

BY LUIS C. SCHMIDT, PARTNER

The Asialaw IP Review, September 2004

PRODUCERS OF TV PROGRAMMES IN MEXICO NEED TO BE CAREFUL WHEN PREPARING THE CONTENT OF THEIR SHOWS BECAUSE THE LEGAL ASPECTS ARE PARTICULARLY IMPORTANT.

The Mexican Copyright Law considers television programmes as a category of copyrighted works. The Law of 1956 mentioned TV as a technology capable of disseminating ideas, and in 1963, Congress first used the concept of TV programmes to identify a genre of works. That consideration passed on to the Law of 1996, which is currently in force. However, the 1996 statute listed audiovisual works as a genre also, making it appear that there is no difference between TV programmes and audiovisual works, in terms of the former being a species of the latter.

The *Copyright Law* of 1996 has defined audiovisual works as those expressed by means of associated images, with or without sound, perceptible by technical devices that make them produce a sense of movement. TV programmes would naturally fit into this description. Congress has indeed recognized that, considering that the general provisions of audiovisual works are applicable to TV programmes.

The *Copyright Law* regards TV programmes as an audiovisual production composed of different materials, many of them works of authorship themselves, made by a number of contributors, under the 'initiative', 'coordination', and 'responsibility' of a producer, who will become the holder of the patrimonial rights thereof. Likewise, the law regards the director, writer, composer, photographers or cartoonists as authors of their contributions to the TV programme, giving them certain limited rights over the public performance of the same. For example, the *Copyright Law* of 1996 introduced a "contract for audiovisual production" provision, by which if not stated otherwise in the agreement, the authors of works participating as contributors to the making of the audiovisual production shall "assign with exclusivity" the patrimonial rights of reproduction and public performance to the producer, for use in connection with the audiovisual production.

The practice in Mexico, as it is in other countries, would be that TV programmes

are the subjects of distribution to broadcasters for public performance. The broadcaster obtains the right to disseminate the programme in virtue of a licence, in the licensed territory, and under the terms and conditions that the parties set upon. The broadcaster would generally pay royalties directly to the producer in conformance with agreement. In many cases the producer of the TV show is the broadcaster of the same and royalties would be distributed in a different form. Something that bears mention, from the legal side, is that under the *Copyright Law* the broadcaster would be holder of neighbouring rights in connection with the broadcasting of the TV show. This right is accrued regardless of whether the broadcaster would have copyright rights over the content of the TV programme.

Producers of TV programmes need to be careful when preparing the content of their shows because the legal aspects are particularly important. A production of this kind would entail the need of authorizations from authors, artists or even ordinary people, who may be owners of the materials used for the show or that are shown in the same, without necessarily being actors or performers.

Formalities tend to be relaxed in case of live transmissions, like news, contests or interview programmes that are not filmed or if filmed, would not be subject to repeated broadcastings. In those cases, the participants would be considered to grant implied consents to the transmission by the fact of having accepted to appear before cameras.

Failure to obtain an agreement from the holders of rights could expose the producer to serious legal action. Among others, the following should be taken into account:

Copyright Actions. A producer making a programme that employs copyrighted material, without having obtained authorization from the right holder, may be subject to infringement actions. Generally, under the *Copyright Law* the use of copyrighted material for the elaboration of a TV production would be regarded a reproduction. Any unauthorized reproduction would necessarily lead to copyright infringement. Actions could also accrue when suppliers of materials for use in productions are not the copyright owners thereof and did not obtain consent from the same.

Performer Rights Actions. The *Copyright Law* refers to the rights of performers as neighbouring rights. Performers are thus mainly the artists that give interpretation to the work or that generally perform the same by acting, singing or playing musical instruments. They can also be mimes or the performers of folkloric arts. TV programmes need to consider that actors, singers or players

are entitled to bring legal actions when they film performances or when they reproduce filmed performances without authorization. In such cases performers would be entitled to bring actions opposing to the filming or its reproduction.

Rights of Self Image and Portrait. This is a right in the *Copyright Law* having a wide connotation, and it is very confusing at the same time. Pictures of people can only be published with their consent. From a first impression, the law would apparently refer to the mere 'static' view of the person in a portrait, photograph or painting. However, the law gives more room for interpretation that the right to oppose would extend to the 'image' of a person. There is not a clear idea of what the law understands as the 'image' of a person, but the right of 'self image' should never go beyond the notion of 'portrait', which implies a 'static' vision, making the statutory interpretation consistent and clear.

In any event, producers should have in mind that the individuals whose portraits, photos or pictures have been reproduced, are entitled to take legal action when they have not granted their consent.

Privacy Laws. The Federal Civil Code has considered a so-called moral right, which is essentially a personal right protecting ordinary persons from disparagement or other misconduct inflicted by third parties, that would cause offence to their names or likeness or attempt against its privacy or personal life. Sometimes TV producers have abused the rights of individuals when making a program, giving room to personal actions under civil laws.

Confidentiality. TV producers have frequently employed materials that are not public or that have not been previously disclosed. Owners of such materials have sued the producers under the argument that the material had remained confidential and undisclosed until the producer used it. Such actions would normally fail, unless the owner of the material is able to prove having entered into an agreement with the producer or with the person having supplied the material to the producer for use in connection with the show, and that the agreement had a clause by which the producer or the person providing the material agreed not to disclose the contents of the same. The obligation by the producer or supplier not to disclose would have to be express, although such an obligation could eventually be implied, if it can be demonstrated that the intention of the parties was to keep the information confidential.

Jurisdiction and Venue. Generally, actions resulting from breach of contract, confidentiality, privacy or related issues, would have to be filed before the local courts where the default occurred or the defaulting party has its domicile for legal purposes. Copyright and neighbouring rights claims are federal and would

essentially be brought against the alleged infringer before an administrative or court of federal jurisdiction.

Criminal actions would only be possible for copyright piracy, when there is a clear indication of bad faith and such an action would be under federal jurisdiction as well. It would not be difficult to bring an action before the Mexican courts when producer is domiciled in Mexico or has produced the TV programme within Mexican territory. Actions can still be brought in Mexico against the local broadcaster who shows the TV. The situation becomes more difficult when the producer and the broadcaster are located abroad. In that case, under *actor rei forum sequitur*, the plaintiff could perhaps take action in the jurisdiction where the producer or broadcaster is found by invoking Mexican law. An alternative would be bringing the action before a court in Mexico and request that, under the New York or possibly the Hague Conventions, the Mexican court attracts jurisdiction by calling the foreign party or parties to its jurisdiction. The foregoing would certainly be done by serving first notice via letters rogatory and requesting the foreign party to indicate a domicile in Mexico for further communications.