

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be placed on the Priority Watch List in 2018.¹

Executive Summary: The Mexican legal regime for IPR protection is both antiquated and administered with weak enforcement, which is stifling the growth of the digital marketplace. The problems are two-fold: first, the IPR regime is insufficient to protect right holders or to provide adequate enforcement tools against online piracy (e.g. injunctive relief), and court procedures falling far short of international standards (e.g. presumptions of authorship and formalities). Second, the enforcement authorities do not have a coherent and coordinated plan to address online piracy, and, continue to focus on hard goods piracy. Improvements in the law and enforcement would benefit Mexican consumers of film, music, video games and books online. As in other countries, Mexican consumers have embraced the digital age at an exponential pace in the last decade, especially for streaming services for copyrighted materials.

The current IPR legal regime is at least two decades behind international norms. For example, Mexico has not fully implemented the 1996 digital copyright and neighboring rights treaties (which it ratified in 2002), much less adopted the full panoply of necessary legal provisions and procedures commonplace in most countries that allows a healthy marketplace to thrive. Protection against the circumvention of technological measures and rights management information—two key components of the digital treaties which allow streaming and on-demand services to function properly—are neither defined nor clearly protected under the Copyright Law of Mexico. Civil cases are expensive and difficult for rights holders to undertake, even against clear infringers, because there are no explicit provisions providing compensatory remuneration (e.g., pre-established or additional damages), making damages hard to prove and collect. Proving copyright ownership, a basic starting point of litigation, is also an obstacle in Mexican civil and criminal cases. Even when prosecutors are willing to commence criminal cases—a difficulty by itself due to a shortage of resources—success depends on proving a “direct economic benefit” by the infringers, instead of showing the harm caused by the infringement; this is a difficult hurdle to overcome. Additionally, injunctive relief is a problem because there are no procedures for preliminary injunctions in Mexican law (including *ex parte* preliminary injunctions). Last, although there are administrative provisions for taking down infringing material and web-blocking infringing sites, this remedy is now in limbo after the Supreme Court reversed an agency ruling blocking a clearly infringing site because the site also contained some legitimate content.

Basic tools for cooperation between rights holders and website owners and service providers are lacking. For example, there are no clear principles of third party liability for those inducing or promoting copyright infringement, which would incentivize Internet Service Providers (ISPs) to take preventive actions, and no mandated provisions for notice and takedown of infringing content and no penalties for non-compliance with such notices even when infringing content is identified. Meaningful reform of the Copyright Law (and related laws), especially on digital enforcement issues, has been long-stalled, including full implementation of the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), awaiting the conclusion of the Trans-Pacific Partnership Agreement (TPP). These reforms cannot wait any longer.

Although the copyright industries report continued good cooperation with some of the Mexican federal authorities in actions against hard copy piracy, there is frustration that enforcement actions and resources have not shifted, after two decades of digital piracy, to online enforcement. And, as with digital piracy, the hard goods

¹For more details on Mexico’s Special 301 history, see previous years’ reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Mexico’s Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



enforcement that is taking place does not target major distribution networks. Enforcement efforts against digital infringement has been further hampered by nationwide budget cuts in 2017 (as in recent years) in various agencies, including several IPR enforcement agencies. In 2015, the Government of Mexico created an IP crime sub-unit within the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI), to focus on improving digital enforcement. This was a positive step, but the sub-unit has not been properly staffed and resourced, and without a government-wide strategy against online enforcement, its work will not be effective. Another example is the Institute of Industrial Property (IMPI), the specialized agency for intellectual property, which is authorized to take administrative actions against infringers but is under-resourced and hampered by outdated procedural rules. 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. This would help in many regions of the country where state and municipal government anti-piracy efforts continue to be weak overall, including in local entities that rarely work on combating piracy at all.

Mexico is now the number two foreign source for unauthorized camcords (behind Russia) in the world, and the number one source in Latin America. In 2017, 81 American (MPAA-member) feature films were sourced from illicit camcords in Mexico—this is significantly more than the 40 films sourced from Mexico in 2015, and, down only slightly from 84 in 2016.

PRIORITY ACTIONS REQUESTED IN 2018

The copyright industries recommend the following to the Government of Mexico as priority enforcement steps and legal reforms for 2018:

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 including 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 Attorney General's Office (PGR); and, properly resource UEIDDAPI and its new sub-unit. The PGR also needs to improve its forensic standards for digital enforcement; and, mandated registration (as a practice, if not a legal requirement) for criminal cases needs to be eliminated.
- Ensure timely destruction of illegal goods seized in criminal and administrative actions to prevent their reentry into the market.

Administrative Enforcement

- Provide IMPI with: (i) *ex officio* authority to investigate infringement; (ii) additional resources and political directives to issue decisions more expeditiously, including actions to takedown and block infringing websites; and (iii) allow its regional officers to conduct local raids. Provide INDAUTOR (the National Author's Rights Institute) with more resources to increase and strengthen its mediation capabilities.
- Support the Coalition for the Legal Access to Culture (CLAC) initiative to spur active cooperation between Internet services and rights holders as a starting point to develop clear third party liability rules, proper injunctive relief, and incentives for 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); focus on prosecuting online service operators, repeat infringers, and 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. PGR also needs to improve

its forensic standards (especially for online piracy). Lastly, there needs to be increased prosecutorial training in IPR cases (with a focus on digital enforcement matters).

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 (“direct economic benefit”) requirement (and onerous authorization standards) as a prerequisite to criminal liability for large-scale copyright infringements; and, remove any such limitations on the making available right which is barred by the WIPO Internet Treaties.
 - (iv) granting customs inspectors *ex officio* powers to detain and seize infringing imports, and clarifying that PGR and Customs can and will act against so-called “goods in transit.”
- Enact an amendment to Article 189 of the Industrial Property Law allowing IMPI to notify defendants via e-mail for administrative IPR violations online. A bill is currently pending in the Congress to accomplish this change.
- 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 (making the act itself illegal).
- Enact legislation to provide clear rules establishing third party liability, including for parties contributing, inducing or promoting infringement of copyright and related rights.

COPYRIGHT PIRACY IN MEXICO

Online Market Outlook: In the past 15 years, Internet use in Mexico has risen steadily from 2.7% in 2000 to 45.1% in 2016, and it is estimated there were 69.9 million Internet users in 2017 (and, there has been an explosive growth of mobile phones and smartphones). The music industry reports (IPSO Connect Report 2017) in 2016, 66% of recorded music industry revenue in Mexico was from digital music services (24% from physical formats); unfortunately, the per capita spending on music in Mexico is only US\$1.10 per year (compared with US\$16.40 per capita in the U.S.). A 2015 study by the Mexican Institute of Competitiveness (IMCO) noted that in the last ten years, the copyright industries and distribution networks were responsible for close to 7% of the Mexican GDP.

According to a 2017 study conducted by CLAC, more than 37 million people consumed pirated music in Mexico in 2016.² So, instead of allowing legal services to grow, illegal services are flourishing in Mexico and harming other marketplaces in Latin America. There are a wide variety of popular pirate services available in Mexico including cyberlocker services, stream-ripping services, sites offering unauthorized downloading and streaming of music, film and videogames, 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. Although there are some local websites,

²See: http://docs.wixstatic.com/ugd/5b1d95_00c541f17c1f4af99e3fb21c5d1d90d9.pdf. The study included 1,200 nationwide interviews in order to get an accurate snapshot of the problem of Internet piracy in Mexico.

many of the infringing sites and services are hosted outside of Mexico (e.g., in Peru, Chile, Columbia and Argentina), but 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. For some video game companies, Mexico is now among the top countries for peer-to-peer sharing of infringing video game files, which has slowed the growth of the legitimate online marketplace in Mexico. Improving the legitimate marketplace, would improve the local economy.

The most widespread source of music piracy is stream-ripping (including music videos posted on YouTube and other similar platforms) as well as “linked” piracy MP3 search engines (indexes). Social networks (including Facebook and Twitter) have also been used to provide links to infringing content, a trend that has been increasing. These platforms are also very popular distribution channels for pre-release piracy. The Motion Picture Association (MPA) reports that subscription television piracy and the use of illicit streaming devices (ISDs) are a growing problem in Mexico. ISDs are media boxes, set-top boxes or other devices that allow users, through the use of illegal software applications (apps), to stream, download, or otherwise access unauthorized content from the Internet. The use of hardware devices, and software, to pirate television programming, including subscription streaming services, is getting more sophisticated and more ubiquitous. This includes the use of web browsers and video apps to allow playback of files of films and television programming. There are over 170 websites with film and television materials harming the Mexican market, including some with over 13,000 illegally reproduced titles. One site, *Pelis24.tv* (formerly, *Pelis24.com*), one of the world’s most popular pirate streaming Spanish-language sites for films and television programming, with a huge audience in Mexico, and another site (*Series24.tv*), were raided in September 2017 in Lima, Peru. There are no reports, yet, of a criminal case commencing against the site operators. 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 2017, Mexico ranked 15th overall in the world (down from 14th in 2016) in the number of connections by peers participating in unauthorized file sharing of video games on public P2P networks. Mexico ranked fifth (a decrease from 2016) in unauthorized file sharing using consoles, 12th using mobile devices (up from 14th in 2016), and 18th using PCs (a slight increase from 2016).

Hard goods piracy: Hard goods piracy continues in manufacturing and distribution networks on the street and at markets (even as digital piracy far eclipses hard copy piracy). In January 2018, as it has since 2012, the U.S. Government named two Mexican physical markets to its “Notorious Markets” list: (1) Mercado San Juan de Dios in Guadalajara which is the largest indoor market in Latin America with close to 3,000 vendors selling pirated films, music and videogames, and including videogame circumvention devices (sold by a majority of the market’s vendors); and (2) El Tepito in Mexico City, an open-air 80 square block market in the middle of Mexico City selling video games, modified consoles and game circumvention devices, and which, as the U.S. Government acknowledges, has become too dangerous for rights holders to enforce their rights.

The motion picture industry is also concerned about these street markets: Lomas Verdes, Juarez or Central Camionera, Toreo Subway Station (State of Mexico) and Salto del Agua and Toreo Markets (Federal District) because they are major 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.

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. Cheaper offerings are now available for “virtual chip” installation (an alternative version of soft mods) for 150 to 250 Pesos (US\$8 to US\$11) for installation services and pre-loaded games. 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. Even when infringing online listings are removed, sellers continue to relist their offerings with little deterrence.

Camcord piracy: As noted, Mexico is now the second largest foreign source of illegally recorded films, and the largest source in Latin America, with 81 MPAA-member feature films sourced from illicit camcords in Mexico in 2017. 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. A draft bill was introduced in October 2017 to amend Article 424 of the Criminal Code for camcording activities; unfortunately, it contains the “for profit” language found elsewhere in the code for IP criminal violations. One positive step (in 2016) was an agreement between rights holders and PGR to screen warning notices before exhibiting films in many 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 (ISDs) including media boxes, set-top boxes or other devices that allow users, through the use of illegal software applications (apps), to stream, download, or otherwise access unauthorized content from the Internet. These devices, are part of a sophisticated online ecosystem facilitating access to pirated audiovisual materials; they are promoted or advertised as facilitating easy access to remote online sources of unauthorized entertainment content, using the ISDs with these apps. The devices are imported into Mexico either pre-loaded with the apps (prior to shipment, by vendors prior to sale, or as an after-sale service), or users can easily obtain the apps themselves to access infringing content. 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 signals 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, and for activities involving the sale or distribution of ISDs. One focus of the Government of Mexico should be enforcement actions against vendors and illegal channels.

COPYRIGHT ENFORCEMENT IN MEXICO

As highlighted, Mexico does not have a centralized coordinator for copyright enforcement, nor any coherent plan of action. At present, three federal agencies are engaged 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 (and can conduct mediation proceedings for aggrieved rights holders). In addition to these federal-level agencies, the Scientific Police (part of the Federal Police) of the Secretary of the Interior (*Secretaria de Gobernacion*) have also assisted rights holders by providing information on illegal software websites (and have also moved to seize domain names of infringing sites.) In 2016, the Scientific Police ordered the Network Information

Centre Mexico (NIC.mx), the agency responsible for the .mx top level domain registry, to suspend the domain *kickass.mx*, a popular mirror site for *kickassstorrents (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 with plans to address digital piracy.

Criminal Enforcement

In the past few years, Mexico has been transitioning to a more adversarial justice system, with judges undergoing training to improve the adjudication of 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. 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). Yet, in spite of better cooperation with rights holders, IPR prosecution at PGR has been hampered because it is not a priority, and PGR suffers from outdated procedures, insufficient resources, inadequate training of new agents, 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, but some industries are reporting improvements, especially by the PGR. A formal coordination process between the government agencies (PGR, the Mexican Tax Administration (SAT), IMPI, and local police forces) is needed to improve the government's ability to efficiently address the distribution of infringing content. In 2017, PGR commenced a criminal enforcement operation against an illegal streaming website (*peliculasmas.com*) offering thousands of movies and television programs; this is one of the first such activities against a streaming service.

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*); this is done as a general practice even though the law does not explicitly require it. 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 and the *peritos* have in the past been reluctant to cooperate with investigations and prosecutions. Additionally, the law should recognize and apply a clear presumption of ownership in civil (and criminal and administrative) matters, and without the need for a mandated registration. In practice, copyright registration certificates are required by Mexican prosecutors to commence criminal cases.

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. Hard copy piracy (for example, at the well-known street markets, labs and distribution centers) is still a concern, but only for some of the copyright industries; digital piracy is now the priority for all of the industries and should be the focus of enforcement priorities. Five years ago, a national IPR enforcement plan was publicly released, and although meetings were held with stakeholders, the plan has never been fully implemented. It needs to be updated and implemented, and preferably given one central authority to direct enforcement. Criminal enforcement needs to be undertaken with a coordinated plan among PGR, SAT, IMPI, Federal Bureau of Consumer Interests (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.

A second recommendation is to significantly improve the PGR's criminal enforcement actions, especially outside of the main cities, and especially aimed at digital piracy activities. 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 UEIDAPI (in PGR) needs resources and training (focused on technology) to properly undertake and to focus on criminal investigations on digital piracy. It was formed initially with five public prosecutors from within the PGR which pledged to fully staff the

UEIDDAPI sub-unit, but other key IPR enforcement units in the PGR and the police are understaffed. In 2017, UEIDDAPI filed 578 investigations for copyright-related crimes. 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 Office of Attorney General for Federal Crime Investigation (SEIDF), which established the UEIDDAPI to work effectively with industries. It has achieved significant results in some key markets. However, this unit is under-resourced and thus unable 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.

A third recommendation is to coordinate municipal, state, and federal government criminal enforcement actions. Of Mexico's 32 states (consisting of 2,400 municipal governments), only five of the 32 state governments regularly cooperate on IPR enforcement—the State of Mexico, the Federal District, Jalisco, Queretaro and Puebla. Otherwise, the states and municipalities have ignored copyright offenses in their jurisdictions.

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, 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); 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. Since 2013, the Copyright Law has allowed 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 (e.g., additional or pre-established 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: Beginning in 2014, IMPI used its administrative authority to take down an infringing website (*ba-k.com*) and issued an order to block access to the site. A monetary fine was imposed against the website administrator, and the website removed the infringing material. A court later upheld IMPI's action and authority. In 2015, IMPI again used its authority this time 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). But the action by IMPI against *mymusic.com* triggered a court case when two ISPs failed to comply with the IMPI order. The court lifted the web-blocking order against *mymusic.com*, and this ruling was upheld by the Supreme Court on the basis that it was disproportionate because the site had some non-infringing material. Rights holders are now working with IMPI and the courts to refine the ruling in that case, and to clarify IMPI's authority to takedown material and block access against sites if a majority of the content on a site is unauthorized. One other limiting factor is that IMPI can only act against an operator with a physical address in Mexico. While the cases and IMPI authority have been sorting out, there have been no other instances for the past two years of IMPI acting to block access to infringing websites. However, with improved inspection practices, some industries report IMPI has taken other actions against online sites, issuing injunctions and imposing fines.

One legislative reform (that resulted from the CLAC) would improve enforcement by IMPI and is pending in the Mexican Congress. The draft bill would amend Article 189 of the Industrial Property Law to permit IMPI to notify defendants via e-mail in cases where IPR violations are committed via an electronic network; it is supported by the copyright industries. Currently, the remedy is of limited use because civil and administrative procedures require site operators to be notified by writ sent to a physical address (which pirate services do not disclose). This antiquated procedure needs to be corrected.

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. The recording industry reports that INDAUTOR has been helpful with its mediation procedures (known as *juntas de avenencia*) allowing music producers (via their collecting societies) to meet with users. INDAUTOR also is responsible for supervising the collecting societies in Mexico. In 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). Unfortunately, the Government of Mexico has also been very slow to create incentives to promote cooperation between rights holders and ISPs. It has been almost ten years since 37 civil organizations representing copyright industries and other rights holders, and collecting societies, formally established the 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 that include notice and takedown, third party liability, 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.

Instead, at present, 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 services completely deny liability. Some IIPA members report cooperation for hosted content takedowns (as well as with the local domain name registry), 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 should not be a substitute to avoid direct liability).

In addition, 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.

Online criminal enforcement faces many obstacles. For example, 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. One such example has been the *demonoid.me* case against a BitTorrent operator that has been long-stalled; and, there are 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 2017 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. Unfortunately, the government proposals offered in recent years for a "notice and notices" system would have instituted a weak notification system to infringers. Additionally, as noted, IMPI claims to only have authority to address local websites (when their administrators or owners are located in Mexico), limiting its 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. 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. IIPA also 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 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.

Customs officials seized 1,615 items in 2016; in 2017, in 81 separate seizures, over 17,000 infringing game consoles were seized. Eight of the importers were "repeat" importers, attempting multiple shipments of infringing (Nintendo) products into Mexico. One such importer attempted 14 separate shipments. One challenge for rights holders to pursue recidivists is the false information provided to Customs by these importers (a red flag for enforcement officials are repeated amendments to importation documents). IIPA urges prosecutors to target recidivist importers, and to work with Customs officials on these cases. Customs chain-of-custody procedures is another hurdle, especially for criminal enforcement. Under existing procedures, Customs officials first alert rights holders to alleged infringing shipments. Upon confirmation of infringing material, prosecutors then order the police to inspect the packages. However, police and prosecutors have been reluctant to commence criminal cases because the packages were previously opened by Customs officials and not (as the PGR office responsible for the Mexico City International Airport requires) in the presence of police witnessing the opening of (each) package. This interpretation that the chain of custody is "broken" has forced rights holders in the video game industry to appeal decisions (incurring additional legal expenses) that terminated cases and investigations. The solution is for the PGR to develop a clear unified rule on chain of custody procedures that shifts the burden to the prosecutor to prove that evidence was altered.

Hard Copy Enforcement

To properly conduct enforcement against hard copy piracy for the motion picture and video game industries, IIPA and the U.S. Government agree that procedures regarding expert reports need to change, customs officials need the proper authority to commence cases, and most importantly, the Mexican authorities need to coordinate their enforcement directed against high-level targets in the distribution chain. Such efforts should also make use of the forfeiture law, under which landlords aware of criminal activity on property they own, must either stop the activity, notify the authorities, or face liability.

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 the WCT and the WPPT, although it did not publish its ratification of those treaties with the Agreed Statements.

Over 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 (Article 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 (Article 27), and enumerating the making available right for producers of phonograms (Article 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. TRIPS (Article 61) also requires that there be effective criminal remedies, including “imprisonment and/or monetary fines,” available in cases of “willful ...copyright piracy on a commercial scale.” The remedies in Mexico for commercial scale piracy have not been effective, and are hampered by procedural hurdles (proof of ownership and “for profit” motives).

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. The renegotiation of NAFTA, should it conclude, provides an opportunity to update and improve these obligations for the age of digital networked access to copyright materials (i.e., digital trade issues), as well as including other global copyright norms for protection and enforcement.

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 circulated (the most recent 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 2018 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 as well as appropriate civil and criminal sanctions; (ii) clarify the making available right for works in Article 27 of the Copyright Law (for producers of phonograms it is 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” (direct 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 strong incentives for the operation of effective and efficient notices and takedowns; (x) add sanctions for satellite and cable signal theft and against illicit streaming devices; and (xi) create presumptions of copyright ownership in civil, administrative and criminal cases (instead of the current practice of requiring certified copies of copyright registrations). There are also provisions in the Copyright Act in Articles 150 (transmissions of works) and 151 (neighboring rights) that provide exceptions to infringement for certain public performances where: a retransmission is not “for profit-making purposes” (Article 150) and “no direct economic benefit is sought” (Article 151). These exceptions are too broad exceeding what treaties permit, and should either be severely restricted or eliminated.

In addition, adding clear third party liability is needed to provide an effective incentive for neutral ISPs (and others hosting or providing digital services) to meaningfully cooperate with rights holders to deter the unauthorized storage, transmission or making available of copyrighted materials. This can be accomplished by limiting monetary damages relief for qualified third parties, and only if they comply with pre-conditions for cooperation (e.g., measures to address repeat infringements), and are neither controlling, initiating, inducing or directly infringing copyrighted material. Providing proper injunctive relief can prevent the dissemination of illegal copies (including those made available prior to legitimate release), and is a crucial element of an effective digital enforcement scheme.

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. There were two such troubling bills introduced in the Congress in 2017 to: (1) introduce a 20% screen quota for non-Mexican films; and (2) revise the VAT tax effectively lowering theater ticket prices for local (Mexican) films, discriminating against U.S. and other foreign titles.