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LUIS SCHMIDT EXPLORES THE NATURE OF COPYRIGHT PROTECTION FOR MEXICAN FILMS

IN SUMMARY

- THE MEXICAN FILM INDUSTRY EMERGED IN THE 1930S. GOVERNMENT AND TALENT HAS DEVELOPED SUCCESSFULLY UNDER THE FRAMEWORK OF AN EFFECTIVE LEGAL SYSTEM THAT WITH CERTAIN MODIFICATIONS HAS CHARACTERISED THE INDUSTRY'S SPIRIT

- THIS ARTICLE ANALYSES THE REGULATORY ASPECTS OF FILM PRODUCTION AND DISTRIBUTION, AS WELL AS THE COPYRIGHT PROTECTION REGIME FOR FILMS

The Mexican film industry emerged in the 1930s under unique creative patterns that imposed a trend. Government and talent developed successfully, working hand in hand, under the framework of an effective legal system that with certain modifications and improvements has characterised the industry's spirit, transcending time until today.

REGULATORY ASPECTS OF FILM PRODUCTION AND DISTRIBUTION

In 1949 the Mexican Congress adopted a statute for controlling film importation and exhibition, which stood in force until 1992, when the current "Film Law" was passed¹. Amongst other important legal provisions, assisted by the administrative regulations of 2001², the Film Law has set down rules in connection with the production, distribution, exhibition, and in general, the

commercialisation of films, the classification thereof, and the incorporation of agencies like "IMCINE"³ - a regulatory body in charge of promoting "quality" national films⁴ by assigning all sorts of resources; "FIDECINE"⁵ - the manager of a fund for investing in new film projects, where economic return is expected, and for granting tax and other sorts of incentives; and the "National Film Library" – keeping a film library and catalogue. Some time later, the Government added a fund called "FOPROCINE"⁶, having similar attributions to FIDECINE, but for the granting of credit and support to Mexican experimental producers.

In addition to funding, the laws have imposed a system of tax and other incentives to stimulate the industry⁷. FIDECINE and FOPROCINE are legally empowered to manage the system of incentives. In particular, they can authorize deductions to investment projects in accordance with the Income Tax Law. By virtue of an amendment that the Mexican Congress approved in December 2005, it is possible for producers to credit income tax for up to 10% of the total investment. Tax authorities shall restrict the incentive to \$45,000 per year to be distributed depending on the number of film making projects that competent authorities approve⁸. Producers are entitled to additional incentives, stipulated in the Film Law and Regulations or in the FIDECINE and FOPROCINE rules. Thus, they can create fund reserves for up to a 100% of the revenues that FIDECINE or FOPROCINE obtain from the distribution of the film. They can obtain cash incentives for future projects, when the film has received international or national prizes. Likewise, Nacional Financiera, a national bank of development, runs an incentive programme for the financing of films in the final stage of production or distribution, such as marketing and promotion.⁹ IMCINE has relied on CONAFILME since 1995 to assist filmmakers to find locations, filming equipment and laboratories; recruit talent and personnel; search all types of business and legal information, including copyright, insurance, labour and migratory; and seek government permits and licences for everything concerning the shooting and production of the film. CONAFILME can recommend the studios that better suit the producer's needs and that includes Estudios Churubusco in the first place. Estudios Churubusco is the most important studio in Latin America. Incorporated as a private company in 1944 and acquired by the Government in 1950, it has been used as a filming facility for thousands of Mexican and foreign productions and co-productions. In 2004 president Vicente Fox sent a bill to Congress with the purpose of privatizing the studio, which was rejected¹⁰. The Film Law makes abundant

references regarding film distribution and commercialisation. The role of IMCINE in film distribution and promotion is relevant and crucial. IMCINE is indeed the manager of a budget that it has utilised in attending film festivals or organising them, in Mexico and internationally. Also, IMCINE is a permanent assistant of national producers seeking distribution or marketing options, who require partnership or other strategic solutions or who in general are in the search of alternatives for the film's exhibition.

In addition to the above, the Film Law provides amongst others: a) a definition of "distributor" — understood as the intermediary activity by which the products are supplied to exhibitors and vendors in ancillary media¹¹; b) a definition of films' "commercial exploitation" — basically referring to their exhibition, broadcasting, video and digital distribution¹²; c) a classification system, divided into five categories¹³; d) an obligation for distributors to obtain state department permits for exhibition or commercialisation¹⁴; e) certain rules for dubbing and subtitling; and f) an obligation that exhibitors devote 10% of the total projection time to national films¹⁵, having on the other hand the right to freely set up the box office ticket price¹⁶.

COPYRIGHT PROTECTION OF FILMS

In conformance with the Copyright Law, films are cinematographic and audiovisual works at the same time, since the words "cinematographic" and "audiovisual" stand for moving images or pictures, with or without sound, that are copied in a tangible object like celluloid, video cassette or a digital registry and that are perceived by technical means¹⁷.

Likewise, the law views films as original creations made by talented authors and artists, under the supervision of a producer who coordinates all creative and administrative efforts¹⁸. From the regulatory side the Film Law would add that a film is a cinematographic work, as defined by the Copyright Law, having the characteristic that is "national or foreign, full-length or shortfilm, in any form or modality"¹⁹. The Film Law is broad enough as to how the film will be distributed: for exhibition, TV broadcasting, video or digital.

Films were regarded derivative works in conformance with the copyright laws of 1847²⁰ and 1956²¹. The law of 1963 was the first to recognise cinematographic works as an independent category²². The Copyright Law of 1996, currently in force, listed them as a species of audiovisual works²³ and provided a set of

substantive rules for films and audiovisual works²⁴ and for so-called "audiovisual production contracts"²⁵.

The Copyright Law confers to the producer all patrimonial rights over the film²⁶. The producer is free to assign said rights to third parties, in whole or part, or to license them for film distribution, exhibition or for use in ancillary media, like video, broadcasting or digital networks. The foregoing is possible regardless of whether the audiovisual production has not started or has not concluded by the time that the transfer has been made²⁷.

The law has recognised the vastness of films' business transactions and has provided protective tools that are wide and comprehensive. For example, producers will find it possible to receive funds from banks or from their partners in exchange for a proportion of the film's rights or generally by disposing of all the rights over the film through full assignments, without a limitation²⁸.

Producers need to consider the following:

- In general terms, assignments are restricted to time limitations under the Copyright Law and accordingly can only exceed 15 years depending on the magnitude of the work's investment²⁹. For obvious reasons, due to the nature of audiovisual productions and the investment that they require, assignments of a film's rights shall be valid when agreed for an indefinite time.
- Video is not referenced as an audiovisual work and video producers are merely the subjects of neighbouring rights³⁰. Why the legislators of 1996 believed that video might not be an audiovisual work is a question that has no answer, since the difference between video, film and TV programmes is determined solely by the medium used to disseminate the work³¹.

The law considers the director, writer(s) of the script or argument, composer(s), photographer(s) and cartoonist(s) as authors of the works that are used in connection with the film or audiovisual production³². Likewise, they are authors of the audiovisual works as such and are thus entitled to patrimonial copyright rights, subject to restrictions³³. Producers are the legitimate owners of patrimonial rights and it is them exclusively who can exploit the films. As an important provision stipulates, once having "consented" to "contribute" to the film it will not be possible that the authors oppose the film's exploitation³⁴. In other words, once having "consented" — authorised by any form available in the laws — the incorporation of their "contribution", authors would be impeded to authorise or prohibit the exploitation of the work. In 2003 Congress approved a public performance remuneration right that would coincidentally strengthen the "contribution" rule of the Copyright Law³⁵. The bill of amendment has

triggered intense litigation at Supreme Court level³⁶. However, the remuneration system has been deemed compatible with the "contribution" limitation by allowing authors to collect monetary compensation from the public performance of the works linked to the film.

If the film is based on a novel or other forms of underlying literary works, a producer can obtain from the writer the right to adapt³⁷ the same to the film and can, in general, negotiate the rights to publicly perform³⁸ the literary work as adapted, through public exhibition, broadcasting, digital technology transmission or to reproduce³⁹ the film for distribution by sale or rental⁴⁰. The same is true in connection with other creative contributions, like the direction, that are required for the film. The contract can be a general licence or assignment, a work-for-hire or an "audiovisual production" agreement, typified in the Copyright Law, by which the writer would assign, on an exclusive basis, all patrimonial rights required for the production, distribution and public performance of the work, as well as the right to subtitle⁴¹. The typified contractual figure would possibly have the advantage that assignments would not be the subject of the general time restriction of the Copyright Law⁴². But audiovisual production agreements seem to be limiting, since they exclude musical works and, by chance, economic rights other than reproduction, distribution and public performance—for example, the right to adapt. It is unlikely in the end that producers use audiovisual production agreements to obtain all the rights needed to make the film. Assignments, licences or work-for-hire "employment"⁴³ or "independent contribution"⁴⁴ agreements are statutory alternatives available to film producers. Some commentators have sustained that there is nothing other than audiovisual production agreements that parties can rely on in connection with films. However, an idea like that seems inconsistent with the Copyright Law as well as other legislative and constitutional contracting principles⁴⁵.

Musical works are expressly excluded from "audiovisual production" agreements and accordingly, producers are required to obtain rights from composers via synchronisation agreements that, as some would state, need to be granted by the composer directly and not by the music publisher holding the patrimonial rights over the songs⁴⁶. However, the law can be interpreted to allow that assignees enter synchronisation agreements for musical works, including compositions and their arrangements. Producers can thus utilise all sorts of contractual vehicles in order to obtain the rights to make the soundtrack of the film. In keeping with that, they can negotiate the transfer of

music rights with authors or publishers and with phonogram producers, if the music will be incorporated into the film by means of a sound recording⁴⁷. Performing artists — screen actors and musicians playing in the soundtrack — are protected under neighboring rights and are thereby subject to a particular legal regime. Performers do not have a full exclusive copyright right as authors do. They essentially hold a "Rome type" right to oppose the fixation of their performances, the reproduction of the performances as fixed in objects and the public communication of the performances⁴⁸. Performers hold additional remuneration rights for all forms of exploitation of their interpretations⁴⁹. Accordingly, apart from labour or service type clauses, performer agreements require "non-opposition" provisions, ensuring that producers are entitled to incorporate the performances into the film and to use the same in connection with all media. As a short reference, the Copyright Law has typified an agreement for the right to fix, reproduce and publicly perform artistic interpretations⁵⁰.

NOTES

1 Published in the Official Gazette of December 29, 1992.

2 Published in the Official Gazette of March 29, 2001.

3 Mexican Film Institute. It was incorporated in the year of 1983, and reports to CONACULTA "Consejo Nacional para la Cultura y las Artes", dependent of the Ministry of Public Education (Article 41 of the Film Law).

4 Articles 3 and 4 of the Film Law provide a definition of "national films", whereas Article 7 dictates that a "national production" shall be that made by a Mexican or in accordance with an international co-production agreement.

5 Fund for Investment and Incentives to Film. The bodies that preceded Imcine were active until August 8, 2001, the date when Fidecine came into operation. Fidecine began activities until 2001 since it was incorporated only after the publication date of Regulation to the Film Law (March 29, 2001), two years after the amendment to Article 33 of the Film Law (January 5, 1999).

6 Fund for Quality Film Production. Privately constituted on December 2, 1997, in virtue of a trust agreement (no. 1154-4) entered into by various government agencies.

7 Articles 31 and 32 of the Film Law.

8 Article 226 of Income Tax Law, published in the Official Gazette of December

29, 2005. Before the reform the incentive was restricted to 3% of the investment.

9 Nacional Financiera. Press Bulletin No. 75/05. Mexico. September 4, 2005.

10 Alcérreca, Rafael. Una Mirada a los Estudios Churubusco. Estudios Churubusco-Azteca. Mexico, 2003 Rosenberg, Tina. Editorial Observer: Just as Mexican Movies Become Chic Again, the Government Pulls Its Support. The New York Times Company. USA. December 11, 2003.

11 Film Law, Article 16. Article 17 refers to distributors' monopolistic practices and their prohibition.

12 Film Law, Article 18.

13 Film Law, Articles 24 and 25 .

14 Film Law, Article 26. Regulations, Articles 16 to 23. The division of the State department is RTC (General Direction of Radio, Television and Cinematography).

15 Film Law, Article 19.

16 Film Law, Article 20. Formerly prices were subject to control. The release of the same by virtue of the 1992 Film Law and the reform of 1999, made it possible for private exhibition chains to grow.

17 Article 94 of the Copyright Law.

18 Articles 95 and 98 of the Copyright Law.

19 Article 5 of Film Law. Article 9 of the Regulations of the Law states that a full-length movie is that exceeding 60 minutes; mediumlength between 30 and 60 minutes, and shortlength less than 30 minutes.

20 Articles 4 and 6 of the Copyright Law, published in the Official Gazette of January 14, 1948.

21 Articles 2 and 4 of the Copyright Law, published in the Official Gazette of December 31, 1956.

22 Article 7 i) of the Copyright Law, published in the Official Gazette of December 21, 1963.

23 Article 13 IX and 95 of the Copyright Law, published in the Official Gazette of December 24, 1996.

24 Title IV, Chapter III of the Copyright Law (articles 94 to 100).

25 Title III, Chapter VI of the Copyright Law (articles 68 to 78).

26 Article 96 of the Copyright Law gives a definition of producer and Article 97, last paragraph, states, "unless otherwise agreed, the law reposes the producer as the holder of patrimonial rights of the audiovisual work as a whole". Article 99, last paragraph aggregates, "without prejudice of the rights of authors, producer can take all actions necessary for the exploitation of the work".

27 Articles 34 of the Copyright Law and 16 of the Regulations.

28 Articles 24, 27, 28 and 30 of the Copyright Law.

29 Article 33 of the Copyright Law and 17 (1 and V) of the Regulations.

30 Articles 135 to 138 of the Copyright Law.

31 Berne Convention, Brussels and Paris Acts, and the "analog procedures" concept.

32 Article 96 of the Copyright Law. Authors can exploit their contributions separated from the audiovisual production.

33 Article 97 of the Copyright Law.

34 Article 99, second paragraph of the Copyright Law based on Article 14 bis (2)(b) of the Berne Convention, Paris Act. The Copyright Law has adopted the Treaty's standard despite the fact that the producer, without the authors, is the holder of patrimonial rights over the film.

35 Article 26 bis. Amendment published in the Official Gazette of July 23, 2003.

36 Cinemas La Huasteca (Amparo en revisión 45/2005, resolved April 27, 2005) and Cinemex Toluca II (Amparo en revisión 105/2005, resolved June 10, 2005).

37 Article 27 (VI) of the Copyright Law and Article 14 of the Berne Convention, Paris Act.

38 Article 27 (II)(b) and (c) and 27 (III) of the Copyright Law.

39 Article 27 (I) of the Copyright Law.

40 Article 27 (IV) of the Copyright Law.

41 Article 68 of the Copyright Law. This article is contradictory to what is stated in Article 99, first paragraph. While under Article 68 assignments can be exclusive and unlimited, in Article 99 this is not a possibility.

42 Article 72 and 43 of the Copyright Law.

43 Article 84 of the Copyright Law.

44 Article 83 of the Copyright Law.

45 Marín López, Juan José. Derechos Patrimoniales en la Obra Audiovisual en la LFDA. Revista Mexicana del Derecho de Autor. Year V. Number 18. Mexico. 2005. Page 21.

46 Article 58 of the Copyright Law.

47 Article 131 of the Copyright Law.

48 Article 118 of the Copyright Law.

49 Article 117 bis, of the Copyright Law not only refers to fixation, reproduction and public performance, but also other forms of use or exploitation ("...by any means, public communication and form of disposal...").

50 Article 121 of the Copyright Law.