

# MEXICO

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Mexico be placed on the Priority Watch List in 2024.<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. 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 Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively, 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 Mexico is still facing a long-standing problem of lack of adequate application and enforcement of its current laws and regulations, affecting legal certainty and security in the business environment. The lack of proper enforcement of current laws, in the absence of other key updated provisions or implementing regulations, has significantly hampered the growth of the digital marketplace in Mexico. 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 the rule of law. Obstacles also 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. Moreover, Mexico's implementation of the WIPO Internet Treaties and the USMCA, including reforms to the Federal Copyright Act and the Federal Criminal Code, is endangered by a lack of implementing regulations and three constitutional challenges, which have generated a chilling effect on practical implementation of the reforms.

Enforcement issues in Mexico also are a concern. For a long time, criminal enforcement activity pertaining to intellectual property (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. In 2023, the prosecutor and agencies responsible for initiating criminal investigations reinstated their previous criteria to reject complaints of IP infringements without proof of direct economic benefit. Civil cases in Mexico are expensive and difficult for rights holders (especially small businesses) to undertake and are slowed by procedural hurdles. The IP legal regime in Mexico is still missing some of the basic tools to address online infringements, including cooperation among 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 2024**

### **Enforcement**

- Develop and adopt a high-level national anti-piracy plan to target major online piracy and counterfeiting operations and to coordinate federal, state, and municipal enforcement activities, which has been one of IIPA's long-recommended enforcement measures.
- Provide the *Instituto Mexicano de la Propiedad Industrial* (Mexican Institute of Industrial Property, IMPI) and *Instituto Nacional del Derecho de Autor* (Mexican Copyright Office, INDAUTOR) with sufficient resources,

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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/2024/01/Appendix-B-2024.pdf>.

improved coordination with the Federal Police, and coordinated investigative and other support from the Scientific Police (in the National Guard).

- Encourage prosecutors to take *ex officio* actions against online piracy and hard copy piracy, focusing on online service operators and seeking deterrent sentences, including incarceration and financial penalties.
- Apply a coherent standard of “commercial scale” based on international practice, permit the initiation of criminal investigations against counterfeiting and piracy, and investigate and prosecute IP infringement cases absent proof of actual lost profits.
- Provide training to improve IPR expertise in the judiciary.
- Improve enforcement against theatrical camcord piracy.

### Legal Reforms

- Publish the implementing regulations of the 2020 Copyright Act amendments and reject interpretations of those amendments that would impede the positive progress made by them.
- Amend the Copyright Act to address issues not resolved in the 2020 amendments.
- Provide incentives for ISPs to cooperate in enforcement against online copyright infringement, including applying the reform of the 2020 Copyright Law to provide secondary liability for copyright infringement.
- 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 Bill to Amend the Federal Copyright Act related to “Literary Translation Contracts.”
- Address issues in the General Law of Libraries, such as requiring the delivery of works within 90 calendar days following the date of their commercial distribution.
- Reject amendments to the Copyright Law that would establish a remuneration system through a “Private Copy Levy” (PCL).
- Reject any interpretation of the Copyright Law that would interfere with exclusive rights, including introduction of a making available remuneration right for performers in addition to the already existing and sufficient exclusive right.

### Market Access

- Reject policies proposing Local Content Quotas.
- Reject discriminatory investment obligations in the audiovisual industry.

## ENFORCEMENT

- **Develop and adopt a high-level national anti-piracy plan to target major online piracy and counterfeiting operations and to coordinate federal, state, and municipal enforcement activities, which has been one of IIPA’s long-recommended enforcement measures.**

The Government of Mexico needs to do much more to ensure effective enforcement of existing laws and regulations and to strengthen the rule of law for the benefit of the protection of IPR. Mexico needs to fully implement the USMCA enforcement obligations. These regulations are crucial for the implementation of key aspects of the reform such as the procedural rules for the notice and stay down obligation for online service providers. One of IIPA’s long-recommended enforcement measures is for Mexico to develop and adopt 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. Mexico also should implement 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) *Unidad Especializada en Investigación de Delitos contra los Derechos de Autor y la Propiedad Industrial* (the Specialized Unit on Investigation of Crimes Committed Against Industrial Property and Copyright, UEIDDAPI) within *Fiscalía General de la República* (the Attorney General’s Office, FGR). Moreover, FGR should improve the forensic standards for digital enforcement

and eliminate the required experts and mandated registrations (as a practice, if not a legal requirement) for criminal cases.

The lack of coordination among enforcement bodies remains a major problem in Mexico. Rights holders report that online infringement remains high. For example, video game publishers experienced among the highest levels worldwide of e-commerce infringement in Mexico, notably of modded hardware and circumvention device listings. Three federal agencies are engaged in copyright enforcement in Mexico: 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; and the Scientific Police (part of the Federal Police) of *Secretaria de Gobernacion* (the Secretary of the Interior) have assisted rights holders by providing information on illegal software websites and seizing the domain names of infringing sites. Establishing a centralized coordinator for copyright enforcement would improve the efficiency and effectiveness of each of these agencies.

Further, Mexico needs to address the importation of circumvention devices used in video games that are entering Mexico in small consignments and via courier packages and enhance penalties against repeat importers. One video game company reported that, despite four separate customs training sessions in 2023 that included many examples of sales of circumvention devices and modified consoles with bundled games as well as installations services available in the country, customs officials identified zero circumvention device-related seizures or detections in 2023. Repeat importers of infringing consoles with built-in pirated games continue operating undeterred. The 2020 Copyright Law reform does not clearly include “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.

In late 2022, the president began the militarization of customs to combat corruption, drugs, and smuggling. As of today, this action has not hindered customs functions. However, such militarization of customs in Mexico may slow administrative functions, leading to higher prices in international trade processes. The professionalization of customs has been delayed due to several leadership changes at the National Customs Agency, which has changed leadership at least four times during the present Administration. 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.

The Government of Mexico should also eliminate the “welfare marketplaces” (in Spanish: “*tianguis del bienestar*”) initiative or similar policies, which take goods that have been seized by the authorities and offer them to the general public. The initiative is problematic from a consumer health and safety standpoint,<sup>2</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.

Finally, the Government of Mexico should increase international cooperation with U.S. prosecutorial and law enforcement authorities to facilitate exchange of communication and cooperation in criminal investigations and enforcement proceedings in Mexico.

- **Provide the *Instituto Mexicano de la Propiedad Industrial* (Mexican Institute of Industrial Property, IMPI) and *Instituto Nacional del Derecho de Autor* (Mexican Copyright Office, INDAUTOR) with sufficient resources, improved coordination with the Federal Police, and coordinated investigative and other support from the Scientific Police (in the National Guard).**

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<sup>2</sup> See the U.S. Department of Homeland Security’s (DHS) Immigration and Customs Enforcement, *Counterfeit Goods: A Danger to Public Safety*, available at <https://www.ice.gov/features/dangers-counterfeit-items>; see also, the 2020 DHS report on *Combating Trafficking in Counterfeit and Pirated Goods*, available at [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) and the United Nations Office on Drugs and Crime Fact Sheet on counterfeit goods, available at [https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit\\_focussheet\\_EN\\_HIRES.pdf](https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf).

The piracy level in Mexico remains high (according to the International Federation of the Phonographic Industry's (IFPI) 2023 Music Consumer Study (MCS) approximately 50%). Further the ability to tackle piracy has worsened due to budget cuts in recent years, including in several key IP enforcement agencies (e.g., IMPI), which have led to reductions or curtailments in effective enforcement activities, including in several key IP enforcement agencies, particularly the FGR. The FGR is responsible for federal criminal enforcement. One video game publisher reported a decline in counterfeit game product seizures from 35,315 products seized in 2022 to only 3,045 in 2023 despite IP trainings for customs officials, and zero police raids in either year. Yet, the market shows that illicit products remain available. On July 1, 2020, a comprehensive amendment to the "Industrial Property Law" (Patents and Trademarks) was also enacted. The law entered into force in November 2020. As part of this new law, IMPI is now empowered to issue blocking orders against infringing sites which, in practice, is a clarification of the powers that IMPI previously exercised as part of its general duties. However, IMPI requires the petitioner to comply with an extreme – and sometimes impossible – burden of proof equivalent to providing certificates of copyright ownership of all the content available in the illegal sites to block that content. The Government of Mexico should allow the initiation of administrative proceedings before IMPI to seek site blocking of websites that offer infringing content, without requiring the industry to prove copyright ownership of all content provided in the pirate websites. Instead, the burden should be calibrated, and IMPI should require the owner/operator of the infringing sites to produce evidence that they have authorization to make the copyright works in question available.

- **Encourage prosecutors to take *ex officio* actions against online piracy and hard copy piracy, focusing on online service operators and seeking deterrent sentences, including incarceration and financial penalties.**

IIPA continues to recommend several detailed "structural" reforms and agency actions to improve criminal enforcement that have been detailed in previous submissions.<sup>3</sup> 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. In one 2023 case involving 7,000 video game consoles preloaded infringing games, the prosecutor terminated the investigation claiming the products did not show the publisher's trademarks and copyrighted works, despite evidence established at the time of seizure. This complicates online or digital matters that do not involve hard goods. However, the problem of online piracy in Mexico is evident: in 2023, Mexico ranked 26th in the world for the number of connections by peers participating in the unauthorized file-sharing of Entertainment Software Association (ESA) member video game titles on public peer-to-peer (P2P) networks, and by the same metric, fifth in the world for unauthorized file-sharing of mobile games.

Furthermore, it is crucial that prosecutors understand that expert opinions are not required in every case to analyze genuine and counterfeit specimens. 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, which undermines effective 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

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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>; IIPA 2022, p. 68-69, available at <https://www.iipa.org/files/uploads/2022/01/2022-SPEC301-3.pdf>.

shipments and trans-shipments. The FGR has been reorganized under the current administration and is closed to the general public, meaning that there have been no coordination meetings with rights holders or rights holder organizations, and such practices, which are common in other countries, are not allowed. The lack of communication with the private sector and the absence of any significant enforcement action by FGR against IPR violations have significantly worsened the situation in the last year. FGR and UEIDDAPI should provide standardized criteria that could allow the initiation of enforcement procedures in FGR and UEIDDAPI. Currently these agencies have changed their previous criteria to determine a “commercial scale,” affecting the initiation of any criminal investigation against counterfeiting and copyright piracy.

IMPI and National Customs Agency have attempted to create an effective partnership to fill in the void. These agencies have delivered timely and decisive results in border enforcement. 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. However, despite these efforts and amendments to the Customs Code in 2018, problems persist. The amendments to the Customs Code did not provide the necessary *ex officio* authority for customs officials to conduct independent seizures of infringing goods and components—a USMCA obligation.<sup>4</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. The lack of action by customs authorities and FGR undermines the enforcement of law and protection of IPR.

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, without the need for a mandatory and certified registration. Mexico needs to change its Copyright Act to ensure these presumptions of ownership apply to all works (it currently exists only for sound recordings), even after the 2020 amendments.

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 Agreement obligations, Mexico should have “effective” criminal remedies, 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 procedural hurdles discussed above.

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 will be taken against piracy and counterfeit goods. 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.

The Government of Mexico should coordinate municipal, state, and federal government criminal enforcement actions (across Mexico’s 32 states and 2,400+ municipal governments). Also, another long-standing IIPA

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<sup>4</sup> See 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>.

<sup>5</sup> See WTO TRIPS Agreement, Articles 41 and 61.

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 *Procuraduría Federal del Consumidor* (Office of the Federal Prosecutor for the Consumer, PROFECO) to use its *ex officio* powers for consumer protection, and its resources against street market piracy.

- **Apply a coherent standard of “commercial scale” based on international practice, permit the initiation of criminal investigations against counterfeiting and piracy, and investigate and prosecute IP infringement cases absent proof of actual lost profits.**

In 2023, FGR and UEIDDAPI, the agencies responsible to initiate criminal investigations, reverted to their previous criteria to reject complaints of IP infringements based on the lack of loss of profits or lack of commercial scale, affecting the initiation of – and creating more burdens to initiate – any criminal investigation against counterfeit and copyright piracy. As a result, criminal penalties have not been available in Mexico for commercial scale infringements without a direct economic benefit. 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.” This change would allow the initiation of enforcement procedures in FGR and UEIDDAPI, and criminal penalties would be available in Mexico for commercial scale infringements absent proof of actual lost profits (in other words, without a direct economic benefit).

- **Provide training to improve 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.

- **Improve enforcement against theatrical 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. Camcords have resurfaced as a piracy problem in Mexico upon theaters reopening in 2021 post-pandemic, 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 derived from camcording because of its harm to the legitimate online distribution platforms and services that provide revenue for financing the development of new creative works worldwide.

## **LEGAL REFORMS**

- **Publish the implementing regulations of the 2020 Copyright Act amendments and reject interpretations of those amendments that would impede the positive progress made by them.**

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), finally implementing its treaty obligations in the 2020 amendments to the Copyright Act. The 2020 package of amendments represent needed reform to Mexico's copyright law. The full list of legal reforms adopted in 2020 improvements includes: the notice and takedown, safe harbor, and related provisions; protection for TPMs and RMI; explicit 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.

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, *Asociación Mexicana de Productores de Fonogramas y Videogramas* (Association of Producers of Phonograms and Videograms, AMPROFON), IFPI's national affiliate in Mexico, *Ilustre y Nacional Colegio de Abogados de México* (National Bar Association of 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. In addition to these challenges, the Supreme Court is deciding a third constitutional proceeding (*Amparo* No. 556/2022) brought by the Article 19 Association, whose membership is unknown, that could undermine the notice and stay down provisions of the Federal Copyright Act. The public version of the draft ruling of the Supreme Court concludes that several notice and stay down provisions of said Copyright Act are allegedly "unconstitutional general rules." Content creators and copyright holders have not been allowed to appear before the courts to defend their rights or file *amici* briefs in this *Amparo* proceeding. Therefore, the draft decision does not take into account the interests of creators and copyright holders. As of January 2024, a final decision was not available and the hearing on the case was postponed, but IIPA is concerned that the Mexican Supreme Court may rule that these provisions are unconstitutional. Although the new laws remain in force in the interim, the challenges have 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.

As mandated by the copyright reform, the Mexican government, and particularly INDAUTOR, were given 180 days to publish implementing regulations for the copyright law. However, after more than two years since the new legislation was enacted, the obligation remains pending. The copyright sector is justifiably concerned by this delay because it indicates that the Secretary of Culture and INDAUTOR may not be adequately prioritizing this matter. This concern would be further exacerbated if the regulatory process has been put on hold due to the constitutional challenges to the law and Supreme Court *Amparo* case No. 556/2022, even though these cases do not currently affect the validity and operation of the law. It is thus important that the Mexican government proceeds to defend vigorously the constitutionality of the adopted legislation and promptly introduce the implementing regulations to prevent a breach to Article 20.88 of the USMCA.

- **Amend the Copyright Act to address issues not revised in the 2020 amendments.**

More revisions are needed to the Copyright Act, as well as in the Industrial Property, Criminal, and Criminal Procedure Codes. For example, Article 232bis of the Copyright Act limits liability and excludes certain activities relating to the manufacturing of, or trafficking in, circumvention devices or technologies, and additionally, provides many exceptions and limitations that are problematic, including those to-be-determined by INDAUTOR.

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

- Establish explicit secondary liability.
  - Amend the Forfeiture Law to cover copyright infringements undertaken by organized crime syndicates.
  - 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.
- **Provide incentives for ISPs to cooperate in enforcement against online copyright infringement, including applying the reform of the 2020 Copyright Law to provide secondary liability for copyright infringement.**

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. 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 114octies). 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 have not been in practice in Mexico’s legal regime because they are subject to constitutional challenges before the 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.

There is a lack of leadership between agencies, including IMPI, and no agency has tried to take the lead and to enhance cooperation or facilitate communication with ISPs with the purpose to improve a notice and takedown system in Mexico. As part of its constitutional rights, ISPs have the right to file an injunction (*amparo*) against a takedown order by IMPI that could suspend the decision of authority and frustrate the takedown of the infringing content.



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. The Government of Mexico should amend the Civil Code and improve the procedures of the judicial power to add pre-established remedies and allow the recovery of 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).

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.

- **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.**

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) was published in the Federal Official Gazette.<sup>6</sup> 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 Law 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 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 ten years of imprisonment and 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.

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<sup>6</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>.

- **Reject the Bill to Amend the Federal Copyright Act related to “Literary Translation Contracts.”**

On February 15, 2022, a draft bill, which would add 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 if 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 would also prohibit the publication of the translated work with alterations, additions, deletions, or any modification made without authorization of the translator.

- **Address issues in the General Law of Libraries, such as requiring the delivery of works within 90 calendar days following the date of their commercial distribution.**

On June 1, 2021, the General Law of Libraries (GLL)<sup>7</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. 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>8</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.

- **Reject amendments to the Copyright Law that would establish a remuneration system through a “Private Copy Levy” (PCL).**

The Government of Mexico should reject proposed amendments of the Copyright Law that would establish a remuneration system through a PCL. Such amendments would require manufacturers and importers of equipment, devices, and technological goods to pay a fixed “compensatory remuneration” for the supposed copying, storing, compacting and/or reproduction of protected works that could occur in the future. This initiative will normalize copyright infringement, offering a blank check to consumers of devices for the unrestricted copying of content, on the assumption that the relevant manufacturer or distributor has already “prepaid” for the reproduction of protected works.

- **Reject any interpretation of the Copyright Law that would interfere with exclusive rights, including the introduction of a making available remuneration right for performers in addition to the already existing and sufficient exclusive right.**

The Government of Mexico should reject any interpretation of the Copyright Law that would interfere with the exclusive rights granted by the Law and those required by international treaties. The introduction of a making available remuneration right for performers in addition to the already existing and sufficient exclusive right would be one such example, and IIPA urges the Government of Mexico not to introduce such a measure.

## **MARKET ACCESS**

- **Reject policies proposing Local Content Quotas.**

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<sup>7</sup> General Law of Libraries (*Ley General de Bibliotecas*), June 1, 2021, available at <https://www.diputados.gob.mx/LeyesBiblio/pdf/LGB.pdf>.

<sup>8</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>.

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, limiting the number of screens in which a given movie can be exhibited, or regulating the dubbing of films 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.

- **Reject discriminatory investment obligations in the audiovisual industry.**

In recent months, there have been legislative efforts aiming to establish 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. Mexican policymakers should reject any such attempt to impose investment obligations.

### **Cooperation and Training**

IMPI has entered a Memorandum of Understanding (MOU) with ESA on August 18, 2022, to enforce and protect video games' IP. IMPI has conducted enforcement activities under the auspices of the MOU and in accordance with the current laws and regulations, including infringement referrals, online inspection visits, and investigations, promoting the importance of IP to creative and innovative industries. Practical efforts to execute the MOU have continued in 2023, including an ESA-led training with 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.