ensure that illegal materials are not returned into the stream of commerce.

Fifth, PROFECO should 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 ongoing training programs with different agencies

undertaken by industry, but PROFECO still needs to be properly resourced to undertake action against street markets.

A continuing weak spot in Mexican IPR enforcement is the judiciary—the need for training to improve IPR expertise by judges—especially training on technology, including circumvention devices, digital distribution, and online piracy; the lack of specialized IP judges and courts; the non-deterrent sentencing in many or most cases (criminal sentences are rare); and, persistent problems with civil litigation. 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 and the award of damages (*reparación del daño*). That court could also issue an advisory to criminal judges nationwide to act expeditiously on applications for search warrants. Finally, Mexico should provide sufficient resources for the IP magistrates within the Tax Court, and consider creating specialized IP administrative circuit courts.

Civil Enforcement

Mexico's three-tiered civil procedure system makes civil litigation very complicated, time consuming, and costly for rights holders. Since 2013, the Copyright Law has allowed rights holders to seek damages in civil courts even before an administrative infringement decision is issued or becomes final. The Copyright Law does not provide statutory damages (e.g., additional or pre-established damages), but rights holders can seek 40% of the gross sales revenues from infringing products as damage awards. Mexican law grants full validity to electronic documents and discovery, although some judges are still not familiar with these rules. The Civil Code provides *ex parte* measures to avoid the destruction of evidence, but these provisions have never been fully implemented. Plus, as noted, there is no secondary liability for copyright infringement at present in the Civil Code.

Administrative Enforcement

IMPI: Starting in 2013, IMPI used its administrative authority to take down an infringing website, and issued an order to block access to the site. A monetary fine was imposed against the website administrator, and the website removed the infringing material. A court later upheld IMPI's action and authority. In 2015, IMPI again used its authority, this time against the website *mymusic.com*, after a case was brought by the Mexican Association of Phonogram Producers (Amprofon) and the Mexican Society of Authors and Composers (SACM). But, that action by IMPI triggered a court case when two ISPs failed to comply with the IMPI order. The court lifted the web-blocking order against *mymusic.com*. The Supreme Court upheld that ruling calling it disproportionate to the infringing harm, because the site contained some non-infringing material (a blog), and the copyright ownership of all of the material on the site was not confirmed. In November 2018, phonogram producers in Mexico brought a test case (working with IMPI) to try to overturn, or at least refine the Supreme Court ruling and to re-institute the authority of IMPI to takedown material and block access against sites if a majority of the content on a site is unauthorized. That case will now not proceed because the site is offline, but the industry plans to bring other cases to overturn the ruling. A further limiting factor, even if the case is overturned, is that IMPI can only act against an operator with a physical address in Mexico. With improved inspection practices, some industries report IMPI has taken other actions against online sites, issuing injunctions and imposing fines.

One legislative reform, still pending for enactment (that resulted from the CLAC), would improve enforcement by IMPI. The reform (an amendment to Article 189 of the Industrial Property Law) would permit IMPI to notify defendants located in Mexico or abroad, via e-mail in cases where IPR violations are committed via an electronic network; it is supported by the copyright industries. Currently, the remedy is of limited use because civil and administrative procedures require site operators to be notified by writ sent to a physical address (which pirate services do not disclose). This antiquated procedure needs to be corrected. In the first half of 2018, IMPI reported 2,877 administrative actions, mostly taken against individuals (not websites), including both copyright and trademark actions.

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. Most report that INDAUTOR has not cooperated with the copyright industries on legal reforms or enforcement matters. The recording industry reports that INDAUTOR has been helpful with its mediation procedures (known as *juntas de avenencia*) allowing music producers (via their collecting societies) to meet with users. INDAUTOR also is responsible for supervising the collecting societies in Mexico. In 2015, the Mexican Congress created a new Ministry of Culture to oversee cultural policy and funding and placed INDAUTOR within that Ministry (with the same authority it had under the Ministry of Education).

Online Enforcement

One of the biggest obstacles to effective online enforcement is the absence of law that directly establishes liability principles for ISPs (who, in the absence of clear law, seek to avoid assuming responsibility). Unfortunately, the Government of Mexico has also been very slow to create incentives to promote cooperation between rights holders and ISPs. It has been over a decade since 37 civil organizations representing copyright industries and other rights holders, and collecting societies, formally established the CLAC to promote and defend copyrights and related rights threatened by physical and online piracy. The CLAC, working with various government entities and federal authorities, focused on legislative reforms, including addressing private copy issues, provisional measures for collecting societies, and promoting cooperation between rights holders and ISPs to address piracy in the online environment. The CLAC initiatives could be the basis for needed improvements, including notice and takedown, third party liability, and a duty on ISPs to provide information to law enforcement agencies (provided, in part, in Article 189 of the 2014 Telecommunications Law). Unfortunately, some in the ISP community continue to oppose these cooperative efforts.

Instead, at present, ISPs are subject only to the general liability principles contained in the Civil and Criminal Codes. Without clear legal standards, ISPs claim uncertainty on how to react to Internet piracy and to takedown notifications from the copyright industries; some services completely deny liability. Some IIPA members report cooperation for hosted content takedowns (as well as with the local domain name registry), but more broadly, there is little or no cooperation with many local ISPs. Other participants in the ecosystem, such as payment processors and advertising networks, should also be encouraged by effective laws to cut off the economic sources of support for piratical websites and services. Some copyright industries report that Google Mexico does respond to takedown notices filed by rights holders to block access to links in *Blogspot*. In general, the takedown procedure has proven to be very time consuming for most of the copyright industries, and it is certainly not an effective or sufficient remedy (and should not be a substitute to avoid direct liability).

In addition, specific provisions in the Telecommunications Law prohibit ISPs from disclosing a customer's personal information to rights holders seeking civil recourse against alleged infringers (although Article 189 of the Telecommunications Law, as amended in 2014, does allow an ISP to cooperate with an order from any competent authority). Additionally, ISPs have been reluctant to include clauses in their subscriber agreements to permit terminations of service contracts if subscribers infringe intellectual property rights. ISP contractual practices thus compound the difficulties of obtaining access to information necessary for seeking civil remedies.

Online criminal enforcement faces many obstacles. For example, file sharing committed through online networks is generally not considered a serious legal violation by Mexican 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 Internet file sharing cases are unavailable. There are no new Internet piracy criminal cases to report in 2018.

For file sharing, the two major ISPs (Telmex Infinitem which has about 70% of the domestic broadband connections in Mexico, and ALESTRA) have, to date, been reluctant to take any actions, which is why legal reforms to address these issues are strongly recommended. A few smaller ISPs do respond to IMPI orders. IMPI has also been working with ISPs and rights holders to consider "cooperative models" for fast and efficient disabling of infringing websites. Unfortunately, the Government of Mexico's proposals offered in recent years only included a very

weak “notice and notice” system which would have compounded an already weak enforcement system. As noted, IMPI claims to only have authority to address local websites (when their administrators or owners are located in Mexico), limiting its effectiveness against foreign infringing sites.

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, or detain it for more than a few hours, 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. 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.

There were amendments adopted in the Customs Code in 2018, but the changes did not provide the necessary *ex officio* authority for Customs officials to conduct independent seizures of infringing goods and components. Instead, under the current Code, it is unclear what authority Customs officials have to seize infringing materials and retain materials.

The video game industry reports that in 2018, there were 188 seizures by Customs authorities, including the confiscation of over 14,000 infringing video game products. Most of the seized material was game consoles with hundreds of pre-loaded and infringing copies of legacy video games. Cooperation with Customs is good, but there are many repeat importers of infringing materials who are not prosecuted. In 2018, there were 24 such repeat importers, with one party caught 16 times with the same infringing product. Without criminal prosecutions or other severe penalties, there are no deterrents for these parties to cease these practices. The video game industry also reports that importers are reducing the size of their shipments to avoid detection, making border enforcement even more critical, but more difficult. Even though there has been extensive training and good cooperation in the past, there were no seizures of circumvention devices by Customs in 2018; this demonstrates that these devices are entering Mexico through small consignments. The Specialized IP Unit in Customs retains criteria that deters inspections of courier packages even though there is evidence of substantial infringement by these packages and in small consignments.

Over a decade ago, 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, and it never implemented a new “protocol” between PGR and Customs officials. Imported raw materials—blank CD-Rs, blank DVD-Rs, jewel boxes and burners—are still widely used to produce pirate material in Mexico. These importations are not considered a crime, but coordinated administrative actions by PGR, SAT, and rights holders have resulted in a few seizures of illegal imported raw material.

IIPA continues to recommend cooperative efforts between U.S. and Mexican customs authorities. IIPA also recommends coordinated meetings on this issue with the PGR Intellectual Property inter-agency committee and U.S. rights holders (and the U.S. Embassy). Mexico should also fully implement the legislation that created a centralized customs registration database to assist with identification of infringing shipments. For such shipments via courier services, complaints of suspected infringing product must be filed with the local PGR office where the shipment is located. It would be more efficient to centralize this (e.g., by allowing notification at the PGR IPR office in Mexico City). Other needed improvements include: adopting procedures to address changes in the size and frequency of shipments and to deal with falsified documents; re-launching Customs’ inspection program and its program for seizing goods arriving at local ports, destined for other countries; adopting a maximum quota on blank media importations used for the pirate market; amending the law to provide for formal notification processes to rights holders; and developing a strategy to identify infringers who import their goods using falsified information. In addition, infringers and importers hide their true identities, so more scrutiny is needed.

One challenge for rights holders to pursue recidivists is the false information provided to Customs by these importers (a red flag for enforcement officials are repeated amendments to importation documents). IIPA urges prosecutors to target recidivist importers, and to work with Customs officials on these cases. Customs chain-of-custody procedures is another hurdle, especially for criminal enforcement. Under existing procedures, Customs officials' first alert rights holders to alleged infringing shipments. Upon confirmation of infringing material, prosecutors then order the police to inspect the packages. However, police and prosecutors have been reluctant to commence criminal cases because the packages were previously opened by Customs officials and not (as the PGR office responsible for the Mexico City International Airport requires) in the presence of police witnessing the opening of (each) package. This interpretation that the chain of custody is "broken" has forced rights holders in the video game industry to appeal decisions (incurring additional legal expenses) that terminated cases and investigations. The solution is for the PGR to develop a clear unified rule on chain of custody procedures that shifts the burden to the prosecutor to prove that evidence was altered. In addition, prosecutors have argued that infringing products without tariff classifications assigned at Customs are deemed not "imported" and thus outside the scope of seizure and prosecution, creating another hurdle to enforcement.

Hard Copy Enforcement

Although digital, not hard copy piracy, is the priority in Mexico for all of the copyright industries, problems of large distribution chains of hard copies still exist. To be effective, procedures regarding expert reports need to change, customs officials need the proper authority to commence cases, and most importantly, the Mexican authorities need to coordinate their enforcement directed against high-level targets in the distribution chain. Such efforts should also make use of the forfeiture law, under which landlords aware of criminal activity on property they own, must either stop the activity, notify the authorities, or face liability.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Mexico is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO TRIPS Agreement. Mexico was a signatory and, in 2002, acceded to both the WCT and the WPPT, although it did not publish its ratification of those treaties with the Agreed Statements. It is also a signatory to the USMCA along with the United States and Canada, but that agreement has yet to be ratified in any of the three countries.

Proper implementation of the WIPO Internet Treaties would incorporate key elements into Mexican law that are currently missing. These include: (i) definitions and provisions on TPMs prohibiting acts of circumvention, the marketing, distribution and trafficking in tools, devices, components, and/or services that can be used to circumvent, along with civil and criminal remedies for violations (although some technological protections exist under current administrative sanctions (Article 231(V)); (ii) definitions of rights management information (RMIs) and protections, and civil and administrative sanctions for the removal or alteration of RMIs; and (iii) a clarification regarding the making available right for works and sound recordings (Article 27 for works; Article 131 for phonograms). Additionally, Mexico needs to address the application of presumptions of ownership for works and sound recordings.

There is also a missing WTO TRIPS enforcement obligation that Mexico should address. TRIPS (Article 61) requires that there be effective criminal remedies, including "imprisonment and/or monetary fines," available in cases of "willful ...copyright piracy on a commercial scale." The remedies in Mexico for commercial scale piracy have not been effective, and are hampered by procedural hurdles already noted (including proof of ownership and the "for profit" motive).

The obligations of the USMCA—already noted—will not come into force until the agreement is fully ratified.

COPYRIGHT AND RELATED LAWS IN MEXICO

Federal Law on Copyright (1996, as amended): The 1996 Copyright Law is in need of significant revision. It was amended in 2018 with the addition of preliminary injunctive relief, and before that, last amended in 2003 (with implementing regulations in 2005).

Draft laws to implement the WIPO Internet Treaties have circulated for years, but have never been enacted, and the circulated drafts (most recently in 2013) fell far short of proper implementation, especially on issues relating to technological protection measures. It is hoped that implementation (now a USMCA obligation, as well as an obligation of other treaties) will fulfil all of the treaty obligations and be undertaken quickly.

The full list of legal reforms (some already noted above) include: (i) adding definitions and protection for TPMs, RMI as well as appropriate civil and criminal sanctions—including closing the loophole for circumvention devices to cover the making or distribution of such devices (i.e., manufacturing, importing, selling, trafficking etc.); (ii) confirming (i.e., clarifying) the making available right for works in Article 27 of the Copyright Law (for producers of phonograms it is part of the distribution right in Article 131(III)); (iii) criminalizing camcording (eliminating the required proof of commercial intent); (iv) raising civil penalties to deterrent levels—the current system does not include statutory damages (or “additional damages”) or the recovery of costs and attorney’s fees; (v) amending the Criminal Code to delete the “for profit” (direct profit) provisions and replace them with acts carried out for commercial advantage or financial gain or that result in substantial harm to rights holders; (vi) amending the Industrial Property Law to give IMPI authority to initiate actions against foreign websites that infringe copyright within Mexico; (vii) amending the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates; (viii) amending the Administrative Code, Tax Code and Criminal Code to (a) provide tax crime prosecution of copyright infringement (when it implicates tax liability) and (b) increase administrative sanctions; (ix) establishing strong incentives for the operation of effective and efficient notices and takedowns; (x) adding sanctions for satellite and cable signal theft and against illicit streaming devices; and (xi) creating presumptions of copyright ownership in civil, administrative and criminal cases (instead of the current practice of requiring certified copies of copyright registrations). There are also provisions in the Copyright Act in Articles 150 (transmissions of works) and 151 (neighboring rights) that provide exceptions to infringement for certain public performances where: a retransmission is not “for profit-making purposes” (Article 150) and “no direct economic benefit is sought” (Article 151). These exceptions are too broad, exceeding what treaties permit, and should either be severely restricted or eliminated.

In addition, adding clear third party liability is needed to provide an effective incentive for neutral ISPs (and others hosting or providing digital services) to meaningfully cooperate with rights holders to deter the unauthorized storage, transmission or making available of copyrighted materials. This can be accomplished by limiting monetary damages relief for qualified third parties, and only if they comply with pre-conditions for cooperation (e.g., measures to address repeat infringements), and are neither controlling, initiating, inducing nor directly infringing copyrighted material.

The Government of Mexico also needs to take administrative and regulatory steps to ensure that all relevant rights 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.

MARKET ACCESS ISSUES

In 2013, a new broadcasting and theatrical exhibition regulation went into force adding burdensome regulations for motion picture and television program producers. In 2014, a new law imposed advertising limits on pay-TV channels. The advertising law was aimed to promote domestically-made programming through a combination of financial incentives and restrictions on advertisements on pay-TV channels (since the majority of these are operated by foreign companies). The law allows a free-to-air channel that dedicates 20% of its programming to

domestic content to qualify for additional advertising time. There are also (49%) limits in Mexico on foreign ownership of broadcast networks. In short, these laws discriminate against foreign content producers.

Separately, some legislators have periodically proposed the adoption of screen quotas, which if adopted, would severely limit the exhibition of U.S. films in Mexico. These would violate the 1992 NAFTA (and the USMCA, if ratified), and should be opposed.