

## NEW MEXICAN COPYRIGHT LAW

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*SUMMARY: A) COPYRIGHT NATIONAL INSTITUTE; B) PERSONS WHO HOLDS THE RIGHT; C) SUBJECT MATTER TO BE PROTECTED; D) MORAL AND ECONOMIC RIGHTS; E). COPYRIGHT AGREEMENTS; F) THE PROTECTION OF COMPUTER PROGRAMS AND DATA BASIS; G) DATA BASIS; H). NEIGHBORING RIGHTS; I) JOINT ADMINISTRATION PARTNERSHIPS; J) THE COPYRIGHT ABSENCE OF PENALTIES*

On December 1996, the Congress of the United Mexican States approved a new Copyright Law (FCRL) <sup>1</sup>. Said law repealed the 1956 Copyright Law <sup>2</sup> and its amendments as well. The FCRL entered into full force and effect on march 24 1997. Among the reasons urging the promulgation of this new law, was the accomplishment of Mexico of the commitments acquire due to the entry into force of the Free Trade Agreement <sup>3</sup>, concretely the provisions set forth in Chapter XVII concerning Intellectual Property. In view of the foregoing, as to industrial property refers, the Industrial Property Law was amended <sup>4</sup>, thus it was necessary to check over and adjust the copyright legislation, in accordance with the requirements of the new technologies and the international commitments acquired as well.

The regulations of the FCRL, were published on the official gazette on May 22, 1998 and became effective on the next day of its

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<sup>1</sup> Published in the Official Gazette on December 24,1996. It became effective on March 24,1997.

<sup>2</sup> The 1956 Federal Copyright Law, was last amended on December 22, 1993, complying with some provions setforth by the North American Free Trade Agreement.

<sup>3</sup> The Free Trade Agreement was published on the Official Gazette on December 20, 1993 and become effective on January 1st. 1994.

<sup>4</sup> The Law on the Promotion and Fostering of Industrial Property was published on the Official Gazette on June 27, 1991. This Law was amended on August 2, 1994. The Law change its name to the Industial Property Law.

publication.

The FCRL contemplates amendments aiming at the exact determination and strengthening of moral and economic rights in favor of the author, nevertheless the transmission of economic rights is limited in time, as we will afterwards in this essay. The FCRL recognizes the neighboring and related rights and organisms which were not provided in the repealed law, such as the creation of the Copyright National Institute (CRNI), the express regulation of several agreements, such as the Literary Work , Musical Piece of Work and Dramatic Work Edition Agreements, Broadcasting, Audiovisual and Advertising Production agreements as well and agreements aimed at the safeguarding of Photographic, Plastic and Graphic, Cinematographic and Audio Visual works, Computer Programs and Data Basis as well. Regarding neighboring rights, it defines widely the artists, whether interpreters or performers and contain provisions relative to the Book Editors, Phonograms and Videograms producers, and the Broadcasting organisms as well. The FCRL contains provisions on the Patriotic Symbols and on Popular Culture Expressions. A Chapter focuses to the regulation of «Reservation of Legal Rights for Exclusive Use», whereby its nullity, cancellation and expiration are provided as means of concluding their legal effects. The regulation of the above mentioned figure and the structure of the nullity, cancellation and expiration proceedings is based upon the provisions of the Industrial Property Law.

The FCRL regulates the Joint Administration Partnerships, which in the previous law were called Authors' Partnerships. The most important goal of such partnerships, is to protect to the authors and holders of neighboring rights, whether nationals or foreigners, and to collect and give them the amounts that on account of copyrights or neighboring rights accrued in their favor. <sup>5</sup>

The FCRL contains four kinds of procedures: 1) before judicial authorities; 2) a settlement procedure; 3) Arbitration and 4) Administrative

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<sup>5</sup> Article 192.

Procedure as to Copyright Infringements. Before judicial authorities civil actions on copyright and neighboring rights will be brought into. They shall be filed and resolve before Federal Courts been complementary the Federal Code on Civil Procedures. The Federal Courts shall acknowledge the penalties on copyright, set forth in the Criminal Code for the Federal District applied on general jurisdiction matters, and for the Mexican Republic as to federal jurisdiction matters <sup>6</sup>. The second procedure contained in the FCRL is the Settlement Procedure, already provided for in the repealed law. In view of the foregoing, the individuals affected in any of the rights safeguarded by the Law, may choose either to exercise the respective judicial actions or to submit to the settlement procedure, consisting in an administrative procedure before the CRNI, which will invite the interested parties in order to reach a settlement in the respective matter.

The FCRL provides for an arbitration proceeding, which rules will be established by the Law, its regulating provisions and those of the Commerce Code which will be of a complementary nature. The interested parties may submit to said procedure through an arbitration clause or through an agreement whereby a dispute is submitted to arbitration. The requirements set forth in the Law in order to be appointed as an arbitrator are the following: be an Attorney at Law; enjoy of recognized prestige and honorability; not offering during the last five years his services to a joint administration partnership; not acting as a lead counselor of any of the parties; not been condemned on account of an intentional crime or felony; not been a consanguineous or kinship relative in the fourth degree of any of the parties, or of the chief executive managers in the case of a corporation, and not been a public servant.

The maximum term for the arbitration will be of 60 days, calculated from the following day to the date established in the document

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<sup>6</sup> The amendments to the Criminal Code for the Federal District applied on general jurisdiction matters, and for the Mexican Republic as to federal jurisdiction matters, were published in the Official Gazette on December 24 1996 and May 19,1997.

containing the arbitrators appointment. The award of the arbitrators group shall be pronounced in writing, be definitive, unappealable and binding upon the parties, be well founded and motivated, and have the character of *res judicata* and shall grant the right to execute on property by means of a summary proceeding. Within five days following the award notification, any of the parties may require from the group of arbitrators, serving notice in writing to the Institute and to the counterpart, the lighting up of its final points, the amendment of any calculation, printing or any other of a similar nature, provided its interpretation is not modified. The expenses accruing on account of the arbitrage procedure shall be charge to each party. The Institute will publish on January of each year a list of the persons authorized to act as arbitrators.

The administrative procedures are divided in two. One relative to the copyright infringements and the other under the title of commercial infringements <sup>7</sup>.

Regarding the former, the copyright actions will be penalized by the CRNI, pursuant to the provisions set forth in the Federal Law on Administrative Procedures, been the maximum penalty 15,000 days of minimum wage.

Concerning the acts of commerce the violations set forth herein shall be penalized by the Mexican Institute of Industrial Property. The Mexican Institute on Industrial Property shall penalize the acts of commerce infringements pursuant to the procedure and formalities set forth in Sections Sixth and Seventh of the Industrial Property Law.

The Mexican Institute on industrial Property (MIIP) may adopt the preventive measures set forth in the Industrial Property Law. Accordingly, the Mexican Institute on Industrial Property, shall have

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<sup>7</sup> Article 29 sets forth the infringements committed in the Copyright field and article 231 sets forth the infringements committed in the Commercial field.

the powers to carry out inquiries; order and practice inspections; and require information as well. However, it will be necessary to amend the regulations of the MIIP and its by laws as well, in order to empower it to carry out the inquiries, order and execute the examination visits and require information. Pursuant to the FCRL, the MIIP may issue a resolution stopping in the border the free circulation of merchandises coming from abroad, in the terms set forth in the Customs Law <sup>8</sup>.

The promulgation of the FCRL, and the amendments to the Criminal Code as well in this regard, has awakened the concern of the studios and of the interested sectors as well, since some of its amendments succeed and others do not. It happens to raise a lot of questions the fact that copyright issues are submitted to the commercial field, when the legal nature of this field is oriented basically towards the personality rights and thus when the provisions set forth in this law are supplementary to the commercial law, the core points of the former losses strength. Much the same, the fact that the transmission of economic rights is limited in time to 15 years and only in exceptional cases may exceed this term, when the nature of the work or the dimension of the investment require so justifies it.

The above happens to be serious, since in the absence of an express provision, any transmission of economic rights shall be considered to last in a term of 5 years. Likewise, it has created a lot of concern the fact that some conducts that in the repealed law were typified as crimes will unravel, since the Law in full force and effect considers them as administrative crimes, thus it is not fortunate that under the title «Act of Commerce Infringements», the violation of such rights is attempted to be stopped, empowering other administrative authority the enforcement of a law strange to its nature and competency.

Only time and the interpretation of the provisions by the administrative authorities and the judicial power, as well as the activity of

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<sup>8</sup> Article 235. The Customs Law was published in the Official Gazette on December 15 1995. Article 148 of it agrees with the provision set forth in article 1718 of the North American Free Trade Agreement, as to the measures to be taken in the border.

legal counselors will tell the fortunate or unfortunate aspects of this new law. Consequently, based on our experience, we will focus on those aspects of mounting importance, either in the new Law and its Regulation or in the Criminal Code, aimed at the protection and safeguarding of copyrights.

## **A) COPYRIGHT NATIONAL INSTITUTE**

Pursuant to the FCRL the CRNI is created. The CRNI, is an administrative authority on copyright and neighboring rights, desconcentrated from the Public Education Ministry. The above means, according to the Mexican law, that the CRNI has financial autonomy and this will allow to carry out its functions independently. We believe that the creation of the CRNI was based on the experience on the creation of the Industrial Property Mexican Institute (IPMI), which since its creation has as a goal to create an independent authority that could maintain itself economically and financially. The functions of the CRNI are those which traditionally carried out the Copyright General Direction, consisting in the safeguarding and promotion of copyrights; the promotion of literary and artistic works; the operation of the Copyright Public Registry; to bring up to date its estate, and to foster the international cooperation and the exchange with institutions in charge of the filing and safeguarding of copyrights and neighboring rights. However, authority not contained in the previous Law, are set forth in the new Law, such as carry out inquiries with respect to presumed administrative violations; require the competent authorities the exercise of examination visits; order and execute provisional acts in order to prevent or finish copyrights and neighboring rights infringements; to impose administrative penalties in agreement with the law, and the others provided herein, its regulations and other applicable provisions.

As a result of the creation of said Institute, the financial and material resources apportioned to the Copyright General Direction, that was the competent authority of the Ministry of Education, will be apportioned to the CRNI aiming at its efficiency.

## **B) PERSONS WHO HOLDS THE RIGHT**

An author is an individual which has created a literary and artistic work. The foregoing obeys to an old copyright tradition considering the individual not the corporation as the author of the work. Provided the work is the result of a joint authorship, the rights granted herein, shall belong to all the authors on an equal basis, except the existence of an agreement the terms of which differ from those set forth herein or the authorship of each is clearly shown.

According to the Regulation, the name of all the coauthors shall be mentioned, even though just the majority of them use or exploit the work.

As. to the exercise of the rights set forth herein, it is required the agreement of the majority, been binding upon each of the authors said agreement. The minority is not compel to contribute to the expenses generated, but on account of the benefits obtained, as the case may be.

When the majority uses or commercially exploits the work, shall take off totally from the corresponding receipt the amount of the expenses entered into and shall hand to the minority the corresponding profit-sharing.

Each of the authors, based on their contribution to the work, may freely exercise the rights referred to herein, as long as their respective contribution is clearly identify.

Unless otherwise agreed upon, each of the joint authors may require the filing of the complete work, point that constitutes a novelty with respect to the prior Law. On the foregoing it is worth mentioning that as well as the prior Law the FCRL, sets forth that the filings in the registry establish the presumption of been true the facts and the acts contained therein, except as otherwise provided. Any filing leaves saved the rights of third parties that may be affected from the work appropriation. The FCRL sets forth the figure of the «remunerated contribution» and provides that unless otherwise provided the individual

or corporation giving a commission aiming at the production of a work or produces it with the remunerated contribution Of third parties, will have the right over this sort of creations to the ownership of the economic rights on it and the powers related with the disclosure, integrity of the work and the collection as well. The person participating in the carrying out of the work, will be entitle to the right that his name be mentioned, regarding the part or parts where he has participated, as its author, artist, performer. The person who, prior remuneration, participated in the making of the work, will be entitle to be recognized as the author of the part or parts where he has participated.

Contrary to the repealed law, the new Law provides for the works resulting from a labor relation established through an individual employment contract. In accordance with the FCRL this agreement shall be evident in writing, in the absence of an agreement to the contrary, it will be assume that the economic rights are divided on an equal basis between the employer and the employee. It is provided as well that the employer may disclose the work without the employee's authorization, but not to the contrary. If an individual employment contract in writing is lacking, the economic rights shall belong to the employee <sup>9</sup>. Much the same the Law establishes that the foreigners, authors or copyright holders of rights and their assignees shall enjoy the same rights as those of the nationals, in the terms set forth herein and in international copyright and neighboring rights treaties executed and approved by Mexico as well <sup>10</sup>.

### **C) SUBJECT MATTER TO BE PROTECTED**

The FCRL defines the protected works as those which are original opened to be disclosed or reproduced in any manner whatsoever, and

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<sup>9</sup> Article 84.

<sup>10</sup> Mexico is a member, among others, of the Berne Convention, the Universal Copyright Convention, the Rome Convention, the Agreement for the Protection of Phonogram Producers, Trade Related Issues of Intellectual Property Rights (TRIPS), and the North American Free Trade Agreement.

classifies them as follows: According to his author: Known, Anonymous, and Pseudonym. According to their disclosure: Disclosed, Unpublished and Disclosed. According to their source: Original Works and Derivative Works. According to the individuals that step in: Individual and Joint authors, and Collective ones. The Law defines each of them and their protection granted by the Law is given to the works from the time they have been fixed on a material support, despite the merit, destination or way of expression. The FCRL defines the fixation as the incorporation of ideas, numbers, signs, sounds, images and such other elements been used to express the work, or the digital expression of them, that in any form or material support, including electronics, allows its perception, reproduction or other way of communication. Regarding the works subject matter of protection of the Law (Article 13), the scheme of the previous Law is followed and follows the classification set forth in Article 2-1 of the Berne Convention. Works such as dramatic, cartoons and comics, arts that include graphic or textile design; compilation works, integrated by a collection of works, such as encyclopedias, anthologies and works or other elements as data basis, provided that such collections, due to their selection or its content's or subject's arrangement, constitute an intellectual creation. The FCRL sets forth those works which are not subject matter of protection, pointing out those which were not provided in the previous Law such as the letters, digits or isolated colors, unless its stylization is such that they are turned into original drawings; the names and titles or isolated phrases simple blank formats or formulates to be filled with any kind Of information, as well as their corresponding instructives; reproductions or copies, without authorization, of shields, flags or emblems of any country, state, city council or similar political division, neither the denominations, acronyms, symbols or emblems of international governmental agencies, or of any other agency officially recognized, and the literal designation of them.

The work may fall in the peoples knowledge through its disclosure, publication, public communication, performance or public representation, public distribution, reprography. Each of this figures is defined by the Law, however it is still a question if there are still existing

other means of putting in the public knowledge a work which is not contained by the Law, or it is not recognized as a lawful way to place a work in the public knowledge, since the list just in the way it is put forward could be construed in a limitative but not enunciative way.

## **D) MORAL AND ECONOMIC RIGHTS**

Moral rights keep the same features of the previous Law, that is they are considered to be tied together to the author, thus it is not able to be transfer, not subject to prescription, not able to be waived and not attachable. According to this right, pursuant to the Traditional Doctrine, the recognition of this right in favor of the author to determine if his work has to be disclosed and the way to disclose it, or to keep it unpublished; To demand respect towards his work, opposing to any deformation, mutilation or other modification to it, and to any action or threat having as a result its demerit or damaging the author's reputation as well; modify their work; withdraw their work out of commerce, and to oppose in the event that a work is attributed to him notwithstanding he is not the creator. Unless otherwise provided among the coauthors, the director or author of the work, has the exercise of the moral rights on the audio-visual work as a whole, regardless of those corresponding to the other coauthors regarding their respective participations. The FCRL recognizes in favor of the author, the economic rights and it is define as the legal owner of it the author, his heir or the acquire in good faith is the holder of the economic right. Thus, he has the authority to authorize or prohibit the material reproduction, publication, edition or fixation of a work in copies or models, carried out by any means either printed, phonographic, graphic, plastic, audio-visual, electronic or the like, provided they are done based on a profit. The author or holder of this rights, has the power to authorize or prohibit the public communication in addition to the traditional ways such as the representation and public exhibition by any means or proceeding, in the case of literary and artistic works.

Being the outcome not quite good, the Regulation defined what must be understood as direct and indirect profit, concretely with regard to the latter, since it is quite unclear.

As direct profit it is understood to be done, the activity having as a purpose the obtainment of an economic benefit as an immediate consequence of the use and exploitation of copyrights, related rights or reservation of rights, the use of an individual's image or carrying out any act whatsoever allowing access to any system aiming at the output of the electronic parts protecting a computer program.

*Its use shall be considered as done based on indirect profit when its outcome is an advantage or additional appeal to the activity performed by the agent in the industrial, commercial or services premises as the case may be.*

Whether or not unexpected profit has been obtained, shall not be deemed considered as a condition for the grading of a conduct or activity.

*The author or holder may prohibit the public access to the above mentioned through telecommunications; the public broadcasting or radio broadcasting of his works, regardless of the type, including the broadcasting or re-broadcasting of the works by cable; optic fiber; microwaves; satellite, or any similar way whatsoever, figures not contemplated in the previous Law, The distribution of the work, including its sale or other ways to transfer the property of the material supports contained therein, as well as other forms to transfer its use and exploitation. The importation to national territory of copies of the works done without his authorization and the disclosure of derivative works, regardless of the type, such as translation, adaptation, paraphrases, fixing ups and transformations. The economic rights shall be in full force and effect during the author's life and, seventy five years from his dead. When the work belongs to several co-authors the seventy five years shall be counted from the latter's dead; and seventy five years from their disclosure. In the case of posthumously published works, seventy five years from their disclosure provided the disclosure is carried out within the protection term set forth above.*

The aspect concerning the transmission of economic rights was object of a special amendment which has awakened the concern of

studious of this field. Pursuant to the law, the holder of this right may transfer on a free basis, in the terms provided in the Law, his economic rights whether in an onerous or gratuitous title or grant exclusive or not exclusive licenses to use. In the event of absence of agreement, the courts having jurisdiction shall determine the amount to be used in the corresponding compensation or a procedure to fix it, as well as the terms for his payment. The execution of acts, agreements and contracts whereby economic rights are transferred and licenses to use as well, shall be written, invariably, otherwise shall be rendered ineffective to the extent provided by law. A novel aspect is that any transfer of economic rights shall establish in favor of the author or the holder of the economic right, as the case may be, a proportional sharing in the profits resulting from the corresponding exploitation, or a fixed and determined compensation. This rights are not able to be waived. In order to produce legal effects against third parties, the acts, agreements and contracts whereby economic rights are transferred shall be recorded before the Copyright Public Registration Office.

One of the points upon which a lot of queries arose, among the interested sectors and the Copyright studios was that relative to the limitation in time of the economic rights transmission. In the terms set forth by the Law, unless otherwise provided, any economic rights transfer will be in force for a term of five years. Only in exceptional cases it will be possible to reach an agreement for more than 15 years when the nature of the work or the dimension of the investment require so justifies it. The causes justifying exceeding the 15 years term, pursuant to the Regulation are the following:

1. In connection with works that due to their extension, its publication implies a major investment to that usually paid by works of its kind.
2. Musical works demanding a longer period of displaying or diffusion.
3. Secondary or incidental contributions to works of a bigger extension, such as prologues, presentations, introductions, and others of the kind.

4. Works, whether literary or artistic including the musical works, merged or incorporated as part of the electronic media programs containing visual, auditive, tridimensional or characterized elements.

The reason put forward to explain the referred limitation are not clear, however, said provision may constitute a privilege on the artistic creations, due to the short-lived of the transmission and because the cultural enterprises or industries when acquainted of such limitation in time may refrain from carrying out a deal in such a short period of time or will seek alternative conduits, such as negotiating abroad. In addition, according to the Law, it is understood that the parties will determine the nature of the work or the cases on which the magnitude of the required investment justifies a term superior to 15 years, situation that might stop production projects, as long as the parties do not reach an agreement or in the event of a conflict. Its deemed necessary that the judicial authority decides the above, thus due to the legal uncertainty posed by said provision, it is possible that the affected sector challenge its enforcement, through a summary proceeding which serves to guarantee constitutional rights.

Regarding the exclusive license agreement, the Law compels to the License to make its best efforts aimed at the efficiency of the use granted, according to the nature of the work and the uses and customs in the professional, industrial or commercial activity as the case may be. It happens to be ambiguous the term best efforts and who will decide if they suffice or not, so as to have the licenses accomplished in the terms previously agreed. Furthermore, in this point it is worth mentioning that it is left opened the fact that the nature of the work shall be attended and the uses and customs of the professional, industrial or commercial activity as well, which happens to be ambiguous and thus may be a source of future conflicts.

The economic rights, in the terms provided in the Law, are not attachable or pledgable even though the fruits and products stemming out of his use could be attached or pledged.

## **E). COPYRIGHT AGREEMENTS.**

In the repealed Law, the Edition Agreement was regulated in an express way and in relation with reproduction agreements of any kind, whether of an intellectual or artistic nature, using different means from printing, that will be regulated by provisions applicable to the edition agreement, not opposing the nature of the means used for the reproduction as the case may be. The FCRL rules and defines 6 kinds of agreements; Literary Work Edition Agreement, Musical Piece of Work Edition Agreement, Dramatic Work Representation Agreement, Radio Broadcasting Agreement, Audio-Visual Production Agreement and the Advertising Agreement.

The Regulation provides that the norms set forth in the Literary Work Edition Agreement, shall be applied to the above mentioned agreements provided they do not oppose to its nature or to the provisions of the law.

*As to the Literary Work Edition Agreement, the FCRL maintains the core principles of the repealed Law, nevertheless it is worth mentioning that contained in article 43: Notwithstanding the terms set forth in article 33 herein, the term for the assignment of rights of a literary work shall not be subject to any limitation whatsoever. Article 33, mentioned above, sets forth that in the absence of express provision, any economic rights' transfer will be in force for a term of five years. Only in exceptional cases it will be possible to reach an agreement for more than 15 years, when the nature of the work or the dimension of the investment require so justifies it. Notwithstanding the terms set forth in article 33 herein, the term for the assignment of rights of a literary work shall not be subject to any limitation whatsoever. The edition agreement of a work does not imply the transfer of the other economic rights of his holder. In advance to the printing of the work, the author shall maintain the right to make corrections, amendments, additions or changes for the better, deemed appropriate. Unless otherwise provided, when the amendments make the edition more expensive, the author shall be compelled to reimburse the expenses generated.*

*It is worth pointing out that for the first time the copyright legislation talks about the obligations of the author or the holder of the economic right when mentioning among these, to deliver the work to the editor in the terms set forth in the agreement, and to warrant the editor the authorship and originality of the work, and the legal use of the rights been transferred. The FCRL, when regulating this agreement, takes from the practice the common incorporation of this kind of articles.*

In the event there is not an express provision in the dramatic work representation agreement as to the period whereby the representation before an audience will last, it shall be understood that it is of one year. Unless otherwise provided, the dramatic work representation agreement subscribed between the author and the entrepreneur authorizes the latter to carry out the representation within the territory of Mexico. The above corrects the interpretation problems as to the territorial jurisdiction of the agreement for this kind of works.

Through the Radio Broadcasting Agreement the author or the holder of the economic rights, as the case may be, their assignee or agent, the title holder or the corresponding collective administration partnership, authorizes a radio broadcasting organism to transmitted it. The provisions applicable to the broadcastings of the organisms referred to above shall be applicable hereinafter, to wire, cable, optic fiber, radio electric waves, satellites or other similar means transmissions, making possible the remote communication to the people of protected works. Through the audiovisual production agreement, the authors or the holders of economic rights, as the case may be, assign on an exclusive basis to the producer the reproduction, distribution, public communication and subtitling of economic rights contained therein, except other wise provided. The musical works are excluded of the above mentioned. Due to force major when an author's contribution is not completed, the producer may use the part already done, having consideration towards the rights of the former on it, including his anonymity, without prejudice of the respective indemnification. Provided that pursuant to a separate agreement between the director

or the performer, and the producer, the final version has been accomplished, the audio-visual production agreement shall be rendered as terminated.

Regarding the public advertisements the possibility to disclosed them shall not exceed a term of six months from its first communication. As set forth in the repealed law, if elapsed, even though it is done within that term partially, its communication shall be recompensed at least with a sum equal to that agreed upon at the beginning every additional period of six months, even though it is only disclosed partially in that period, at least with an amount equal to that agreed at the beginning. From the above it is derived that the by-out figure is not contemplated in our legislation and it is provided in the same that once three years have elapsed from the first communication, its use shall require the authorization of authors and the holders of the derivative rights of the works used. In the event advertising is done using printing material, the agreement shall specify the support or material supports used to reproduce the work and, in the case of pamphlets or means used which are different from periodical publications, the number of models forming part of the respective issuance.

The provisions of the literary work edition agreement, the musical piece of work edition agreement and the audio-visual production agreement are applicable to the advertising agreements, absent opposition to provisions set forth herein. Therefore, it is questionable the application of article 33 of the FCRL as to the temporary limitation of the economic rights transmission to the agreements referred to above. Article 43 establishes an exemption to the provisions set forth in Article 33, in relation to the Literary Work Edition Agreement, That is, the term limitation in the transmission of rights set forth in Article 33 is not applicable to this agreement. Accordingly, if the provisions of the Literary Work Edition Agreement are applicable in that not contrary to the agreements above mentioned being one of said provision that of Article 43 referred to above. Thus, Article 33, that limits the transmission of economic rights would not be applicable to the agreements provided in the Law.

## **F) THE PROTECTION OF COMPUTER PROGRAMS AND DATA BASIS**

Under the title of Copyright Protection, several provisions engender such as to who is considered to be the author of a work, how derivative works are protected, and the rights of the translator or the holder of economic rights of the translation and the situation of joint authorship works and the legal situation of copyright on a work with music and lyrics, which unless otherwise provided shall belong on an equal basis to the author of the literary and musical part.

In this section works such as photographic, plastic and graphic, cinematographic and audio-visual, computer programs and data basis are contained.

The legal approach to these three works, just as they are prescribed in the Law, constitute a renovation with respect to the repealed Law, absent of specific provisions. Unless otherwise provided, it shall be considered that the author transferring the ownership of his painting, sculpture and plastic work, has not granted the respective acquirer the right to reproduce it, but the right to exhibit and represent it in a catalogue. When the exhibition is carried out in conditions affecting his honor or professional standing, the author may oppose to the exercise of such rights, as the case may be. Unless otherwise provided, the exclusive right to reproduce a pictorial, graphic or sculptoric work does neither includes the right to reproduce it, regardless of the kind of article been used, nor the commercial promotion of it. Audio-Visual works are those expressed through a group of associated images, with or without incorporated voices, been perceptible using technical devices, thus producing a movement sensation. Without prejudice to the rights of the authors of works adapted or included therein, the audio-visual work, including the cinematographic, shall be protected as an original work. The authors of the audio-visual works are: the director; the authors of the outline, adaptation, script or dialogue; the composers of music; the photographer, and the cartoons' authors. Unless otherwise provided,

the producer is considered to be the holder of the economic rights of the work as a whole. The producer of the audio-visual work is the individual or corporation having the initiative, the coordination and the responsibility when creating the work, and the sponsorship as well.

The regulation and safeguarding of the computer programs and data basis, as they are provided in the Law, its an innovation and development with respect the protection accorded to them by the repealed Law. The FCRL defines computer programs as follows:

Article 101.- A computer program is understood as any original expression, whether in language or code, of a group of instructions that, with a sequence, structure, and a determined organization, has as a purpose that a computer or technical device carries out any specific task or function.

Pursuant to article 13, containing the works subject matter of protection, the computer programs are in section different from those of the literary works, however, Article 102 sets forth that computer programs are protected just in the same terms and conditions as literary works, this with the purpose of complying with Article 1705 of the North American Free Trade Agreement, which assimilates computer programs to literary works. Such protection extends either to operative programs or to application programs, either in the form of a source code or an object code. The computer programs which purpose is to create negative effects on other programs or equipment are excluded from the protection set forth above.

Moral rights are preserved by the author, thus it might turn to be difficult the adaptation of the work or the use of other programs if his prior authorization is not obtained in order to preserve the integrity of the work or to give him the corresponding credit as well. Regarding the economic rights on the program and its documentation, unless otherwise provided the economic rights and the documentation as well of a computer program, shall pertain to the employer when created by one or several employees in the fulfillment of their activities or

following the instructions of the former. In this works the exception contained in article 33 are applicable as well regarding the limitation in time on the transmission of economic rights, since in the case of computer programs is not dependent upon any limitation whatsoever. A computer program economic rights consists in the power to authorize or prohibit 1. The complete or partial reproduction of the program, in any manner whatsoever; 2—A program's translation, adaptation, arrangement or any other modification and the reproduction of the resulting program; 3.- The distribution in any form whatsoever of the program or a copy of it, including its leasing, and 4.- The decompiling, the processes aiming at the reverse engineering of a computer program and the dissemble as well.

## **G) DATA BASIS**

The protection as compilations shall be granted to data basis or other materials readable through the use of machines or other means whatsoever, which on account of their contents' selection and arrangement constitute intellectual creations.

The holder of the economic rights related to data basis shall have the exclusive right to authorize or prohibit in relation to the way of expression of its structure, the following: 1 .- Its permanent or temporal reproduction, whether total or partial, by any means and by any form whatsoever; 2.- Its translation, adaptation, reorganization and any other modification; 3.- The distribution of the original or copies of the data basis; 4.- Its public communication, and 5.- The reproduction, distribution or public communication of the results of the operations referred to above. The importation, manufacturing, distribution and utilization of devices or the offering of services aimed at the elimination of the technical protection of the computer programs, the transmissions through the electromagnetic spectrum and telecommunication networks and of programs concerning electronic elements.

## **H) NEIGHBORING RIGHTS**

In relation to this topic the FCRL sets forth provisions with respect to artists whether interpreters or performers, book editors, phonogram producers, videograms producers and broadcasting organisms. The protection established by the Law shall not damage neither affect in any way whatsoever the copyright protection in the literary and artistic works. The length of the protection granted to the artists shall be fifty years from: the first fixation on a phonogram of the interpretation or performance; the first interpretation or performance of the works recorded on a phonogram, or the transmission for the first time through the radio, television or any other means whatsoever. As to book's publishers, the protection referred to in the Law shall be of 50 years from the first edition of the book so published. Regarding phonogram producers, the protection accorded shall be of fifty years from the first fixation of the sounds in the phonogram. In the case of videogram producers the length of the rights provided. Is of fifty years from the first fixation of the images in the videogram whereas the length of the rights provided to the broadcasting Organisms is of 25 years from the first broadcast or original transmission of the program.

Artists, whether interpreters or performers have the right to oppose to the public communication of their interpretations or performances; the fixation of their interpretations or performances on a material support, and the reproduction of the fixation regarding their interpretations or performances. In the case of phonogram producers, defined as the individual or corporation fixing for the first time the sounds of a performance or the digital representation of the same and is responsible of the phonograms edition, reproduction and publication, has the right to authorize or prohibit 1.-The direct or indirect, total or partial reproduction of their phonograms, and the direct or indirect use of them as well; 2.-The import of phonograms' copies made without previous authorization; 3.-The offer for sale or other form including its distribution through signals or broadcastings, resulting in the first public distribution of the original and each exemplar of the phonogram; 4.-The adaptation or transformation of the phonogram, and 5.-The commercial

leasing of the original or a copy thereof, provided it has not been reserved by the authors or the holders of the economic rights.

A videogram is considered, in the terms set forth by the FCRL, as the fixing of related images, with or without incorporated sound, giving the sense of movement, or a digital representation of said images of an audio-visual work or the representation or performance of a work or a folkloric expression, and the images of the same class, with or without sound as well. It also defines de videogram producer as the individual or corporation fixing for the first time related images, with or without incorporated sound, giving the sense of movement, or a digital representation of said images, whether or not they constitute themselves an audio-visual work. With respect to his videograms, the producer enjoys the rights whether to authorize or prohibit their reproduction, distribution and public communication. Regarding the corresponding emissions, the broadcasting organisms will have the right to authorize or prohibit: 1.-The rebroadcastening; 2.-The differed transmission; 3.-The simultaneous or differed transmission, whether by cable or any other system; 4.- The fixation on a material support; 5.- The reproduction of the works fixed, and 6.- The public communication by any means and form whatsoever aiming at the obtaining of a profit.

Compensation for damage or loss shall be paid by the person who notwithstanding the previous authorization of the legitimate distributor of the signal: 1.- Deciphers a codified satellite signal carrier of programs; 2.- Receives and distributes a codified satellite signal carrier of programs which has been illegally decoded, and 3.Participates or assists in the manufacturing, import, sale, leasing or the performance of any act whatsoever upon which a device or system may be used to decode a satellite decoded signal, carrier of programs.

## **I) JOINT ADMINISTRATION PARTNERSHIPS**

The repealed Law identified them as copyright societies. This subject created an especial interest due to permanent conflict stemming

from the collection of royalties accrued on account of the commercial use of the works, specially the monetary perceptions coming from copyright belonging to foreign authors, without the need to have any representation whatsoever. The joint administration partnerships have the same purposes as the previous ones, that is to say, to protect authors and holders of neighboring rights, whether nationals or foreigners, and to collect and hand over as well the amounts that on account of copyrights and neighboring accrue in their favor. The Law provides that the assignees of the authors or the title owners of neighboring rights either nationals or foreigners residing in Mexico may be members of the joint administration partnerships. The FCRL establishes that the persons legitimize to form part of a joint administration partnership may freely choose whether to affiliate it or not, much the same, may choose whether to exercise individually their economic rights, through a representative or through the partnership. The joint administration partnerships shall not participate in the collection of royalties when their members choose to carry out individually their rights in relation with any use of the work or have agreed on direct mechanisms to do so. The partners may not carry out the collection of royalties by themselves, if they have granted a power to the joint administration partnerships, unless said power is repealed.

The joint administration partnerships shall not impose upon a compulsory basis the procedures of all the types of use, neither the total work nor its the future production. In the case that the partners choose to exercise their economic rights through a representative, this shall be an individual and shall have the Institute's prior written authorization. The power granted in favor of the representative shall neither be replaceable nor transferable.

It is established that all the acts, agreements and contracts shall be executed in writing as the case may be between the joint administration partnerships and the authors, the holders of economic rights or the legal owners of neighboring rights, and among said partnerships the users of the works, performances, phonograms, videograms or broadcastings of their partners, as the case may be. The CRNI prior

notice of at least the ten per cent of the members shall require to the joint administration partnerships, any kind of information and will order verifications and audits to check the fulfillment provided in the Law and its regulatory provisions. This constitutes an important obligation with respect to the repealed Law and an effective application of it will allow a better performance of such partnerships, in favor of their members.

## **J) THE COPYRIGHT ABSENCE OF PENALTIES**

Several conducts once considered to be of a criminal nature, with the new Law turn to be administrative infringements, either in the division established in the FCRL or in the Commercial Law. Some conducts which still are offenses or other that were incorporated as such, were the cause of amending the Criminal Code for the Federal District applied on general jurisdiction matters, and for the Mexican Republic as to Federal jurisdiction matters. In such instrument, penalties are sanction with prison that varies from 6 month to 6 years and fines raising from 30 to 30,000 days. From the reading of the Criminal Code 7 conducts typified as offenses are derived, three of them considered as that by the repealed Law. The others are the following:

1.- Anyone that in a fraudulent way, at a commercial scale and without authorization of the copyright holder, produces, imports, sales, stores, transports, distributes or leases works protected by the FCRL.

2.- Anyone manufacturing whose aim is the creation of a pecuniary benefit, a device system aiming to turn out the electronic devices for the protection of a computer program.

3.- Anyone who notwithstanding his prior knowledge uses aiming at the creation of a pecuniary benefit an interpretation or performance.

4.- Anyone manufacturing, selling or leasing an electronic device so as to decode a decoded satellite signal, carrier of programs with the prior authorization of the lawful distributor of said signal.

5.- Anyone aiming at the creation of a pecuniary benefit who decodes a decoded satellite signal, carrier of programs with the prior authorization of the lawful distributor of said signal and anyone who prior knowledge publishes a work substituting the name of the author with other name.

6.- Anyone producing, reproducing, importing, storing, transporting, distributing, selling, leasing copies of works, phonograms, videograms or books protected by the FCRL, in a willful manner, or a commercial scale and without the authorization of the copyright owner or related rights.

This offenses will be prosecuted prior complaint of the interested party, with the exception of that consisting in the speculation with free text books distributed by the Ministry of Education. Even though said activities are typified as offenses, a copyright absence of penalties has been the point discussed in this chapter, since no of them has been considered as a serious offense and in all these cases a bail can be obtained, avoiding that the liable individual is condemned. The above mentioned concurs with the penitentiary and criminal tendency consisting in that some violations are punish in alternative ways.

Regarding the infringements set forth by the Law, it happens to be questionable the opinion between those focusing on copyrights and on commercial businesses, as if they were completely different activities, strange to each other, thus according them a special treatment. All of them, in one way or another have as a direct result the infringement of copyrights. It seems that the profit interest establishes the model to classified them in one category or in other, as well as to sanction them upon different systems, through daily fines based on the General Minimum Wage. As to copyrights refers, sanctions goes from five thousand to fifteen thousand days of minimum wage, depending on the infringement committed, while those of a commercial nature goes from five hundred to ten thousand days of minimum wage, depending as well on the infringement committed.

Regarding the former, the Regulations set forth the rules for filing before the Copyright Institute and administrative infringement action. The copyright owner, may request to the Copyright Institute, to carry out some legal measures to prevent a violation of copyrights or neighboring rights, while in the case of commercial infringements, the FCRL refers to the Industrial Property Law regarding the proceedings and formalities therein provided. The FCRL, as well as the Regulations authorize the MIIP to carry out inquiries; order and practice inspections; and require information as well. Concerning the acts of commerce infringements, the Mexican Institute on Industrial Property is authorized to issue a resolution stopping the free traffic in the border of merchandises coming from abroad, in the terms set forth in the Customs Law. Notwithstanding the foregoing, we considered that in the Bylaws of the MIIP and its Internal Regulation it is empowered to execute the activity referred to above, since this instruments, as well as the Decree creating the MIIP, does not contain the power to do.