

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2005 SPECIAL 301 REPORT

### MEXICO

#### **EXECUTIVE SUMMARY**

**Special 301 Recommendation:** IIPA recommends that Mexico remain on the Special 301 Watch List in 2005.

**Overview of Key Problems/Achievements in 2005:** 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. Estimated trade losses due to copyright piracy topped US \$870 million in 2004.

Although the Office of the Attorney General (PGR) has notably increased its commitment to seize pirate product from street markets, effective case preparation, indictments and prosecutions are still far below the level needed to have any significant effect. In addition, there are well known pirate marketplaces that remain largely outside the reach of law enforcement—most notably the district of Tepito. Without a government-initiated, sustained campaign against well known pirate marketplaces like Tepito, the situation in Mexico is unlikely to change dramatically, regardless of the otherwise fine intentions and work of PGR.

While anti-piracy actions taken by administrative authorities remains generally positive, there have been recent problems in pursuing inspections, and gaps remain in the law and regulations which require improvement in order to give copyright owners with a similar level of protection afforded trademarks. In particular, Mexico should adopt changes granting the government *ex officio* authority with respect to copyright violations. Less than 1% of all criminal raids in 2004 resulted in a sanction (including fines and jail terms). Mexico also should consider undertaking a more comprehensive effort to modernize its 1996 Federal Law on Copyright in order to fully implement the WIPO Internet Treaties. The government must make intellectual property protection and enforcement a priority.

#### **Actions Which Could be Taken by the Mexican Government in 2005**

##### **Enforcement**

- Improve police coordination between federal and state enforcement;
- Significantly improve investigations and raids against pirates involved in commercial distribution and street piracy;
- Encourage prosecutors to act swiftly on complaints, and to recommend maximum sentences to the courts in order to improve deterrence;
- Improve administrative enforcement by the Mexican Industrial Property Institute (IMPI), for example, IMPI agents should be accompanied by police to assist them to gain entry during inspections;
- Improve judicial training efforts on copyright enforcement;
- Improve border enforcement;

- 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 the street level;
- Issue mandatory sentencing guidelines, or at a minimum, suggested guidelines;
- Issue deterrent sentences for criminal copyright infringement;
- Enact and enforce decrees to ensure the procurement and use of legal computer software in governmental agencies, especially at the state and municipal levels.

## Legislative

- Issue copyright regulations of the 2003 amendments to the 1996 copyright law;
- Pass penal code amendments on anti-circumvention of technological protection measures;
- Pass penal code amendments on *ex officio* authority for police;
- Improve legislative and regulatory schemes to fill gaps in enforcement measures and to equalize treatment of copyrights with trademarks;
- Fully implement WIPO Treaties' obligations (including establishment of notice and takedown provisions, ISP liability, clear temporary copy protection, provision of a making available right as well as criminal sanctions and civil remedies on anti-circumvention and rights management information.

<b>MEXICO</b>										
<b>Estimated Trade Losses Due to Copyright Piracy</b>										
<b>(in millions of U.S. dollars)</b>										
<b>and Levels of Piracy: 2000-2004<sup>1</sup></b>										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
<b>Records &amp; Music<sup>2</sup></b>	326.0	60%	360.0	61%	459.0	68%	366.8	61%	300.0	63%
<b>Entertainment Software<sup>3</sup></b>	132.2	76%	136.9	66%	NA	NA	202.5	83%	NA	90%
<b>Business Software<sup>4</sup></b>	230.0	65%	220.0	63%	168.9	55%	146.9	55%	145.7	56%
<b>Motion Pictures</b>	140.0	70%	50.0	45%	50.0	40%	50.0	40%	50.0	40%
<b>Books</b>	42.0	NA	40.0	NA	40.0	NA	40.0	NA	30.0	NA
<b>TOTALS</b>	<b>870.2</b>		<b>806.9</b>		<b>717.9</b>		<b>806.2</b>		<b>525.7+</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission, and is available on the IIPA website at [www.iipa.com/pdf/2005spec301methodology.pdf](http://www.iipa.com/pdf/2005spec301methodology.pdf).

<sup>2</sup> RIAA reports that the 2000-2004 estimated losses due to recording piracy in Mexico reflect losses experienced by the overall industry, including both U.S. and Mexican record companies.

<sup>3</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses."

<sup>4</sup> BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Mexico, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 resulting in a significantly higher loss estimate (\$369 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

## **COPYRIGHT PIRACY**

Several key trends in piracy have affected Mexico, including continuing high levels of optical disc piracy, an increase in Internet piracy, illegal commercial-scale photocopying of books, and the longstanding problem of street sales of pirated products.

### **Survey of Industry-Specific Concerns**

**Filmed entertainment:** The Motion Picture Association (MPA) reports that optical disc piracy rates in Mexico are some of the highest in the world, and getting worse. Since mid-2003, the piracy rate and losses to the audio-visual industry have increased dramatically. Currently, for each DVD a studio sells, pirates sell at least two copies, and usually more for top titles. According to MPA market surveys, in early 2003, 30% of the DVD market was pirate, but by March 2004, just 12 months later, the piracy rate had risen to over 65% of the optical disc market. The piracy rate has continued to increase through 2004. This dramatic increase in such a short time is due to the tremendous surge of pirate product available in the nation-wide system of street markets. Because of this growth, annual losses to the U.S. motion picture industry due to audiovisual piracy in Mexico have risen significantly to \$140 million in 2004.

Although some of the total street market system is licensed by federal or local authorities in legal street markets (*tianguis*) or semi-legal permanent covered markets, growth has occurred in street markets that are unregulated and politically protected by local authorities for political or financial interests. This unregulated market provides a constant supply of piracy. For example, MPA has found 1,877 wholesale points-of-sale in 85 large, permanent markets, with a daily available stock of 679,000 pirate optical discs. In addition, there are an estimated 1,500 (and growing) smaller, less permanent or rotating, street markets not surveyed by MPA that each have one to three booths that carry pirate audio-visual product. Pirate points-of-sale easily outnumber legitimate DVD sell-through points-of-sale and total theatrical screens, while providing a convenient, direct competition. The main distribution centers for optical disc piracy are well known to law enforcement authorities: Tepito, Plaza Meave, Eje Central, Lomas Verdes in Mexico City; CAPFU in Puebla; and San Juan de Dios in Guadalajara. One single black market distribution area deserves specific mention: the Tepito Bazaar in central Mexico City. One of the world's largest centers of pirate product and contraband sales (as well as of drugs and weapons), Tepito has over 400 permanent booths specializing in optical disc piracy at wholesale prices. The market is well organized and politically protected, primarily by the Mexico City government and police.

**Sound recordings and music:** For the recording industry, Mexico is one of the top ten pirate markets in the world. Pirates have moved from cassette format to a variety of CD-based media. Recording piracy in Mexico represents \$326 million in losses and covers approximately 59.8% of all units sold in the country. The neighborhood of Tepito in Mexico City has been a major problem for the recording industry for too many years, and accounts for approximately 65% of the pirate music product manufactured and distributed in the country. In addition, over 50,000 points of sale in street and covered markets around the country offer pirate product. Unit by unit they are putting the legitimate industry at serious risk.

**Business software:** The estimated level of piracy for business software applications in Mexico has remained basically the same over the past few years, with the 2004 piracy level placed at 65%. Preliminary estimated trade losses due to software piracy in Mexico rose to \$230 million in 2004. The Mexican federal government is among the most "legal" in all of Latin

American with respect to its software licensing efforts. However, Mexico has never issued a government legalization decree. Mexican states and municipalities should make further progress on legal software use and a federal decree could serve as a model for the States. In addition, the Business Software Alliance (BSA) remains very concerned with continuing end user piracy, which is not deterred by relatively weak IMPI enforcement; see more detailed discussion below. A bright spot in the enforcement firmament is a BSA System Builder Campaign called *Integrando un Mexico Legal*, or “Building a Legal Mexico,” a program in which the PGR (criminal justice authorities) has taken the lead in carrying out investigations all over Mexico to detect computer integrators/assemblers that load their systems with illegal software. During 2004, the campaign had a strong nationwide impact, with more than 50 actions conducted throughout Mexico, and the arrest of 52 persons who face criminal charges for piracy and organized crime activities. More than 42,000 CDs with infringing software have been seized. Lists of legal system builders are published regularly as a means to encourage the use of legitimate software.

**Book publishing:** The Association of American Publishers (AAP) reports that illegal photocopying of books continues unabated in Mexico. The bulk of these activities takes place in and around institutions where books are most used as textbooks. These schools have photocopy machines in their libraries, in addition to private on-campus photocopying businesses, and selected contents of books (rather than entire books) are regularly copied. This copying routinely surpasses permissible levels under the copyright law. Copy shops in and around the UNAM (national university) in Mexico City can charge as little as 2-3 US cents per page, allowing producers of illegal copies to undercut the market for legitimate materials. Universities are tacitly, and sometimes actively, condoning infringing activity on campus. In some cases, materials taken from U.S. books are posted on the institution’s intranet for classroom use, without permission and without payment to the publishers.

The Mexican copyright law is deficient in that it allows students to copy one complete copy of every work, provided it is not done for profit; this violates TRIPS and should be revised. The local reprographic rights organization (RRO), CEMPRO (*Centro Mexicano de Protección y Fomento a los Derechos de Autor*), established in mid-1998, started collecting small amounts of licensing royalties in 2001, but payments remain voluntary, and are thus not a good source of revenue for legitimate companies. Most Spanish language books sold in Mexican universities are published in Mexico by wholly-owned subsidiaries of U.S. companies. Others are translated from the English under license, so lost royalties are significant as well. Both enforcement officials and education/university officials should take a more active role in fighting this unauthorized photocopying, especially on campus. Universities should implement policies discouraging this activity, complete with consequences for those who engage in it. APP estimates that book piracy losses in Mexico rose to \$42 million in 2004.

**Entertainment software:** Videogame piracy on all platforms (from cartridges to CD-ROMs) continues to be widespread in Mexico. Pirated factory-produced (silver) CD-ROMs for PlayStation® are shipped from Asia (at times through the U.S.), making this entire market in Mexico pirate. Pirate CD-ROM games for PlayStation2®, all made in Asia, have taken over half the Mexican market (50% piracy). For PC-based games, the biggest piracy challenge is local CD-burning. There have also been reports of counterfeit cartridge-based games being assembled in Tepito. Nintendo has received multiple customs seizure notices from U.S. and Luxembourg identifying Mexican importers and involving large numbers of counterfeit cartridge components for in-country assembly. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Mexican marketplace was \$132.2 million in 2004, with a 76% piracy rate.

## **The street vendor piracy problem and efforts to “convert” street vendors of illicit products to legal sales**

A huge problem in Mexico involves some 50,000 sale points offering pirate products. This estimate includes wholesale points-of-sale in large permanent markets as well as smaller, less permanent street markets. It is imperative that any anti-piracy campaign by the government include as a top priority reducing this enormous distribution network. There have been recent efforts by the federal and local governments in Guadalajara to “convert” street vendors away from the sale of piratical goods and towards the sale of legitimate articles. With respect to the commercial side of street sales, the Mexican government is creating small “commercial centers” to relocate street booths and to encourage self-employment (*auto-empleo*). This project is moving forward with federal funding in various states, and the copyright industries salute this important initiative. It is our understanding that the State of Jalisco government is providing seed funds to guarantee the purchase of legitimate articles by street vendors in Guadalajara. This represents a real win-win situation for all concerned—street vendors stop violating the law, copyright owners gain additional points of sale, and the government collects tax revenue from a no longer “informal” part of the economy. In fact, the Mexican government should expand this conversion program to Mexico City.

Nevertheless, while the visions of these conversion programs should be applauded, it is imperative to call upon the Mexican government to adopt zero-tolerance policies with respect to converted markets and streets in the nearby vicinity. These conversion programs will *only* succeed if they are accompanied by an aggressive zero-tolerance campaign to ensure that street vendors operate under the rules and do not revert to the sale of pirate materials. It is essential, therefore, that the Mexican government adopt measures to ensure that these centers do not end up serving as distribution points for pirate product, and that their activities are controlled by the PGR, and subject to administrative enforcement. If the Mexican government is going to fund, assist or encourage such centers, there should be an effective enforcement method made specifically available in the contractual arrangements and a strong government effort to keep piracy out of new centers and eradicate it from current centers (for example, Plaza Meave, Pericoapa, Lomas Verdes, Plaza Venuslav, all in Mexico City metro area, San Juan de Dios, Medrano and El Parian in Guadalajara, and CAPU y Cuchilla in Puebla). For this program to succeed, more raids in Guadalajara are needed, especially in the San Juan de Dios and Parian markets, in order to clean out the pirate stands and give converted merchants the opportunity to sell legitimate product.

The option of state and municipal control has recently developed because the growth of unregulated markets is now a political, economic and public security concern to local authorities. Previously, street markets provided a political and financial benefit to these authorities, but they are now growing beyond control. There is now no counterweight to their growth and many authorities believe that the street markets need local control, both on the municipal and state levels. MPAA reports that on the municipal level, for example, the Jalapa, Veracruz Mayor has worked to take administrative licensing action against markets selling pirate audio-visual goods. The effort has been very successful. At least two other cities, Cuernavaca and Irapuato, have taken similar action. On the state level, the Governor of Jalisco and his Secretary of Economic Development are working with copyright industry groups, home video distributors, music wholesalers and PGR to establish a “legal commerce” effort in street markets, displacing piracy with original DVDs and CDs and licensing these outlets by legally requiring that they sell only

legitimate product. Whether or not this commercialization works, the model is designed to require that street sales be limited to legal products with systematic licensing, inspections, and sanctions. The Jalisco governor's recognition of the problem is significant and provides precedent for other states in developing efforts that reduce piracy in street markets.

## **COPYRIGHT ENFORCEMENT**

In order to bring down piracy levels in Mexico, it is essential to attack manufacture, distribution, sale and importation. Copyright owners have been working, and will continue to work, closely with law enforcement authorities with respect to manufacture and distribution. However, at the same time, it is critical that the Mexican government address the issue of ongoing sale of pirated goods. Unless the Mexican government deals with the strong market for pirated goods in Mexico, the industries believe they will be largely wasting their time dealing with production.

### **Police raids result in large seizures but piracy remains high.**

The industries continue to report generally good cooperation with police in various jurisdictions around Mexico. To strengthen the anti-piracy fight, other Mexican agencies, including the federal tax authorities as well as state and municipal authorities, need to become much more involved in anti-piracy activities. Some industries also turn to the Federal Preventive Police (PFP) for assistance in raiding activities.

Interactive coordination between the PGR and the private sector has improved. The Assistant Attorney General for the Mexico City area meets regularly with private sector representatives to review anti-piracy actions, and by order of the Assistant AG for Regional Offices, each state PGR office has specific anti-piracy goals for the year (investigations, seizures, but notably, not arrests or indictments), including monthly meetings with the local private sector affected by piracy.

Getting seizures has not been the problem in Mexico; obviously, there is a lot of pirate product out there, and there is always room for more seizures. For example, in mid-June 2004, the PGR was involved in a raid that netted the seizure of 7,600 CD-R burners—the largest seizure of CD-R burners in the world, at least to the knowledge of the Recording Industry Association of American (RIAA). Another encouraging action took place in November 2004 when customs seized 15.8 million units of blank CD-Rs as contraband in three coordinated raids against a major importer. In a separate action, press reports on June 17, 2004, indicate that Mexican officials began destroying 63 million copies of pirated CDs and DVDs which have been seized in recent years. The problem is that seizures alone, if not followed by deterrent penalties, do not result in lowering the piracy rates and deterring individuals and enterprises from the lucrative business of copyright piracy.

In September 2004, MPA reported its largest black market raid this year. Over 500 police officers raided pirate distribution centers just outside Mexico City, seizing over 70,000 illegal optical discs, many featuring products in current theatrical release. This early-morning September 3 raid in Cuernavaca involved three distribution centers and one optical disc lab. The raid is important because it took place in a black market that, until now, has been completely protected by local politicians. MPA also advises about large seizures in Monterrey, where the PGR seized 168,000 pirate discs in August and September. The actions seized

101,200 pirate discs from the city's largest permanent street market and an additional 67,629 in two smaller street markets. The majority were product in current theatrical release. However, despite these large raids, MPA points out that these numbers pale in comparison to the numbers of pirate movies sold every day in Mexico City's Tepito market, where nearly 400 permanent booths sell pirate movies on digital discs. The PGR has not taken effective action against piracy there. On January 4, 2005, a precedent-setting operation coordinated by MPA and the PGR resulted in the seizure of CD-Rs containing a total of 2,500 films, most of them of titles currently being exhibited in local cinemas. Aside from their retail function, the metro stop locations served as distribution centers for vendors who ply their pirated wares inside metro trains. The vast Mexico City metro system has 192 stations and serves a city of more than 20 million people, many of which use it as their primary means of daily transportation.

ESA reports that two raids coordinated through the Attorney General's Office and the Federal Investigation Agency at Bazaar Pericoapa and Plaza Meave resulted in the seizure of 20,000 counterfeit GameBoy® cartridges. An ESA member company reports that, as in past years, there were incidents of violence against law enforcement officers and accompanying company representatives occurring during raids against vendors of counterfeit and pirated products.

The PGR interacts directly with the industry through its anti-piracy coordinating committees, especially at the state level. These committees have proved effective in several states, including Nuevo Leon, Morelos and Puebla, in allowing the private sector both to communicate and to direct some PGR action against street piracy. However, it is premature at this point for all the industries to evaluate fully how this new PGR infrastructure is working. It does appear that the PGR is making an effort to keep agents who are already familiar with IPR matters on-staff.

Training to support effective investigation and prosecution remains imperative. IIPA and its members support the August 2004 State Department/INL announcement to devote \$150,000 to train Mexican law enforcement officials in the capital as well as regional anti-piracy units in Monterey, Puebla and Guadalajara. The problem remains that deterrence against piracy is lacking in Mexico

## **Prosecutions are too Few and Criminal Judgments are Not Deterrent.**

One of the most longstanding and disturbing problems in Mexican criminal copyright enforcement has been that so few criminal prosecutions are brought by the PGR. In 2004, less than 1% of all raids (counting both criminal and administrative actions) resulted in a sanction (including fines and jail terms). This percentage rate declined from 2003 to 2004 (see chart, below).

The copyright industries report that the Mexican judiciary continues to view copyright infringement as a minor offense, and issues very few deterrent sentences, given the high level of piracy in the country. The one measure under the revised penal code that has shown some teeth is that the possibility of bail has been removed for those indicted for criminal copyright infringement.

Mexico should consider adoption of mandatory sentencing regulations, or the Supreme Court itself should set out recommended guidelines. In the absence of deterrent sentencing, prosecution is a futile exercise. The good news is that as a few individuals have been sentenced

to lengthy jail terms. Unfortunately, the piracy situation remains dire and these sentences, while recognized as a step in the right direction, underscores the need for Mexican authorities to intensify efforts to create real deterrents against piracy.

## **Administrative copyright enforcement by IMPI.**

Administrative enforcement through the Mexican Industrial Property Institute (IMPI) has remained weak on copyright-related enforcement matters, and is notably less deterrent than it was several years ago. For example, BSA highlights the following challenges it has encountered in its administrative actions: (1) IMPI inspectors are frequently denied entry by corporate pirates, and yet make no attempt to invite the police to accompany their inspections, which would prevent such denials. Given that the applicant for provisional measures has already posted a bond to respond to any damages that could be caused to visited parties, this weak enforcement regime should be fixed. (2) When entry is denied, the pirates have time to erase illegal intellectual property (such as computer software) or to falsify invoices proving purchase. IMPI is too willing, during return inspections, to bless the pirate's cleaned-up situation, without any attempt to recognize what happened in the weeks (or months) since the initial inspection was denied. No presumptions in favor of the plaintiffs are made by IMPI, despite the fact that such presumptions are permitted by law. (3) IMPI inspectors are excessively cautious, and those in charge of the operational level resist technological improvements (such as effective system detection software demonstrated by the BSA) that would produce much better reports about piracy within a given target enterprise: IMPI inspectors sometimes fail to detect pirate products when searching computers manually. (4) In litigation, IMPI continues to maintain the untenable position that the BSA members' copyrights only protect the names of their software programs but not their content, apparently confusing copyright with trademark principles. Once Mexico recognized computer programs as literary works, as presently set forth in Article 102 of the Ley Federal del Derecho de Autor, and in consequence of Mexico's adherence to the Berne Convention for the Protection of Literary and Artistic Works, Article 15,<sup>5</sup> it is clear that the name of a copyright holder appearing on a copyright certificate creates a presumption of ownership of the entire computer program, and not just the name of the program. IMPI's criteria also violate Article 41(1) of TRIPS, in that they deny an "effective action against any act of infringement of intellectual property rights." Because of IMPI's odd legal positions, a growing percentage of BSA's budget is now spent litigating against IMPI in the courts. IMPI often rules in favor of putative pirates. BSA raised these issues in a private document provided at a meeting with IMPI in the summer of 2004. At the end of 2004, BSA received a legalistic defense by IMPI of its positions, in which it was alleged that BSA's concerns about inadequate enforcement (which have been raised in numerous meetings with top IMPI officials over the years) have not been documented by the BSA in IMPI's files, that IMPI inspectors are seldom denied entry (and when they are it is because of BSA errors), and that copyright certificates do not give any presumption about the ownership of the underlying computer program. What the defense really illustrates is lack of will to provide deterrent-level enforcement.

Other industries report that IMPI is helpful, but it takes a long time to see results. MPA uses administrative agencies to attack optical disc piracy at the retail level through INDAUTOR (the Copyright Office) and IMPI. Ironically, while these agencies do not have the immediate

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<sup>5</sup> Article 15 (1) states: In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner.

impact that the criminal process has, they do ultimately result in sanctions (monetary fines) that are close to deterrent levels, although it takes as long as two years for the sanction to be imposed and another 6-12 months to be collected. ESA notes that while IMPI administrative actions have been helpful, there continue to be many problems with the agency, especially in certain trademark counterfeiting actions. In 2004, it was learned that IMPI would begin working with the police and thus have the necessary manpower to accompany IMPI officials on enforcement raids. It is hoped that these agencies begin to coordinate on enforcement actions and that such cooperation continue.

## **Border enforcement needs improvement.**

There has been increased cooperation between certain copyright holder groups and Mexican customs, but this conclusion does not apply across-the-board. The recording industry in particular recognizes and thanks customs for their tremendous efforts in seizing raw materials destined for the production of pirated products. The action that netted over 15 million units of blank CD-Rs is a positive sign that Mexican customs is willing to act.

However, ESA and its members report that there continue to be problems with stopping and seizing pirate and counterfeit product at the border. Formal requirements to initiate actions are onerous. Customs does 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 because Customs does not have authority to detain the shipment for more than a few hours. There must be greater cooperation between these two agencies in order to improve border enforcement, and to expedite the procedures by which customs may make immediate seizures of clearly infringing products.

## **Border efforts to track blank optical grade media must continue.**

Given the growth of optical discs (OD) piracy in Mexico, it is important to track imports of blank ODs. To this end, the recording industry negotiated an agreement in 2002 with the Mexican finance ministry (which includes Customs) to address the problem of pirate CD-Rs. This agreement called for reducing the number of ports of entry for CD-R and CD burners, to 15 (down from 52) as well as providing training and assistance to Customs authorities. The recording industry reports that this agreement, along with additional support from IMPI actions with Mexican Customs, have contributed very positively to the seizures of large shipments of blank CD-R products (IMPI coordinates actions with customs under the Industrial Property Law, and customs conducts the actual confiscations). Approximately 36 million blank CD-Rs were intercepted from 2001 through 2003, and 11 million during 2003—from strictly border operations. Over 500 million blank CD-Rs entered Mexico during 2003.

## **The disturbing consequences for anti-piracy enforcement of the adverse decision in the CCC case**

In June 2004, IIPA brought to the U.S. government's attention a pending case on appeal involving member companies of the Business Software Alliance (BSA). On March 23, 2004, the Eighth Court of Appeals of the Superior Court of the Federal District ordered four BSA member companies to pay moral damages to *Consultores en Computación y Contabilidad, S.C.* ("CCC") for actions relating to a criminal search and seizure operation run by a Mexican federal

prosecutor in 1998. This ruling was substantially upheld by the Third Collegiate Court (federal) in Civil Matters in September of this year, which instructed the Eighth Court of Appeals to once again condemn the BSA member companies to pay moral damages in an amount to be determined by the original trial court (the amount requested by the plaintiffs is “at least US\$100 million”), which the Eighth Court of Appeals did in October 2004, in a final *sentencia*, or judgment. Essentially, the courts, in judgments that BSA believes are untenable based on the facts and the record and disturbing in their implications, ruled that BSA sued CCC knowing CCC was innocent.

The IIPA and its members are very concerned about this precedent: only in Mexico have private parties such as the BSA members faced personal liability when it was the criminal justice authorities, and not the BSA members, who acted against a defendant, as this was a criminal proceeding (not a private civil action) conducted by the Mexican attorney general’s office (PGR) and police authorities. Indeed, the criminal justice authorities (and not the BSA members) then conducted their own internal investigation, asked for and obtained a search warrant from a judge, and then carried out the search and seizure operation. Moreover, only in Mexico has any party seeking anti-piracy enforcement faced potential liability of this magnitude. The final judgment in the CCC case sends a message to all companies that antipiracy enforcement in Mexico can lead to seemingly unlimited liability against the private party that merely asked the authorities to act, which will chill all anti-piracy activity in Mexico.

## COPYRIGHT ENFORCEMENT SUMMARY IN MEXICO FOR 2004

	MOTION PICTURE ASSOCIATION CASES	BUSINESS SOFTWARE ALLIANCE CASES	RECORDING INDUSTRY (LOCAL AND U.S.) CASES	2004 TOTAL	COMPARE 2003
TOTAL NUMBER OF RAIDS	1,026	84	1,377	2,487	2,071
CRIMINAL RAIDS	793	50	1,375	2,218	1,742
ADMINISTRATIVE RAIDS	233	34	2	269	329
NUMBER OF PERSONS HELD IN PRE-TRIAL DETENTION	34	52	157	212	224
NUMBER OF INDICTMENTS	50	0	74	124	75
NUMBER OF CASES RESULTING IN FINES OR JAIL TERMS	0	0	22	22	37
LEVEL OF SENTENCES IMPOSED	NONE	0	6 MONTHS TO 6 YEARS	(SEE LEFT)	
RATIO OF CONVICTIONS/ FINES TO NUMBER OF CRIMINAL RAIDS CONDUCTED	0%	0%	1.6%	0.9%	1.8%
PIRATE COPIES SEIZED	3,991,039	102,000	8,034,348	AT LEAST 12.1 MILLION COPIES	AT LEAST 14.9 MILLION COPIES
OTHER MATERIALS RELATED TO INFRINGING ACTIVITIES WHICH WERE SEIZED (ITEMIZED)	794 BURNERS	N/A	27.8 MILLION BLANK CD-Rs AND 8,834 BURNERS		

## COPYRIGHT AND RELATED LAWS

### **Delay in issuing implementing regulations to the 2003 Copyright Law amendments.**

Amendments to Mexico's 1996 Federal Copyright Law entered into force on July 24, 2003. The copyright industries worked diligently to shape some of the more troubling parts of this legislation. Two bright notes in these 2003 amendments included the extension of the terms of protection for works and objects of related rights, and the deletion of a deleterious private copying levy.

More than a year later, regulations to implement the 2003 amendments have not yet been adopted. Implementing copyright regulations were drafted in the summer and fall of 2003, in a very non-transparent manner. Draft regulations were published in December 2003, but were rejected by the legal advisor to President Fox. Another version of these regulations, which appear to address concerns of the copyright industries, were issued again in the Spring of 2004, but have still not yet been officially promulgated. Some reports suggest that these regulations might be issued sometime in the Spring 2005, two years after the copyright law amendments were adopted.

## **Mexico still needs to fully implement the WIPO Treaties.**

The 2003 copyright law amendments failed to address the comprehensive reform needed by Mexico to: (1) effectively implement the obligations of the WIPO Treaties (of which Mexico is a member), and (2) correct existing deficiencies in the law with respect to Mexico's obligations under the NAFTA Intellectual Property Chapter and the WTO TRIPS Agreement.

Mexican government officials have indicated that that it is possible that they might consider initiating a long-term process to revise the Mexican Federal Copyright Law, perhaps starting in 2005. The copyright industries request that any such initiative involve public comments and that the process be as transparent as possible.

## **Organized crime law amended to include copyright piracy**

On December 3, 2002, the Mexican Chamber of Deputies approved legislation to amend the Mexican organized crime legislation to include copyright piracy. The law (which appears in Article 424*bis* of the Federal Penal Code) was finally signed on April 4, 2004, entering into effect on May 12, 2004. This means more power and local resources to fight copyright piracy. Copyright pirates could face 20-40 years in jail, in addition to the penalty for the underlying IP crimes, if organized crime elements in piratical behavior are proved; this would represent an increase from the prior 12-year maximum. (Note: the maximum imprisonment penalty for software piracy is 10 years.) We also understood this reform to give Mexican police three new enforcement tools: holding suspects under house arrest for up to 30 days; tapping phones; and protecting witnesses (without the suspect/defendant knowing the witness's identity).

The PGR has empowered its Organized Crime Division to investigate piracy and has developed systematic coordination with the private sector. The Organized Crime Division has some of the PGR's best investigators and attorneys and has resources that the other divisions do not have, such as paid informants, wire-tapping authority and witness-protection programs. However, the lack of concrete anti-piracy action by this division through late 2004 casts some doubt on its potential.

## **Bill on *ex officio* copyright actions still pending**

A bill to amend the criminal code to increase criminal penalties for copyright infringement and to give *ex officio* authority to the police to pursue copyright infringement actions has been presented to the Mexican senate. This bill is still pending, and has the support of the recording and film industries.

Interestingly, in May 2004, a law was adopted that gave the Attorney General of Consumer Affairs (PROFECO) the power to take *ex officio* actions against black market and informal markets. Also included were powers to seize product, close markets, and issue sanctions. These powers are not new; they simply allow PROFECO to seize goods that do not comply with official standards. PROFECO's powers could be used to address widespread street piracy. In fact, the local recording industry has used PROFECO operations in Guadalajara and San Juan De Dios.

## **Criminal code reform to establish sanctions for anti-circumvention**

A bill to amend the Mexican criminal code to establish criminal sanctions for the circumvention of technological protection measures (TPMs) was introduced in 2004, and was pending in the lower house's Justice Commission. Further work was needed on this bill to better reflect the scope of what the industries view as an effective anti-circumvention bill. We understand that additional amendments have been proposed to better capture the kinds of acts which could circumvent TPMs (including devices, components and services). (The current Mexican copyright law does provide some civil anti-circumvention measures but these are only applicable to computer software, not other copyrightable subject matter; this is why further amendments to the criminal code as well as to the copyright law are required for full WIPO Treaties' implementation.)

## **Bill on a private copying levy to be opposed by the content industries**

Another proposal to implement a private copying levy on analog and digital products and blank media was contained in earlier drafts of copyright amendments in 2004. Such a proposal in the 2003 Copyright Law package was strongly opposed by the copyright and technology industries for a variety of reasons. Ultimately it was stricken from the final legislation. The Mexican performing groups have reintroduced private copy levy legislations, and we again oppose adoption of this misguided proposal. The Mexican group of AIPPI (an intellectual property bar organization) has strongly opposed these bills, saying that it is not true that the local IP community favors levies. The issue has been also addressed by the local group of the Internet Society and the Mexican Internet Association (AMIPCI), among others, condemning levy legislations. Fortunately, the Mexican Senate rejected two separate bills to implement private copy levies, and we are hopeful that these initiatives will remain dormant.

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