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# Internet piracy: the Mexican perspective

**There are many obstacles to effective online law enforcement, with a lack of proper and specific regulations to assist brand owners not helping the situation**

The proper regulation of the Internet continues to be a key issue on both the national and international agendas. However, it is important to clarify the meaning of 'piracy'. Many consider it to be any conduct that involves the unauthorised copying or plagiarising of any IP right. This is partly due to the fact that the term is not clearly defined in Mexican legislation; the Federal Criminal Code refers to very different conduct under the same term, concerning the illegal seizure or taking control by violent means of a vessel or aircraft. 'Piracy' as it relates to IP violations can be found in only a few international conventions and treaties, and is more often used in the definitions used by specialised industry associations when referring to:

- the unauthorised downloading of software;
- the publication and/or distribution of illegal (unauthorised) software by any means; or
- the use of the Internet to transmit codes or other technologies designed to circumvent security measures contained in software products.

In a 2011 report the Business Software Alliance stated that the value of pirated software in Mexico was equal to \$1.249 billion, a figure that compares unfavourably to the \$942 million spent on legal software sales in the same period. Even with the sustained efforts of the Mexican authorities – resulting in a decrease in the piracy rate of 1% each year since 2009 – this issue remains a serious one for information technology companies, particularly because around 80% of illegal software is distributed online.

According to information published by the United Nations Educational, Scientific and Cultural Organisation, the goods most often downloaded illegally are films,

music, video games and software – in other words, works protected by copyright and related IP rights. Such illegal activities are implemented through peer-to-peer file-sharing sites dedicated to providing links to infringing hosted content and illegal distribution hubs, as well as social networks.

Considering the extent and complexity of the problem, in recent years policy makers and legislators have asked a key question in an attempt to address the issue: who should be responsible (and punished) for performing such illegal activities? Different answers have been given to this question, resulting in varying opinions that neither internet service providers (ISPs) nor end users should be held responsible for actions involving pirated content, since neither participates in the creation or acquisition of the illegal material that is subsequently circulated in cyberspace. The debate continues and, although no specific legislation applies to internet piracy issues, such behaviour is covered by national laws which address the issue from different angles:

- The Federal Civil Code regulates the foundations of civil and contractual obligations, as well as the acceptance of offers using digital media.
- The Commercial Code admits electronic data transfers as one of the means of legally acceptable correspondence between contracting parties and as a means of settling contracts, as well as giving certain definitions regarding the digital environment.
- The Federal Code of Civil Procedure sets down several rules as to the acceptance of evidence concerning information generated and/or communicated in electronic, optical or any other digital format.
- The Federal Tax Code validates internet

transfers by addressing specific provisions concerning royalties or sums paid using electronic data media in matters concerning industrial, commercial or scientific activities, and defines the concept of a 'digital document'.

- The Federal Criminal Code foresees specific penalties for copyright violations and child pornography, even when the criminal conduct is performed using remote digital means (ie, the Internet).

Although all of these laws may be implicated, it is vital to identify the existing laws and regulations that specifically inhibit, punish or pursue internet piracy. The Criminal Code provides for imprisonment of between three and 10 years for:

*"anyone producing, reproducing, bringing to the country, storing, transporting, distributing, selling or leasing copies of works, phonograms, videograms or books that are protected by Federal Copyright Law, when such conduct is knowingly performed with commercial intent and without authorisation of the copyright or related rights owner, or who knowingly so provide any form of raw materials for producing or reproducing works, phonograms, videograms or books, or anyone who, with commercial intent, manufactures devices or systems aimed at deactivating or circumventing software or devices designed to protect electronic devices or signals."*

Article 231 of the Copyright Law is the clearest instrument defining the various conduct comprising this multi-faceted problem:

*"The following conducts shall constitute*

commercial infringements, whenever they are performed with the aim of obtaining a direct or indirect profit:

(iii) to produce, reproduce, store, distribute, transport or sell copies of works, phonograms, video or books, protected by either a copyright or any related rights, when performed without the authorization of the author and/or the legal right holder(s) in terms of this Act...

(v) Import, sell, lease, or perform any action that makes available a device or system whose purpose is to deactivate the electronic protection devices of a computer program;

(vi) Forward, post, reproduce and disseminate to the public any broadcast or emission without the proper authorization;

(vii) Use, reproduce or exploit a reservation of rights notice or computer program without the consent of the owner."

The question remains of why, despite the existence of several laws addressing these matters and the creation of specialised law enforcement units, plus growing public awareness, the Internet is still considered to be a safe haven for pirates and infringers alike. It could be said that internet piracy is a complex phenomenon, and that authorities face many practical obstacles to online law enforcement, but in reality the problem is a lack of proper and specific regulation and of adequate means to combat the issue effectively.

In its 2012 Special 301 Report, the Office of the US Trade Representative noted that while Mexico has elicited positive results by strengthening the observance and enforcement of IP rights, there are still serious issues to address to reduce the availability of pirated and counterfeit items, including the high prevalence of piracy over the Internet. Moreover, it stated that there is poor coordination between federal, state and municipal authorities, which hinders effective prevention of illegal activities. Added to the low penalties established by law for IP rights infringers, this results in a minimal deterrent effect. In its conclusion, the report recommended that Mexico ratify and implement the Anti-counterfeiting Trade Agreement (ACTA), an international instrument which it has already signed. ACTA has faced major



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opposition from some sectors of the public, as it is considered to damage various rights protected by the Mexican Constitution, such as freedom of speech and privacy from government actions. At this moment, ACTA necessarily needs to be further examined by the Senate before it can continue on the ratification process.

The debate generated by ACTA focused on the "digital environment" section of the agreement. ACTA requires each of its members to enact domestic laws aimed at ensuring that the civil and criminal proceedings available to IP rights holders permit effective action against infringement in the digital environment, including expeditious measures to prevent further infringements. The strengthening of the ability of government and law enforcement agencies to monitor and enforce laws in cyberspace contrasts with the increased ease of using and accessing the Internet, even through mobile devices. In addition, there is a need to increase public awareness that infringements should never be tolerated as, in the end, they result in serious damage that can be impossible to repair.

The International Intellectual Property Alliance argues that as yet, there is no point of agreement between rights holders and ISPs, as rights holders should be given the means to enforce their IP rights effectively while not interfering with ISPs' operations and the right of end users to enjoy the Internet. Considering the underlying issues, the main question remains unanswered. The key to resolving this issue lies in reconciling the rights of rights holders, ISPs and the public by producing effective regulations that guarantee the efficient enforcement of IP rights, while preserving the fundamental rights of freedom of speech and inviolability of private communications.

One answer can be found by applying the principle of weight. More people use the Internet for legitimate activity than for illegitimate activity, and such use must always be provided with a defence against laws limiting constitutional rights. However, at the same time the need for a law providing effective penalties against the people responsible for internet piracy should be addressed. In light of this, efforts should be made to establish true coordination between rights holders and ISPs by providing incentives and guarantees so that ISPs are not penalised for merely facilitating the passage of allegedly infringing information, but rather have the legal power to denounce and provide information on infringers to both rights holders and government authorities. [WTR](#)