

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be placed on the Priority Watch List in 2022.<sup>1</sup>

**Executive Summary:** Since 2020, the Government of Mexico has made significant improvements to the country's intellectual property (IP) regime as part of the government's endeavors to implement its obligations under the U.S.–Mexico–Canada Agreement (USMCA), which entered into force on July 1, 2020. These improvements include revising its Copyright Law and Criminal Code, as well as the Federal Protection of Industrial Property Act. Although Mexico ratified the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, the WIPO Internet Treaties) in 2002, the country did not implement these treaties until 2020. Two significant 2020 reforms include the addition of protection against the circumvention of technological protection measures (TPMs) and protection for rights management information (RMI)—key components of the WIPO Internet Treaties that gave rise to content delivery models like streaming and on-demand services. These developments are very positive, because, in the absence of these provisions, the growth of the digital marketplace in Mexico has been significantly hampered by an IP legal framework that is decades behind international norms.

Obstacles remain, however. Despite Mexico implementing the WCT, the full implementation of the WPPT and the USMCA, with its reforms to the Federal Copyright Law and the Federal Criminal Code, is endangered by constitutional challenges. Parts of the 2020 legal reforms are being challenged in court on constitutional grounds. Although the new laws remain in force in the interim, the challenges generated a chilling effect on practical implementation of the reforms, because authorities are not willing to address cases based on a law that has been questioned. Moreover, in 2021, a series of legislative initiatives were developed to counteract the reforms made in the Copyright Law, with proponents of these initiatives claiming that the changes unlawfully restrict freedom of speech. However, considering that the reforms to the Copyright Law were grounded in the new obligations of the USMCA, the challenges and initiatives to overturn them should not be approved or produce any legal result. If the constitutional challenges or the legislative initiatives were to succeed, it would create a significant setback for IP rights holders and make Mexico less globally competitive. IIPA urges the Government of Mexico's executive and legislative branches to robustly defend the 2020 Copyright Reform from the constitutional challenges and bills filed against key provisions. This task is crucial to secure the progress achieved. Moreover, these new laws will need to be properly enforced and adjudicated, with proper staffing and resources.

For a long time, criminal enforcement activity pertaining to IP infringement in Mexico has been uncoordinated and generally weak, slowed by procedural and structural deficiencies, as well as by a lack of adequate resources. Unfortunately, the legal reforms of 2020 did not fully address these deficiencies. Under existing law, 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. Due to the lack of political will to prosecute IP crimes, enforcement in this area has become non-existent. Additionally, budget cuts in recent years, including in several key IP enforcement agencies, particularly the Attorney General's Office (FGR), have led to reductions or curtailments in effective enforcement activities, seizures, and campaigns. One of the major institutional challenges has been to achieve an effective transition from the General Administration of Customs to the recently created National Customs Agency of Mexico, which will play a key role in the detection and detention of counterfeit and pirated products in transit.

<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>.



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, 2020 saw the enactment of new laws that 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 IP legal regime is still missing some of the basic tools to address online infringements, including by spurring cooperation between rights holders, website owners, and service providers. For example, the current law specifies only general liability instead of a 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 2022**

IIPA recommends that the Government of Mexico prioritize the following legal reforms and enforcement measures for 2022:

### **Legal Reforms**

- The Secretary of Culture and the Copyright Office (INDAUTOR) should publish the implementing regulations of the 2020 copyright amendments. These regulations are a key element of the implementation of numerous important provisions from the new legislation.
- Implement all legal reforms required under the USMCA and other treaty obligations—in the Copyright Law, as well as in the Industrial Property, Criminal, and Criminal Procedure Codes by:
  - increasing compliance with the reforms required under the USMCA, which remain incipient;
  - 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;
  - implementing the presumption of copyright protection arising from copyright notices, exceptions to the circumvention of TPMs, and providing civil remedies for satellite and signal piracy;
  - granting customs inspectors *ex officio* powers to detain and seize infringing imports, and clarifying that the 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 (Mexico needs to amend its copyright law to provide for “pre-established” and/or “additional damages” consistent with the USMCA Article 20.82.6 that are “an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm” as set forth in Article 20.82.8.);
  - enacting legislation to provide clear modern rules establishing third-party liability for copyright infringement, including for parties contributing to, 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 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); the reform does not clearly cover in civil laws “trafficking in devices or services or software” that circumvent and does not include proper sanctions in civil or criminal law for these activities as required by the USMCA;
- ensuring timely destruction of illegal goods seized in criminal and administrative actions to prevent their entry into the market;
- eliminating the welfare marketplaces initiative; 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 guidance to apply its *ex officio* powers to investigate online infringements and initiate audits of infringing websites, including foreign websites;
  - (2) sufficient resources for the takedown of infringing materials;
  - (3) the ability for regional officers to conduct local enforcement actions (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 Scientific Police (in the National Guard);
  - (5) resources to implement conciliation proceedings according to the new Federal Law for the Protection of Industrial Property; and
  - (6) resources to help empower the newly formed Anti-Piracy Committee.
- Providing the INDAUTOR with more resources to increase and strengthen its mediation capabilities, including appointing a Director General, a position that has been vacant since October 2020.

### **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 IP 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 and 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 has increased the consumption of unauthorized materials, and, to a lesser extent, it has also driven traffic to legal sites. Although some large pirate websites are hosted locally, many infringing sites and services routinely accessed by individuals in Mexico are hosted outside of the country (e.g., in Peru, Chile, Colombia, Argentina, Germany, and France, among others).

A major concern that inhibits the growth of healthy legal markets is the increased availability of piracy devices, also referred to as illicit streaming devices (ISDs), including media boxes, set-top boxes, or other devices that allow users, in combination with illegal software applications (apps), to stream, download, or otherwise access unauthorized content from the Internet. The motion picture industry reports that subscription television piracy and the

use of piracy devices are the two fastest growing piracy challenges in Mexico. The use of hardware devices and apps to pirate television programming, including subscription streaming services, is sophisticated and ubiquitous, with these devices widely available in Mexican grey markets. This type of piracy 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 pre-loaded with the apps, the apps are added as an after-sale service, or users can easily obtain the apps themselves to access infringing content. Enforcement authorities should take criminal enforcement actions against device vendors and the operators of the infringing apps used on these devices.

Online piracy continues to rise in Mexico, severely compromising the growth of the audiovisual market in the territory and abroad. The lack of efficient monitoring and control by government entities regarding digital piracy and the use of ISDs, caused by a severe shortage of resources and lack of coordination among government agencies, are among the primary factors that contribute to the poor performance of copyright enforcement. The return of the public to movie theaters may also result in an increase in illicit camcording in the region, following a reduction in such activity because of public health restrictions from COVID-19. It is estimated that 80% of Mexican citizens regularly consume or utilize some sort of pirated product, with few active initiatives focused on improving the country's condition in this regard, making the country a significant liability to the protection of IP rights and diminishing its global competitiveness. The independent sector of the film and television industry (IFTA) is especially concerned about Internet piracy because of its harm to the legitimate online distribution platforms and services that provide revenue for financing the development of new creative works worldwide.

In 2021, Mexico ranked 23<sup>rd</sup> overall in the world (down from 19<sup>th</sup> in 2020) in the number of connections by peers participating in unauthorized file sharing of video games on public peer-to-peer (P2P) networks. Mexico ranked eighth (down from seventh in 2020) in unauthorized file-sharing of console-based games, fifth for video games on mobile devices (up from 12<sup>th</sup> in 2020), and 29<sup>th</sup> using PCs (down from 23<sup>rd</sup> in 2020). For some video game companies, Mexico is now among the top countries for P2P sharing of infringing video game files and unauthorized digital goods (UDG), including cheats and hacks, which has slowed the growth of the legitimate online marketplace in Mexico. In addition, illegal sales of video game subscriptions, account usernames, and passwords are rampant in the country.

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, per capita spending on music in Mexico is only US\$1.60 per year, compared with US\$23.91 per capita in the United States.<sup>2</sup> At the same time that music streaming services are developing, the most widespread source of music piracy is stream-ripping. The International Federation of the Phonographic Industry's (IFPI) Music Consumer Study (2021) found the rate of piracy in Mexico was 50%, 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

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<sup>2</sup>International Federation of the Phonographic Industry (IFPI) Global Music Report 2021, p. 156.

that are then assembled in Mexico. Top sellers on Mercado Libre (on the U.S. government's Notorious Markets list for online piracy sites in 2020) offer a wide variety of mod chips and mod services, and sell thousands of units of each, an indication of their high-volume business. ESA members report that on marketplaces, like *Mercadolibre.com.mx*, offer loaded game cards with pirated games can be sold for MXN\$8,000 - MXN\$10,000 (approximately USD\$390 - USD\$500) and circumvention devices for approximately MXN\$599 (approximately USD\$30). Members, however, also report very high compliance rates with these marketplaces for the removal of these listings. Until the 2020 amendments, enforcement actions against distributors of circumvention devices have 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 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.

Arcade pirated consoles have become increasingly popular in online marketplaces, making their way into legitimate online marketplaces, such as Mercado Libre and Walmart, as well as in physical markets, including several popular department stores. Piracy is exacerbated by the presence of organized crime, and the lack of enforcement from criminal prosecutors. As an emerging and harmful form of piracy, digital streaming has been identified as a growing threat to rights holders that has superseded other sources of online infringing activities, such as downloads and cyberlockers. Furthermore, video game piracy is not only a challenge with respect to physical devices, such as counterfeit preloaded gaming consoles, modification, or circumvention devices, and other infringing video game accessories, it is also a major concern with respect to digital goods, such as cheats, hacks, and illegal primary and secondary game accounts.

**Camcord Piracy:** Criminal enforcement against illicit 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. 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, in recent years, many MPA member films have been sourced from illicit camcords in Mexican theaters. Following the 2020 theater closures due to the COVID-19 pandemic, camcords have resurfaced as a piracy problem in Mexico in 2021, and it is hoped the new laws and improved 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). Prior to 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. 2020 also saw Mexico amend 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. Thus, Mexico provides limited criminal sanctions for the manufacturing, importation, sale, or lease of devices or systems carrying satellite signals, but not for carrying cable signals. It also provides limited sanctions for acts of interrupting or interfering with cable and satellite signals and for decrypting satellite signals, but only if undertaken "for profit." In accordance with the USMCA Article 20.86.3, Mexico should 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 signals and include cable systems in the decryption laws.

**Hard Goods Piracy:** Although the copyright industries have prioritized the fight to stem digital piracy, hard

goods piracy continues to present a challenge on the street and at physical markets. Three physical markets were 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, 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, which was added to the 2020 list, 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 IP enforcement agencies (e.g., IMPI), have led to reductions or curtailments in effective enforcement activities. The Government of Mexico has yet to produce a coherent or coordinated plan to address online piracy, as hard goods piracy remains the primary focus of enforcement officials. One long-recommended enforcement measure 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 plan would help in many regions of the country where state and municipal government anti-piracy efforts continue to be weak overall, including local authorities that rarely work on combating piracy at all. Instead of a centralized coordinator for copyright enforcement, three federal agencies are 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 seizing the 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 change 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 combating 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 requirement is followed 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. Lastly, 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. Consistent with its 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, Mexico’s remedies for commercial-scale piracy have not been effective and are hampered by the noted procedural hurdles.

Under the current Administration, FGR and UEIDDAPI have been reluctant to prosecute IP crimes, and there have been very few criminal enforcement actions regarding piracy and counterfeit goods, both in the online and physical realms. Notwithstanding the significant and commendable progress made by the Government of Mexico in its efforts to strengthen the country’s Intellectual Property regime consistent with its obligations under USMCA, there does not appear to be any political will to prosecute IP crimes in Mexico at this time.

**Structural Reforms and Jurisdictional Issues:** IIPA continues to recommend several detailed “structural” reforms and agency actions to improve criminal enforcement.<sup>3</sup> IIPA urges the Government of Mexico to undertake, and to prioritize, the implementation of 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 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. The piracy situation is getting worse in Mexico. The enforcement activities of FGR, particularly the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright (UEIDDAPI), have been lacking and ineffective in combating illegal conduct in online and physical marketplaces, and counterfeit and piracy goods continue to be sold across Mexico. Because FGR and UEIDDAPI have ceased executing border measures to detain containers with pirated goods, including preloaded video game consoles, preloaded handheld systems, video game accessories, counterfeit legacy game cartridges, and merchandise bound for the local market, or stop in-transit shipments and trans-shipments, IMPI and Customs have created an effective partnership to fill in the void. These agencies have delivered timely and decisive results in the realm of piracy-related border interdictions. However, high turnover in these offices in 2021 have significantly delayed these seizure cases.

Mexico’s “welfare marketplace” (in Spanish: “*tianguis del bienestar*”) initiative, which takes goods that have been seized by the authorities and offers them to the general public, is problematic from a consumer health and safety standpoint,<sup>4</sup> and it clearly violates the “effective protection” clauses in the USMCA, the TRIPs agreement, and more than 30 trade agreements to which Mexico is a party.

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, which has since been disbanded. The Government of Mexico needs to properly staff and resource UEIDDAPI to address IP cybercrimes, as well as staffing other key IP enforcement units in FGR and the police. FGR can still take *ex officio* actions, but criminal cases cannot proceed without a complaint filed by a rights holder. As with other IP enforcement-focused government entities, IMPI, the specialized agency for intellectual property authorized to take administrative actions against infringers, is also severely under-resourced and 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

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<sup>3</sup>See, e.g., IIPA 2019, 46-47, available at <https://iipa.org/files/uploads/2019/02/2019SPEC301MEXICO.pdf>.

<sup>4</sup>See the U.S. Department of Homeland Security’s (DHS) Immigration and Customs Enforcement’s characterization of counterfeit goods as a danger to public safety here: <https://www.ice.gov/features/dangers-counterfeit-items>. See also, the DHS report from 2020 here: [https://www.dhs.gov/sites/default/files/publications/20\\_0124\\_plcy\\_counterfeit-pirated-goods-report\\_01.pdf](https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf). Finally, see the United Nations Office on Drugs and Crime Fact Sheet on counterfeit goods here: [https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit\\_focussheet\\_EN\\_HIRES.pdf](https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf).

of Attorney General for Federal Crime Investigation (SEIDF), which also created UEIDDAPI—but this unit is under-resourced. The FGR Organized Crime Investigative Division (FGR-SIEDO) has excellent investigators, 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 SEIDF, as well as additional resources and training.

A third structural recommendation is to coordinate municipal, state, and federal government criminal enforcement actions (across Mexico's 32 states and 2,400+ municipal governments). Also, another long-standing IIPA recommendation has been 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, which is an accelerated timetable. The copyright industries have also successfully utilized the *Ley Federal de Extinción de Dominio* (Federal Law for Property Forfeiture) in piracy cases, but materials seized in the FGR enforcement operations continue to find their way back into the black market. A fourth recommendation that is important to 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.

**Intellectual Property Rights (IPR) Expertise in the Judiciary:** A continuing weak spot in Mexican IP criminal enforcement is the judiciary. Training to improve IPR expertise by judges is an ongoing need—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*). The Supreme Court should 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 with 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, intended to meet USMCA requirements, is a welcome step. The Mexican legal system includes general liability principles contained in the Civil and Criminal Codes, but it does not include explicit 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 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.

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 termination of service contracts if subscribers infringe IP 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 for statutory damages (e.g., additional or pre-established damages), and the USMCA-related amendments implemented in 2020 did not address 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, including 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.

## **Border Enforcement**

In 2020, the video game industry brought seven suits with IMPI regarding border measures. Approximately 40,030 miscellaneous infringing items have been seized, most of which are illegal gaming consoles. 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 piracy-related border enforcement and to expedite the procedures by which customs may make independent seizures of clearly infringing products.

One challenge for rights holders to pursue recidivist importers 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 are 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 order the police to inspect the packages. However, police and prosecutors are reluctant to commence criminal cases unless customs officials have taken care to open the packages in the presence of police, who must witness the opening of each package, as required by the FGR office responsible for the Mexico City International Airport. This interpretation—that the chain of custody is "broken" if customs officials have not opened each package in the presence of police—has forced rights holders in the video game industry to appeal decisions, incurring additional legal expenses. FGR should develop clear, unified rules on chain of custody procedures and shift the burden to prosecutors to prove that there has been an 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) but did not adopt laws implementing its treaty obligations until 2020.

**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 above. Other positive reforms include:

- First, the reforms added 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 distributing of such devices.
- 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.
- 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.
- 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).
- 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).
- The new laws added sanctions for camcording, as well as against satellite and cable signal theft.

However, more revisions are needed:

- Article 232bis limits liability and excludes certain activities relating to the manufacturing of, 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 232bis) 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 232qua refers to RMI infractions only that remove RMIs, and not to altering or modifying RMIs; this article should be revised to cover these activities.
- While the reforms explicitly provide a making available right and right of communication to the public for works and recordings (see above), the Copyright Act should be amended to the extent Article 131, applicable to sound recordings, does not currently cover electronic reproductions of copies (i.e., phonograms) of sound recordings. The Copyright Law should also be amended to provide a reproduction right for performances.

For all the laws that were enacted, INDAUTOR is now preparing draft implementing regulations; unfortunately, this process is proceeding slowly for these much-needed new changes. This delay is very troubling considering the constitutional challenges underway, as well as the vocal opposition from many copyright opponents already seeking to weaken amendments to laws not yet implemented, all of which are meant to undermine the new reforms.

Some of the other key reforms that are needed, but were not achieved through the 2020 changes include:

- Establish third-party liability;
- Raise civil penalties to deterrent levels—and including statutory, pre-established, or “additional” damages and

the recovery of costs and attorney's fees;

- Amend 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”;
- Amend the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates;
- Amend the Administrative Code, Tax Code, and Criminal Code to (i) provide tax crime prosecution of copyright infringement (when it implicates tax liability) and (ii) increase administrative sanctions;
- Create presumptions of copyright ownership in civil, administrative, and criminal cases; and
- Add criminal provisions to enforce against the production or distribution of piracy devices;
- Severely restrict or eliminate exceptions to infringement for certain public performances where retransmission is not “for profit-making purposes” (Article 150, transmissions of works) and “no direct economic benefit is sought” (Article 151, neighboring rights). These exceptions are too broad, exceeding what treaties permit.

**Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities (Cultural Heritage Law):** On January 17, the “Federal Law of Protection to the Indigenous and Afro-Mexican People Cultural Heritage” (the Law) was published in the Federal Official Gazette. The Law entered into force on January 18, 2022, and its regulations must be issued within the following 180 days, according to its first transitory article.<sup>5</sup> The Law aims to register, classify, and document the traditional cultural expressions (TCEs) of indigenous communities, while also broadening their scope of protection, acknowledging their economic rights, and introducing an enforcement scheme. Although some of its objectives are aligned with WIPO's stance on the protection of indigenous peoples' traditional knowledge and traditional cultural expressions, the way the Law is drafted creates legal uncertainty for a range of creative industries, given the absence of guidelines for the granting of authorization, the lack of clarity as to which communities are associated with a particular expression, and the fact that some expressions could be removed from the public domain.

The law also lists a catalog of administrative infringements that are unclear and ambiguous and establishes fines that range from US\$2,240.00 to US\$224,000.00. The law also establishes criminal penalties for the improper use and exploitation of the elements of cultural heritage of indigenous and Afro-Mexican communities or peoples, and for the cultural appropriation of elements of the cultural heritage of indigenous communities or peoples. Criminal penalties range from two to 10 years of imprisonment (double if the conduct results in “cultural ethnocide”). The U.S. government should encourage Mexico to implement this initiative with transparency, broad stakeholder engagement, and adherence to good regulatory practices and USMCA commitments.

**General Law of Libraries:** On June 1, 2021, the General Law of Libraries (GLL)<sup>6</sup> was published in the Federal Official Gazette. The law establishes the Legal Deposit of Publications and mandates that copies of works (including audiovisual works) and phonograms need to be deposited with the Library of Congress, the Library of Mexico, and the National Library, in the case of materials other than press works (audio and audiovisual) and delivered to the Library of Mexico. The General Directorate of the Library of Mexico may allocate them to specialized institutions for their conservation and use, as is the case of the “*Fonoteca Nacional*” (the National Archive of Recorded Sound) and the “*Cineteca Nacional*” (the National Cinematographic and Audio-visual Archive). The provisions of the GLL state that works delivered to the Legal Deposit of Publications shall be made available in public libraries and through electronic means; nonetheless, the regulations of such making available of works are still pending and generate uncertainty to rights holders. The GLL violates the authors' and rights holders' right to receive compensation from the exploitation of their works. The GLL is also unconstitutional and contrary to multiple IP and trade agreements. Even when the law appears to be limited to those works produced in national territory, it also includes the works “edited” in national territory, which could include subtitling or dubbing. The term “editing” may be broadly defined as “publishing through any means or procedures a work” or as the reproduction and distribution of a work's material

<sup>5</sup>Ley Federal de Protección al Patrimonio Cultural de los Pueblos Indígenas y Afromexicanos, January 17, 2022, available at [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5640770&fecha=17/01/2022#:~:text=Tiene%20por%20objeto%20reconocer%20y,de%20la%20Constituci%C3%B3n%20Pol%C3%ADtica%20de](http://www.dof.gob.mx/nota_detalle.php?codigo=5640770&fecha=17/01/2022#:~:text=Tiene%20por%20objeto%20reconocer%20y,de%20la%20Constituci%C3%B3n%20Pol%C3%ADtica%20de).

<sup>6</sup>General Law of Libraries (*Ley General de Bibliotecas*), June 1, 2021, available at [http://www.diputados.gob.mx/LeyesBiblio/pdf/LGB\\_010621.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/LGB_010621.pdf).

form, according to the Federal Copyright Act (Article 42).

Furthermore, the GLL contradicts several sections of the Mexican Copyright Law, including the exclusive right of rights holders to determine when their production will be made public and how it should be exploited and distributed. Although the intention of the GLL is to provide access to culture throughout public libraries in Mexico, it should observe and comply with the Mexican Copyright Law and avoid infringement in lieu of licensing.

## Case Law

**Constitutional Challenges to Copyright Act Reform:** Soon after the Copyright Act reform passed, two constitutional challenges were filed seeking to repeal key provisions of the amendments. The first challenge was filed by the National Commission of Human Rights, seeking to repeal provisions related to notice and stay down and protection for TPMs. The second challenge was filed by a group of around 30 senators from opposition parties in Congress and based on similar grounds as the first challenge. In both cases, AMPROFON, IFPI's national affiliate in Mexico, filed *amicus curiae* defending the amendments. Numerous support letters from industry bodies in many countries were also delivered to the Supreme Court in support of the notice and stay down provisions adopted in 2020.

At the same time, two additional challenges were filed in lower courts, seeking judicial protection for individual plaintiffs. One of these lawsuits was filed by Televisa (the biggest broadcasting conglomerate in the country). A second challenge seeking individual protection from the amendments was filed by the Authors and Composers Society (SACM), arguing that the 2020 copyright amendments equalized the protection of neighboring rights with that of copyright, and that itself constitutes a serious threat to the rights of authors and composers. In both cases, industry bodies in Mexico (AMPROFON and SOMEXFON) filed motions to be recognized as interested parties in the proceedings, so far without success.

***Lysa v. Varham Hotels:*** On November 18, 2019, the Supreme Court ruled in favor of the plaintiff in *Lysa v. Varham Hotels*.<sup>7</sup> The plaintiff was a private entity operating in Mexico as a representative of MPA members in the licensing of audio-visual works for communication to the public in hotels and transportation companies. The decision has the value of affirming the obligation of hoteliers to pay performance rights for the communication to the public of audiovisual works in hotel rooms in Mexico. The decision is the first constitutional court level decision on the matter and clarifies the scope of the communication to the public right in Mexican copyright law. The issue of performance rights for music and movies played in hotel rooms has been a very contentious one in Mexican courts and in many countries in Latin America for many years.

## MARKET ACCESS ISSUES

Two market access issues impact motion picture and television program producers. Pay television is an important outlet for foreign programmers and continues to be subject to more stringent advertising restrictions than free-to-air broadcast television, which is supplied by domestic operators. Pay television programmers have long been allowed to follow the industry practice of inserting up to 12 minutes per hour for advertising without exceeding 144 minutes per day, a practice upheld by Mexico's court in 2015 as consistent with Mexico's statutes. In February 2020, the industry regulator abruptly reversed course, stating that pay-TV channels must adhere to a strict 6-minute per hour advertising limit, including during primetime. This change significantly reduces advertising revenue for foreign (e.g., U.S.) film and television program producers and raises concerns about the non-discriminatory provisions and principles in the USMCA. A second market access concern is the 49% limit placed on foreign ownership of broadcast networks, which is further reduced to the share permitted for Mexican broadcasting investment in the company's

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<sup>7</sup>*Lysa v. Varham Hotels* (File: 4040/ 2019 "Amparo Directo en Revisión").

country of origin. However, this reciprocity does not extend to countries with a higher permissible foreign investment share, including the United States, where the Federal Communications Commission permits foreign entities to own 100% of broadcast networks (subject to case-by-case reviews), creating another instance of discriminatory treatment.

A February 2021 bill aimed to repeal the Federal Cinematographic Law and create the Federal Cinematographic and Audiovisual Law. This bill would have imposed a local content quota on streaming/OTT services and installed a range of theatrical restrictions intended to limit U.S. film exports and grant market-distorting preferences to local films. Such policies, if implemented, would unfairly restrict U.S. exports that support hundreds of thousands of U.S. jobs, in violation of Mexico's USMCA commitments. While this particular bill has lost viability, there remains significant local pressure to install protectionist policies in the audiovisual sector. Instead, Mexican policymakers should encourage open markets, investments, and collaborations that would result in job creation, knowledge transfer, and the internationalization of the local industry for the benefit of both the U.S. and Mexican industries.