

Private Copying as Seen from Mexico

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I. The situation in Mexico

In Mexico, the Federal Law on Copyright (*Ley Federal del Derecho de Autor; LFDA*) of December 24, 1996, includes the following provisions related to private copying:

“Art.40. The holders of the author’s patrimonial rights and of related rights may demand a compensatory remuneration for the reproduction of works and objects of related rights without their authorization and without being covered under any of the limitations provided in articles 148 and 151 of this Law.”

“Art 19. – The compensatory remuneration for private reproduction shall be paid to the author; the holder of the related rights, or assignees thereof for reproduction performed under the terms of Article 40 of the Law.

Art 20. – The compensatory remuneration for private reproduction shall be collected by the authors, holders of the related rights, and assignees thereof, personally or through a society.”

Article 40 of the LFDA and Articles 19 and 20 of the Regulation for the implementation of that Law published in the official gazette (*Diario Oficial de la Federación*) on May 22, 1998, are not enough to apply the private reproduction system in our country. At the same time, the analysis of these provisions results in that Article 148(IV) establishes the possibility to reproduce only once and only one edition of a literary or artistic work, for private use of the individual making the copy, provided it is without lucrative purposes and it does not affect the normal exploitation of the works concerned. For this the authorization of the holder of rights is not needed, and no remuneration has to be paid. The only conditions are the indication of the source and the reproduction of the work without any alteration.

This provision contains the limits to the author’s patrimonial rights allowing an individual to make a copy of only one work by his/her own means and without lucrative purposes. This provision is appropriate since it corresponds to the famous three-step test provided for in Article 9(2) of the Berne Convention, the importance of which has been pointed out in multiple occasions by WIPO.

However, the provision of Article 40 seems to suggest that anybody is allowed to make a copy subject to the payment of a compensatory remuneration, and that

it is even not a condition that copy is for private use as provided for in Article 148(IV).

This is an exceptionally dangerous problem for authors and the holders of related rights, because with this kind of inappropriate regulation, the reproduction of works and objects of related rights seems to be allowed without authorization and with the payment of some remuneration about which that almost no one knows what it is. This may not be regarded a special case which is the first condition of the three-step test under Article 9(2) of the Berne Convention.

Last year, the Mexican Senate (*Camara de Senadores del Congreso de la Unión*) approved the following amendment to Article 40, during its December 30 session:

“Article 40. – The holders of author’s patrimonial rights and of related rights shall be entitled to receive a compensatory remuneration for any reproduction made without their authorization, provided that it is intended for personal and private use of the person making it, and that it is without any direct or indirect lucrative purposes, in accordance with the following provisions:

I. The payment of compensatory remuneration shall be the obligation of the manufacturer or importer of mechanical, electronic or digital devices with the capability to store, compact, duplicate or reproduce any kind of works, performances, productions and publications, as well as of the manufacturer or importer of blank material supports that are sold to the public without including any work and that may be used for reproduction in any of the devices mentioned above;

II. The distributors, wholesalers and retail sellers of reproduction devices and blank material supports described in the point above, shall make certain that the importers and manufacturers of such devices and material supports have paid the compensatory remuneration; otherwise they shall be jointly liable with them.

III. The compensatory remuneration mentioned in this article shall be applied under the following terms:

“Reproduction devices

- a) “Burners” of phonograms and the like, integrated or not in other devices: 3% on the invoiced price of the first-hand sale;
- b) Audio tape players and the like: 3% on the invoiced price of the first hand sale;
- c) Video players and the like: 3% on the invoiced price of the first hand sale;
- d) “Burners” of audiovisual works and the like, integrated or not in other devices: 3% on the invoiced price of the first hand sale;
- e) Audio and video electronic-format “compactors”(MP3, MP4, WAF, MOV and the like): 6% on the invoiced price of the first hand sale.

Blank material supports

- a) Compact discs (CD ROM, minidisc and the like): 7.5% on the invoiced price of the first hand sale;
- b) Audio tapes audiocassettes, DAT and the like: 7.5% on the invoiced price of the first hand sale;
- c) DVD and the like: 9% on the invoiced price of the first hand sale;
- d) Video tapes and the like: 9% on the invoiced price of the first hand sale.

IV. The collective management societies representing authors concerning their patrimonial rights and holders of related rights shall collect the remuneration mentioned in this article and shall assign an amount equal to 20% of the total income collected for the purposes of cultural activities.

V. The obligation to pay compensatory remuneration as provided for in this article shall not apply when the producers of phonograms or videograms introduce legally in the market material supports including mechanisms or systems that prevent third parties from making a non authorized reproduction thereof.”

However, the House of Representatives (*Camara de Diputados del Congreso de la Unión*) did not approve these provisions, because the entrepreneurs, members of the National Chamber of Information Technology Industry (*Cámara Nacional de la Industrial de la Informatica; CANIETI*), argued that, if these provisions were adopted they could become bankrupt, and that in any case this would be a fiscal tax. All this caused confusion in the public opinion through articles published in the press and statements made in the media. Finally some relevant deputies expressed opposition to the provisions adopted by the Senate. It was found that there was a need to carry out a deeper study on this issue.

With all this, the provisions of Article 40 discussed above still apply in Mexico, and evidently they obviously prejudice the rights and legitimate interests of authors and related rights holders because they extend free use beyond the limits allowed by Article 9(2) of the Berne Convention.

Therefore, there is a need to make a deeper analysis of this situation. The Mexican authors' society *Sociedad de Autores y Compositores de Música* (SACM), has started such an analysis. The society would welcome the implementation of the levy system for private reproduction, in spite of the fact that authors would receive relatively lower amounts for the exploitation of their works and would have to change their exclusive right for a compulsory license with a minimum remuneration.

II. Reflections over private copying

1. Article 9(1) of the Bern Convention provides for the authors' exclusive right to authorize the reproduction of their works in any manner or form.

2. Article 8 of the WIPO Copyright Treaty of December 20, 1996, establishes

the authors' exclusive rights to authorize any communication to the public of their works by wire or by wireless means, including the making available to the public of their works, in such a way that the members of the public may have to access to the works from the place and the time individually chosen by them.

3. On the basis of these provisions it is evident that the authors have the rights to authorize the reproduction and the communication to the public of their works. These rights are also acknowledged in the legislation of the countries that are party to the Berne Convention and the WIPO Copyright Treaty.

4. Article 9(2) of the Berne Convention establishes the authority of the legislation of countries of the Berne Union to permit reproduction of works (1) in certain special cases, (2) if this does not conflict with a normal exploitation of the works; and (3), furthermore, if it does not cause any unreasonable prejudice to the legitimate interests of the authors.

5. The legislation of the various countries provide for exceptions and limitations taking into account the famous three-step test provided in this provision of the Berne Convention.

6. The problem caused by private copying is that evidently, in most of the cases, it is not regulated appropriately in harmony with the above-mentioned provisions of the Berne Convention; since with the new technologies anybody in any part of the world is able to download a work from the Internet without with the authors' authorization and, of course, without the payment of any remuneration, causing with this to him an obvious prejudice.

7. The mass reproduction of works by the new technologies conflict with the normal exploitation of works, since those who make copies in this way do not buy legitimate copies, and this evidently causes an unreasonable prejudice to the legitimate interests of authors.

8. Those who copy a work from the Internet are transgressing the authors' reproduction and/or communication to the public rights, and, therefore, and thus under the majority of such legislation, the persons involved commit a criminal act to be pursued as part of combating piracy.

9. For the above reasons, it is necessary to analyze if it is possible that the countries' legislation limit, by an indirect compulsory license, the exclusive right of authors to authorize the reproduction of their works when free private reproduction does not correspond to the famous three-step test under Article 9(2) of the Berne Convention.

The various sectors are in agreement that there is need that the Congress analyze again this subject matter in order to have a proper system for private reproduction in Mexico.