

# LEY FEDERAL DEL DERECHO DE AUTOR

*By Peter Smith*

On March 24, 1997, Mexico enacted its new Federal Copyright Law (1997 Law).<sup>1</sup> The new law calls for stiffer fines for copyright infringement and is augmented by reforms to the penal code making certain copyright violations a criminal offense. In light of Mexico's painful history of intellectual property abuse and its long-standing unwillingness to address this problem,<sup>2</sup> there is concern that the new law will do little to hamper the widespread infringement of U.S. copyrights.<sup>3</sup> In short, Mexico has promised to improve the situation in the past and failed. Whether the current effort to reform will prove more effective turns on whether Mexico can address structural impediments to intellectual property protection and the extent to which domestic and international pressures will enable this effort to remain on track.

## I. THE LACK OF ADEQUATE INTELLECTUAL PROPERTY PROTECTION IN MEXICO

Mexico is one of the world's largest markets for pirated intellectual property.<sup>4</sup> U.S. industry experts estimate that Mexico's failure to provide adequate intellectual property protection costs U.S. music, film, and software industries almost half-a-billion dollars per year.<sup>5</sup> In fact, one Mexico City neighborhood sold 66 million pirated cassettes last year for more than \$85 million.<sup>6</sup> During the same period, Mexico's entire legitimate recording industry sold only 30 million cassettes.<sup>7</sup> U.S. industry experts also estimate that the losses in Mexico from pirated video games alone were

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1. See "Ley Federal del Derecho de Autor," D.O., 24 de Marzo de 1997.

2. See Recent Int'l Developments, *Mexican Enforcement of Intellectual Property Rights*, 8 No. 5 J. PROPRIETARY RTS. 32 (1996) [hereinafter Recent Developments].

3. See *Intellectual Property Enforcement Seen as Insufficient, Experts Say*, WORLD INTELLECTUAL PROPERTY REPORT, May 1997, at 155 [hereinafter *Enforcement Seen as Insufficient*].

4. See *id.*

5. See *Fighting a Formidable Force; U.S. Commerce Drowning in Mexico's Piracy*, AUSTIN AMERICAN STATESMAN, Apr. 28, 1996, at 6G; see also *Intellectual Property Enforcement Seen as Insufficient*, *supra* note 3, at 155.

6. See *Fighting a Formidable Force; U.S. Commerce Drowning in Mexico's Piracy*, AUSTIN AMERICAN STATESMAN, Apr. 28, 1996, at 6G.

7. See *id.*

more than \$100 million in 1995<sup>8</sup> and that the losses due to the theft of business software has surpassed the \$200 million mark.<sup>9</sup> In fact, software piracy is the greatest single threat to the advancement of the software industry worldwide.<sup>10</sup> Worldwide losses due to piracy surpassed the \$15 billion mark in 1994 and have continued to increase.<sup>11</sup>

There will be little incentive for corporations to invest in the development and implementation of improved technology and new works if existing technology and works can be taken without compensation.<sup>12</sup> As commercial and technological changes make piracy easier and more lucrative, this problem will intensify.<sup>13</sup> Because the development and sale of intellectual property will be a significant source of economic growth in the future, any threats to this burgeoning industry may have substantial economic effects worldwide.

Inadequate intellectual property protection is particularly alarming to the United States for a number of reasons. First, as a pioneer in the development of intellectual property, the United States has a competitive advantage in this field. When intellectual property is pirated abroad, the thefts usually occur at the expense of U.S. companies. Second, the role and potential of information products in international trade have increased significantly.<sup>14</sup> Third, as foreign markets expand so do the opportunities for unauthorized copying.<sup>15</sup> Fourth, the development of relatively inexpensive means of copying has made piracy more profitable.<sup>16</sup> Fifth, re-

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8. See Recent Developments, *supra* note 2, at 32.

9. See Robert Holleyman, *Software Piracy Abroad: Challenges and Opportunities*, in PLI'S SECOND ANN. INST. FOR INTELL. PROP. LAW 1996, at 425 (PLI Patents., Copyrights, Trademarks, & Literary Prop. Course Handbook Series, No. G4-3961 (1996)).

10. See *id.* at 422.

11. See *id.*

12. See *id.* at 438 n.11. (citing Chair's Conclusions, G7 Ministerial Conference on Feb. 26, 1995, providing high levels of legal and technical protection of creative content will be one of the essential conditions to ensure the necessary climate for investment needed for development of the information society).

13. See Gabriel Garcia, Comment, *Economic Development and the Course of Intellectual Property Protections in Mexico*, 27 TEX. INT'L L.J. 701, 715 (1992).

14. See *id.* (citing INTELLECTUAL PROPERTY RIGHTS, GLOBAL CONSENSUS, GLOBAL CONFLICT?, 4 (Michael R. Gadbow & Timothy J. Richards eds., 1988) for the fact that the percentage of U.S. exports containing valuable intellectual property rose from 9.9% in 1947 to 27.4% in 1986.)

15. See *id.*

16. See *id.*

search and development costs continue to increase.<sup>17</sup> When the results of these costly investments are pirated, the copyright holder suffers a greater loss while the pirate is rewarded with higher profit margins.<sup>18</sup> As the above statistics demonstrate, Mexico's lackluster intellectual property protection costs the United States dearly; therefore, Mexico's inability to improve the situation is of great concern in this country.

## II. OVERVIEW OF MEXICO'S COPYRIGHT REGIME

In 1991, the antiquated Mexican Copyright Law of 1963 was modernized.<sup>19</sup> As a result, Mexican copyright law encompasses all of the major areas of intellectual property protected by the United States.<sup>20</sup> The copyright regime established under the new code has continued this trend. The 1997 Law states, that under the auspices of Article 28 of the Mexican Constitution, copyright protection has been created to foster national culture and to protect the works of various types of authors and artists.<sup>21</sup>

Title I of the 1997 Law defines the general guidelines for protection. All original works susceptible to being reproduced in any form or medium may receive protection,<sup>22</sup> and the protection begins as soon as the works are affixed upon a tangible medium.<sup>23</sup> All subject matter is divided into original and derivative works,<sup>24</sup> and non-Mexican authors are given an express grant of protection.<sup>25</sup>

Authors are defined in Title II as the person creating the literary or artistic work.<sup>26</sup> Protected matter includes literary, musical, pictorial, dance, ballet, cartoons, architecture, photography, film, radio, or television.<sup>27</sup> In contrast, ideas, concepts, formulas, methods, systems, processes, inven-

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17. See *id.* (citing INTELLECTUAL PROPERTY RIGHTS, GLOBAL CONSENSUS, GLOBAL CONFLICT?, 4-5 n.5 (Michael R. Gadbow & Timothy J. Richards eds., 1988) for the fact that in the U.S. semiconductor industry, the ratio of research and development to sales was 7.4% in 1980 and rose to 14% in 1986.)

18. See *id.*

19. See "Ley Federal del Derecho de Autor," D.O. , 17 de Juli 1991 reformed "Ley Federal del Derecho de Autor," D.O. , 1963.

20. See Donald L. Dubuque, Comment, *The Implication of NAFTA to Intellectual Property Protection*, 5 J. INT'L L. & PRAC. 137, 138-39 (1996).

21. See "Ley Federal del Derecho de Autor," D.O. , 24 de Marzo de 1997, art. 1.

22. See *id.* art. 3.

23. See *id.* art. 5.

24. See *id.* art. 4.

25. See *id.* art. 7 (foreign owners of copyrights enjoy the same protections as Mexican nationals).

26. See *id.* art. 12.

27. See "Ley Federal del Derecho de Autor," D.O. , 24 de Marzo de 1997, art. 13.

tions, business plans, sovereign banners and symbols, isolated names or sentences, or texts of legislation receive no protection.<sup>28</sup> The law stipulates that protected works must bear the legend D.R. followed by the symbol "©," the name and address of the copyright owner, and the year of the first publication.<sup>29</sup> However, in keeping with the spirit of the Berne Convention, a violation of this rule will only result in sanctions by the respective government agency, not in a default of rights.<sup>30</sup> In addition, Mexican law contains a moral rights provision<sup>31</sup> granting the author some degree of control over his or her work even if it has been sold or licensed to another party.<sup>32</sup> An author has exclusive rights in the exploitation of the work including the rights to copy, distribute, adapt, perform and display the work.<sup>33</sup> In most instances, this authority remains valid for the life of the author plus 75 years.<sup>34</sup>

Assignments and licenses are allowed, and their regulation is discussed in Title III. Although the rules vary from industry to industry, the courts are instructed to construe them in favor of the authors.<sup>35</sup> The law even has a provision limiting assignments to five years unless the relevant parties have contracted otherwise.<sup>36</sup> Title IV discusses the process of protection and creates standing for copyright owners to bring infringement actions.<sup>37</sup> Each medium is discussed separately. Protection for computer software is expressly provided, and in direct contrast to the U.S. Supreme Court's ruling in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,<sup>38</sup> the facts in databases are protected for five years.<sup>39</sup>

A number of the limitations to copyright protection are discussed in Title VI. If it is not possible for a party to obtain permission for the use of copyrighted works for the advancement of science, culture, or national

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28. *See id.* art. 14.

29. *See id.* art. 17.

30. *See id.*

31. *See id.* art. 19-21.

32. Gloria DELGADO DE CANTU, HISTORIA DE MEXICO 50-61 (1987) (explaining that the inclusion of moral rights is not surprising in light of the French influence over Mexican law during the reign of Maximilian, a French-supported European aristocrat who ruled Mexico during the 1860s).

33. *See* "Ley Federal del Derecho de Autor," D.O., 24 de Marzo de 1997, art. 24-27.

34. *See id.* art. 29.

35. *See id.* art. 31.

36. *See id.* art. 29 (duration) & art. 33 (assignments).

37. *See id.* art. 77.

38. 499 U.S. 340 (1991) (holding that facts inside of a database are not protected in the United States).

39. *See* "Ley Federal del Derecho de Autor," D.O., 24 de Marzo de 1997, art. 108.

education, the Secretary of Public Education may authorize publication.<sup>40</sup> In addition, a number of fair use type exceptions are spelled out in detail,<sup>41</sup> and the use of all public domain works is expressly authorized.<sup>42</sup> Additional titles of the 1997 Law discuss a number of ancillary points in greater detail, and the text of the statute concludes with a detailed description of enforcement procedures.

In summary, the text of the 1997 Law creates a blanket of protection with very few variations from its U.S. counterpart, and most of these variations provide for broader, not narrower, protection.<sup>43</sup> Based upon this legal framework, casual observers might conclude that Mexico is a bastion of copyright protection; however, even the most comprehensive legal code is meaningless if it is not enforced, and the Mexican copyright law is no exception.

### III. ADDRESSING MEXICO'S ENFORCEMENT PROBLEMS

Most of Mexico's comprehensive copyright protections have been in place for almost seven years, and they have done very little to disrupt Mexico's annual theft of \$500 million in U.S. copyrights.<sup>44</sup> According to a 1996 report from the International Intellectual Property Alliance (IIPA), Mexico still needs major reform of the police and judicial agencies as well as modifications to the procedure and penalties included in the copyright law itself.<sup>45</sup> It is uncertain if the new law will solve these problems.

According to Robert Holleyman, a noted intellectual property scholar, there are a number of steps that developing nations such as Mexico should follow to adequately enforce intellectual property protections. The goal of these guidelines is to guarantee enforcement and provide copyright holders an efficient means of protecting their rights. First, the government agencies, charged with enforcing the new laws must be given the necessary tools. The most important of these tools is the authority to perform random unannounced searches once preliminary evidence of infringement has been established.<sup>46</sup> This measure is essential because the nature of intellectual property makes it easy for pirates to destroy inculpatory evi-

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40. *See id.* art. 147.

41. *See id.* arts. 148-51.

42. *See id.* art. 152.

43. *See id.* arts. 19-21 (moral rights), 29 (75-year duration), 33 (assignment), 108 (facts in databases).

44. *See Fighting a Formidable Force; U.S. Commerce Drowning in Mexico's Piracy*, AUSTIN AMERICAN STATESMAN, Apr. 28, 1996, at 6G.

45. *See Recent Developments*, *supra* note 2, at 32.

46. *See Holleyman*, *supra* note 9, at 441.

dence if they have prior notice of a search. Second, copyright holders must have the right to enjoin infringing activity upon a showing of sufficient cause.<sup>47</sup> Third, the level of possible civil damages must be high enough to adequately compensate the rights holders.<sup>48</sup> Fourth, high criminal sanctions must be established and imposed in order to deter piracy, and fifth, the enforcement system procedures must be modern and efficient.<sup>49</sup> In many legal systems, the resources and time necessary to pursue an infringement complaint serve as a disincentive to any action by the rights holder.<sup>50</sup> Until 1997, these requirements were not adequately met in Mexico.<sup>51</sup>

In an effort to ward off a NAFTA dispute resolution proceeding, the December 1997 Law attempts to address the enforcement concerns.<sup>52</sup> Under the old regime, the maximum fine for infringement was 500 times the daily minimum wage, or \$1,500,<sup>53</sup> a paltry sum in the million-dollar piracy industry. The 1997 Law creates a maximum fine of 15,000 times the daily minimum wage, or \$45,000.<sup>54</sup> The same piece of legislation also amends Mexico's penal code to provide for six months to six years of imprisonment for copyright violations.<sup>55</sup>

Aside from raising the potential risks to copyright violators, the process of obtaining relief has been streamlined, and civil authorities have been given greater authority to investigate and convict copyright infringers. For example, two government agencies have been delegated the task of enforcement and regulation: the National Copyright Institute and the Mexican Institute for Industrial Property (IMPI).<sup>56</sup> The first agency is a division of the ministry of education while the second is part of the commerce ministry.<sup>57</sup> In addition, as a complement to the Mexican federal courts, a preliminary voluntary conciliation process, as well as an alterna-

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47. *See id.*

48. *See id.*

49. *See id.* at 441-42.

50. *See id.*

51. *See Recent Developments, supra* note 2, at 32.

52. *See id.*; *see also Copyright Law Stiffens Penalties, But Critics Call Law Insufficient*, WORLD INTELLECTUAL PROPERTY REPORT, Feb. 1997, at 45 [hereinafter *Copyright Law Stiffens*].

53. *See Recent Developments, Mexico's New Copyright Law Increases Protections*, 9 NO. 3 J. PROPRIETARY RTS. 19, 19 (1997).

54. *See id.*; *see also* "Ley Federal del Derecho de Autor," D.O., 24 de Marzo de 1997, art. 230.

55. *See Recent Developments, Mexico's New Copyright Law Increases Protections*, 9 NO. 3 J. PROPRIETARY RTS. 19, 19 (1997).

56. *See* "Ley Federal del Derecho de Autor," D.O., 24 de Marzo de 1997, art. 2.

57. *See Copyright Law Stiffens, supra* note 52, at 45.

tive arbitration procedure, will be established to help resolve copyright conflicts.<sup>58</sup> Such a system may provide a quick cost-effective means of relief. Furthermore, both agencies as well as the Mexican federal courts have been given extended powers to evaluate infringement actions and assess fines if necessary. Under the appropriate circumstances, they now have the authority to impose sanctions, issue preliminary restraining orders and injunctions, seize infringing materials, perform on-site inspections, and force discovery.<sup>59</sup>

At first glance, the new law appears to be a sign of pending improvement; however, uncertainty still exists. First, the law has some shortcomings. For example, dividing the enforcement of the new measures between two government agencies may be problematic. Many experts fear that this "complicated and unnecessary interaction between two institutions" will only serve to complicate the relief process.<sup>60</sup> In addition, the timing of the law has caused concern. Because it was drafted at exactly the same time that the World Intellectual Property Organization's Diplomatic Conference in Geneva was updating the Berne Convention, the new law must already be amended to include the relevant changes.<sup>61</sup>

Although the above flaws in the text of the law must be addressed, the issue of greatest concern is the Mexican government's dedication to intellectual property protection. The Mexican government has created the necessary tools to protect copyrights, but implementing these changes will require federal resources and resolve.<sup>62</sup> Mexico has no legal tradition of intellectual property protection, and there are very few experts to help resolve disputes.<sup>63</sup> The law cannot force the judiciary to act quickly. It will not guarantee that arbitration hearings are conducted fairly or that bureaucratic officials will perform their duties as expected. No mere law can do that. Likewise, eradicating piracy may involve substantial short-term costs and increased unemployment.<sup>64</sup> Mexican consumers will have to be weaned from their dependence on pirated goods, and this may lead to political opposition. The new law may call for the creation of an efficient copyright enforcement system, but unless the federal government commits

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58. See "Ley Federal del Derecho de Autor," D.O., 24 de Marzo de 1997, arts. 217-220.

59. See *id.* arts. 1, 210, & 234; see also "Acuerdo Por El que Se Delegan Facultades En El Director De Asuntos Juridicos Del Instituto Mexicano De La Propiedad Industrial," D.O., 2 de Mayo de 1997, art 1.

60. *Copyright Law Stiffens*, *supra* note 52, at 45.

61. See *id.*

62. See *Enforcement Seen as Insufficient*, *supra* note 3, at 155.

63. See *id.*

64. See Garcia, *supra* note 13, at 712-13.

the necessary money and clout to the relevant enforcement agencies, the inefficiencies and corruption that have hampered previous enforcement efforts may remain.

Fortunately, there is evidence that the Mexican government is going to take this commitment seriously and improve its record. First, Mexico's adoption of an export-led economic development strategy will necessitate raising copyright protection standards. Second, Mexico's membership in the North American Free Trade Agreement (NAFTA) will keep pressure on the Mexican government to implement improvements to Mexico's intellectual property system.

#### IV. MEXICO'S ADOPTION OF AN EXPORT-LED ECONOMY WILL PROMOTE COPYRIGHT PROTECTION

Mexico's previous disdain for copyright protection stemmed from its domestic economic policy. The Mexican political system grants significant power to its President to pursue his political agenda.<sup>65</sup> During the 1970s, Mexican President Luis Escheverria experimented with "import substitution industrialization" (ISI) as a means of promoting domestic development. The resulting "Escheverrian Wall" of protectionist tariffs, subsidies, and limits on foreign investment was an attempt to promote domestic industrialization by severely curtailing foreign competition and exploitation.<sup>66</sup>

Escheverria's experiment had adverse consequences for intellectual property protection. Like many developing countries, Mexico was convinced that adopting weak national policies for intellectual property would promote industrialization by reducing costs to domestic industry, quelling the competitive advantage of foreign firms, giving domestic firms access to greater technology, and decreasing dependence upon foreign technology.<sup>67</sup> As part of this grand scheme, the Patent and Trademark Law of 1976 was passed. Based on the rationale that technology belongs to all mankind, the new law deemed all proprietary rights to ideas or concepts unacceptable, especially if those ideas and concepts were held by developed nations.<sup>68</sup> In addition, the 1963 Copyright Act was not revised even though it did not provide express protection to computer programs, sound

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65. *See id.* at 704.

66. *See id.* at p. 721-23.

67. *See id.* at 711 (citing ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 159 (1990)).

68. *See Garcia, supra* note 13, at 728.



recordings, or video recordings.<sup>69</sup> The fallout of this drastic neglect of intellectual property protection is still felt today.

Escheverrian's experiment did generate a boom in Mexican domestic industry, but it was short-lived. When developed nations realized that their property rights would not be protected by Mexican laws, they invested elsewhere. Without foreign capital and "know-how," the Mexican industry that developed behind the Escheverrian Wall was second rate, inefficient, and unable to compete on the world market.<sup>70</sup> By 1982, Mexico was on the brink of financial ruin.<sup>71</sup> The ISI model was discredited.<sup>72</sup>

Mexico's new economic policy supports strengthening all intellectual property protection. Since the end of the Escheverrian Administration, Mexico has adopted "export-led industrialization fueled by foreign investment and technology."<sup>73</sup> This model involves an exchange of interests.<sup>74</sup> To foster its development, Mexico needs foreign investment to provide employment, technology, and capital. Mexico's potentially low production costs make it an ideal place for multinational corporations to invest. However, foreign businesses made it clear that, before they would invest significant capital, Mexico had to create an environment conducive to such investment. Aside from reduced tariffs and fewer restrictions on foreign ownership, intellectual property protection needed to be improved.<sup>75</sup>

Starting with President Miguel de la Madrid and continuing with President Salinas de Gortari, Mexico has sought to address the needs of foreign investors by dismantling the Escheverrian Wall and opening the domestic economy. In 1991, as part of this general policy, Mexico finally amended the 1963 Copyright Law.<sup>76</sup> Copyright protection would include the works of interpreters, performers, and producers of sound and video recordings. Protection was expressly extended to sound recordings, movies, computer software, and computer programs. These revisions also

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69. See "Ley Federal del Derecho de Autor," D.O. , 17 de Juli 1991 reformed "Ley Federal del Derecho de Autor," D.O. , 1963.

70. See Garcia, *supra* note 13, at 704.

71. See *id.* at 721.

72. See *id.* at 721-22.

73. *Id.* at 722.

74. See *id.* at n.78 (citing MICHAEL P. TODARO, ECONOMIC DEVELOPMENT IN THE THIRD WORLD 427-51 (1989) to discuss trade liberalization as a means of generating rapid export growth and economic development).

75. Garcia, *supra* note 13, at 730.

76. See "Ley Federal del Derecho de Autor," D.O. , 17 de Juli 1991 reformed "Ley Federal del Derecho de Autor," D.O., 1963.

granted copyright owners exclusive rights to reproduction, distribution, and rentals for a term of fifty years, and stiffened the criminal and civil penalties for infringement.<sup>77</sup> In 1991, Mexico made an even bolder statement of its dedication to intellectual property protection by repealing the extremely protectionist 1976 Patent and Trademark Law.<sup>78</sup> Foreign businesses have responded with increased investment, and the United States removed Mexico from the United States Trade Representatives' list of nations with the worst intellectual property protection.<sup>79</sup>

The 1997 Federal Copyright Law was another step in the progression toward intellectual property protection. As long as Mexico maintains its present economic policy, the application of federal resources to the fight against piracy can be expected. However, as supporters of Escheverrian's Wall learned in the 1980s, uncertainty in Mexico can lead to dramatic policy changes, and Mexico continues to be politically and economically volatile. As recently as 1994, there was a peasant uprising in the Chiapas region, a series of political assassinations, and a stock market crash.<sup>80</sup> Drug dealers still hold a tremendous amount of power, and in 1997, the Institutional Revolutionary Party (PRI) lost its working majority in the lower house of the national legislature for the first time in sixty-eight years.<sup>81</sup> The present Mexican government has adopted an economic policy that mandates a strong intellectual property protection regime, but, in light of Mexican history and some more recent developments, it would be premature to rule out the possibility of another policy shift.

## V. INTERNATIONAL INFLUENCE WILL REINFORCE MEXICO'S COMMITMENT TO COPYRIGHT PROTECTION

Pressure from the United States will encourage Mexico to follow through on its commitment to intellectual property protection. The United States has made intellectual property protection an integral part of its international trade policy.<sup>82</sup> There are three means by which the United States has tried to improve the situation: (1) extraterritorial enforcement

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77. *See id.*

78. *See* "Derecho por el que se Reforma y Adiciona la Ley de Invenciones y Marcas," D.O., 16 de Enero 1987.

79. *See* Garcia, *supra* note 13, at 731.

80. *See* Michael Elliot & Tim Padgett, *Breaking a Stranglehold*, NEWSWEEK, Aug. 22, 1994, at 36; *see also* Marc Levinson, *A Crash That's Contagious*, NEWSWEEK, Jan. 23, 1995, at 36.

81. *See* Martha Brant, *Liposuctioned to Death*, NEWSWEEK, July 21, 1997, at 43.

82. *See* Garcia, *supra* note 13, at 716.

of U.S. intellectual property legislation; (2) bilateral pressure; and (3) international agreements.

U.S. firms suffering from international piracy have sought relief in U.S. courts, but it is a generally accepted principle that the U.S. Copyright Act does not have an extraterritorial effect. In the past, U.S. courts would consider these causes of action and determine whether it was appropriate for the U.S. judicial system to become involved.<sup>83</sup> However, the 1994 opinion in *Subafilms, Ltd. v. MGM-Pathe Communications*<sup>84</sup> ushered in an era of judicial restraint. *Subafilms* concluded that the legislature, wishing to avoid international unrest, purposely refrained from incorporating extraterritorial application into the U.S. Copyright Act.<sup>85</sup> This decision has made suits in U.S. courts for infringement outside of the United States nearly impossible.<sup>86</sup>

Bilateral agreements and the threat of sanctions have also been used to encourage adequate levels of protection. The United States Trade Act of 1974 authorizes the United States Trade Representative (USTR) to investigate unfair trade practices in other countries.<sup>87</sup> The Act also permits the USTR to impose retaliatory sanctions under certain circumstances.<sup>88</sup> Subsequent revisions to the act, referred to as Special 301 and Super 301, have extended the USTR's responsibilities.<sup>89</sup> Under Super 301, the USTR must not only investigate unfair trade practices, but also initiate proceedings against the nations displaying the most egregiously unfair practices.<sup>90</sup>

For political and strategic reasons, the U.S. Executive branch has been hesitant to invoke its sanctioning power. For instance, despite political pressure to sanction Mexico, President Clinton has refused, fearing that the possible adverse economic fallout and negative attention would jeopardize U.S. acceptance of NAFTA.<sup>91</sup> Additionally, it is very difficult for the U.S. President to impose sanctions when relations with strategically important nations are involved. The President must consider national and regional security as well as fair trade.

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83. See Dubuque, *supra* note 20, at 150.

84. See 24 F.3d 1088 (9th Cir. 1994).

85. See *id.* at 1089.

86. See Dubuque, *supra* note 20, at 152-53.

87. See United States Trade Act of 1974, 19 U.S.C. § 2412 (1978).

88. See *id.*

89. See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 817-18 (3d ed., 1995).

90. See *id.* at 818.

91. See *Fighting a Formidable Force: U.S. Commerce Drowning in Mexico's Piracy*, AUSTIN AMERICAN STATESMAN, Apr. 28, 1996, at 6G.

Recently, the favored means of securing adequate intellectual property protection has been bilateral and multilateral agreements. The General Agreement on Tariffs and Trade (GATT) is an international trade agreement that fosters reduced trade barriers through multilateral negotiations, and its offspring, the World Trade Organization (WTO), is a mechanism for enforcing these measures and resolving disputes between member states. A new and important feature of the WTO is the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). TRIPS mandates that all WTO members will provide a minimum level of intellectual property protection.<sup>92</sup> In addition, Mexico has joined the United States and Canada in NAFTA. Chapter 17 of NAFTA stipulates with great specificity that each member state must provide adequate intellectual property protection by enacting and enforcing strict laws against piracy.<sup>93</sup>

As part of its open market strategy, Mexico has joined both the WTO and NAFTA, and, like most developing nations, Mexico is being pressured to conform to the intellectual property provisions of these two agreements. Because NAFTA is the more stringent of the two agreements and takes priority if any conflicts arise, it is the preferred means of improving copyright protection in Mexico.<sup>94</sup> NAFTA requires each member state to grant its domestic administrative and judicial authorities broad powers to protect intellectual property within its borders. NAFTA stipulates that these domestic government entities be given the power to confiscate goods without compensation, order injunctions, take preventative measures, exclude importation of infringing goods, and award damages plus attorney's fees and costs.<sup>95</sup> NAFTA also mandates that Mexico end its traditional practice of not recognizing pretrial relief.<sup>96</sup> Aside from granting the necessary enforcement powers, NAFTA provides a specific list of procedures and remedies that simplify the complaint process and provide private parties with the "strongest mechanisms to achieve transnational justice."<sup>97</sup> NAFTA also requires cooperation among member states and includes provision for the mutual extension of technical assistance, including the training of personnel.<sup>98</sup> This assistance is crucial in

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92. See Dubuque, *supra* note 20, at 145-46.

93. See *id.* at 146-67.

94. See *id.* at 146.

95. See *id.* at 147-48.

96. See *id.*

97. James A.R. Nafziger, *NAFTA's Regime for Intellectual Property*, 19 HOUS. J. INT'L L. 807, 822 (1997).

98. See North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, art. 1719, 1995 WL 522861, Dec. 17, 1992.

Mexico, where no tradition of intellectual property protection exists and resources are limited.

NAFTA does not establish a central or uniform system of dispute resolution. Chapter 17 describes the minimum standards of protection, enforcement, and due process, but it leaves the actual work to the agencies and courts of the member states.<sup>99</sup> If, however, a member state fails to provide effective access to relief, dissatisfied parties may seek inter-governmental dispute resolution as described in Chapter 20.<sup>100</sup>

Chapter 20 establishes the Free Trade Commission and states that one of its duties is to “resolve disputes” that may arise regarding the interpretation and application of NAFTA.<sup>101</sup> Article 2004 provides that, if a member nation finds that any benefit it “could reasonably have expected to accrue” from the agreement is being “nullified or impaired,” that nation may seek recourse under this dispute settlement process.<sup>102</sup> Intellectual property protection is expressly listed as one of the benefits that a nation could “reasonably expect to accrue” from the treaty.<sup>103</sup> If the commission is unable to resolve the conflict in a timely manner, then a five-member arbitration panel shall be formed.<sup>104</sup> The panel will examine the issue within 20 days from the date it is requested and issue a published report within 135 days.<sup>105</sup> The report will detail the measures to be adopted to improve the situation and a failure to comply will result in a suspension of “benefits of equivalent effect.”<sup>106</sup> In other words, if Mexico fails to implement the intellectual property guidelines described in Chapter 17 of NAFTA, the United States can seek redress from a multi-national NAFTA panel, and, if Mexico defies this panel’s decision, sanctions will be imposed.

In addition, the previously mentioned NAFTA panel has the authority to review matters from judicial and administrative proceedings within the respective member states.<sup>107</sup> Therefore, U.S. corporations, not just the U.S. government, may ask the NAFTA panel to intervene and review decisions and actions by Mexican agencies and civil courts.<sup>108</sup> This provi-

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99. *See id.* arts. 1714-16.

100. *See id.* art. 2005.

101. *See id.* art. 2001.

102. *Id.* at ANNEX 2004.

103. *See id.*

104. *See id.* arts. 2007-08, 2011.

105. *See id.* art. 2016-17.

106. *See id.* art. 2018-19.

107. *See id.* art. 2020.

108. *See id.*

sion will allow U.S. companies to seek redress without involving the U.S. government, saving time and money as well as limiting political interference.

Mexico's new law is an obvious attempt to comply with NAFTA. The groundwork for protection described in Chapter 17 was used as a model for the enforcement aspects of the new law and these provisions were rapidly adopted to avert the threat of a Chapter 20 dispute.<sup>109</sup> This willingness to acquiesce is a sign of Mexico's commitment to copyright reform. Mexico has crafted its legislation around the NAFTA standards and responded to the promise of increased trade and technical assistance as well as the threat of an international arbitration proceeding. This willingness to cooperate suggests that Mexico is taking its NAFTA obligations seriously and will follow through with adequate support of its anti-piracy campaign.

## VI. CONCLUSION

The text of Mexico's new Federal Copyright Law establishes comprehensive protections similar to those afforded works in the United States. The law also grants the government increased enforcement powers and provides for stiff civil and criminal penalties for infringement. However, because of the political, judicial, and economic realities in modern Mexico, the success of these measures depends upon the Mexican government's dedication to the crusade against piracy.

Mexico may finally be ready to commit the necessary resources to improve the situation. As long as the domestic economy is centered around export-led growth, it will be in Mexico's best interest to provide adequate copyright protection. In addition, Mexico's membership in NAFTA requires immediate improvement in its copyright protection scheme, and, in light of Mexico's professed willingness to abide by its NAFTA commitments, a sufficient effort and subsequent improvement should be forthcoming.

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109. See *Enforcement Seen as Insufficient*, *supra* note 3, at 155; see also *Copyright Law Stiffens*, *supra* note 52, at 45.