# Copyright vs. Author's Right (*Droit D'auteur*) with Regard to Audiovisual Works

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IN THIS paper, I will be focussing on my subject from two points of view: first, how the question presents itself in Latin American countries and, second, its impact on the compensation that authors receive for the exploitation of audiovisual works.

To begin with, I would like to point out that because of the differences between the Anglo-American legal conception of Copyright and that of the continental European or Civil Law tradition with respect to author's right, the two terms are not completely equivalent, even though there has been a process of gradual *rapprochement* between the two standpoints as national legislations tend to be brought into line with one another. This has been a consequence, first, of the Berne Convention (in which the continental conception prevails), and more recently, of the efforts that are being made within the European Union to achieve legal harmonization.

The Anglo-American copyright system prevails in countries that follow the Common Law (such as the United Kingdom, the Commonwealth countries, the United States, etc.) and it regulates the activity of exploitation of works.

The legal conception of author's right in the continental European tradition is essentially individualistic; broadly speaking it was followed also by the Latin American countries –and by numerous countries in Africa and Eastern Europe–. It considers the author's right to be a personal and inalienable right of the physical person of the author to control the use of works of his creation; it is only exceptionally admitted that the original ownership can be vested in other persons, e.g., in collective works –unless otherwise agreed.

In isolated cases a presumption of transfer is established –unless otherwise agreed– with respect to the exploitation rights of the works, although limited in the manner provided by the law. In general, there are

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very few situations in which the author has sufficient negotiating power for claiming rights which, in principle, are established by the law, not in his favour, but to the advantage of the producer, commission agent, employer, and so on.

In countries where the Anglo-American system prevails, in the case of authors who create works by virtue of a contractual labour relationship, or in the case of a commission work or in cases where authors create such works for audiovisual productions, the employer, commission agent or producer is considered to be the original owner of the copyright –although only with respect to the works created under such contracts– through the attribution of original ownership established in the law, by transfer mandated by law, or through a legal presumption of transfer, unless otherwise stipulated.

According to section 101 of the Copyright Law of the United States of America, 'works made for hire' are considered to be: (1) works prepared by an employee within the scope of his or her employment; or (2) works especially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work (defined and exemplified in the last part of the same paragraph), as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered as 'a work made for hire'. And according to paragraph (a) of section 201, copyright in a protected work is vested initially in the author or authors of the work; but it is next established –in paragraph (b)– that in the case of a 'work made for hire', the employer or another person for whom the work was prepared is considered the author for the purposes of ownership of copyright and, unless the parties have expressly agreed otherwise in a written instrument signed by them, *owns all of the rights comprised in the copyright.*

A remarkable difference with the continental European tradition may be seen in the attribution of authorship to natural or juridical persons performing activities concerning the industrial exploitation of works (in the United Kingdom, according to section 9(2) of the Copyright, Designs and Patents Act, 1988: producers of sound recordings and films, broadcasting organizations, cable programme distributors and publishers) to which Prof. Cornish refers as *the entrepreneurial copyright.*[1]

In spite of the foregoing, both legal systems recognise a principle which constitutes the characteristic of copyright: the author enjoys, on an exclusive basis, the right of undertaking himself –or authorising third parties to undertake– the economic exploitation of the work. This allows him to determine the conditions governing the use of the work and to obtain an

1. Cornish, W. R., *Intellectual Property*, 275 (London, Sweet & Maxwell, 2nd Ed., 1989).

economic reward.

All Latin American countries have laws concerning the rights of authors and most of them have also constitutional clauses which explicitly recognise the rights of authors in their works.

Many of these laws were passed during the first half of the last century and -generally- their main sources were the Spanish law of 1879 (replaced only in 1987), the Italian Royal Decree of 1925 and the Berne Convention, although the movement of Latin American countries joining the Berne Union only began in 1967[2] with the accession thereto of Argentina, Mexico and Uruguay in that same year.

Some laws passed during the first half of the last century, i.e., before 1950, have not yet been replaced, for example, those of Argentina and Uruguay.

During the fifties and sixties, in Guatemala, Mexico, Peru and Venezuela new laws were passed, the source of which was also the Berne Convention, although the latter two, i.e., Peru and Venezuela, were strongly influenced by the French Law of March 11, 1957.

In the following twenty years, i.e., –the seventies and eighties– there was important legislative progress in the region, which resulted in the enactment of new laws in several countries. Those, obviously, added to the principles of the Berne Convention and also special regulations on neighbouring rights were issued by means of rules which basically follow those of the Rome Convention.

But in the last decade, new laws were adopted in eleven Latin American countries: in 1992 in Bolivia, in 1993 in El Salvador and Honduras, in 1994 in Panama, in 1996 in Peru and Mexico, in 1998 in Brazil, Guatemala and Ecuador, in 1999 in Nicaragua and in 2000 in Dominican Republic.

Aditionally, in Venezuela, in 1993, such a broad revision of the law was passed, that practically it was equivalent to the adoption of a new law.

In other countries, like Argentina, Chile, Colombia, Costa Rica and Cuba, partial reforms of different importance were adopted aiming to update some aspects, more or less far-reaching, particularly referring to the protection of neighbouring rights, to the collective management of author's rights and neighbouring rights, to the State's tutelage function, to the explicit mention as protected works of computer programmes and data bases, to the scope of criminal offences related to piracy, especially phonogram piracy, to the extension of the term of protection and other specific aspects.

In these countries and in others whose legislation was passed prior to the present decade, like Argentina and Uruguay, amendments have been

2. With the only exceptions of Haiti (in 1886) and Brazil (in 1922).

planned including the necessary modifications in order to comply with some aspects of the Berne Convention and the WIPO 'Internet Treaties'.

As mentioned above, the national legislations of Latin American countries, broadly speaking, traditionally follow the European Continental concept. But in the reforms passed during the last decade, it is possible to notice the increasing influence of the Copyright system, particularly in the widening of the *'iuris tantum'* legal presumptions of assignment, –i.e., those that admit proof to the contrary– and in the entitlement by law of exploitation rights of certain categories of works in favour of third parties.

It is well-known that the European Continental legislations have these *'iuris tantum'* legal presumptions of assignment, particularly in favour of the producer of a film and his right to exhibit it in movie theatres and the granting of original ownership in favour of persons other than the author, as in collective works -unless expressly agreed otherwise. We could also find these presumptions in Latin American legislation, jointly with others, but always in restricted cases. For example, in the Colombian law we find some other presumptions: in certain circumstances in favour of the commission agent (Article 20) and of the purchaser of a negative of a photographic work (Article 186).

But since the reform of the Venezuelan law in 1993, besides the entitlements given by law or the legal presumptions that can be called 'traditional', i.e., -with respect to collective and cinematographic works- nowadays the legal presumption reaches 'audiovisual works' in general[3], a broader concept than that of 'cinematographic works', because it covers not only the latter ones but also television works whose authors -at least in Latin American countries- stipulate their contracts concerning earnings considering a restricted territorial and temporal dissemination.

In Venezuelan law, such presumption of assignment, as well as the one established in favour of software producers, is extended without limitation and for the entire duration thereof, to the exclusive right to exploit the audiovisual work, to exercise the exclusive rights of translation, adaptations, adjustments and any other transformations; to prevent the use of the title to identify another work of the same genre; to decide about the dissemination of the work and to exercise on his own behalf the moral rights over these

3. Venezuela (1993), Art. 15: 'It shall be presumed, unless expressly agreed otherwise, that the authors of the audiovisual work have assigned to the producer, without limitation and for the entire duration thereof, the exclusive right to exploit the audiovisual work, as defined in Article 23 and contained in Part II, including their consent to his exercise of the rights referred to in Articles 21 and 24 of this Law, and also to his right to decide on disclosure.
Without prejudice to the rights of the authors, the producer may, unless otherwise provided, exercise in his own name the moral rights in the audiovisual work to the extent for the exploitation thereof.'

works, as far as necessary for its exploitation.

In Article 16, the presumption of transfer set forth in favour of audiovisual work producers is explicitly extended, in an unlimited form and for the whole protection term, to the exclusive right of exploiting the broadcast works, understood as the creation especially produced to be broadcast through radio or television[4].

Also, in Article 17, a similar legal presumption in favour of software producers is established, i.e., giving them, in an unlimited form and for the whole protection term, the exclusive right of exploitation of the computer programmes, with the same additional rights as established for audiovisual and broadcast works[5].

Finally, in Article 59, the same legal presumption is established for works created under working relations or commissioned, in favour of the employer or the commission agent, in an unlimited form and for the whole protection term, giving them the exclusive right of exploitation which is extended to the authorisation to disseminate them, as well as to exercise the exclusive rights of translation, adaptations, adjustments and any other transformations, to prevent the use of the title to identify another work of the same genre, to grant them permission to decide on the dissemination of the work and to exercise on his own behalf the moral rights on it, as necessary for its exploitation. There is only one exception: the legal assignment shall not be effected by implication in the case of lectures or

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4. Venezuela (1993), Art. 16: 'Broadcast work shall be understood to mean the creation produced specifically for transmission by radio or television, without prejudice to the rights of the authors of the pre-existing works.
Authorship of a broadcast work shall belong to the natural person or persons who bring about the intellectual creation of the said work.
It shall be presumed, unless expressly agreed otherwise, that the authors of the broadcast work have assigned to the producer, without limitation and for the entire duration thereof, the exclusive right to exploit the broadcast work, as defined in Article 2 and contained in Part II, including their consent to his exercise of the rights referred to in Articles 21 and 24 of this Law, and also to his right to decide on the disclosure of the work.
Without prejudice to the rights of the authors, the producer of the broadcast work may, unless otherwise provided, exercise the moral rights in the work to the extent necessary for the exploitation thereof.
The provisions on audiovisual works shall be applicable, *mutatis mutandis*, to broadcast works.'

5. Venezuela (1993), Art. 17: '[...] It shall be presumed, unless expressly agreed otherwise, that the authors of the computer program have assigned to the producer, without limitation and for the entire duration thereof, the exclusive right to exploit the work, as defined in Article 23 and contained in Part II, including their consent to his exercise of the rights referred to in Articles 21 and 24 of this Law, and also his right to decide on the disclosure thereof, and given him permission to exercise the moral rights in the work to the extent necessary for the exploitation thereof.'

lessons given by professors in universities, schools or any other educational institution[6].

Article 59, as well as the other above mentioned legal dispositions of Venezuelan law, strongly recalls sections 101 and 201 (b) of the Copyright Law of the United States of America concerning the 'works made for hire'.

The legal presumption in favour of a commission agent of works made for hire and of the employer, is also found, in the same form and with a more or less faded wording, in Article 16(2) of the Peruvian law, as well as in other three of the recently passed laws: Article 16 of Equatorian law, Article 75 of the Guatemalan law and Article 14(2) of the Paraguayan law.

And though the former Guatemalan law of 1954 also contained the legal assignment of economic rights on works prepared by an employee or especially ordered or commissioned by a publisher for their use as contribution to a dictionary or an encyclopaedia or by film producers as parts of a motion picture, it was not extended, as in the current law, *to all* works especially ordered or commissioned. Furthermore, in the former Equatorian law of 1976, the authors of works especially ordered or commissioned, or resulting from a working contract had, at least, the non-waivable right to a share of its public use.

In the laws of El Salvador, Honduras, Panama and the Dominican Republic, the legal presumptions of assignment are established in favour of audiovisual works and software producers. In Bolivia, the legal presumption appears only in relation to cinematographic works, and in Brazil and Mexico in relation to audiovisual works and only as far as the economic rights are concerned –in Mexico it is explicitly stated that 'broadcast works' are included (Article 99). In Nicaraguan Law it is established that, in any event, the authors of the audiovisual work and his or her successors will be entitled to compensation rights, non-waivable and non-assignable '*inter vivos*', for each of the manners of exploitation that they have contractually assigned to the producer (Article 77). The Nicaraguan Law also provides that the producer is bound to present to the authors, at least once every six months,

6. Venezuela (1993), Art. 59: 'It shall be presumed, unless expressly agreed otherwise, that the authors of works created in the course of employment relations or on commission have assigned to the employer or commissioning party, as the case may be, without limitation and for the entire duration thereof, the exclusive right to exploit them as defined in Article 23 and contained in Part II of this Law.
The delivery of the work to the employer or commissioning party, as the case may be, shall imply consent to the disclosure thereof by the latter, to the exercise by him of the rights referred to in Articles 21 and 24 of this Law and also to his defence of the moral rights in the work to the extent necessary for the exploitation of the work.
The assignment referred to in this Article shall not be effected by implication in the case of lectures or courses given by the teaching staff at universities, secondary schools and other educational establishments.'

a detail of the revenues arising out of the exploitation of the work, and that he will make available all the documents which allow to determine the accuracy of the accounts, in particular, the contracts under which he has assigned to third parties all or part of the rights to which he is entitled (Article 78).

However, the laws of the Latin American countries containing the broader legal presumptions of assignment, state that the qualification of author corresponds to the natural person who creates the work and they establish general principles in relation to the ownership and exploitation contracts, which are very favourable to the authors. They also include broad and precise regulations on moral rights.

This can be seen as a contradiction, but I think that it is actually intentional. At the same time that the principles of great doctrinal value in the European Continental concept are being established, an undermining of the rights of authors takes place in areas that currently are economically the most relevant ones, like movies, television works, computer programmes and, additionally, works made for hire for a commission agent and those resulting from a working contract.

As things are evolving, it is probable that these regulations will continue to appear in legal reforms of other countries in the region, especially those in which there is no important development and enforcement of the rights of authors. And even in those few Latin American countries where copyright –or more precisely author's right– is most developed, strong lobbying is nonetheless taking place.

The different titles by which the transfer of the economic rights '*inter vivos*' and their respective effects may occur are the touchstone of the extent to which a legal system of author's right complies with its basic purpose of protecting the creator of the work.

In the legal amendments that are being carried out in order to be updated and adapted to the Berne Convention, the WCT, and especially the TRIPS Agreement rules and provisions that are very similar to those established in the United States Law about 'works made for hire' and other derogations of the authors exploitation rights -and even of their moral rights, are being incorporated in the most important economic areas.

As João Correa has pointed out, although recently, the United States copyright law has been moving closer to the author's right system, the two concepts continue to be fundamentally different in the audiovisual field

7. Correa, JOÃO, as General Secretary of AIDAA (International Association of Audiovisual Writers and Directors) and FERA (European Federation of Audiovisual Film Makers), "The Universal Declaration of Human Rights and moral and economic rights relating to audiovisual works", 3 *Copyright Bulletin* 10 (Paris, UNESCO, 1998).

because of the status of 'works made for hire', whereby the author is working for an employer; the producer is the original owner in the copyright, and is regarded as the author, while the director and the scriptwriter are simple employees of the producer and their rights are covered by the Labour Act and not by the Copyright Act. They are protected by the trade unions for wage-earners, the American guilds.[8]

The rights of scriptwriters of audiovisual works in Latin American countries are not protected by the Labour Act and scriptwriters do not have, like their colleagues of the United States, trade unions for wage-earners such as the Writers Guild of America –East and West– and a 'Theatrical and Television Basic Agreement' with a Schedule of Minimums that provides not only theatrical and television compensation fees but also television compensation rerun rates since the 1st rerun to the 13th rerun and each rerun thereafter[9]. In some Latin American countries, authors only have legal provisions that follow paragraph (b) of section 201, and this rule, isolated in Copyright laws, undermines the rights of authors of audiovisual works as well as the rights of authors in other areas of major economic importance against an economic and social background quite different from the one existing in the United States.

Both, the copyright system and the author's right system are able to protect authors' rights, but –as Correa pointed out– they are governed by completely different legal traditions and they have different effects on the relationship between authors, producers and distributors, in the amount of authors' fees and on the way in which these fees are managed and collected.[10]

As a consequence of the obligations to which States parties have become bound under the international agreements, the Latin American countries must amend their legislations to adapt them, and some sectors are taking advantage of those amendments in order to increase the influence of the copyright system by means of legal presumptions of assignment, unless expressly agreed otherwise. However, the authors in Latin American countries are not in a negotiating position strong enough so as to be able to change those express legal presumptions in their individual contracts with the companies. It is well known that, in general, the possibility to agree upon better conditions than those set forth in the law is for the author, more theoretical than practical.

João Correa said that it is impossible for European film producers to base themselves on the American model –because domestic markets do not enable them to reach the 'critical mass' required to produce large-budget

8. See, *Schedule of Minimums*, Writers Guild of America 1998. Theatrical and Television Basic Agreement, May 2, 1998.
9. *Supra* note 8, at 10.

films in the American sense of the term. They do not have access to the American market, which deprives them of the possibility of making a 'pay its way' film, as their American counterparts can, and their financial capacity does not enable them to compete with the 'majors', even in their own country[11]. By the same reasons, it is not fair to deprive the scriptwriters and other authors of the Latin American countries of the right to participate in the economic success of their works, by means of following an isolated rule of the United States Copyright law, the 'works made for hire' rule stated in paragraph (b) of Section 201.

10. *Supra* note 8.