

MEXICO

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Mexico be placed on the Priority Watch List in 2020.¹

Executive Summary: The growth of the digital marketplace in Mexico has been severely hampered by an IPR legal framework that is decades behind international norms and cannot properly address online infringement by sites and services. Criminal enforcement activity has been uncoordinated and generally weak, slowed by procedural and structural deficiencies, as well as by a lack of adequate resources. Although it ratified the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) in 2002, Mexico has yet to fully implement these treaties. The obligations in the U.S.–Mexico–Canada Agreement (USMCA) will also require Mexico to make significant improvements in its current IPR regime, including protections against the circumvention of technological protection measures (TPMs) and for rights management information (RMI)—two key components of the Internet Treaties that gave rise to new content delivery models such as streaming and on-demand services. These and other legal reforms to modernize the Mexican legal regime for the digital marketplace (detailed below) are long overdue.

Criminal and civil copyright cases face numerous obstacles not found in other countries. Success in a criminal case depends on proving a “direct economic benefit” to the infringer, instead of focusing on the harm caused to a rights holder by infringement. This is a difficult hurdle to overcome for a prosecutor willing to commence a criminal case in a country already short on resources for such cases. Civil cases are expensive and difficult for rights holders to undertake, and are slowed by procedural hurdles. The IPR legal regime is missing basic tools to address online infringements and to spur cooperation between rights holders and website owners and service providers. For example, there are currently no clear principles of third party liability for those inducing or promoting copyright infringement, which are necessary to incentivize Internet Service Providers (ISPs) to take preventive actions. There are currently no mandated provisions for notice and takedown of infringing content, and no penalties for non-compliance with such notices even where infringing content is clearly identified.

PRIORITY ACTIONS REQUESTED IN 2020

The copyright industries recommend the following to the Government of Mexico as priority legal reform and enforcement steps for 2020:

Legal Reforms

- Fully modernize laws, including by implementing the USMCA and other treaty obligations—in the Copyright Law, and in the Industrial Property, Criminal, and Criminal Procedure Codes by:
 - (i) removing the proof-of-profit (“direct economic benefit”) requirement as a prerequisite to criminal liability; adding aiding and abetting criminal provisions; removing the for profit limitation on the making available right, and clearly including a violation of making available in the Criminal Code;
 - (ii) adopting definitions and provisions on TPMs, as well as civil and criminal penalties, with criminal sanctions for the importation and distribution of devices used for the unauthorized circumvention of TPMs. This should include sanctions for “acts” as well as the distribution, marketing or trafficking in anti-circumvention devices, components and services;

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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



- (iii) adopting definitions and sanctions for rights management information (RMI);
 - (iv) granting customs inspectors *ex officio* powers to detain and seize infringing imports, and clarifying that the Attorney General's Office (FGR) and Customs can and will act against so-called "goods in transit";
 - (v) enacting legislation to impose criminal penalties for the unauthorized camcording of films in theaters, and eliminate any required proof of commercial intent—making the act itself illegal. The law should mandate a prison term of three to ten years, and fines;
 - (vi) enacting provisions to properly address cable and satellite signal theft;
 - (vii) enacting legislation to provide clear modern rules establishing third party liability for copyright infringement, including for parties contributing, inducing or promoting infringement of copyright and related rights, along with proper injunctive relief and incentives for efficient and effective notice and takedown systems with ISPs, and including repeat infringer measures.
- Enact an amendment to Article 189 of the Industrial Property Law to allow the Institute of Industrial Property, (IMPI) to notify defendants via e-mail or any other digital mean, for administrative IPR violations online.

Criminal Actions, Raids and Prosecutions

- Fully implement the USCMA enforcement obligations by:
 - (i) implementing a strategic national *ex officio* anti-piracy campaign with a consistent focus on major targets emphasizing coordination of the police and prosecutorial resources;
 - (ii) improving the FGR forensic standards for digital enforcement and eliminating the required experts and mandated registrations (as a practice, if not a legal requirement) for criminal cases;
 - (iii) addressing the importation of circumvention devices used in video games that are entering Mexico in small consignments and via courier packages;
 - (iv) ensuring timely destruction of illegal goods seized in criminal and administrative actions to prevent their reentry into the market.

Administrative Enforcement

- Fully implement the USCMA enforcement obligations by:
 - (i) providing IMPI with: (1) resources and political directives to apply its *ex officio* powers to investigate online infringements and inspections of infringing websites; (2) additional resources for the takedown of infringing materials; and (3) the ability for regional officers to conduct local raids. Also IMPI should improve coordination with the Federal Police so that IMPI can take enforcement actions in difficult or risky areas with police security;
 - (ii) providing 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.

Prosecutions, Judges and Courts

- Encourage prosecutors to take *ex officio* actions against online piracy and hard copy piracy; focusing on online service operators, and seeking deterrent sentences, including jail time and fines;
- Investigate and prosecute IPR infringement cases absent proof of actual lost profits.

THE COPYRIGHT MARKETPLACE IN MEXICO

In the past two decades, there has been an explosive growth of online access in Mexico, including by the use of mobile phones and smartphones. For example, a 2019 IFPI study revealed that 95% of consumers surveyed used their smartphones to listen to music (during a three-month period), and that they listened to an average of 25.6 hours of music per week in Mexico. Although online markets have steadily developed, healthier growth has been hindered by weak enforcement, as well as by outdated copyright and related laws. Competing with the legitimate

digital markets are a wide variety of popular pirate services in Mexico, including 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, BitTorrent index sites, and online markets offering video game-related digital goods, including usernames, passwords and user account information. Although there are some local websites, many of the infringing sites and services are hosted outside of Mexico (e.g., in Peru, Europe, Russia, and Ukraine, among others), but are routinely accessed by individuals in Mexico.

For some video game companies, Mexico is now among the top countries for peer-to-peer (P2P) sharing of infringing video game files and in-game digital goods, which has slowed the growth of the legitimate online marketplace in Mexico. In addition, illegal sales of subscriptions, as well as account usernames and passwords, is rampant for video games. For recorded music, the vast majority of legitimate revenue in Mexico is from digital music services, including subscription services. Although music industry revenue continues to increase, the per capita spending on music in Mexico is only US\$1.18 per year, compared with US\$20.26 per capita in the U.S. per the IFPI Music Listening Report 2019. At the same time that music streaming services are developing, 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, and these platforms are especially popular distribution channels for pre-release piracy.

A major concern to the growth of healthy legal markets is the increased availability of piracy devices (i.e., illicit streaming devices (ISDs)) and applications (apps), including media boxes, set-top boxes or other devices that allow users, in combination with illegal software apps, to stream, download, or otherwise access unauthorized content from the Internet. The Motion Picture Association (MPA) reports that subscription television piracy and the use of ISDs are the two fastest growing problems in Mexico. The use of hardware devices, and software, to pirate television programming, including subscription streaming services, is sophisticated and ubiquitous, with these devices widely available in Mexican grey markets. This includes the use of web browsers and video apps to allow playback of films and television programming. These devices are part of a sophisticated online ecosystem facilitating access to pirated audiovisual materials; they are advertised as facilitating easy access to remote online sources of unauthorized entertainment content. The devices are imported into Mexico either pre-loaded with the apps, as an after-sale service, or users can easily obtain the apps themselves to access infringing content. Enforcement authorities should take criminal actions against these vendors and the operators of the infringing apps used on these devices.

There are over 200 websites with film and television materials harming the Mexican market, including some with over 13,000 illegally reproduced titles. One site, *pelisplus.co*, has tens of thousands of links to illegal film and television titles. These illegal sites are some of the regions’ most popular for streaming Spanish-language films and television programs, with a huge audience in Mexico. 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 2019, Mexico ranked 14th overall in the world (down from 11th in 2018) in the number of connections by peers participating in unauthorized file sharing of video games on public P2P networks. Mexico ranked fourth (down from third in 2018) in unauthorized file-sharing of console-based games, 14th for video games on mobile devices (down from 11th in 2018), and 20th using PCs (down from 14th in 2018).

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 online infringement of entertainment software in Mexico. Circumvention is accomplished by installing “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 that are then assembled in Mexico. In 2019, the video game industry reported few (for some companies no) seizures at the

border, but there are plenty of online markets selling these devices. Vendors and online marketplaces such as Mercado Libre, sell circumvention devices 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\$13) 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—the USMCA obligates Mexico to correct this deficiency. Sellers merely relist their offerings with little deterrence after infringing online listings are removed.

Hard goods piracy: Although stemming digital piracy is the priority of the copyright industries, hard goods piracy continues on the street and at markets. Two physical markets remain on the U.S. Government’s Notorious Markets list (as they have every year since 2012): (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 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, a place which has become, as the U.S. Government acknowledges, too dangerous for rights holders to enforce their rights. In 2019, FGR successfully raided a facility in Jalisco that was part of a larger illegal network (FasterFTP); FGR also disrupted camcording activities in theaters in Mexico City and in Puebla. The Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI), within the FGR, raided another camcording operation in Puebla, seizing illegal film materials, as well as drugs and firearms.

Camcord piracy: To date, overall criminal enforcement against camcording has been ineffective because of a weak law (and one that is rarely applied). The few criminal convictions that have been successful in recent years were the result of prosecutions based on an array of crimes other than camcording. Under the flawed current law, a successful criminal prosecution of a camcorder 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, significant economic 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. The USMCA requires Mexico to correct its law. Implementation of this USMCA obligation should be done properly (which would not require a finding of a “for profit” motive to commence a criminal case). The number of MPA member films sourced from illicit camcords in Mexican theaters fell to 22 in 2019, down from 98 in 2018. This decline is in part due to rights holder activities with law enforcement and exhibitors to target some of the more active release groups. But, new laws and better enforcement is needed to properly address this problem.

Satellite and Cable Issues: Satellite and signal piracy remain a major concern in Mexico. 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. In accordance with the USMCA (Article 20.86), Mexico needs to amend its laws to provide civil and criminal remedies for cable piracy, as well as satellite piracy. Additionally, Mexico needs to amend its Criminal Code to eliminate the “for profit” requirement for acts of decryption of satellite, include cable systems in the decryption laws, and amend its Copyright Law to apply clear protection for both cable and satellite dissemination.

COPYRIGHT ENFORCEMENT IN MEXICO

Budget cuts in recent years, including in several key IPR enforcement agencies (e.g., IMPI), have led to reductions or curtailments in effective enforcement activities. There continues to be no coherent or coordinated plan to address online piracy, as hard goods piracy still appears to be the primary focus of enforcement officials. One long-recommended enforcement step is the development and adoption of a high-level national anti-piracy plan to

target major online piracy and counterfeiting operations, 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. Instead of a centralized coordinator for copyright enforcement, there are three federal agencies engaged in copyright enforcement in Mexico. The FGR (formerly, the PGR) is responsible for federal criminal enforcement. The Mexican IMPI takes administrative actions under the Industrial Property and Copyright Law. INDAUTOR 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 seized domain names of infringing sites). In the past, an inter-agency committee (COIDAPI) periodically prepared strategic national enforcement plans, but that process was replaced by informal discussions between various IP enforcement agencies and rights holders.

Criminal Enforcement

Since Mexico transitioned to an adversarial justice system, criminal copyright cases are no longer prosecuted *ex officio*, but only upon the filing of a complaint against an infringer. This has resulted in prosecutorial delays of IP related crimes, including at FGR. Good cooperation continues to exist between rights holders and IMPI and FGR, as well as with the Mexican Tax Administration (SAT); some industries also report improved cooperation with INDAUTOR. However FGR prosecution continues to suffer from outdated procedures, insufficient resources, long delays (years) for cases to resolve, and the lack of deterrent sentences. The formation of the new government late in 2018 required the re-appointment of all FGR prosecutors and department heads, which further stalled progress.

A complicating element in combatting video game, music, and motion picture piracy in Mexico is the cumbersome requirement (by FGR) that each copy of an infringing product 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, music, or film, rights holders must submit an equal number of legitimate game, music, and film DVD copies to the experts for comparison. The *peritos*' reports take much too long to complete and the *peritos* are insufficiently trained in digital issues and often reluctant to cooperate with investigations and prosecutions. Per the USMCA, the Mexican laws need to be amended to provide clear presumptions of ownership in civil, criminal and administrative matters, based on the copyright notice appearing on the work, or on a screen, and, without the need for a mandatory and certified registration (a current requirement to commence a criminal case).

One major obstacle to effective criminal enforcement is that file sharing via online networks is generally not considered a serious legal violation by Mexican courts. As noted, Article 424*bis* of the Criminal Code requires a profit motive as a prerequisite for criminal infringement which has thwarted effective prosecutions in Internet file sharing cases. There were no new Internet piracy criminal cases to report in 2019.

Structural reforms and jurisdictional issues: IIPA continues to recommend several detailed “structural” reforms and agency actions to improve criminal enforcement.² An overarching priority is to implement a national *ex officio* anti-piracy campaign. Such an effort would seek to coordinate the various police agencies to identify and target individuals responsible for large-scale distribution and importation of pirated goods, including major organized crime syndicates. The priority should be criminal enforcement directed against digital piracy. Criminal enforcement needs to be undertaken with a coordinated plan among FGR, SAT, IMPI, Federal Bureau of Consumer Interests (PROFECO) and the Federal Police. SAT remains engaged with FGR in support of enforcement actions related to audiovisual and music piracy, especially in cases of suspected money laundering or tax evasion.

²See <https://iipa.org/files/uploads/2019/02/2019SPEC301MEXICO.pdf> at pp. 46-47.

Another recommendation is for FGR to significantly improve its criminal enforcement actions against digital piracy. UEIDDAPI needs resources and training focused on technology to properly undertake criminal investigations directed against digital piracy. Until 2016, there was a specialized IP enforcement sub-unit within UEIDDAPI; the sub-unit was disbanded. The Government of Mexico needs to properly staff and resource UEIDDAPI to address IP cybercrimes, as well as staffing other key IPR enforcement units in FGR and the police. FGR can still take *ex officio* actions, but criminal cases need a complaint to be filed by a rights holder to commence a case. As with other IP enforcement government entities, IMPI, the specialized agency for intellectual property authorized to take administrative actions against infringers, is also severely under-resourced; it is also hampered by outdated procedural rules.

FGR has a special deputy attorney general department to focus on organized crime syndicates—the Office of Attorney General for Federal Crime Investigation (SEIDF)—which also created UEIDDAPI, but this unit is under-resourced. There is also a FGR Organized Crime Investigative Division (FGR-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 FGR-SIEDO and FGR-SEIDF, as well as additional resources and training.

A third structural 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 state governments regularly cooperate on IPR enforcement—the State of Mexico, the Federal District, Jalisco, Queretaro and Puebla. A fourth recommendation is for enforcement agencies to 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 FGR enforcement raids continue to find their way back into the black market. A fifth recommendation is for PROFECO to use its *ex officio* powers for consumer protection to stop street market piracy, and to resource it properly.

IPR expertise in the Judiciary: A continuing weak spot in Mexican IPR criminal enforcement is the judiciary. There is an ongoing need for training to improve IPR expertise by judges—especially training on technology, digital distribution and piracy, and the use of circumvention technologies. Other weaknesses include the absence of specialized IP judges and courts, and non-deterrent sentencing in most criminal cases where sentences are rare. Mexico should consider mandatory sentencing regulations for criminal copyright cases, or have the Supreme Court issue 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 search warrant applications. Additionally, Mexico should provide sufficient resources for the IP magistrates within the Tax Court, and consider creating specialized IP administrative circuit courts.

Civil Enforcement

One of the biggest obstacles to effective online civil enforcement is the absence of secondary liability for copyright infringement for ISPs and similar parties in the Civil Code. The USMCA (Article 20.88) requires Mexico to implement “legal incentives for Internet Service Providers to cooperate with copyright owners to deter the unauthorized storage and transmission of infringing materials or, in the alternative, to take other action to deter the unauthorized storage and transmission of copyrighted materials.” ISPs need encouragement to meaningfully cooperate with rights holders to deter the unauthorized storage, transmission or making available of copyrighted materials. This can be done by limiting monetary damages for qualified third parties, but only if they comply with pre-conditions for cooperation (e.g., measures to address repeat infringements), and they are neither controlling, initiating, inducing nor directly infringing copyrighted material.

The USMCA (Article 20.88) also requires “Internet Service Providers to expeditiously remove or disable access to material residing on their networks or systems upon obtaining actual knowledge of the copyright infringement or becoming aware of facts or circumstances from which the infringement is apparent, such as through receiving a notice.” The Mexican law, when amended to comply with the USMCA to provide for such steps, should

require an immediate takedown, without burdensome documentation requirements, and not only when an ISP receives notice of infringement, but upon actual knowledge of the infringement or when the ISP is aware of facts or circumstances from which infringement is apparent (so-called “red flag” knowledge). The USMCA obligations will prohibit the Government of Mexico from re-visiting past proposals to adopt “notice and notice” procedures, in lieu of more effective remedies. It has been over a decade 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 online (and physical) piracy, including promoting cooperation between rights holders and ISPs. The CLAC initiatives are still a valuable forum for proposed improvements, including notice and takedown, third party liability, 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 continue to oppose these cooperative efforts. Article 20.88 should be implemented in Mexico to ensure the eligibility of safe harbors is available only to technical, automatic and passive services, and should include measures that have been demonstrated to be effective in preventing or restraining infringement, including among other things, disabling access to the specific location identified by the rights holder infringing content.

Absent these changes in law, ISPs are currently 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. While some IIPA members report cooperation for hosted content takedowns (as well as with the local domain name registry), more broadly, there is little or no cooperation with many local ISPs. Other participants in the ecosystem, such as payment processors and advertising networks, should also be encouraged by effective laws to cut off the economic sources of support for piratical websites and services. In general, the current 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. ISP contractual practices thus compound the difficulties of obtaining access to information necessary for seeking civil remedies. 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 necessary.

In general, Mexico’s three-tiered civil procedure system makes civil litigation very complicated, time consuming and costly for rights holders, even against obvious infringers. The Copyright Law allows rights holders to seek damages in civil courts even before an administrative infringement decision is issued (or becomes final), but the law does not provide statutory damages (e.g., additional or pre-established damages). Rights holders can seek 40% of the gross sales revenues from infringing products as damage awards. The USMCA provides for pre-established damages, but unfortunately, as a permissive rather than a mandatory obligation of the agreement. There are other problematic procedural formalities to commencing cases in Mexico, for example, burdensome steps to prove copyright ownership in lieu of presumptions of ownership—the USCMA mandates such presumptions. Mexican law grants full validity to electronic documents and discovery, although some judges are unfamiliar with these rules. The Civil Code also provides *ex parte* measures to avoid the destruction of evidence, but these provisions have never been fully implemented.

In 2018, one positive legal reform was the adoption of an amendment to the Copyright Law of Mexico (amending Articles 213 and 215) to provide for preliminary injunctions (“precautionary measures”) in civil cases. This remedy is especially useful to address pre-release piracy. The 2018 amendment also permitted *ex parte* preliminary injunctions, provided rights holders give infringers 72 hours’ written notice before the order goes into effect.

Administrative Enforcement

IMPI: Once granted the administrative authority (in 2013), IMPI took its first action to take down an infringing website, 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 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). But, that action by IMPI 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 the Supreme Court later upheld that ruling, calling IMPI's actions disproportionate to the infringing harm, because the site contained some non-infringing material (a blog), and the copyright ownership of all of the material on the site was not confirmed. A further limiting factor, even if the case is eventually overturned, is that IMPI can only act against an operator with a physical address in Mexico. With improved inspection practices, some industries report IMPI has taken other actions against online sites, issuing injunctions and imposing fines. Rights holders can alternatively initiate an administrative proceeding before IMPI, or bring a court case for civil damages, or request an injunction.

While the two major telecom (ISP) companies generally do not cooperate, a few smaller ISPs do respond to IMPI orders. IMPI has also been working with ISPs and rights holders to consider "cooperative models" for fast and efficient disabling of infringing websites. But, 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. One legislative proposal (an amendment to Article 189 of the Industrial Property Law) would permit IMPI to notify defendants located in Mexico or abroad, 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. In the first half of 2019, IMPI reported 3,440 administrative actions, mostly taken against individuals (not websites), including both copyright and trademark actions. In 2019, IMPI also approved the destruction of almost 5.1 million pirated works, the largest in a single year.

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 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. Since 2015, INDAUTOR has been funded and housed within the Ministry of Culture, which was created to oversee cultural policy and funding (prior to that INDAUTOR was housed in the Ministry of Education).

Border Enforcement

Although the Customs Code was amended in 2018, the changes did not provide the necessary *ex officio* authority for Customs officials to conduct independent seizures of infringing goods and components. Under the current Code, it is unclear what authority Customs officials have to seize and retain infringing materials. There remain formal and onerous requirements to initiate border actions in Mexico. For example, absent an official order from IMPI, Customs authorities will not seize infringing product entering the country, or detain it for more than a few hours, even where the material is clearly infringing. Because IMPI does not issue expedited authorizations to seize products identified by Customs as infringing, suspect merchandise is usually allowed to enter Mexico. 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.

The video game industry reports that in 2019, there were 95 seizures by Customs authorities, including the confiscation of over 39,000 infringing video game products. Most of the seized material was game consoles with hundreds of pre-loaded and infringing copies of legacy video games. Cooperation with Customs is good, but there

are many repeat importers of infringing materials who are not prosecuted (in 2019, there were nine such instances). Without criminal prosecutions or other severe penalties, there are no deterrents for these parties to cease these practices; instead, shipment interdictions are treated as a cost of doing business for infringers. The video game industry also reports that importers are reducing the size of their shipments to avoid detection, making border enforcement even more critical, but more difficult. Even though there has been extensive training and good cooperation in the past, at least one major company reported no seizures of circumvention devices by Customs in 2019. This demonstrates that these devices are entering Mexico through small consignments. The Specialized IP Unit in Customs retains criteria that deters inspections of courier packages even though there is evidence of substantial infringement by these packages and in small consignments. The industry reports that small-quantity seizures are being dropped by prosecutors for a lack of tariff classification (which treats the material as never having been imported), requiring an appeal and additional expenses by rights holders.

Over a decade ago, FGR 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, FGR halted its seizure of in-transit containers, claiming a lack of authority, and it never implemented a new “protocol” between FGR 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 FGR, SAT, and rights holders have resulted in a few seizures of illegal imported raw material.

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 FGR 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, as in the case of the tariff classification problems. FGR should instead develop a clear unified rule on chain of custody procedures that shifts the burden to the prosecutor to prove that evidence was altered.

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. It is also a signatory to the USMCA along with the United States and Canada. As noted, there are many WIPO Internet Treaties, and now USMCA obligations, that Mexico must implement once that treaty is fully ratified (and that cannot await the four-year implementation period).

One missing WTO TRIPS enforcement obligation that Mexico should address is the requirement in TRIPS (Article 61) 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 the procedural hurdles already noted regarding proof of ownership and the “for profit” motive.

COPYRIGHT AND RELATED LAWS IN MEXICO

Federal Law on Copyright (1996, as amended): The 1996 Copyright Law is in need of significant revision. It was amended in 2018 with the addition of preliminary injunctive relief, and before that, 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, and the circulated drafts (most recently in 2013) fell far short of proper implementation. It is hoped that USMCA implementation, which would include implementation of the Internet Treaties, will proceed in 2020. Draft laws for USMCA implementation are currently being prepared by INDAUTOR along with the Ministry of Economy for submission to Congress.

The full list of legal reforms (many already noted above) include: (i) adding definitions and protection for TPMs, RMI as well as appropriate civil and criminal sanctions—including closing the loophole for circumvention devices to cover the making or distribution of such devices (i.e., manufacturing, importing, selling, trafficking etc.); (ii) establishing third party liability and strong incentives for the operation of effective and efficient takedown notices, and remedies against repeat infringers; (iii) confirming (i.e., clarifying by separately enumerating) the making available right for works in Article 27 and 131 of the Copyright Law; (iv) criminalizing camcording (and eliminating the required proof of commercial intent); (v) raising civil penalties to deterrent levels—and including statutory damages (or “additional damages”) or the recovery of costs and attorney’s fees; (vi) 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”; (vii) amending the Industrial Property Law to give IMPI authority to initiate actions against foreign websites that infringe copyright within Mexico; (viii) amending the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates; (ix) 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; (x) adding sanctions for satellite and cable signal theft and against illicit streaming devices; and (xi) creating presumptions of copyright ownership in civil, administrative and criminal cases.

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. One positive note in 2019 was a Supreme Court case holding a hotel in violation of the right of public communication where hotel guests accessed copyrighted materials in their rooms via a hotel streaming service. In addition, 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.

MARKET ACCESS ISSUES

In 2013, a new broadcasting and theatrical exhibition regulation went into force adding burdensome regulations for motion picture and television program producers. In 2014, a new law imposed advertising limits on pay-TV channels. The advertising law was aimed to promote domestically-made programming through a combination of financial incentives and restrictions on advertisements on pay-TV channels (since the majority of these are operated by foreign companies). The law allows a free-to-air channel that dedicates 20% of its programming to domestic content to qualify for additional advertising time. There are also (49%) limits in Mexico on foreign ownership of broadcast networks. In short, these laws discriminate against foreign content producers. Separately, some legislators have periodically proposed the adoption of local content quotas (including one introduced in the Senate in 2019), which if adopted, would severely limit the distribution of U.S. films in Mexico—and, if adopted would violate the USMCA (and 1992 NAFTA Agreement), and should be opposed.