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International copyright law has embraced the question of whether copyright owners-or neighbouring rights holders- should be entitled to rental rights and, if so, whether said rights should be rendered as exclusive or remunerative. Answers have been discussed in international and regional treaties as well as in most countries' national systems, but these issues remain open.

Under copyright theories, distribution has been regarded as the spreading or dissemination of works embedded in originals or in multiple copies through commercial or non-commercial means. Accordingly, the copyright holder makes the work accessible to the public, for trade or other purposes, regardless of whether the corresponding copies are ultimately acquired or not. Also, distribution entails any activities associated with the offering of the copies, such as their storage or transportation.

A number of national jurisdictions recognize a distribution right of exclusive nature, independent from the right of reproduction. The German Law of 1901 pioneered in this field by introducing the so-called *Verbreitungsrecht*. On an international level, the splitting of distribution rights from reproduction rights was firstly recognized in the Berne Convention in connection with cinematographic works. However, distribution was recognized as a right of full scope in more recent international treaties. Article 1705(2)(b) of NAFTA (North American Free Trade Agreement) imposes on the three member states an obligation to grant copyright owners a right to authorize or prohibit "the fist public distribution of the original and each copy of the work by sale, rental or otherwise".

Likewise, Articles 6(1) of the WIPO Copyright Treaty, and (8)(1) and 12 of the WIPO Performances and Phonograms Treaty, confer upon authors of literary and artistic works as well as performers or phonogram producers the "exclusive right of authorising the making available to the public" of the original copies of their works, performances or phonograms, through sale or other transfer or ownership.

A relevant issue is the moment when distribution rights terminate. International treaties, as well as the domestic laws of various countries, have stated that distribution rights are exhausted after the copy incorporating a work of authorship has been sold for the first time. The acquirer is entitled to dispose of

the original or copy by virtue of successive sales. The first sale doctrine, as it has been called in Anglo-Saxon systems, was preceded by the *Ershöpfung* theory of German law and later adopted by the international copyright system. In particular, the WIPO treaties allow the member states to "determine the conditions" that are applicable to the exhaustion of rights after the first sale or other transfer of the copy of a copyrighted work.

Since proprietors can rent their originals or copies of works for commercial purposes, governments have asked whether copyright owners should be entitled to exclusive or non exclusive remunerative copyright rights. On an international level, the majority response has been that copyright owners should indeed be entitled to rental rights. Substantive provisions can be found in NAFTA, Article 1705(2)(b); TRIPS, Article 11-applicable to computer programs and cinematographic works; WIPO Copyright Treaty, Article 7 –applicable to computer programs, cinematographic works and works embodied in phonograms; WIPO Performances and Phonograms Treaty in Articles 9 and 13; and the Directive 92/100 of the European Community.

As a general international rule, holders of copyright distribution rights can be the subject of rental rights at least in connection with computer programs and cinematographic works. The foregoing implies that first sale doctrine shall not extend to rentals and, to the contrary, that rental rights shall remain with the copyright holder, even after a transfer of proprietorship of the original or any copy of the work. In other words, the predominant rule dictates that distribution rights cannot become exhausted in bulk or as a whole, since at least rental rights shall be regarded as an exception to that rule. Thus be scope of exhaustion becomes restrictive or limited not only from a territorial angle, but also from a material or objective perspective.

International treaties impose a certain degree of formality or limitations in connection with distribution rights. NAFTA is clear enough about this when it states that the member states' domestic laws need to provide "first public distribution rights" by "sale, rental or otherwise".

TRIPS establishes that, concerning cinematographic works and computer software at the least, member states shall regard rental rights as exclusive rights to authorise or prohibit. Likewise, the treaty does not impose exhaustion or restrictions to bring the rights to an end. Pursuant to cinematographic works, members can choose not to grant exclusive rental rights, unless the rental leads to uncontrollable copying situations. From the foregoing, TRIPS recognises exclusive rental rights as a first alternative and, secondly, it offers to member states the chance not to confer exclusive rights, unless rental itself leads to the

widespread copying of films. However, if a member country does not opt for an exclusive rental rights system, it still can follow a remunerative system, upgradeable to an exclusive system, in the event that the government authorities face a widespread problem of film copying, motivated by the rentals.

The WIPO Copyright Treaty address the issue of rental right in a manner that is practically identical to TRIPS, with certain minor variations. On the other hand, the WIPO Performances and Phonograms Treaty, confers on performers and phonogram producers an exclusive rental right of performances fixed in phonograms (performers) and of authorizing the commercial rental of phonograms' copies (phonogram producers), while giving the contracting parties having a remuneration system as at April 15, 1994, to maintain that system, provided that said system does not lead to the material impairment of the exclusive rights of reproduction held by the performers or phonogram producers.

International treaty rules have been implemented into the national legislations in different forms. However, the general rules deriving from international treaties have taken the lead in that regard. Countries belonging to the European Community have adopted Directive 92/100, which is compatible with the standards imposed by the TRIPS and WIPO treaties. Spain, for example, incorporated the Directive into domestic legislation in 1996 and, in keeping with that, a general distribution and specific rental rights provided that the latter is not subject to exhaustion. On the other hand, Germany, Denmark, the Netherlands and some other European jurisdictions had adopted a distribution model before TRIPS. Latin America countries such as Costa Rica, El Salvador, Panama, Peru and Venezuela have orientated their national laws toward a distribution rights system.

In order to comply with the NAFTA Treaty of 1993, the Mexican government inserted distribution as a bundle of patrimonial rights in the Copyright Law of 1996. Accordingly, distribution was defined as the "making available to the public of the original or copy of a work by virtue of sale, rental and in general, any other form". In addition, the law set a distribution exhaustion criterion: "when distribution is made by means of sale, this right shall become exhausted after the first sale (of an original or copy)". The obscure language used by the legislator of 1996 has raised the question of whether it is the sale right or whole distribution right that exhausts. Working in benefit of copyright owners, it would seem that only sale rights end after originals or copies are placed into commercial streams, while all other distribution rights continue. In any dispute, the NAFTA standard should prevail, as in light of the Constitution, it is self-applicable and preemptive over the Copyright Law.

NAFTA is a reason, in itself, to justify the existence of a copyright rental right in Mexico of exclusive nature. TRIPS and the WIPO Copyright Treaty give additional supportive background, in harmony with NAFTA, since they both state that member countries are required to either establish direct exclusive rental rights or, alternatively, exclusive rental rights triggered from the widespread copying of films. The decision of the legislator in 1996 indicates that Mexico opted for the former option.

Pursuant to the distribution and rental rights of performers and phonogram producers, Mexico seem to have elected the remunerative rights formula proposed by the WIPO Performances and Phonograms Treaty (for unknown reasons, the pertinent provision in the Copyright Law utilises the expression "making available" rights instead of "distribution rights"). The problem is that, before April 15, 1994, performers and phonogram producers were subjects of compensation only in connection with the public performance rights. The 1996 law extended the remunerative system to rental rights in an apparent contradiction with the terms of the WIPO Performances and Phonograms Treaty. Certainly, the foregoing has opened a new question-whether performers and phonograms producers enjoy rental rights of any kind or nature.