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BACKGROUND: A SCENARIO OF NEW DEVELOPMENTS

Digital Technology is nothing else but a new challenge for copyright law. An initial question that experts have raised though is how much these new technologies have represented a threat for copyright in terms of the universal value it has signified throughout times.
During the mid-nineties the approach was not so much optimistic the reason being that works-of-authorship can be so easily be copied by digital means and then distributed without any control through digital networks potentially accessed from anywhere in the world.

With the advent of such forms of digital expressions as multimedia or of technologies as the network infrastructure, new forms of creativity, reproduction and dissemination of copyrightable subject matter have developed as well, and it is the convergence of all the foregoing that has shaped the so called 'global information society.'1

However, time has shown that all that fear has been a mere speculation at the end, as copyright did indeed become a major player in the global information society. It has been generally understood that as the network would not fulfill its purpose of giving access to information in quantity and quality, should not a framework be created by which the rights of authors and other titleholders be secured, thus attracting their attention and interest to use the network for the distribution and publication of their works?2

As one commentator has stated "the idea that works and information 'deserve to be free' is no more valid or economically viable today than it was in the seventeenth and eighteenth centuries when authors' rights began to be enshrined in national and international law."3 In accordance with that statement, digital forms of reproduction and distribution could have been as threatening as it was the case for other reproduction or dissemination

technologies that have developed in the past. Thus, if copyright was capable enough to survive to the challenges of then 'new' but now 'old technologies' why is it not able to survive the digital revolution?

THE EXTERNAL FACTORS WHICH PRODUCE AN IMPACT ON MEXICAN LAW

With the above in mind, as from 1995 national and regional governments such as those of the USA and European Union, as well as international bodies such as WIPO, started to find their way for the setting up of the rules that would ensure that copyright institutions adapt to the new manifestations of technology. Initially, said efforts were embodied into projects such as the Green paper[4] and the White paper.[5]

However, the so-called 'Berne Protocol'[6] was the precedent of what later matured as the WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonogram Treaty (WPPT). Internationally then, the idea of a revision to the Berne Convention expanded so strongly that nothing would have stopped it from becoming real and tangible.
The process of implementing an international set of rules was not simple and indeed troublesome. The reason was that the White Paper and draft Berne Protocol had heavily leaned towards the interests of copyright owners and mistakenly overlooked those of service providers as well as users of information on line. These projects were strongly criticized and consequently never approved.

Under the White Paper, service and infrastructure providers were bound to permanently police their clients and in general, the users of information in digital network, so that they would not infringe copyright rights of any sort. Among others, the text of the White Paper suggested changes to concepts such as fixation and reproduction, in order to include that transient copies made on random access type memories of computers is also regarded as fixation or reproduction. Likewise, it proposed that distribution right should include the transmission of copies through the network, and that a right of importation and production of derivative works be recognized in favor of copyright titleholders.

The view of service and infrastructure providers was however different. Some of them had already be held liable for infringement, whether directly as in the US case Playboy Enterprises v Frena,7 or as contributory infringers as in Religious Technology Center v Netcom.8 They were thus very concerned indeed as to whether they should be “considered publishers or distributors of copyright infringing material and liable for contributory infringement, even though they do not know or have any way of controlling, limiting or policing the distributor of that infringing material.”9 They were obviously against the White Paper and draft Berne Protocol and pushed before the US Congress as well as in the international front, so that their views were taken into account. The controversial position of copyright owners, users and service providers came to the attention of the framers of WCT and WPPT. Due to this, discussions at the Diplomatic Conference concerning both the draft agreements were held under more objective grounds. As a matter of fact, at the end of discussions, the position of users and service providers was definite in that the agreements had reached a major balance. This is clearly obtained from the outcome of the Diplomatic Conference of December 20, 1996 at WIPO's headquarters in Geneva, where besides TRIPS obligations having been reformulated in the language of Berne, the discussion was aimed at resolving the conflicting positions of content providers vis-à-vis principles of public interest of consumers of content (access to information and freedom of speech) and rights of infrastructure providers. The 'making available' right represented a significant achievement though, which entails the adoption of a new formula applicable against unauthorized use of works in the digital environment. The same occurred as to the new provisions concerning technology measures and rights management information. Notwithstanding the achievements, the proposal to broaden the scope of the right of reproduction to include the temporary copying of works, was not finally approved. Different groups had criticized that approach basing their arguments on the fact that digital communicated information is constantly being 'stored and forwarded', for purposes of browsing the Internet, sending e-mails or viewing or displaying digital files, amongst others. If the modification had been approved, users and service providers would have been constantly held liable for making 'reproductions', notwithstanding the concept of how fair the purpose would have been. Accordingly, after discussions among delegates of many nations, the change was not passed, at the Diplomatic Conference. It was then submitted for new analysis in the future.

The initial proposal calling for rules as to technological protection systems was subject to controversy as well. The reason for the conflict was that the initial proposal submitted to the Conference by which making of devices for the circumvention of the protection systems installed or used by anyone would be referenced as illegal regardless if circumvention using said devices is done for legal and valid purposes. A main concern was that such a prohibition would serve to restrict access to material in the public domain. Likewise, the prohibition would also threaten legitimate dual-use technology and evisceration of copyright exceptions. As a result, the Diplomatic Conference adopted an alternative proposal which applied to the act of circumvention rather than the making of circumvention devices as the prohibition to be imposed, and which was focused on acts allowing infringement. This latter position was approved and article 11 of WCT was drafted accordingly.[10]

MEXICO AND THE INFORMATION SOCIETY

Mexico has been an active promoter of copyright law and a true participant in the development of an international system of protection. The Internet would have not been the exception to the rule. The Mexican delegation participating at the discussions of WCT and WPPT played an active role in the negotiation and adoption of said international agreements. As of May 18, 2000, Mexico deposited the instruments of accession to the WCT and had earlier done so for WPPT. WCT is actually pending at Congress while WPPT was approved on March 1, 2000. As a matter of fact, the Mexican Law of 1996, which was passed through Congress prior to the conclusion of the Diplomatic Conference held at WIPO's headquarters in December 1996, already had introduced certain provisions that would later become the standard of the treaties.[11]
Accordingly, the Mexican Law of 1996 inserted the following in anticipation of the final outcome of WCT and WPPT:
(1) A ‘making available’ right by which in terms of article 8 of WCT “members of the public may access these works from a place and time individually chosen by them”. Accordingly, article 27 II c) of the Copyright Law regards “the public access by means of telecommunication” as a patrimonial right. Inspired on article 8 of WCT, that provision considers the 'making available' right within the

broader category of 'communication to the public'. In addition, the provision employs the very broad notion of 'telecommunication', which tries to cover every single form of communication at distance and includes digital networks.

(2) A 'transmission' right, as stated in article 27 (III) of the Copyright Law, independent from the general concept of communication to public. In other words, the Mexican legislator of 1996 created a new bundle of patrimonial right, calling it a 'transmission right'.

(3) A whole chapter devoted to protection of computer programs, where amongst other many rules, it is possible to find that computer programs are protected as literary works.12

(4) Provisions relating to 'compilations of data', also known as 'databases', recognizing both a copyright right as well as a sui generis right. A principal provision establishes that bases of data or of 'other material', perceptible by the means of machines or any other form, which by reason of the selection and disposal of content represent ‘intellectual creations’ shall be protected as ‘compilations’.13 Thus, having considered them as ‘compilations’, the law has afforded a copyright type of protection to a data base if ‘original’, calculated for the regular term of life plus 75 years; on the other hand, it has also granted a sui generis right to 'non-original' databases, although protection in this case is for a reduced term of five years.

(5) Notions of ‘fixation’ and ‘reproduction’, which include the temporary or ephemeral copying of protected works.14 The legislator of 1996 was certainly unaware, at the time that the statute was passed, that the Diplomatic Conference of WCT would end up dropping the original idea of ‘ephemeral reproduction’ as it would have imposed a high burden on users and infrastructure providers. By having anticipated the final result at WIPO, the Mexican law indeed ruled on the ephemeral copying of works as a form or reproduction.

(6) A ‘technical protection system’ provision aimed at protecting the circumvention of codification mechanisms of computer programs. The rule in the Mexican law has nonetheless a narrower scope than that of what it later would become article 11 of WCT, which states that the prohibition attends to

the circumventing of technical mechanisms in general. Additionally, the legal provision overlooks the 'purpose of infringement' requirement of article 11 of WCT. The reason is again that Copyright Law was passed by Congress slightly before the Diplomatic Conference of WCT, in which the 'purpose of infringement' factor was approved.

Notwithstanding the above, WCT and WPPT have not been really or at least been fully implemented into Mexican Law. As it can be appreciated, the changes made already reflect some of the standards of both agreements, but in certain aspects compliance has not been made thoroughly, and in others it was made against WCT trends.

Examples of the first category can be the technical protection system provision, which in the Mexican Law was limited to software. Examples of the second group are the reproduction right which under the copyright law extends to ephemeral copying, the technical protection provision itself, which is silent as to the 'infringement purpose', and the lack of regulation on the rights and obligations concerning Rights Management Information, as in article 12 of WCT. However, the real challenge for the Mexican Government is implementing the safe harbor rules as well as limitations to the new rights conferred by the law. This will be basically needed in order to fully meet all standards of WCT and WPPT, and in particular articles 10 of WCT and 16 of WPPT as well as the agreed statements of both articles.

Regarding circumvention of technological measures the copyright law does not state a single restriction, as for example when it is done for the copying of material or information which is or should be available and accessible to the public. A provision of this kind can be found in the US Digital Millenium Copyright Act, together with at least six additional exceptions dealing with the issue of circumvention.15 Likewise, the Mexican Copyright Law could observe certain restrictions to the now very broad reproduction right. As mentioned above, the concept of reproduction admits the ephemeral copying of works, which in any event would cover situations such as a transitory transmission, system caching, storage of information on systems or networks art direction of users, and use of information location tools as browsers, search engines and directories. In conclusion, the Mexican Copyright Law has compiled with most of all requirements of WCT and WPPT, which has meant a big step towards the

implementation of rules protecting copyright owners in the digital or information society. But is very likely that Mexican government will soon come under pressure from other interested sectors for introducing a balance in the performance of the Mexican information society.

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1 Holleyman, Robert and Steinhart, Jeffrey; Multimedia in the Global Information Infrastructure; Memory of WIPO Worldwide Symposium on Copyright in the Global Information Infrastructure, Mexico City, May 22 to 24, 1995, p. 56.
2 Holleyman, id at p. 60. See also Lehman Bruce A.; Intellectual Property and the National and Global Information Infrastructure; published at same WIPO Symposium Memory, p. 75.
3 Holleyman opus cit. at p. 61.
4 "The Green Paper on Copyright and Neighboring Rights in the Information Society" was the European approach to GII for submission to the Commission of the European Community.
5 Global Infrastructure (GII) led to the US Government adoption of so-called White Paper.
6 The idea of Berne Protocol arose out of GII and was mostly inspired on projects such as White Paper.
7 839 E Supp. 1552 (MD. FLA. 1993).
8 907 F Supp. 1361 (ND. Cal 1995).
9 Street E Lawrence; Law of the Internet; Lexis Law Publishing, USA; Eight Ed. 1998, p. 415.
10 Vinje Thomas C.; The New WIPO Copyright Treaty: A Happy Result in Geneva; EMR; Street And Maxwell, UK, Volume 19 Issue 5, 1997, p. 230.
11 The Copyright Law of 1996 was discussed at Congress during December of 1996 and published on December 24 of same year.
12 Chapter IV of Title IV of 1996 Copyright Law, referring to Computer Software and Data Bases. Articles 101 to 114.
13 Article 107 of Copyright Law.
14 Articles of 6 and 16 (VI).

15 The Digital Millenium Copyright Act of 1998 (DMCA) signed by US President Clinton on October 28, 1998. Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).