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## Comments

# Forget NAFTA: How the U.S. Can Obtain Improved Protection of Copyrighted Goods in Mexico Through the Creation of An Open United States-Mexico Border

Dara Cox Bachman\*

The United States, Mexico, and Canada ratified the North American Free Trade Agreement (“NAFTA”) eleven years ago,<sup>1</sup> yet critics still complain of continued high levels of immigration, slow progress on environmental problems, weak enforcement of labor standards, a decline in real wages, and increased transshipments through Mexico of illegal drugs.<sup>2</sup> The pirating of copyrighted goods in Mexico is also a constant<sup>3</sup> among this list of problems as the pirating industry continues to swell in Mexico despite NAFTA’s restrictions.<sup>4</sup> The United States has been one

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1. North American Free Trade Agreement (Dec. 17, 1992) U.S.-Can.-Mex., H.R. Doc. No. 103-0159 (effective Jan. 1, 1994) [hereinafter NAFTA].

2. Gary C. Hufbauer & Jeffrey J. Schott, *The Prospects for Deeper North American Economic Integration: A U.S. Perspective*, 195 C.D. HOWE INST. 1, 4- 5(2004).

3. U.S. Trade Rep. Special 301 Report-Mex. (2004).

4. *Id.*

of Mexico's biggest critics and has complained of its inability to comply with the legislative standards established by NAFTA, yet the U.S. has made few additional efforts beyond these complaints to aid Mexico in coming into compliance.<sup>5</sup>

Mexico's continued struggle with the harmonization of its policies with those of Canada and the U.S. is most notably a result of Mexico's continuing economic problems.<sup>6</sup> Although Mexico's government has been persistent in amending its statutes so that facially the nation appears in compliance with NAFTA,<sup>7</sup> a continual lack of capital has prevented Mexico from implementing and enforcing the necessary changes.<sup>8</sup> NAFTA's goal was to significantly raise levels of foreign direct investment through the economic integration of the three nations.<sup>9</sup> However, eleven years after NAFTA was ratified, such drastic improvements in Mexico's economy have not occurred.<sup>10</sup> Therefore, the U.S. must realistically search for an alternative to boost Mexico's economy if it ever hopes to see Mexico harmonize its laws in practice with those of its northern neighbors.<sup>11</sup>

This comment will demonstrate how an open U.S.-Mexico border can make a lasting impact on the Mexican economy, thereby enabling Mexico to improve all areas where it has failed to come into compliance with NAFTA by looking specifically at the situation regarding copyright law. Mexico has failed to offer the full protection afforded under the copyright protection chapter of NAFTA, Chapter 17. The failures of the copyright law will be used throughout the comment as an example of a deficiency in Mexican law that has cost the U.S. hundreds of millions of

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5. See, e.g., *id.* The U.S. approach has been to make self-evident suggestions of what Mexico can do to make copyright protection more stringent and to hold bilateral discussions regarding methods of improvement; however, the U.S. has offered no assistance in implementing these suggestions. See *id.*

6. Hufbauer, *supra* note 2, at 8.

7. See, e.g., Ley Federal del Derecho de Autor [Mexican Federal Copyright Law], D.O., (July 1, 1991) [hereinafter 1991 Federal Law]; Ley Federal del Derecho de Autor, D.O., (Mar. 24, 1997) [hereinafter 1997 Federal Law].

8. Hufbauer, *supra* note 2, at 8. Conversely, the U.S. economy has always enjoyed a cyclical recovery throughout the years that has clouded the U.S.'s ability to understand Mexico's economic problems. *Id.*

9. LYUBA ZARSKY & KEVIN P. GALLAGHER, INTERHEMISPHERIC RESOURCE CENTER, NAFTA, FOREIGN DIRECT INVESTMENT, AND SUSTAINABLE INDUSTRIAL DEVELOPMENT IN MEXICO (2004), [www.americaspolicy.org/briefs/2004/0401mexind\\_body.html](http://www.americaspolicy.org/briefs/2004/0401mexind_body.html). NAFTA has performed poorly in terms of economic growth and "sustainable industrial performance." *Id.*

10. *Id.*

11. Associated Press, *Poverty Level Down, but Still Big Challenge for Mexico* (July 28, 2004), at <http://globalexchange.org/countries/mexico/2384.html>. As President Fox explained "Mexico is still very far away" from a situation of economic equality [with the U.S.]. *Id.*

dollars a year and yet the U.S. has done little more than file documents to register complaints. Any plan by the U.S. to curb copyright piracy must recognize that economic growth must be widespread so that the government has financing to enforce the provisions and so that the masses will be able to afford the inflated price of goods.<sup>12</sup>

Part one of the comment will give a brief history of Mexican copyright law. In part two, the comment will provide the reader with an understanding of the state of copyright protection currently in Mexico. Part three of the comment will explain how NAFTA has affected Mexican copyright law and the various provisions available to all Member Nation copyright holders. Part four of the comment will speculate as to how an open border policy is a logical step for the U.S. to take if it would like to change the situation in Mexico. This section will further discuss what both the U.S. and Mexico must do to implement such a change and some of the common concerns that have prevented the U.S. from implementing such a change in the past. Moreover, this comment will demonstrate how such efforts by the U.S. could have a drastic influence on the specific area of copyright law in order to show how such changes could affect all areas of NAFTA, so that NAFTA may finally operate as intended.

#### I. The History of Mexican Copyright Law

Mexico has steadily increased the protection afforded under its federal copyright laws over the last 15 years.<sup>13</sup> Mexican copyright law remained unchanged for decades until 1991,<sup>14</sup> when Mexico amended its law in anticipation of the enactment of the North American Free Trade Agreement (NAFTA). Prior to this amendment, Mexico's government gave little attention to copyright protection, in large part, because of a widely held belief that stringent copyright protection would hamper economic growth within Mexico.<sup>15</sup> Mexico, like many developing nations, had a long-standing fear that strong intellectual property protection would only benefit the developed nations while raising production costs within the developing nation.<sup>16</sup>

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12. Joan Grillo, *Pirates Sail the Virtual Seas*, BUS. MEX., Sept. 2003, at <http://amcham.com.mx/publicaciones/business/sept03/pirates.html>. As one anonymous counterfeiter explained, counterfeiting "allows [Mexicans] to get stuff for a price they can afford. Most Mexicans are struggling economically, so they look for the cheapest offer." *Id.*

13. See, e.g., 1991 Federal Law, *supra* note 7; 1997 Federal Law, *supra* note 7.

14. The 1963 Federal Copyright Law was not amended until almost thirty years later with the 1991 Federal Law.

15. See, e.g., Ewell E. Murphy, Jr., *From the Yukon to the Yucatan, Houston's State in the New North America*, HOUS. LAW. May/June 1992 at 29.

16. Keith E. Makus, *Normative Concerns in the International Protection of*

In the 1970s, Mexican President Luis Echeverria created a protectionist regime later dubbed the "Echeverrian Wall."<sup>17</sup> His regime established protectionist tariffs, subsidies, and limits on foreign investment in the hopes that domestic trade would be rejuvenated.<sup>18</sup> He theorized that without copyright protection, production costs would be reduced thereby eliminating external competition, since the copyrighted goods of developed nations were necessarily sold at higher prices.<sup>19</sup> This theory, at least internally, proved true because the majority of the people of Mexico could not afford copyrighted goods, but would buy the internally manufactured counterfeited goods.<sup>20</sup> Initially this restructuring did create a boom in Mexico's economy; however, in the long run, developed nations stopped investing in Mexico once they realized that their property rights were not being protected.<sup>21</sup> The loss in external investment as a result of this faulty protectionist scheme placed Mexico on the brink of bankruptcy in 1982.<sup>22</sup>

After the economic fall-out of 1982, Mexico dedicated itself to an export-led economy that encouraged foreign investment and technological discovery.<sup>23</sup> The new system established an exchange of goods that allowed Mexico to trade its low production costs for employment, technology, and capital.<sup>24</sup> Initially Mexico encountered resistance from investing nations.<sup>25</sup> In order to combat this resistance, Mexico needed to give potential investing nations reassurance that it would provide adequate copyright protection to their goods.<sup>26</sup> In 1991, Mexico put in place a new federal copyright law ("1991 Law"). The

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*Intellectual Property Rights*, 13 *WORLD ECON.* 387, 387 (1991).

17. See Murphy, *supra* note 15.

18. *Intellectual Property Rights, Global Census, Global Conflict?* 2 (R. Michael Gadbow & Timothy J. Richards eds., 1988).

19. *Id.*

20. John Lannert, *Mexican Labels Hope Trade Agreement Aids Piracy Battle*, *BILLBOARD*, Aug. 29, 1992.

21. Murphy, *supra* note 15, at 33. Aside from the theoretical errors of past presidents, what little copyright protection Mexico did provide was insufficient because it failed to cover major genres generally afforded copyright protection such as sound recordings, computer programs, and video recordings. *Id.*; Ley Federal del Derecho de Autor, D.O., (1963).

22. Murphy, *supra* note 15, at 29.

23. U.S. INT'L TRADE COMMISSION, PUB. NO. 2275, *REVIEW OF TRADE AND INVESTMENT LIBERALIZATION MEASURES BY MEXICO AND PROSPECTS FOR FUTURE UNITED STATES-MEXICO RELATIONS (PHASE 1: RECENT TRADE AND INVESTMENT REFORMS UNDERTAKEN BY MEXICO AND IMPLICATIONS FOR THE UNITED STATES)* (1990).

24. MICHAEL P. TODORO, *ECONOMIC DEVELOPMENT IN THE THIRD WORLD* 427-51 (1989).

25. Edwin F. Einstein, *Promising Developments in Technology Transfer and Intellectual Property Protection in Mexico*, *Newsl. of the Int'l Sec. (State Bar of Tex.)*, Apr. 1990, at 13.

26. *Id.*

1991 amendments to the copyright law were made in anticipation of the signing of NAFTA and were the legislative beginning of regaining the confidence of foreign investors.<sup>27</sup>

*A. The 1991 Copyright Law Amendments*

The 1991 Law extended copyright protection to the works of interpreters, performers, and producers of sound and video recordings as well as sound recordings, movies, computer software, and computer programs.<sup>28</sup> In addition, the amendments vested sole reproduction, distribution, and rental rights to copyright owners for fifty years,<sup>29</sup> and implemented harsher criminal and civil penalties for infringement.<sup>30</sup> Prior to 1991, infringement penalties ranged from fines of fifty to 10,000 pesos and prison sentences of thirty days to six years.<sup>31</sup> The 1991 Law increased the monetary fines to 500 days of minimum daily wage, or \$1,500, and prison terms from six months to six years.<sup>32</sup> Investing countries responded positively to the additional protections.<sup>33</sup> For example, the United States took Mexico off of the United States Trade Representative's Special 301<sup>34</sup> list of nations with the weakest copyright protection.<sup>35</sup>

Despite the statutory changes, Mexican law still failed to give adequate protection for various reasons. First, the government agencies did not have the tools to enforce the laws.<sup>36</sup> Additionally, because Mexico did not traditionally provide injunctions but maintained a lengthy

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27. *Id.*

28. 1991 Federal Law, *supra* note 7.

29. *Id.*

30. Mariano Soni, *Mexican Copyright Law*, BUS. MEX., Oct. 1991, at 14.

31. *Id.*

32. 1991 Federal Law, *supra* note 7.

33. John Lannert, *supra* note 20. In 1992, an authorized cassette sold for \$11.30 while a counterfeit cassette sold for \$1.60. Mexico sold only fifty four million cassettes in the official market in contrast to the seventy million cassettes that were sold in the pirate market that year. *Id.*

34. The U.S. Trade Representative has the power to investigate unfair trade practices in foreign nations under The United States Trade Act of 1974. Special 301 is a revision to that Act which expands the U.S. Trade Representative's power to investigate and sanction countries with high levels of counterfeited goods. See United States Trade Act of 1974, 19 U.S.C. § 2412 (1978).

35. Christopher M. Gacek, *U.S. Goals for Patent Protection in the GATT Trade Talks*, THE HERITAGE FOUND., Oct. 31, 1991, available at <http://www.heritage.org/Research/TradeandForeignAid/BO863.cfm>. Mexico was previously placed on this list because of the large volume of goods pirated in Mexico each year. *Id.*

36. Robert Holleyman, *Software Piracy Abroad: Challenges and Opportunities*, 1996 PLI SECOND ANN. INST. FOR INTELL. PROP. LAW 441. Most notably, Mexican authorities must be able to perform unannounced searches of known copyright infringers. *Id.*

judicial process and provided relatively small damage awards,<sup>37</sup> a large percentage of people were forced to rely upon the speedier criminal remedies; however, criminal remedies did not compensate the copyright owner and thus were of limited use to private parties.<sup>38</sup> The U.S. strongly urged Mexico to implement a system with higher civil penalties and more severe criminal sanctions that would prevent future acts of piracy.<sup>39</sup>

### B. *The 1997 Copyright Law Amendments*

Mexico continued to dedicate itself to improving its copyright legislation and on March 24, 1997, Mexico enacted yet another new federal copyright law ("1997 Law") in order to address some of the above mentioned problems that still existed.<sup>40</sup> The 1997 Law defines eligible works for protection generally as all original works that are able to be reproduced<sup>41</sup> as soon as the works are recorded in a tangible medium.<sup>42</sup> The 1997 Law extends protection to any author that creates the literary or artistic work<sup>43</sup> and expressly includes non-Mexican authors.<sup>44</sup> Generally copyright protection continues for the life of the author plus seventy five years,<sup>45</sup> and gives the author exclusive control over the use of the work.<sup>46</sup> Additionally, authors retain some control over the work even if it has been sold or licensed under a moral rights provision.<sup>47</sup> Remedies now include a maximum fine of 15,000 times the daily minimum wage, or \$45,000.<sup>48</sup> Nevertheless, Mexican copyright law continues to not include the following works: ideas, concepts, formulas, methods, systems, processes, inventions, business plans, sovereign banners, and symbols, isolate names or sentences, or texts of

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37. *International Property Enforcement Issues to Play Major Role in NAFTA Talks*, Int'l Trade Rep. (BNA), at 1553 (Oct. 23, 1991).

38. *Id.*

39. U.S. Trade Rep. Special 301 Report-Mex. (1990).

40. 1997 Federal Law, *supra* note 7.

41. *Id.* art. 3.

42. *Id.* art. 5. These requirements closely mirror U.S. copyright requirements. See Copyright Act, 17 U.S.C.A. § 102 (1976).

43. 1997 Federal Law, *supra* note 7, art. 12.

44. *Id.* art. 7.

45. *Id.* art. 29.

46. *Id.* arts. 24- 27. The right to exploit includes the right to copy, distribute, adapt, perform and display the work. *Id.*

47. *Id.* arts. 19- 21; Alejandro Perez- Serrano F., *Overview of Copyright Protection in the United States and Mexico*, 1997 COPYRIGHT NAT'L LAW CENTER FOR INTER-AMERICAN FREE TRADE. Moral rights are defined as a set of prerogatives related to the honor, prestige, and reputation of the author. *Id.*

48. 1997 Federal Law, *supra* note 7, art. 230.

legislations.<sup>49</sup> In sum, the 1997 Law, on its face, actually affords similar protection to that of the U.S. law, if not more protection.<sup>50</sup> However, enforcement shortcomings and judicial flaws have stunted the application of Mexico's copyright law so that in practice it continues to fall short of operating as effectively.<sup>51</sup>

## II. The Present State of Intellectual Property Protection in Mexico

Despite the great strides Mexico has taken in improving its copyright laws, Mexico remains a center for piracy.<sup>52</sup> A lack of government action,<sup>53</sup> the difficulties presented by the creation of two government agencies to regulate the law,<sup>54</sup> and bad timing<sup>55</sup> are just some of the reasons that the 1997 Law has failed to operate as intended. While it is true that the Attorney General (PGR) is stepping up efforts to stop copyright infringements by creating a special division which oversees nothing but intellectual property crimes,<sup>56</sup> such efforts to increase enforcement are not enough to keep up with the rate of increase in piracy.<sup>57</sup>

Although the U.S. recognizes the efforts of the Mexican government in amending the law,<sup>58</sup> the efforts to enforce the law have been insufficient.<sup>59</sup> In July of 2003, Mexico drafted another set of

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49. *Id.* art. 14. It should be noted that these types of works do not receive protection under the United States Copyright Law. Copyright Act, 17 U.S.C.A. § 102(1976).

50. *Id.*; 1997 Federal Law, *supra* note 7. Mexican Law provides greater protection in several cases than the U.S. copyright law. *See, e.g., id.* at art. 19-21 (moral rights), 29 (75 year duration), 33 (assignment), 108 (facts in databases).

51. *Fighting a Formidable Force: U.S. Commerce Drowning in Mexico's Piracy*, Austin American Statesman, Apr. 28, 1996, at 6G.

52. INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, COMMERCIAL PIRACY REPORT 2003—PRIORITY TERRITORIES (2003). Fifty eight percent of Mexicans buy only pirated music making Mexico the tenth largest pirating market which cost the U.S. market \$445 Million in 2003; altogether, the U.S. lost \$712 million in 2003 on intellectual property infringements. U.S. Trade Rep. 2004 Special 301 Report Watch List-Mex.

53. *Fighting a Formidable Force*, *supra* note 51, at 6G.

54. U.S. Trade Rep. Special 301 Report-Mex.(2004).

55. *Id.* The amendments fail to address the obligations of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, both of which Mexico is a party to. Therefore, Mexico will need to further amend these amendments shortly. *Id.*

56. Grillo, *supra* note 12. In 2002, the PGR implemented seven times the amount of raids from the year before resulting in a total of 1,488 raids. *Id.*

57. INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, *supra* note 52. The piracy rate was up to sixty eight percent in 2002 from sixty percent in 2001. *Id.*

58. U.S. Trade Rep. Special 301 Report, *supra* note 54. Prior legislation declaring piracy to be an organized crime and creating the special intellectual property prosecutor within the office of the Attorney General are two examples of steps the U.S. believes indicate that Mexico's copyright law could be headed in the right direction. *Id.*

59. *Id.* In 2004, the U.S. included Mexico as one of its countries to watch for piracy. *Id.*



amendments to the federal copyright law to combat the billions of dollars lost by foreign industry due to piracy in Mexico each year.<sup>60</sup> However, U.S. reports complain that even this new legislation fails to address the inability to provide national treatment and the scope of exclusive rights.<sup>61</sup> Once again, the U.S. urges Mexico to expand its anti-piracy and anti-counterfeiting efforts against street piracy and commercial distribution in all major cities.<sup>62</sup>

The U.S. reports fail to make realistic suggestions for improvement.<sup>63</sup> Furthermore, such suggestions are not of use to Mexico, whose piracy numbers continue to climb after 11 years of being a part of NAFTA regardless of the numerous changes it has made to the Mexican copyright law.<sup>64</sup> These types of unilateral demands have been made by the U.S. for years and have proven ineffective.<sup>65</sup> If the U.S. is serious about improving copyright protection in Mexico, it must devise an alternate solution to aid Mexico in its path to harmonizing its copyright protection with the other North American nations.

### III. How NAFTA Has Affected Mexican Copyright Laws

#### A. *General Provisions*

As drafted, Chapter 17 of NAFTA, the intellectual property chapter, was intended to provide "adequate and effective protection and enforcement of intellectual property rights" to U.S., Mexican and Canadian nationals "while assuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade."<sup>66</sup> NAFTA is structured as follows: 1) commands the Member Nations to put into effect Chapter 17 as well as the terms of four other international IP treaties;<sup>67</sup> 2) specifies that NAFTA is a floor for IP protection, and

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60. U.S. Trade Rep. Special 301 Report, *supra* note 54.

61. *Id.*

62. *Id.* In order to strengthen its law, the U.S. enumerates that Mexico should "impose strong criminal penalties and destroy seized products, and increase the speed of administrative and judicial actions." Additionally, the U.S. urges Mexico to use its previously adopted organized crime law to stop intellectual property infringements. *Id.*

63. U.S. Trade Rep. Special 301 Report, *supra* note 54.

64. INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, *supra* note 52.

65. *See, e.g., supra* note 39.

66. NAFTA, *supra* note 1.

67. *Id.* The four international treaties are: 1) The Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonogram, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67; 2) The Berne Convention on Copyrights, Sept. 9, 1886, 168 Consol. T.S. 185; 3) The Paris Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. 6923, 24 U.S.T. 2140, T.I.A.S. 7727; and 4) either of two Conventions for Protection of new Varieties of Plants, Dec. 2, 1961, 33 U.S.T. 2703, 815 U.N.T.S. 89 (entered into force 1968). *Id.*

that nations are able to make stronger provisions if they so desire;<sup>68</sup> 3) requires that each nation afford copyright owners of other nations equal protection to the copyright holders of its own nation;<sup>69</sup> 4) grants Member Nations the power to control abusive intellectual property practices regardless of any provisions of Chapter 17.<sup>70</sup> However, Chapter 17 does not practically address the issue of how a nation like Mexico is to go about the enforcement of these provisions.

Article 1705 outlines copyright protection and requires that Member Nations protect all works covered by article 2 of the Berne Convention,<sup>71</sup> that “embody original expression within the meaning of the convention.”<sup>72</sup> Additionally, article 1705 enumerates the specific authorization, prohibition, and transfer rights the Member Nations must grant to copyright holders<sup>73</sup> and sets a minimum term for which the copyright must last.<sup>74</sup>

Generally, Chapter 17 requires that Member Nations provide accessible and effective enforcement procedures under national law that provide for copyright holders to take actions against those who infringe on their copyright.<sup>75</sup> The enforcement provisions require that the Members authorize the issuance of injunctions<sup>76</sup> and provide for preliminary injunctions to prevent the entry of allegedly pirated goods into the marketplace.<sup>77</sup> Furthermore, NAFTA requires damages and criminal penalties in specific cases.<sup>78</sup> Finally, NAFTA requires border enforcement of intellectual property protection so that counterfeit goods may be impounded at customs.<sup>79</sup>

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68. *Id.* art. 1702.

69. *Id.* art. 1703.

70. *Id.* art. 1704.

71. The Berne Convention is outside the scope of this comment. It is only necessary to reference the list of enumerated copyrightable goods in Chapter 17 to understand the relevant provisions of the Berne Convention for this comment.

72. *Id.* art. 1705. Article 1705 does not provide an exhaustive list of copyrightable goods but does specify a number of goods, including computer programs that must be protected. *Id.*

73. *Id.* art. 1705(2)-(3).

74. *Id.* art. 1705(4). A copyright must last not less than the life of a natural person plus 50 years. *Id.*

75. *Id.* art. 1714. This requirement is not just that the nation provide a method by which to prosecute but that the remedy must also be expeditious, fair, equitable, not unreasonably complicated or expensive, and not lengthy or delayed. Problems arise in clarifying which Nations' systems meet this arbitrary requirement because each Nation has a system of copyright infringement remedies in place that is intended to meet all of the above requirements. *Id.*

76. *Id.* art. 1715.

77. *Id.* art. 1716. *But see International Property Enforcement, supra* note 37.

78. *Id.* arts. 1714, 1717.

79. *Id.* art. 1718. Article 1718 also provides for a method by which improperly impounded goods may be retained by the proper owner. *Id.*

*B. Specific Remedies and Procedures for U.S. Copyright Holders under NAFTA to Prevent and Cure Mexican Copyright Infringement*

Articles 1714 to 1720 enumerate the enforcement requirements and remedies available under NAFTA.<sup>80</sup> The general provisions require that each party provides for civil and administrative proceedings and border protection under domestic law.<sup>81</sup> Such proceedings must be fair and equitable, not unreasonably complicated or costly, and may not entail unreasonable time limits or delay.<sup>82</sup> The parties must also provide decisions on the merits, which shall if possible be delivered in writing and preferably state the reasons on which the decisions are based, that shall be made available to the parties in a proceeding without undue delay, and such decisions shall be made based upon only the evidence that was presented in the proceeding.<sup>83</sup> In addition, each party must have a process by which final administrative decisions may be reviewed.<sup>84</sup> The section clarifies that no provisions require any party to NAFTA to create a different legal system for intellectual property protection than that party uses for the enforcement of their own laws generally.<sup>85</sup> Nevertheless, NAFTA does require that each party give its judicial authorities vast powers<sup>86</sup> to 1) order evidence from the opposing party when the other party has substantiated a claim that the opposing party has relevant evidence, 2) make evidentiary decisions when the opposing party refuses access to evidence, subject to a hearing for the opposing party on the allegations of evidence, 3) issue an injunction ordering a party to cease infringement,<sup>87</sup> 4) order payment from the infringer to the right holder in an amount adequate to compensate the right holder where the infringer knew or had reasonable grounds to know,<sup>88</sup> 5) order the

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80. *Id.* arts. 1714- 1720.

81. *Id.* art. 1714.

82. *Id.*

83. *Id.*

84. *Id.* The requirement that a party must provide an opportunity of review does not apply in the case of criminal acquittal. *Id.*

85. *Id.* However, article 1715 specifies certain processes that must be present in all judicial proceedings that may be additional to the proceedings that a party normally requires. Article 1715 requires that defendants have timely written notice with sufficient detail, parties to a proceeding be allowed to employ independent legal counsel, the proceedings not require excessive personal appearance requirements, all parties be permitted to present all relevant evidence and to substantiate their claim, the proceedings have a means by which to identify and protect confidential information. *Id.* art. 1715.

86. *Id.* This requirement would seem to contradict article 1714 of NAFTA. *See id.* art. 1714.

87. *Id.* art. 1715. This right may not be enforced unless the person(s) had reason to know before using the good that such behavior would be in violation of an intellectual property right. *Id.*

88. *Id.* This right may be extended even when the infringer did not know or had no

infringer to pay the right holder's expenses, including attorney's fees, and 6) order payment for expenses to a party improperly enjoined or restrained in a proceeding.<sup>89</sup> In addition, a party's judicial authorities must be given authority to deter intellectual property infringement through orders to dispose of pirated goods outside the channels of commerce in a manner which avoids harm to the copyright holder or orders to destroy the goods.<sup>90</sup> Furthermore, the materials and instruments used predominantly for the pirating industry must also be disposed of outside the channels of commerce in a manner that would minimize future risks of infringements.<sup>91</sup>

Although the provisions of Chapter 17 provide various enforcement means and statutory requirements of copyright protection, NAFTA has permitted Mexico to practically fall short of compliance because it has established facial compliance. While the principles of NAFTA look good on the surface, the U.S. continues to struggle as it waits for all nations to be in full compliance with NAFTA. As is evidenced by the copyright problems in Mexico and the loss suffered by the U.S. economy, just meeting the terms of NAFTA is not sufficient if NAFTA is to ever meet its goal of creating a free trade environment in North America.

#### IV. What the United States Can Do to Aid Mexico in its Fight Against Pirating Within Mexico: The Formation of a New Trade Agreement

The U.S. should look outside the smaller problem of copyright piracy to Mexico's larger reality. Mexico's governmental action in enforcing copyright protection and all the terms of NAFTA have been insufficient in large part because Mexico does not have the capital to sustain a government that can be harmonized with the U.S. and Canada.<sup>92</sup> While it is true that corruption is also a contributing factor to the enforcement problems in Mexico, it can be concluded that corruption also stems from financial needs.<sup>93</sup> If Mexico's economy could be boosted long-term, the nation would have the means to implement the demands the U.S. has made on it; however, the U.S. has taken no real

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reasonable grounds to know of the infringement in the case of copyrighted goods and sound recordings. *Id.*

89. *Id.*

90. *Id.* art. 1715(5)(b).

91. *Id.* The disposal authority is tempered by a clause which provides that the seriousness of the infringement and the remedies ordered in addition to the interests of the parties must be weighed out. *Id.*

92. See, e.g., Richard E. Neff, *Mexican Copyright Protection: Proposals for Better Legislation and Enforcement*, 1993 U.S.-MEX. LAW INST. 51, 62.

93. *Id.*; see *infra* note 126 and accompanying text.

strides to aid Mexico in improving its economy. Only when Mexico has resources to work with can the U.S. realistically expect changes in the law to happen.

While NAFTA has increased jobs in both the U.S. and Mexico, NAFTA has failed to provide the million plus jobs needed in Mexico and failed to breach the wage gap between the U.S. and Mexico.<sup>94</sup> Therefore, in order to thoroughly aid Mexico, the U.S. must find a way to steadily stimulate Mexico's economy in order to bring it up to a comparable level.<sup>95</sup> Nevertheless, the U.S. does not have extra money, or enough money, to boost Mexico's economy. Based upon the two nations' resources, the best solution for both countries is that the two nations find a way in which to open the U.S. border to provide much needed jobs in such a way that both countries will benefit.

Mexico has an abundant supply of inexpensive laborers,<sup>96</sup> while America has an abundance of employment opportunities that those already residing in America refuse to work.<sup>97</sup> These needs suggest that the U.S. and Mexico should work together to establish a trade agreement in which Mexican workers can travel and work in the U.S. as needed, while the U.S. will be provided with an ample workforce.<sup>98</sup> Mexico's economy would be boosted as a result, creating more money to be spent within the economy, less need for pirating as society is more able to afford copyrighted goods, and a greater financial reserve for the government to use in enforcing the copyright provisions of NAFTA. The long-term goal would be to create a free flow of people just as NAFTA has created a free flow of goods.<sup>99</sup> In essence, such a transition would

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94. *The NewsHour with Jim Lehrer*, interview by Ray Suarez with Vicente Fox, Mexican presidential candidate, (PBS television broadcast, Mar. 21, 2000), [www.pbs.org/newshour/bb/latin\\_america/jan-june00/fox\\_3-21.html](http://www.pbs.org/newshour/bb/latin_america/jan-june00/fox_3-21.html). The average worker in Mexico makes five dollars a day while the average worker in the United States makes sixty dollars a day. *Id.*

95. Mexico does not need as lucrative an economy as the U.S. to have the financing for reform of its policies. Rather, the goal is only to create a reliable economy with resources that will continue to bring money into the nation for years to come.

96. Stephen Johnson and Sara J. Fitzgerald, *The United States and Mexico: Partners in Reform*, THE HERITAGE FOUND., Dec. 18, 2003, available at <http://www.heritage.org/Research/LatinAmerica/BG1715.cfm>.

97. *Id.*

98. *Id.* The article emphasizes that "new workers cannot be produced as rapidly as corn, semi-conductors, or mobile telephone service when demand rises. They must be grown and educated over the course of at least sixteen years before they can join the labor force. Immigration allows new workers to enter the labor force rapidly to fill a variety of positions in response to rising demand for labor." *Id.*

99. *The NewsHour*, *supra* note 94; Johnson, *supra* note 96. U.S.-Mexico trade has nearly doubled in the years since NAFTA making Mexico the U.S.'s second largest trade partner. *Id.* Trade between the U.S. and Mexico was boosted from \$100 million in 1994 to \$232 million in 2002. *Id.*

bring a market that already exists<sup>100</sup> into a safer, more profitable realm, and in so doing provide Mexico with the means, both in the private and public sector, by which to reasonably enforce copyright provisions.<sup>101</sup>

A. *The Measures the U.S. Must Take to Create an Immigration Work System.*

1. The Present Stage of an Open Border in the U.S.

The U.S. demand for workers and the millions of dollars that Mexico has to gain from an open border policy are enormous.<sup>102</sup> Equally as astounding is NAFTA's failure to create enough jobs within Mexico<sup>103</sup> and the number of Mexicans still in need of jobs.<sup>104</sup> Between 1994 and 2002, only around twelve percent of those in need of employment were provided with jobs.<sup>105</sup> The problem has been exasperated by the increasingly low labor costs that foreign competition can offer which has caused many of Mexico's maquiladora plants to close down.<sup>106</sup> The U.S., on the other hand, has around 1.2 million seasonal jobs on farms where most Americans choose not to work.<sup>107</sup> Mexico would like to export its unemployed workers which would have created a market in excess of 14.5 million dollars in 2003 had a system been put in place.<sup>108</sup>

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100. See *infra* note 104 and accompanying text.

101. DANIEL T. GRISWOLD, CATO INST., WILLING WORKERS: FIXING THE PROBLEM OF ILLEGAL MEXICAN MIGRATION TO THE UNITED STATES 1 (2002). Currently the labor migration from Mexico to the U.S. is plagued with smuggling, document fraud, death at the border, artificially depressed wages, and threats to civil liberties. *Id.*

102. Hufbauer, *supra* note 2, at 13. The U.S. employed 5.5 million illegal and legal Mexican immigrants in 2003. An estimated 4.5 million illegal immigrants lived in the U.S. in 2000. *Id.* at 14. Mexicans represent over half of those illegally residing in the U.S. GRISWOLD, *supra* note 101.

103. ZARSKY, *supra* note 9. Between 1994 and 2002, about 630,000 jobs were created in the manufacturing sector. *Id.*

104. *Id.* Around 730,000 new workers entered the Mexican work force each year between 1994 and 2002. The high numbers are credited to the dislodgment of farmers. Johnson, *supra* note 96.

105. *Id.* The jobs that have been created are generally of poor quality, without benefits, and pay somewhere around seven to thirteen percent less than what the same jobs would have paid in 1994. Although Mexican population growth has fallen, the job creation rate is still below the population rate. *Id.*

106. *Id.* In countries like China labor has dropped as low as \$0.25 per hour while Mexico still remains somewhere around \$1.75 per hour. This decrease in foreign manufacturing costs caused Mexico to lose 290,000 jobs by 2003. *Id.*

107. *Id.*

108. ROBERTO SURO, REMITTANCE SENDERS AND RECEIVERS: TRACKING THE TRANSNATIONAL CHANNELS, MULTILATERAL INVESTMENT FUND AND THE PEW HISP. CENTER 17(2003).

Presently, the U.S. enforces a tight border system<sup>109</sup> that has not stunted immigration, as the U.S. had hoped, but rather has caused Mexican immigrant workers to enter and stay in the U.S. illegally.<sup>110</sup> Prior to the terrorist attacks of September 11, 2001, Mexican President Vicente Fox and U.S. President George W. Bush were creating a U.S.-Mexico High Level Working Group on Migration with the goal of matching Mexican workers with willing U.S. employers in order to create a safe migration system for employment.<sup>111</sup> President Fox proposed an open border throughout North America in order to increase the availability of the continent's labor supply.<sup>112</sup> After the September 11 attacks all such discussions ceased and border security has tightened, making President Fox's goal far off.<sup>113</sup> This is not to say that the U.S. is not giving the issue any attention. Currently there are two bills before Congress which would, if implemented, sufficiently regulate the distribution of work visas.<sup>114</sup> However, these bills do not purport to allow greater numbers of immigrants across the border but rather aim to have greater control over those already permitted in the country in order to offer them greater mobility with supervision.<sup>115</sup>

## 2. The First U.S. Steps to Creating an Open Border.

The U.S. must establish a more easily facilitated system for issuing immigrant temporary working visas to identify those entering the U.S. only for temporary employment so that immigrant workers will be

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109. GRISWOLD, *supra* note 101, at 2. The U.S. currently has in place a protectionist system known as "Operation Hold the Line" which extends from El Paso into New Mexico. *Id.* at 4.

110. *Id.* at 4-5. Because of the dangerous conditions and prices involved in crossing the border, Mexican immigrants are remaining in the United States longer to avoid such harsh conditions and prices on the return trip. *Id.* at 6-7.

111. Johnson, *supra* note 96; Press Release, White House, Joint Statement Between the United States of America and the United Mexican States (Sept. 6, 2001) at <http://www.whitehouse.gov/new/releases/2001/09/20010906-8.html>. Although the September 11 attacks halted U.S. immigration reform, it has remained a centerpiece of Mexico's foreign policy reform. Johnson, *supra* note 96.

112. *Id.* Such a North American workforce will not be possible so long as Mexico is infested with monopolies, corrupt practices, uneducated workers, and insufficient law enforcement provisions. *Id.*

113. *Id.*

114. *Id.* The Border Security and Immigration Improvement Act (H.R. 2899) and the Agricultural Job Opportunity, Benefits and Security Act (H.R.3142) have both been introduced with the goals of ensuring that employers first seek out U.S. workers, allowing tracking of current visa holders upon switching from one employer to another so that all time working will be credited towards residency, receiving taxes from the visa holder for the work performed only to be transferred to Mexico's social security system upon departure, preventing welfare payments from being given to the visa holders, and creating a U.S.-Mexico database that will provide information regarding temporary positions. *Id.*

115. *Id.*

permitted to cross the border, while prohibiting indefinite stays.<sup>116</sup> This will require greater enforcement efforts by the U.S. both on the border to monitor entrance, and within the nation to ensure that U.S. farmers who employ immigrant workers go through the necessary filing requirements.<sup>117</sup> These homeland enforcement officials would be responsible for the tracking of those who have entered on temporary visas to decrease the number of illegal immigrants in the U.S. who overstay after entering legally on temporary visas.<sup>118</sup> Conversely, the increase of personnel on the border would serve to create more entry points in order to protect as well as expedite routine crossings for commuter and businesses.<sup>119</sup> All of these efforts would be made with a goal to have an open exchange of people in the same manner as there is a free flow of goods presently.<sup>120</sup> However, these efforts will not be successful if the U.S. does not receive support from the Mexican government which also must make necessary political, economic, and security reforms to effectuate an open market.<sup>121</sup>

*B. How Mexico Can Aid the U.S. in the Monitoring of an Open Border*

Although it seems clear that a plan by the U.S. that would bolster Mexico's economy from the inside would be an effective and innovative way for the U.S. to aid Mexico while receiving some of the long sought after reforms, Mexico still must resolve some issues on its own to ensure that the open border would be more of an assistance to the U.S. than a nuisance. For instance, Mexico must deal internally with its tumultuous political structure,<sup>122</sup> the monopolistic aristocracy that still controls much of Mexico's economy,<sup>123</sup> and the security institutions of Mexico that continue to lag behind the other North American nations as a result of corruption.<sup>124</sup> Additionally, the two nations should create a new treaty

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116. *Id.*

117. *Id.* Although the number of temporary visas is unrestricted, only a minority of U.S. farmers as well as immigrant workers, follow the established procedures. *Id.*

118. GRISWOLD, *supra* note 101, at 5. Around one in six illegal immigrants first entered the United States legally but then stayed illegally past the allotted time period. *Id.*

119. Johnson, *supra* note 96.

120. *The NewsHour*, *supra* note 94.

121. Johnson, *supra* note 96.

122. *Id.* In 2000, President Fox was the first president elected not from the Revolutionary Institutional Party (PRI) in over 70 years, as a result of political reforms that led to fair elections; however, the PRI still remains a strong enough force in the legislature in conjunction with another opposition party to veto President Fox's agenda. Moreover, the majority of candidates are still selected by party leaders which effectively prohibits people "off the street" from running for office. *Id.*

123. *Id.*

124. *Id.* Mexican officials earn between \$200-\$500 per month and some still accept



that would outline Mexico's goals to use the economic benefits that flow from the open border primarily for bringing Mexico into true compliance with the terms of NAFTA.

Although President Fox has proposed an overhaul of the political structure of Mexico, the suggestions need to be followed through in order to ensure a collaborative effort.<sup>125</sup> President Fox's weak support in the Mexican Congress, however, suggests that it may be some time until such proposals are brought into law.<sup>126</sup> His suggestions include the curbing of corruption by citizen checks and balances at all levels.<sup>127</sup> These goals would be facilitated by the opening of primaries to all citizens who would like to run for office and by linking representatives with specific districts that would hold them accountable.<sup>128</sup> In addition, the power to collect taxes and control local services would be delegated to the local jurisdictions.<sup>129</sup> Through these changes, Mexico would not only lessen its own corruption but would also bring Mexico into a more compatible state with the government of the U.S.

Additionally, Mexico must commit to assisting the U.S. in border security.<sup>130</sup> If the Mexican government is as eager to work with the U.S. as it claims to be to create an immigration work program, then it too must assist in the implementation of the program.<sup>131</sup> A good starting point for the two nations would be the regular holding of joint training conferences for enforcement officers.<sup>132</sup> This would require Mexico to assign additional enforcement officers to the border.<sup>133</sup> Through these programs, common standards by which to regulate immigration would be created.<sup>134</sup>

Additionally, Mexico needs to focus on putting an end to elitist monopolies. Mexico must attempt to terminate such monopolies by extending credit for small Mexican businesses at comparable rates to the

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bribes in order to supplement their income. Many judicial procedures in Mexico still remain inconsistent with American law such as torture-induced confessions. *Id.*

125. *Id.*

126. Hufbauer, *supra* note 2, at 20.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. GRISWOLD, *supra* note 101, at 21.

132. Johnson, *supra* note 96. The U.S. and Canada already conduct such joint training programs. Mexico is already a part of counter-narcotics training with Canada and the U.S. *Id.*

133. Although the use of enforcement resources for the border would initially mean decreased security in other areas of regulation, the primary focus should be on jumpstarting Mexico's economy, and after that occurs, the U.S. can realistically demand a change in policy as agreed to under the terms of NAFTA.

134. *Id.*

U.S. and Canada and by expediting the licensing process.<sup>135</sup> Furthermore, Mexico must work on education reform so that workers will have opportunities beyond agriculture.<sup>136</sup> Mexico needs to focus on job creation internally as much as the U.S. will focus on job placement within its borders in order to ensure that the Nation will have an adequate job supply.

In exchange for the increased revenue that Mexico will gain as a result of an opening of the border, the U.S. should demand of Mexico that the money be used in the enforcement of regulations that will bring it into compliance with NAFTA, in particular, with Chapter 17 of NAFTA. The millions of dollars that the U.S. will be giving to the individuals of Mexico that will flow into the economy should more than compensate for a Mexican rejuvenation of efforts to halt copyright infringement; moreover, the U.S. will be spared the millions of dollars lost each year as a result of copyright infringement.

*C. Why Has the U.S. Failed to Create an Open Border Previously?*

Other than the obvious security fears created by the September 11 attacks, U.S. officials as well as the general population have many fears regarding the opening of the U.S.-Mexico border. The biggest concerns are that an open border would create a new flood of immigrants into the nation that it would be unable to support, cause a lack of jobs for low-skilled Americans, establish a new lower class that will forever be unable to assimilate, and negate security measures already taken to protect the nation.<sup>137</sup> Although each of these concerns has some legitimacy and must be monitored,<sup>138</sup> none of these outweigh the benefits previously discussed.<sup>139</sup>

The first concern of an open border stems from the idea that the lowered costs and lowered risks will encourage hordes of Mexicans that would otherwise not cross the border to do so.<sup>140</sup> However, those same improved conditions that will encourage migration will likely encourage others already in the U.S. to return home to Mexico and permit those who enter to work to only stay so long as work exists.<sup>141</sup> For the same

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135. *Id.*

136. *Id.*

137. GRISWOLD, *supra* note 101, at 11.

138. *Id.* Each of these concerns has been either embellished or misconstrued. *Id.*

139. *See* SURO, *supra* note 108.

140. GRISWOLD, *supra* note 101, at 11.

141. *Id.* In other words, the "circular pattern of migration" that existed prior to the border crackdown in the mid and late 1980s would be reinstated. If given the choice, Mexican workers would rather return to their families and homeland than stay in the U.S. indefinitely. *Id.*

reason, it is not likely that the migrant workers would go through the cost and trouble of moving their entire family north for a seasonal job when they know they can return safely.<sup>142</sup> In other words, this argument fails to recognize that immigration numbers directly correspond with labor needs.<sup>143</sup> Finally, both the decreasing birth rate in Mexico and the increased creation of jobs within Mexico will lower the number of immigrants seeking work in the years ahead.<sup>144</sup>

The second concern, regarding the displacement and lowering of wages of low-skilled Americans, incorrectly blames immigrants for depressed wages.<sup>145</sup> In reality, immigrant workers motivate high-school dropouts to complete their education as a result of this perceived competition for jobs.<sup>146</sup> Furthermore, more education and skills are the logical solution for American high school drop-outs and not heavier restrictions on willing migrant laborers who do not have the same labor opportunities afforded to them in their country.<sup>147</sup>

Yet another concern is the burden imposed on taxpayers by migrant workers stemming from a fear of an increase in the costs of welfare, schooling, and healthcare.<sup>148</sup> It is irrefutable that immigrant workers tend to pay less in taxes and use governmental assistance programs more than the average American household; however, it is a misstatement that immigrants are heavy users of welfare.<sup>149</sup> This concern also fails to take into account the 1996 amendments to the U.S. welfare law specifically aimed at keeping immigrants from receiving welfare.<sup>150</sup> 1997 calculations, regarding the net fiscal impact of immigrants, show that the average immigrant and his descendants pay more in taxes than they

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142. *Id.* Under a prior, more open border regulatory scheme, the rate of return to Mexico was high. *Id.*

143. GRISWOLD, *supra* note 101, at 12. During the 2001 recession in the U.S., the number of Mexican immigrants dropped to an estimated half the level of the year before. *Id.*

144. *Id.*

145. *Id.* at 13. Between 1980 and 1994, the increase in immigration caused a five percent drop in the wages of American workers without high school diplomas. International trade and technological improvements are thought to be the other major factors that continue to cause a decrease in wages. *Id.*

146. GRISWOLD, *supra* note 101, at 13. This fact is evidenced by the spike in high school graduates between 1910 and 1930, the time period commonly referred to as the last "Great Migration." See Rodney Ramacharan, *Migration and Human Capital Formation: Theory and Evidence from the U.S. High School Movement*, 2002 INT'L MONETARY FUND 3.

147. GRISWOLD, *supra* note 101, at 13.

148. *Id.*

149. *Id.* Mexican immigrants come to the U.S. to work, not to collect welfare. This is a result of a higher number of two-parent households and labor force participation by immigrant workers than native born workers. *Id.* at 13-14.

150. *Id.* at 14. The legislation caused a decline in low-income immigrant families with children by more than half between 1994 and 1999. *Id.*

receive in services.<sup>151</sup> However, immigrant workers, without high school educations, cost the U.S. somewhere around \$13,000 over their lifespan.<sup>152</sup> Continuing reforms in the welfare law will further reduce this dollar amount as well as future generations of educated, higher paid immigrants.<sup>153</sup> Moreover, the benefits gained by the U.S. in having sufficient supplies of laborers at lower costs offsets these temporary costs to the government.<sup>154</sup>

A fourth concern is that an increase in immigration will create a permanent lower class.<sup>155</sup> Mexicans have migrated in high volumes in the last two decades, but these numbers are not unprecedented in relation to the American population.<sup>156</sup> The U.S. has always been able to absorb large numbers of immigrants as immigrants disperse throughout the nation and learn the English language.<sup>157</sup> Moreover, surveys continue to show that the attitude of Mexican immigrants is largely one of pride and appreciation for the freedoms and opportunities within the nation.<sup>158</sup> This fear of a “seething underclass” that is unable to adapt is misplaced.<sup>159</sup>

One final concern is that allowing migrant workers into the nation compromises U.S. security. Mexican immigration and security concerns are not as closely linked as many believe.<sup>160</sup> The U.S. government recognizes this fact and none of the legislation drafted to heighten security has addressed Mexican migration.<sup>161</sup> Furthermore, the legalization of Mexican migration would only act to increase security because it would free up resources to monitor terrorist activity<sup>162</sup> and would encourage large numbers of immigrants entering the country to

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151. GRISWOLD, *supra* note 101, at 14.

152. *Id.*

153. *Id.*

154. *Id.* at 14-15.

155. *Id.* at 15. Mexican immigrants tend to retain ties to their homeland and insulate their communities within the U.S.; therefore, Mexicans tend to assimilate more slowly than other immigrants. *Id.*

156. GRISWOLD, *supra* note 101, at 15. In the 1990s, 1.5 Mexican immigrants per every 1,000 U.S. residents entered this country while in the years between 1841 to 1860, the U.S. received 3.6 Irish immigrants per year per every 1,000 U.S. residents. *Id.*

157. *Id.* at 15-16. Studies show that Hispanics are dispersing faster across the country than any migrating group previously has and that only three percent of Mexican immigrants speak English poorly or not at all. *Id.* at 16.

158. *Id.* at 17.

159. GRISWOLD, *supra* note 101, at 17.

160. *Id.* For starters, the September 11 attacks were neither linked to Mexico nor linked to temporary working visas like those that would be provided under an open border system. Canada has been the preferred point of entry for terrorists. *Id.* 17-18.

161. *Id.* at 18.

162. *Id.* An estimated three billion dollars is spent on monitoring the illegal entrance of Mexican workers each year. *Id.*

register with the government so that they may be more easily monitored.<sup>163</sup> Although it is a valid concern in the aftermath of the September 11 attacks, a relationship between Mexican migration and terrorism is attenuated at best.<sup>164</sup>

Each of these concerns will be dealt with over time as the U.S. government adapts to the changes. Some of these concerns will likely never even become an issue. And all of these concerns will be substantially outweighed by the benefits the U.S. will receive from the workforce and the improvements that the U.S. will see as a result of Mexico's improved economy, so long as Mexico agrees to use this financing for compliance efforts.

## V. Conclusion

Although NAFTA has been in place for over a decade,<sup>165</sup> the U.S. continues to struggle with many of Mexico's policies as a result of a lack of enforcement.<sup>166</sup> One such issue that costs the U.S. millions of dollars every year is copyright infringement.<sup>167</sup> Since it has become clear that the mere presence of NAFTA and the threat of sanctions are insufficient to bring Mexico into compliance with many parts of NAFTA,<sup>168</sup> and since it is increasingly clear that Mexico's biggest concern is financing,<sup>169</sup> the U.S. needs to make a change in its own policies and negotiate a new trade agreement if it ever wishes to see a change. By looking specifically at the issue of copyright protection, this comment has sought to establish an alternative approach for aiding Mexico by which the U.S. will ultimately see a greater change in Mexican policy.

Mexico has made vast changes to its copyright law in order to come into compliance with NAFTA and has continued to make further changes to satisfy the two northern Members of NAFTA. Moreover, Mexico has facially taken the preliminary steps to come into compliance with NAFTA.<sup>170</sup> However, such superficial changes have done little to harmonize Mexico's laws in practice.<sup>171</sup> While the U.S. has issued warnings and given Mexico recommendations,<sup>172</sup> it has never done anything to actually change the situation. As can be seen in the case of

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163. GRISWOLD, *supra* note 101, at 18.

164. *Id.* at 17.

165. NAFTA, *supra* note 1.

166. Hufbauer, *supra* note 2, at 8.

167. INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, *supra* note 52 and accompanying text.

168. U.S. Trade Rep. Special 301 Report, *supra* note 54.

169. Associated Press, *supra* note 11 and accompanying text.

170. 1997 Federal Law, *supra* note 7.

171. Hufbauer, *supra* note 2, at 8.

172. U.S. Trade Rep. Special 301 Report, *supra* note 54.

copyright piracy, Mexico continues to allow large amounts of piracy because it cannot afford greater protection of an industry that does not benefit its economy; furthermore, the vast majority of Mexicans cannot afford copyrighted goods.<sup>173</sup> If the U.S. would agree to President Fox's requests<sup>174</sup> and open the borders to maximize the profitability of an industry that already exists, with an agreement established that in exchange for the market creation Mexico will use the increase in revenues to crack down on the pirating of music, the U.S.'s copyrightable goods as well as the nation's labor force would benefit. As the economic situation continues to improve, so too could the U.S. continue to make suggestions that Mexico would actually have the means to implement. Furthermore, NAFTA would finally become the great free trade agreement that it was drafted to be.

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173. Lannert, *supra* note 20. As a Mexican distributor bluntly explained, "[Mexican] people cannot afford nonpirated product, and the record labels have raised their prices, thereby directly supporting it."

174. *The NewsHour*, *supra* note 94.

