

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

MEXICO

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Mexico remain on the Special 301 Watch List in 2006.

While IIPA's submission only requests that Mexico remain on the Watch List, the fact remains that notwithstanding the efforts of the Attorney General, whose office has been very responsive, the piracy situation in Mexico has not materially improved, and the sheer dimension of the piracy problem in the Mexican market reflects a situation more in line with those of countries on the Special 301 Priority Watch List than the Watch List. Simply put, the Mexican Government must focus not only on increased enforcement, but must enhance its efforts in all areas, with emphasis on increased public awareness of the nature and repercussions of rampant piracy in Mexico, based on development of a strategy to significantly decrease levels of piracy rather than to merely maintain current practices. It is urgent that the Mexican Government develop more effective methods to work with state and municipal governments to attack the blatant problem of over 50,000 street vendors openly offering pirate products. The best efforts being extended by the Attorney General and some enforcement agencies will be wasted unless the government can address the sizable offer of illicit product found in practically every corner of the country. In addition, judicial training must be intensified, and modifications to the penal code to grant *ex officio* authority are sorely needed.

Actions Which Could Be Taken by the Mexican Government in 2006: 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.

Enforcement

- Focus efforts to fight piracy in well-know street markets (like Tepito in D.F. and San Juan de Dios in Guadalajara) which sell vast quantities of pirated goods in broad daylight;
 - Significantly improve investigations and raids against pirates involved in commercial distribution and street piracy;
 - Insist that PROFECO use its *ex officio* powers to stop piracy in street markets;
 - Insist that state and municipal governments take a proactive role and be held accountable for fighting piracy at the street level.
- Have the PGR's Organized Crime Division work closely with copyright industry and carry out systematic and effective investigations and actions against chief pirates who are involved with organized crime.
- Crack down on illegal photocopying by copyshops on or near major university campuses.
- Improve police coordination between federal and state enforcement.
- Involve the tax authorities (SAT) in sustained anti-piracy actions.
- Encourage prosecutors to act swiftly on complaints, and to recommend maximum sentences to the courts in order to improve deterrence.
- Impose higher sanctions on door-closings (i.e., refusals to admit inspectors during a governmental audit or raid).

- Improve administrative enforcement by the Mexican Industrial Property Institute (IMPI), for example, IMPI agents should be accompanied by police with the authority to gain entry into the targeted premises during inspections.
- Continue to track the importation of blank optical media products.
- Improve border enforcement.
- Issue mandatory sentencing guidelines, or at a minimum, suggested guidelines, in the courts.
- Improve judicial and administrative training on copyright enforcement.
- 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

- Support passage in the House of the Anti-Piracy Bill which would amend the penal code to give *ex officio* authority for police (the bill has already been approved by the House and is in the Senate for approval).
- Make refinements to the bill proposing to amend the penal code regarding the anti-circumvention of technological protection measures.
- Make refinements to the bill proposing to amend the copyright law to authorize the use by authors, performers and record producers of technological protection measures to protect against unauthorized use.
- 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).
- Pass amendments to the Film Law to prevent parallel imports of films.
- Pass amendments to the criminal code to sanction piracy of open TV signals.
- Pass the penal code amendment to provide protection against unauthorized camcording in theaters.

COPYRIGHT PIRACY IN MEXICO

Summary: Copyright piracy remains a serious problem in Mexico, with 2005 revealing no significant improvement in the piracy situation. Piracy involving hard goods, optical discs, Internet piracy, photocopying and street sales continued in 2005. Unfortunately, piracy affecting some industries (such as the audiovisual industry and the recording industry) worsened over the past year. 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, on piratical production and distribution. 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. Total estimated losses due to copyright piracy in Mexico, as reported by IIPA members, amounted to \$1.25 billion in 2005.

MEXICO
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005¹

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music ²	376.5	65%	326.0	60%	360.0	61%	459.0	68%	366.8	61%
Entertainment Software ³	137.7	75%	132.2	76%	136.9	66%	NA	NA	202.5	83%
Business Software ⁴	214.2	64%	222.0	65%	220.0	63%	168.9	55%	146.9	55%
Motion Pictures ⁵	483.0	62%	140.0	70%	50.0	45%	50.0	40%	50.0	40%
Books	42.0	NA	42.0	NA	40.0	NA	40.0	NA	40.0	NA
TOTALS	1,253.4		862.2		806.9		717.9		806.2	

Audiovisual piracy: The Motion Picture Association (MPA) reports that optical disc piracy in Mexico is among the worst in the world, and is getting worse. In the last 18 months the piracy rate and the losses to the audio-visual industry have increased dramatically. This dramatic increase in such a short time is due to the tremendous surge of pirate product available in the system of street markets. 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. Not only has the volume of optical disc piracy increased in this market system, the market system itself has increased in size and extension. Pirates are also using the subway stations, where there is great circulation of people, to sell pirate DVDs. Pirate points-of-sale easily outnumber legitimate DVD sell-through points of sale and total theatrical screens, while providing a convenient direct competition. For 2005, MPA's methodology for calculating estimated piracy losses and piracy levels changed, and includes estimated losses and levels due to internet piracy. This new methodology more accurately evaluates the market harm caused by audiovisual piracy in Mexico (compared to prior methodologies). For 2005, MPA reports that preliminary estimated losses in Mexico due to audiovisual piracy (including both hard goods and internet) were \$483 million, and the estimated piracy level was 62%.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B to IIPA's 2006 Special 301 submission, and is available on the IIPA website at www.iipa.com/pdf/2006spec301methodology.pdf.

² RIAA reports that the 2000-2005 estimated losses due to recording piracy in Mexico reflect losses experienced by the overall industry, including both U.S. and Mexican record companies. The losses are calculated using a third-party survey to improve accuracy of the estimate.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁴ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Mexico, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁵ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

Music and recording piracy: For the recording industry, Mexico continues to be one of the top ten pirate markets in the world. Burned CD-Rs and DVD-Rs are the format of choice for almost all pirates. Recording and music piracy in Mexico represents \$376.5 million in losses and covers approximately 65% of all units sold in the country. The level piracy has increased slightly over the last year by 5 percentage points (from 60% to 65%) due to mostly the spread of street vendors in south and central Mexico. The key areas of anti-piracy actions such as Mexico City, Jalisco and Monterrey have either remained at the same level or decreased. In part, the efforts made to combat piracy in key markets have contributed to a small recovery of the legitimate market, which increased by 26% in units. Nevertheless, Tepito has continued to be a major problem for the recording industry for far too many years; it accounts for approximately 65% of the pirate music product manufactured and distributed in the country. Another major concern for the industry is Internet piracy. A third-party survey conducted by the local industry association revealed that approximately 600 million songs are annually downloaded illegally. This level piracy is threatening the development of an emerging legal download business now represented by two new important websites: Tarabu.com and Beon.com.

Business software piracy: The estimated level of business software piracy in Mexico has remained basically the same over the past few years, with the 2005 piracy level placed at 64%, and estimated trade losses at \$214.2 million in 2005.⁶ The Business Software Alliance (BSA) remains very concerned with continuing end user piracy. This industry also reports problems with Tepito and San Juan de Dios (in Guadalajara) which serve as manufacturing (burning labs) and selling points for pirated software. Higher fines need to be imposed on parties who close the doors during a governmental inspection or raid. Copyright certificates from abroad must be given full recognition. Electronic audit means should be fully implemented. Additional staffing in governmental agencies is necessary.

Entertainment software piracy: Videogame piracy on all platforms (from cartridges to CD-ROMs) continues to be widespread in Mexico, with pirated products most prevalent at informal markets and sales centers. Circumvention devices and services that facilitate the installation of such devices are also prevalent at these sales centers. 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. Reports indicate that counterfeit cartridge-based games are being assembled in Tepito. Seizure notices received from U.S. Customs & Border Protection identified Mexican importers as being involved in the importation of significant quantities of counterfeit Game Boy Advance components from Hong Kong and intended for assembly in country. The total number of counterfeit components was 45,974. The Entertainment Software Association (ESA) estimates that the value of pirated videogame product in the Mexican marketplace was \$137.7 million in 2005, with a 75% piracy rate.

Book piracy: The Association of American Publishers (AAP) reports that illegal photocopying of books remained a huge problem for the publishing industry in 2005. 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

⁶ Lowering the piracy level could accrue numerous economic benefits to the Mexican economy as well as the IT sector. BSA and International Data Corporation (IDC) released a new study on December 8, 2005, which illustrates global economic gains from reducing software piracy. This report, Expanding the Frontiers of Our Digital Future: Reducing Software Piracy to Accelerate Global IT Benefits, using 2004 data, found the following: reducing Mexico's 65% piracy rate by 10 percentage points would help the industry grow by almost 50 percent to \$11 billion by 2009, and pump \$2.7 billion into the economy, create nearly 7,000 more new jobs, and increase local industry revenues by more than \$2 billion. The extra business activity, in turn, would generate an additional \$300 million in tax revenue to help the Mexican government pay for public benefits and services. See <http://www.bsa.org/idcstudy/pdfs/Mexico.pdf>.

permissible levels under the copyright law.⁷ For example, copy shops in and around the UNAM (the national university) in Mexico City charge as little as 2-3 US cents per page, allowing producers of illegal copies to undercut the market for legitimate texts. (Off-campus facilities of major office supply chains and other reputable businesses to restrict the content and amount of material being copied.) Universities are condoning, directly and/or indirectly, 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. By one industry estimate, the number of pages of copies of copyrighted materials made in Mexican universities per year amounts to at least 5 billion pages. Some 80% of these, mostly in Spanish, are published in Mexico by wholly-owned subsidiaries of U.S. companies. 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. 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. These payments remain voluntary, and are thus not a good source of revenue for legitimate companies, though some publishers report that payments have improved a bit. AAP estimates that book piracy losses in Mexico remained at \$42 million in 2005.

Street vendor piracy and efforts to legitimize markets: Without a doubt, 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. For example, one of the world's largest centers of pirate product and contraband sales (as well as of drugs and weapons), Tepito, is well organized and politically protected. It is imperative that any anti-piracy campaign by the government include as a top priority reducing this kind of distribution network. For example, MPA reports that in Tepito alone there are more than 600 booths of pirate movies with an average of 20,000 units each, selling counterfeit goods in daylight. Huge simultaneous raids hit more than 20 pirate DVDs laboratories in Tepito and seized 4 million units of pirate goods with virtually no impact on the offering of piracy. In addition, there are an estimated 1,500 (and growing) smaller, less permanent or rotating, street markets not surveyed by MPA that also have one to three booths each that carry pirate audio-visual product and sell at higher retail prices to local consumers. The growth of these unregulated markets is now a political, economic and public security concern to local authorities. 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.⁸

The Mexican government conducted yet another raid on Tepito on January 19, 2006. The Attorney General's (PGR) office, with support from 600 federal and local police, raided 224 small and medium-sized warehouses and 15 CD-R replication facilities, resulting in the seizures of 1.7 million recorded CD-Rs, 5 million inlay cards and 957 burners. The size and sophistication of these operations clearly reflect the existence of structured, organized enterprises at-work.

⁷ 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 provision violates TRIPS and should be revised.

⁸ 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 now believe that the street markets need local control, both on the municipal and state levels. On the municipal level, for example, the Jalapa, Veracruz mayor has worked to take administrative licensing action against markets selling audio-visual piracy. The effort has been very successful. At least two other cities, Cuernavaca and Irapuato, have taken similar action (we have found that some of these points with music product sell both pirate and legit product). On the state level, the governor of Puebla has been a great supporter of the anti-piracy fight and is working in close coordination with MPA and PGR to make the state of Puebla a piracy free market with original DVDs and CDs and licensing these outlets by legally requiring that they sell only legitimate product. The model is designed to require that street sales be limited to legal products with systematic licensing, inspections, and sanctions.

Over the past 18 months, there have been efforts by the federal, state 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. We also understand that the City of Guadalajara has started to revoke operating licenses of those vendors who refuse to convert to legitimate product or change to other different legitimate goods. This measure may have a greater effect on pirate vendors because some stand locations in key markets may be worth up to US\$200,000. The local recording industry reports that to date, the City of Guadalajara has revoked 22 licenses in the major covered market of “San Juan de Dios” and seems committed to continue with the program. The Mexican government should consider expanding this conversion program to Mexico City.

Nevertheless, we repeat again, that while the visions of these conversion programs should be applauded, it is imperative that the Mexican government 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. These actions need to be complemented with a license revocation program that will threaten the ability of those vendors to earn a living.

COPYRIGHT ENFORCEMENT IN MEXICO

Over the last two years, the Office of the Attorney General (PGR) has increased its commitment to seize pirate product from street markets, improve effective case preparation, prepare indictments and conduct prosecutions, but all this unfortunately is still far below the level needed to have any significant effect in the marketplace. Some pirate marketplaces, such as Tepito, still remain outside the reach of law enforcement. Without a government-initiated, sustained campaign against well known pirate marketplaces, the situation in Mexico is unlikely to change dramatically.

Raids, seizures and cooperation with the police and PGR: 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.

Cooperation and coordination between the PGR and the private sector remained good in 2005. 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 Attorney General 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. 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. The recording industry reports that the PGR, the Assistant Attorney General and its anti-piracy task force continues to be fully engaged in the campaign to the extent of available resources. Over 1,200 raids have been carried out over the course of 2005 against a number of targets that include pirate replication facilities, warehouses and street points. In addition, the PGR has provided support in the enforcement part of the conversion program in Guadalajara. It is important that PGR release its *Acuerdo Nacional contra la Piratería* (National Anti-Piracy Agreement) so that said instrument may become a means for ensuring a smooth transition into the next government. In this sense, PGR, the Ministry of Economy, the State Department (*Gobernación*) and the other agencies involved must work together closely to establish a coordinated and effective national anti-piracy strategy, and, more importantly, to implement it effectively.

Getting police to seize product has not been the predominant problem in Mexico; obviously, there is a lot of pirate product out there, and there is always room for more seizures. 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 2004, the PGR 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 and 2005 casts some doubt on its potential. Due to the complex investigative procedures established by the law, this division has not undertaken concrete actions against piracy. MPA recommends a strong partnership between Organized Crime Division and copyright industry to carry systematic and effective investigations and actions against main pirates who are involved with organized crime.

The Attorney General of Consumer Affairs (PROFECO) has the authority to take *ex officio* actions against black market and informal markets, including the powers to seize product, close markets, and issue sanctions. In 2004, the local recording industry has used PROFECO operations in Guadalajara and San Juan de Dios. PROFECO has been instrumental in identifying pirate product for the municipal authorities to take action on the license revocation programs in four key municipalities making up metropolitan Guadalajara. PROFECO should get much more actively involved in fighting piracy at the street markets, especially in Mexico City, Puebla, Guadalajara and Monterrey. PROFECO's *ex officio* powers could be used to address widespread street piracy; however, the lack of concrete actions leads to the conclusion that PROFECO does not have political willingness to adopt effective measures against piracy. PROFECO should work with copyright industries and use its *ex officio* powers to inhibit piracy in street markets.

The recording industry reports that anti-piracy authorities conducted a large operation in July 2005 at a well known pirate market in Guadalajara, executing 55 search warrants, seizing over 80,000 pirate discs, and closing a number of stores.

Full prosecutions remain few and sanctions are not deterrent. Again in 2005, no significant progress was made in resolving one of the most longstanding and disturbing problems in Mexican criminal copyright enforcement. 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). Cumulative year-end data for 2005 is not yet available from all industries (see chart, below). The recording industry reports a 5% sentencing-to-number of criminal raids ratio for 2005, an improvement over prior years.

COPYRIGHT ENFORCEMENT STATISTICS IN 2005 IN MEXICO (PARTIAL DATA)					
	MOTION PICTURE ASSOCIATION CASES (JAN-JULY 2005)	BUSINESS SOFTWARE ALLIANCE CASES (2005)	RECORDING INDUSTRY (LOCAL AND U.S.) CASES (2005)	2005 TOTAL	COMPARE 2004
TOTAL NUMBER OF RAIDS	928	443	1,265	2,636	2,487
CRIMINAL RAIDS	918	34	1,265	2,217	2,218
ADMINISTRATIVE RAIDS	10	409	0	419	269
NUMBER OF PERSONS HELD IN PRE-TRIAL DETENTION	N/A	N/A	208		212
NUMBER OF INDICTMENTS	N/A	N/A	64		124
NUMBER OF CASES RESULTING IN FINES OR JAIL TERMS	N/A	N/A	11		22
LEVEL OF SENTENCES IMPOSED	N/A	N/A	2 YEARS BUT SENTENCES ARE SUSPENDED	(SEE LEFT)	
RATIO OF CONVICTIONS/ FINES TO NUMBER OF CRIMINAL RAIDS CONDUCTED	N/A	N/A	5%		0.9%
PIRATE COPIES SEIZED	6,771,469	N/A	12,817,214	<i>AT LEAST 19.6 MILLION COPIES</i>	<i>AT LEAST 12.1 MILLION COPIES</i>
OTHER MATERIALS RELATED TO INFRINGING ACTIVITIES WHICH WERE SEIZED (ITEMIZED)	704,658 BLANK OPTICAL DISCS ; 1,163 DVD BURNERS	N/A	17,121,000 BLANK CDR'S AND DVDR'S	(SEE LEFT)	

MPA reports that even though seizures of optical discs by the PGR set a record in 2005, piracy has not declined. These seizure actions are effective in temporarily removing pirate product and causing limited financial losses to pirates, but are not effective to date in terms of prosecutions leading to deterrent sentences. (Only PGR can develop a case for prosecution after a raid.) Effective efforts to attack piracy will require more deterrence than just seizures. Although the PGR has notably increased its commitment to seize pirate product from street markets, effective case preparation, indictments and prosecutions are still far below the needed commitment to have any significant effect.

In 2005, BSA member companies brought 34 criminal cases, which represents a shift because for several years, BSA chose not to pursue criminal actions in Mexico.

The recording industry reports that only 11 sentences were issued in 2005 for incarceration of up to 3 years but most of them were suspended because judges felt the crimes were not serious enough to jail the pirates. The only bright spot in this issue has been that some judges are awarding damages to the companies as part of the criminal convictions. In one case in Guadalajara, the industry was compensated with approximately \$2,700, not nearly enough to repair the damage, but it represents a positive change.

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 positive traction 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.

Administrative copyright enforcement by IMPI improved in 2005. BSA reports that 2005 represented a significant improvement in cooperation with the Mexican Industrial Property Institute (IMPI). As for administrative anti-piracy actions, BSA and IMPI collaboration was better than ever: 324 *ex officio* raids and 88 *ex parte* actions were brought in 2005. IMPI implemented for the first time a fully operational electronic audit system. In addition, BSA also worked with INDAUTOR, the copyright office, to implement a system of institutional mediations (*juntas de avenencia*). It completed 28 such mediations in 2005. These actions are an alternative to litigation. Parties are given the opportunity to talk about a specific infringement situation and reach an amicable solution. The campaign entitled PIÉNSALO BIEN or “Think about it” was more robust, encompassing both software system builders and end users. It intensified its operations within the Mexico City metropolitan area, and it reached out considerably to states like Nuevo León, Guadalajara, Veracruz, Puebla and Quintana Roo.

Two historical problems with IMPI are being addressed. First, in recent years, BSA has reported that one of its major challenges in its administrative actions was that IMPI inspectors were frequently denied entry to the suspected premises (if IMPI invited the police to accompany them on their inspections, such denials would be prevented). In December, 2005, an Appeals Court belonging to the Tax Court (Novena Sala Regional Metropolitana Civil) has recently issued a decision ruling that IMPI is to presume the truth of all the allegations made by the complainant, considering that the alleged infringer denied IMPI entry into its premises. In addition, IMPI’s Executive Director made several radio appearances, stating that those who close their doors to administrative enforcement should beware of the consequences. BSA is hopeful that this case will reverse the historical trend and significantly improve administrative enforcement efforts. Second, IMPI historically denied the possibility of using electronic audits to review use of allegedly infringing software in end-user owned computers. Today, IMPI officers are using laptops, portable printers and USB units to audit targets. BSA has donated hardware, software, training and the costs for obtaining an expert opinion relating thereto.

Furthermore, ESA launched its new anti-piracy program for entertainment software in May 2005. Working with IMPI, the industry took administrative actions against eleven vendors at the Pericoapa Bazaar in Mexico City which were involved in the distribution of pirated and counterfeit computer and video games. A large quantity of pirated entertainment software for the PlayStation2[®], the Xbox[®], and PCs were seized from most of the vendors during the raid (nearly 1,000 pieces of infringing material including two CPUs containing pirated material). IMPI officials on the raid were also accompanied by officers from the Mexico City riot police to provide protection. In June 2005, IMPI, along with ESA local counsel, conducted a raid against vendors of pirated and counterfeit entertainment software product at the Perinorte sales mall, resulting in the seizure of approximately 800 pirated products on optical discs and one CPU from the targeted vendors. In December, another

raid was conducted at the Pericoapa Bazaar resulting in the seizure of 1,751 pirated entertainment software products (games for play on PlayStation, Xbox and GameBoy Advance®) and 1 CPU containing pirated content. A December raid at Plaza Meave also resulted in the seizure of over 1,500 counterfeit *Nintendo* products. Over 350 security police were involved in support of the action and to avoid rioting and violence.

As noted above, IMPI officials were accompanied by riot police on market raids. Although the presence of riot police at these raids can be helpful for maintaining the peace, they lack a mandate and the authority to demand entrance into the premises targeted for the raids. In the case of market raids by IMPI, the riot police typically wait outside the market while the IMPI agents, unaccompanied by any police, attempt to inspect and serve enforcement documents on various vendors operating out of separate booths inside the market. For administrative enforcement to be more effective, IMPI agents should be accompanied by police officers with authority to enter premises so that vendors cannot simply refuse entrance during inspections.

MPA uses administrative agencies to address a few cases involving optical disc piracy at the retail level through IMPI and INDAUTOR (the Copyright Office). Although these agencies do not have the immediate 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.

Border efforts to track blank optical grade media must continue. Given the growth of optical disc (OD) piracy in Mexico, it is important to track imports of blank ODs. 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). In 2005 this work with Customs netted total seizures of over 17 million units of blank optical media.

Border enforcement needs improvement and better interagency coordination. 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 recognizes Customs for their tremendous efforts in seizing raw materials destined for the production of pirated products. The action that netted over 17 million units of blank CD-Rs in 2005 is a positive sign that Mexican Customs is willing to act. ESA and its members report that while there continue to be problems with stopping and seizing pirate and counterfeit product at the border, there were two significant seizures in 2005, with a total of 115,000 counterfeit *Game Boy* cartridge components seized. The seizure operation was conducted by Mexican Customs after receiving information from Canadian authorities. 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.

Civil Infringement Actions: In 2005, BSA initiated 12 civil copyright infringement actions. While the initial instances of these actions are being resolved, it is still early to assess the results. BSA notes that the Tax Court has issued an interesting decision: AOS Solutions S.A. de C.V., ruling that door closures may result in the presumption of the authorities that complainants' assertions are true. This decision should be followed by administrative and judicial authorities.

Trainings: Copyright industry associations and companies regularly conduct training and informational seminars for Mexican enforcement authorities. For example, BSA led several training programs with IMPI and INDAUTOR during 2005, and has participated as presenting speakers in various conferences organized by the Ministry of Economy, UNAM, AMIPCI, the Computer Law Association, and other associations and chambers. BSA also conducts a regular roadshow at Universidad Iberoamericana, Tecnológico de Monterrey, ITAM and some other 360 universities (through UNIVERSIA). BSA is creating the Mexican Software Consortium to help with lobbying, street enforcement actions, and training administrative authorities and judges. MPA organizes training sessions frequently, from occasional large general sessions (discussing general issues such as the political and economic context issues, cyber crime and optical disc tendencies, etc.) to frequent small practical training sessions for identification of pirate product for seizure purposes. MPA both offers and receives requests for training. The program's priority is smaller sessions oriented toward practical identification for seizure of pirate product. All Mexican enforcement agencies have been open to receiving such training. The ESA provided training seminars for IMPI officers, for both the copyright and trademark divisions. The training addressed specific piracy and enforcement issues faced by entertainment software publishers in the country, as well as targeted sessions on how to identify pirated products for seizure. At the Mexico City Electronic Game Show, the organization also delivered and promoted an anti-piracy message. Finally, 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.

COPYRIGHT AND RELATED LAWS IN MEXICO

Copyright Law (1996, as amended) and Regulations: 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. Regulations to implement the 2003 amendments were issued in September 2005.

Mexico still needs to fully implement the WIPO Treaties.⁹ The WIPO Treaties have not been fully incorporated into Mexican Law. The Agreed Statements still need to be published in the Official Gazette. 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),¹⁰ 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

⁹ Please see prior IIPA Special 301 reports for more comprehensive details on the deficiencies in the current Mexican copyright law; see <http://www.iipa.com/countryreports.html> and scroll down to Mexico.

¹⁰ The Mexican government is undertaking efforts to correct a problem with the proper publication of the WIPO Treaties. The text of the treaties, as published in the *Diario Oficial de la Federación*, is incomplete, and the Treaties' agreed statements are missing. Fortunately, the full texts seem to have been approved by the Executive and ratified by the Senate.

revise the Mexican Federal Copyright Law. Any reform should include ISP liability and create notice and takedown procedures, a comprehensive making available right, and civil and criminal sanctions on the circumvention of technological protection measures and removal or alteration of electronic rights management information. The copyright industries request that any such initiative involve public comments and that the process be as transparent as possible.

Bill on *ex officio* copyright actions: An Anti-Piracy 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 was presented to the Mexican House in 2004. The good news is that it was recently passed by the House in December 2005, and is pending before the Senate. There is optimism that the House will pass this legislation, too, which would be a great result.

Proposed 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, approved in the Lower House in 2005, and is now pending in the Senate. 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.)

Proposed copyright law amendment regarding technological protection measures: Also pending in Congress is a bill which amends the copyright law to grant the right to authors, performers and record producers to insert technological protection measures in their works, performances and sound recordings. More work is needed on this bill to better reflect the scope of what the industries view as an effective anti-circumvention bill, including sanctions against the circumvention of TPMs, and removal and alteration of electronic rights management information.

Software legalization decree in government ministries: The Mexican federal government is among the most "legal" in all of Latin America 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. So far, INDAUTOR, the Education Ministry of Jalisco and the Municipality of Zapopan have agreed to self-audit and publicly set the example for legal software. BSA reports that the efforts in Jalisco are moving forward.

Organized crime law: 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.) This reform also gave 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). Due to the complex investigative procedures established in this law, the Organized Crime Division of the PGR has not undertaken concrete actions against piracy. An amendment to this law may be considered to simplify the procedures. To our

knowledge, none of the 2005 criminal copyright cases were based on the organized crime law.

Amendment to criminal code to provide protection against unauthorized camcording in theaters: MPA is sponsoring a bill presented by Congressman Javier Orozco, which amends the Criminal Code to punish with a prison term from 3 to 10 years and fines the unauthorized camcording of films in theaters; the respective legal action would be *ex officio*. Currently the bill is in the Lower House and MPA expects it to be voted on in 2006.

Amendment to the Film Law to prevent the parallel imports of films: In 2004, a bill was presented in the Lower House which would prevent the parallel imports of films by determining and imposing administrative sanctions on those who commercialize films without the previous authorization and rating granted by the Radio, Television and Film Secretariat. MPA supports this initiative.

Free television piracy bill and amendment to the Television and Radio Federal Law: In 2004, an amendment to the criminal code was presented in the Lower House which would sanction with a prison term from 4 to 8 years anyone who uses, exploits and operates public communication networks. This bill should also be modified to sanction the unauthorized use and retransmission of pay-TV signals. MPA supports its modification and approval. In addition, the Lower House just approved an amendment to the Television and Radio Federal Law to regulate the grant of licenses to pay TV operators, establish a must-carry obligation, limit the market share of individual broadcasters, reduce the validity period of licenses, etc. MPA understands that this initiative should be modified to include a provision to protect digital audiovisual content.

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