Questionnaire for the ALAI Study Days 2015 in Bonn

Remuneration for the use of works

Exclusivity v. other approaches

Response of the Argentine Group

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A. Questions in relation to scope and enforcement of exclusive rights under existing law

In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement in the first place cannot be concluded and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.

1. How are the following acts covered by the copyright law of your country (statute and case law):

   i. Offering of hyperlinks to works
   ii. Offering of deep links to works
   iii. Framing/embedding of works
   iv. Streaming of works
   v. Download of works
   vi. Upload of works
   vii. Supply of a platform for 'user-generated content'
   viii. Other novel forms of use on the internet.

Statutory Rights. The Argentine Intellectual Property Act, Law # 11,723 (the "IP Act"), does not specifically regulate either the aspects contemplated in the question or any of the uses on the Internet of works or categories protected as neighboring rights. However, these uses are still covered because Section 2[1] of the Intellectual Property Act recognizes a broad and exclusive right to dispose of works, in whatever form and manner of exploitation. It is considered that this broad formulation covers the Internet. Case law and scholars hold coinciding views along the aforementioned lines.

In turn, Section 12 of the Act refers to the application of general law in all aspects not expressly contemplated in specific intellectual property provisions[2].

Therefore, even though specific provisions have so far not been adopted, it may not be considered that there is a legal void or lack of protection in the digital environment.

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[1] Section 2. *The right of ownership of a scientific, literary or artistic work shall include, for its author, the right to dispose of, publish, perform and publicly exhibit, alienate, translate, adapt or authorize the translation of, and reproduce the work in any form.*

[2] Section 12. *Intellectual property shall be governed by the provisions of common law, subject to the conditions and limitations established in this Law.*

2. In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address right owners before using works (eg, users uploading protected content on platforms like Youtube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders))?

Please refer to the response to the preceding question.

3. a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under 1. above, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:

- for content providers
- for host providers
- for access providers
- for others?

Considering the lack of specific provisions (see Section A.1.) the protection of rights (droit d'auteur and neighboring rights, image rights, privacy, etc.) in the digital environment, and specifically in Internet traffic is the object of court debate. In this regard, the courts have adopted conflicting views when analyzing the liability of intermediaries for third party infringements (content suppliers, host providers, search engines, social networks, etc.). So far, only one case has been resolved by the Argentine Supreme Court ("Rodriguez, M.B. v. Google inc. et al. – in re Damages", a judgment handed down on October 28, 2014) exempting intermediaries from liability, in a case involving a model's image rights. Considering the peculiarities of the case in question, it would not be prudent to conclude that in Argentina there already is a conclusive position in connection with this matter. However, it should be noted that there is a tendency, on the part of certain lower courts, to only establish indirect liability for intermediaries, namely the possibility -in general terms- to avoid liability if they prove that they acted diligently when notified of the infringement. This is a consequence of the application of Section 12 of the IP Act.

b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?

In addition, the following aspects are considered to establish liability, such as:
i. Business carried out by the intermediary (automatic or merely technical activities, without content manipulation);

ii. The degree of knowledge (the so-called notice and takedown doctrine is analyzed);
iii. Notice of the infringement (direct, administrative or court-ordered);
iv. Scope of the infringing activity;
v. Benefit resulting from the infringing activity; etc.

4. In these cases of infringement, who has standing to sue:

- the author
- the exclusive licensee
- the non-exclusive licensee
- the employer of the author
- the CMO that manages the exclusive right?

In the aforementioned cases, the plaintiffs have so far been the authors, affected right holders and collective management organizations

B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees

If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.

1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:

- as a general rule for all kinds of contracts;
- as regards 'best-seller' situations (i.e., when parties did not presume that the work would become a best-seller);
- in the case of oppressive contracts;
- in other cases;

and if so, under what conditions?

There are no specific provisions in the IP Act. Notwithstanding the foregoing, in the laws regulating authors' collective management organizations, these entities have the power to establish fees, even though authors may demand higher remuneration. In the remaining cases, authors and users reach an agreement regarding remuneration.
With regard to directors of films and audiovisual works, the fees are approved by the National Executive Power (Resolution 61/2010 adopted by the Chief of Staff).
Moreover, there is a statutory license system, concerning the right of public communication of works and categories protected as neighboring rights, in connection with musical artists and performers, actors and phonogram producers.

With the exception of the aforementioned categories, there is no mechanism ensuring adequate remuneration, without prejudice to the obligation, in some cases, to negotiate licenses through collective management organizations, which are in charge of taking care that the different uses are adequately compensated (see in that regard the response to Section C of this questionnaire). There are no specific rules for the aforementioned situations.

2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?

Please see our response to the preceding question.

3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.

Please see our response to Section 1.

C. Questions in relation to statutory remuneration rights

The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.

1. In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?

There is a remuneration system, laid down by the National Executive Power, exclusively limited to the right of public communication in connection with certain right holders, namely, performing artists (both musical and acting performers) and phonogram producers. Consequently, all other authors -such as authors and composers of musical works - among others- retain their individual rights.
Argentine law does not contemplate either the private copy exception or the droit de suite.

2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?

The IP Act provides for a compulsory license in Section 6, establishing that: *"Heirs or legal successors may not oppose third parties republishing the works of the claimant, where they allow more than 10 years to elapse without causing the works to be published. Nor may the heirs or legal successors oppose third parties translating the*

works of the claimant, once 10 years have elapsed after the latter's death. In these cases, if there is no agreement between the third publisher and the heirs or legal successors concerning the conditions of printing or remuneration, both will be established by arbitration."

In turn, Argentine law also contemplates the already mentioned statutory license for the right of public communication of phonograms (right concerning phonogram producers and musical performers and artists) and of performances fixed in audiovisual works (performing actors).

3.

i. For which statutory remuneration rights does your law provide for obligatory collective management?

The statutory license concerning the aforementioned right of public communication is managed by legally recognized societies, and the National Executive Power establishes the amount of compensation that users must pay to right holders, based on the latter's suggestions.
Performing artists are represented by the Argentine Performers' Association (Asociación Argentina de Intérpretes – AADI) and phonogram producers are represented by the Argentine Chamber of Phonogram Producers and Manufacturers (Cámara Argentina de Productores e Industriales de Fonogramas – CAPIF). Collection activities are carried out through a joint collection entity called AADI CAPIF Collecting Civil Association (AADI CAPIF Asociación Civil Recaudadora (ACR) (Executive Order 1671/74, Section 5). Compensation is laid down by Resolution 390/05 of the Mass Media Secretariat.
Performing actors collect through the Argentine Society of Performing Actors (Sociedad Argentina de Gestión de Actores Intérpretes – SAGAI; created by Executive Order 1914/06) and compensation is laid down by Resolution 181/08 of the Mass Media Secretariat.
Moreover, in relation to musical performers and phonogram producers, it is worth noting that Executive Order 1671/74, Section 5, sets forth that collection proceeds obtained by the joint collection entity (AADI CAPIF ACR) are distributed 67% among performing artists (AADI) and the remaining 33% goes to phonogram producers (CAPIF).

ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?

It is always managed collectively.

iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?

The party obligated to pay is the party responsible for the act of public communication of the work or category protected as a neighboring right, such as broadcasting organizations, exhibitors, hotels and other lodging facilities, restaurants and bars, dancing venues, among others.

iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?

The fees have been determined by the National Executive Power, through the Mass Media Secretariat (now called the Media Secretariat) based on suggestions by the interested parties. Remuneration varies in accordance with the uses and importance they have for the user in question.

v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?

See prior response.

vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?

The establishment of fees in a norm by the National Executive Power has advantages and disadvantages. On one hand, the rule maker is a third impartial party (who has borne in mind the interests of all parties involved, right holders and users alike) which provides a stronger basis for its legitimacy and facilitates management with respect to the user. On the other hand, modifying the fees when remuneration is not considered adequate or reasonable (whether by right holders or users) is more difficult. In any case, applicable rules provide that the parties may mutually agree to set aside the amounts established by the rules, which are taken as a minimum reference. In some cases the norms establish remuneration based on a percentage of the users' revenues (billing, ticket sales, etc.). However, in other cases a fixed amount is established. Although these are minimum amounts, due to issues pertaining to the Argentine economy, they are difficult to update, which results in their being frequently outdated. In case of failure to pay, judicial proceedings seeking compliance are long (in general, ordinary proceedings[3]). It should be noted that all defenses raised in the past by users

[3] Argentine law of civil procedure contemplates express, summary and ordinary proceedings, the latter being the longest type of proceedings, allowing for the parties to submit all defenses and exceptions and present all sorts of evidence.

concerning the system's legitimacy, including the constitutionality of collecting societies' monopoly representation or determination of remuneration, have been rejected by Argentina's highest courts.

vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?

The regulation does not provide a solution in this regard, without prejudice to any court actions which may be instituted (procedural law sets forth the possibility of injunctions ensuring the execution of judgments).

D. Mechanisms to ensure adequate remuneration for creators and performers

The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.

1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?

Management of the right of communication of phonograms to the public, involving performing artists and phonogram producers, is conducted by a joint collection entity. The law establishes that the distribution of proceeds among right holders is 67% and 33%, respectively.

2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?

See response to Section C.3.

3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these distribution keys determined inside CMOs)? Which percentages are in practice applied?

See response to Section C.3.

4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and

on the basis of which agreement is the remuneration distributed between them in this case?

See response to Section C.3.

5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?

There aren't any.

E. Questions on new business models and their legal assessment

1. Which new business models do you know in your country in respect of the supply of works via the internet?

   Please list such business models, such as Spotify, Netflix, etc., and describe them briefly.

There are different models, including:
Spotify: Musical works. Free access streaming (supported by advertisers and access limitations – only online access) or premium service (for a flat fee and the possibility to create playlists and off line access).
Netflix: audiovisual works. Paid access streaming.
Open Digital Contents (Contenidos Digitales Abiertos – CDA): The National Government makes available part of an audiovisual database created with its contribution. Free and unrestricted access (www.cda.gob.ar).
Faro Latino: Musical works and videos. Free or paid streaming access.
iTunes: paid downloads of musical works, software applications and games. While in Argentina it is possible to download films through iTunes, it is still not possible to download TV shows through the service.

2. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found

They have not encountered problems to operate.
Without prejudice to the above, it is important to mention two cases currently being heard by national courts, questioning the role of ISPs based on their knowledge, participation and/or encouragement of infringement, with a different scope.
The first of these cases concerns the website "Taringa.net", enabling users to share all sorts of information through postings, including copyrighted works.

The second case concerns the website “Cuevana.tv”, allowing free Internet distribution of intellectual works, especially audiovisual works, through connections or links via hyperlinks.
To date, a final judgment has not been handed down in these cases. However, it is worth noting that the defendants are facing criminal proceedings as a result of their conduct.

3. In your country, are there offers that are based on flat rates, ‘pay-per-click’ or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.

Please see response to Section 1.

4. Within these business models, how do authors and performers get paid?

Payment is made pursuant to the negotiations carried out by the right holder or eventually through collective management organizations. In some cases, remuneration consists of revenue percentages, while in others lump sum payments are made in order to include the work in the catalogue which is made available to the public.