

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be retained on the Watch List in 2013.¹

Executive Summary: Mexico is a very important export and foreign sales market for all of the U.S. copyright industries. But this market is being significantly limited by high levels of piracy of copyrighted works, which remained very high in 2012, for hard copy, and especially digital materials. Copyright piracy in Mexico takes various forms: CD-R and DVD-R burning of music; audiovisual and videogame discs; unauthorized camcording in theaters; unlicensed use of software by enterprises; unauthorized photocopying at universities; and widespread sale of all hard copy material in street markets.

The Mexican authorities, notably the Attorney General's Office (the PGR – responsible for federal criminal enforcement), the Mexican Institute of Industrial Property (IMPI – responsible for administrative actions under the Industrial Property and Copyright Law) and INDAUTOR (the author's rights institute responsible for registering copyrights, as well as enforcement), have worked well with rights holders from all of the copyright industries. Much of the successful enforcement has focused on hard copy piracy, but there have been very disappointing results against Internet piracy due to ineffective criminal and customs procedures. Most non-commercial digital platforms are generally not prosecuted at all, even though there is rampant piracy including peer-to-peer (P2P), and at social networking sites, at linking sites and in cyberlockers. Effective enforcement against digital piracy will require revisions to the Copyright Law, and authorities also need increased resources and training, and to coordinate their efforts. Even though cooperation among the federal authorities is good, state and municipal government anti-piracy efforts continue to be weak, with few of these local entities working at all on combating illegal trade and piracy. One key recommendation is for the government to develop a high-level national anti-piracy plan (by appointing a commissioner) to develop a national strategy, and to coordinate federal, state and municipal enforcement activities, and address Internet piracy (coordinating both hard good and Internet piracy enforcement, including the federal commission on telecommunications, IMPI, INDAUTOR, and organizations representing Internet Service Providers (ISPs) and rights holders). In addition, the enforcement authorities are hampered by a number of statutory deficiencies in dealing with the size and scope of the digital piracy problem.

One of the key missing legal reforms is the full implementation of the WIPO digital treaties, including proper protection for technological protection measures (which is imperative for many copyright industries). Additionally, the Government of Mexico has been very slow to work on resolving a cornerstone of Internet enforcement, namely a cooperative agreement between rights holders and ISPs. Efforts to raise penalties to deterrent levels and to create a warning system for online users stalled in 2012. Some Internet-related legislative reforms (including a clear making available right), seem to be gaining momentum, and may move forward in 2013.

There were some notable positive achievements in Mexico in 2012. In November 2012, the Ministry of Economy became the first government body in the world to become certified under a program launched by BSA | The Software Alliance (BSA) to implement software asset management (SAM) best practices aligned with the International Organization for Standardization (ISO) SAM standard. This demonstrates a strong commitment by the Government of Mexico in promoting the use of legal software, and it sets an example for private enterprises on the importance of adopting IP protection best practices.

¹For more details on Mexico's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



The copyright industries recommend several legal reform and enforcement measures (criminal, administrative and prosecutorial) for the Government of Mexico to take in order to improve its IPR regime. These measures are in keeping with Mexico's participation in the Trans-Pacific Partnership (TPP) negotiations, which aims to achieve a high-standard agreement on IPR, market access, and other key trade issues. Taking these steps would significantly improve market conditions for U.S. and Mexican rights holders and benefit the U.S. and Mexican economies as a whole, and, in particular, the critical sectors of our economies that depend on copyright protections.

PRIORITY ACTIONS REQUESTED TO BE TAKEN IN 2013

The copyright industries recommend that the Government of Mexico take the following priority enforcement and legal reform measures:

Criminal Actions, Raids and Prosecutions

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

Administrative Enforcement

- Provide IMPI with additional resources, including personnel and training, and proper authority to conduct inspections, and allow IMPI's regional officers to become enforcement inspectors to conduct raids in their localities (in light of the 2011 reorganization of IMPI). Encourage IMPI to expeditiously issue its decisions, to

waive or lower rights holder's deposit fees in instances of "obvious" piracy, and to expedite the process for destroying illegal materials.

- Provide INDAUTOR with more resources and facilities to increase and strengthen its mediation capabilities, particularly by providing more mediators and mediation rooms, and requiring more expeditious notices to rights holders.

Prosecutions, Judges and Courts

- Encourage prosecutors to take *ex officio* actions against all forms of piracy (and especially online piracy), to focus on prosecuting individuals arrested in such actions, and to seek deterrent sentences, including jail time. Encourage the Supreme Court to issue an advisory on this point to criminal judges nationwide and for judges to act expeditiously on applications for search warrants. Encourage judges to treat copyright treaty obligations as self-executing (as the Supreme Court equated them with human rights), since the June 2010 constitutional amendments made international treaties pertaining to human rights self-executing.
- Implement *ex parte* remedies, especially injunctive relief, for civil IPR infringement cases in order to fulfill Mexico's TRIPS obligations. On August 30, 2011, the Civil Code was amended to permit these remedies, but they have not yet been implemented.
- Continue to provide and expand on IPR enforcement training for law enforcement officials, prosecutors and judges. Provide sufficient resources for the IP magistrates within the Tax Court. Training should focus on: technology, including circumvention devices, digital distribution and online piracy.
- Create specialized IP administrative circuit courts.
- Allow civil damages to be an additional award to plaintiffs in administrative and criminal cases.

Legal Reforms

- Fully implement the WIPO digital treaties – in the Copyright, Industrial Property, Criminal and Criminal Procedural Codes.
- Develop legislation calling for ISPs' cooperation to address online piracy following the direction of the Coalition for the Legal Access to Culture (CALC) initiative, and including notice and takedown procedures.
- Ensure that all relevant rights holders are entitled in law and practice to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.
- Pass legislation to impose criminal penalties for the unauthorized camcording of films in theaters.
- Amend the Criminal Code and the Copyright Law to facilitate the imposition of criminal sanctions for the distribution and importation of devices used for the unauthorized circumvention of technological protection measures (TPMs).
- Enact and enforce decrees to ensure the procurement and use of legal computer software in governmental agencies at all levels (especially all state and municipal agencies).
- Strengthen administrative enforcement by: (1) providing tax crime prosecution of copyright infringement (when it implicates tax liability); and (2) increasing administrative sanctions.

- Amend the Customs Code to provide *ex officio* authority for the interception of shipments of suspected infringing material.
- Implement the recently enacted legislation to create a centralized customs registration database to assist with identification of infringing shipments.
- Adopt legal norms that create incentives for ISPs to cooperate with right holders in fighting infringement taking place over their networks or platforms, including *inter alia*: (1) legal incentives for ISPs to cooperate with rights holders to effectively deal with Internet piracy; (2) rules that clarify the illegality of providing services that are intended to promote the infringement of copyright and related rights; and (3) injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders.
- Ensure that an unauthorized online distribution, communication or making available is considered an act of infringement, regardless of whether it is undertaken for profit-making purposes or other commercial benefit or advantage. The government has, reportedly, prepared a draft bill to provide a making available right.

COPYRIGHT PIRACY IN MEXICO

Here is a snapshot of the nature of piracy and of the ongoing enforcement challenges in Mexico:

Internet piracy: As Internet use grows rapidly in Mexico, weak laws and enforcement are falling behind the technological advances causing high levels of piracy. There are now an estimated 42 million Internet users in Mexico, representing 36.5% of the population; in 2000, only 2.7% of the population had Internet access (according to www.internetworldstats.com). Mexico has no clear secondary (ISP) liability law in place, and no formal notice and takedown procedures; either would substantially improve Internet enforcement if properly implemented.

For unauthorized downloads, the most prevalent digital platforms are P2P file sharing services, as well as sites dedicated to providing links to infringing hosted content, illegal distribution hubs (also known as cyberlockers), forums and social networks, BitTorrent index sites and blogs. Many sites are hosted mainly in the U.S. and Europe, but administered in Mexico. One example of that was demonoid.me. In its December 2012 Out-of-Cycle Review of “Notorious Markets” the U.S. Government praised the Government of Mexico for taking down the BitTorrent tracker demonoid.me last year; during its operation, it was a major source of pirated material worldwide, but the criminal investigation of the operators of that system has stalled.

The most widespread source of music piracy is P2P activity due to the migration of customers from hard copies to downloaded copies, with ARES, Gnutella and BitTorrent dominating (e.g., Megaupload, Fourshare and Rapidshare), as well as “linked” piracy on blogs and forum sites. Blogspot, a Google service, has been widely used; Google Mexico has been blocking links in response to takedown notices sent by rights holders (although their takedown procedure has proven to be very time consuming, and, thus not a very effective remedy). A Motion Picture Association (MPA) study (IPSOS survey) found very high Internet piracy rates continuing, as in recent years, with streaming, BitTorrent, cyberlockers and FTP servers currently causing the most serious problems. Independent film producers (IFTA members) are especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services – harming consumers and rights holders alike. Revenue from these platforms and services, which are licensed country-by-country, is critical to financing the development of new creative works worldwide, since piracy in one territory harms other markets instantly. Thus, Internet piracy is impacting the financing and distribution of independent content because minimum guarantees for license fees are being hurt by piracy, namely theatrical, DVD and television rights. BSA reports that downloading of software via illegal websites, P2P platforms and online auction sites is growing, with a rise in the market for illegal passwords, codes and key generators.

Hard goods piracy: Focused enforcement efforts are needed against the manufacturing and distribution networks, and on street and market sales. The main distribution centers for optical disc piracy (CDs and DVDs) – of music, film, entertainment and business software – remain as follows: Tepito, Lomas Verdes, Pericoapa, Salto del Agua, Plaza Meave, and Plaza de la Computación in Mexico City; La Cuchilla in Puebla; Las Pulgas in Monterrey; and San Juan de Dios, La Fayuca, and El Parián in Guadalajara. Tepito, San Juan de Dios and La Cuchilla are the dominant sources for manufacturing and sale, along with growing problems at Plaza de la Computación. IIPA continues to recommend focusing enforcement on these locales, with a more systematic approach to identifying and prosecuting the criminal organizations operating in these (and the other) markets. In fact, the U.S. Government named three of these Mexican markets to its 2012 “Notorious Markets” list: (1) Pulga Rio (Las Pulgas), calling it a “major hub for counterfeit and pirated goods” in the state of Nuevo Leon, operating despite law enforcement activities to decrease the number of vendors; (2) San Juan de Dios, describing it as an “indoor flea market” with over 80 vendors selling pirated first-run movies, music, videogames, software and counterfeit clothing and other items; and, (3) Tepito “reportedly the main warehousing and distribution center for pirated and counterfeit products” sold throughout Mexico.

In 2006, the film and music industries combined their anti-piracy operations into the Association for the Protection of Film and Music (APCM). APCM reports that hard goods piracy for 2012 in the film industry remained at the same rate as in 2011 (so, at about 85%, and at about 71% for music). Flea market piracy remained at the same (high) levels as last year, and was especially problematic in the markets already mentioned (and others) in Mexico City, Guadalajara, Puebla, Cuernavaca (Morelos) and Monterrey. There remain at least 80 very large, very well-known, “black markets” in Mexico, many of which are well organized and continue to be politically protected. In some street locations, consumers can exchange previously purchased pirated product. Vendors also make available infringing copies of any catalog product or TV series, often with a 24-hour turnaround time.

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

For years, hard goods piracy has been the most damaging form of piracy for the entertainment software industry, as evidenced by the enormous quantities of burned optical discs and counterfeit cartridges (and memory sticks) found in the major markets (cited above), particularly Tepito, Pericoapa and San Juan de Dios. Most of the pirated games available for purchase in Mexico are burned domestically, either burned on demand or sourced from local production points and wholesale distribution centers. Industry enforcement efforts have uncovered multiple burning labs in Tepito capable of producing hundreds of thousands of pirated games. Additionally, counterfeit cartridges continue to be imported from Asia, often in component pieces which are then assembled in Mexico. Circumvention activity continues to be a significant problem for the Entertainment Software Association (ESA), and occurs openly in many markets. The widespread availability of circumvention devices and technologies underpins and facilitates the growing problem of online piracy of entertainment software in Mexico. Circumvention is accomplished by the installation of “modification chips” in consoles, which bypass the technological protections embedded in the hardware and enable the play of pirated games, or by modifying the game platform’s operating system to facilitate the play of pirated games (so-called “soft modding”). Enforcement against distributors of circumvention devices is unavailable, because Mexican criminal law prohibits only the domestic manufacture of such devices, but not the distribution or sale thereof. Increasingly, consumers in Mexico source their circumvention devices from online auction and e-commerce sites. Vendors sell circumvention devices for approximately 350 to 500 Pesos (US\$28 to \$40), often with memory cards containing up to 400 unauthorized copies of games as part of the sale.

The independent film and television segment of the motion picture industry (IFTA) reports that online and physical piracy remain a significant export constraint for independent producers and distributors, the majority of which are small-to-medium-sized businesses. Independent producers partner with local authorized distributors to finance

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

Enterprise end-user software piracy: The primary concern for the business software industry remains the unlicensed use of software by enterprises (end-user piracy). BSA’s most recent software piracy study found that the PC software piracy rate in Mexico was 57% in 2011 (a 1% point improvement from 2010), with an estimated commercial value of unlicensed software of US\$1.25 billion.² Illegal software is most commonly available at street markets (by “carpenteros”), and, as noted, for downloads at online auction sites, specialized download sites and file sharing sites. In addition, “white box” vendors (small local assemblers or non-brand name vendors of computer hardware) continue to be a considerable source of software piracy, usually hard disk loading. As noted, one important step forward was the certification in November 2012 of the Mexican Ministry of Economy as meeting software asset management best practices under BSA’s Certification in Standards-Based Software Asset Management for Organization (CSS(O)) program. The CSS(O) program is an enterprise-level certification for software asset management based on a standard set by the International Organization for Standardization (ISO).³ Certification under this program indicates that an organization is compliant with all of its software license agreements and that its management controls and procedures reflect the ISO standard. Certifications were also awarded to several other agencies associated with the Ministry of Economy, including the Federal Competition Commission, Federal Commission for Regulatory Improvement, Federal Attorney’s Office of the Consumer, and ProMexico. IIPA commends this important development and hopes it will set an example for other government ministries and the private sector to follow.

Camcord piracy: The illegal recording of films in Mexican theaters continues to cause significant harm to the U.S. motion picture industry, but in 2012, there were significant enforcement improvements against this type of piracy. In 2012, only three films were detected as stolen from Mexican theaters, down from the 37 in 2011. As major blockbuster theatrical release dates in Mexico and the U.S. begin to coincide, Mexico has become a source of Spanish-dubbed camcords which are then made available online. The enforcement challenge in Mexico remains the same: the police cannot arrest an individual camcording unless there is also evidence of a distribution. To sustain a successful prosecution under the current law requiring proof of intent to distribute, investigators have to watch the thieves actually camcord the movie, walk out of the theater, hand it over to the people who hired them, and then wait for the film to be widely distributed; by that time, grievous harm has resulted. This is a terribly inefficient use of government resources, has little deterrent effect, and is causing grave economic damage, which is why legislative fixes are necessary.

²BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Mexico was 57%, representing a commercial value of unlicensed software of US\$1.25 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

³ For more information about the CSS(O) program, see www.bsa.org/CSSO.

For book publishers, unauthorized photocopying of academic materials at copy shops in and around university campuses remains a concern. Universities should promote respect for copyright with the adoption of appropriate use and copyright policies, and encourage professors and teaching staff to promote the use of legitimate textbooks and materials to address this infringing behavior.

COPYRIGHT ENFORCEMENT IN MEXICO

Criminal Enforcement

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

A second goal is further improving the PGR’s criminal actions. In 2010, in a very positive development, legislation was enacted giving PGR the authority to take *ex officio* actions against copyright infringement; unfortunately, in 2012, the number of such actions decreased. In most cases, however, rights holders had to file (*ex parte*) complaints to commence cases, and had to build cases on their own and take their information to the authorities, before enforcement commenced. The copyright industries are also applying the “Ley Federal de Extinción de Dominio” (Federal Law for Property Forfeiture) to piracy cases. The PGR anti-piracy coordinating committees are proving effective in several states, including Nuevo Leon, Morelos and Puebla. One particularly severe problem facing IIPA members is piracy undertaken by organized crime syndicates which are increasingly responsible for piracy in Mexico the past few years. The PGR has a special piracy unit, the “Subprocuraduría” Specialized in Investigation of Federal Crimes (SEIDF), which has worked effectively with industries and achieved significant results in some key markets (including in digital piracy cases). However, this unit is under-resourced to effectively dismantle the organized crime networks. There is also a PGR Organized Crime Investigative Division (PGR-SIEDO) with excellent investigators and attorneys and resources that the other divisions do not have – including paid informants, wire-tapping authority and witness protection programs. IIPA members recommend better coordination between PGR-SIEDO and PGR-SEIDF. Criminal prosecutions remain a major concern for APCM Mexico because criminal sentences are rare, given the number of raids and cases commenced; additionally, more resources and training are needed.

The Mexican Tax Administration (SAT) is encouraged to use its inspection power to investigate and audit companies for unlicensed software use given that such use can constitute a tax violation. Using this authority would serve as a powerful deterrent to unlicensed software use by business enterprises. In 2012, IMPI referred 150 cases to SAT for this purpose; IIPA recommends action on these cases as quickly as possible in 2013. The Scientific Police of the Secretaría de Seguridad Publica have also assisted rights holders by providing information on illegal software websites.

One problem that undermines the effectiveness of raids by PGR is seized goods finding their way back into the black market because they are not expeditiously destroyed. IIPA continues to recommend that PGR adopt a policy to expeditiously destroy infringing goods as Customs, IMPI and PGR lack clear procedures on how to handle and destroy confiscated goods. Some rights holders continue to report problems, although there were several instances where rights holders were notified, and did cooperate in the destruction of confiscated goods. Article 70 of the Federal Law for the Administration and Alienation of Public Sector Goods (FLAAPSG) governs the regulation of seized or abandoned goods relating to IP crimes. However, Article 75 of FLAAPSG requires a final court order to

destroy goods (if they are not “abandoned”) which means that while there is some cooperation more recently, prosecutors need to wait 90 days to declare goods “abandoned” under current law in order to destroy them. IIPA recommends both clarity in the law, and more cooperation with rights holders to ensure that illegal materials do not get returned into the stream of commerce.

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

Summary of some criminal actions in 2012: In 2012, APCM reported good ongoing cooperation with PGR on film and music actions. Across Mexico against physical (hard good) piracy, IMPI conducted 1,200 inspection visits and 1,200 *ex officio* raids. The total amount of materials seized in police raids was as follows: 1,716,133 CD-Rs and 1,814,263 DVD-Rs (motion pictures); as a result of the inspections at cybercafes, 601 street raids, 711 warehouse raids, 106 laboratories and factory raids, 114 jukeboxes and 974 burners seized. In total, there were 118 arrests, 81 indictments, and 36 sentences in 2012 (and 69 individuals currently are in prison for IPR violations including over 35 defendants who have received sentences of four years or more). Against digital music piracy, in 2012, APCM reported 149,154 actions (down from 882,402 in 2011), consisting of 1,388 cease and desist letters to webpages; 30,740 for permalinks; 117,169 against cyberlocker links; 209 notifications to blogs and 1,039 links removed from YouTube (including 3,300 cyberlocker and streaming link notices from the motion picture companies). BSA reported that there were no criminal convictions in 2012 for software piracy (there were two convictions in 2011, and 20 criminal cases commenced). As noted, BitTorrent tracker demonoid.me was taken down with the cooperation of the Mexican authorities. Unfortunately, the criminal case against the operators of the service has stalled: the main operator of the service was initially imprisoned and materials used in the service were seized, but the operator of the service was subsequently released. The criminal case is ongoing.

Unfortunately, the ESA’s anti-piracy enforcement program did not see a sufficiently high level of activity from PGR in 2012. Despite a few successful raids in early 2012, the videogame industry was unable to secure any enforcement actions between July and December. A lack of coordination between the government agencies (PGR, specialized IP unit, and local police forces) was mostly to blame for this lack of enforcement against the distributors of infringing entertainment software. On several occasions the specialized IP unit obtained search warrants to raid premises known to harbor commercial-scale piratical operations. Unfortunately, those search warrants were not executed because police officers were never assigned to undertake raids. The entertainment software industry, along with the other copyright industries, recommend that prosecutors focus their efforts on major sellers, rather than on street vendors (further recommending that street vendor raids be used to investigate supply chains to target large-scale distributors, with follow-up criminal prosecutions, especially given the high rates of recidivism).

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

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

Civil Enforcement

Mexico's three-tiered civil procedure system, involving actions in the first and second instance, plus the Amparo hearing makes civil litigation more complicated, time consuming, and costly for rights holders. Another concern is the delays in resolving cases. There have been some recent improvements: for example, Mexican law grants full validity to electronic documents and discovery, although, some judges are still not yet familiar with these rules. On August 30, 2011, Mexico amended the Civil Code to provide *ex parte* measures to avoid the destruction of evidence; however, those provisions have not yet been implemented. The other major impediment is that damages can only be collected after an infringement decision has become *res judicata*. This can mean an eight-to ten-year process of litigation in IMPI, the Tax Court and the circuit courts, with an additional two years to claim damages after *res judicata*, in a civil court. This *res judicata* prerequisite for copyright infringement damages was set by the Supreme Court in 2008. BSA reported that in 2012, provisional measures to preserve evidence (i.e., the seizure of computers with allegedly infringing software) were used effectively by IMPI in administrative cases. One 2012 amendment to the federal judicial laws (including the Industrial Property Law) would permit the imposition of damages without a prior administrative infringement; IIPA recommends its adoption.

Administrative Enforcement

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

IMPI: In 2012, IMPI undertook 1,383 actions against enterprises infringing software licenses (985 *ex officio* actions and 398 *ex parte* raids, also known as “full raids”) – an increase from 2011 (and with very good results in part because higher fines were imposed, and door closures generated immediate fines under a new law that took effect in 2012). As in recent years, BSA and other rights holder groups continued to report significant cooperation and coordination with IMPI on enforcement actions, resulting in more and higher fines. The 2012 law (in force, January 2012) is an important factor in improving IMPI enforcement: the law both increased penalties and established a presumption of infringement in cases where enterprises refuse entry to IMPI inspectors (so-called “door closures”). In 2012, there were 66 cases where fines were immediately imposed on “door-closers.” BSA reported improved cooperation on raids, evidentiary analysis, fines and seizures, as well as an increase in the number of IMPI actions in 2012 from prior years in general (and as noted, that door closures did result in automatic fines and the presumption of infringement). Many of the copyright industries continue to recommend that investigations be conducted more rapidly, and that evidence be preserved immediately upon discovery of a presumptive infringement (including evidence discovered by the authorities during inspections, even if that evidence is not listed on the inspection order). Several copyright industries reported that IMPI inspectors in 2012 did gather more detailed evidence than in prior years, and that this resulted in better outcomes for infringement cases (including higher fines). Last, it is recommended that IMPI empower its regional offices to conduct raids and seizures. BSA and IMPI signed collaboration agreements (and this resulted in the strong number of *ex officio* actions and raids, reported above); in one such agreement in 2012, more than 3,000 letters were sent to software users, to generate awareness regarding IP rights.

In 2007, AMPROFON and IMPI signed an agreement to conduct 80 administrative procedures every month against the illegal downloading on cyber cafés, mainly in the capital city area; this agreement remains in force and continues to be successful. In 2012, the number of administrative procedures was increased from 80 to 100 per month.

In past two years, the MPA continued its anti-piracy campaign in cooperation with theater owners, by airing anti-piracy public service announcements in theaters (airing before screenings). Additionally, the short anti-piracy announcement was added onto many DVDs.

INDAUTOR: IIPA members continue to recommend additional training for INDAUTOR staff on key copyright matters and that public awareness initiatives should continue to issue general information about the importance of copyright to the local culture and economy. INDAUTOR also is responsible for supervising the collecting societies in Mexico. This includes the authority to issue tariff rates for the broadcasting of sound recordings in TV and radio stations.

Online Enforcement

Legal reforms: There are several legal deficiencies hampering effective online enforcement: first, there is no specific Mexican legislation establishing liability principles for ISPs in piracy cases. It is assumed that ISPs are subject only to the general liability principles contained in the Civil and Criminal Codes. Second, specific provisions in the Telecommunications Law prohibit ISPs from disclosing customer's personal information to rights holders seeking civil recourse against alleged infringers. The absence of clear law results in a lack of certainty for ISPs on how to react to Internet piracy and to notice and takedown notifications from the copyright industries. Some IIPA members report cooperation with hosted content takedowns, but most said the ISPs were "not cooperating" or there was "very little cooperation" by the ISPs. Because ISPs are not allowed to provide information on alleged infringers, rights holders must bring a criminal action to the PGR to obtain those details. Additionally, ISPs have been reluctant to include clauses in their subscriber agreements to permit terminations if subscribers infringe intellectual property rights. It is hoped that in 2013, ISP liability issues, and clear notice and takedown rules will be adopted. The film and music industries report that they have received a decent level of cooperation from some Mexican ISPs involving hosted content, such as the removal of illegal music and movie files posted on webpages and forums.

Generally, file sharing committed through P2P networks is not considered a serious legal violation by the civil courts. Article 424*bis* of the Criminal Code requires a profit motive as a prerequisite for criminal infringement, and as a result effective prosecutions in P2P cases are unavailable. APCM reports very few Internet piracy cases filed last year (and none pertaining to P2P piracy) mainly due to the lack of adequate criminal provisions as described above. For P2P file sharing, ISPs (especially Telmex, which has about 70% of the domestic broadband connections in Mexico) have, to date, been reluctant to take any actions, which is why legal reforms to address these issues are strongly recommended. The increase in broadband access in Mexico, without corresponding laws, has led to the surge in online piracy rates in recent years. ESA reports that in 2012, Mexico placed 14th in the world in the number of connections by peers participating in unauthorized file-sharing of select ESA-members titles on public peer-to-peer networks (Mexico was 28th in world in 2011).

It has been five years since the commencement of an attempt to reach agreement between an initial coalition of rights holders and ISPs, under the auspices of the Mexican communications ministry; the process broke down due to opposition from the Communications Secretary and the Federal Commission of Telecommunications (COFETEL). In 2009, 37 civil organizations representing copyright industries, other rights holders and collecting societies formally established the CALC to promote and defend copyrights and related rights threatened by physical and online piracy, working with different government entities and federal authorities. The CALC also focused on legislative reforms, including addressing private copy issues and promoting cooperation between rights holders and ISPs to address piracy in the online environment, but no legislation was advanced in 2012. IMPI has also been working with ISPs and rights holders to develop "cooperative models" for fast and efficient disabling of infringing websites. There is currently a bill being drafted to enforce the rights holder's authorization for "making available" (i.e., for the distribution or commercialization of copyright material on websites).

Border Enforcement

There remain formal, onerous requirements to initiate border actions in Mexico. For example, Customs authorities will not seize infringing product entering the country without an official order from IMPI; this is true even in cases where the product is clearly infringing. Because IMPI does not issue immediate authorizations to seize products which have been identified by Customs as infringing, the suspect merchandise is usually allowed to enter

the country; this is because Customs does not have authority to detain a shipment for more than a few hours. IIPA recommends greater cooperation between these two agencies to improve border enforcement, and to expedite the procedures by which Customs may make independent seizures of clearly infringing products. Additionally, the Customs Code needs to be amended to grant customs officers *ex officio* powers.

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

Several years ago Customs began an anti-piracy initiative to: (1) conduct regular trainings of Mexican officials at various ports on intellectual property enforcement issues and the identification of various types of pirated product; and (2) hold monthly meetings with industry members to review the results of the trainings and to make improvements in border enforcement. ESA continues to report positive results from ongoing training efforts with Mexican Customs officials (and it conducted seven more training programs with customs officials in 2012 throughout Mexico), including detention notifications and seizures of pirated game product from diverse ports, in particular, Guadalajara and Monterrey. ESA notes that importers are now reducing the size of their shipments to avoid detection, making border enforcement even more critical, but more difficult. ESA did report an improvement in the level of support from Customs in dealing with shipments of circumvention devices.

COPYRIGHT AND RELATED LAWS IN MEXICO

Federal Law on Copyright (1996, as amended): Amendments to Mexico’s 1996 Copyright Law entered into force on July 24, 2003; regulations to implement these amendments were issued in September 2005. Mexico acceded to both the WIPO Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) in 2002, but has yet to publish the WCT and WPPT Agreed Statements. Draft laws that were prepared in 2012, specifically for treaty implementation, would fall far short of proper implementation on issues relating to technological protection measures, for example, and fail to address third party (ISP) liability at all. There are many remaining deficiencies in the Copyright Law (including long-standing NAFTA and WTO TRIPs obligations), as well as those relating to digital treaty implementation. IIPA has detailed a list of recommended amendments in prior filings; it is available at: <http://www.iipa.com/rbc/2010/2010SPEC301MEXICO.pdf>.

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

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

- A bill to amend the Criminal Code to punish – with a prison term (three to ten years) and fines – the unauthorized camcording of films in theaters. The legislation needs to eliminate any required proof of commercial intent.
- A bill (in the Copyright Law or Criminal Code) to establish criminal sanctions for the distribution or trafficking of devices used for the circumvention of TPMs. The bill should include “acts” as well as devices, components and services. Mexico’s existing criminal law concerning TPM protection (Penal Code, Article 42) has proven ineffective because it only applies to the domestic manufacture of circumvention devices. Since such devices are made abroad and imported into Mexico, there is no criminal enforcement against retailers of these devices.
- A bill to adopt CALC proposals to promote cooperation between rights holders and ISPs.