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AN AMENDMENT BILL RECENTLY PASSED BY CONGRESS WILL INTRODUCE SWEEPING CHANGES TO MEXICO'S COPYRIGHT LEGISLATION. HOWEVER, THE NEW BILL HAS NOT BEEN WITHOUT CONTROVERSY. IN PARTICULAR, THERE HAS BEEN MUCH DEBATE OVER PRIVATE REPRODUCTION RIGHTS AND WHETHER COPYRIGHT HOLDERS SHOULD BE COMPENSATED.

During April and May 2003, the Mexican Congress debated a bill (Bill) which will significantly amend the country's 1996 *Copyright Law*. The main aim of the Bill is to implement a number of new provisions that will grant additional rights to authors and holders of neighbouring rights such as artists and phonogram producers.

Among other things, the original draft of the Bill proposed amending the Copyright Law to include a compensation right for private copying of authored works. A number of interested groups, including the electronic products industry, were opposed to this change. As proposed, manufacturers and vendors of equipment and media for reproducing copyrighted material would bear the obligation for covering compensation claims. To the relief of many electronics manufacturers, the private copy levy system proposal was dropped from the final Bill. Collecting societies who had lobbied Congress to retain the provision were disappointed and vowed to undertake new strategies to push for further reform.

This article analyzes the background to copyright protection in Mexico and examines why the private copy levy proposal failed to make it into the final version of the Bill.

### **Copyright protection and patrimonial copyrights**

Under Mexican copyright law, a work is the personal intellectual creation of an expression of human sensibility, talent and ingenuity. A creation meeting the above criteria will be granted full protection under copyright law. Mexican

copyright law further requires that the work be embodied in a tangible medium of expression. It is this act of creation and fixation of the author's creation in a material and durable form that leads to copyright protection. However, it will always be the intangible element - human creation - that will be protected and not the medium or *corpus mechanicum* in which it has been embodied.

As is broadly the case in many other jurisdictions and under international treaties such as the Berne Convention, the regime of patrimonial rights<sup>1</sup> contemplated under Mexican law can be divided into five categories: reproduction; distribution; control of derivative works; public performance; and display.

Mexican copyright law also recognizes a limited number of other rights, through which third parties are free to use a work without the author or copyright holder's permission, subject to the proviso that such rights holders will be entitled to fair compensation. Examples of such cases include works whose nature allows or encourages them to be exploited on a wide scale. The only two examples considered under Mexican law are public communication of phonographic works and *droit de suite*<sup>2</sup> - this latter right will be introduced into law under the Bill.

### **Right of reproduction**

Under Mexican law, both authors and artists hold a reproduction right allowing them to authorize or prohibit third parties from making copies of their copyright works in any format, whether mechanical, electronic or digital. This reproduction right is broad and covers all genres of works without limitation. Reproduction rights are also wide in the sense that, subject to certain limitations, they can be opposed for almost any purpose. Accordingly, authors or copyright holders can halt the reproduction of their works by another party if the works are being reproduced for a public or commercial purpose (i.e. they will be made available for sale in the market or otherwise distributed).

Copyright holders may also stop the non-commercial reproduction of their works if the copies are being made for free public distribution.

However, the Copyright Law contemplates one exception to this general right to control reproduction. Article 148(IV) states as a limitation to copyright rights: "the reproduction on one single occasion and of one copy, of a literary or artistic work, for the personal and private use of the person making it and without a purpose of gain. Juristic persons shall not be entitled to that exception, unless in case of educational or investigative institutions or those that are not devoted to commercial activities".

Under this provision, people are entitled to make one copy of any work-of-authorship for their personal use, without needing authorization from the author or artist and without having to pay compensation. This is not restricted merely to private copying in its strictest sense and also includes reprography. On the other hand, however, the extent of the provision is clearly to cover personal copying, and not such activities as peer-to-peer file sharing or online or offline distribution of copies made without authorization.

In summary, Mexican law does not regard private copying as a compensation right, but as an exception to reproduction rights or, as commonly understood in the Anglo-Saxon copyright world, fair use. This legislative understanding is of key importance when assessing whether or not a system of private copy levies would work in Mexico.

### **Arguments in favour of the private copying exemption**

Before the 1950s, the level of technology in existence meant that the reproduction of copyright works by private persons was of only trivial importance to many copyright holders. However, the major technological advances of the past 50 years or so have served to move this problem to centre stage. Reproduction technologies, particularly those involving computers and the internet, have blurred the dividing line between public and private use. These new technologies pose daunting posing challenges to copyright owners and professional advisers, who must now search for new ways to counter new threats. This situation has also driven new debate on where legislative lines should be drawn when assessing rights and exemptions.

Germany was one of the first countries to make legislative changes in this area alter ground-breaking decisions by German courts that ignored the traditional division of public and private use<sup>3</sup> and imposed "contributory liability" on the manufacturers and vendors of equipment and media.<sup>4</sup>

Other countries, particularly those in the European Union (EU), quickly followed Germany's lead. The EU's 2001 Copyright Directive is premised on the principles established by the courts in Germany and elsewhere, but at the same time is designed to protect the non-authorized reproduction of works in a digital environment by using Technical Protection Measures (TPM) and Digital Rights Management (DRM). Given these dual objectives, the Directive has established a "phase out" provision that will ensure a transition from the current levies system to a TMP/DRM system, where only one system can apply at any one time, thereby avoiding unjustified double payments.

With respect to copyright exemptions, including private copying, the Directive

indicates that the member states of the EU must comply with the "three-step test" as established under the provisions of the Berne Convention (Article 9.2). This test is also reflected in other international treaties such as the Trade-related Aspects of Intellectual Property Rights Agreement (Article 13) and the World Intellectual Property Organization Copyright Treaty (Article 10). Under these treaties, exemptions to copyright rights are only possible in "certain special cases... which do not conflict with a normal exploitation of the work" and "do not unreasonably prejudice the legitimate interests of the right holder". It is worth noting that when the Copyright Law was passed in 1996, the Mexican legislature considered that the private copy exception of the law met the requirements of the three-step test.

### **The current position in Mexico**

As already noted, Congress recently dropped a proposal made by various collecting societies, to introduce a right of private copy in favour of authors, artists and other holders of copyright and neighbouring rights. While collecting societies and many copyright holders have expressed their disappointment with the decision, an examination of the current copyright framework in Mexico shows that it would be extremely difficult to admit, let alone impose, an obligation on the manufacturers and vendors of equipment and media for reproducing works-of-authorship to compensate rights holders for private copy activities.

The current private copy exception under Mexican copyright law clearly establishes that, in certain circumstances, both natural and juristic persons are permitted to make one copy of a copyright work for private use without having to compensate the author, artist or holder of copyright. As a "fair use" type of exception, copyright owners may not oppose the reproduction of their works when made for private purposes and are not entitled to any compensation, including levies.

It would therefore be unfair for persons buying equipment or media used for making a copy of a copyrighted work to have to pay a "compensation" fee as part of the price. If anything, it is even more unjust to expect manufacturers and vendors to pay such a fee.

The case for imposing a levy on manufacturers and vendors becomes weaker still when it is noted that the Copyright Law does not recognize the concept of "contributory infringement". Liability under the law can only be imposed on persons who have directly used or exploited works-of-authorship. Persons other than these are not considered to have infringed copyright, even where they

have helped an infringer to commit an infringing act. This clearly places manufacturers and vendors of equipment and media outside the sphere of responsibility for infringement.

As a signatory to the Berne Convention, Mexico has recognized that TMPs and DRMs require protection in online and offline digital environments, and has amended the Copyright Law to ensure that circumvention of these systems is prohibited and that penalties will be imposed on violators.

Given these protections, it seems somewhat redundant to introduce a levy system that, by virtue of other existing legislation, only exists to catch reproduction using analogue technologies in a world that is rapidly leaving such technologies behind.

Finally, the imposition of a levy system on manufacturers and vendors of equipment and media would be unconstitutional. Some of the reasons, which have already been dealt with above, relate to the nature of private copying and exemptions, and to third party involvement. Other issues include taxation – the levies imposed would certainly not meet the requirements that taxes and other such payments are subject to under terms of the Federal Constitution.

Given all these factors, Congress was wholly correct in its decision to dismiss the proposals of the collecting societies.

#### ENDNOTES

1 Patrimonial rights are the set of rights that allow authors to benefit from their creations and to control their exploitation.

2 An artist's resale rights.

3 Grunding Reporter case of 1955.

4 Personalausweise case of 1964.