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## **AD HOC INFORMAL MEETING ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES**

**Geneva, November 6 and 7, 2003**

INFORMATION ON MEXICO RELATING TO THE QUESTIONNAIRE TO  
NATIONAL EXPERTS CONTAINED IN THE APPENDIX TO THE STUDY ON  
TRANSFER OF THE RIGHTS OF PERFORMERS TO PRODUCERS  
OF AUDIOVISUAL FIXATIONS (DOCUMENT AVP/IM/03/4)

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\* The views expressed in the Study are those of the authors and not necessarily those of the Member States or the Secretariat of WIPO.

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## PREFACE

In order to provide an appropriate response to the questionnaire supplied, we have considered it relevant to take into account the legislation prior to that in force, the technical name of which is “*Decree on reforms and additions to the Federal Copyright Law of 1956, published in the Official Federation Gazette of December 21, 1963,*” and which in fact constituted a new law, for which reason it was known; we will thus refer to it in this document as the 1963 Law. Similarly, we have taken into account the provisions of the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed in Rome in 1961; the Berne Convention for the Protection of Literary and Artistic Works, Paris Act of 1971; the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) of 1994; and the WIPO Performances and Phonograms Treaty (WPPT) of 1996, all international instruments to which Mexico has acceded and that are in force throughout the national territory under the order contained in Article 133 of the Political Constitution<sup>1</sup>. Finally, the current legislation which, under the name of the Federal Copyright Law, was published in the Official Federation Gazette on December 24, 1996, and which entered into force 90 days after its publication, is dated March 24, 1997, its Regulations, published in the Official Federation Gazette of May 22, 1998, and the last reforms and additions to the law, published in the Official Federation Gazette of July 23, 2003; Federal Law on Cinematography; Federal Labor Law and Federal Civil Code.

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<sup>1</sup> Article 133: “This Constitution, the laws of the Congress of the Union emanating therefrom and all the treaties in compliance therewith, concluded and being concluded by the national President, with the approval of the Senate, shall be the Supreme Law of the whole Union. The judges of each State shall abide by said Constitution, laws and treaties, notwithstanding the provisions to the contrary which may be contained in the Constitutions or laws of the States.”



## PART I

### Substantive Rules Governing the Existence, Ownership and Transfer of Audiovisual Performers' Rights.

#### I. NATURE AND EXISTENCE OF AUDIOVISUAL PERFORMERS' RIGHTS

##### A. Characterization of Audiovisual Performers' rights

1. *Does your national law characterize the contribution of audiovisual performers as coming within the scope of:*

- a. *copyright*
- b. *neighboring rights (explain what in your country "neighboring rights" means)*
- c. *rights of personality*
- d. *other (please identify and explain)*

Response: The Federal Copyright Law in force envisages, as subjects protected by its provisions, authors, performers, publishers, phonogram and videogram producers, and broadcasting organizations, as laid down in Article 1 which reads as follows:

"Article 1. This Law, governed by Article 28 of the Constitution, is designed to protect and promote the national cultural heritage and to protect the rights of authors, performers, publishers, producers and broadcasting organizations, in relation to their literary or artistic works in all their manifestations, performances, editions, phonograms or videograms and broadcasts, as well as other intellectual property rights.

Mexican legislation deals with the rights of performers as part of neighboring rights and establishes over those rights the hierarchy of copyrights, thereby retaining coherence with the international agreement acquired through the 1961 Rome Convention, Article 1 of which is virtually incorporated in the text of Article 115 of the national law.

Title V of the current law is entitled "On neighboring rights" and is divided into five chapters, the second of which pertains to the rights of performers.

As for the meaning of "neighboring rights," it should be pointed out that neither in the 1963 Law nor in that in force is the term defined. The content and scope of this concept in Mexico are those traditionally adopted within the international framework and specialized doctrine. In that connection, a neighboring right can be understood as that which applies to anything linked or related to a different right. By derivation, the connections are the rights and subjects attached to another main subject. Within this framework, the rights of performers, producers of phonograms and broadcasting organizations are considered to be related to copyrights, with the qualification that the (related) term has encompassed two separate kinds of rights: some of an intellectual nature (those of performers) and others of an entrepreneurial or industrial nature (those of phonogram producers and broadcasting organizations).

In the legislation previous to that in force, the term “neighboring rights” covered only the subjects envisaged by the Rome Convention, i.e.: performers; phonogram producers and broadcasting organizations.

The new Law incorporated in the term, in addition to the subjects protected under the Rome Convention, publishers of books and producers of videograms, whereby the latter were defined as “the natural or legal person fixing for the first time associated images with or without incorporated sound, providing a sensation of movement or a digital representation of such images, irrespective of whether they constitute an audiovisual work” (Article 138). As can be appreciated, the legislator attempted to adapt the definition of a phonogram producer to the new figure, within the Mexican legal system. A critique of this issue exceeds the scope of this work, for which reason we have omitted to consider it.

## B. Scope of rights covered

Note: Article 39 of the Regulations under the Federal Copyright Law, in Title VII referring to “neighboring rights,” states that “performances, phonograms, videograms, books and broadcasts shall be protected in the terms provided for by the Law, irrespective of whether they incorporate literary and artistic works.”

### 1. *Do audiovisual performers enjoy exclusive economic rights?*

- a. *fixation*
- b. *reproduction*
- c. *adaptation*
- d. *distribution of copies, including by rental*
- e. *public performance; communication to the public*
- f. *other (please describe)*

Response: Article 85 of the 1963 Law, previous to the one in force, stated that performers would have exclusive entitlement to dispose, for any purposes, either totally or partially, of their economic rights as derived from the performances in which they took part.

The current 1996 Federal Law contains no similar provision.

In line with these ideas, in response to the relevant question three provisions of the Law should be borne in mind within the current legal framework. The first of those provisions is that contained in Article 118, which establishes the right of opposition of performers, subject to the following assumptions:

1. The public communication of their performances (in accordance with the Law, “public communication” covers performance, recital and public performance in the case of literary and artistic works; public exhibition by any means or procedure in the case of literary and artistic works, and; public access by means of telecommunication<sup>2</sup>);

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<sup>2</sup> See Article 27, II(a), (b) and (c) of 1996 Federal Copyright Law (LFDA96).

2. The fixation of their performances on a material carrier (“fixation” is defined in the Law as “the incorporation of letters, numbers, signs, sounds, images and other elements in which the work has been expressed, or of digital performances thereof which, in any form or on any material carrier, including electronic means, allows their perception, reproduction or other form of communication”<sup>3</sup>); or

3. The reproduction of the fixation of their performances.<sup>4</sup>

The Law warns in the same Article that those rights of opposition shall be considered exhausted, once the performer has authorized the incorporation of his performance in a visual, sound or audiovisual fixation. The legislator thereby claimed to achieve compliance of the text of the national legislation with the international provision contained in Article 19 of the Rome Convention.

The last paragraph of Article 118 was supplemented in the reforms and additions to the Law, published in the Official Federation Gazette of July 23, 2003, the text of which reads as follows:

“These rights shall be considered exhausted once the performer has authorized the incorporation of his performance in a visual, sound or audiovisual fixation, *provided that the users who use such material carriers for profit-making purposes make the appropriate payment.*”<sup>5</sup>

This addition is incorrect, since the authorization for the fixation is granted to the producer, be it of phonograms or audiovisual works, and the payment of the royalties derived from the secondary performance, or of the remuneration derived from the exploitation of the audiovisual work is not made by the producer but by the user of the phonogram or audiovisual work in question, and the failure to pay that remuneration or royalty cannot therefore be ascribed to the producer, nor may the producer be held responsible to the extent that the fixation authorization granted by the performer shall be withdrawn by him, which would run counter to the principle of legal safety.

Article 19 of the Rome Convention, on which the precept commented on is based, outlines the position of convention-based law with respect to cinematographic works and the other fixations of images, as commented on in the Guide to the Rome Convention (19.1), an opinion with which we concur, while noting that in Mexican legislation although a distinction is established between cinematographic and audiovisual works, in my opinion the latter constitute the generic conception and the former (cinematographic works) the specific conception. In that regard, see Article 13 (IX) of the current Law.<sup>6</sup>

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<sup>3</sup> See Article 6, LFDA96.

<sup>4</sup> The precedent to this Article in the 1963 Law (the one previous to that in force) is found in Article 87 which stated, in wording more in keeping with Article 7 of the Rome Convention, the following: “Performers shall be entitled to oppose: I. The fixation on a material carrier, broadcast and any other form of public communication of their direct performances; II. The fixation on a material carrier of their performances directly broadcast or televised, and III. Reproduction, other than for the purposes authorized thereby.”

<sup>5</sup> Our italics.

<sup>6</sup> Article 13 LFDA96: “The copyrights to which this Law refers shall be recognized with regard to works in the following branches: ... IX. Cinematographic and other audiovisual works.”

As regards the exhaustion of the right, the relevant provisions of the Regulations under the Law should be taken into account, Article 50 of which reads as follows:

“Article 50: The exhaustion of the right to which the last paragraph of Article 118 of the Law refers shall be limited only to the exploitation procedures expressly authorized by the performer.

The fixation, public communication or reproduction of the fixation of the performance made beyond the authorization granted shall entitle the performer to oppose the act in question, in addition to requesting damages for any harm caused.”

The second provision of the Law, which needs to be envisaged in responding to this question, is that contained in Article 121 of the Law, which reads as follows:

“Article 121: Unless otherwise agreed, the conclusion of a contract between a performer and a producer of audiovisual works for the production of an audiovisual work shall give rise to the right to fix, reproduce and communicate to the public the performer’s performances. The above shall not include the right to use separately the sound and images fixed in the audiovisual work, unless expressly agreed.”

As stated in the relevant Article, contracts relating to the production of audiovisual works concluded by the performers with the producers of said works shall contain a presumption of transfer to the latter, whereby such transfer shall include the right to fix, reproduce and communicate to the public the performer’s performances.

The provision commented on is closely related to Article 120 which precedes it and which states that “the performance contracts shall specify the times, periods, compensation and other terms and procedures subject to which the performance in question may be fixed, reproduced and communicated to the public.”

In conclusion, the question asked may be answered by taking into account firstly the fact that the performer’s right arises from the time when his performance is fixed in a material carrier, which enables it to become known to the public by any form or means.

The performer thus holds sway over his performance and it is he who decides whether the performance should be fixed, something which will depend on the terms and conditions of his performance contract, thereby giving rise to the right of opposition enshrined in Article 118 of the Law and governed by Article 50 of the respective Regulations.

Furthermore, in relation to audiovisual works, it has been demonstrated that the contracts which performers conclude with the producers of such works contain a presumption of transfer of those economic rights to said producer, unless otherwise agreed, which in any case should be expressly stated.

Finally, as regards the right of adaptation which may fall to the performer, such a right is not regulated by Mexican legislation.

2. *What is the duration of performers' exclusive rights?*

Response: Article 122 of LFDA96 stated initially that “the protection granted to performers would be 50 years, starting from (i) the first fixation of the performance of a phonogram; (ii) the first performance of works not recorded on phonograms, or (iii) transmission for the first time by radio, television or any other means.”

Under the reforms and additions to the Law in force from July 24, 2003, the period of protection for performers was extended to 75 years.

As regards the subject matter of this questionnaire, it should be emphasized that in the chapter on neighboring rights Mexican law has envisaged those rights which relate to the incorrectly named *producers of videograms*.

The “*videogram*” is defined in Article 135 of the Law, in the following terms:

“Article 135: A videogram shall be considered to be the fixation of associated images, with or without incorporated sound, which give a sensation of movement, or of a digital representation of such images of an audiovisual work or of the performance of another work or an expression of folklore, as well as of other images of the same class, with or without sound.”

Moreover, Article 94 of the Law defines audiovisual works as follows:

“Article 94: Audiovisual works mean those expressed through a series of associated images, with or without incorporated sounds, that can be perceived using technical devices producing the sensation of movement.”

The definition of films, contained in Article 5 of the Federal Law on Cinematography<sup>7</sup>, should be highlighted:

“Article 5: For the purposes of this Law, a film shall be understood as a cinematographic work containing a series of associated images, created on an appropriate perceptible carrier, with or without incorporated sounds, with a sensation of movement, and the product of a script and a coordinated management effort, the primary purposes of which are to be shown in cinematographic halls or places acting thereas, and/or their reproduction for sale or rental.

They shall include Mexican and foreign long, medium-length and short films, in any format or by any procedure.

Their transmission or broadcast via electronic, digital or any other known or future means shall be governed by the relevant laws.”

It may be inferred from the above that as regards the legislator of the current Law, the term “videogram” applies to any type of audiovisual works, including cinematographic works. In that connection, the duration of the rights granted to the producer, in accordance with

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<sup>7</sup> Published in the Official Federation Gazette of December 29, 1992.

Article 138, shall be 50 years from the first fixation of the images in the videogram, which gives rise to the question, where such rights have been exhausted at the end of the 50 years, of what happens to the rights of the performers whose performances were incorporated in that videogram, and whose rights, subject to the reforms of July 2003, were extended from 50 to 75 years. In this case, the period of protection of the performers' rights shall exceed by 25 years the period granted to the videogram producer.

3. *Do audiovisual performers enjoy moral rights?*

Response: This has been the case only since the current Federal Copyright Law came into force, when the moral right of performers was incorporated in the text of the Law, in the terms indicated in Article 117, which reads as follows:

“Article 117: A performer shall enjoy the right to recognition of his name in relation to his performances, as well as to oppose any distortion, mutilation or any other offence against his performance which damages his prestige or reputation.”

In accordance with the scope of this Article, only the “right to respect” is recognized for a performer, consisting of the recognition of his capacity as a performer and of the defense of the integrity of his performance, but the Law does not as a result grant him any capacity of authorship or any right of disclosure.

To support the text of the Law, the respective Regulations grant performers the entitlement to request reparations for moral harm and the payment of damages where their moral rights are contravened. Article 50 of the Regulations provides thus where it states that performers shall be entitled to request reparations for moral damage and the payment of damages, where the use of their performance is made in contravention of the provisions of Article 117 of the Law.

Article 1916 of the Civil Code states that moral damage shall be understood as any effects suffered by a person in terms of his feelings, emotions, beliefs, propriety, honor, reputation, private life, configuration and physical aspects, or in the consideration in which he is held by others.

According to the Civil Code, where an unlawful fact or omission causes moral damage, the party responsible for the damage shall be obliged to provide reparations therefor in the form of financial compensation, irrespective of whether material damage has been caused, both in terms of contractual and extracontractual responsibility.

This action shall not, according to the Law, be transferred to third parties by acts *inter vivos* and it shall pass to the heirs of the victim only where the action has been taken during his lifetime.

In order to determine the amount of the compensation, the judge shall take into account the rights infringed, the degree of responsibility, the economic situation of the party responsible and that of the victim, as well as the other circumstances of the case.

To conclude, the right to a name, or “right to credit,” is established in general in the contracts signed by performers with the producers of audiovisual works, and generally

speaking these provisions which deal with such a right are envisaged in the collective labor contracts signed by the trade unions such as the National Association of Actors with the various cinematographic producers or those of other audiovisual works.

As regards the right in the integrity of the performance, no labor-related or contractual provision exists which could make it effective. To the best of our knowledge, no claim of this nature has been made thus far by a performer against a party possibly infringing such a right.

4. *What is the duration of performers' moral rights?*

Response: The Law does not indicate a duration specific to moral rights, but it may be inferred that this is 75 years subject to the terms and conditions which Article 122 of the Law indicates as a general standard.

5. *Do audiovisual performers have remuneration rights?*

- a. *are these in lieu of or together with exclusive rights? (Please explain)*
- b. *describe the rights to remuneration that audiovisual performers have*

Response: Yes. Such rights have been sustained in the Mexican legal system since the 1963 Federal Copyright Law, previous to the one in force, entered into force.

On November 9, 1965 the Official Rates for the payment of copyright royalties, for persons exploiting cinematographic films, were published in the Official Federation Gazette; the Rates envisaged, *inter alia*, the right to remuneration for performers.

These Rates establish:

“FIRST. Those exploiting protected works in cinematographic films shall, through the respective distributors, cover 1.5% (one and a half per cent) of the net income from each showing.

SECOND. For the purposes of these Rates, net income shall be the amount resulting from the amount of income from each showing minus the tax on public events.

THIRD. From the net income for each showing 0.6% shall be paid to the writers, 0.5% to the composers, 0.25% to the directors and 0.15% to the performers participating in the showing of the material, in accordance with the previous articles.

FOURTH. The distributors shall agree with the respective companies the system to be used for verifying the fees to which the previous articles refer.

The costs involved shall be covered, in the appropriate proportions, by the companies concerned.

FIFTH. At the request of the interested parties, the Directorate General of Copyright may, at its discretion, grant an exemption from or reduction of the

payment established in these Rates, in the case of exhibitions organized, either usually or possibly, for educational, cultural or charitable purposes. The exemptions or reductions granted may be modified or renewed by the Directorate General of Copyright itself at any time, where the features used to justify such exemptions or reductions are altered in the showing.

SIXTH. The provisions of these Rates shall not apply to the transmission of films on television or by similar procedures.”

An addition was made to the Rates through an agreement published in the Official Federation Gazette of July 13, 1976, whereby 0.15% was granted to musical performers for their performances contained in cinematographic material.

Two fundamental aspects of these Rates should be highlighted: firstly, that they apply exclusively to showings in cinematographic halls and secondly, that they exclude the transmission of films by means of television or similar procedures.

Article 1 of the 1963 Federal Copyright Law, considered to be of *ordre public* and social interest, established the nullity of those agreements through which conditions less than those accepted by the Official Rates lawfully issued by the Secretariat of Public Education (Article 159) are laid down.

Furthermore, Article 79 of this Law established the general standard regarding the remuneration derived from exploitation of works and performances. The Article reads as follows:

“Article 79. The royalties for the use or exploitation of works protected by this Law shall arise where performances or showings are made for purposes of profit obtained directly or indirectly. These royalties shall be established in the agreements concluded by the authors or societies of authors with the usufructuaries; where no agreement exists, they shall be governed by the Official Rates issued by the Secretariat of Public Education which, in fixing them, shall endeavor to balance the interests of the different parties which are members of the appropriate joint committees.

In the case of cinematography, they shall be determined by the rates issued by the Secretariat of Public Education and the usufructuaries shall cover them through the distributors.

*The provisions of this Article are applicable in relation to the rights of performers.”*<sup>8</sup>

As may be appreciated, the form in which this right of remuneration is established may be through agreements or official rates. In the case of cinematographic films, the law prescribed the implementation of official rates, by virtue of which all remaining audiovisual works were fundamentally subordinate to the conclusion of agreements.

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<sup>8</sup>

Our italics.



In that regard, Article 74 of the 1963 Law prescribed that where radiobroadcasting or television stations had, for technical or scheduling reasons and for the purposes of a single subsequent broadcast, to record or fix the image and sound in advance in their studios, for musical selections or parts thereof, literary, dramatic, choreographic and dramatico-musical works, or complete programs and in general any work suitable for broadcasting, they could make such recordings subject to a specific number of requirements, and it was clear that such requirements would not be applicable in cases where authors or performers had concluded an agreement in return for remuneration, authorizing subsequent broadcasts.

In accordance with this provision, Article 75 of the 1963 Law in question established that in cases of a radio or television transmission to be made and recorded simultaneously, the prior consent of the authors or performers participating in the transmission should be obtained, in order to be reproduced at a later date for profit-making purposes.

The Regulations under the Law in force contain specific references to the right to remuneration, in Articles 8, 9 and 10 which govern the concept of the *royalty*.

Article 8 of the Regulations defines that royalty as “the economic remuneration generated by the use or exploitation of the works, performances, phonograms, videograms, books or broadcasts in any form or by any means.”

Article 9 provides that the payment of royalties to the author, the holders of neighboring rights and their legal successors shall be made independently to each of the persons entitled thereto, according to the method of exploitation in question.

Finally, Article 10 states that the royalties for (public) performance or exhibition of literary and artistic works shall be generated in favor of the authors and holders of neighboring rights, as well as of their legal successors, where this is done for direct or indirect profit-making purposes.

Of importance for the purposes of this questionnaire is Article 35 of the Regulations under the Law, which states that “the authors of the audiovisual work and the performers participating therein shall be entitled to a share of the royalties generated by the public performance of the work.”

Of equal importance is the form in which these royalties are established. Article 203 of the current Law, which envisages the obligations of collective management societies, includes in such obligations those of negotiating the amount of the royalties to be paid to the users of the repertory which they administer and, in cases where no agreement is reached, proposing to the National Copyright Institute the adoption of general official rates containing details of the justification therefor.

As regards this provision, Article 212 of the Law prescribes that the official rates for the payment of royalties shall be proposed by the Institute at the express request of the collective management societies or of the respective users.

Article 166 of the Regulations states that the rates referred to in Article 212 of the Law shall be the basis on which the parties may agree the payment of royalties and shall constitute the objective criteria for the quantification of damages by the judicial authorities.<sup>9</sup>

The same Regulations state that the official rates issued by the National Copyright Institute shall provide that the proposed amounts are updated on January 1 and July 1 each year, at the same rate as the increase during the six months immediately prior thereto in the national Consumer Price Index (CPI), published monthly by the Bank of Mexico.

It should be emphasized that in relation to the rates governing the payment of royalties for the exploitation of cinematographic films in cinematographic halls, those fixed on November 9, 1965 continue to be in force, given that when this document was published no proposal had been made in that regard. In that connection, the third transitional article of the Regulations continues to apply, which mentions that the official rates issued for the payment of royalties shall remain in force until such time as the National Copyright Institute proposes new rates.

As regards the remuneration derived from the retransmission of television programs, the performers have concluded agreements with the most important broadcasting organizations in the country, in which the conditions and forms of payment of such remuneration are established.

Finally, it should be emphasized that as a result of the reforms of July 2003 the right to remuneration or the royalty, a non-waivable royalty was introduced for performers, through which the legislator restored this provision, previously incorporated in Article 84 of the 1963 Law. Article 117 bis of the Law now establishes the royalty and reads as follows:

“Article 117 bis: Performers shall have the non-waivable right to receive remuneration for the use or exploitation of their performances, made for direct or indirect profit-making purposes, by any means, public communication or method of provision.”

In line with the development of the questionnaire, it is indicated that this right of remuneration operates in conjunction with the rights of exclusivity, although, as noted, the right of remuneration is non-waivable, as expressly provided for by the Law, insofar as the other exclusive rights may be transmitted by any means and in the terms prescribed in the same Law, i.e. provided it is in writing, and the conditions and scope of the rights transmitted are clearly established, together with the agreed forms of economic compensation.

It is usual in Mexico for performers to be contracted through labor or paid collaboration contracts. Such contracts are governed in general through trade unions which fix the conditions of employment, wages, working hours, social benefits and so on, and leave those relating to performers' rights to the provisions of the specific Law, in this case the Federal Copyright Law.

In the case of cinematography, the National Association of Actors exists, a trade union with influence throughout the territory of the Republic of Mexico.

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<sup>9</sup> See Articles 167 to 173 of the Regulations, in which the procedures for fixing the corresponding official rates are established.

In the case of productions made by television companies, it is also the National Association of Actors which is empowered. Matters relating to the remuneration derived for the secondary exploitation of performances are governed in this area by the agreements which collective management bodies such as the National Performers Association (ANDI) or the Society of Performers (EJE) have concluded with the main national television companies.

This leads us to the following question.

6. *Are audiovisual performers' right subject to mandatory collective management?*

Response: Chapter VI of the 1963 Law, previous to the one in force, governed authors' societies. This Chapter closed with Article 117 which established that its provisions would apply to the societies which organize performers and are designed to put into effect the rights recognized for them by the law.

Within those provisions, and as a result of the reforms published in the Official Federation Gazette of January 11, 1982, the concept of representation by operation of law, which granted authors' societies the entitlement to recover, in the country and without the need for a mandate or any reciprocal agreement, the royalties generated by the exploitation of works in the various media, with no importance being attached to the nationality of the works. This regulation was basically applied in practice in the area of cinematography and, consequently, any other type of exploitation in other media was excluded.

As regards the representation of national performers, the courts took the following decision:

Authority: Circuit Collegiate Courts  
Source: Federation Judicial Weekly  
Period: 8A  
Volume: IV Second Part 1  
Page: 206

**COPYRIGHT, LACK OF LEGITIMACY OF AUTHORS' SOCIETY TO COVER BENEFITS ACCRUING TO MEMBERS, IF IT DOES NOT SATISFY THE DETAILED CONTENT OF ARTICLE 98(II) OF THE COPYRIGHT LAW.** Article 98(II) of the Copyright Law establishes that authors' societies are delegated to collect and transfer to their members, and also to the foreign authors in their branch, the fees stemming from the copyrights accruing to them and also that national authors should grant, on an individual basis, a mandate to the society so that it collects the fees stemming from their rights, without which it may not undertake the coverage referred to, apart from where at the end of a two-year period the author has not collected the fees to which he is entitled; thus, on that assumption, even where there is no express individual mandate, the authors' society shall collect the fees and shall notify the author or his legal successor through the Directorate General of Copyright of the Secretariat of Public Education. *If the society does not therefore demonstrate that the express individual mandates were granted to it by the members, nor that the exceptional assumption applies whereby those for which it may collect the fees accruing to the members are unnecessary, the society clearly lacks the legitimacy required to*

*request, on behalf of the members, the fees to which they are entitled, owing to a lack of proof that the requirements indicated by the legal rule in question have been fulfilled, for which reason the resolution as considered does not infringe guarantees.*<sup>10</sup>

FIRST COLLEGIATE COURT OF THE FIFTH CIRCUIT.

#### PRECEDENTS

Direct protection 187/89. Society of Authors and Music Composers, Society of Authors of Public Interest. October 25, 1989. Unanimity of votes. Rapporteur: Adrián Avendaño Constantino. Court administrator: Mr. Manuel García Valdez.

Within this arrangement, the rights derived from exploitation of works and performances (known as rights to remuneration or royalties) were collected by the authors' societies which had exclusive management rights in that one of them was authorized for each branch of creation or specialization. The Supreme Court of Justice made that ruling in a decision even before the 1963 Law came into force; given the importance of the ruling, it is cited below:

Court: Second Division  
Source: Federation Judicial Weekly  
Period: 6A  
Volume: XII  
Page: 124

**AUTHORS' SOCIETIES. ONLY ONE SOCIETY SHOULD EXIST IN EACH BRANCH.** In accordance with the provisions of the Federal Copyright Law, only one authors' society should exist in each branch, in accordance with Articles 66, 69(I), 74(II) and (IV), and paragraph VIII of the statement of reasoning of the Law in question, from which it emerges that the clear idea of the legislator has been that one authors' society exists in each branch, since otherwise there would be no reason to declare them to be of public interest, nor could it be united with the authors, or less still put forward a solid front against national and foreign users, nor even conclude agreements with foreign authors' societies in its branch, since no one would have national representation and the increase in the number of representative bodies would provide justification for the uncertainty of users in covering royalties and would even provide a basis for dismantling those which have been established, to the prejudice of the majority of authors. For that reason, in the statement of reasoning of the Law in question it is noted that copyright has a marked similarity to labor law and, in this regard, it is well known that only one trade union exists which has signed the collective contract and which is responsible for requesting its revision where appropriate, and also its implementation. Thus, if the existence of a number of authors' societies in each branch were accepted, the collection of copyrights would be obstructed by a huge number of difficulties in the face of the users' uncertainty as to who should make the payment, which on many occasions would mean that the payment was not made and to the hope that through a long ruling it would become clear who should

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<sup>10</sup> Our italics.

make the payment, something which was not part of the legislator's thinking, in fact exactly the opposite, i.e. ensuring that the copyright becomes part of the author's capital resources in a rapid and effective manner.

## PRECEDENTS

Revised protection 672/57. Mexican Society of Authors and Composers, Authors' society. April 9, 1958. Majority of three votes. Rapporteur: P. C. José Rivera.

These criteria are virtually abandoned in the new Law, apart from representation by mandate, designed to give legitimacy to the collective management society to act on behalf of its members.<sup>11</sup>

To begin with, the terms "authors' societies" was abandoned in favor of adopting "collective management societies," which are defined in the Law as any legal person which, for non-profit related reasons, is established with legal protection for the purposes of protecting authors and holders of neighboring rights, both in Mexico and abroad, as well as collecting and transferring thereto the amounts generated in their favor on the basis of copyright or neighboring rights.<sup>12</sup> The first difference is already established here, since this type of body will not only be exclusive to authors or performers, but also to other holders of neighboring rights, in the sense intended by the current legislation.

Of relevance in the new system of rules is Article 195 which, to a large extent, answers the question raised. This provision of the law establishes that persons who may form part of a collective management society may opt freely to become a member of that society or not; similarly, they may choose between exercising their economic rights on an individual basis, as a representative or through the society. In other words, the Law enshrines the freedom of membership for authors or holders of neighboring rights, and establishes that such societies may not participate in the coverage of royalties where members choose to exercise their rights on an individual basis in relation to any use of the work, or have in fact agreed direct mechanisms for their coverage.

Where members have granted a mandate to the collective management society, royalties may not be covered by the members themselves, unless the mandate is repealed.

The rule concludes by stating that collective management societies may not impose as an obligation the management of all exploitation procedures, nor the whole of the work or of future productions.

In accordance with the latter paragraphs, Article 197 of the Law itself provides that where the members of a collective management society opt for the society to collect payments on their behalf, they should grant the society a general power for lawsuits and payment collection.

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<sup>11</sup> See Article 200, LFDA96.

<sup>12</sup> See Article 192 of the 1996 Law.

Finally, Article 198 provides that the royalties or fees collected by collective management societies are not prescribed for such societies and against the members and, in the case of fees or royalties for foreign authors, that the principle of reciprocity shall apply.<sup>13</sup>

Bearing in mind the above, it may be concluded that, in general terms, the response to this question is no. The rights of performers of audiovisual works are not subject to a compulsory contract with a collective management society.

As regards the manner in which collective management societies operate in Mexico and, specifically those which bring together performers, it is noted that three bodies currently exist: the National Performers Association (ANDI) which groups together in fundamental terms the actors from cinematographic and other audiovisual works; as well as models and actors participating in commercial advertisements; the Mexican Society of Music Performers (SOMEM), set up a long time ago and whose activities are now virtually suspended, and finally the Performers Society (EJE), set up recently and in the process of development.

The operation of the above bodies should be adjusted to the provisions of Title IX of the Law (Articles 192 to 207) and of Chapter II of Title XI of the Regulations (Articles 115 to 136), the wording of which is contained in the Appendix to this document.

## II. INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS

### A. Who is the initial owner?

Bearing in mind that both the provision of the international convention (Rome Convention) and the national legislation grant performers a right of opposition, it should be inferred that although it is not expressed in that manner in the legal texts, performers are vested with ownership of their performances, since they are the ones who decide whether the performances should be fixed, a matter which will depend on the terms and conditions contained in the performance contract. That being the case, it should be considered that the performer is the person in whom initial ownership of his right is vested, including where a presumption of transfer of the economic rights in the fixation of audiovisual works exists, since this presumption emanates precisely from the contract concluded, and the contract is nothing more than an agreement of wills, and such an act of willingness shown by the performer's intention to conclude the contract therefore implies the exercise of the initial ownership of his performance.

#### 1. *In your country, is the performer vested with initial ownership?*

Response: Consequently, in Mexico the performer is the person who is vested with initial ownership of his performance, in accordance with the terms of the previous paragraph.

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<sup>13</sup> The precedent to this provision is contained in Article 105 of LFDA63.

2. *Is the performer's employer/the audiovisual producer so vested?*

Response: It is noted that initial ownership is vested with the performer. In a labor relation the right of exploitation of the performance belongs to the employer. The same occurs with the producer of the audiovisual work. For that purpose, Article 121 of the Law should be recalled, which establishes that unless otherwise agreed the conclusion of a contract between a performer and a producer of audiovisual works for the production of such a work entails the right to fix, reproduce and communicate to the public the performer's performances, and that this does not include the right to use separately the sound and images fixed in the audiovisual work, unless expressly agreed.

3. *Is a collective so vested?*

Response: No. As has previously been commented in this document, collective management societies may only represent their members if the power to act in lawsuits and for payment collection is granted to them.

That being the case, the collective management society will be only a representative of the performer's rights, but shall not be vested with any ownership of the rights belonging to performers.

B. What is owned?

1. *Is the performer the owner of rights in her performance?*

Response: In an audiovisual work, the contract concluded between the performer and producer establishes the presumption of transfer of the economic rights. In that regard, the appropriate response is no, once the performer has concluded the contract, but on the other hand the performer will continue to be vested with ownership of the right to remuneration or royalty.

2. *Is she a co-owner of rights in the entire audiovisual work to which her performance contributed?*

Response: No. Mexican legislation does not enshrine any right of co-ownership or the capacity of collaborator to a performer within a cinematographic work. Article 97 of the Law establishes the following, with regard to those who have the capacity of author and who are vested with the appropriate economic rights in the specific work:

“Article 97: The following are authors of audiovisual works:

- I. directors-producers;
- II. the authors of plots, adaptations, scripts or dialogs;
- III. the authors of musical compositions;
- IV. photographers, and
- V. the authors of caricatures and cartoons.

Unless otherwise agreed, the producer shall be considered to be the holder of the economic rights in a work as a whole.”

In that regard, Article 95 states that without prejudice to the rights of the authors of the works adapted or included therein, an audiovisual work shall be protected as an original work. Based on this Article, Article 14 bis of the 1971 Paris Act of the Berne Convention is applied in the national legislation.

Paragraph (1) of the international instrument is that which the Mexican legislator has adapted in Article 95 referred to above. The Berne Convention states that the owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in Article 14.

In that regard, Article 14 bis (2)(a) of the Convention is a remission clause, since it states that the determination of the owners of copyright in a cinematographic work remains the reserve of the legislation of the country in which protection is claimed and, in the case of Mexican law, the holder of the economic rights in that work shall be the producer, as inferred from a reading of the second and third paragraphs of Article 99 of the Law.<sup>14</sup>

It should be added that such ownership vested in the producer is also expressly enshrined in the Federal Law on Cinematography, Article 9 of which reads as follows:

“Article 9: For the purposes of this Law, the holder of the rights of exploitation of a cinematographic work shall be the producer, or duly accredited licensee, and this shall not affect the non-waivable copyrights belonging to the writers, composers and directors, and also to the performers who have participated in the work. That being the case, all parties may, jointly or separately, undertake actions in relation to the competent authorities for the protection of their respective rights, in accordance with the Federal Copyright Law.”

In accordance with Article 14 bis (2)(b), in Mexican legislation performers are not considered to be collaborators in a cinematographic work, since such a characteristic falls to the authors of the literary portion, the composer, director-producer, photographer, and authors of caricatures and cartoons, where in the latter case an audiovisual work has such subject matter or is produced in that form.

Furthermore, Article 83 of the Law states that, unless otherwise agreed, a natural or legal person commissioning the production of a work or producing the work with the paid collaboration of other persons shall be entitled to own the economic rights in the work, and shall possess the entitlements relating to the disclosure and integrity of the work and collection in relation to such creations; the Article adds that a person participating in the production of the work in return for remuneration, shall have the right to be mentioned

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<sup>14</sup> Article 99, LFDA96. P.2: “Once the authors or holders of economic rights have agreed to make their contributions to the production of an audiovisual work, they may not oppose the reproduction, distribution, public performance, transmission by cable, broadcasting, public communication, subtitling and dubbing of the texts of that work.” P.3: “Without prejudice to the rights of the authors, the producer may undertake all the actions necessary for the exploitation of an audiovisual work.”



expressly in his capacity as author *or performer* of the part(s), in the creation of which he has participated.

3. *Other ownership? Please describe.*

Response: As already mentioned in this document, a performer shall be vested with non-waivable ownership of the right to remuneration or royalty, as derived from the exploitation of the works in which his performances have been incorporated.

### III. TRANSFER OF AUDIOVISUAL PERFORMERS' RIGHTS

#### A. Legal provisions regarding contracts

1. *Does the copyright/neighboring rights law or other relevant legal norm set out rules regarding transfers of rights?*

Response: Yes. The Law has specific provisions regarding the transfer of economic rights, but such provisions are within the specific sphere of copyright. Articles 30, 31 and 33 govern in fundamental terms the general aspects relating to the transfer of economic rights.

The important thing is to determine whether these provisions are applied in a manner similar to the transfer of economic rights of performers.

Article 30 states firstly that the holder of the economic rights may freely transfer his economic rights or grant exclusive or non-exclusive licenses for use, in accordance with the law.

What may happen in this provision in relation to performers' rights is that performers may freely transfer their economic rights. Where we do not consider that such a transfer can be applied, this is done through the granting of either exclusive or non-exclusive licenses for use, especially since the performer's right arises precisely through the fixation of the performance, despite the fact that the performance is not a work.

The second part of Article 30 states that any transfer of an author's economic rights will be costly and temporary, and that in the absence of agreement as to the amount of remuneration or the procedure for fixing the remuneration, as well as the terms for its payment, that matter shall be decided by the competent courts.

Such a norm may give rise to ambiguous interpretations: one thing is the compensation received by an author for a commissioned work and the other is establishing the amount of the royalty. If we take into account the negotiation on the fixing of the amount of the royalty, the provision is in compliance but does not appear to be so as regards the fixing of the amount to be covered for the provision of a service or the production of a work.

This provision can be applied in a similar manner for performers, thereby supporting the principle that any transfer of rights should be burdensome and temporary.

Finally, Article 30 prescribes that the acts, agreements and contracts for which economic rights are transferred, as well as licenses for use, should be drawn up invariably in writing, otherwise they will be considered null and void.

This is a further principle which can be applied in a similar manner to the contractual arrangements concluded by performers.

Article 31 provides that any transfer of economic rights shall provide for a proportional share of the income from the exploitation in question for the author or, where appropriate, the holder of the economic right, or a fixed level of remuneration; in conclusion, the Article declares the right to be non-waivable.

The provision may be applied in a similar manner to the rights of performers, especially where Article 117 bis grants a non-waivable right to the royalty for such subjects.

In addition, Article 34 of the Regulations under the Law states that audiovisual production contracts shall provide for the proportional share or fixed remuneration for the authors or holders indicated in Article 97 of the Law, which shall prevail for each act of exploitation of an audiovisual work, with emphasis being placed on the fact that where no method of exploitation is envisaged in the contract, this shall be reserved for the authors of the audiovisual work. Finally, this provision applies in relation to the performances which are included in the audiovisual work.

Article 33 states that failing an express stipulation, any transfer of economic rights shall be considered to be of five years' duration, and that a period of more than 15 years may be agreed only in exceptional cases, where the nature of the work or scale of the required investment so justifies.

In the case of performers, this provision is applied in a similar manner and especially where, through the principle of hierarchical structuring, the right of the performers is subordinated to that of the authors. That being the case, a contract concluded by an author - with respect, for example, to an audiovisual work - in which a particular period has been agreed, will subject the performer to that period.

Subject to these considerations, Articles 120 and 121 of the Law in force, already mentioned in this document, should be consulted and are, in specific terms, those which regulate the contractual relations of performers, as well as Article 34 of the respective Regulations.

2. *Please indicate if the rule is a rule of general contractual law, or is a rule specified in the law of copyright and/or neighboring rights.*

Response: The contractual matters relating to performers are fundamentally envisaged in the Federal Copyright Law. The labor relations of these artists are governed by the Federal Labor Law, in Articles 304 to 310 incorporated in Chapter XI ("Musical Actor Workers") under Title Six ("Special Works"), the wording of which is given in Annex 2 to this document.

3. *Must the transfer be in writing?*

Response: From a reading of Articles 120 and 121 of the Law, in relation to the third paragraph of the Article 30 applied by analogy, the response to this question is yes.

4. *Must the terms of the transfer be set forth in detail, e.g. as to the scope of each right and the remuneration provided?*

Response: Yes. This fact emerges from a reading of Article 120 of the Law, which indicates clearly that performance contracts should specify the times, periods, forms of compensation, and other terms and procedures subject to which the performance in question may be fixed, reproduced and communicated to the public.

Similarly, in what follows, Article 34 of the Regulations under the Law applies.

5. *Must the writing be signed by the performer? By the transferee?*

Response: By both parties. The signature in a document is a clear and unquestionable manifestation of the graphic expression of consent, an essential feature of contracts.

B. Transfer by Operation of Law

1. *Are there legal dispositions transferring either the performer's exclusive rights, or a share of the income earned from the exercise of her exclusive rights, or from the receipt of remuneration rights?*

Response: The only legal provisions dealing with the transfer of the rights of performers are incorporated in the Federal Copyright Law. The transfer of the non-waivable rights of remuneration or royalty may be transferred *mortis causa*.

2. *Expropriation.*

Response: Expropriation operates in the Mexican legal system in cases of public usefulness and subject to appropriate compensation.

This scenario as such is not specifically envisaged as part of copyright or neighboring rights. However, the Law establishes a limitation in cases of public usefulness, which at all events is similar to the scenario commented on. This limitation is envisaged in Article 147 which reads as follows:

“Article 147: The publication or translation of literary or artistic works necessary for the advancement of national science, culture and education shall be considered to be of public usefulness. Where it is not possible to obtain the consent of the holder of the appropriate economic rights, and in return for the payment of financial compensation, the Federal Executive Authority may, through the Secretariat of Public Education, *ex officio* or at the request of a party, authorize the publication or translation in question. The above provision shall be

without prejudice to the international treaties on copyright and neighboring rights to which Mexico has acceded and which it has approved.”

Articles 38 to 43 of the Regulations under the Law establish the mechanisms for implementing the limitation commented on.

By way of additional information, there is no knowledge to date of an expropriation procedure being launched against the rights belonging to a performer.

3. *Bankruptcy.*

Response: Mexican legislation does not contain any express provision on copyright which envisages such a circumstance.

4. *Divorce; community property.*

Response: As part of inheritance, the economic product of economic rights, and especially those generated as royalties, may be affected in a situation of divorce if the divorcee or his partner is a performer and is married subject to the rules of community property.

5. *Intestacy.*

Response: As part of inheritance, the economic product of economic rights, and especially those generated as royalties, may be incorporated in the deceased's legacy. Where the latter did not leave a will, civil law provides for a special procedure so that the legitimate heirs may denounce the party intestate to a family-law judge in order to take possession of the legacy.

Ordinary legislation provides that where a person dies without heirs, his assets shall be used for the purposes of public charity.

C. Irrebuttable Presumptions of Transfer

1. *Does the employment relationship between the audiovisual performer and the producer give rise to an irrebuttable transfer of the performer's rights?*

Response: In accordance with the provisions of Article 121 of the Law, the answer is no.

2. *What rights does the transfer cover?*

3. *If fewer than all rights, please identify and explain which rights are transferred and which are retained?*

D. Rebuttable Presumptions of Transfer

1. *Does the employment relationship between the audiovisual performer and the producer give rise to a rebuttable transfer of the performer's rights?*

Response: Yes, as indicated by Article 121 of the Law.

2. *What rights does the transfer cover?*

Response: In accordance with Article 121 of the Law, the right to fix, reproduce and communicate to the public a performer's performances and, by extension, taking into account the provisions of Article 99 applied by extension, public performance, exhibition, cable transmission, broadcasting, subtitling and dubbing of the audiovisual work.

3. *If fewer than all rights, please identify and explain which rights are transferred and which are retained?*

Response: The rights transferred are those indicated in response to the previous question. The right to remuneration or royalty, derived from the exploitation of the performance fixed in an audiovisual work, cannot be transferred since this right is non-waivable.

E. Contract Practice

1. *If the transfer of audiovisual performers' rights is not effected by a legal presumption, are there standard contractual provisions?*

Response: No. The Federal Copyright Law is clear as to the contractual arrangements which a performer uses with a producer of an audiovisual work, in the terms indicated in Article 121 of the Law, as already commented on.

2. *Do these provisions appear in collective bargaining contracts?*

Response: In general, there are two types of contracts for audiovisual works: one is a labor contract – which may be collective in nature, if it is signed by the trade union with an association or group of producers – and an individual contract which in general derives from such a collective stipulation. The contracts establish the conditions in which the musical performance service will be provided; in which place, subject to which working hours; and the remuneration to be collected. Such contracts provide implicit authorization by the performer for the performance to be incorporated in the audiovisual work in question.

The regulations relating to the exploitation of an audiovisual work have two different aspects: (i) cinematographic works. In such works, the aim or purpose of the exploitation of the work and the means used are agreed depending on the labor relation in question; and (ii) audiovisual works produced by television organizations, where it is common for labor standards and those relating to performers' rights to co-exist. In general, such contracts

establish the terms and conditions in which the fixed interpretation will be exploited and in what places (national territory, specific areas abroad or the rest of the world in general terms).

In the case of cinematography, the royalties are fixed by the Official Rates of November 9, 1965. However, the exploitation of a cinematographic work through rental, hiring or sale on video or DVD, or the open or cable transmission by television, are generally governed by the contracts which collective management societies, representing performers as appropriate, sign with the users.

3. *In individually negotiated contracts?*

Response: Nothing prevents a performer in legal terms from establishing specific provisions through individual negotiations. This can be common in the case of performers owing to their fame, prestige or acceptance and public impact, as a result of which they can obtain better conditions for their contractual arrangements.

4. *What rights do these provisions transfer? Please describe.*

Response: Those rights inherent in or relating to the exploitation of audiovisual works in the various appropriate media. Articles 99 and 121 of the Law provide precise details of these circumstances.

F. Limitations on the Scope or Effect of Transfer

1. *Does copyright/neighbors rights law or general contract law limit the scope or effect of transfers? Please indicate which law is the source of the limitation.*

Response: The Law applicable to the case is the Federal Copyright Law and its Regulations. Article 2 of the Law establishes that its provisions are of *ordre publique* and social interest, which implies that those rights considered to be non-waivable for authors or performers cannot be affected subject to being declared null and void.

There is no such thing as limitation for the transfer of economic rights in relation to performers. The Law does provide that in a contract the rights which have not been expressly transferred are understood to be reserved for the performer, which is inferred from the right of opposition that assists him (Article 118 of the Law in relation to Article 50 of the Regulations). Similarly, Article 34 of the Regulations is applicable in this regard.

Such a limitation exists only as regards the possibility of waiving the right to remuneration or royalty.

On the other hand, in general terms the Law provides for a series of limitations on the rights of performers, and the same limitations are envisaged in Article 150 and 151 of the Law which read as follows:

“Article 150: Royalties for public performance shall not be created where the following circumstances occur concurrently:

- I. Where the performance is through the communication of a transmission received directly on a monoreceiver radio or television appliance of the type commonly used in private homes;
- II. No payment is made to see or hear the transmission, or does not form part of a group of services;
- III. The transmission received is not retransmitted for profit-making purposes, and
- IV. The receiver is a minor subject or a micro-industry.”

“Article 151: The use of the performances, phonograms, videograms or broadcasts of performers, phonogram or videogram producers, or broadcasting organizations shall not constitute infringements of their rights, where:

- I. No direct economic benefit is pursued;
- II. The material in question is in brief fragments used in information concerning current events;
- III. For educational or scientific research purposes, or
- IV. This coincides with the cases provided for in Articles 147, 148 and 149 of this Law.”<sup>15</sup>

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<sup>15</sup> LFDA96: Article 147: The publication or translation of literary or artistic works necessary for the advancement of national science, culture and education shall be considered to be of public usefulness. Where it is not possible to obtain the consent of the owner of the corresponding economic rights, and in return for the payment of compensatory remuneration, the Federal Executive Authority may, through the Secretariat of Public Education, *ex officio* or at the request of a party, authorize the publication or translation in question. The above shall be without prejudice to the international treaties on copyright and neighboring rights to which Mexico has acceded and which it has approved. Article 148: The literary and artistic works already disclosed may be used, provided that the normal exploitation of the work is not affected, without the authorization of the owner of the economic right and without remuneration, the source invariably being cited and the work being unaltered, only in the following cases: I. Citation of texts, provided that the portion used cannot be considered a simulated and substantial reproduction of the content of the work; II. Reproduction of articles, photographs, illustrations and comments referring to current events, published by the press or disseminated on radio or television, or by any other means of dissemination, where this has not been expressly prohibited by the owner of the right; III. Reproduction of parts of the work, for scientific, literary or artistic criticism and research; IV. Reproduction on a single occasion, and in one copy, of a literary or artistic work, for personal and private use of the person making the

[Footnote continued on next page]

2. *Do these limitations concern:*
- a. *particular rights, e.g., moral rights*
  - b. *scope of the grant, e.g., future modes of exploitation*
  - c. *other (please describe)*

Response: The limitations apply as regards the waiving of the right to a royalty. As to the moral rights of the performer, the respective Chapter of the Law which governs such rights does not provide any information in that regard, contrary to what occurs with an author's moral rights.

As regards future modes of exploitation, it has been noted that although such modes are not expressly indicated in a contract, they are reserved for the performer. This can also be inferred from a reading of Article 34 of the Regulations under the Law.

3. *Do audiovisual performers enjoy a legal right to terminate transfers of rights?*
- a. *is this termination right transferable?*
  - b. *waivable?*

Response: No. The law contains no information in this regard.

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[Footnote continued from previous page]

reproduction and for non-profit making purposes. Legal persons may not avail themselves of the provisions of this section, except in the case of an educational or research institution, or where this is not devoted to commercial activities; V. Reproduction of a single copy, by an archive or library, for reasons of security and preservation, and where the work is out of print, unlisted and in danger of disappearing; VI. Reproduction for the purposes of written evidence in judicial or administrative proceedings, and VII. Reproduction, communication and distribution by means of drawings, paintings, photographs and audiovisual procedures of the works which may be seen in public places. Article 149: The following may be done without authorization: I. The use of literary and artistic works in shops or institutions open to the public, which market copies of the works in question, provided that there are no admission charges and that said use does not take place outside the area where the sale is made and is intended solely to promote the sale of copies of the works, and II. Temporary recording, subject to the following conditions: (a) the transmission shall be made within the period appropriate for that purpose; (b) no broadcast or accompanying or simultaneous communication should be made for recording purposes, and (c) the recording shall provide entitlement to a single broadcast. The recording and fixation of the image and sound made in the conditions mentioned above shall not make compulsory any additional payment separate from that corresponding to the use of the works. The provisions of this section shall not apply in cases where the authors or performers have concluded a binding agreement which authorizes subsequent broadcasts.



## PART II

### International Private Law Rules for Determining the Law Applicable to Transfer of Audiovisual Performers' rights

#### I. LAW APPLICABLE TO DETERMINE INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS

Prior consideration: in order to have a clear conception of the responses to the second part of the questionnaire, we have considered the following clarifications necessary:

– The international private law rules in the Mexican legal system are fundamentally enshrined in Articles 12, 13, 14 and 15 of the Federal Civil Code, which read as follows:

“Article 12: Mexican laws shall govern all persons on the national territory as well as the acts and events occurring on that territory or under national jurisdiction, as well as those subject to said laws, apart from where these laws provide for the application of foreign law and apart from the provisions of the treaties and agreements to which Mexico is a party.”

“Article 13: The applicable law shall be determined in accordance with the following rules:

- I. The legal situations validly established in national bodies or in a foreign State in accordance with its law shall be recognized;
- II. The status and capacity of natural persons shall be governed by the law of the place of their domicile;
- III. The establishment, rules governing and extinction of actual rights in immovable property, as well as the contracts for leasing and temporary use of such property, together with movable property, shall be governed by the law of the place where they are located, even though its owners are foreign;
- IV. The form of legal acts shall be governed by the law of the place in which they are concluded. They may, however, be subject to the forms prescribed in this Code where the act is to take effect in the Federal District or, in relation to federal matters, on national territory; and
- V. Apart from the provisions of the previous sections, the legal effects of acts and contracts shall be governed by the law of the place in which they are to be performed, unless the parties have validly designated the applicability of a different law.”

“Article 14: In the application of foreign law the following shall be observed:

- I. The law shall be applied as it would be by the corresponding foreign judge, for which purpose the judge may gather the necessary information regarding the text, validity, sense and legal scope of the law in question;
- II. Substantive foreign law shall be applied, except where in view of the special circumstances of a case, the rules conflicting with the law, which make the substantive Mexican rules or those of a third State applicable, shall, by way of exception, be taken into account;
- III. The fact that Mexican law does not provide for institutions or procedures essential to the applicable foreign institution, where similar institutions or procedures exist, shall not prevent the application of foreign law;
- IV. The previous, preliminary or incidental issues which may arise as the result of a major issue shall not necessarily be resolved in accordance with the law governing the major issue; and
- V. Where various aspects of a single legal relationship are governed by various laws, those laws shall be applied harmoniously and an attempt made to achieve the aims sought by each of those laws. The difficulties caused by the simultaneous application of such laws shall be resolved by taking into account the requirements of fairness in the specific case.

The provisions of this Article shall be observed where the law of a different federation body is applicable.”

“Article 15: Foreign law shall not apply where:

- I. Fundamental principles of Mexican law have been artificially evaded and the judge is obliged to determine the fraudulent intention of such evasion; and
- II. The provisions of foreign law or the outcome of its application are contrary to principles or institutions fundamental to Mexican public order.”

– As regards the international treatment of copyright and neighboring rights, the relevant Mexican law enshrines the principle of national treatment, as it emerges from Articles 7 and 8 of the Federal Copyright Law, which read as follows:

“Article 7: Foreign authors or right holders and their legal successors shall enjoy the same rights as national authors, in accordance with this Law and the international copyright and neighboring rights treaties to which Mexico has acceded and which it has approved.”

“Article 8: Performers, publishers, phonogram or videogram producers, and broadcasting organizations which have made, outside the national territory, respectively the first fixation of their performances, their publications, the first fixation of the sounds of such performances or the images of their videograms or communication of their broadcasts, shall enjoy the protection granted by this Law and the international copyright and neighboring rights treaties to which Mexico has acceded and which it has approved.”

– Finally, it is important to take account of the opinion of the national Supreme Court of Justice regarding the hierarchy of the treaties signed by Mexico, in relation to federal and local laws.

The ruling mentioned was issued by the full bench of our highest court, with the number P. LXXVII/99, corresponding to the Ninth Period, and may be viewed in the Federation Judicial Weekly and its Gazette, Volume X, November 1999, page 46. Owing to its importance, the text of the ruling is given below:

IN HIERARCHICAL TERMS INTERNATIONAL TREATIES ARE ABOVE FEDERAL LAWS AND ON A LEVEL BELOW THAT OF THE FEDERAL CONSTITUTION. In terms of doctrine, the question of the hierarchy of rules under our law has been persistently raised. There is unanimity regarding the fact that the Federal Constitution is the fundamental standard and that, although in principle the expression “...shall be the Supreme Law of the whole Union...” appears to indicate that not only the Magna Carta is supreme, the objection is overcome by the fact that the laws must emanate from the Constitution and be approved by a representative body, such as the Congress of the Union and that treaties must comply with the Fundamental Law, which clearly indicates that only the Constitution is the supreme law. The problem regarding the hierarchy of the rules of the legal system has found separate solutions in terms of case law and doctrine, among which the following are highlighted: supremacy of federal law over local law and the same hierarchy for both, in their straightforward variants, and with the existence of “constitutional laws,” and that law qualified as constitutional shall be supreme. *Notwithstanding, the Supreme Court of Justice considers that international treaties are on a second level immediately beneath the Fundamental Law and above federal and local law.*<sup>16</sup> This interpretation of Article 133 of the Constitution is derived from the fact that these international agreements are assumed by the Mexican State as a whole and bind all its authorities in relation to the international community; this explains the fact that the Constituent Assembly has authorized the national President to accede to international treaties in his capacity as head of State and, similarly, the Senate to intervene as a representative of the will of the federative bodies and, by ratifying such treaties, place an obligation on its authorities. Another important aspect in considering this hierarchy of treaties is that relating to the fact that there is no limitation on competence in this area between the federation and federative bodies, i.e. the federal or local competence concerning the content of a treaty is not taken into account, other than by the National President and the Senate which, under the express mandate of Article 133 itself, may place an obligation on the Mexican State in any regard, irrespective of whether for other purposes this is within the competence of the federative bodies. As a consequence of the above, the interpretation of Article 133 leads us to consider federal and local law to be in third place in a single hierarchy under the provisions of Article 124 of the Fundamental Law, which states that “The entitlements which are not

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<sup>16</sup> Our italics.

expressly granted by this Constitution to federal employees shall be reserved for the States.” It remains clear that in its previous ruling, the highest court had adopted a varying position in ruling P.C/92, published in the Gazette of the Federation Judicial Weekly, No. 60, corresponding to December 1992, page 27, heading: FEDERAL LAWS AND INTERNATIONAL TREATIES HAVE THE SAME HIERARCHY IN TERMS OF RULES;” however, the full court bench considers it timely to abandon such an opinion and adopt that which considers treaties, including in relation to federal law, to be superior in hierarchical terms.

Revised protection 1475/98. National Union of Air Traffic Controllers. May 11, 1999. Unanimity of ten votes. Absentee: José Vicente Aguinaco Alemán. Rapporteur: Humberto Román Palacios. Court administrator: Antonio Espinoza Rancel.

In its private hearing held on October 28 last, the full court bench approved the isolated preceding ruling, No. LXXVII/1999; and determined that the vote was sufficient to become a legal precedent. Mexico, Federal District, October 28, 1999.”

A. What country’s (countries’) copyright/neighborhood rights law determines whether the granting performer initially owned the rights transferred:

Response: Mexican law, in the terms of the answer given in the first part of the questionnaire.<sup>17</sup>

– (1) (a) If the country of origin of an audiovisual work is taken as a criterion, copyright legislation makes no statement in this regard.<sup>18</sup> There are references in the Regulations under the Federal Law on Cinematography (Article 13(VIII) and (IX)), which refer to co-productions:

“Article 13: Where an international co-production is made between one or more foreign natural or legal persons from a country with which the Mexican Government does not have a relevant treaty or agreement, the co-production contract concluded for that purpose shall establish and contain at least the following:

VIII. The provision whereby it shall be essential to express, at the beginning of the production credits, as well as in advertising and any film production material, the name of the country of origin of the major co-producer, without prejudice to the right of the other co-producer(s) mentioned as such, when making the co-produced film known to the public in any format or by any means known or to be known.

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<sup>17</sup> See: II. Initial Ownership of Audiovisual Performers’ Rights. - A. 1. In your country, is the performer vested with initial ownership? Page 16.

<sup>18</sup> It should, however, be taken into account that the relevant provisions of the Berne Convention have force of law on Mexican territory, in accordance with Article 133 of the Constitution and the court ruling which grants higher hierarchical status to the treaty over federal or local law.

IX. In cases where a co-produced film is part of any of the international cinematographic festivals, it shall be necessary to make clear the nationality of the co-producers or, where appropriate, in the terms established by the regulations of the corresponding festival.”

However, it should be stated that the nationality of an audiovisual work, for copyright purposes, should be justified in accordance with Article 4(a) of the Berne Convention. Notwithstanding, as demonstrated, it is national legislation which determines the protection of the rights of foreign performers in relation to copyright.

– (2) If the performers’ country of residence is taken into account and, if there is more than one country, the country where the majority of the performers are based, it should be taken into account whether those performers are nationals of a country which recognizes their rights or whether that country has an international convention-based relationship with Mexico, or whether those performers are domiciled in any country which has such a relationship with Mexico.

In that connection, primacy should be given to the provisions of Article 8 of the Federal Copyright Law which focuses on the place of first fixation of the images of performances and, above all, on the relevant provisions of the international treaties to which Mexico has acceded and which it has approved.

In cases where the performers are nationals or residents of a country which has not signed any relevant treaty, or where the country of first fixation does not have convention-based links with Mexico either, it should be stated that those performers or their rights could not be recognized in Mexico, not only owing to a lack of reciprocity but also to the fact that, since no international convention-based relationship exists, the principle of national treatment would not apply either.

– (3) As regards the country designated by (or located in) the transmission contract, the provisions of the Federal Copyright Law and specifically those contained in Articles 7 and 8 would of course apply, together with Article 12 of the Federal Civil Code.

– (4) We do not consider that the opinion on each country where the work is exploited should be adopted.

5. *When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others), how is the substantive copyright or neighboring rights law underlying the initial ownership of the rights determined?*

- a. *with reference to the country from which the communication originates?*
- b. *or with reference to the country or countries in which the communication is received?*

The question should be considered in relation to Article 13(V) of the Federal Civil Code, i.e., it should be considered firstly that these acts are governed by the law of the place in which they are to be performed, unless the parties have designated in the contract the applicability of a different law. Since it is a case of whether the place where those acts are to

be performed in Mexico, the legislation applicable to determine the substantive copyright and/or neighboring rights would be the Federal Copyright Law.

## II. LAW APPLICABLE TO TRANSFERS OF RIGHTS

### A. Transfers by operation of law

*1. Does your country's law or case law give local effect to a transfer by operation of a foreign country's law?*

Response: The transmission of rights generated in a foreign country, which is to take effect on Mexican territory, will be envisaged subject to the provisions of Article 13 of the Federal Civil Code.

In the cases of expropriation, bankruptcy, divorce – community property – intestacy, or other type of acquisition of rights, any person claiming to be the owner of such rights subject to any of those events, shall be accredited or acknowledged as the lawful owner of the instrument which is valid on the national territory, provided that such transfers do not contravene the provisions of Article 8 of the Federal Civil Code, which reads as follows:

“Article 8: The acts performed contrary to the spirit of the prohibitive laws or those of public interest shall be null and void, except in cases where the law states the opposite.”

In relation to this Article, Article 6 of the same Code establishes the following:

“Article 6: The will of individuals does not grant exemption from observing the law, nor may it alter or modify the law. Only the private rights which do not affect public interest directly may be waived, where such waiving does not harm a third party's rights.”

These two provisions relate directly to Article 2 of the Federal Copyright Law, the first paragraph of which states:

“Article 2: The provisions of this Law are of *ordre public*, social interest and to be generally observed throughout national territory. Its administrative application is the responsibility of the Federal Executive Authority through the National Copyright Institute and, in the cases provided for by this Law, the Mexican Industrial Property Institute...”

B. Transfers effected by contract

1. *When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others); is the substantive copyright or neighboring rights law underlying the grant determined:*

- a. *with reference to the country from which the communication originates?*
- b. *or with reference to the country or countries in which the communication is received?*

Response: Neither the Federal Copyright Law nor the Regulations thereunder refer specifically to this aspect. In this case, the terms of the agreement reached by the parties apply and that agreement shall be implemented throughout the national territory, in accordance with domestic legislation as per Article 13 of the Federal Civil Code.

2. *What law governs issues going to the scope and extent of a transfer:*

Response: In the first instance, it is the agreement of wills which applies. Secondly, the principle of *lex fori* applies, in accordance with the provisions of the Federal Copyright Law and Federal Civil Code mentioned.

3. *What law governs issues going to the validity of the form of a transfer:*

Response: The Federal Copyright Law which requires that any transfer of rights shall be in writing.

C. The Role of Mandatory Rules and *Ordre Public*

1. *Do mandatory rules (lois de police) automatically apply local law to local exploitations made under a foreign contract?*

Response: Yes.

2. *Describe the instances in which mandatory rules apply to transfers of rights by audiovisual performers.*

Response: Fundamentally, the provisions of Article 121 of the Federal Copyright Law, and Articles 34 and 35 of the Regulations under that Law.

3. *Do local courts, having initially identified the applicability of the law of the foreign contract, nonetheless apply local law on grounds of public policy/ordre public?*

The response is contained in Articles 13 and 14 of the Federal Civil Code.

4. *Describe the instances in which the ordre public exception applies to invalidate transfers of rights by audiovisual performers.*

Response: Where the provisions of Article 121 of the Federal Copyright Law have been infringed, or where the remuneration for a performer has not been agreed in accordance with Article 117bis of the Federal Copyright Law, and Articles 34 and 35 of the Regulations under that Law.

The provisions of Article 8 of the Federal civil Code are also applicable to such cases.

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