Brazil holds public comment period on proposed revisions to 1998 Copyright Law

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On June 14, 2010, the Executive Office of the President released a proposed law intended to "modernize" the existing statute governing authorial and connected rights in Brazil, Federal Law No. 9.610 of 1998 (hereinafter, "the Copyright Law").

The proposed law is the result of several years of nationwide public meetings and consultations sponsored by the Ministry of Culture in an effort to raise awareness about, and build consensus for, revisions intended to update the 1998 Copyright Law.

The proposed law is open to public comment via the Ministry of Culture's website (http://www.cultura.gov.br/consultadireitoautoral/ajuda/) until August 31, 2010. At some point thereafter, it will be sent to the House of Deputies, the lower chamber of Brazil's Congress, to begin the legislative approval process.

The text of the 1998 Law, as modified by the new proposed law, can be found at this link (in Portuguese): http://www.cultura.gov.br/consultadireitoautoral/wp-content/uploads/2010/06/Lei9610_Consolidada_Consulta_Publica.pdf.

Below are some of the most notable changes to the Copyright Law contained in the proposed law.

In sum, the proposed revisions (1) greatly expand the Brazilian government's direct participation in the field of copyright; (2) reduce parties' freedom to contract over copyrights, as well as the legal certainty of contracts entered into, while creating new requirements for the validity of these contracts; (3) expand the types of conduct which are considered not to infringe copyright; and (4) create disincentives for attempting to enforce copyrights. Further, in our opinion, the revisions open the door to widely varied and inconsistent interpretations and enforcement of copyright law by Brazilian courts.

Principles which should guide interpretation of the Copyright Law:

►The opening articles are expanded to clarify that the Law must balance copyright with other fundamental rights guaranteed by the Brazilian Constitution, including cultural rights, and promote "national development." Further, the Law should be interpreted and applied to "stimulate artistic expression and cultural diversity" and "guarantee freedom of expression and access to culture, education, information, and knowledge" by "harmonizing these interests with the interests of copyright holders and society." Finally, the Law should be applied "in harmony with" the principles and laws concerning free initiative, the defense of competition, and consumer protection.

Contracts based on copyright:

►A new article provides that in contracts based on copyright, the parties must observe the principles of honesty and good faith, and cooperate to achieve the end goal of the contract and the expectations of each party. Also, where a party to certain type of contracts obtains an "extreme advantage due to extraordinary and unforeseeable events," either party can request that the contract be revised or terminated. In addition, where a copyright holder signs a "manifestly" unfair contract under duress or out of lack of experience, the contract can be nullified unless it is modified or supplemented to create a more equitable situation.

Formal registration remains optional:

► Formal registration of copyrights remains optional. However, the Executive Branch of the federal government will now be empowered to define the form and conditions for registration, as well as the government agencies which will be responsible for registration, and the Ministry of Culture will set the actual fee amounts and payment procedures. In the past, these tasks fell to the various government entities which accepted copyright registrations, depending on the type of work.

Limitations on authors' rights:

►A new section in the author's property rights Chapter provides that a party authorized to copy a work must maintain accurate records of all copies, made by whatever means or process, for review by the author. Another new section in this Chapter excludes from protection the short and temporary use of a phonographic or audiovisual works in free-of-charge broadcasts, provided that the broadcasting entity has inserted the work itself and uses it for its own live broadcasting or re-broadcasting.

► The article defining the limits of copyright has been revised extensively, including:

- New sections permitting the owner of a legitimately-acquired work to personally make a single copy of the work for personal, non-commercial use, and also to reproduce the work in other formats in order to render it portable or operable with other systems, so long as the copies are for personal, non-commercial use.

- New sections permitting theatrical presentations, recitations, audiovisual exhibitions, and musical performances:

  - in home and school environments, when presented free of charge, without intent to profit, and for those limited audiences, and

  - in any location, presented free-of-charge and without intent to profit, so long as the performance fits one of the following categories: is purely for didactic purposes; is presented to disseminate culture, shape public opinion or debate, or is presented by recognized "cineclubs"; is presented

inside churches or places of worship exclusively as part of religious activities; or is presented for therapeutic or rehabilitative purposes in hospital or prison environments.

● A new section permitting the reproduction, distribution, communication, and public display of works, for non-commercial purposes and the exclusive use of disabled persons, where the disability requires a specific manner to present the work, or requires the work to be adapted to be presentable

● A new section permitting the reproduction and public display of works in CVs or professional portfolios, so long as the person doing so is either one of the authors of the work or the person appearing in the work

● A new section permitting libraries, archives, document centers, museums, film libraries and other museum-type institutions:

▪ to reproduce for non-commercial use works in order to conserve, preserve, or archive them

▪ to make available to the public protected works which are part of their collections by any means, inside their facilities, including by a closed computer network, to permit research, investigation, or study

● a new section permitting the reproduction, for non-commercial purposes, of out-of-print literary, phonographic, or audiovisual works no longer available for purchase from the party authorized to exploit the work, in quantities sufficient to meet market demand

● a new section providing a general exclusion for the reproduction, distribution, and public communication of protected works when the use is:

▪ for educational, didactic, informational, or research purposes, or "creative" purposes, and

▪ limited to that which is needed to achieve the desired end, "without prejudice to the normal exploitation of the work or causing undue prejudice to the legitimate authors' interests"

Copyright term remains the same:

► The article defining the basic copyright term is reworded, though not changed substantively, to make clear that copyrights exist throughout the life of the author plus 70 more years counted from January 1 of the year following the author's death. In addition, collective works are added to the article governing the term for copyrights for audiovisual and photographic works, which provides for 70 years counted from January 1 of the year after the work's initial publication.

Copyright licenses and assignments:

► A new article clarifies that copyrights can be licensed without ownership itself being transferred.

► A new section adds that all rights automatically revert back to the copyright owner at the end of the term of the agreement.

► A new section adds that any license or assignment of copyright must be formally recorded with a relevant government entity.

Work-for-hire concept reinstated:

► A new chapter reinstates "work-for-hire" concepts (which had been contained in the predecessor to the 1998 Copyright Law). Unless otherwise provided by contract, employers, public entities, and parties which have contracted the services of others own the property rights for works created by employees in the performance of their job functions and by contractors hired for specific tasks. However, the employee or contractor retains property rights regarding "the remaining modes of utilization of the work," though only to the extent the exercise of such rights does not "unjustly harm" the employer, public entity, or party which contracted for the service. Contractors must always be hired pursuant to written agreements, and, unless barred by the terms of the agreement, have the right to include work done for a client in a published collection of their complete works beginning one year after the work is first used by the client. Also, where a contractually-provided-for start date for use of a work is not met by the party which ordered the work, rights in the work revert to the contractor which created it. Contractual clauses limiting the moral rights of contractors over their works are null and void. Finally, the following categories and situations are not covered by these provisions: radio professionals and performers; contractual relationships related to commercial exploitation of news articles; contractual relationships resulting from relations between professors, researchers and teaching or research institutions, when the work clearly exceeds the scope of the task agreed upon or when a work is used in a manner not contemplated in the contract; and productions of audiovisual works in non-advertising situations.

Compulsory licenses created:

► A new chapter empowers the Brazilian President to grant "involuntary licenses" which permit parties to translate, reproduce, distribute, publish and display literary, artistic, and scientific works, so long as the licenses "necessarily serve the interests of science, culture, education, or the fundamental right of access to information," when:

- there are insufficient copies of a work, already publicly-known for more than 5 years, "to satisfy the necessities of the public;"

- a copyright owner "unreasonably" refuses to allow, or creates obstacles to, use of a work, or uses the copyright in an abusive manner;

- it is impossible to obtain authorization from the owner of a work which is presumed to still have not fallen into the public domain, because the owner cannot be identified or found; or

- an author or copyright owner unreasonably refuses or creates obstacles to licensing of a collective work.

The licenses can only be issued to and upon the request of parties which have a legitimate interest and the "technical and economic ability to efficiently exploit the work" within the Brazilian market. The parties must prove that they attempted to obtain a license from the copyright holder, which refused or created unreasonable obstacles to licensing (specifically, when the compensation sought by the copyright holder is not customary for the market). All "involuntary licenses" include payment of compensation to the copyright holder in an amount determined by the government via "due legal process." The license process will be handled by the Ministry of Culture. Once granted, an "involuntary license" must be started by the deadline set by the government to do so, or be lost, and the licenses cannot be assigned. "Involuntary licenses" are prohibited where they will create a conflict with the author's moral rights over the work, and will be rescinded if the licensee fails to meet the requirements of the license or fails to pay the author. Computer programs *per se* cannot be the subject of "involuntary licenses."

Limitations on publisher's rights:

►Revisions to the article governing the publisher/author relationship: require the publisher to divulge the work "attending to the legitimate interests of the author;" prohibit contractual clauses transferring the author's property rights to the publisher; and permit the author to request termination of the contract if the publisher creates obstacles to distribution of the work in detriment to the author's legitimate interests.

► New articles expressly apply the provisions of this chapter to not only books but also newspapers, magazines, and other periodicals, such as translations, photographs, drawings, caricatures, and musical works.

Reproduction of copyrighted work via photocopy or similar means:

► A new chapter requires commercial, profit-seeking enterprises which copy literary, artistic, and scientific works: to pay royalties to copyright owners via associations set up by the copyright holders for this purpose; to obtain copyright owners' prior approval before copying; and to keep detailed records of all copies made. The chapter also requires editors which receive these royalties to pay at least 50% of amounts to the authors of the copied works.

Collective enforcement / royalty collection:

► New articles require associations which collect royalties on behalf of copyright owners to register with the Ministry of Culture and provide the Ministry with detailed financial and operational reports and other relevant information on an annual basis.

- The registrations can be annulled if they were not obtained legally, or cancelled if it is determined that an association does not comply with the requirements set forth in the law. All associations existing as of January 1, 2010, are automatically "grandfathered" in, though they will still be required to file annual reports.

- The associations are required to: operate with greater transparency, publishing their methods of calculation, billing, and distribution on websites, as well as publishing their Articles of Incorporation and other corporate documents, and royalty collection and distribution rules on websites; and work to increase operational efficiency and reduce the amount of time taken to pay the rightholders. [Should the associations fail to do so, a new article in the civil sanctions section of the Law permits the Ministry of Culture to impose a fine of up to R$ 50.000,00 against the management of the associations as a result.

- Associations which collect royalties for public performances of musical works must do so through a single, central collection office. Associations which collect royalties on behalf of the audiovisual industry must now also do so through the same central collection office used by the music industry when a user owes royalties to both groups. The royalty collecting associations for the two industries will have 6 months from the effective date of the new law to begin collecting royalties through the unified central office.

- The directors, superintendents, and managers of the individual royalty-collecting associations and the central collection office can be held personally liable, jointly and severally with the organizations and each other, for failure to pay copyright holders amounts due because of malicious acts or negligence. Consumer complaints about the collection activities of these associations and the central collection office can be filed via government agencies authorized to receive and investigate consumer and anti-competition complaints.

Overreaching by copyright owner can be punished:

► A new subsection to the article on monetary damages for violations of copyright provides that damages can also be awarded against entities which "make difficult or impair" acts which the Law considers to be beyond the limits of copyright, as well as against entities which "make difficult or impair" use of works, transmissions, radio broadcasts, or audio recordings which have entered the public domain.

► Another new subsection to the article on monetary damages provides that damages do not apply when a party alters, suppresses, modifies, or disables anti-copy features or

computer codes designed to prevent copying of a work in the course of acts which the Law considers to be beyond the limits of copyright.

► Yet another new subsection to the article on monetary damages provides that anti-copy features or computer codes designed to prevent copying of a work must be set up to be effective only during the validity term of copyright in the work.

► New articles added to the section of the Law concerning civil sanctions provide that a copyright holder or representative thereof which exercises the copyright "in an abusive manner," and any party which offers "payola" to a radio broadcaster or pay-television service, commits an "violation of the economic order," punishable as appropriate under Brazil's Competition Law, in addition to any civil sanctions under this Law.

Statute of limitations:

► A new article adds that the statute of limitations for civil actions concerning violations of copyright expires 5 years from the date of violation of the right, except in the case of a "continuing violation" of copyright by a single infringer or group of infringers, where the statue of limitations will run 5 years from the last violation.

Effective date:

► A new article providing that the revised Law will go into effect 180 days after it is officially published.