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México, Response to Questionnaire Concerning for the

Remuneration for the use of works: Exclusivity v. other approaches

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Authors' Note: The Ley Federal del Derecho de Autor is a Federal Law that comes from the article 28 of the Mexican Constitution and is available in french Version on the Mexican Copyright Office website (Indautor), http://www.indautor.gob.mx/documentos_normas/ley_f_derecho_autor_frances.pdf.

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.

ANSWER:

Mexican Legislation does not cover the specific acts of use of works on the internet. Although, they may be compared with the normal uses of works, with some limitations since such acts have very specific conducts.

Case law in Mexico regarding such acts is very recent. The only existing precedent (from 2015), involves the use of hyperlinking to illegal sites that allowed the download of works that were made available to the public without authorization.

The precedent uses the theory of hyperlinking, establishing that deep linking constitute an illegal conduct of making works available to the public without the authorization of the copyright owner.

For the other acts, there are no precedents. But they all can be compared with unauthorized use of works, which can result in a copyright infringement as long as they cannot be accepted as an exception covered by the three-step test of the Berne Convention.

Also, there may be exceptions for certain acts. In the case of iframing it could be analyzed as conduct that does not require authorization form the copyright owner since it is not making use of works different form the one that was authorized in the first place. In case it is considered as an act of making a work available to the public, it can be a use that does not require authorization or remuneration in favor of the copyright owner because it does not affects the normal exploitation of the work, and it is not different from the interests of the author and finally it should be considered as a special case. All of the above to realize such acts as an exception covered by the tree-step rule.

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))?

   ANSWER: There is a Mexican association called *Asociación Protectora de Cine y Música, A.C.* (APCM), which protects the film and music industries in Mexico. It is one of the main actors that make anti-piracy campaigns, and works with the authorities to enforce copyrights of such industries.

   APCM has a system to detect illegal uploaded content based on the *Digital Millenium Copyrigth Act (*DMCA) and the ISP policy of the USA.

   In Mexico, there are no mechanisms to detect multiple users to force them to comply with a licensing relation at this time.

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?

   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)?

   ANSWER: NO, none of the ISP has any liability on copyright infringements.

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?

   ANSWER: The standing to sue corresponds to the person or entity that is holder of the *patrimonial rights* in order to take actions against the infringer or by a CMO or any legal representative of the rights holder.

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?

ANSWER: According to the Mexican Copyright Law (MCL), assignment or license agreements must consider remuneration in favor of the authors and performers. Terms and conditions related with the exploitation of works must contain the minimum protection by law. It must be always remunerated and time must be always specified. Articles 26 bis, 33, and 131 bis.

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

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)?

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

   ANSWER: Yes, only in the case of utility public, the artistic or literary use of works for the advancement of science, culture and education and only can exercise it the Government through a compensatory payment. Article 147 of MCA.

3.

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

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?

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)?

ANSWER: The user.

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

ANSWER: The tariff is fixed by contract since the law does not dispose an specific mechanism. The CMO's established the tariffs unilaterally.

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

ANSWER: The CMO's decide unilaterally the tariffs, if the remuneration rights are paid to the right holder the CMO's do not supervise.

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.)?

ANSWER: Judicial proceedings in Mexico may take too long and in most of the times the right holder does not have the resources to initiate legal actions against users that reject to pay. That is why; the main recommendation is to ask for an ADR procedure before the Mexican Copyright Office to try to get an arrangement.

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)?

ANSWER: Mexican legislation provides injunctions to guarantee that an infringement must be stop, but it does not consider specific mechanisms to grant the obligation of the remuneration.

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.)?

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

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?

   ANSWER: The procedures that CMOs used to determine the percentages are fixed by them. Each CMO has its own way to decide percentages by crating formulas to determine the income.

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?

   ANSWER: It is decided by the parts.

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

   ANSWER: There are no mechanisms of supervision.

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.

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

   ANSWER: Currently there have not raised any legal problems. It has all being solved with the CMO to cover the remuneration rights in the specific case of Spotify. There has not being solved by any Mexican court an issue like this.

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.

   ANSWER: There are no micro payment models, different than the mentioned above, which are basically on demand services offered to the public.

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

   ANSWER: Authors and performers are paid by CMOs.

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