



October 30, 2002

Ms. Kira M. Alvarez
Director for Intellectual Property
Section 301 Committee
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: Mexico: Request for public comments
concerning identification of countries under
Section 182 of the Trade Act of 1974, 67 Fed.
Reg. 63186 (October 10, 2002)

Dear Ms. Alvarez and the Committee:

The Section 301 Committee published a notice requesting public comments concerning the identification of countries under Section 182 of the Trade Act of 1974. The Committee is seeking information regarding “out of cycle reviews” (OCR) in the 2002 Special 301 annual review, and Mexico is included in this exercise. In March 2002, the International Intellectual Property Alliance (IIPA) submitted a detailed letter to Ambassador Zoellick and Commerce Secretary Evans regarding our industries’ experiences in Mexico.¹ This letter supplements prior IIPA and IIPA-member reporting on developments in Mexico.

IIPA Special 301 Recommendation: Place Mexico on the “Watch List”

There have been a variety of recent improvements in the manner in which the Mexican government has addressed piracy and we applaud those developments. Nevertheless, the piracy situation in Mexico has not improved and the government clearly needs to improve its performance in order to provide the kind of effective enforcement required under its international obligations. Notwithstanding such improvements and the efforts of the Mexican government, Mexico continues to be one of the leading pirate markets in the world and its absence from the 301 lists is not justified. We propose, with some regret, that USTR place Mexico on the Special 301 “Watch List.”

¹ The IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA’s March 6, 2002 letter requesting high-level bilateral engagement on copyright issues with Mexico is posted on the IIPA’s website (www.iipa.com) specifically at http://www.iipa.com/rbc/2002/2002_Mar6_MEXICO.pdf.

As noted throughout this submission, this recommendation should not obscure the fact that there have been significant positive developments over the past year. Unfortunately, Mexico's omission from the 301 list has conveyed a false impression that the Mexican government has been providing adequate and effective protection. That is not the case.

Estimated trade losses due to copyright piracy topped \$800 million in 2001 alone. The Mexican market for legitimate copyright products is overrun with high levels of piracy in all sectors. For the recording industry, Mexico represents the third worst pirate market in the world. Sales have decreased more than 25% over the past three years as pirates have moved from cassette format to a variety of CD-based media.

MEXICO: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 – 2001²

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Sound Recordings & Music³	366.8	61%	300.0	63%	80.0	50%	80.0	50%	70.0	50%	60.0	50%
Business Software Applications⁴	146.9	55%	145.7	56%	108.8	56%	122.0	61%	108.0	62%	108.4	67%
Entertainment Software	202.5	83%	NA	90%	NA	NA	170.1	85%	163.2	82%	150.0	75%
Motion Pictures	50.0	40%	50.0	40%	60.0	55%	62.0	55%	55.0	55%	61.0	55%
Books	40.0	NA	30.0	NA	37.0	NA	35.0	NA	35.0	NA	35.0	NA
TOTALS	806.2		525.7+		285.8+		469.1		431.2		414.4	

Few criminal prosecutions are brought by the PGR (Office of the Attorney General). Less than 4% of all criminal investigations of copyright piracy result in a criminal sentence. With rare exception, the Mexican judiciary stills views copyright piracy as a minor offense and fails to issues deterrent-level sentences. Administrative fines for copyright infringement are only half that available for trademark counterfeiting; this inequity must be equalized. Other agencies, such as the federal tax authorities as well as state and municipal authorities, need to become much more involved in anti-piracy activities.

Status Report on Copyright Piracy and Enforcement in Mexico

Prosecutions and Criminal Judgments: The copyright industries' experience with criminal copyright enforcement in Mexico has been discouraging over the years, especially given the high levels of piracy. The industries see some improvement in this area as a number of

² The methodology used by the IIPA member associations to calculate these estimated piracy levels and losses in Mexico is the same as that reported in our 2002 Special 301 submission, and is available on the IIPA website (www.iipa.com) specifically at <http://www.iipa.com/pdf/2002SPEC301METHODOLOGY.pdf>. Interestingly, the Mexican PGR site also quotes IIPA's estimated trade losses from 1996-2001.

³ RIAA reports that the 2001 and 2000 estimated losses due to recording piracy in Mexico reflect losses experienced by the overall industry, including both U.S. and Mexican record companies. The 1999 numbers reflect U.S. losses only.

⁴ This chart contains BSA's final 2001 numbers, which were slightly lower than the preliminary estimate of \$150 million and 58% reported in the IIPA's March 2002 document.

individuals have been sentenced to effective jail terms. Unfortunately, the piracy situation remains dire and these sentences, while recognized as a step in the right direction, reflect that there remains a need for the Mexican authorities to intensify efforts to create real deterrents against piracy. While the industries praise the Attorney General for initiating some successful raids and large seizures, these actions have been restricted mostly to Mexico City. Raiding efforts must be expanded to other cities and prosecution must be improved. Criminal arrests and prosecutions remain inconsistent, as a general practice.

The recording industry reports continued good cooperation with the PGR and notes that arrests have been made, and in some cases, jail sentences of up to 6 years have been issued with defendants serving time in jail. In late July, four individuals were convicted of sound recording piracy and were given record fines: two individuals from Guadalajara were sentenced to 6 ½ years in jail and fined US\$67,000 for unauthorized reproduction of sound recordings; the second duo was sentenced to 14 months and fined nearly US\$30,000 for the sale of pirate sound recordings. These actions are encouraging in that it reflects a greater concern for the piracy problem and a willingness to address this issue. In all, the recording industry reports that current problems confronted by the PGR to be more successful in combating piracy result primarily from lack of resources rather than lack of will.

The motion picture industry (MPA) has seen positive recent improvement in PGR willingness to coordinate and willingness to raid, a very significant change from the very poor response the industry reported throughout 2001. However, MPA has failed to see a commitment to effective PGR investigation or effective PGR prosecution after the raids. As a result, while PGR raid results have improved, deterrence has not been sought or achieved. MPA also notes positive results with the Federal Preventative Police (Policía Federal Preventiva or PFP) in raids. PFP has an excellent investigation agency (Unidad Inteligencia), but it is restricted in raiding in that it does not have independent jurisdiction and can only support IMPI or PGR raids. Coordination and cooperation by PGR is problematic, so MPA has coordinated PFP raids through IMPI. So far, this combination has resulted in reliable and effective action and MPA strongly encourages its continuance and expansion.

IDSA reports that some of its member companies have been working with the PGR, the PFP and IMPI to conduct actions on pirate and counterfeit Nintendo® products. For example, in a raid this past spring, the PFP and IMPI seized over 2,700 counterfeit videogame cartridges in the street stalls of the MAEVE flea market. This past summer, the PGR seized a container entering the Mexico City airport which contained 2,400 pieces of clothing bearing counterfeit game trademarks.

With respect to business software actions, BSA is not bringing criminal copyright cases in Mexico for a variety of reasons, including concerns about how the cases are handled, resulting in civil damages actions against BSA members by defendants.

Judicial Reform: The Mexican judiciary continues to view copyright infringement as a minor offense, issuing very few deterrent sentences, given the high level of piracy in the country. The July 2002 convictions of four defendants involved in sound recording piracy represent hope that the tide has changed and more deterrent sentences will result in appropriate cases. Mexico

should consider adoption of mandatory sentencing regulations, or the Supreme Court itself should set out recommended guidelines

Administrative Enforcement: Administrative enforcement through the Mexican Industrial Property Institute (IMPI) continues to show improvements. For example, BSA acknowledges the support provided by IMPI to BSA during the Zero Tolerance Campaign against software piracy run nationwide this year in Mexico, in particular IMPI's self-initiated actions against suspected software pirates, and IMPI's joint participation in press relations and similar activities. BSA and IMPI signed a cooperation agreement on April 12, 2002. Additional support to this Zero Tolerance Campaign was given by INDAUTOR (the Copyright Office); the Zero Tolerance Campaign will continue at least through 2002. MPA also reports consistent positive results from IMPI action and consistently good coordination with the agency. MPA is especially pleased with the coordination of IMPI with the PFP and strongly encourages continued cooperation between these two agencies.⁵ MPA also reports that INDAUTOR has improved its enforcement slightly (14 cases) and should be encouraged to participate in all anti-piracy coordination.

Border Measures: The recording industry negotiated an agreement with the Finance Ministry, which includes Customs, to address the problem of pirate CD-Rs. This agreement calls for limiting the number of ports of entry for CD-R and CD burners as well as providing training and assistance to customs authorities. The effective implementation of this agreement is viewed by the recording industry as an integral part of the overall anti-piracy campaign. The recording industry reports that this agreement, along with additional support from IMPI actions with Customs (Aduanas), have contributed very positively to the seizures of large shipments of blank CD-R products. So far, approximately 30 million blank CD-Rs have been intercepted. These actions are based on a number of infractions including smuggling, tax evasion and the infringement of patent rights in the blank CD-R disc. Because of IMPI's enforcement authority under the Mexican Industrial Property Law, IMPI coordinates actions with Customs which in turn conducts the actual confiscation. The seizure of such massive imports of product is aimed at addressing the source of the piracy problems caused by widespread CD-R burning – the discs themselves.

Centralized Coordination: One of the industries' long-time criticisms has been that Mexico has lacked a coordinated effort in copyright enforcement as a whole. President Fox has not yet spoken out directly on this subject, although his Administration has made encouraging comments. At the BSA's Mexico Tech Summit on October 9, 2002, Economy Secretary Derbez stated the following: "In Mexico, we will tolerate no violation of the industrial property laws, and our position is that of 'zero tolerance.'"

Since IIPA's March 2002 Mexico letter, the PGR established an Inter-ministerial Committee to Fight Piracy and Counterfeiting on April 15, 2002. This committee's establishment is encouraging but the true test is whether this committee leads to more raids, more prosecutions, and more deterrence in the criminal system. The recording industry reports that monthly follow up meetings are contributing to improving actions and identifying weaknesses in the anti-piracy campaign. For example, BSA participated in seven raids conducted jointly by

⁵ As reported above, MPA has noted a lack of willingness by PGR to follow-up cases initiated by the PFP, perhaps for political reasons, and thus IMPI allows for prosecutorial follow-up.

IMPI and PFP in cases generated by the work of this Committee. In those cases, over 22,000 CDs containing illegal software and 7 CD burners were detected and seized. However, MPA reports that PGR coordination with IMPI and PFP through this Committee leaves much to be desired. At the BSA Mexico Tech Summit, Secretary Derbez stated the following with respect to the 25,000 companies that have received Zero Tolerance Campaign letters: "We have commenced our audit program of those companies, and you have our commitment that we will audit each and every one of them, until it is clear that the illegal use of software will not be tolerated in this country."

In addition, the Minister of the Interior (*Gobernación*) needs to coordinate efforts by State and Municipal authorities.

Recommended Action Steps on Copyright Enforcement

It is essential that the Fox Administration follow-up on the commitments of Economy Secretary Derbez to apply zero tolerance to piracy in Mexico, include a similar commitment from Attorney General Macedo of the PGR, address the urgent need for effective copyright enforcement to combat endemic piracy in Mexico, and implement specific measures to achieve practical results. IIPA has asked the U.S. Executive Branch to use all opportunities (including the upcoming November cabinet-level BiNational Commission meetings) to convey to the Mexican government the importance the U.S. places on Mexico's efforts to reduce piracy levels and improve enforcement.

There are several actions in the short-term and the mid-term which the copyright industries believe the Mexican government can and should take. Below is an illustrative (non-exhaustive) list of several key suggestions:

(A) Short-term actions:

- The public announcement by President Fox of a specific, intensified copyright anti-piracy campaign, combined with immediate action, would give credence to his Administration's efforts to fight corruption and improve economic development in Mexico.
- The PGR needs to expand its anti-piracy campaign nationwide, instead of only focusing on Mexico City. Guadalajara and Monterrey are important locations that need intense coverage.
- By either criminal or administrative procedures, the Mexican government must crack down on the 18,000 street vendors that deal in piratical products.
- Judges should apply the copyright law and penal codes consistently and accurately in order to issue deterrent-level sentences against copyright infringement. Mexico should consider adoption of mandatory sentencing guidelines, or the Supreme Court itself should set out recommended guidelines.
- Permanent IMPI inspectors should be appointed in the major Mexican cities outside Mexico City, particularly in Monterrey and Guadalajara; we understand that IMPI is hoping to achieve this in its 2003 budget.

- Piracy cases handled by IMPI should be expedited in order to conduct the requested inspections within two weeks from filing of the inspection petition.
- IMPI should take all appropriate measures to impose the maximum fine (10,000 minimum salaries) against serious IP infringements. As an example, the business software industry reports that even though the level of fines imposed by IMPI against software pirates have increased since 2001, they still tend to be below the maximum of 10,000 minimum salaries.
- Sustained and aggressive anti-piracy involvement by the tax authorities is also needed.
- State and municipal governments should take a proactive role in fighting piracy at street level.
- Mexican state and municipal governments need to be more proactive in legalizing the business software that they use.

(B) Mid-term action items:

- The Mexican legislature should pass a bill to include piracy as an organized crime violation. In fact, a bill has been presented to the Chamber of Deputies which is an initiative to reform the Federal Law Against Organized Crime and would include copyright infringement as a crime (Article 424*bis* Federal Criminal Code). This bill is expected to be discussed and analyzed in the next legislative term. (IIPA does not have the text of the bill and requests that the USG ask to obtain a copy from the GOM for further review).
- IMPI's fines for commercial copyright violations (10,000 minimum salaries) should be increased at least to the same level as the fines provided for trademark violations in the Mexican Industrial Property Law (20,000 minimum salaries). This longstanding inequity requires a remedy.
- Legislation should provide that minimum deterrent fines be imposed when defendants prevent IMPI from conducting an administrative raid. The purpose of enacting legislation stating minimum deterrent fines is that neither IMPI nor the Tribunal Fiscal (which has jurisdiction to review IMPI's resolutions) can reduce the amount of the fines below a certain statutory minimum. IMPI has argued that they cannot impose the maximum fines because they are later reduced by the Tribunal Fiscal. The amount of the fines imposed by IMPI has varied since 2001: for example, IMPI imposed some fines in the amount of US\$32,000 last year.
- Legislation should be passed stating that those who provide materials and know or should have known that such materials would be used to carry out IP crimes, will also be responsible as accessories or for contributing to these crimes. Present legislation only penalizes those who "knowingly" provide materials for the commission of these crimes, so it is very difficult to prosecute them. (Note: The "knowingly" or "*a sabiendas*" requirement is provided in Article 424*bis*, section 1, paragraph 2, of the Mexican Federal Penal Code, and in Article 223, section 3, of the Mexican Industrial Property Law).

- Legislation should be enacted stating that street piracy is a crime for which prosecution can be initiated by Mexican authorities, and not just by the injured parties.
- Efforts to amend the Mexican Copyright Law should be made in a transparent manner. IIPA has learned the INDAUTOR has already contacted some local Mexican groups, requesting advice on copyright reform proposals (other industry groups were not contacted by INDAUTOR this spring). Given the importance of proper implementation of the WIPO Treaties (Mexico is a party to both the WCT and the WPPT), IIPA believes that the Mexican government should make tangible efforts to keep the U.S. government actively apprised of its plans and progress on this reform effort. Given the rise in CD-R burning and internet piracy, IIPA and its members remain extremely interested regarding the further reform of the Mexican copyright law to provide copyright holders with comprehensive rights and appropriate remedies against infringements.⁶

The chart below represents our compilation of copyright anti-piracy actions taken during the first three quarters of 2002 in Mexico, as reported by IIPA member associations.

**COPYRIGHT ENFORCEMENT SUMMARY in MEXICO
 for JANUARY-SEPTEMBER 2002**

	Motion Picture Association Cases	Business Software Alliance Cases	Recording Industry (local and U.S.) Cases	Totals
Number of raids	445	--	529	974
Criminal raids	97 PGR, 4 PFP	--	518	619
Administrative raids	330 IMPL, 14 INDA	33	11	388
Number of persons held in pre-trial detention	0	--	219	219
Number of indictments	13	--	64	77
Number of cases resulting in fines or jail terms	3	5	16	24
Level of sentences Imposed	1 for 6 months, 2 for 6 years	Approx. US\$20,000 per defendant	6 years and fines up to US\$18,000	(see columns)
Ratio of convictions to number of PGR raids conducted	3.1%	--	3.1%	3.9%
Pirate copies seized	369,350 tapes, 177,283 optical discs	22,346	4,950,613 ⁷	55,519,592

⁶ IIPA had analyzed the Mexican copyright law for TRIPS/NAFTA compliance in IIPA's 1999 Special 301 report, which is posted on our website (www.iipa.com) specifically at http://www.iipa.com/rbc/1999/rbc_mexico_301_99.html. Mexican copyright law does not fully implement the obligations of the two WIPO Treaties.

⁷ The recording industry reports that of the total 3,886,533 pirate units seized in this time period, 4,413,433 were pirate CD-Rs and 537,180 were pirate audiocassettes. In addition, its "Operation Frontier" program alone resulted in the seizure of 10,833,980 blank CD-Rs.

Other materials seized (itemized)		7 CD burners	1,000 CD-Writers, 63 High Speed Duplicating Machines, 39 CPUs, 18 million inlay cards, 51,553 Jewel Boxes, 897 offset machines, 50,000 crystal boxes, 29,948,715 blank CD-Rs	(see columns)
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The PGR has posted IPR-related enforcement statistics for the first five months of 2002, but more recent statistics have not yet been posted on its website.⁸

Conclusion

Mexico is one of the most important markets in this hemisphere and one where, notwithstanding improved efforts by Mexican law enforcement authorities, piracy levels and losses remain unacceptably high. Despite some recent positive efforts by Mexican authorities in combating piracy, those actions have not improved the marketplace for legitimate copyright products and piracy remains pervasive. The Mexican government needs to take additional steps to lower the debilitating piracy levels that are devastating the legitimate market for copyrighted products in Mexico. We also ask that U.S. government officials continue to engage their Mexican colleagues, at the highest levels, to press for continuing the progress made to-date and to undertake enhanced efforts to deter piracy.

Respectfully submitted,



Eric H. Smith,
President
International Intellectual Property Alliance

⁸ For example, the PGR cites seizures of 109,169 pirate videos, 8,378 videogames and 1,932,373 audiocassettes and music CDs in that time frame. The PGR reports 158 people were detained (on all IPR counts, including counterfeiting, so break-out numbers for persons detained for copyright infringements are not posted). To view the PGR statistics (Spanish text only), go to <http://www.pgr.gob.mx/homepage.htm> and scroll to "Combate a delitos federales" and click on "Avances."