

INITIATIVE WITH DECREE PROJECT TO AMEND AND ADD VARIOUS PROVISIONS TO THE MEXICAN COPYRIGHT LAW TO FACILITATE ACCESS TO CULTURE

On December 7, 2021, the "*Initiative with decree project to amend and add various provisions to the Mexican Copyright Law to facilitate access to culture*", submitted by senators *Geovanna del Carmen Buñuelos de la Torre* and *Cora Cecilia Pinedo Alonso* of the Labor Party -*Partido del Trabajo*-, was published in the Gazette of the Senate of the Mexican Congress.

This Initiative seeks, according to its explanatory memorandum, to reach a better balance between the exclusivity rights granted by the Mexican State in favor of the authors of works, protected by the Mexican Copyright Law ("**MCL**"), and the right of access to culture guaranteed in section 4 of the Mexican Constitution.

In this sense, the Initiative states that the current term of economic rights of works in accordance with the MCL is excessive, that is: (i) during the life of the author and 100 years after his/her death, (ii) if the work belongs to several co-authors, the 100 years term shall be counted from the death of the last one, and (iii) 100 years from the disclosure of the work.

It is pointed out that, according to international treaties on the subject matter and subscribed by Mexico, the Mexican legislation goes beyond by establishing a term of 100 years *postmortem* for the validity of economic rights, while the Berne Convention for the Protection of Literary and Artistic Works establishes a term of 50 years *postmortem*, and the United States-Mexico-Canada Agreement establishes a minimum term of 70 years *postmortem*. The Initiative proposes to amend article 29 of the MCL to reduce the term of validity of economic rights from 100 to 70 years *postmortem*, which might generate controversy as it could be considered a regression considering the principle of progressiveness of human rights. The Initiative also proposes to add two paragraphs to the mentioned article, the first of which stipulates that the rights acquired by third parties may not exceed the term of validity established for economic rights, which is self-evident because once the economic rights expire, they may not be subject to any acquisition whatsoever. The second paragraph establishes that no claim related to economic rights regarding works of public domain shall be admissible.

The foregoing results confusing, since it is clear that once the economic rights over a work expire, it becomes of public domain by operation of law, but the feasibility subsists of claims regarding the economic rights of a work (which might already be in the public domain), for violations made during the term of validity of the same.

Furthermore, the Initiative addresses article 33 in force of the MCL, which establishes that in the absence of express stipulation, all transfer of economic rights shall be considered for a 5-year term, and it may only be stipulated for more than 15 years on an exceptional basis, when the nature of the work or the magnitude of the investment may justify it. To this, the Initiative proposes to add that when it is intended to stipulate for a term longer than 15 years, the parties will be required to provide the evidence justifying it at the time of requesting its registration before the Copyright Public Registry, at which time the Mexican Copyright Office ("**MCO**") will evaluate and approve or deny the requested term.

In this sense, it would seem accurate to regulate this specific matter in more depth in order to provide greater legal certainty, but we consider that this is not the way, since the validity of an agreement for longer than 15 years is risky and uncertain, in addition to leaving at MCO's discretion the qualification of the justification stated by the parties, without any further guidelines to know the standards or criteria regarding what may be considered a valid justification. Additionally, according to the MCL, registrations before the MCO's Copyright Public Registry, are presumptive and not constitutive of rights, and therefore giving the MCO a sanctioning power that it did not previously had.

Moreover, the Initiative addresses article 148 in force of the MCL, which establishes several exception cases to exclusivity rights, allowing the use of disclosed works without authorization of the owner and without remuneration, provided that the normal exploitation of the work is not affected, the work is not altered, and the source is cited. The Initiative proposes to amend sections III and V of the article in question. The exception established in section III currently allows the reproduction of parts of a work for scientific, literary, and artistic criticism and research. The Initiative intends to broaden such exception to allow the reproduction of parts of a work for criticism, *commentary, parody, satire, pastiche, news dissemination, teaching* and scientific, literary and artistic research. We find particular concern regarding the term "*pastiche*", since according to the Royal Spanish Academy, it is defined as "*Imitation or plagiarism that consists of taking certain characteristic elements of an artist's work and combining them in such a way that they give the impression of being an independent creation*", this is a contradiction, since one of the prerequisites for the exceptions of article 148 to operate is precisely that the work is not altered, being the "*pastiche*" precisely an alteration, thus violating the moral rights of the author to oppose deformations, mutilations and other

modifications of his/her work, without any justification for it. Regarding section V, it currently allows the reproduction of a single copy of a work by an archive or library, for security or preservation reasons, and which is out of print and in danger of disappearing. In this sense, the Initiative proposes to amend such section to allow the reproduction *and provision to the public* of *copies* of a work by an archive, library, *gallery or museum* for preservation, *research, study or interlibrary loan* purposes. This would not only extend the right to reproduce more than a single copy, but also to make them available to the public.

Finally, the MCO is addressed, seeking to add new functions and faculties to it. With respect to article 209 in force of the MCL, the Initiative proposes to add sections VII and VIII, establishing as functions of the MCO: *(i)* to identify and promote the dissemination of works of public domain, and *(ii)* to facilitate public access to culture through the limitations of Copyright and Related Rights determined by law, in order to allow access to works for the community in collaboration with public cultural and educational institutions. Regarding article 210 of the MCL, the Initiative seeks to add a section V, establishing as a faculty of the MCO to provide technical advice on copyright matters to public educational and cultural institutions to facilitate the classification and access to works of public domain. The new functions and faculties that the Initiative intends to incorporate to the MCL represent important new burdens for the functions of the MCO, which in practice could represent a challenge for its implementation.
