SPANISH RESPONSE TO ALAI - PUNTA DEL ESTE QUESTIONNAIRE

ALADDA (*Asociación Literaria y Artística para la Defensa del Derecho de Autor*. Spanish Group of ALAI, www.aladda.org) [1]

2.1 Protected rights

2.1.1. Protected patrimonial rights: How do countries put into effect the new rights (or clarified rights) established by the treaties?

The rights afforded by the WIPO Internet treatises **were to a large extent already granted** to authors and artists by the Spanish LPI.

As far as **authors** are concerned, it must be borne in mind that from 1987, the Spanish Copyright Act (Law 22/1987 de Propiedad Intelectual, LPI/1987) provides a **general and exclusive right** allowing authors either to authorise or to exclude others from exploiting their works in any way (see art. 17 from the version currently in force of the Spanish Copyright Act - *Texto Refundido de la Ley de Propiedad Intelectual*, TRLPI). Exclusive rights over acts of reproduction (art. 18 TRLPI), distribution (art. 19 TRLPI) public communication (art. 20 TRLPI) and transformation (art. 21 TRLPI) are only part of that broader general exclusive right. Accordingly, **it may be said that, properly speaking, there are no "new rights", albeit different forms of pre-existing rights**. The foreword to the Law 23/2006 (by which the TRLPI has been amended in order to transpose the Infosoc Directive) emphasizes it: "*Amendments to our legislation as to the rights of reproduction, distribution and public communication are aimed at mentioning expressly or clarifying what was already implicitly understood*" (II, 1).

Artists, producers of sound recordings, film producers and broadcasting organizations are also granted –since the 1987/LPI- exclusive exploitation rights **similar to those granted to authors**. Thus, both art. 122 of the mentioned 1987/LPI and art. 132 of the Spanish Copyright Act currently in force provide that the **provisions of Book I (Libro I) relating to author's exploitation rights and their limitations are to be applied where appropriate to the rights of artists, performers, producers and broadcasting organizations**. Accordingly, the definition of the exploitation rights granted to the latter is to be found in Book I of the Act. The rights concerned are the reproduction, the distribution and the public communication rights. It must be borne in mind that the **artists' distribution right** (art 109 TRLPI) was first acknowledged as a

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result of the transposition of the Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright (Law 43/1994, of 30 December). The Spanish legislature proceeded following the same pattern as to **broadcasting organizations** (art. 126.1, f TRLPI).

2.1.2. Reproduction rights

2.1.2.1. Subsequent to the TRIPS and WIPO treaties, did your national law specify that reproduction rights apply to digital copies? If your law has not so specified, are amendments expected? In lieu of or in addition to legislation, did your country's case law already apply reproduction rights to digital copies?

Even before the WIPO Internet treatises, there was general agreement in Spain as to the fact that the reproduction right covers also digital copies. The Law 23/2006 has modified the definition of "reproduction" (art. 18 TRLPI) in order to bring it in line with art. 2 of the Infosoc Directive. However, the new language does not imply a change in the concept of the reproduction right, as stated in the foreword to the Ley 23/2006 transposing the Infosoc Directive: "*The reproduction right, without being modified in its concept, is yet clarified by means of explicitly adding to it all forms by which it may take place, preventing thus any doubts as to whether reproduction acts made by digital systems are effectively covered by it*" (I, 2). –Despite no such doubts ever existed. Therefore, the amendment was not essential. Digital copies are covered by the reproduction right, irrespective of whether they are made with respect of subject matter protected by author's rights or by neighbouring rights. There is no controversy on this subject among Spanish Courts. However, when it comes to artists, a distinction is made between fixation (art. 106 TRLPI) and reproduction. As a result, the concept of reproduction when applied to artists is more restrictive than otherwise (art. 107). "Fixation" is in art. 18 TRLPI a part of the broad concept of reproduction. The difference between art. 18 TRLPI and arts. 106-107 TRLPI has no consequence in terms of this question.

2.1.2.2. Does the legislative or judicial coverage of digital copies include temporary or transient copies?

Regarding computer programs, the 1987/LPI, which remains the basis of the Copyright Act currently in force (that is, the 1996 TRLPI) excluded from the concept of the reproduction right "*the introduction of the program in the internal memory in order to enable its use*" (art. 99.3 1987/LPI). This provision was applied irrespective of whether such copies were to be considered stable or non-stable. Therefore, it could have been argued that the concept of reproduction set out in art. 18 of the 1987/LPI did not cover the latter. Doubts, however, were rapidly dispelled. When the Directive on the legal protection of computer programs was transposed into national law, it was clearly stated (at least with respect to computer programs) that their reproduction could be "permanent or temporary" (art. 4, a) Law 16/1993). Currently, art. 99, a) TRLPI sets out an identical provision. This was also the common interpretation of art. 18 TRLPI (concept of reproduction).

Accordingly, **even before the enactment of the Law 23/2006 (which transposed the Infosoc Directive into national law) there was general agreement upon temporary copies falling within the concept of reproduction**. Scholars (jurisprudence) usually

interprets art. 18 TRLPI (definition of reproduction) together with art. 31.1 TRLPI, which currently sets out the limitation on temporary acts of reproduction set forth in art. 5.1 Infosoc Directive. In this regard, the notion of reproduction may be better understood if attention is brought to the fact that the introduction of an exception for temporary acts of reproduction was deemed necessary, even though these acts (besides being temporary) lack any independent economic significance, are transient or incidental and furthermore are an integral and essential part of a technological process whose sole purpose is to enable either a transmission in a network between third parties, or a lawful use.

2.1.3 Right to distribute tangible objects

2.1.3.1. Did Article 6 of the WIPO Treaty (Article 8 of the WPPT), which provides for a right of distribution, result in actual or pending changes to your national copyright law? Has caselaw played a role in the development of the distribution right?

The distribution right to which art. 6 WCT refers **was already afforded to authors**. The Law 23/2006 modified art 19 TRLPI with the sole purpose of making clear that the right refers to the exploitation of the work through **tangible means (supports)**. By doing so, the distinction between acts of distribution and acts of public communication is thought to be more sharply drawn (see Foreword to Law 23/2006, II, 3). **The case law has not played any role yet**. The right and its scope were (and still are) clearly set forth in the Law.

As far as **artists** are concerned (art. 8 WPPT) the Spanish Copyright Act currently in force affords them the right of distribution (art. 19) as a result of having transposed Directive 92/100 EEC on rental and lending rights. Therefore, no further amendments to the distribution right were required as a result of arts. 8 and 9 WPPT.

2.1.3.2 Is the right of distribution co-extensive with art. 6, or is it broader?

The Spanish Copyright Act currently in force provides for **a broad notion of distribution**. The broad notion of distribution is defined as "*the making available to the public of the original work or copies thereof in tangible means, either by means of its sale, rental, lending or by any other possible means*". Accordingly, "distribution" under Spanish law **covers more than simply the sale of the work and other means of transmitting the property thereupon**. Rental and lending are acts of distribution, too. Once more, it is important not to forget that the above-mentioned situations are the most representative, though not the only possible ones. **Any form of exploitation consisting in making the work available to the public by tangible means is to be considered an acto of "distribution"**.

2.1.3.3. Does the right of distribution of tangible articles persist after the first sale?

The Spanish Copyright Act currently in force provides for the exhaustion of the distribution right according to the European Directives. It results from the *first sale* (sale or transmission of property by other title *inter vivos*) and only affects the subsequent resales (and other forms of property transmission). There is no exhaustion regarding forms of distribution which do not imply a transfer of property, as in the case of rental and lending. The extension of exhaustion is **limited to the EU** (the *first sale*

must take place in a country of the EU or of the EEE, with the consent of the right owner, and does not affect the subsequent *resales* that are done out of this area).

2.1.4 Right to make available to the public

2.1.4.1 Has Article 8 of the WIPO Treaty (Article 10 of the WPPT), completing the right of communication to the public by the right to make available to the public, resulted in actual or pending changes in your national copyright law? Has caselaw played a role in the development of the making available right?

In Spain, **it has been generally admitted that authors have the exclusive right of making available to the public their works in such a way that members of the public may access them from a place and at a time individually chosen by them**. More specifically, the so-called "interactive making available right" has been widely admitted as a type of public communication as set forth in art. 20 TRLPI. In this respect, it must not be forgotten that the LPI/1987 already mentioned as a type of public communication "the public access to computer databases by means of telecommunication" (art. 20.2, h) LPI/1987). **The Law 23/2006 now mentions it explicitly** (art. 20.2, I) TRLPI). Yet, as it has been underlined in its Foreword (II, 4), the referred mention has exclusively been introduced "*for the sake of clarity*"; Spanish courts never understood it otherwise.

As far as **artists** are concerned, a large number of authors accepted that the "interactive making available right" was part of the broader public communication right afforded to them by art. 108 TRLPI. **With the passing of the Law 23/2006, an explicit reference in this respect has been added** (new art. 108.1, b) TRLPI). Yet, it should be noted that the Foreword to the Law 23/2006 refers to the acknowledgement of a **"«*new*» *exclusive right of making available to the public*"** (III, 1). This right is afforded "*in any event*", as opposed to what happens with respect to art. 108.1, a) TRLPI. **The most important feature of this exclusive right is that it comes together with a remuneration right in the event the exclusive right is assigned**. When the bill (of Law 23/2006) was still under consideration, artists expressed views contrary to the acknowledgement of a mere exclusive right whose enforcement they considered beyond their possibilities. They feared that upon negotiation with the producers, they would be forced to assign the exclusive right. Therefore they lobbied for the exclusive right to fit the pattern of a right with compulsory administration by collecting societies. Alternatively, they lobbied for a solution similar to the one adopted for the rental right. This was the solution that the legislature adopted in the end. In this respect, after having assumed the assignment of the exclusive right of making available (art. 108.2 TRLPI), art 108.3 TRLPI provides that : "*the artist […] who has assigned either to a producer of sound recordings or to a film producer his right of making available to the pubic […]* ***preserves the inalienable right to obtain an equitable remuneration from the person making the work available to the public.*****"** It is noteworthy to mention that following the success of artists, filmmakers lobbied too, obtaining as a result a similar right (see art. 90.4 TRLPI) the wording of which, though, has posed a number of problems.

Producers of sound recordings (art. 116.1 TRLPI) and **broadcasting organizations** (art. 126.1, c) TRLPI) are also granted the making available right after the passing of the Law 23/2006.

Surprisingly, **this is not the case with respect to film producers**. Art.122.1 TRLPI remains unaltered. It sets forth that film producers have "*the right to authorise the public communication*". Yet, nothing in the wording of the law suggests that the intention of the legislature was to deny them the right to control the making available of their works set forth by the Infosoc Directive. It is therefore to be understood that, **despite the lack of an explicit mention in this sense, the making available is part of the broader public communication right**.

2.1.4.2 Is the implementation of the right to make available made through the right of communication to the public? Through the right to distribute copies? Through reproduction rights? By an independent right? By an accumulation of various rights?

It follows from the previous answer, that the making available is **a form of communication to the public.** The remark indicating that "distribution" takes place by means of tangible means (art. 19.1 TRLPI) was introduced in order to avoid that the making available online is construed as amounting to an act of distribution, regardless of the fact that *a posteriori*, users may obtain a copy in their terminals or computers. However, the regime that applies to **copies** produced at origin (i.e. in the server in which the work is hosted) and at destination (i.e. in the computer of the end user) is far from clear. Although there is no consensus on the issue, it is commonly accepted that the referred copies are to be considered as independent acts and, therefore, subject to due authorisation when they are not covered by a specific exception or limitation (i.e. private copy with regard to copies *at destiny*). Therefore, the process of making available would involve two rights, that is to say, reproduction and public communication.

2.1.4.3 What is the relationship between ownership of the making available right and the characterisation of the right (see previous question)?

In principle, **the right of making available is held by the owner of the right of public communication.** Needless to say, nothing prevents an assignment of the right of public communication limited to the making available, on account of the independence between rights and types of exploitation.

2.1.4.4. What national law do your country's courts apply to determine ownership of the making available right when the work is communicated (or made available) from one country, and received in another?

The Spanish Law is applied, unless otherwise agreed by the parties. In that case, it would apply the law governing the particular contract.

2.2. New requirements

2.2.1. Technological protection measures

2.2.1.1. How has this new requirement been established, not only as concerns legal texts but also through case law and/or administrative decisions and/or inter-professional agreements?

In Spain, the **Infosoc Directive was transposed considerably late** (Law 23/2006 of 7 July, by which the TRLPI was amended -attached). **The delay explains the lack of relevant case law**. There are no administrative decisions on the subject, either, for no intervention by the Administration is foreseen with regard to technological protection measures. So far, no professional or market arrangements exist.

The transposition of the Infosoc Directive into national law was practically literal, as the Foreword of the Law 23/2006 states: "*the transposition of the provisions relating to technological measures and the information for the rights*" management has tried to follow as much as possible the wording of the Directive (IV, 2). As a result from the amendment, **a new Title V has been introduced into Book III of the TRLPI**. New art.160 TRLPI foresees civil sanctions against those who undertake **acts of circumvention** of effective technological measures, either consciously or as a result of negligence (art. 160.1 TRLPI, identical with art. 6.1 Infosoc Directive). Likewise, the so-called **preparatory acts** (art. 160.2 TRLPI, identical to art. 6.2 Infosoc Directive) are considered illegal, too. **The definitions as to "technological measures" and "effective technological measures"** are to be found in art. 160.3 TRLPI, with identical wording to art. 6.3 Infosoc Directive. Art. 162 TRLPI sets out a provision intended to protect the **information needed for digital rights' management**. The wording of that provision is also identical to that used in art. 7 Infosoc Directive.

The Spanish Law, following EU Directives, provides for **specific rules for technological measures on computer programs** (art.160.4 TRLPI and arts. 102 and 103 TRLPI). We consider this to be an unwanted solution, which should be overcome by unifying all TPM rules.

The circumvention of TPM (and the preparatory acts) are considered a **criminal offence** under art. 270.3 of the Criminal Code (Organic Law 10/95, modified by Organic Law 15/2003). In that sense, ***Circular* 2/2006, of 5 May of the General Prosecutor** (which predates Law 23/2006 –transposing the InfoSoc Directive- but was already taking into account the InfoSoc transposition bill being drafted at that time) is important.

2.2.1.2. What are the civil, administrative; and criminal remedies against unauthorized circumvention of the technological protection measures, and against unauthorized distribution of circumvention devices or services? Are the remedies autonomous (sui generis); are they specific to the copyright law, or are general tort remedies applied? Is the magnitude of the remedy equal to that incurred in the case of copyright infringement? If not, why?

No administrative measures are envisioned against the acts of circumvention or the preparatory acts. Such measures would be possible only indirectively, for instance, as for consumer protection purposes.

Civil measures have already been explained under the former question: both acts of circumvention and preparatory acts give rise to **the same actions and remedies as provided for copyright infringements**: (1) cautionary measures (arts. 138 and 140 TRLPI), with a specific reference to the preparatory acts for the circumvention of TPM (art. 141.4 TRLPI) ; (2) cease of the illicit activity (art. 139 TRLPI), with a specific reference to the injunction, disabling, destruction or precinct of the instruments and devices used for the circumvention of TPM [art. 139.1, pfos. f) and g)]; and (3) damages

(losses suffered and gains not perceived). Cautionary measures and injunctions may be ordered against **intermediaries**. The same applies as to **computer programs**: the infringement of TPM rules give rise to the same actions and remedies provided for copyright infringements (art. 103 TRLPI).

Criminal remedies are provided for under art.270 and ss Criminal Code. According to its art. 270.3 : "*The same sanction [prison of from 6 months to 2 years and fine of from 12 to 24 months] will apply to whoever manufactures, imports, circulates or holds any devide specifically intended to supress without authorization or neutralize any technical device used to protect computer programs or any other works or performances, under the first paragraph of this article*". This article was modified in 2003 (Organic Law 15/2003) to extend the criminal protection of TPM –formerly only existing for computer programs- to all works and protected subject matter. As a general comment concerning the criminal protection, it should be mentioned the **tendency to reduce its scope of application by means of a strict interpretation of the requirements of "lucrative intent"** (*ánimo de lucro*) and "prejudice of third parties" (*perjuicio de tercero*) (art. 270.1 Criminal Code). In that sense, see Circular 2/2006 of the General State Prosecutor.

2.2.1.3. What solutions has your country's law found to reconcile the benefits of certain exceptions and the respect for the technological protection measures?

The Spanish Law follows substantially the InfoSoc Directive, with the specifications commented below.

2.2.1.4. Does the legislation establishing technological measures provide for circumstances justifying personal or preliminary actions (furnishing of means) to circumvent the technological measures (e.g., for the positive benefit of an exception)?

The Spanish Law, like the InfoSoc Directive, is not clear when defining the exact relation between the protection of technology and the infringement of copyright. Such relation is set through "*technological measures*" (art. 160.3 TRLPI and 6.3 DSI). It should be understood that TPM are **only protected to the extent that serve a copyright purpose**. Not otherwise. In that sense, art. 160.3, I TRLPI refers to "*acts, referred to works or protected subject matter, which do not have the authorization from the intellectual property rights owners"*. Thus, no infringement will occur when TPM are circumvented to access subject matter in the public domain.

This article refers to the exploitation acts subject to the owner's authorization. When authorization derives not from the owner but from the law -that is, when a limit (***exception)*** applies-, **art. 161 TRLPI** follows **art. 6.4 InfoSoc Directive**. Accordingly, copyright owners are obliged **to ensure the beneficiaries of specific limits their enjoyment**, as long as they have had "lawful access" to the works and protected subject matter. These limits are: private copy, public security and official proceedings; handicapped people; illustration of teaching or research; reproduction by broadcasting organizations; and reproductions for research and conservation purposes by libraries and alike. If owners fail to facilitate the enjoyment of the limit, its beneficiaries **can turn to civil jurisdiction**. When consumers are the beneficiaries, consumer rights organizations have standing to sue.

The Spanish Law has also introduced **the InfoSoc Directive rule that excludes the intervention in favor of the limits in the case of works made available online** by means of a contract (art. 161.5 TRLPI)

The **private copy** deserves a special comment. The InfoSoc Directive does not oblige member States to ensure the limit of private copy, it is simply set as optional. **Spain has chosen to require respect of the private copy limit; As previously said, users can claim the benefit of the private copy limitation against TPMs set to prevent it.** Courts, however, must respect any TPM set to control the number of reproductions, as set by the InfoSoc Directive (art. 161.4 TRLPI).

The "interventionist" option in favor of the private copy limitation is a provisional one. The law does not preclude a future change that may be set directly by the Government. **Additional Provision 1ª Law 23/2006** states that the Government (not the Parliament) can modify paragraphs 1, 2 and 4 of art. 161 TRLPI, "*in accordance to the social needs and the technological development*". Therefore, the relationship between private copy and technological measures could be altered by a simple governmental decision.

2.2.1.5 More generally, how has your country's legislation, administrative measures and case law attempted to ensure the balance between technological protection and the benefit of certain exceptions?

This question is answered already under #2.2.3.1 : As a last resort, and failing any agreement between the parties, the balance between limits and TPMs will depend upon court decisions. At some point, the possibility that the conflict be decided by the Commission of Intellectual Property (therefore, decided by the Administration) was considered, but finally refused.

2.2.1.6 Who decides when the conditions justifying circumvention are fulfilled? A commission that develops an exception applicable to all concerned users ? A commission that develops an exception case-by-case? A court to whom a user wishing to benefit from an exception has made appeal? Are business practices developing to help determine when circumvention should be permitted?

The question is answered already in the previous paragraphs. So far, no commercial agreements exist; no judicial decisions, either. And we do not know of any case that has been brought to court.

2.2.2. Copyright Management Information (CMI). Has the implementation of this requirement to protect CMI been efficient in ensuring the viability of information communicated with the work?

(Please explain the substance of the laws, decrees, court or administrative decisions or other professional practices, with references and hyperlinks or copies)

Legal implementation has been done as required by the WIPO Treaties and the InfoSoc Directive. But we have no information regarding its effects in practice.

2.3 Exceptions

2.3.1. General view of the three-step test

2.3.1.1 Does your country's legislation explicitly incorporate the three-step test?

The *Three-Step Test* was **introduced into Spanish Law in 1998**, when implementing the EU Directive on Databases, and granting it **a general scope** (for all limitations, not only for those affecting databases). It is provided for under art. 40 bis TRLPI. Two comments on that respect:

1ª) **It lacks the *first step (certain special cases***). The Spanish legislator understiood that it was already satisfied with the legal tipification of the exceptions (arts. 31 to 40 TRLPI). It was not deemed a criterion for the courts to interpret and apply, at least, formally, since after all a judge can always decide to bring to the ECJ the question of whether a specific limit complies with the InfoSoc Directive and specifically its *three-Step Test* (art. 5.5).

2ª) **The order of the steps is different** from the one established in international treaties and the InfoSoc Directive: the *legitimate interests of the author* comes before the *normal explotation of the work*. It is not a conscient choice… the altered order comes from the Database Directive!

2.3.1.2. If not, may (or must) a court apply the test?

The *Three-Step Test* (*Two-StepTest*) is a norm for the interpretation and application of the law In theory, judges **should always use it**. In practice, it is rarely so. **It has only been used expressly in very few decisions**, of lower courts, and not as a decisive criterion but merely to "reinforce" other prevailing arguments. It is worth mentioning that judges do not look at the *Three-Step Test* as a restrictive norm. In some cases, it has been used to "give more space" to some limit. Paradoxicaly, the methodology of "**double fences**" (limits precisely defined plus the *Three-Step Test* as a safety bolt) produces such an effect. **In the hands of judges and courts, the *Three-Step Test* can lead to both strict interpretations as well as more liberal ones.** Without turning the *Three-Step-Test* into a limit, courts can feel legitimized to do flexible interpretations, provided that neither the normal exploitation of the work nor the legitimate interests of the author are damaged. In Spain, however, there is not enough caselaw to make any final conclusions.

2.3.1.3. In what order are the three steps of the test examined? What definitions have been given by legislation; administrative measure or caselaw to each of the conditions?

Always bearing in mind the lack of sufficient caselaw, Spanish judges do not see the *Three-Step Test* as a staircase that should be climed one step at a time, according to a precise pre-established methodology. Rather, they look at art. 40 bis TRLPI (*Two-Step Test*) as a **set of criteria to be considered liberally and globally.** The fact that the EU itself has followed a different order in different Directives reinforces such a view. On the other hand, since it is not clear whether art. 5.5 EU InfoSoc Directive (Three-Step Test) should be compulsorily implemented into national laws by member states, it is perfectly understandable that Spanish judges see art. 40 bis TRLPI as a rule for

interpretation of national law, that can be easily and flexibly considered as done with art.3 Spanish Civil Code (which sets the general criteria for the interpretation of the law).

2.3.1.4. Has the WTO panel decision of June 2000 concerning the interpretation of local exceptions by national courts had an impact on the interpretation of exceptions by your country's courts?

The WTO panel decision is acknowledged by scholarly literature but does not seem to have been used by caselaw. So far, its impact has been nil. This will likely change, eventually, but so far, it has not had any practical impact. Neither the strict methodology nor the reading of the *Three-step-test* done by the WTO Panel has not been applied by any Spanish court.

2.3.2. Interoperability

(Please explain the substance of the laws, decrees, court or administrative decisions or other professional practices, with references and hyperlinks or copies)

2.3.2.1 Do your country's laws or administrative regulations contain provisions concerning interoperability of computer programs with other computer programs? Of computer programs with other works in digital format?

The question of interoperability is governed according to the terms provided for in the EU **Directive on computer programs of 1991**. There is no specificity worth mentioning. **Art. 100.5 and 6 TRLPI** faithfully implement art. 6 EU Directive on computer programs.

2.3.2.2 Do your country's judicial decisions address interoperability of computer programs with other computer programs? Of computer programs with other works in digital format?

No judicial decisions exist. The question of interoperability could be tackled by administrative bodies, such as the *Comisión Nacional de la Competencia* (Law 15/2007), or by consumer protection entites. However, we have no account of any decisions in that matter.

2.3.2.3. Do your country's laws contain provisions concerning interoperability related to the presence of technological protection measures (e.g., for purposes of overcoming the inability to read lawfully acquired files on certain playback devices)? Describe the system in place (e.g., legal provisions, special commissions with the power to require interoperability) to achieve interoperability.

No other norms exist, apart from those already mentioned under # 2.3.2.1. It should be borne in mind that the EU InfoSoc Directive in its art. 1 declares that all previous Directives (among them, the computer program one) are not affected by it. Norms on the protection of technological measues in the InfoSoc Directive do not affect those set in the Computer program Directive. Obviously, this may cause some problems, which

are unavoidable within a body of law –the European author's right- which is being built in a fragmented form.

3 The author's place in copyright as modernized by the TRIPS Agreement and the WIPO Treaties

Please indicate the effect on the human author (i.e., on the actual creator; not a juridical person) of the legislative, administrative, and court decisions implementing the TRIPs and WIPO Treaties. To what extent have authors (as opposed to corporate copyright owners), benefited from these modernizations? To what extent have these modernizations harmed authors? Please take into account as well any relevant business or industry practices.

As far as **physical persons** (authors and artists) it should be mentioned (as done under # 2.1.4.1) that **the granting of the right of making available as an exclusive right was seen as dangerous,** to the extent that –as such- it may be assigned. Therefore, the Law 23/2006 granted **artists** a right of simple remuneration that applied (and remained with the artist) once the exclusive right had been assigned to the producer. (vid. # 2.1.4.1). As done with artists, the **authors of audiovisual works** also claimed and obtained a similar treatment (although it is not clear whether the remuneration right is "instead of" the exclusive right or "in addition to" –as is in the case of artists). The relationship between exclusive rights and remuneration rights and their possible overlapping, in favor of the same person and relating the same exploitation act, remains a very polemic topic in Spanish Law.

In theory, the protection of technological measures and the express grant of a right of making available should facilitate the development of new business models. This is happening **at a slow pace and with some difficulties**. However, we have gathered some information. The main part of the offer (mainly in the music and audiovisual fields) is **not Spanish but "global"**:

Books.- We have a lack of books in electronic form, either in Spanish or other official languages. Nevertheless, in the last 2 or 3 years, some initiatives are appearing:

- "*E-libro*" (www.e-libro.es): e-libro is the International Partner of ebrary (see www.ebrary.com) for Spain and Portugal. In these countries the company sells ebrary English Collections and Services, and its own collections in Spanish and Portuguese. Additionally, the company offers other e-services. Books are offered in pdf format and protected by DRM; users can copy or print material under demand but they must pay and additional cost for each act (the price of copy or print is not included in the price of the licence). E-libro is offering to universities other products: (1) IaP (Print on demand): university can publish their books or works through e-libro and users can ask for a copy of these works; (2) e-libro thesis: university can publish their thesis on e-libro; every sale of the thesis originate economical benefits for the university (3) e-libro journals: similar to e-libro thesis, is the possibility to publish an electronic version of the university's journals
- "*Vlex*" (http://vlex.com/): Vlex is offering a database with Spanish legislation and jurisprudence and access to a big number of e-books specialized in legal material and in Spanish. Users (usually, university libraries) must licensed all

the database; the final user can make copies or print the e-books (is not possible to download an entire book, only if you use the option chapter by chapter)

- "*Deusto*" (http://www.e-deusto.com): "*Deusto*" is a well known publisher on economy and business science, Deusto is selling electronic version of their books and journals. Users can buy single titles or subscribe a collection of e-books.
- "*Google Book Search*": in 2007, 6 Spanish libraries signed agreements with Google to digitalize their collections. The first one was the library of the Universidad Complutense de Madrid; the other five libraries are: the National Library of Catalonia, the library of the Ateneno Barcelonés (a Catalan cultural society), the library of the Centro Excursionista de Catalunya, the Montserrat Library (Monastery of Montserrat) and another religious library. All these libraries are digitalizing only books in public domain.

Music

In 2004, before the express inclusion of the making available right in the Copyright Law, the main on line stores started to offer the downloading of music:

- "*iTunes*" (Apple),
- "*MSN Music*" (Microsoft) and
- "*Terra Music Premium*" (Telefónica) http://musicapremium.terra.es/preventa/portada.htm).

In that date in Spain were also operative other four stores under agreements with "OD2 On Demand Distribution" http://www.ondemanddistribution.com, the great European provider of technical infrastructure and licenses for music producers, recently acquired by Loudeye:

- *"los40.com"*, http://www.los40.com
- *"MTV Spain"*, http://www.mtv.es/
- *"Tiscali",* http://www.tiscali.es/
- *"Wanadoo"*.

MSN Music, through the alliance of Microsoft with Loudeye, also made use of OD2.

At the moment in Spain, in spite of the **difficulties to introduce new models of business** for digital music, it's possible to acquire music through the following services, although not all TPM (http://www.ifpi.org/content/section_links/tracker-region-europe.html, Spain):

- *"eMusic"*, http://www.emusic.com/
- "*iTunes Spain*", http://www.apple.com/es/itunes/
- "*MSN Music Spain Club*", http://sib1.od2.com/common/framework11.aspx?shid=036A0045
- "*Digital MTV Downloads Spain*", http://sib1.od2.com/common/framework11.aspx?shid=036A002E
- "*MU4US*", http://www.mu4us.com/
- "*Terra Pix Box*" http://www.terra.es/pixbox/

- "*Wanadoo Jukebox*". http://sib1.od2.com/common/framework11.aspx?shid=05D7002E

In the Spanish musical market the downloading of music amounts to 6 %, with a value of 22 million euros. Spain occupies the ninth position in the international classification of digital sales (source AGEDI, collecing society of phonograms producers).

It's also remarkable the creation of "alternative sites" that offer music (and video) under creative commons licences. On these sites, musicians and artists publish their works and users can download without restrictions (usually, works are free of charge, or the site suggests a payment like a contribution) Some examples:

- "*Date a conocer*" (http://www.dateaconocer.com): on this web, musicians and artists can promote their works licensed under creative commons licences. They offer the possibility to listen their one radio channel with the music of their catalogue.
- "*Jamendo*" (http://www.jamendo.com/es/): similar to the other sites.

Photos/Images

- *Ministry of Education and Science*.- Image and sound database offered by the Spanish Ministry of Education and Science (http://recursos.cnice.mec.es/bancoimagenes4/). This database contains photos, videos, sounds and animations; users can download and use free of charge. Material can only use for non commercial educational purposes.
- "*VEGAP Image Bank*" (www.bi.vegap.es).- VEGAP Image Bank starts in 2004 as a service for VEGAP collecting society members . It is created with the aim to digitize the photographic material of the artworks and to keep the all records on a database, with detailed information on the artwork. You may browse and search without having to register on the site, but as a registered user you will be able to place an order and download a high resolution image on request, once the licensing rights have been granted.

Audiovisual

The clarification of the legal issued in the making available right has enabled the posibility of real video-on-demand (VOD) services. Up to last March, the satellite operator Digital+ was servicing the market with films and sport events (mainly football) via a near-video-on demand (NVOD), and SGAE, trough its SDAE had a VOD portal (films and music) with a quite reduced offer, with little, if any, market appeal. But from them on several services have apeared in the market. The most relevant ones are:

- "*Imagenio*", of the Spanish telco Telefonica (www.telefonica.es/tol/imagenio.html): The Telefonica offer (with a potential market of over 15 million lines) relays on DSL transmission, and its offer is concentrated on recent feature films. Its main contraint id that still has a limited territorial coverage, being it only available on certain urban areas.
- "*Ojo*", of the cable broadcaster ONO, (http://www.ojo.tv): The cable broadcaster ONO lauched its VOD service Ojo (eye) by the end of 2006. Its footprint is

wider than Imagenio, though still limited. Its offer is consisting of films and tv series.

- "*Filmotech*", developed by the Spanish film producers collecting society EGEDA (http://www.filmotech.com): Filmotech offers mainly feature films with an average of of 7 and beyond years old since release. The company was promoted by the Spanish film producers colecting society, and its main characteristic is that it is governed by the rightholders directly. Download for a time, limited or not, is the only issue offered. Release was done in March 2007, and since May is available worldwide.

The appearance of these offers, still in a very primary stage, should be considered as beneficial for authors. They have the possibility to include in their contractual negotiations the making available right, though the legal presumption of art. 88.1 of the Copyright Law extends its presumption to this exploitation form. Nevertheless, and in order to alleviate such negative impact, art. 91 recognizes a residual, not transferable nor waivable right, to be collected by the collecting societies exclusively.

The technical measures (DRMs mainly) are under the public scope. And dicussion. As a first approach, while the music industry is divided, and film industry has fully endorsed them, from the authors point of view they should be contemplated as positive. The civl law had no provision to that extent, though the Criminal Code had provisions but only for technical devices (decoders mainly), not for materials recorded.

DRMs are esential for the film authors rights and situation. In the music business model, they are not as essential as they are for the film industry, that relays its economic system in the exclusity (territorial, media and time). And through the managed copy system (as a limited expression of the copy for personal use exception), is fully compatible with it. And will guarantee the authors the permanence of the revenue source of the private copy.