

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be placed on the Priority Watch List in 2017.¹

Executive Summary: There are two significant impediments stifling the development of a vibrant legal marketplace in Mexico for consumers of music, films, video games and books online. First, the Mexican IPR legal regime is antiquated for the digital age. For example, Mexico has not yet fully implemented the 1996 digital copyright and neighboring rights treaties, much less the full panoply of legal provisions and procedures commonplace in most countries. Second, Mexican enforcement authorities continue to focus on hard goods, not digital piracy. The copyright industries report continued good cooperation with some of the Mexican federal authorities in efforts against hard copy piracy. And, some agencies have developed infrastructures for addressing Internet piracy, but resources in key spots remain woefully short for effective enforcement. Budget cuts in 2016 nationwide in various agencies (including several IPR enforcement agencies), will only worsen these problems.

Mexican consumers, as in other countries, have quickly embraced the digital age in recent years, with exponential growth in the last decade. But legal reforms lag. In 2015, the Government of Mexico took a positive step forward by creating an IP crime unit to focus on improving digital enforcement. This new sub-unit was formed with five public prosecutors within the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI) in the Attorney General's Office (PGR). Unfortunately, the unit is understaffed, with only two of the five prosecutors currently in place. The PGR has pledged to fully staff the UEIDDAPI sub-unit, but other key IPR enforcement units in the PGR and the police are also understaffed.

Meaningful reform of the Copyright Law (and related laws), especially on digital enforcement issues, has been long-stalled. The Government of Mexico delayed reforms for several years awaiting the conclusion of the Trans-Pacific Partnership Agreement (TPP). With the demise of the TPP, Mexico needs to move forward in order to comply with its existing treaty obligations (WTO TRIPS, the WIPO Internet Treaties, etc.) as well as to catch up to international norms to allow the digital marketplace to flourish in Mexico.

The Government of Mexico has also been very slow to create incentives to promote cooperation between rights holders and Internet Service Providers (ISPs) to combat online copyright infringement. Draft amendments in the past (for example, those circulated in 2013) failed to address third party ISP liability at all, and failed to create incentives for the kind of active participation between the various actors in the Internet ecosystem necessary to expand opportunities for a robust and legitimate online marketplace. Over eight years ago, 37 civil organizations representing copyright industries and other rights holders, and collecting societies, formally established the Coalition for the Legal Access to Culture (CLAC) to promote and defend copyrights and related rights threatened by physical and online piracy. The CLAC, working with various government entities and federal authorities, focused on legislative reforms, including addressing private copy issues, provisional measures for collecting societies, and promoting cooperation between rights holders and ISPs to address piracy in the online environment. The CLAC initiative provides a starting point for needed improvements, including *inter alia*: (1) an effective notice and takedown (and "staydown") system; (2) clear third party liability rules, including for parties inducing or promoting infringement of copyright and related rights; and (3) injunctive relief and a duty on ISPs to provide information to law enforcement agencies (provided, in part, in Article 189 of the 2014 Telecommunications Law). Unfortunately, some in the ISP community oppose cooperative efforts.

¹For more details on Mexico's Special 301 history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of Mexico's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



Mexico is now the number one foreign source for unauthorized camcords. In 2016 (through November), 79 American feature films were sourced from illicit camcords in Mexico—this is significantly more than the 40 films sourced from Mexico in 2015.

In 2016, as in prior years, there were some notable enforcement actions undertaken against hard goods piracy resulting in the seizure of large quantities of illegal goods. While hard copy piracy is an ongoing problem for some industries, digital piracy is significantly worsening for all the copyright industries. In addition, state and municipal government anti-piracy efforts continue to be weak overall, with few local entities working on combating piracy. One enforcement step that has been long-recommended is the development and enactment of a high-level national anti-piracy plan to adopt a broad strategy against major targets, and to coordinate federal, state and municipal enforcement activities. Even with large-scale enforcement actions in 2016, hard copy piracy persists, including CD-R and DVD-R burned discs (and USB drives) of music and audiovisual and video games (as well as circumvention devices), all widely available in numerous street markets; and, the unauthorized photocopying of books at universities remains a significant problem.

PRIORITY ACTIONS REQUESTED IN 2017

The copyright industries recommend the following to the Government of Mexico as priority enforcement steps and legal reforms for 2017:

Criminal Actions, Raids and Prosecutions

- Implement a national *ex officio* anti-piracy campaign with a consistent year-round focus on major targets (e.g., online sources of infringing content, suppliers, traffickers and distribution chains), emphasizing coordination of the police and prosecutorial resources, and a strategic approach, with a prominent role for the UEIDDAPI, within the PGR (and, properly resource UEIDDAPI and its new sub-unit).
- Ensure timely destruction of illegal goods seized in criminal and administrative actions to prevent their reentry into the market.

Administrative Enforcement

- Provide the Institute of Industrial Property (IMPI) with additional resources, encourage it to issue decisions more expeditiously, allow IMPI regional officers to conduct local raids, provide INDAUTOR (the author's rights institute) with more resources to conduct *ex officio* inspections related to copyright infringements as well as the facilities to increase and strengthen its mediation capabilities.
- Support the CLAC initiative to create an environment of active cooperation between Internet services and rights holders, including, but not limited to, an efficient notice and takedown system with ISPs.

Prosecutions, Judges and Courts

- Encourage prosecutors to take *ex officio* actions against online piracy (as well as hard copy piracy); to focus on prosecuting individuals arrested in such actions; to build efficiencies by creating a reference library of legitimate copies; and to seek deterrent sentences, including jail time. Also, PGR should be encouraged to reverse its current refusal to investigate and prosecute IPR infringement cases absent proof of actual lost profits, rather than based on the harm to rights holders. Last, there needs to be increased prosecutorial training in IPR cases.

Legal Reforms

- Fully implement the WIPO Internet treaties—in the Copyright Law, and the Industrial Property, Criminal and Criminal Procedure Codes (as detailed in this report) including by:
 - (i) adopting definitions and provisions on technological protection measures (TPMs) as well as civil and criminal penalties, with criminal sanctions for the importation and distribution of devices used

for the unauthorized circumvention TPMs. This should include sanctions for “acts” as well as devices, components and services. Mexico’s existing criminal law concerning TPM protection (Penal Code, Article 42) has proven ineffective because it only applies to the domestic manufacture of circumvention devices; more often these devices are made abroad and imported into Mexico;

- (ii) adopting definitions and sanctions for rights management information (RMI);
 - (iii) removing the proof-of-profit standards (and onerous authorization standards) for infringements of the making available right, and as a prerequisite to criminal liability for large-scale copyright infringements;
 - (iv) granting customs inspectors *ex officio* powers to detain and seize infringing imports.
- Enact legislation to impose criminal penalties—with a prison term (three to ten years) and fines—for the unauthorized camcording of films in theaters, and eliminate any required proof of commercial intent.

COPYRIGHT PIRACY IN MEXICO

Internet piracy: In the past 15 years, Internet use in Mexico has risen from 2.7% in 2000 to 45.1% in 2015; mobile phone use has grown to 85.3 per hundred Mexicans. But, as noted, Internet piracy has grown rapidly because the legal regime and enforcement have lagged far behind the rate of Internet and mobile access by Mexican consumers. That is unfortunate because the copyright industries could add to the Mexican economy if supported with a solid IPR legal regime. A 2015 study by the Mexican Institute of Competitiveness (IMCO) noted that in the last 10 years, the copyright industries and distribution networks were responsible for close to 7% of the Mexican GDP. The music industry reports (IPSO Connect Report 2016) that 64% of Internet users in Mexico use audio streaming, and 77% are doing so on their smartphones. In addition, 60% of recorded music industry revenue in Mexico is from digital music services; unfortunately, the per capita contribution is US\$1 per year (compared with US\$15.50 per capita in the U.S.). Instead of allowing legal services to grow, illegal services are flourishing in Mexico and also spreading harm into other marketplaces in Latin America. The most prevalent digital platforms are stream-ripping services as well as MP3 search engine sites that provide links to enable the downloading of film, music and video game content hosted on cyberlocker platforms, and, BitTorrent index sites. While many of these infringing sites and services are hosted outside of Mexico (e.g., in Peru, Chile, Columbia and Argentina), they are routinely accessed by individuals in Mexico. Even though many sites and services are not hosted in Mexico, the Mexican authorities can still use effective remedies and regulations against large-scale infringers, and can do so without unintended collateral consequences, in addition to adopting notice and takedown and other more effective measures for local sites administered in Mexico.

The most widespread source of music piracy is stream-ripping (e.g., YouTube-MP3.org) as well as “linked” piracy MP3 search engines (indexes). Social networks (including Facebook and Twitter) have also been used to provide links. These platforms are also very popular distribution channels for pre-release piracy. The Motion Picture Association (MPA) reports almost 90 websites harming the Mexican market, including *Pelis24.com*, which is a popular streaming linking site (and, one of Mexico’s largest websites) that currently offers more than 150,000 links to more than 10,000 illegally reproduced titles including films and television series. The site has been active since 2013. The independent sector of the film and television industry (IFTA) is especially concerned about Internet piracy because of its harm to legitimate online distribution platforms and services that provide revenue for financing the development of new creative works worldwide. In 2016, Mexico ranked 14th overall in the world (up from 18th in 2015) in the number of connections by peers participating in unauthorized file sharing of video games on public P2P networks. Mexico ranked fourth (an increase from 2015) in unauthorized file sharing using consoles, 14th using mobile devices, and 19th using PCs. In 2016, there were ten major sources of illegal entertainment software available for downloads. But, in a significant positive development, the federal police disabled the operation of a mirror website of *kickassstorrents* (*kickass.mx*) in Mexico.

Hard goods piracy: Hard goods piracy persists both in manufacturing and distribution networks on the street and at markets (even as digital piracy has far eclipsed hard copy piracy). In December 2016, as it has since 2012, the U.S. Government named two Mexican physical markets to its “Notorious Markets” list: (1) San Juan de Dios in Guadalajara; and (2) Tepito in Mexico City. As the 2016 report noted, in these two markets “significant levels of piracy and counterfeiting continue” as well as in “dozens of other markets across Mexico.” The U.S. Government encouraged Mexico “to continue coordinated law enforcement efforts, including against high-level targets in the distribution chain” to reduce piracy in these markets and to “empower customs officials to interdict infringing imports on their own authority.” The motion picture industry, in its Notorious Markets filing singled out not only the two named street markets, but also Lomas Verdes, Juarez or Central Camionera, Toreo Subway Station (State of Mexico) and Salto del Agua and Toreo Markets (Federal District) as the main suppliers of pirated optical discs in the Federal District of Mexico. In addition, there are labs and warehouses throughout Mexico. The nearly 90 well-known markets operating across Mexico, are, in many instances, owned by municipalities even though organized crime is clearly involved in their operations, including running discrete distribution chains.

Hard goods piracy, mainly street piracy, remains very damaging for the entertainment software industry. Flea markets, bazaars, plazas and other established marketplaces, including Plaza Meave, and others named above, are proliferating and very popular, as evidenced by the enormous quantities of burned optical discs and counterfeit cartridges (and memory cards loaded with hundreds of video games downloaded from the Internet) found in many of the major markets. Industry enforcement efforts have uncovered multiple burning labs capable of producing hundreds of thousands of pirated video games. The widespread availability of circumvention devices and technologies in many markets, and, increasingly, from online auction and e-commerce sites, underpins and facilitates the growing problem of mass online infringement of entertainment software in Mexico. Circumvention is accomplished by the installation of “modification chips” in consoles, which bypass the technological protections embedded in the hardware and enable the play of pirated video games, or by modifying the video game platform’s operating system to facilitate the play of pirated video games (so-called “soft modding”). Circumvention devices are typically manufactured overseas and shipped in component pieces which are then assembled in Mexico. Vendors, and online marketplaces such as Mercado Libre, sell circumvention devices for approximately 350 to 500 Pesos (US\$19 to US\$28), often with memory cards containing up to 400 unauthorized copies of video games as part of the sale. Top sellers on Mercado Libre offer dozens of different mod chips and mod services, and sell thousands of units of each, an indication of their high-volume business. Enforcement against distributors of circumvention devices is unavailable, because Mexican criminal law prohibits only the domestic manufacture of such devices, but not their distribution or sale.

IIPA continues to recommend focusing enforcement on these locales, with a more systematic approach to identifying and prosecuting the criminal organizations operating in these markets. Such efforts should make use of the new forfeiture law, under which landlords aware of criminal activity on property they own, must either stop the activity, notify the authorities, or face liability. In addition, the labs and warehouses located in many markets should remain a focus of enforcement activity.

Camcord piracy: As noted, Mexico is now the world leader in sourcing illegally recorded films from Mexican theaters, nearly doubling the number from 2015. There have been a few convictions in recent years in several highly-publicized cases, but only because prosecutors were able to prove not only camcording, but an array of other crimes. In Mexico, successful enforcement against camcord piracy requires evidence of intent to distribute, that is, proof of a profit motive, which is very difficult to obtain. To do this, investigators have to watch the thieves actually camcord the movie, walk out of the theater, hand a copy to the people who hired them, and then wait for the film to be widely distributed; by that time, grievous harm has resulted. By comparison, in the U.S. or Canada, the laws recognize the act of unauthorized camcording in a cinema as a crime by itself. Mexico’s anti-camcording law must be strengthened to allow for enforcement without proof of a profit motive, to prevent further harm to the Mexican box office, as well as to the other distribution channels for films in Mexico. One positive step in 2016 was an agreement between rights holders and PGR to screen warning notices before exhibiting films in all theaters in Mexico to deter camcording.

Other issues: Satellite and signal piracy remain a concern in Mexico as well as the use of illicit streaming devices (media boxes, set-top boxes and other devices that allow users through the use of private apps, to stream, download or otherwise access unauthorized content from the Internet). These devices are gaining popularity in Mexico and becoming a leading vehicle for online piracy of audiovisual material. The current Criminal Code (the Federal Penal Code, Article 426) covers only encrypted-program-carrying satellite signal theft. There is no law prohibiting the theft of encrypted program-carrying cable signals. Nor are there current civil remedies for parties harmed by the decryption of encrypted program-carrying satellite signal or its content, or for cable systems. Mexico thus needs to amend its Criminal Code (and the Copyright Law or Civil Code) to cover cable systems, and to eliminate the “for profit” requirement for acts of decryption of satellite and cable systems, and to provide criminal and civil remedies in the Criminal Code and the Civil Code, for such activities. In addition, the Government of Mexico needs to take enforcement actions against vendors and illegal channels.

COPYRIGHT ENFORCEMENT IN MEXICO

Three federal agencies take the lead in copyright enforcement in Mexico. The Attorney General's Office (the PGR) is responsible for federal criminal enforcement. The Mexican IMPI takes administrative actions under the Industrial Property and Copyright Law. INDAUTOR (the author's rights institute) is responsible for registering copyrights, as well as enforcement. The Scientific Police of the Secretary of Public Security (*Secretaria de Seguridad Publica*) have also assisted rights holders by providing information on illegal software websites. In 2016, the Scientific Police ordered NIC Mexico, the agency responsible for the .mx top level domain registry, to suspend the domain *kickass.mx*, a popular mirror site for *kickasstorrents* (*kat.cr*), and a criminal case was commenced.

An inter-agency committee (COIDAPI) has periodically prepared strategic national enforcement plans; COIDAPI is currently preparing a new version (to be released in 2017) with plans to address digital piracy.

Criminal Enforcement

Mexico is transitioning to a more adversarial justice system, so judges are undergoing training with foreign judges, including U.S. federal district court judges with expertise in IPR criminal cases. The new criminal system means that criminal copyright cases will not be prosecuted *ex officio*, but only upon the filing of a complaint against an infringer. While cooperation between rights holders and the PGR is very good, IPR prosecution is hampered by insufficient resources, inadequate training of new agents (despite many programs), long delays (years) for cases to resolve, and the lack of deterrent sentences. The number of cases is still far below what is needed to have any significant effect on the marketplace. A formal coordination process between the government agencies (PGR, the Mexican Tax Administration (SAT), IMPI, and local police forces) would improve the government's ability to efficiently address the distribution of infringing content. There has been increased cooperation between rights holders and IMPI and PGR in recent years (and a few industries report better cooperation with INDAUTOR as well).

A complicating element in combatting video game piracy in Mexico is the cumbersome requirement (by PGR) that each copy of an infringing game must be accompanied in prosecution files by a physical copy of a legitimate original for comparative examination by experts (*peritos*). Under the existing system, when the comparison involves multiple copies of the same infringing game, rights holders must submit an equal number of legitimate game copies to the experts for comparison. More frustrating, the *peritos* have been reluctant to cooperate with investigations and prosecutions. IIPA members encourage Mexican IPR authorities to create a reference library of legitimate originals to be used by the experts (or, use online authorized website copies), and to seek cooperation with these experts. Additionally, the law should recognize a clear presumption of ownership in civil (and criminal and administrative) matters. IIPA members also recommend that prosecutors continue to focus their efforts on major sellers and repeat offenders, rather than on the highest priority targets, and that they work to identify these targets in collaboration with rights holders. In 2016, it was reported that over 900,000 items were seized in 269 raids.

As noted, even though UEIDDAPI's sub-unit formation was a major step forward, it is hampered by inadequate resources. It should be properly resourced to conduct raids and seizures at major (physical piracy) markets and to create or expand "pirate free" areas around legal vendors at markets (those noted above) to go after supply chains in order to dismantle the manufacturing of pirate material sold to market owners. This unit, along with the other enforcement authorities, should address digital piracy as a priority, including increased IPR judicial training, with an emphasis on technology, so that prosecutors seek, and judges impose, deterrent criminal penalties.

Structural reforms and jurisdictional issues: IIPA continues to recommend several "structural" reforms or agency actions to improve criminal enforcement. An overarching priority is to implement a national *ex officio* anti-piracy campaign. Such an effort would seek to coordinate the various police agencies (including the Federal Police, the Ministry of the Interior (Gobernación), and SAT, as well as state and local police) that need to be involved in identifying and targeting individuals responsible for large-scale distribution and importation of pirated goods, including the major organized crime syndicates engaged in these operations. The campaign could also focus on well-known street markets, labs and distribution centers responsible for the sale of large quantities of pirated goods. Four years ago, a national IPR enforcement plan was publicly released, and although meetings were held with stakeholders, the plan has never been fully implemented. PGR has discussed re-energizing an effort to implement a national plan with the various agencies. The plan released a few years ago was a step in the right direction, even if it did not have all of the recommended components to be more effective, and it now needs to be updated to reflect commitments from various authorities on digital enforcement. What is required is the joint implementation and monitoring of an IPR enforcement plan among PGR, SAT, IMPI, PROFECO and the Federal Police. SAT remains engaged with PGR in support of enforcement actions related to audiovisual and music piracy, especially in cases where money laundering or tax evasion was suspected. But PGR remains under resourced as well.

A second and related recommendation is to coordinate municipal, state, and federal government criminal enforcement actions. In Mexico's 32 states there are 2,400 municipal governments, 190 of which have populations of over 100,000. Each one of these municipalities has regulations related to commercial establishments, markets and street vendors; but even so, few local anti-piracy actions have been taken. Only five of Mexico's 32 state governments regularly cooperate on IPR enforcement—the State of Mexico, the Federal District, Jalisco, Queretaro and Puebla.

A third recommendation is to significantly improve the PGR's criminal enforcement actions, especially outside of the main cities. Before the adoption of the new criminal system, the PGR had the authority to take *ex officio* actions and criminal cases against copyright infringement, but it prioritized raids at laboratories and warehouses. The specialized IP sub-unit within UEIDDAPI (in PGR) needs resources to properly undertake criminal investigations of digital piracy. PGR can still take *ex officio* actions (e.g., raids), but criminal cases now formally need a complaint to be filed by a rights holder to commence the case.

Organized crime syndicates continue to predominate in hard goods piracy, and increasingly, in digital piracy. The PGR has a special deputy attorney general department, the *Subprocuraduría* Specialized in Investigation of Federal Crimes (SEIDF), which established the UEIDDAPI to work effectively with industries. It has achieved significant results in some key markets. However, this unit is also under-resourced to effectively dismantle organized crime networks. There is also a PGR Organized Crime Investigative Division (PGR-SIEDO) with excellent investigators and attorneys and resources that the other divisions do not have, including paid informants, wire-tapping authority and witness protection programs. IIPA members recommend better coordination between PGR-SIEDO and PGR-SEIDF as well as additional resources and training.

Fourth, enforcement agencies should adopt clear and consistent policies for the expeditious destruction of seized infringing goods. The copyright industries have successfully applied the *Ley Federal de Extinción de Dominio* (Federal Law for Property Forfeiture) in piracy cases, but materials seized in the PGR enforcement raids continue to find their way back into the black market. Some rights holders continue to report problems, although there have been instances where rights holders were notified, and did cooperate in the destruction of confiscated goods. Article 75 of

the Federal Law for the Administration and Alienation of Public Sector Goods requires a final court order to destroy goods, unless they are abandoned, and prosecutors need to wait 90 days to declare goods “abandoned” in order to destroy them. IIPA recommends both clarity in the law, and more cooperation with rights holders to ensure that illegal materials are not returned into the stream of commerce.

Fifth, the Federal Bureau of Consumer Interests (PROFECO) should use its *ex officio* powers for consumer protection to stop street market piracy. Unfortunately, PROFECO lacks the human and financial resources to properly conduct raids, and needs police assistance to protect its personnel during raids. There have been ongoing training programs with different agencies undertaken by industry, but PROFECO still needs to be properly resourced to undertake action against street markets. Multiple changes in the leadership in PROFECO have complicated efforts to develop sustained and effective enforcement improvements.

A continuing weak spot in Mexican IPR enforcement is the judiciary—the need for training to improve IPR expertise by judges (especially training on technology, including circumvention devices, digital distribution, and online piracy); the lack of specialized IP judges and courts; the non-deterrent sentencing in many or most cases (criminal sentences are rare, given the number of raids and cases commenced); and, persistent problems with civil litigation. IIPA recommends that Mexico consider the adoption of mandatory sentencing regulations for criminal copyright cases, and/or that the Supreme Court issue its own recommended guidelines to assist judges with the imposition of deterrent sentences and the award of damages (*reparación del daño*). That court could also issue an advisory to criminal judges nationwide to act expeditiously on applications for search warrants. Judges could also be encouraged to treat copyright treaty obligations as self-executing (in accordance with 2010 constitutional amendments and Supreme Court decisions). Finally, Mexico should provide sufficient resources for the IP magistrates within the Tax Court, and consider creating specialized IP administrative circuit courts.

Civil Enforcement

Mexico’s three-tiered civil procedure system makes civil litigation very complicated, time consuming, and costly for rights holders. There have been some recent improvements. For example, the Copyright Law (since 2013) allows rights holders to seek damages in civil courts even before an administrative infringement decision is issued or becomes final. The Copyright Law does not provide statutory damages, but rights holders can seek 40% of the gross sales revenues from infringing products as damage awards. Mexican law grants full validity to electronic documents and discovery, although some judges are still not familiar with these rules. The Civil Code (since 2011) provides *ex parte* measures to avoid the destruction of evidence; however, those provisions have still not been fully implemented.

Administrative Enforcement

IMPI: In 2014, for the first time, IMPI used its administrative authority to take down an infringing website (*ba-k.com*), and issued an order blocking access to the site. The website administrator was punished with a penalty fee, and the website removed the infringing material. The case is still pending because two ISPs have failed to comply with the IMPI orders. In 2015, IMPI used its authority against the website *mymusic.com* after a case was brought by the Mexican Association of Phonogram Producers (Amprofon) and the Mexican Society of Authors and Composers (SACM). These cases, while positive developments, have been the exception. There were no administrative proceedings in 2016 to take down or block access to infringing websites, in large part, due to pending appeals filed by the ISPs on these cases. These issues may ultimately go to the Supreme Court for resolution.

Regarding hard copy piracy, since 2012, IMPI has been able to impose more severe penalties and has been able to apply a presumption of infringement in cases where enterprises refuse entry to IMPI inspectors (so-called “door closures”). These changes have borne fruit, with IMPI undertaking actions against businesses, imposing fines, including immediate fines in door closure cases or against businesses who opposed inspection visits. Rights holder groups report significant cooperation and coordination with IMPI on enforcement actions (for example, against commercial establishments using unauthorized music), resulting in more and higher fines. In the first half of 2016, it was reported that there were over 231 IMPI administrative actions including 245 copyright infringements and 89

provisional measures related to copyright infringements. In 2016, IMPI added IPR enforcement officers in regional offices in Guadalajara and Leon, which was a positive step. The copyright industries continue to recommend that investigations be conducted more rapidly (including faster issuance of decisions), 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). IMPI needs more resources to carry out its enforcement mission, including recording equipment, personnel and training. IMPI should also be encouraged to waive or lower rights holder's deposit fees in instances of "obvious" piracy and should empower its regional offices to conduct raids and seizures.

INDAUTOR: IIPA members continue to recommend additional training for INDAUTOR staff on key copyright matters, and that public awareness initiatives should continue to issue general information about the importance of copyright to the local culture and economy. Most report that INDAUTOR has not cooperated with the copyright industries on legal reforms or enforcement matters. INDAUTOR should be allocated more resources and facilities to increase and strengthen its mediation capabilities as well as to conduct *ex officio* inspections related to copyright infringement. 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. In late 2015, the Mexican Congress created a new Ministry of Culture to oversee cultural policy and funding and placed INDAUTOR within that Ministry (with the same authority it had under the Ministry of Education).

Online Enforcement

One of the biggest obstacles to effective online enforcement is the absence of law that directly establishes liability principles for ISPs (who, in the absence of clear law, seek to avoid assuming responsibility). Instead, ISPs are subject only to the general liability principles contained in the Civil and Criminal Codes. Without clear legal standards, ISPs claim uncertainty on how to react to Internet piracy and to takedown notifications from the copyright industries. Some IIPA members report cooperation for hosted content takedowns, but more broadly, there is little or no cooperation with many local ISPs. Some copyright industries report that Google Mexico does respond to takedown notices filed by rights holders to block access to links in *Blogspot*. In general, the takedown procedure has proven to be very time consuming for most of the copyright industries, and it is certainly not an effective or sufficient remedy. And with the web access denial cases pending judicial review, there were as noted, no such actions in 2016. Mexico needs to enact legislation to create incentives and a duty for ISPs to cooperate with right holders to combat infringement taking place over their networks or platforms (following the CLAC initiative).

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

Regarding criminal enforcement, file sharing committed through online networks is generally not considered a serious legal violation by Mexican courts. Article 424*bis* of the Criminal Code requires a profit motive as a prerequisite for criminal infringement, and as a result, effective prosecutions in Internet file sharing cases are unavailable. After the *demonoid.me* case against a BitTorrent operator stalled, there have been no new Internet piracy criminal cases to report. For file sharing, the two major ISPs (Telmex Infinitum which has about 70% of the domestic broadband connections in Mexico, and ALESTRA) have, to date, been reluctant to take any actions, which is why legal reforms to address these issues are strongly recommended. A few smaller ISPs do respond to IMPI orders. It is estimated that over 100 million takedown requests were filed by rights holders in recent years, including many in 2016 to delist infringing music from Google search results (sent to Google by Mexican music organizations). IMPI has also been working with ISPs and rights holders to consider "cooperative models" for fast and efficient disabling of infringing websites. The proposals offered in recent years for a "notice and notices" system would have instituted a weak notification system to infringers. Additionally, IMPI claims to only have authority to address local

websites (when their administrators or owners are located in Mexico), limiting any effectiveness against foreign infringing sites.

Border Enforcement

There remain formal, onerous requirements to initiate border actions in Mexico. For example, Customs authorities will not seize infringing product entering the country, or detain it for more than a few hours, without an official order from IMPI. This is true even in cases where the product is clearly infringing. Because IMPI does not issue immediate authorizations to seize products which have been identified by Customs as infringing, the suspect merchandise is usually allowed to enter the country. IIPA recommends greater cooperation between these two agencies to improve border enforcement, and to expedite the procedures by which Customs may make independent seizures of clearly infringing products. There were some steps taken in 2016 to improve collaboration between Customs, IMPI and PGR. A significant improvement would be for the Customs Code to be amended to grant Customs officers *ex officio* powers to independently conduct seizures of infringing goods and components.

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

IIPA continues to recommend cooperative efforts between U.S. and Mexican customs authorities, not only to prevent Mexican exports of pirated movies to the U.S. and Latin markets, but also to control blank media exports from Southeast Asia that pass through the U.S. to Mexico (to avoid Mexican taxes). In addition, IIPA recommends coordinated meetings on this issue with the PGR Intellectual Property inter-agency committee and U.S. rights holders (and the U.S. Embassy). Mexico should also fully implement the legislation that created a centralized customs registration database to assist with identification of infringing shipments. For such shipments via courier services, complaints of suspected infringing product must be filed with the local PGR office where the shipment is located. It would be more efficient to centralize this (e.g., by allowing notification at the PGR IPR office in Mexico City). Other needed improvements include: adopting procedures to address changes in the size and frequency of shipments and to deal with falsified documents; re-launching Customs’ inspection program and its program for seizing goods arriving at local ports, destined for other countries; adopting a maximum quota on blank media importations used for the pirate market; amending the law to provide for formal notification processes to rights holders; and developing a strategy to identify infringers who import their goods using falsified information. In addition, infringers and importers hide their true identities, so more scrutiny is needed.

The Customs authorities have continued their anti-piracy initiatives with the support of the local American Chamber of Commerce, participating in regular training programs (in conjunction with IMPI) for Mexican officials at various ports on intellectual property enforcement issues and the identification of various types of pirated product, and with regular meetings with industry members. The video game industry continues to report positive results from ongoing training efforts with Mexican Customs officials (and is willing to undertake additional training). These results include detention notifications and seizures of pirated video game product from diverse ports, in particular, Guadalajara and Monterrey. The industry notes that importers are now reducing the size of their shipments to avoid detection, making border enforcement even more critical, but more difficult. Despite these smaller sized shipments, the video game industry appreciates the cooperation and successes that they have received from border authorities in Mexico in seizing infringing products. For many years, there were improvements in the level of support from Customs in dealing with shipments of circumvention devices. In 2015, there was, however, a sharp decline. But in a positive sign, 2016 was much improved. In 2013, 2,718 game copiers (circumvention devices) were seized by Mexican Customs authorities; in 2014, 2,673 were seized; in 2015, only 100 of these circumvention devices were seized. In 2016, 1,615 items were seized. The motion picture industry reported 15,643 Customs actions in 2016.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Mexico is a member of the Berne Convention, the Geneva Phonograms Convention, and the WTO (TRIPS) Agreement. Mexico was a signatory and, in 2002, acceded to both of the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), although it did not publish its ratification of those treaties with the Agreed Statements.

Fifteen years after acceding to the WIPO Internet Treaties, Mexico has not fully implemented the treaties and its legal regime is missing several key elements required by the treaties and many other related provisions (such as, notice and takedown procedures). Some of the key missing elements are: (i) definitions and provisions on TPMs prohibiting acts of circumvention and the trafficking in tools, devices, components, or services that can be used to circumvent, along with civil and criminal remedies for violations (although some technological protections exist under current administrative sanctions (Art. 231(V)); (ii) definitions of rights management information (RMIs) and protections, and civil and administrative sanctions for the removal or alteration of RMIs; and (iv) clarification regarding the making available right for works (Art. 27), and enumerating the making available right for producers of phonograms (Art. 131).

One long-standing WTO TRIPS obligation that Mexico has not implemented is to adopt *ex parte* remedies, additional damages and especially injunctive relief, for civil IPR infringement cases.

Mexico is also, of course, a signatory to the North American Free Trade Agreement (NAFTA) and the obligations of the IPR Chapter (Chapter 17) in that trade agreement. The copyright law and enforcement obligations in the NAFTA were negotiated more than a quarter-century ago, and are thus outmoded. Re-opening NAFTA could provide an opportunity to update these obligations for the age of digital networked access to copyright materials as well as including other global copyright norms.

COPYRIGHT AND RELATED LAWS IN MEXICO

Federal Law on Copyright (1996, as amended): The 1996 Copyright Law was last amended in 2003 (with implementing regulations in 2005). Draft laws to implement the WIPO Internet Treaties have circulated for years, but have never been enacted. Some of the drafts that most recently circulated (in 2013) would have fallen far short of proper implementation on issues relating to technological protection measures, for example. The legal reform deficiencies and failure to implement treaty obligations are long-standing. It is hoped that 2017 will finally be the year of improvement for a long-standing list of deficiencies.

The list of legal reforms (some already noted above) include: (i) adding definitions and protection for TPMs, RMIs and appropriate civil and criminal sanctions; (ii) clarify the making available right for works in Article 27 of the Copyright Law, and clearly enumerating the right for producers of phonograms in Article 131 (it is currently part of the distribution right in Article 131(III)); (iii) criminalizing camcording (eliminating the required proof of commercial intent); (iv) raising civil penalties to deterrent levels—the current system does not include statutory damages (or “additional damages”) or the recovery of costs and attorney’s fees; (v) amending the Criminal Code to delete the “for profit” provisions and replace them with acts carried out for commercial advantage or financial gain or that result in substantial harm to rights holders; (vi) amending the Industrial Property Law to give IMPI authority to initiate actions against foreign websites that infringe copyright within Mexico; (vii) amending the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates; (viii) amending the Administrative Code, Tax Code and Criminal Code to (a) provide tax crime prosecution of copyright infringement (when it implicates tax liability) and (b) increase administrative sanctions; (ix) establish an effective and efficient system for notice and takedowns; (x) add sanctions for satellite and cable signal theft and against illicit streaming devices; and (xi) create presumptions of copyright ownership.

The Government of Mexico also needs to take administrative and regulatory steps to ensure that all relevant rights holders are entitled in law and practice to operate effectively through the collecting bodies of their choice in the licensing of broadcasting, public performance and other communications to the public.

In 2013, a new broadcasting and theatrical exhibition regulation went into force adding burdensome regulations for motion picture and television program producers. Separately, some legislators have periodically proposed the adoption of screen quotas, which if adopted, would severely limit the exhibition of U.S. films in Mexico. These would violate NAFTA and should be opposed.