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1 - Does your jurisdiction's copyright law provide for a so-called "triple test" provision, namely a provision which reiterates the requirement of international treaties that exceptions and limitations to copyright shall only apply in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author? If yes, please provide [an English version of] the text of this provision. If no, how does your law understand and comply with that requirement? In particular, is that requirement taken into account by the courts in individual cases and to what extent? Is there any case law which can serve as guidance? Can you refer to concrete examples used by your national scholars to illustrate that requirement and its concrete consequences? In particular, can you comment on precedents, if any, where the court found that (i) the application of the exception conflicts with the normal exploitation of the work (ii) unreasonably prejudices the legitimate interests of the author?

R: Brazil is signatory to the TRIPS Agreement, which establishes in its Article 13 the so-called triple test to determine whether a use of a work is violating the copyright of a third party. This agreement was internalized in Brazilian law by Federal Decree No. 1,355 of December 30, 1994 and, therefore, since that date, is enforced as federal law in Brazil.

Before signing TRIPS agreement, however, Brazil was already signatory to the Berne Convention, which had introduced the three-step test in its 1967 revision². In effect, Article 9, item 2 of the Convention states that:

"It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice."

Notwithstanding international treaties, Brazil has enacted a federal law that regulates copyright - Federal Act No. 9.610 of February 19, 1998 (hereinafter "Copyright Act"³). This law brings in its article 46 a series of exceptions to the exercise of copyrights⁴, that are more restrictive than the treaties. More particularly, however, and in view of the question, attention is drawn to section VIII of this article of law, transcribed below:

Chapter IV

¹ The rapporteur would like to thank his associate Ms. Daniela Camara Colla for the inestimable aid with research and responding the questions. He would also like to thank Mr. Lucas Antoniazzi for reviewing the text and fine tuning some points of it.

² Internalized into Brazilian law by Federal Decree No. 75,699, of May 6, 1975.

³ All excerpts from the Brazilian Federal Copyright Act are taken from WIPO's translation thereof, available on <http://www.wipo.int/wipolex/en/details.jsp?id=514>. Access on May 16, 2017.

⁴ Owing to an express request from International Rapporteur, we are adopting in this answer the word "exception" instead of "limitation". However, it should be noted that Brazilian Law names these instances where no copyright can be enforced as limitations and not exceptions.

Limitations on Copyright

46. The following shall not constitute violation of copyright:

VIII - the reproduction, in any works, of small stretches of pre-existing works, of any nature, or of integral works, in the case of plastic arts, when reproduction itself is not the main objective of the new work and does not prejudice the exploitation, reproduction nor cause unjustified prejudice to the legitimate interests of the authors.

This section brings generic criteria to identify when a use of part of works or, in the exclusive case of the works of plastic arts, of the integral work, can be treated as an exception or, on the contrary, should be considered copyright infringement.

The first criterion is that the reproduction of a small part of any work or of the entire work, in the case of creations of the plastic arts, is not the main objective of the new work.

This criterion is construed as determining that the new work must have different objectives from the work reproduced (in its entirety or in parts) and that it is substantially different from the work reproduced.

The second criterion is that reproduction does not prejudice the normal exploitation of the reproduced work.

This criterion is construed in the sense that the new work cannot compete with the original and reproduced work, that is, the new work cannot be composed in a way that replaces the work reproduced.

Of course, this criterion is to be construed in a reasonable way, that is, if the person accessing the new work is satisfied with the partial or complete reproduction of the previous work, thus no longer desiring to access the previous work, this effect cannot be directly and automatically attributed to the author of the new work, unless the structure of the new work is intended precisely to achieve this effect. For example, if one is satisfied with a short chapter of a novel reproduced in a book that brings together excerpts from several novels, it must be reasonably inferred that the person had no interest in reading the partially reproduced work and that this disinterest was not caused by the book. The same is true of the person who loses interest in accessing a work of art because he has seen a reproduction thereof in a magazine or a book: one should reasonably presume that this person would never have an interest in accessing the original work, regardless of the content of the new work.

Ultimately, the third criterion is that reproduction in the new work does not cause unjustified harm to the authors of the earlier work. As in the second criterion, the criterion of harm must be construed as having the purpose of preventing reproduction which aims at substituting access to the original work. For example, an electronic site which, without the authorization of the right holder, reproduces the central chapters of a non-fiction book, i.e. those which bear the essence of the work's thesis, can effectively undermine the normal exploitation of the reproduced work and cause harm (by diminishing sales of the work) to the right holder. On the other hand, if the same book is the object of scathing criticism that sums up the thesis and quotes some essential passages from the book, and this criticism provokes in the reading public an aversion for the criticized book, this effect cannot be understood as a unjustified harm, because what leads the reader not to acquire the work is not the fact that he has already essentially read it, as in the first scenario, but because he relies on the opinion expressed by the critic, who persuades him, in a legal fashion and using excerpts from previous work, not to access such work.

The use of these three criteria, in section VIII of article 46 of the Copyright Law, has brought the triple test mark provided for in TRIPS and the Berne Convention.

Nevertheless, the triple test provided for in TRIPS and the Berne Convention, as it has the force of federal law in Brazil, should also apply to all exceptions provided for in Chapter IV of the Brazilian Copyright Act, some of which will be seen in additional detail below.

There are in Brazil a series of judicial cases that, in different contexts, apply the rule of the three steps test to exclude copyright enforcement. Here are some cases.

From the Superior Court of Justice:

SPECIAL APPEAL N ° 1,320,007 - SE (2012 / 0082234-4) RAPPOREUR: JUSTICE NANCY ANDRIGHI. COPYRIGHT. SPECIAL APPEAL. CENTRAL BUREAU FOR COLLECTION AND DISTRIBUTION. MUSICAL PUBLIC PERFORMANCE. RELIGIOUS EVENT. LACK OF PROFITS AND INCOME COLLECTION. FAMILY CIRCLE. ART. 46, VI, OF FEDERAL ACT No. 9.610 / 98. THREE STEPS RULE. COPYRIGHT NOT OWED. I. Federal Act No. 9.610 / 98, regulating the matter in an extensive and strict manner, abolished the direct or indirect profit for the exhibition of the work as a criterion of the duty to pay author's remuneration, erecting as a taxable event only the circumstance of having promoted the public performance of the artistic work, in a place of collective frequency. II. Concerning musical performances, these do not depend on the author's authorization when performed in the family circle or for exclusively educational purposes in educational establishments, if there is no intention of profit. III. A "family circle" is understood not only as the enclosure of the home, in a strictly physical sense. The action that is allowed is the one performed within the limits of the family circle and with "family purpose". In this way, the public performance that takes place in a venue where the family is not residing, but is momentarily intending to generate a family environment, should not suffer the incidence of copyright charges. IV. Per the three steps rule, it is permissible to limit the author's exclusive right when: (i) he is faced with certain special cases; (ii) the use does not impair the normal exploitation of the work and (iii) the use does not cause unwarranted harm to the legitimate interests of the author. V. Special appeal heard and upheld.⁵

SPECIAL APPEAL N ° 964404 - ES (2007 / 0144450-5). RAPPOREUR: JUSTICE PAULO DE TARSO SANSEVERINO. COLLECTION OF COPYRIGHT. CENTRAL BUREAU FOR COLLECTION AND DISTRIBUTION-ECAD. PUBLIC MUSICAL PERFORMANCES AND ENVIRONMENTAL SOUNDING. EVENT CONDUCTED IN SCHOOL, WITHOUT PROFIT, WITH FREE ENTRANCE AND EXCLUSIVELY RELIGIOUS PURPOSE. I - Controversy over the possibility of collecting the copyrights of a religious entity for public musical performances and environmental sounding in school, opening the Vocational Year, religious event, non-profit and with free admission. II - The need for systematic and teleological construction of the normative statement of art. 46 of Federal Act No. 9,610/98 in the light of the exceptions established by the special law itself, ensuring the protection of fundamental rights and constitutional principles in collision with the rights of the author, such as privacy, culture, education and religion. III - The effective scope of protection of the

⁵ Free translation.

author's right to property (article 5, XXVII, of the CF) arises only after considering the restrictions and limitations that oppose it, and must be considered, as such, those resulting from the list extracted from articles 46, 47 and 48 of Federal Act No. 9,610/98, construed and applied in accordance with fundamental rights. III - Use, as a criterion for the identification of restrictions and exceptions, of the three step test rule, which is governed by the Berne Convention and the WTO / TRIPS Agreement. IV – Acknowledgement, in the present case, under international conventions, that limiting the incidence of copyright "does not conflict with normal commercial use of works" and "does not unreasonably harms the interests of the author." V - SPECIAL APPEAL PARTIALLY GRANTED.⁶

From the State Court of Appeals of Rio de Janeiro:

Rapporteur: Judge ANTONIO SALDANHA PALHEIRO – Judgement date: 04/12/2012 – Fifth Civil Chamber. Appeal No. 0225705-28.2011.8.19.0001.

CIVIL APPEAL. COPYRIGHT. MAJOR ARGUMENT OF THE APPELLANT IS THAT IT WOULD BE A RELIGIOUS INSTITUTION, WITHOUT PROFITS, AND THE ENTRANCE TO ITS EVENTS IS FREE. ALLEGATIONS UNTRUTHFUL. IN SPITE OF THE EVENTS HAVING RELIGIOUS TRACES, THE PURPOSE THEREOF IS THE MEETING OF BUSINESS MEN. CONSIDERATION OF THE ANNUAL FEE COLLECTION TO MEMBERS BEYOND THE VARIOUS POSSIBLE CATEGORIES OF CORPORATE MEMBERSHIP. POSSIBILITY OF AFFILIATION THAT IF ANYTHING CONFIRMS THE CONCEPT OF ASSOCIATION, AS ANY OTHER OF THE SAME NATURE. HOWEVER, THERE IS NO WAY TO DEFINE IT AS AN EXCLUSIVELY RELIGIOUS ENTITY, A CHARACTERISTIC THAT REFLECTS IN ITS EVENTS. THE BERNE CONVENTION, TO WHICH BRAZIL IS A SIGNATORY, THE GREAT TREATY ON INTERNATIONAL PROTECTION OF COPYRIGHTS, BRINGS THREE STEP TEST, IMPOSING LIMITATIONS ARISING OUT OF THE RIGHT OF AUTHOR, RUNNING IN THE CURRENT PHRASE "THE THREE-STEP TEST SETS LIMITS TO LIMITATIONS ON AUTHOR'S RIGHTS". UNDER THIS PERSPECTIVE, IT IS OF GREAT VALUE THE QUOTATION OF THE THREE LIMITS TO THE COPYRIGHT, WHICH ARE: (A) IN CERTAIN SPECIAL CASES; (B) DO NOT CONFLICT WITH THE NORMAL COMMERCIAL EXPLOITATION OF THE WORK; (C) DO NOT UNJUSTLY HARM THE LEGITIMATE INTERESTS OF THE AUTHOR. THE ASSOCIATION DOES NOT EXCEED THE THREE STEP TEST RULE, BUT IT DOES NOT COMPLY WITH ANY OF THE HYPOTHESES REFERRED TO IN ARTICLES 46, 47 AND 48 OF FEDERAL ACT NO. 9.610 / 98, BEING THEREFORE LEGITIMATE TO BE CHARGED AS A CONSIDERATION OF THE USE OF COPYRIGHTS. APPEAL DENIED.⁷

2. Does your jurisdiction's copyright law provide for a list of exceptions? If yes, is it a closed list, namely a list designed in such a way that any use which falls outside the list is not permitted - unless it is authorized by the copyright owner?

⁶ Free translation.

⁷ Free translation.

R: Yes, Chapter IV of the Brazilian Copyright Act, entitled "On Limitations to Copyright", brings a closed number of copyright exceptions. However, some exceptions have been written in such a way that they do not seek to define a specific situation, but embrace several hypotheses. This is the case of the exception brought in section VIII of Article 46, cited in the answer to question 1.

An example of the application of art 46, VIII is the case of the use of excerpts from musical works in the documentary *Alô Alô Terezinha*, about the famous Brazilian TV show host Chacrinha:–

APPEAL No. 0352238-03.2009.8.19.0001 – Rapporteur Judge FERNANDO FERNANDY FERNANDES – Judgment date: 03/08/2011 - THIRTEENTH CIVIL CHAMBER. COPYRIGHT. PUBLIC PERFORMANCE OF MUSICAL WORKS. AUTHORIZED REPRODUCTION OF SELECTED SECTIONS. FEDERAL ACT No. 9610, of 1998. APPLICABILITY. CIVIL APPEALS. COPYRIGHT. APPLICATION OF SECTION VIII OF ART. 46 OF FEDERAL ACT No. 9610/98. EMPLOYMENT OF SMALL ARTS OF "BACKSTAGE" AND "HUMBLE PEOPLE" MUSIC, IN THE DOCUMENTARY "ALÔ, ALÔ TEREZINHA!". RULING REVERSED. There is no doubt about the importance of the communicator to the national artistic context, as well as the great value of the documentary itself, which, like all works of this kind, is committed to portraying faithfully the subject matter. It is noted that, *in casu*, section VIII of art. 46 of Federal Act No. 9.610 / 98 perfectly conforms to the situation described, notably because of the reproduction of the small parts of the songs, in the documentary, aiming to accurately portray the programs presented by the great Abelardo Barbosa, one of the most important hosts of television shows between the 50s and 80s, and his important collaboration for television and popular culture in the Country.⁸

3. If your jurisdiction's copyright law provides for a list of exceptions, what are the fundamental rights or the objectives supporting the permitted uses which justify the exceptions? In particular, do the exceptions pursue the following fundamental rights or objectives: education, research, access to culture and knowledge, freedom of expression and right to receive and disseminate information, privacy and private use, needs of people with a disability, preservation of cultural heritage, public security, freedom of panorama? Are there fundamental rights or objectives which are overlooked or unduly minimized in the current list of exceptions?

R: Chapter IV of the Brazilian Copyright Law establishes a series of exceptions to copyright, based on several fundamental rights.

The right to information bases the exception contained in item I, letter "a" of article 46, which allows the press to transcribe newspaper news, granted that its authorship and source are mentioned. The same is true for the exception of subsection I, letter "b", of the same device, which allows newspapers to transcribe public. However, these exceptions apply only to printed press and do not benefit internet press:

46. The following shall not constitute violation of copyright:

I. the reproduction:

⁸ Free translation.

(a) in the daily or periodical press of news or informative articles, from newspapers or magazines, with a mention of the name of the author, if they are signed, and of the publication from which they have been taken;

(b) in newspapers or magazines of speeches given at public meetings of any kind;
(c) of portraits or other forms of representation of a likeness, produced on commission, where the reproduction is done by the owner of the commissioned subject matter and the person represented or his heirs have no objection to it;

(d) of literary, artistic or scientific works for the exclusive use of the visually handicapped, provided that the reproduction is done without gainful intent, either in Braille or by means of another process using a medium designed for such users;

The purpose of letter "d" of this section is to safeguard the rights of the visually impaired to access information, since it allows the reproduction of works in braille or any other support appropriate to the visually impaired, provided it is not for profit. This exception has been widened to encompass any person with disabilities, as per the Accessibility Law (Federal Law No. 13,146, of July 6, 2015)⁹:

Article 42. A person with a disability has the right to culture, sport, tourism and leisure on an equal basis with other persons, and is guaranteed access to:

I - cultural goods in an accessible format;

II - television, film, theater and other cultural and sporting activities in an accessible format; and

III - monuments and places of cultural importance and spaces that offer services or cultural and sporting events.

Paragraph 1 - The refusal to offer intellectual work in a format accessible to the disabled person is prohibited, under any argument, **including under the claim of protection of intellectual property rights**. (emphasis added)

Section II of Article 46 allows for private, non-profit copying. However, it restricts this right to the reproduction of excerpts, provided it is made for the copyist's own use. Thus, the impossibility of reproducing a work in its entirety for educational or research purposes directly affects students and researchers who, to the fullest extent of the law, will have to acquire them:

II. the reproduction in one copy of short extracts from a work for the private use of the copier, provided that it is done by him and without gainful intent;

Section III is based on the right to freedom of expression, education and access to information and culture, by allowing the reproduction of excerpts from works for the purpose of study, criticism or controversy, provided that reproduction is made to the extent appropriate to the purposes:

III. the quotation in books, newspapers, magazines or any other medium of communication of passages from a work for the purposes of study, criticism or debate, to the extent justified by the purpose, provided that the author is named and the source of the quotation is given;

⁹ Free translation.

The right to education and information is also protected under section IV, which allows the transcription of classes and speeches by students for their use in study, prohibiting, however, their publication without the permission of the teacher or speaker:

IV. notes taken in the course of lessons given in teaching establishments by the persons for whom they are intended, provided that their complete or partial publication is prohibited without the express prior authorization of the person who gave the lessons;

The freedom of trade and the right of the consumer inspire the exception contained in section V, which allows the reproduction of musical, phonographic and audiovisual works in devices that are being offered for sale, with the aim to demonstrate to consumers their operation:

V. the use of literary, artistic or scientific works, phonograms and radio and television broadcasts in commercial establishments for the sole purpose of demonstration to customers, provided that the said establishments market the materials or equipment that make such use possible;

Educational law and privacy are protected under section VI, which allows the reproduction of dramaturgical and musical works in the family recess or, for didactic purposes, in schools, provided they are not for profit. One should note that audiovisual works are not covered by this exception, even if the reproduction or use is made without gainful intent:

VI. stage and musical performance, where carried out in the family circle or for exclusively teaching purposes in educational establishments, and where devoid of any profit-making purpose;

Section VII allows the reproduction of works protected by copyright in judicial and administrative proceedings, based on the right of access to justice, contradictory and ample defense:

VII. the use of literary, artistic or scientific works as proof in judicial or administrative proceedings;

Section VIII seeks to cover all the cases not mentioned in the previous sections, provided they meet the three requirements addressed in question 1.

Article 47 allows paraphrase and parody, provided the new work is not a reproduction, in essence, of the original work. However, this article brings a controversial addendum that excludes the paraphrase and the parody that generate discredit to the original work:

47. Paraphrases and parodies shall be free where they are not actual reproductions of the original work and are not in any way derogatory to it.

The Brazilian Courts have already applied such an exception to advertisements:

"Use of musical compositions in advertising campaign, without prior authorization; insertion with the purpose of making parody using the songs as a background; reproduction of short excerpts and for a few seconds that does not characterize copyright infringement. Federal Act No. 9.610/98. The use of musical compositions was not for a long period, soon followed by information about the product for sale, a fact that authorizes the application of the provisions of Article 46, section VIII, of the Law No. 9,610/98, to exclude the right to compensation, because there was no

copyright infringement. I assume from the probative set that the small parts of the musical compositions were used as a background and with the intention of making a parody, in the carnival period. The reproduction of the musical compositions was not the objective of the commercial, did not hinder its normal exploitation and did not even cause prejudice to the author." (São Paulo State Court, Appeal No. 480.378-4 / 0, 9th Chamber of Private Law, Judge Rapporteur Carlos Stroppa, issued on June 10, 2008)¹⁰.

Finally, article 48 provides an exception that protects freedom of panorama:

48. Works permanently located in public places may be freely represented by painting, drawing, photography and audiovisual processes.

In our view, the list is insufficient, especially if we consider such exceptions as a closed list.

As already said, to except paraphrase and parody from copyright, while conditioning this exception to the fact that the new work does not create discredit for the paraphrased or parodied is to place in the hands of the right holder and the judges an excessive power that ultimately curbs such artistic manifestations. Brazil has several cases in which a parody had to be removed from circulation because it did not meet the condition of "not generating discredit".

This interpretation was put to the test in the conflict between famous Brazilian singer Roberto Carlos and a comedian who was running for congress called Tiririca. Tiririca employed in his political propaganda a parody of a famous music from Roberto Carlos, who then brought the case to Justice. The District Court Judge found infringement, on the grounds that the changed lyrics were not in fact parody, as they were not employed on a comedy show, but with the sole purpose of attracting votes.

In turn, the freedom to perform musical or dramaturgical pieces in the family recess and / or at school, for didactic purposes, demands an update. On the one hand, the exception resents the absence of audiovisual works and the reproduction of works of plastic arts, which are increasingly instrumental in education. On the other hand, it is not uncommon, for example, that such a performance be filmed and uploaded on video platforms such as Vimeo and YouTube and, for a variety of reasons, generate a huge repercussion, including economic repercussion. In such cases, where does the family recess end and the public access begins? This is a matter unanswered by legislation and has not yet been judicially addressed.

Finally, there is much criticism voiced over the fact that there is no specific exception for orphan works or for works that have not been edited for a long time because of lack of interest or difficulties imposed by the authors' heirs. There are those who, in the name of access to culture and the duty of the State to protect public memory, have even defended a compulsory paid license of such works, to avoid their forgetfulness and to promote their diffusion.

4. If your jurisdiction's copyright law provides for a list of exceptions, are the conditions mentioned in the provisions - in order for the use concerned to be permitted – [unduly] strict and compelling, or rather is there room for flexibility? Can you mention examples to illustrate solutions in this respect? Does the law make a distinction between (i) uses for commercial purposes and uses for non-commercial purposes (ii) uses by individuals and uses by others (e.g. companies, organizations)?

¹⁰ Free translation

R: In our view, there is some flexibility and scope for a wider interpretation of some exceptions. At a minimum, paragraph VIII of Article 46, by providing conditions for a use to be an exception rather than describing a specific hypothesis, already gives an opening to the adaptation of the rules for new situations.

Several of the legal provisions determine that the exception only applies when the use is not for commercial purposes - the exception of reproduction for the visually impaired; the private copy of extracts; the performance of plays and music in the family recess and at school, for didactic purposes. Other cases, such as freedom of opinion and parody and paraphrasing, as well as the quotation of newspaper news, or of works for didactic or critical and controversial purposes, are not limited by commercial use, but rather by the reasonableness in the use. In fact, it would be unfeasible to prohibit, for example, the commercial purpose of a textbook that wanted to cite several literary works!

Some legal exceptions apply only to individuals: the transcription of classes or speeches, the private copy of excerpts, the performance of plays and music in family recess. Others are exclusive to organizations or companies: the exception of the demonstration of the product for sale; the freedom to reproduce excerpts from newspapers, books and magazines, etc.

It should be noted that there is no consensus in Brazil concerning the presumption of profit and commercial purpose when the person who reproduces the work is a company or an individual entrepreneur.

5. If your jurisdiction's copyright law provides for a list of exceptions, are the exceptions listed mandatory or optional? Does your law make a distinction in this respect? If yes, does the distinction depend on the nature of the exception? If the exceptions are mandatory, does that mean that they cannot be ruled out by contract, even if the contract organizes an online (interactive) access to the works? Does your law make a distinction between off-line and on-line uses in this respect? Do you have any other comment concerning the mandatory or the optional character of the exceptions?

R: In our view, the list of exceptions is mandatory, but this is a controversial issue. There are different stances held by experts in the field. Since there is a character of subjectivity in some of the legal dispositions, such as what are considered as *excerpts*, some points become susceptible to different interpretations. It is worth noting that under the terms of article 4 "the agreements involving copyright are strictly construed."

The Brazilian Copyright Act mentions that copyrights are extendable to "any other medium of communication", which encompass the Internet, for example, article 46, section III, of the Brazilian Copyright Act:

46. The following shall not constitute violation of copyright:

III. the quotation in books, newspapers, magazines or any other medium of communication of passages from a work for the purposes of study, criticism or debate, to the extent justified by the purpose, provided that the author is named and the source of the quotation is given;

In any event, under section IV of article 46, the musical performance could be done through the internet via streaming.

6. If your jurisdiction's copyright law provides for a list of exceptions, do these exceptions relate to the "reproduction right" only or to the "right of communication to the public" only, or to both? Does the law make a distinction depending on the exception concerned? If yes, what are the negative consequences in practice for the user of the work, i.e. to what extent is he prevented from making use of the work in a way that is sufficiently effective for the purpose contemplated by the legislature? Can you give some illustrations?

R The list of exceptions brought by the Brazilian Copyright Act does not make this distinction explicitly, as in article 46, I, a, b, c, d; II and VIII.

But in other situations, it is possible to infer from the text of the exceptions that they are intended to confer a right to reproduction and a right of communication to the public. For example, the right of private copying is based on the right to reproduction, whereas the exception that allows the reproduction of news and public speech seems to be much more related to the right to communicate such content to the public.

Concerning the right of communication to the public, this is not explicitly mentioned in article 46. However, as public performance is a species of the genus communication to the public, one could say that it is protected under article 46, sections V and VI.

7. If your jurisdiction's law provides for a list of exceptions, do these exceptions also affect the moral rights of the author? Is the impact on moral rights explicit or implicit? Is it legitimate and proportionate? Is there a mechanism which guarantees a minimum level for the preservation of the moral rights of the copyright owner? Conversely, is there any risk that the copyright owner could unduly invoke his moral rights to block the exception? Please give some examples.

R: The Brazilian Copyright Act establishes the following moral rights of the author:

Chapter II Moral Rights of the Author

24. The moral rights of the author are understood to be the right:

I. to claim authorship of the work at any time;

II. to cause his name, pseudonym or conventional sign to appear or be announced as that of the author when the work is used;

III. to keep the work unpublished;

IV. to ensure the integrity of the work by objecting to any modification or any act liable in any way to have an adverse affect on the work or to be prejudicial to his reputation or honor as author;

V. to amend the work either before or after it has been used;

VI. to withdraw the work from circulation or to suspend any kind of use that has already been authorized where the circulation or the use of the work are liable to have an adverse affect on the reputation or image of the author;

VII. to have access to the sole or a rare copy of the work that is lawfully in a third party's possession with a view to preserving the memory thereof by means of a photographic or similar or an audiovisual process, in such a way that the least possible inconvenience is caused to its possessor who shall in any event be indemnified for any damage or prejudice suffered.

In all the exceptions, the right to authorship, that is, to have one's name or pseudonym mentioned as the author of a work, is safeguarded. Sometimes, explicitly, as occurs in the text of article 46, item I, letter "a" and subsection III. Sometimes, implicitly, as is done with letter "b" of the same device or with article 48, which guarantees freedom of panorama.

The right to mention of authorship is regularly applied by the Courts:

"Court of Appeals of Rio de Janeiro - INTERLOCUTORY APPEAL No. 0035473-23.2015.8.19.0000. Judge Rapporteur RENATA MACHADO COTTA - Trial: 08/20/2015 - THIRD CIVIL CHAMBER COMPLIANCE WITH LEGAL REQUIREMENTS. DECISION ATTACKED AGAINST EVIDENCE IN THE RECORDS. GRANT OF INJUNCTIVE RELIEF. In the present case, the appealed decision appears to be contrary to the evidence in the case, since the plaintiff has provided elements of minimum evidence to demonstrate compliance with the legal requirements for the grant of injunctive relief. Indeed, there is likelihood in plaintiff's allegations, given that the fact that a chapter of his book was published in Leandro Karnal's book was widely noticed and disseminated in specialized media, as is inferred from the reports of various magazines and newspapers. In addition, the fact was acknowledged by one of the editors and by the publisher, as it can be drawn from the exchanges of e-mails attached to the records. On the other hand, danger in waiting is patent given that every day that passes the copyrights of the plaintiff are being violated in a very serious way, with the insertion of a piece of work of his authorship in a book by someone else, without any mention or quotation to the true author of the chapter "Gothic pains, private pleasures." However, copyright is the set of legal rules which aim to regulate relations arising from the creation and use of intellectual works (artistic, literary or scientific) - these being understood as the creations of the spirit, in any form externalized - being disciplined at National and international level and including copyright and related rights. The rules of copyright impose on all members of society respect for these creations of the human spirit, while granting its creators the exercise of exclusive prerogatives. In this step, it is evident that with the continued sale of Leandro Karnal's books, with the chapter authored by Fernando Muniz, the readers themselves will be harmed, as they will buy a defective, incomplete and infringing copyrighted work. Appeal granted."

On the other hand, the right to prevent any modification in the work is mitigated by the exception that allows the paraphrase and, especially, the parody, that almost always implies in the alteration of the original work. The limit for this exception, as already mentioned, is that the parody or paraphrase cannot cause discredit to the work or its author.

As already said, there is always a risk that this limitation to parody and paraphrase be transformed into a mechanism for the owner of the parodied or paraphrased work to unfairly oppose a use of the work by a third party.

Another issue is the attribution of authorship when executing the freedom of panorama: although the authorship of a work in a public place is often not evident, there are precedents in Brazil in which it was considered that, after authorship is claimed, the person using the work cannot omit author's name in credits.

An issue that, as far as we know, has not become a practical problem in Brazil, is whether a work altered by the author or even removed from circulation by the will of the author (who has therefore retracted it) must be removed from collections and didactic works or works of literary criticism. In fact, this moral right aims to safeguard the author's right not to see his person and his public image linked to a work that he published under different circumstances. In this respect, not being able to extract the excerpts from this work of books and magazines of a didactic or critical character would be to empty the purpose of the law. On the other hand, culture and collective memory can suffer greatly from the exercise of this right in such circumstances.

8. Under your jurisdiction's copyright law, to what extent is there a risk that technological protection measures could prevent from enjoying the benefit of the exceptions to copyright? Is there an obligation upon the copyright owner to make available to the beneficiary of an exception the means of benefiting from that exception? Is there a distinction between the exceptions, depending on their nature? How can the individual user of a work (or a group of individual users) obtain the full and effective benefit of the exceptions?

R: Although the Brazilian Copyright Act brings a list of exceptions, it is not concerned with determining that the author / right holder allows such exceptions to be fully exploited, nor does it evidence what the remedies would be in the case of a technological barrier against reproduction or one that prevents the full enjoyment of a legal exception.

On the other hand, the Brazilian Copyright Act deems as unlawful the disablement, alteration or removal of technological barriers inserted into works:

Article 107. Without regard to the seizure of the equipment used, any person shall be liable to damages in an amount not less than that resulting from application of the provisions of Article 103 and its sole paragraph who:

I. alters, removes, modifies or in any way disables technical devices that have been incorporated in copies of protected works and productions to prevent or restrict reproduction;

II. alters, removes or in any way spoils the encrypted signals intended to restrict the communication to the public of protected works, productions or broadcasts or to prevent the copying thereof;

III. without authorization removes or alters any rights management information;

We do not know of any judicial case that discusses the use of technological protection in view of the right of the public to use the limitations of legal exceptions.

However, it is possible to imagine some examples of conflicts, such as putting in place a dispositive that blocks copy of small portions of a music or an audiovisual work, which prevents the exercise of the exception contained in item VIII of article 46 of the Copyright Law.

Another example is an audiovisual or musical work made available exclusively by streaming whose access is limited (for example, one can only listen to a certain number of times a week, or must make a new payment for its availability). In these cases, this limitation may in fact prevent the full enjoyment of the educational exception (Article 46, section VI of the Brazilian Copyright Act), whenever a special and facilitated access to educational institutions is not available.

Even if the law does not provide its own remedy, we understand that the recalcitrant owner can be sued by anyone who has the right to enjoy the exception, in order to mitigate or remove his technological barriers to access to the work. However, this is our opinion and, to the best of our knowledge, the Brazilian judiciary has not had occasion to face this issue.

9. Does your jurisdiction's copyright law provide for a "catch all" exception, i.e. an exception which is worded in such a way that it can apply in various cases which differ significantly from each other (e.g. "fair use")? If yes, what is the wording of that exception and what are potential illustrations of its flexibility? What are the conditions for a successful application of this exception? What is the guidance for the application of this exception? To what extent are the effects of this exception sufficiently predictable? To what extent is this exception compliant with the triple test?

R: Although it intends to bring a closed list of exceptions, the Brazilian Copyright Act ends up creating a "catch all" exception with item VIII of article 46, already commented:

46. The following shall not constitute violation of copyright:

VIII. the reproduction in any work of short extracts from existing works, regardless of their nature, or of the whole work in the case of a work of three-dimensional art, on condition that the reproduction is not in itself the main subject matter of the new work and does not jeopardize the normal exploitation of the work reproduced or unjustifiably prejudice the author's legitimate interests.

This exception allows, for example, the sample in music, the use of short extracts of audiovisual works in documentaries or even in works of fiction, among other uses of previous works.

However, there is no public guide or test set by the courts for the correct employment of this exception. This creates great insecurity on the part of both the right holders and those interested in exploring this exception for reproduction of small excerpts of works or full reproduction of works of plastic arts.

The exception at hand reaches full reproduction (works of plastic arts) or excerpts (other works), provided that such use is not the purpose of the work itself, that it does not prejudice the regular exploitation of the preexisting work nor generate illegitimate damages to their holders.

In our view, this exception is consistent with the three-step test contained in Article 13 of TRIPS. However, due to the lack of a public guide for its application or even enough legal cases, its application in practice is still covered by uncertainties, marring its full potential.

10. In your jurisdiction's legal system, when you make abstraction of the exceptions mentioned in the copyright law, to what extent can other fundamental rights than copyright (e.g. freedom of expression, right to private life, right to education) prevail above copyright so that ultimately the use of a work is permitted without the consent of the copyright owner? Can you mention different situations where other fundamental rights can prevail and result into a permitted use of the work? Is the solution different if

the use concerned is already addressed in the copyright law itself, and said use does not comply with the conditions required for the application of the exception? Is there case law which can serve as guidance?

R: Brazil is a Civil Law jurisdiction. Hence, the exceptions contained in the copyright law are considered as the fair and prior agreement between the fundamental rights of the author of the work and those protected under the exceptions.

This, however, is a view constantly challenged by more progressive scholars, who understand that the list of exceptions contained in the law cannot encompass all situations in which, for the protection of a fundamental right, copyright should be limited.

The most controversial debate in this respect is that of orphan works or those which, although they have a well-known authorship, have been withdrawn from circulation by disinterested or overly demanding heirs who raise very high barriers to their publication and performance.

In one of the attempts to reform Brazilian copyright law, a provision was included for the compulsory licensing of rights in situations such as those mentioned above.

11. If your jurisdiction's copyright law provides for a list of exceptions, does it also provide for a compensation in favor of the copyright owner? Does the law make a distinction between the exceptions in this regard? How is the compensation calculated? Is there a mechanism to ensure that the compensation remains within certain limits, i.e. it does not result into an "overcompensation" to the detriment of some categories of users?

R: No. Exceptions are absolute and do not give the copyright holder the right to be paid.

12. Does your jurisdiction's law provide for an exception in order to allow temporary acts of reproduction which are necessary to enable a lawful use? What is the wording (in English) of that exception? What are the conditions thereof? Is that exception sufficiently effective to enable the development of [most of] legitimate online activities/ new business models? Can you give some examples where that exception was (un)successfully applied? Is that exception mandatory?

R: Yes, as per article 30, paragraph (1) of the Brazilian Copyright Act:

30. In the exercise of the right of reproduction, the owner of copyright may make the work available to the public in whatever form and place and for whatever time that he considers appropriate, either for a consideration or free of charge.

(1) The exclusive right of reproduction shall not be applicable where the reproduction is temporary and done for the sole purposes of making the work, phonogram or performance perceptible by means of an electronic medium, or where it is transitory or incidental, provided that it is done in the course of the use of the work that has been duly authorized by the owner.

(2) Regardless of the manner of reproduction, the number of copies made shall be notified and checked, the person who reproduces the work being responsible for the keeping of such registers as will permit the author to verify the economic profits derived from exploitation.

There is no compensation to the copyright owner and the exception is deemed as mandatory.

13. Does your jurisdiction's copyright law provide for exceptions in order to allow the freedom of expression? If yes, please provide [the English version of] the text of these provisions. What are the conditions for the use to be permitted? Can you give some examples where these exceptions were successfully, respectively not successfully, applied? Is there any compensation required for the benefit of the copyright owner? Are the exceptions concerned mandatory?

R: Yes. The exceptions are contained in articles 47 and 48 of the Brazilian Copyright Act. There is no compensation to the copyright owner and they are mandatory:

47. Paraphrases and parodies shall be free where they are not actual reproductions of the original work and are not in any way derogatory to it.

48. Works permanently located in public places may be freely represented by painting, drawing, photography and audiovisual processes.

These exceptions have been enforced by the Brazilian Courts:

"In order to analyze, in a few words, the subordination of the use of Victor Brecheret's work to the prior and express authorization of appellant Sandra (pages 1610.) Honorable Judge Luiz Sérgio de Mello Pinto rightly dismissed the necessity of prior and express authorization of the appellant, since what the book contemplates is the insertion of photographs that portray public works that certainly the author [Victor Brecheret] made to order (pages 1589). Art. 48." (São Paulo Appeals Court, Appeal No. 0119159-30.2006.8.26.0000, 9th Chamber of Private Law of the Court of Justice of São Paulo, Des. Piva Rodrigues, Decision issued on May 31, 2011).

14. What are the cases (e.g. political speeches, news of the day, mere items of press information), if any, where your jurisdiction's copyright law explicitly provides that the content concerned is excluded from the benefit of copyright protection? If there is a list of such cases, is that list a closed list? Is there, in your view, any content missing in that list? Would you recommend to provide for such a list?

R: In Brazil, there is no list of works that, although original, are not protected by copyright. The list embedded in the Copyright Act (Article 8) only covers examples of works that are intrinsically lacking in originality and, consequently, do not deserve protection under the Act:

8. The following shall be excluded from copyright protection within the meaning of this Law:

I. ideas, normative procedures, systems, methods or mathematical projects or concepts as such;

II. diagrams, plans or rules for performing mental acts, playing games or conducting business;

III. blank forms intended for completion with all kinds of scientific or other information, and the instructions appearing thereon;

IV. the texts of treaties or conventions, laws, decrees, regulations, judicial decisions

and other official enactments;

- V. information in common use such as that contained in calendars, diaries, registers or legends;
- VI. names and titles in isolation;
- VII. the industrial or commercial exploitation of the ideas embodied in works.

However, Article 46, section I, in its subheadings "a" and "b", exempts copyright on news and public speeches in a way that allows them to be reproduced in newspapers, an exception already enlarged – at least in practical terms - for blogs and social media, as long as the text is not altered and the authorship and source are mentioned.

In any case, however, no payment is due to the authors or copyright holders of works reproduced under a legal exception.

15. In the context of education, what are the uses which are permitted by your jurisdiction's copyright law? What are the conditions for the uses to be permitted? Are the provisions sufficiently broad to cover distance learning? Does the law make a distinction depending on whether the user is a profit or a non-profit organization, and pursues a (non-) commercial purpose? Is there a compensation provided for the benefit of the copyright owner? How is the compensation calculated? Are the exceptions concerned mandatory?

R: There are two mentions to studies in the text of the limitations. The first is contained in clause VI of article 46 of the Copyright Law, and allows the performance of musical work or play in school context for didactic, non-profit purposes. If these requirements are met, there is no compensation expected for the author or owner of the work reproduced.

This exception is mandatory, that is, it cannot be removed by contract. In our view, the exception is broad enough to cover distance education, but there is no judicial discussion on the subject.

Another exception related to student life is the one that allows the transcription of classes or speeches by the students, for their use, being forbidden to divulge or commercialize their content without the permission of the teachers or lecturers (Article 46, section IV).

Other exceptions that may apply to an educational environment are the right of private copy of excerpts (Article 46, section II) and the quotation of previous works (Article 46, section III).

16. In the context of research, what are the uses which are permitted by your jurisdiction's copyright law? Is there an exception to support big data related activities? Is there an exception concerning "text and data mining"? What are the conditions for said uses to be permitted? Does the law make a distinction depending on whether the user is a profit or a non-profit organization and pursues a (non-) commercial purpose? Is there a compensation for the benefit of the copyright owner? Are the exceptions concerned mandatory?

R: There is no such exception under Brazilian Law. However, Article 46, section VIII should be applicable and the user should always take care not to interfere with the normal exploitation of the work or to cause unjustified damage to the legitimate interests of the authors.

17. In your jurisdiction's copyright law, to what extent and under which conditions is the copyright exhausted? To what extent and under which conditions does exhaustion of

copyright apply to online situations where the work has been made available by electronic means in a digital format? To what extent can the copyright owner exclude the exhaustion of copyright via the terms and conditions of an agreement?

R: As a rule, Brazil follows the exhaustion of rights upon first sale. However, Brazilian Federal Copyright Act establishes exceptions to exhaustion of rights in the so-called "droit de suite". Article 38 of the Brazilian Copyright Act states that "the author has the irrevocable and inalienable right to collect a minimum of five per cent of any gain in value that may be achieved in each resale of an original work of art or manuscript that he has disposed of."

Also, Berne Convention, which is incorporated into law in Brazil, establishes in its article 14 *ter* that "the author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work."

Besides these articles, Brazilian Law does not establish any other exception to first-sale exhaustion. It is our belief however that copyright owners may build exceptions into the agreements, as long as it is not a standardized agreement nor an end consumer agreement.

18. Does your jurisdiction's copyright law provide for a panorama-exception? What are the conditions for that exception? Does the law make a distinction depending on whether the user is a profit or a non-profit organization and pursues a (non-) commercial purpose? Is there a compensation for the benefit of the copyright owner? Is the exception mandatory?

R: Yes. Article 48 of the Brazilian Copyright Act provides for the panorama exception, which is mandatory, does not entail payment to the copyright owner and allows use for profit:

48. Works permanently located in public places may be freely represented by painting, drawing, photography and audiovisual processes.

19. To what extent and under what conditions does your jurisdiction's copyright law allow to make private copies? Is the private copy exception inapplicable to some critical situations (like the scanning of works by others than private individuals)? Is there a compensation for the benefit of the copyright owner? If yes, what form(s) of compensation (one single form or two forms)? Is there a risk that the compensation system could result into an "overcompensation" to the detriment of some users? Is the exception mandatory?

R: The Copyright Act allows for copy of only small excerpts for private, non-profit, use. The exception is mandatory and the owner of the copied work is not entitled to receiving any compensation. The exception is mandatory:

46. The following shall not constitute violation of copyright:

(...);

II. the reproduction in one copy of short extracts from a work for the private use of the copier, provided that it is done by him and without gainful intent;

20. When you make an overall assessment of your jurisdiction's copyright law, what are the risky factors which could possibly result into an imbalance between the rights of the copyright owner and the rights of (/ the fair use made by) the users of works? In particular, where do the risks come from: the absence of certain exceptions so that

specific fair uses could be prevented? The wording of certain conditions for the application of specific exceptions which is unduly demanding to the detriment of some categories of users? The effect of “overcompensation” which unduly favors the copyright owner? The negative impact of some exceptions on the normal exploitation of the work or the legitimate interests of the copyright owner so that the copyright owner is unduly disfavored? What solutions do you recommend to tackle potential issues in this respect?

R: Chapter IV of the Brazilian Copyright Act is one of the sections of the legal document that have not yet been modified, even though it was enacted on 1998.

The Act needs an update in general and for exceptions in special. There are a lot of issues arising from a legal text that has become dated, as pointed out during this report.

For example, one cannot find in the Act a single mention to “internet” or “online” or any other related word. In a civil law Country, this means that use on the internet must be construed through systematic interpretation of the Act, always subject to different positions. This is a major source of risks to both right holders and exception users.

Another criticism that must be made is to the fact that the Act does not include audiovisuals in the exceptions for use in schools without any gainful intent, reflecting a dated view on didactic activities.

The exception that allows newspapers to freely use news pieces as long as authorship and source are mentioned should be expressly enlarged to encompass the internet as well as independent reporters and individuals.

The fact that lawful reproduction of previous works is limited to small excerpts is also a source of risks to all parties involved, because there is no definition of “small excerpts” nor public guides or tests set up by courts to ascertain whether the excerpt of the work reproduced was “small” under the purposes of the Copyright Act.

Ultimately, the fact that a copy or digitization of a work can only be done in small excerpts and by the owner of a copy of the work impedes that libraries digitize copyrighted works to safeguard them from destruction, corruption or loss. This restriction stands contrary to the current trends in other Countries.

The Act should also be more clear on whether the exceptions are mandatory, to what extent they may be restricted under agreement and to expand the exceptions by setting up post-use compensation to right holders.

Brazilian copyright law is still far from being adequate to current times and this inadequacy gets worse literally each passing day. Maybe, its excessive and outdated restrictions and legal framework are one of the causes of Brazil always appearing on lists of countries involved with counterfeiting and copyright violation. Hence, any step towards updating the Act may be a step towards removing Brazil from such dishonorable lists.