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MEXICO'S SUPREME COURT HAS TRIED TO CLARIFY RECENT AMENDMENTS TO THE LAW ON COPYRIGHT REMUNERATION.

The Supreme Court of Mexico recently rendered two judgments addressing remuneration rights in copyright law. In both cases the plaintiffs, Cinemex and Cinemas La Huasteca, two film exhibitors, sued the Mexican Congress, among other authorities, for having passed and published, on July 23 2003, a bill of amendments to the Copyright Law, and in particular, for having included certain provisions granting authors and performing artists a right to "seek remuneration" for the public performance of their works or performances. In the plaintiff's view, the bill of amendments was contrary to the constitutional rights that they hold as users of films and other copyrighted content and accordingly the bill was not applicable to them. However, the outcome of the two actions was that the Supreme Court upheld the bill.

A BOTCHED REFORM

Before the amendment, Mexican copyright law was essentially based on the principles of patrimonial and moral rights. Patrimonial rights imply the exclusive capacity of authors or tale holders to use or exploit their works-of-authorship and to prevent third parties from exploiting them without authorization. Public performance is one of the bundles of copyright rights of authors or copyright owners. Remuneration rights have existed to some extent, as a sort of exception to patrimonial rights or a legal licence, but subject to restrictions and other forms of control. With the amendments, Congress brought a major change, inserting non-renouncing remuneration rights accruable to authors and their assignees for all kinds of public communication of the works. Similar rights were

apparently granted to performers.

While the reform essentially had a good purpose, the fact is that Congress did not understand the reasons behind it. Collecting societies lobbied for a remuneration system, in the abstract, inspired by European doctrines, aimed at ensuring that authors and performers benefit in economic terms from the utilization of the works. But it was the task of Congress to reduce the general idea into a tangible and coherent legislative set of provisions, consistent with the principles of the Copyright Law.

Obviously this did not happen. Remuneration has been regarded as a modern approach in copyright law, adopted by many countries, which is good for owners of rights, as well as for publishers and for users, as it abandons radical proclamations, making monopolies appear more limited and less harmful. In keeping with this, remuneration right systems stand on two fundamental premises: (1) providing social access to culture by diminishing the adverse effects and impact of exclusive copyright rights; and (2) giving a practical solution to the ever-increasing questions posed by technologies that are capable of disseminating information on a large scale. Reason dictates that authors and performers should obtain an income in exchange for the free use of their works and performances. In keeping with this, copyright laws in various jurisdictions have carefully considered when utilization of works should be the subject of patrimonial rights compared to remuneration rights. For example, private copying and droit de suite have been the subject of remuneration rights as well as the public performance or rental of sound recordings or of audiovisual productions.

The Mexican Congress overlooked these considerations, in particular the issues deriving from remuneration rights in the field of public performance of copyrighted works (remuneration in other fields such as droit de suite would not necessarily represent an issue since there is no patrimonial right to be contradicted).

It is obvious that legislators did not address the technical implications of the problem, such as the analysis of comparative law, in particular the laws of those national jurisdictions supposedly having influenced a remuneration regime to be transplanted into the Copyright Law of Mexico. The reason is that Congress did not impose limitations on the exclusive right of public performance in order to ensure that the remuneration system would be constructed over a solid legal structure. Congress just let the two systems coexist, causing legal uncertainty

for film exhibitors, broadcasting organizations or other companies doing public communication of works. These bodies now have to confront copyright owners — individuals and corporations — that can claim a fair and equitable remuneration for the public performance of the work, and in addition an exclusive right to authorize or prohibit the performance, which could possibly imply extra payment. But the inconsistencies did not end there, considering that not only authors, but their assignees also, would be the beneficiaries of the remuneration right. One of the new provisions states expressly that the author and the assignee shall enjoy the right to remuneration. The implications of these issues grew given the multiple options that Congress provided by inserting rules conferring at the same time real and credit-like rights.

By chance — rather than careful technical analysis — audiovisual works might have escaped from the messy new rules as, before the amendment, the Copyright Law already considered certain remuneration rules with express limitations on patrimonial rights. Accordingly, authors of contributions to audiovisual productions (such as writers or composers) would be impeded from stopping the exhibition or other forms of public performance of the film, but would still have the right to obtain some income from the exhibitors or broadcasters.

Neighbouring rights of performing artists might fall within the exception as well, if it is taken into account that in accordance with the Copyright Law, the right of public performance becomes exhausted when the artist has consented to the fixation of his or her interpretation. The exhaustion of the patrimonial right can be regarded as precisely the type of limitation that the law needed to impose to shift a patrimonial right to a remuneration right. Of course, that cannot be regarded as a Mexican legislative invention as it was rather the response given by the more studious legislator of the Law of 1963 to the challenge posed when implementing the standards of the Rome Convention. Accordingly, the language that the legislator of 2003 added to the existing regime was confusing, by stating that exhaustion would only be possible after the artists receive their income for the public performance of their interpretations.

THE SUPREME COURT'S ANALYSIS

The Supreme Court's analysis of the amendments is certainly more methodical and thus better than that of Congress — whole analysis did not exist at all but the two decisions are still not as exhaustive and interpretative as expected. The two resolutions are contradictory in certain aspects (in view of structural organization rules, for certain matters the Supreme Court does not act as a whole body, but is divided into two chambers of five ministers each. Here, the first chamber addressed Cinemas La Huasteca, while the second chamber addressed Cinemex). First of all, neither of the resolutions addressed the conflicting questions of remuneration versus exclusive rights. The reason may have been that the amended provisions are confusing to the extent that no one, except perhaps copyright specialists, could have noticed the intrinsic objectives of the amendments and the flaws that Congress introduced. At first glance, the ordinary reader of the reformed text could easily, but mistakenly, conclude that it only repeats, unnecessarily and ambiguously, the already existing patrimonial right provisions of the law. The Ministers of the Supreme Court possibly fell into that assumption by missing the fine and subtle issues that the amendments entailed and concentrating instead on the more superficial aspects of the discussion. Nevertheless, the rulings have indeed given a general impression that the remuneration and patrimonial right systems cannot apply to the same event (the same act of public performance), as it was the mandate of Congress that the remuneration system supercedes in cases like that.

The two chambers of the Supreme Court concentrated heavily on the notions of transmissibility of copyright rights of an economic nature as well as the likelihood that these rights could not be renounced. The approach was different though. The first chamber agreed that authors are legally entitled to transfer their rights of economic nature to an assignee, it being impossible that authors and assignees can hold the rights "simultaneously". This affirmation is based on the legal connotation of the word "assignment" (in Spanish causahabiencia), that does not entail that the same right is concurrently owned by the transferring party and the transferee because when the former assigns the right in virtue of an agreement it "ceases being the title holder" and the latter "becomes the new holder in terms of what is agreed". On the other hand, the second chamber found that the new rights could only be transferred mortis causa, because that they cannot be renounced. For the second chamber a right

that cannot be renounced is a right that cannot be transferred, at least while the author is alive. In both cases, the Supreme Court arrives at the conclusion that the newly adopted rights do not affect film exhibitors since it is the purpose of copyright law to protect authors and performing artists with the granting of economic rights.

The rulings of the Supreme Court are silent or unclear in many respects. First, they lack a thorough discussion defining the superceding nature of remuneration rights over patrimonial rights in the public performance of works-of-authorship. Second, they are vague in how the assignment and transmissibility issues have been dealt with. For example, the sentences never stated which rights could be transferred — patrimonial rights, remuneration rights or both. In other words, the Supreme Court was not clear if it is possible to transmit remuneration rights (inter vivos or mortis causa), if only patrimonial rights can be transmitted (an author assigns the patrimonial right of public performance to a publisher and is then entitled to a remuneration right that cannot be transmitted, or if this latter right is assignable as well) or if both can be the subject of transmission. Third, they do not define whether the remuneration right system should apply solely in cases where the author or performers have assigned their patrimonial rights or if the system could be extended to cases where the authors or performers have not assigned their patrimonial rights, reserving for themselves the power to authorize third parties to publicly perform works or interpretations.

A MISSED OPPORTUNITY

The Supreme Court of Mexico had a unique opportunity to dictate useful guidelines in connection with the new regime of remuneration rights, which did not happen in the end. The two decisions rendered responded to some of the questions that plaintiffs brought to the Court's attention, but were definitively inconclusive. The copyright community, including creators and publishers as well as society at large, would have expected the Supreme Court to be more focused and exhaustive, considering how brutally Congress handled the Copyright Law. To use a common expression, the loose ends were tightened but not completely fastened, as they should have been.