

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be placed on the Priority Watch List in 2023.<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 Act 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, but insufficient 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. One of the main problems in Mexico is not only the lack of implementing regulations for the 2020 reforms and other needed legislation, but also the lack of enforcement of existing laws.

Obstacles remain in compliance with high-level international standards for the recognition and protection of intellectual property rights (IPR), particularly those related to the digital environment and enforcement procedures. The 2020 reforms have not been translated into concrete results for the protection of IPR. Moreover, Mexico implementing the WCT, the full implementation of the WPPT, and the USMCA, with its reforms to the Federal Copyright Act and the Federal Criminal Code, is endangered by the constitutional challenges that were filed by the National Human Rights Commission and a minority of the Mexican Senate. 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, as of today there are no regulatory provisions, even when said provisions are necessary to fully implement the 2020 reforms. Furthermore, in 2021 and 2022, a series of legislative initiatives were developed to counteract the reforms made in the Mexican Copyright Act, with proponents of these initiatives claiming that the reforms unlawfully restrict freedom of speech. However, considering that the reforms to the Copyright Act were grounded in the new obligations of the USMCA, the challenges and initiatives to overturn them should be rejected. 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 calls on the Mexican government to take the necessary actions to ensure that existing laws are fully enforced. IIPA also urges the Government of Mexico's executive and legislative branches to robustly defend the 2020 Copyright Reform from the constitutional challenges and bills that endanger Copyright Act 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, a lack of prosecutorial initiative, and 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

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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://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

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. The Criminal Code, Copyright Act, and Federal Protection of Industrial Property Act need to be amended to delete “for profit” provisions and replace them with “acts carried out for commercial advantage or financial gain” and “significant acts not carried out for commercial advantage or financial gain that have a substantial impact on the interests of the copyright or related rights holder.” In this way, criminal penalties would be available in Mexico for commercial scale infringements without a direct economic benefit.

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. In many cases seized materials are not destroyed, and instead re-circulate into the marketplace.

Even though the Mexican Institute of Industrial Property (IMPI) has consistently ordered the destruction of infringing goods, the Federal Industrial Property Protection Law should be amended to ensure that in all cases that infringing goods be destroyed without unwarranted delay at the right holder’s request, and to clarify and simplify the existing procedures. Currently, the law requires an agreement between the parties to decide the destination of the infringing goods. Mexico should amend its current laws to require, at the rights holder’s request, that infringing goods be destroyed in all cases, and the IP-related laws be expanded to include that courts may order the destruction or disposal outside of commerce of “materials and implements that have been used in the manufacture or creation of the infringing goods” as stated in Article 20.81 of the USMCA.

Additionally, in late 2022, the president began the militarization of customs as a way to combat corruption, drugs, and smuggling. As of today, this action has not hindered customs functions. However, such militarization of customs in Mexico may lead to higher prices in international trade processes, by slowing administrative functions.

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, these amendments have not been in practice in Mexico’s legal regime due to the constitutional challenges before the Supreme Court of Mexico, as well as the lack of implementing regulations of the said amendments. The IP legal regime in Mexico 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 secondary liability for those inducing or promoting copyright infringement, which would incentivize Internet service providers (ISPs) to take preventive actions.

## **PRIORITY ACTIONS REQUESTED IN 2023**

IIPA recommends that the Government of Mexico prioritize the following legal reforms and enforcement measures for 2023:

### **Legal Reforms**

- The Secretary of Culture and the Copyright Office (INDAUTOR) should publish the implementing regulations of the 2020 Copyright Act amendments. These regulations are a key element of the full implementation of numerous important provisions from the legislation based on the USMCA provisions.
- Implement all legal reforms required under the USMCA and other treaty obligations—in the Copyright Act, as well as in the Industrial Property, Criminal, and Criminal Procedure Codes by:
  - Ensuring full 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 Act 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 secondary 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.
- Reject a draft bill to reform the General Health Act (GHA) to include videogames as a General Health Issue.
- Clarify the scope of the Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities, in a manner that brings greater legal certainty for all stakeholders.
- Reject the Draft Decree repealing Section IX of Article 223 of the Federal Telecommunications and Broadcasting Law that aims to regulate translation contracts.

### **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 TPMs 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 IMPI with sufficient resources, improved coordination with the Federal Police, and coordinated investigative and other support from the Scientific Police (in the National Guard).
- Providing INDAUTOR (Mexican Copyright Office) with more resources to increase and strengthen its mediation capabilities, including appointing a Director General, a position that has been vacant since October 2020.
- Encouraging the administrative bodies that enforce IP to cooperate with rights holders to effectively enforce IP in the digital realm.

## 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 illegal and 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.

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 music revenue in Mexico is only US\$2.17 per year, compared with US\$29.45 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 for 2022 (MCS) found a music piracy rate of 53% in Mexico, one of the highest in the world. The study showed that 49% of Internet users said they used a stream-ripping website or mobile app to download pirated music in the previous month, while 23% reported using a cyberlocker site to obtain pirated music in the same period. Reinforcing the popularity of pirate site *y2mate*, 9.3% of all Internet users aged 16 to 64 in Mexico said they had visited the site to download music in the last month. Popular stream-ripping sites include *y2mate.com* (34.3 million visits), *mp3y.download* (10.8 million visits), and *savefrom.net* (9.1 million visits) in the third quarter of 2022 based on SimilarWeb data. Cyberlockers are also widely used: *Mega.nz* received 32.5 million visits from Mexico in the same period, *1Fichier.com* received over 9.7 million visits, and *Zippyshare.com* received more than 5.4 million visits, all during the same period, based on SimilarWeb data.

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<sup>2</sup> International Federation of the Phonographic Industry (IFPI) Global Music Report 2022, p. 164 and 188.

The Entertainment Software Association (ESA) reports that in 2022, Mexico ranked 13th globally for the number of peer-to-peer (P2P) detections of infringing console-based video game files. 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”). Online communities, such as Team Xecuter FB on Facebook, further promote chip installation. Circumvention devices are typically manufactured overseas and shipped in component pieces that are then assembled in Mexico. Sellers on online marketplaces offer infringing goods and circumvention devices, including via some new marketplaces that have entered the region, and notably on *shopee.com.mx*, *mercadolibre.com.mx*, *linio.com.mx*, and *clasf.mx*. Top sellers on certain online platforms 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 sellers on online marketplaces offer loaded game cards with pirated games sold for between MXN\$8,000 and MXN\$10,000 (approximately US\$390 - US\$500) and circumvention devices for approximately MXN\$599 (approximately US\$30). Members, however, also report very high compliance rates with these marketplaces, including *Mercado Libre*, for the removal of these listings. One video game company reports having conducted 1,641 enforcements in Mexico in 2022, 82% of which involved circumvention devices.

Members generally report very high compliance rates with these marketplaces for the removal of these listings. However, an increasing concern is the appearance online of “plug and play” systems, on which copyrighted content is loaded but difficult to identify, because the online sellers are removing information about the games included within. Platforms then reject enforcement requests without evidence of sample purchases for each product, a costly and lengthy exercise for rights holders due to the volume and ease of manufacturing these products. 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 video game 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 424bis 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 Motion Picture Association (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 upon theaters reopening in 2021, and it is hoped the new laws and improved enforcement will properly address this problem. The independent sector of the film and television



industry (namely, the Independent Film & Television Alliance (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.

**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 168bis); 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 Act 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 2021 List (released in February 17, 2022).<sup>3</sup> 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 counterfeit goods, video games, modified consoles, and game TPM 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 TPM 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 in 2020, has 300 stalls selling video games (as well as counterfeit apparel and products). One video game company reports that Mexico’s customs authorities seized over 35,000 units of preloaded consoles with unauthorized video games in 2022, most of which would have been sold via online marketplaces or informal markets.

## **COPYRIGHT ENFORCEMENT IN MEXICO**

The piracy situation in Mexico has gotten worse in the past year. 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. One of IIPA’s long-recommended enforcement measures 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 Act. 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. On the other hand, the president announced the militarization of customs as a way to combat corruption and for improving the fight against drugs and smuggling. Such militarization of customs in Mexico has led to higher

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<sup>3</sup> USTR, 2021 Review of Notorious Markets for Counterfeiting and Piracy, February 17, 2022, available at <https://ustr.gov/sites/default/files/IssueAreas/IP/2021%20Notorious%20Markets%20List.pdf>.

prices in international trade processes by slowing administrative functions. Besides the costs, the delays may run contrary to the effort at the regional and multilateral levels to facilitate trade as provided in Chapter 7, Customs Administration and Trade Facilitation, of the USMCA and the Trade Facilitation Agreement of the World Trade Organization (WTO), where there are international commitments for the facilitation and clearance of goods, including those in transit.

## Criminal Enforcement

Since Mexico transitioned to an adversarial justice system in 2008, despite the availability of *ex officio* action in the Criminal Code, in practice prosecutors no longer prosecute criminal copyright cases without the filing of a complaint against an infringer. This change has resulted in prosecutorial delays of IP-related crimes, including at FGR. A complicating element in combating 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. This complicates online or digital matters where no hard goods are involved. Furthermore, it is crucial that prosecutors understand that expert opinions are not required in every case to analyze genuine and counterfeit specimen. 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 result is delays and, in some cases, investigations have been dropped due to undertrained prosecutors, leading brand owners to re-introduce actions often against repeat offenders. The *peritos'* reports are a formalistic requirement that take much too long to complete, and the *peritos* are insufficiently trained in digital issues and often reluctant to cooperate with investigations and prosecutions. Rights holders then must appeal those decisions through a Control Judge, adding to the expense and delay of effective enforcement.

Additionally, although Article 5 of the Copyright Act 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. This is an additional formalistic practice of Mexican authorities that is contrary to the main purpose of international commitments on IP recognition and protection. 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 Act for all works (it exists for sound recordings), even after the 2020 amendments.

Lastly, Mexican courts generally do not consider file sharing via online networks to be a serious legal violation; this is a continuing obstacle to effective criminal enforcement. Consistent with its WTO TRIPS obligation, Mexico should have “effective” criminal remedies,<sup>4</sup> including “imprisonment and/or monetary fines,” available in cases of “willful . . . copyright piracy on a commercial scale.”<sup>5</sup> 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. There exists a general understanding in all government offices that few to no actions against piracy and counterfeit goods are taken. Also, inside the UEIDDAPI is a general order to not perform any search warrants for these types of cases. Notwithstanding the significant and commendable progress made by the Government of Mexico in its efforts to strengthen the country’s IP 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.

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<sup>4</sup> The WTO TRIPS Agreement, Article 41.

<sup>5</sup> *Id.* at Article 61.

**Structural Reforms and Jurisdictional Issues:** IIPA continues to recommend several detailed “structural” reforms and agency actions to improve criminal enforcement that have been detailed in previous submissions.<sup>6</sup> IIPA urges the Government of Mexico to undertake, and to prioritize, the implementation of a national *ex officio* anti-piracy campaign. Another recommendation is for FGR to significantly improve its criminal enforcement actions against digital piracy. The piracy situation is getting worse in Mexico.

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>7</sup> and it clearly violates the “effective protection” clauses in the USMCA, the WTO TRIPS Agreement, and more than 30 trade agreements to which Mexico is a party.

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 Act) 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 among 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 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 Octies). 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 and there are administrative penalties (fines) for non-compliance with notices. However, Mexican law should also require an ISP with actual knowledge of an infringement or that is aware of facts or circumstances from which infringement is apparent (so-called “red flag” knowledge), to take down material. Moreover, these amendments are subject to constitutional challenges before the

<sup>6</sup> See, e.g., IIPA 2019, 46-47, available at <https://iipa.org/files/uploads/2019/02/2019SPEC301MEXICO.pdf>; IIPA 2022, p. 68-69, available at <https://www.iipa.org/files/uploads/2022/01/2022-SPEC301-3.pdf>.

<sup>7</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).



Supreme Court that are still pending for final resolution, and the Mexican government has not issued domestic regulations to the Copyright Act to allow an effective implementation of the USMCA commitments.

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 safe harbors imply that such potential secondary liability exists, but IIPA urges the Government of Mexico to make such liability explicit in its law. 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 IPR. 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 Infinitem, 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 Act 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.

## Border Enforcement

FGR and UEIDDAPI have ceased executing border measures to detain containers with pirated goods, including counterfeit video game consoles, controllers, 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 border measures field. In 2020, the video game industry brought seven suits with IMPI regarding border measures. As a result, approximately 40,030 miscellaneous infringing items were 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 (Article 20.84).<sup>8</sup> Under the current code, Customs’ authority is unclear regarding seizures and retention of infringing materials. There are unnecessary, formalistic, and onerous requirements to initiate border actions. For example, absent an official order from IMPI, Customs authorities will not seize infringing products entering the country or detain them for more than a few hours, even where the material is infringing. Nonetheless, as of today IMPI has effectively addressed this issue through expeditious communications with customs to seize infringing goods.

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<sup>8</sup> USTR, United States-Mexico-Canada Agreement (USMCA), Article 20.84, available at <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/20%20Intellectual%20Property%20Rights.pdf>.

## **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), implementing its treaty obligations in 2020.

**Federal Law on Copyright (1996, as amended):** The 1996 Copyright Act 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; protection for TPMs and RMI; explicitly provide a making available right and right of communication to the public for works and recordings, as well as adaptation or transformation of the phonogram and rent of the original or copies of the phonogram; and 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.
- 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 Act 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 in an attempt to undermine the new reforms.

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

- Establish explicit secondary 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 already 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;
- Add criminal provisions to enforce against the production or distribution of piracy devices; and
- 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, 2022, the “Federal Law for the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities” (the Cultural Heritage Law)<sup>9</sup> was published in the

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<sup>9</sup> *Ley Federal de Protección al Patrimonio Cultural de los Pueblos Indígenas y Afromexicanos*, January 17, 2022, available at <https://www.diputados.gob.mx/LeyesBiblio/ref/lfpccpcia.htm>.

Federal Official Gazette. The Law entered into force on January 18, 2022. The regulations to this law should have been issued within the 180 days following its publication. However, INDAUTOR asserts that the law can be enforced even in the absence of secondary regulations. 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 TCEs, 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>10</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. A draft bill amending Articles 33, 39, and 43, and adding Article 34bis to the General Law of Libraries was presented before the House of Representatives on February 1, 2022. Instead of curing issues with the GLL that IIPA has delineated in previous filings,<sup>11</sup> the draft bill introduces new issues, such as requiring the delivery of works within 90 calendar days following the date of their commercial distribution.

**Bill to Amend the Federal Copyright Act:** On February 15, 2022, a draft bill, which adds Chapter VIII, "Literary Translation Contracts," to Title III of the Federal Copyright Act, and Articles 76bis to 76sexties was introduced in the House of Representatives. The Bill aims to regulate translation contracts from the perspective of literary creation and as a tool for the dissemination of culture and knowledge, and it could have implications for dubbing and subtitling of audiovisual productions. The Bill provides that any remuneration paid to the translator shall be proportional to the income obtained from the exploitation of the work, and in the event that the translator chooses to receive a fixed and determined consideration and this proves to be inequitable with the income obtained from the exploitation of the work, the translator may demand compensatory remuneration. This Bill also prohibits the publication of the translated work with alterations, additions, deletions, or any modification made without authorization of the translator.

**Decree Repealing Section IX of Article 223 of the Federal Telecommunications and Broadcasting Law:** A Draft Decree repealing Section IX of Article 223 of the Federal Telecommunications and Broadcasting Law was introduced in the Senate on February 10, 2022. The decree proposes to repeal a provision that could infringe freedom of expression principles, so it is positive for creative industries.

## 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

<sup>10</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).

<sup>11</sup> See, e.g., IIPA's 2022 Special 301 submission on Mexico ("IIPA 2022"), p. 72-73, available at <https://www.iipa.org/files/uploads/2022/01/2022-SPEC301-3.pdf>.

Congress and based on similar grounds as the first challenge. In both cases, AMPROFON, IFPI's national affiliate in Mexico, INCAM, and some other relevant stakeholders, filed *amicus curiae* briefs 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.

## **MARKET ACCESS ISSUES**

**Pay-TV Advertising Limits:** 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 six-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.

**Foreign Ownership Restrictions:** 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 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.

**Local Content Quotas:** On a regular basis, Mexican lawmakers and policymakers propose protectionist policies, such as the imposition of local content quotas in both theatrical and streaming, over-the-top (OTT) windows, as well as limits to the number of screens in which a given movie can be exhibited or regulating the dubbing of the features regardless of the market preferences. If adopted, such measures would severely limit the exhibition of U.S. films in Mexico and would potentially contravene Mexico's USMCA commitments. Instead, Mexican policymakers should encourage open markets, investments, and collaborations that would result in job creation, knowledge transfer, and the internationalization of the alignment of local industry with international best practices for the benefit of both Mexican and U.S. industries.

**Investment Obligations:** There are several legislative efforts establishing performance requirements to investments in the form of a financial contribution in favor of the Mexican audiovisual industry. If adopted, such measures would be discriminatory and harmful to the audiovisual services platforms that operate within Mexico and may be contrary to USMCA commitments.

**Bill to Reform General Health Act (GHA):** Additionally, on July 6, 2022, a bill to reform the General Health Act (GHA), was introduced before the House of Representatives to include videogames as a General Health Issue. The Bill aims to amend Article 3, Section XXI of the GHA to include a matter of general health in the design and implementation of public policies and actions to prevent, treat, and control the problematic use of and addiction to video games.

## **Cooperation and Training**

IMPI has entered a Memorandum of Understanding (MOU) with ESA to enforce and protect video games' IP. IMPI seems to be committed to creating IP enforcement activities, including infringement referrals, online inspection visits, and investigations, and promoting the importance of IP to creative and innovative industries. Practical efforts to execute the MOU have already begun, including ESA-led training for over 60 members of the IMPI enforcement team on issues specifically impacting the video game industry. IMPI has further engaged in training with the motion picture and recording industries on issues related to those industries.