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# Protecting The Cultural Heritage Of Indigenous And Afro-Mexican Peoples

13-07-2023 Jaime Rodriguez and Alejandra Badillo



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**In January 2022, the Federal Law for the Protection of the Cultural Heritage of Indigenous and Afromexican Peoples and Communities was issued in order to protect and safeguard the cultural heritage, knowledge, traditional cultural expressions, and collective intellectual property of indigenous and Afromexican peoples and communities.**

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This, in response to the multiple cases of plagiarism and unauthorized appropriation of indigenous designs and creations, especially by international fashion brands.

This new law aims to prevent unauthorized appropriation and unauthorized use, exploitation, or commercial exploitation of cultural knowledge, identity, and other expressions that are part of the material and immaterial heritage of indigenous and Afromexican peoples and communities, as well as it also seeks to sanction the use and exploitation by third parties outside the community.

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## RELEVANT FIGURES IN THE LAW

### Definitions

In terms of the law, "cultural heritage" refers to the set of material and immaterial assets that comprise the languages, knowledge, objects, and all the elements that make up the cultures and territories of indigenous and Afromexican peoples and communities, which give them a sense of community with their own identity and which are perceived by others as characteristic, to which they have full rights of ownership, access, participation, practice, and enjoyment in an active and creative way.

While "collective property rights" refers to the real or direct ownership rights that indigenous and Afromexican peoples and communities have over their cultural heritage, based on their knowledge, manifestations of their sciences, technologies, and traditional cultural expressions, as well as the associated manifestations that, continuously or discontinuously, they have practiced and that were transmitted to them by members of their own community from previous generations.

As for what is meant by "Afromexican peoples and communities," the law states that they will be all those who self-identify, under different denominations, as descendants of African populations and who have their own forms of organization, social, economic, political and cultural aspirations, and who freely affirm their existence as culturally differentiated collectivities.

While "indigenous peoples and communities" will be understood as those who form a social, economic, and cultural unit, settled in a territory and who recognize their own authorities according to their customs and traditions.

### Holders

All cultural heritage of indigenous and Afromexican peoples and communities shall be

reserved by the corresponding people or community, and it will be each people or community who decides the expressions of its cultural heritage that are inaccessible to any kind of use or exploitation by third parties, and those available prior agreement or consent of the interested parties.

The right over the elements of the cultural heritage of indigenous and Afromexican peoples and communities is inalienable, imprescriptible, irrevocable, unseizable, and collective right by nature.

All the elements of cultural heritage constitute a collective heritage of each indigenous and Afromexican people or community. The right of collective property is non-transferable.

### **Authorizations**

Indigenous and Afromexican peoples and communities may authorize the use, exploitation, and commercialization of their cultural heritage elements and collective property, through their express, free, prior, and informed consent.

All authorizations will be onerous and temporary and will involve a fair and equitable distribution of benefits, except as otherwise agreed. Additionally, all agreements must be executed before the National Institute of Indigenous Peoples.

### **Unauthorized use**

Indigenous and Afromexican peoples and communities shall have the right to claim their collective property at any time when third parties use, exploit, commercialize, exploit or improperly appropriate elements of their cultural heritage.

Shall be considered infringements:

- The reproduction, copying, or imitation, even confusingly similar, of elements of the cultural heritage of peoples and communities without the authorization of the rights holder or holders.
- The improper appropriation or exploitation by third parties, without authorization and for their own benefit, of the cultural heritage of indigenous and Afromexican peoples and communities.
- Failure to comply with the terms of the authorization granted for the use, exploitation, or commercialization of elements of the cultural heritage of peoples and communities.
- Authorizing the use, exploitation, commercialization, or industrialization of elements of the cultural heritage by third parties without being designated for it by any

indigenous or Afromexican people or community holder of a manifestation.

- Holding oneself out as the holder of some collective right over elements of the cultural heritage of indigenous and Afromexican peoples and communities without having the quality or representation of the same.

- Making available to the public through any known or unknown electronic means, elements of the cultural heritage of indigenous and Afromexican peoples and communities without their consent.

Shall be considered as a crime of improper use and exploitation of cultural heritage of indigenous and Afromexican peoples and communities:

- Reproducing, copying or imitating by any means and for profit, in series or industrially, even confusingly similar, elements of the cultural heritage of indigenous and Afromexican peoples and communities, without prior, free and informed consent and without authorization.

1. ii) Distributing, selling, exploiting or commercializing in any way and for profit, elements of the cultural heritage of indigenous and Afromexican peoples and communities, without authorization.

iii) Disseminating, by any means, manifestations of the cultural heritage of indigenous and Afromexican peoples and communities that have been declared inaccessible for use, exploitation, commercialization, or industrialization.

The crime of misappropriation will be committed by any person who, by any means, presents themselves as the owner, author, creator, or discoverer of any of the elements of the cultural heritage of indigenous and Afromexican peoples and communities, even if said person argues that the creation or authorship was inspired by the cultural expressions of indigenous and Afromexican peoples and communities, if these maintain a high degree of similarity, even to the point of confusion, and were made without free, prior, and informed consent.

## **Sanctions**

Indigenous and Afromexican peoples and communities may choose mediation, complaint for infringements of the law, or criminal claim, when they identify the unauthorized use of elements of their cultural heritage.

If mediation is chosen as an alternative dispute resolution mechanism, the National Institute of Indigenous Peoples will help obtain a lawful and satisfactory agreement for the parties involved.

In the case of filing a complaint for violations of the law, the procedure will be handled by the Mexican Copyright Office.

If the infringer does not prove the legality of its actions, the Mexican Copyright Office may implement the following injunctions: i) removal from circulation, sale, public exhibition, or availability in electronic media of the goods referred to in the complaint, ii) prohibition of the sale of the goods in question, iii) seizure of goods, iv) suspension of activities or closure of establishments, and v) compensation for damages.

In addition, infringers will be sanctioned with a fine as up to fifty thousand Units of Measurement and Updating (approximately \$5,187,000.00 pesos), as well as measures to ensure the reparation of damages.

If the option of filing a criminal claim is chosen, the procedure will be handled by the Office of the General Attorney and federal courts. Crimes related to protection will be prosecuted *ex officio*.

For the commission of these crimes, a prison term of two to ten years and a fine of up to fifty thousand Units of Measurement and Updating will be imposed. When the conduct has the effect of cultural genocide, because it generates serious harm, conflict, or damage that puts the integrity and continuity of cultural heritage at risk, these penalties will be increased up to double.

## **IMPACT ON INTELLECTUAL PROPERTY**

Undoubtedly, the enactment of this law is a great achievement, as it allows for better protection of the intellectual property rights enjoyed by indigenous and Afro-Mexican peoples and communities over the set of tangible and intangible assets that comprise their languages, knowledge, objects, and all elements that constitute their cultures and territories.

However, there are still many questions about its scope and implementation, as while this law establishes the legal basis for protecting the cultural heritage and collective intellectual property, there are other regulations, such as the Federal Law of Industrial Property Protection, where procedures are also established to guarantee the protection of intellectual property, as well as to prevent and sanction acts that infringe industrial property rights or constitute unfair competition.

It could be said that the procedures to prevent and sanction conducts established as infringements in both laws may be the same, with the risk that the administrative act that declares the infringement and the article on which it is based may be declared unconstitutional for contravening the constitutional principle that no one can be sanctioned twice for the same offense (*non bis in idem*).

Therefore, it will be necessary to delimit the scope of protection and punishable conducts of both laws, as well as to establish criteria for the authorities to avoid a declaration of unconstitutionality that would lead to the law not being able to be applied for the purposes for which it was drafted.

**Author biography:**

*Jaime Rodriguez joined OLIVARES in 2007 and became a partner in 2023. He has extensive experience in copyright, litigation, trademarks, unfair competition and domain name dispute resolution, and this versatility has allowed him to participate in a variety of relevant matters and cases pertaining to different areas of intellectual property.*

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Olivares, indigenous designs, Afro-Mexican, plagiarism, appropriation, exploitation, cultural knowledge, Mexican Copyright Office, infringement