

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be placed on the Priority Watch List in 2021.<sup>1</sup>

**Executive Summary:** In 2020, to implement the obligations of the U.S.–Mexico–Canada Agreement (USMCA), which entered into force on July 1, 2020, Mexico made significant improvements in its current IPR regime, revising its Copyright Law, Criminal Code, as well the Federal Protection of Industrial Property Act. These are very positive developments. Mexico ratified the WIPO Internet Treaties (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)) in 2002, but it took until 2020 for Mexico to implement these treaties. Two significant 2020 reforms include the addition of protections against the circumvention of technological protection measures (TPMs) and for rights management information (RMI)—key components of the WIPO Internet Treaties that gave rise to content delivery models such as streaming and on-demand services. Without these provisions, the growth of the digital marketplace in Mexico has been hampered by an IPR legal framework decades behind international norms.

There are still remaining obstacles. First, parts of the 2020 legal reforms are being challenged in court on constitutional grounds (although the new laws remain in force in the interim). Second, these new laws will need to be properly enforced and adjudicated, including staffed and resourced. For a long time, criminal enforcement activity in Mexico has been uncoordinated and generally weak, slowed by procedural and structural deficiencies, as well as by a lack of adequate resources. These deficiencies were not corrected by the legal reforms of 2020. Success in a criminal case still depends on proving a “direct economic benefit” to the infringer, instead of focusing on the harm caused to a rights holder by infringement (the exception—the result of a 2020 reform—is for criminal prosecutions against camcording). The “direct economic benefit” for criminal cases (unique to Mexico) is a difficult hurdle to overcome for a prosecutor willing to commence a case in a country already short on resources for such cases.

Civil cases in Mexico are expensive and difficult for rights holders (especially small businesses) to undertake, and are slowed by procedural hurdles. In a positive development in 2020, new laws mandate compliance with notices to remove infringing content, with measures to prevent infringing content from being uploaded again, as well as providing safe harbors for services and platforms that comply with the notices. However, the IPR legal regime is still missing some of the basic tools to address online infringements that can spur cooperation between rights holders and website owners and service providers. For example, there is only general liability in current law and no clear principle of third party liability for those inducing or promoting copyright infringement, which would incentivize Internet Service Providers (ISPs) to take preventive actions.

### **PRIORITY ACTIONS REQUESTED IN 2021**

The copyright industries recommend the following to the Government of Mexico as priority legal reform and enforcement steps for 2021:

#### **Legal Reforms**

- Implement all of the legal reforms mandated by the USMCA and other treaty obligations—in the Copyright Law, and in the Industrial Property, Criminal, and Criminal Procedure Codes by:

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<sup>1</sup>For 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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



- removing the proof-of-profit (“direct economic benefit”) requirement as a prerequisite to criminal liability (including for satellite and cable decryption); adding aiding and abetting criminal provisions for both physical and online piracy; removing the for-profit limitation on the making available right, and clearly including a violation of making available in the Criminal Code;
- 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”;
- amending the Civil Code to add pre-established remedies, and to recover costs and attorney’s fees; current law does not provide compensatory damages, including lost profits or sufficient monetary damages, nor costs or fees; and
- 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.

### **Criminal Actions, Raids and Prosecutions**

- Fully implement the USMCA enforcement obligations by:
  - implementing a strategic national *ex officio* anti-piracy campaign with a consistent focus on major targets, emphasizing coordination of the police and prosecutorial resources, and prominently using (and properly resourcing) the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI) within the FGR;
  - 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;
  - addressing the importation of circumvention devices used in video games that are entering Mexico in small consignments and via courier packages (and enhancing penalties against repeat importers);
  - ensuring timely destruction of illegal goods seized in criminal and administrative actions to prevent their reentry into the market; and
  - using *ex officio* authority to enforce the new anti-camcording criminal penalties.

### **Administrative Enforcement**

- Fully implement the USMCA enforcement obligations by:
  - providing the Institute of Industrial Property (IMPI) with: (1) the resources, training and political directives to apply its *ex officio* powers to investigate online infringements and audits of infringing websites; (2) sufficient resources for the takedown of infringing materials; (3) the ability for regional officers to conduct local raids (and improving IMPI coordination with the Federal Police so IMPI can take enforcement actions in difficult or risky areas with police security); (4) coordinated investigative and other support from the Cyber Police (in the National Guard); and (5) resources to help empower the newly-formed Antipiracy Committee; and
  - 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;
- Initiate actions against entities failing to provide remuneration for the public performances or broadcasting of sound recordings; there are very serious concerns that rule of law problems render actual royalty collections currently both unsafe and ineffective; and
- Investigate and prosecute IPR infringement cases absent proof of actual lost profits.

## **THE COPYRIGHT MARKETPLACE IN MEXICO**

As online access, as well as mobile phone and smartphone use, have grown exponentially in Mexico in recent years, legitimate online markets have developed, but their growth has been hindered by weak enforcement, as well as by outdated laws. A wide variety of popular pirate services compete with legitimate digital markets in Mexico, including stream-ripping services, sites offering unauthorized downloading and streaming of music, film and video games, 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. The COVID-19 crisis significantly increased the consumption of unauthorized materials, as it also drove traffic, to a lesser extent, to legal sites. There are some large local pirate websites, but many of infringing sites and services are hosted outside of Mexico (e.g., in Peru, Chile, Colombia, Argentina, Germany and France, among others), and are routinely accessed by individuals in Mexico.

A major concern to the growth of healthy legal markets is the increased availability of Piracy Devices (PDs, also referred to as illicit streaming devices) 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 PDs 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.

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 2020, Mexico ranked 19th overall in the world (down from 14th in 2019) in the number of connections by peers participating in unauthorized file sharing of video games on public peer-to-peer (P2P) networks. Mexico ranked seventh (down from fourth in 2019) in unauthorized file-sharing of console-based games, 12th for video games on mobile devices (up from 14th in 2019), and 23rd using PCs (down from 20th in 2019).

For some video game companies, Mexico is now among the top countries for P2P sharing of infringing video game files and unauthorized 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\$1.41 per year, compared with US\$22.11 per capita in the U.S. per the IFPI Global Music Report (released in September 2020). At the same time that music streaming services are developing, the most widespread source of music piracy is stream-ripping. IFPI's Music Consumer Study (2019) found the rate of piracy in Mexico was 44%, one of the highest in the world, with high rates of stream-ripping and mobile app downloading, as well as high rates of cyberlocker and BitTorrent site use. Popular stream-ripping sites such as *y2mate.com*, *mp3-youtube.download*, *savefrom.net* and *flvto.biz* (each with millions of visitors per month), and several cyberlockers (e.g., *1fichier.com* and *zippyshare.com*) are the most problematic, along with "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.

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” (“mod 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. There have been 19 major markets identified that sell circumvention devices, as well as pirated copies of video games (one-third of these markets are in Mexico City). The devices often include memory cards containing up to 400 unauthorized copies of video games as part of the sale. Top sellers on *Mercado Libre* (on the U.S. government’s Notorious Markets list for online piracy sites in 2020) 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. Enforcements against distributors of circumvention devices have, until the 2020 amendments, not been available, because Mexican criminal law prohibited only the domestic manufacture of such devices, but not their distribution. The 2020 laws correct this deficiency by shutting off the supply line of devices and systems, not only if domestically manufactured, but also if imported into or distributed in Mexico. IMPI has indicated it will now proactively engage in this type of online enforcement, which is encouraging.

**Camcord Piracy:** Criminal enforcement against camcording has historically been ineffective in Mexico for two reasons: (1) inadequate laws and (2) weak and infrequent enforcement of the existing laws. One of the 2020 amendments, adopted to comply with the USMCA, corrects the legal regime deficiency. The new Article 424*bis* of the Criminal Code criminalizes camcording, and, in the only exception in the Code, deleted the for-profit motive as a prerequisite for criminal infringement, which had thwarted effective prosecutions of camcording. However, the new provision does require a rights holder to file a claim. Until the 2020 change, the few camcording criminal convictions that had been successful were the result of prosecutions based on an array of crimes other than camcording. As reported in prior IIPA filings, many MPA member films have been sourced from illicit camcords in Mexican theaters in recent years. In 2020, due to the COVID-19 pandemic and the resulting closure of theaters, there are no camcording statistics to report. It is hoped, once theaters re-open, the new laws and better enforcement will properly address this problem.

**Satellite and Cable Issues:** Satellite and signal piracy remain a major concern in Mexico. Another positive development in 2020 was the adoption of two amendments to the Criminal Code (Federal Penal Code) to: (1) impose criminal sanctions for infringers receiving or distributing encrypted programs transmitted via satellite signals without authorization from the legal satellite distributor (Article 168*bis*); and (2) criminalize the modification and distribution of devices or systems intended for signal theft (Article 426). Until these changes, the Criminal Code covered only encrypted-program-carrying satellite signal theft. The new provisions also include penalties for those aiding or abetting these activities. Also in 2020, Mexico amended the right of public communication in the Copyright Law to include the making available of works through wire or wireless means (as required by the USMCA), so there is clear protection for both cable and satellite dissemination. However, Mexico did not amend the Copyright Law or Civil Code to add proper USMCA-mandated sanctions, i.e., civil remedies, for cable systems, and still needs to do so.

**Hard Goods Piracy:** Although stemming digital piracy is the priority of the copyright industries, hard goods piracy continues on the street and at markets. Three physical markets are on the U.S. government’s Notorious Markets 2020 list (released in January 2021). The first two have been on the list since 2012: (1) 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 (2) 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, video games, and video game circumvention devices (sold by an estimated one-third of all of the market’s vendors). A third market, La Pulga Rio in Monterrey, was added to the list this year; it has 300 stalls selling video games (as well as counterfeit apparel and products).

## **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. 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 assisted rights holders by providing information on illegal software websites, and have also seized domain names of infringing sites.

### **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, 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.

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. Although Article 5 of the Copyright Law refers to copyright registrations as only voluntary ("recognition of copyright and neighboring rights does not require registration"), in practice the FGR and courts require registrations to commence a criminal case. The USMCA (Article 18.72.1) requires Mexico 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. Mexico needs to make this change to its Copyright Law for all works (it exists for sound recordings), even after the 2020 amendments. Last, a continuing obstacle to effective criminal enforcement is that file sharing via online networks is generally not considered a serious legal violation by Mexican courts. As a WTO TRIPS obligation, Mexico should have "effective" criminal remedies, including "imprisonment and/or monetary fines," available in cases of "willful ...copyright piracy on a commercial scale." Unfortunately, remedies in Mexico for commercial scale piracy have not been effective, and are hampered by the noted procedural hurdles.

**Structural Reforms and Jurisdictional Issues:** IIPA continues to recommend several detailed "structural" reforms and agency actions to improve criminal enforcement.<sup>2</sup> 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

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

crime syndicates. The priority should be criminal enforcement directed against digital piracy 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.

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. One positive 2020 change in the Federal Industrial Property Law adds the ability for rights holders to calculate and collect damages for IMPI-imposed sanctions against infringers.

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 (within the 32 states and 2,400 municipal governments). A long-standing IIPA recommendation was for enforcement agencies to adopt clear and consistent policies for the expeditious destruction of seized infringing goods. Another of the positive 2020 amendments (in the Federal Industrial Property Law) gives IMPI the authority to order the destruction of infringing goods 15 days after a final court decision, an accelerated timetable. The copyright industries have also 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 fourth recommendation (i.e., from those industries still confronting hard copy piracy) is for PROFECO to use its *ex officio* powers for consumer protection, and its resources, against street market piracy.

**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

The 2020 package of amendments adopted notice and takedown procedures, defined ISPs, and provided legal remedies and safe harbors to ISPs providing mere conduit, caching, and storage and information location tools, by limiting monetary damages—but not injunctive relief or administrative sanctions—for ISPs that respond properly and timely to notices (Copyright Act, new Article 114). The changes add specific provisional measures to order the suspension, stay down, blocking or removal of content, and the cessation of acts that are infringing or unauthorized. The new provisions also require ISPs to have repeat infringer policies, and counter notification procedures (requiring rights holders to commence judicial, administrative or criminal actions within 15 days of notification by an ISP). The

new Mexican law compels an ISP receiving a notice of infringement to comply, but it does not require an ISP even with actual knowledge of an infringement or once aware of facts or circumstances from which infringement is apparent (so-called “red flag” knowledge) to take down material. There are administrative penalties (fines) for non-compliance with notices.

The package, as required by the USMCA, is a welcome step. The Mexican legal system includes general liability principles contained in the Civil and Criminal Codes, however, it does not include 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.” While the notice and takedown and related provisions are a strong first step, ISPs need further encouragement to meaningfully cooperate with all rights holders (large and small) to deter the unauthorized storage, transmission or making available of copyrighted materials that come with secondary liability.

For over a decade, 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, but unfortunately, some in the ISP community continue to oppose these cooperative efforts. For years, IIPA members have reported sporadic cooperation with hosted content takedowns (as well as with the local domain name registry), but generally little or no cooperation with many local ISPs, and it is hoped the new laws will significantly improve ISP actions and cooperation. Other participants in the ecosystem, such as payment processors and advertising networks, should also be encouraged by effective secondary liability laws to cut off the economic sources of support for piratical websites and services.

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.

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), and the USMCA 2020 amendments did not change this deficiency. Rights holders can seek 40% of the gross sales revenues from infringing products as damage awards. 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 (which, as noted, is an unfulfilled USMCA obligation). 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.

One recent (2018) 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 holding 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. The 2020 amendments added new authority and sanctions for IMPI to be more effective. This included an amendment (Federal Industrial Property Law, Article 367) for IMPI to provide notifications to defendants by electronic means (if so requested by rights holders), or if the defendant is abroad (e.g. to issue blocking orders against foreign pirate sites), by public notice. This was a positive development long-supported by the copyright industries.

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 has to date used its authority only against local websites (when their administrators or owners are located in Mexico), limiting its effectiveness against foreign infringing sites. It is hoped the new IMPI authority will be used to address this problem.

**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. 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. INDAUTOR is (since 2015) 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—a USMCA obligation. Under the current code, Customs' authority is unclear regarding seizures and retention of infringing materials. There are formal and onerous requirements to initiate border actions. 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.

In 2020, the video game industry participated in seven customs enforcement actions (with Customs officials and IMPI), seizing a total of 40,030 infringing items, mostly counterfeit or modified video game consoles. 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 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 2020. 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 dropped by prosecutors for a lack of tariff classification (which treats the material as never having been imported), requiring an appeal by and additional expenses for 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.

One challenge for rights holders to pursue recidivists is the false information provided to Customs by 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 must 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 are reluctant to commence criminal cases if packages have been 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 (similar to the tariff classification problems). FGR should develop clear unified rules on chain of custody procedures and shift the burden to prosecutors to prove alteration of evidence.

## **COPYRIGHT AND RELATED LAWS IN MEXICO**

Mexico was a signatory and, in 2002, acceded to the WIPO Internet Treaties (although it did not publish its ratification of those treaties with the Agreed Statements), and only in 2020 adopted implementing laws.

**Federal Law on Copyright (1996, as amended):** The 1996 Copyright Law was significantly revised by the 2020 amendments. It was last amended in 2018 with the addition of preliminary injunctive relief, and before that, was amended in 2003. The full list of legal reforms adopted in 2020 has improvements, including the notice and takedown, safe harbor, and related provisions already noted in detail. First, the reforms added (Article 114*bis*) definitions and protection for TPMs with copy and access controls, and for RMIs. The new provisions make clear that circumvention is actionable independent of copyright infringement, and closed the existing loophole for circumvention devices to cover the making or distribution of such devices. However, Article 232*bis* limits liability and excludes certain activities relating to the manufacturing or trafficking in circumvention devices or technologies (including so-called “no mandate” language), and additionally, provides many exceptions and limitations that are problematic, including those to-be-determined by INDAUTOR. The TPM sanctions (Article 232*bis*) regarding manufacturing or trafficking do not include the “promotion, advertising or otherwise marketing” of circumvention devices or services; these activities should be included in future amendments. Further, Article 232*qua* refers only to RMI infractions that remove RMIs, and not also including the altering or modifying of RMIs; this article should be revised to cover these activities. The Copyright Code (Article 232 etc.) and Criminal Code (Article 427 etc.) include appropriate civil and criminal sanctions, respectively, and neither require proof of “willful” actions to be sanctioned. Second, the reforms explicitly provide a making available right and right of communication to the public for works and recordings (Articles 27 and 131 of the Copyright Law). Third, the Federal Protection of Industrial Property Act amendments broadened IMPI enforcement authority, including allowing provisional measures to suspend the transit of goods (imports or exports), even if by digital means, and added new calculations for the recovery of damages for rights holders (fines up to US\$1 million). Fourth, the new laws added sanctions for camcording, as well as against satellite and cable signal theft. For all the laws that were enacted, INDAUTOR is now preparing draft implementing regulations, but

unfortunately this process is proceeding slowly for these much-needed new changes. This is very troubling considering the constitutional challenges underway, as well as the vocal opposition from many copyright opponents already seeking weakening amendments to laws not yet implemented, all of which are meant to undermine the new reforms.

Some of the other still-needed reforms after the 2020 changes include: (i) establishing third party liability; (ii) raising civil penalties to deterrent levels—and including statutory, pre-established, or “additional” damages and the recovery of costs and attorney’s fees; (iii) amending the Criminal Code to delete the “for profit” provisions (with the exception of the fix adopted for camcording), and replacing them with “acts carried out for commercial advantage or financial gain or that result in substantial harm to rights holders”; (iv) amending the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates; (v) 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; (vi) creating presumptions of copyright ownership in civil, administrative and criminal cases; and (vii) criminal provisions to enforce against the production or distribution of Piracy Devices. There are 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 recent positive Supreme Court ruling (in 2019) found a hotel in violation of the right of public communication where hotel guests accessed copyrighted materials in their rooms via a hotel streaming service. Mexico’s law now provides exclusive rights for the public performances and broadcasting of sound recordings which is a positive step. This provides a sufficient legal basis for producers and performers (and composers) to initiate proceedings against entities that fail to provide remuneration for the public performances or broadcasting of sound recordings. Even though IMPI has adequate authority to impose penalties on entities using sound recordings without remuneration, including the ability to impose fines and to temporarily suspend operating licenses of such entities, there remains a serious concern in Mexico that profound rule of law problems render actual royalty collections both unsafe and ineffective. In addition, the Government of Mexico 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**

There are two market access issues impacting motion picture and television program producers. In 2014, a new law imposed advertising limits on pay-TV channels, and effective in February 2020, the regulations implementing that law got even more severe. The advertising law is meant to promote domestically-made programming and pay-TV channels, many of which are primarily operated by foreign entities at present. The law and regulations impose daily and hourly advertising limits, but only on foreign content, while domestic and free-to-air material is allowed twice the daily quota and no hourly caps. Until 2020, the caps were 12 minutes of advertising per hour, but in 2020 the limit was halved to six minutes, including during primetime. This change will significantly reduce advertising revenue for foreign (e.g., U.S.) film and television program producers. Its discriminatory treatment raises concerns about the non-discriminatory provisions and principles in the USMCA. A second market access concern is the limit (49%) placed on foreign ownership of broadcast networks (by comparison, in the U.S., the Federal Communications Commission permits foreign entities to own 100% of broadcast networks, subject to case-by-case reviews).