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MANAGING INTELLECTUAL PROPERTY, JULY/AUGUST 2003

In principle, the system has recognized the author as the original owner of copyrights, whether of personal or patrimonial nature.

And being the first owner of the rights, the author has control over the transfer of patrimonial rights to third parties, who can only become "secondary" or "derivative" owners. with certain exceptions. Moral rights are not the subjects of transfers, as they cannot be disposed of by any means.

Transfer of patrimonial rights can be viewed in Mexico as a premier form of copyright contracting. That system has matured from the lesser-developed notions of earlier copyright statutes and civil codes, to the newer rules of the law of 1996, which is the statute that is currently in force. Formerly, the laws and doctrine would refer to "concessions" as an equivalent word for transfers and, in keeping with the French approach, the law would not find a real difference between an assignment of rights and a licence, except for certain aspects, including that the rights granted can be reversed.

After the law was changed in 1996 to make it compatible with NAFTA, transfers, as the law has called them, could be made through either assignment, which implies a full transfer of the copyright rights having been assigned expressly, and subject to the limitations in the law, or through licences - responding to a partial or limited transmission of rights, where the author would keep control over the use or exploitation of the work made by the licensee.

Mexican copyright and neighbouring rights laws have been supported by different arguments, but generally have been formed as ways of protecting the rights of someone - the author or the artist - who is the weaker part in a relationship where the user, having a stronger economic capacity, can take advantage of that to the detriment of the former.

The legal treatment of book publishing agreements is a good example of that.

Under the copyright laws in effect in Mexico, including the current Act of 1996, agreements of this kind would require that the author "delivers", without transferring rights of any sort, a work of her creation to the publisher for reproduction of samples and its public distribution.

NAFTA AND THE COPYRIGHT LAW OF 1996

NAFTA was supposed to facilitate that copyright contracting would be reduced to the transfer of rights by either assignment or licence. Article 1705 (3)(a) and (b) make it clear that copyright rights can be transferred by virtue of contracts and that the transferee shall be able to "exercise the rights in its own name and enjoy fully the benefits derived from those rights". However, while the Mexican government did implement these provisions into the 1996 Law, it also kept the old system by imposing the ad hoc limitation on book publishing agreements as referred above.

The 1996 Copyright Law is a legislative piece that is hard to define. On the one hand, it enhances the principles of NAFTA, calling for modernity in a business-oriented fashion. On the other hand, it has made clear that Mexico still follows the trend, undergone by a number of countries, especially belonging to the authors' rights system, to protect authors by adopting more and more provisions dealing with individual contracts that would not only deal with book publishing. An entire classification system has evolved as a result, recognizing new forms of individual contracting under a specified purpose, including music publishing, stage performance, broadcasting of radio and TV programmes, and audiovisual production.

TRANSFER OF RIGHTS

As regards to the transfers of patrimonial rights, the Copyright Law of 1996 establishes that the holder thereof can freely assign them to third parties. Certain very important restrictions were imposed however, which can be synthesized as follows:

a) The assignment has to be made in writing.

- b) It must set forth, in favour of the author, a proportional participation in the income obtained from the use in question or a fixed remuneration.
- c) In the absence of express provisions, any assignment of property rights is considered to have a term of five years. Contractual provisions on protection terms cannot exceed 15 years, and will be possible only when the magnitude of the investment required for the exploitation of the work justifies it, at the discretion of the competent authorities.
- d) Assignments are specific to the rights that are transferred. For example, reproduction rights, public performance rights and so forth.
- e) Recordal of assignment is needed.
- f) Future works cannot be assigned globally and instead they will have to be defined and specified before they can be the subject of an agreement.

The Law of 1996 also refers to licences by providing that:

- a) It will have to expressly indicate when granted on an exclusive basis.
- b) Licensee in an exclusive licence will bear the obligation to facilitate all media required for the exploitation of the authored work.
- c) The licence has to be made in writing.

The law does not make it clear that a licence needs to be recorded. Similarly, it does not state anything that licences are restricted to the same limitations that assignments are subject to. The reason is that, from its literal interpretation, the word "transfer" appears to be narrow in scope and equivalent to assignments. In line with this, licences should not be required to fulfil the consideration and temporality restrictions, and by the same token recordal would also not be needed.

However, what is clear is that the licensee will be entitled to the exercise of all rights obtained from the copyright holder, up to the extent that the agreement has disposed. And generally a licence would be restricted by temporality, territoriality and grant of rights, just to mention the most common. As for the latter, licences can essentially be granted for the reproduction or distribution of works according to the particulars of each genre, such as musical works (including mechanical and synchronization rights), software, and audiovisual works (that is, video production).

Likewise, licences can be granted in connection with any form of public performance and transmission possible. Accordingly, small and grand rights can be the subject of licensing as well as rights deriving from the public communication of works by live or mechanical means or by processes of

projection or by diffusion, transmission or retransmission, including wire or wireless reception, whether analogue or digital. Notwithstanding the above, the Copyright Law appears to be in favour of a "free use" system, placed outside the traditional notions of licensing, whether voluntary or compulsory. The statute contemplates that holders of authors' and neighbouring rights shall not be able to oppose the public communication of phonograms as long as they get compensated, and to that end a system of tariffs would apply. Because of the free use system, inspired by European theories, the possibilities of compulsory licensing under the Copyright Law is practically non-existent, with the exception of a translation licence in terms of the Berne Convention and of NAFTA.

OTHER CONTRACTING FORMS

A less typical form of contracting is work for hire. Under the Copyright Law, work for hire performs as an exception to the principle that patrimonial rights are initially vested upon the author. Accordingly, whoever commissions the creation of a work or a part thereof from an author, under employment or as a freelancer, and recompenses the author for the contribution, can be regarded as the "original" owner of the rights. This means that the commissioner or employer becomes the owner of patrimonial rights *ab initio* and without the need of a transfer. In the case of freelance works, work for hire can trigger from a contractual relationship or by the mere application of the law, just as long as an order to produce the work and a consideration can be proven. This would not apply to works under employment as the Copyright Law imposes an obligation on the employer to state, in the employment agreement, that the employee will perform as an author and the rights on the creations obtained will belong to the former. In the absence of a clause in the labour agreement referring to this fact, the rights shall be shared by the parties, and if there is no labour agreement, it shall be the employee who owns the rights.

The Copyright Law makes a reference to collective licensing, as it would be exercised by collecting societies of authors, artists or other titleholders.

Collecting societies have the legal power to manage the rights relating to mass use of works, which cannot be negotiated on an individual basis due to the fact that it is possible the work will be used by a great number of people at the same

time and at different places. The administration of rights is principally made through the collection and distribution of royalties and other forms of income deriving from the use of works, such as compensation or others. Collecting societies require a government authorization to incorporate and perform in Mexico, and for that end they have to comply with an array of legal obligations. Among others, they need to show their membership and the express mandate conferred upon the collecting society in terms of the civil law to represent them in the administration of rights. An author or artist would always be free to choose how their rights would be collected, whether by virtue of a collecting society or by herself or an individual representative.

Once incorporated and approved, collecting societies can request users of works to enter into licences for the use of the works of their members. It is certainly possible, under the law, to rely on a blanket licence entered in bulk or a specified licence made for particular purposes. It may be sometimes easier indeed to use the blanket form, as otherwise the management of the rights could become much harder and impractical.

One point that is sensitive would concern foreign collective administration of rights. Foreign collective societies or their members cannot perform their rights in Mexico directly. As mentioned, only legal entities that have been set up and authorized in compliance with the Copyright Law will be permitted to operate as a collecting society on behalf of their members. By contrast, foreign licensors cannot perform as a collecting society and grant licences directly. They would be required to do it through an equivalent Mexican collecting society, in virtue of a so-called "reciprocity agreement", as referred by the law, apparently inspired on the CISAC (International Confederation of Authors and Composers Societies) model contract.

However, the law has merely thrown in that concept without defining it or in general without making any particular specification or reference. Accordingly, it would be hard to know what that really means and what the legal requirements would be for them to acquire validity and enforceability. There is trouble and confusion as to what the Mexican partner of the foreign licensors should comply with in order to collect from the users of works. The Copyright Office has not taken the issue seriously enough and has proceeded to record reciprocity agreements without requiring the foreign party to show it has been incorporated, in accordance with the laws of a foreign country, to perform as a collecting society and having obtained representation from their members.