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## Star–Crossed Copyrights: The Story of How Mexico Defied Civil Law Traditions by Infusing Common Law Ideologies into its Audiovisual and Motion Picture Copyright Regulations

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# **Star–Crossed Copyrights: The Story of How Mexico Defied Civil Law Traditions by Infusing Common Law Ideologies into its Audiovisual and Motion Picture Copyright Regulations**

Camila Chediak<sup>†</sup>

*This Note was inspired by the out-of-the-ordinary, yet practical approach that Mexico chose to implement when it waived certain longstanding copyright moral rights principles in favor of the U.S. common law work-made-for-hire approach for its audiovisual and motion picture regulations. Since the inception of its copyright law, Mexico has strictly adhered to the civil law ideologies that are generally standard to civil law countries, particularly in its loyalty to the original creators of creative works through the moral rights doctrine. The United States, on the other hand, favors utilitarian ideologies that emphasize the societal importance of fostering innovation through the balance of creator rights and limitations. This Note will breakdown and analyze Mexico's unique "hybrid law" that incorporates a work-made-for-hire exception to its moral rights ideologies through (1) the examination of each country's traditional copyright*

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*laws, (2) the analysis of two international treaties that influenced the creation of the copyright exception, and (3) the effects of the hybrid law on the audiovisual and motion picture industries. Furthermore, this Note will discuss how the hybrid law created the flexibility to promote greater collaboration between the United States and Mexico.*

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## I. PITCHING MATERIAL

Around the early fourteenth century, Romeo killed Juliet's cousin in the cobblestoned streets of Verona, Italy.<sup>1</sup> In 1912, the British ocean liner Titanic sank in the North Atlantic Ocean after hitting an iceberg on its first voyage.<sup>2</sup> December 7, 1941, marked a tragic moment in American history when Japanese forces attacked a U.S. naval base in Pearl Harbor.<sup>3</sup> What do these two historical events and this classic literary play have in common? Their stories were told in major Hollywood motion pictures as runaway productions shot in various parts of Mexico.<sup>4</sup>

Mexico has been a popular destination for film production for many decades, but especially after *The Night of the Iguana*, filmed in Puerto Vallarta in 1964, garnered incredible success.<sup>5</sup> Mexico's promise of cheap labor, exotic lands, and close proximity to the United States incentivized American movie production companies to move their operations to the home of their southern neighbors.<sup>6</sup> However, it was the North American Free Trade Agreement (NAFTA) and its implications on Mexico's copyright protections for audiovisual and motion picture industries that strengthened Mexico's attraction for runaway production companies.<sup>7</sup>

Mexico's copyright law has evolved very little overall and was traditionally criticized as inadequate.<sup>8</sup> Like most civil law countries,

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<sup>1</sup> WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 3, sc. 1.

<sup>2</sup> *Titanic Sinks*, HISTORY, <https://www.history.com/this-day-in-history/titanic-sinks> (last updated Apr. 13, 2021).

<sup>3</sup> *Pearl Harbor*, HISTORY, <https://www.history.com/topics/world-war-ii/pearl-harbor> (last updated Dec. 2, 2021).

<sup>4</sup> Stephen Woodman, *11 Films You Didn't Know Were Shot in Mexico*, CULTURE TRIP (Apr. 20, 2018), <https://theculturetrip.com/north-america/mexico/articles/11-films-you-didnt-know-were-shot-in-mexico/> ("Baz Luhrmann's classic 1996 modernization of *Romeo and Juliet* made use of Mexico City and Boca del Rio, Veracruz . . . . James Cameron's [*Titanic* was] filmed . . . near Tijuana." A scene from *Pearl Harbor* was also shot in the same movie production set as *Titanic*.)

<sup>5</sup> TAMARA L. FALICOV, *LATIN AMERICAN FILM INDUSTRIES* 23 (2019).

<sup>6</sup> *See id.*

<sup>7</sup> *See generally* Ley Federal de Derechos de Autor [LFDA], art 13, Diario Oficial de la Federación [DOF] 24-12-1996, últimas reformas DOF 01-07-2020 (Mex.) [hereinafter LFDA].

<sup>8</sup> STEPHEN ZAMORA ET AL., *MEXICAN LAW* 642 (2005).

Mexico prioritizes the rights of the creator above all else.<sup>9</sup> Mexico's copyright law known as *derechos del autor*—directly translated as “rights of the author”—gives the creator absolute rights over her creation.<sup>10</sup> However, since the adoption of NAFTA into its laws, Mexico has made a unique exception to its otherwise rigid copyright rules, but only for the audiovisual industry.<sup>11</sup> This deviation marked a very unusual and progressive change to Mexico's otherwise unyielding ideologies.<sup>12</sup> In doing so, Mexico merged the dichotomies between Mexico and U.S. copyright laws into something that could mesh well with the industry.<sup>13</sup> This in turn created a flexibility within Mexico's otherwise traditional laws that allows for greater collaboration between the United States and Mexico.<sup>14</sup>

This Note will take a microscopic look at NAFTA's copyright provisions; the analysis will look at how NAFTA set the stage for Mexico's current laws that allow audiovisual and motion picture production companies to bypass some of the rights that traditionally belong to authors.<sup>15</sup> Part II of this Note will analyze Mexico's copyright history and compare the traditional civil law system to the U.S. common law<sup>16</sup> ideologies and work-made-for-hire system.

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<sup>9</sup> See Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT'L & COMP. L. REV. 423, 423 (1999).

<sup>10</sup> ZAMORA ET AL., *supra* note 8, at 661.

<sup>11</sup> See generally Peter Smith, *Ley Federal del Derecho de Autor*, 13 BERKELEY TECH. L. J. 503, 516 (1998).

<sup>12</sup> See generally LFDA (Mex.).

<sup>13</sup> See generally *id.*

<sup>14</sup> See Greg Walz-Chojnacki, *Copyright Law and the Implications for Developing Nations*, UWM REPORT (Feb. 22, 2017), <https://uwm.edu/news/copyright-law-and-the-implications-for-developing-nations-tomas-lipinski/>.

<sup>15</sup> *Mexico has a new Federal Law for the Protection of Industrial Property and has amended the Federal Copyrights Law*, GARRIGUES (July 20, 2020), [https://www.garrigues.com/en\\_GB/new/mexico-has-new-federal-law-protection-industrial-property-and-has-amended-federal-copyrights-law](https://www.garrigues.com/en_GB/new/mexico-has-new-federal-law-protection-industrial-property-and-has-amended-federal-copyrights-law) [hereinafter GARRIGUES]. This Note acknowledges that NAFTA was restructured into the United States-Mexico-Canada Agreement (USMCA) under the Trump Administration, as well as the *Ley Federal del Derecho de Autor 2020* reform on copyright laws. *Id.* However, the substantive changes to both do not have any effect on the audiovisual and motion picture industries or relating to the topics discussed in this Note. *Id.*

<sup>16</sup> Toni M. Fine, *Excerpt Reproduced from American Legal Systems*, LEXISNEXIS, [https://www.lexisnexis.com/en-us/lawschool/pre-law/intro-to-american-legal-system.page#:~:text=The%20American%20system%20is%20a,of%](https://www.lexisnexis.com/en-us/lawschool/pre-law/intro-to-american-legal-system.page#:~:text=The%20American%20system%20is%20a,of%20)

Part II will then compare the U.S. chain of title to Mexico's *cadena de títulos* to explain the general benefits of the work-made-for-hire system. Next, Part III will take an analytical look at Mexico's original copyright law and the Berne Convention's role in both Mexican and U.S. copyright laws. This section will analyze the language of NAFTA Article 1705, a crucial law in the evolution of Mexico's copyright law. Part III will conclude with a thorough analysis of what this Note dubs the "hybrid law." In Part IV, this Note will shift from a legal analysis to a more commercial perspective to further explain how the updated copyright law factors into other important production considerations from a producer's point of view. To conclude, Part V will outline the hybrid law's subsequent commentary, critiques and praises alike.

## II. THE MAIN CHARACTERS

### *A. The Dichotomy that Exists Between Common Law and Civil Law Copyrights*

#### i. United States Copyright Law and Ideologies, Including the Work-Made-for-Hire Approach

The United States Constitution explicitly empowers Congress to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>17</sup> Upon this empowerment, Congress passed the first federal copyright law in 1790, which has been updated numerous times to address changing times<sup>18</sup> This Constitutional foundation establishes the ultimate goal of encouraging creativity and promoting the growth and flourishing of the nation

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20the%20matter%20before%20it. (last visited Feb. 19, 2022). This Note refers to the American common law system to contrast with Mexico's civil law system. "Common law" heavily relies on court precedent in formal adjudications, which includes statutory interpretation. *Id.* "Civil law," on the other hand, is a system that relies on the letter of the law found within the codes themselves. *Id.*

<sup>17</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>18</sup> Alison Hall, *Promoting Progress: Celebrating the Constitution's Intellectual Property Clause*, LIBR. OF CONGRESS (Sept. 17, 2020) <https://blogs.loc.gov/copyright/2020/09/promoting-progress-celebrating-the-constitutions-intellectual-property-clause/>.

culturally through the duality of protections and limitations.<sup>19</sup> U.S. copyright law has established this balance through a utilitarian system that grants a number of exclusive rights along with exceptions and limitations.<sup>20</sup> The utilitarian theory of intellectual property generally endorses intellectual property rights as a way to foster innovation, but subject to limitations on the rights, particularly in the duration of the rights, so as to balance the social welfare loss of monopoly exploitation.<sup>21</sup> Inversely, non-utilitarian theorists prioritize a creator's moral rights to control her own creations.<sup>22</sup>

Of the opposing types of theories, the utilitarian theory has been a framework to the development of U.S. copyright law.<sup>23</sup> This is noticeably evident from the Congressional Committee reporting on the 1909 Copyright Act, which states: "The enactment of copyright legislation by Congress under the terms of the Constitution is not based on any natural right that the author has in his writings, [ . . . ] but upon the ground that the welfare of the public will be served [ . . . ] by securing to authors for limited periods the exclusive rights to their writings."<sup>24</sup> Title 17 of the United States Code houses the United States' copyright laws along with the exceptions and limitations, which vary depending on different industries.<sup>25</sup> This Note will focus on the audiovisual industry.

Hollywood has an idealized image that people associate with it. The glamor of Hollywood has captured the eyes of many famous and aspiring artists in the years since its birth in 1920.<sup>26</sup> However, in reality, Hollywood, like any industry, exists as a "collection of corporations seeking profits."<sup>27</sup> The U.S. movie industry is a

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; see PETER S. MENELL, *Intellectual Property: General Theories*, in ENCYCLOPEDIA OF LAW AND ECONOMICS 129 (2000), <http://www.dklevine.com/archive/ittheory.pdf>.

<sup>21</sup> MENELL, *supra* note 20.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 130.

<sup>24</sup> *Id.*

<sup>25</sup> See generally, 17 U.S.C. § 101 (2018).

<sup>26</sup> See Douglas Gomery, *Film and Business History: The Development of an American Mass Entertainment Industry*, 19 J. OF CONTEMP. HIST. 89, 90 (1984) (describing American film's development into a "big business" in the early 20th century).

<sup>27</sup> *Id.* at 89.

lucrative and giant player in the international film market that amasses billions of dollars in revenue a year.<sup>28</sup> As a result, the industry is made up of many commercial and legal procedures,<sup>29</sup> one of which is the work-made-for-hire copyright law.<sup>30</sup>

Similar to civil law countries, the United States only allows authors to claim the rights of copyrighted works.<sup>31</sup> However, the work-made-for-hire exception is where the United States greatly differs from those countries.<sup>32</sup> The work-made-for-hire-exception—imbedded in 17 U.S.C. § 101 Copyright Law—allows for two instances in which this exception may apply.<sup>33</sup> Not only does the definition of the second category fit the motion picture and audiovisual industries, they are both explicitly written into the text of the provision.<sup>34</sup> The reason for that is because the end product of a film production company requires the buildup of many individual pieces

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<sup>28</sup> José Gabriel Navarro, *Film Industry in the U.S. – Statistics & Facts*, STATISTA (Nov. 30, 2021), <https://www.statista.com/topics/964/film/> (clarifying how prior to 2020 revenue projections maintained healthy reach into billions, but Covid-19 pandemic severely impacted film industry revenues due to unprecedented circumstances).

<sup>29</sup> See Matt Jacobs, *The Legal Side of Filmmaking and Video Production*, FILMMAKING LIFESTYLE, <https://filmlifestyle.com/legal-side-of-filmmaking/> (last visited Feb. 7, 2021).

<sup>30</sup> U.S. COPYRIGHT OFFICE, CIRCULAR NO. 9: WORKS MADE FOR HIRE (2012), <https://www.copyright.gov/circs/circ09.pdf>.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> A “work made for hire” is:

(1) work prepared by an employee within the scope of his or her employment; or  
(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

17 U.S.C. § 101.

<sup>34</sup> *Id.*

to create the final movie that hits theatres<sup>35</sup>—or, as is increasingly common, streams across billions of television screens.<sup>36</sup>

In the film industry, screenwriters, designers, musical composers, and other contributors essentially work as employees for the producers through work–made–for–hire agreements.<sup>37</sup> An employee’s status under a work–made–for–hire contract implicates rights such as authorship, copyright ownership, copyright term, and termination.<sup>38</sup> Essentially, under a U.S. work–made–for–hire agreement, the creator gives the producer a large “bundle of rights” and loses claim to the work<sup>39</sup>—although the creator *might* retain a form of credit for their contribution to the final product, as seen in the final movie credits.<sup>40</sup> Because the bundle of rights is so essential, it is necessary that each creator consciously give up her rights through signed, written agreements.<sup>41</sup>

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<sup>35</sup> Dov S-S Simens, *38 Steps of Filmmaking (Making-a-Movie Takes 38 Bank Checks . . . Can You Name Them?)*, WEB FILM SCHOOL (June 20, 2016), <https://www.webfilmschool.com/38-steps-of-filmmaking-discover-what-filmmaking-costs/>.

<sup>36</sup> Gordon Burtch et al., *Will Movie Theaters Survive When Audiences Can Stream New Releases?*, HARV. BUS. REV. (Jan. 15, 2021), <https://hbr.org/2021/01/will-movie-theaters-survive-when-audiences-can-stream-new-releases> (reporting increasing tension between movie theaters and studios who may continue to simultaneously release movies through streaming services long after Covid-19 restrictions on movie theaters lift).

<sup>37</sup> Carol M. Kaplan, *Once More unto the Breach, Dear Friends: Broadway Dramatists, Hollywood Producers, and the Challenge of Conflicting Copyright Norms*, 16 Vand. J. Ent. & Tech. L. 297, 300 (2014).

<sup>38</sup> U.S. COPYRIGHT OFFICE, CIRCULAR NO. 30: *Works Made for Hire* (2021), <https://www.copyright.gov/circs/circ30.pdf>.

<sup>39</sup> See SHERRI L. BURR, ENTERTAINMENT LAW IN A NUTSHELL 178–79 (4th ed. 2017).

<sup>40</sup> See generally *How Many Movies Credits Go Uncredited?*, STEPHEN FOLLOWS (Oct. 24, 2016), <https://stephenfollows.com/uncredited-movie-credits/> [hereinafter FOLLOWS].

<sup>41</sup> BURR, *supra* note 39, at 178.

ii. Mexican Copyright Law and Ideologies, Including Moral Rights Principles

Mexico's copyright law began to formulate as early as the nineteenth century.<sup>42</sup> Even before Mexico achieved independence from Spain in 1821, existing legislation protected authorial matters.<sup>43</sup> These laws gave contemporary writers the right to exploit their work until death and then pass that right on to their heirs for a certain period.<sup>44</sup> Mexico's original moral rights system dating back to this early legislation was influenced by the French copyright system known as *droit moral* or *droit d'auteur*,<sup>45</sup> just as it influenced many civil countries' copyright laws.<sup>46</sup>

Mexico's copyright law covers a wide range of artistic work including literature, radio and television, dances, computer programs, and, of course, cinematographic and other audiovisual works.<sup>47</sup> *Ley Federal de Derechos de Autor* (LFDA) governs Mexican copyright law.<sup>48</sup> The LFDA copyright law is made up of two distinct classifications: *derechos morales* and *derechos patrimoniales*.<sup>49</sup> *Derechos morales*, the moral rights classification, refers to the sole ownership rights inherent to the author.<sup>50</sup> These rights are non-transferrable and exist beyond the length of the creator's life.<sup>51</sup> This right gives the creator total control over a work's distribution, modification, and authority over whether the public may access the work.<sup>52</sup>

*Derechos patrimoniales*, or patrimonial rights, are the rights to economically benefit from the piece produced.<sup>53</sup> This classification

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<sup>42</sup> See Ariel Antonio Morán Reyes, *Antecedentes del derecho de Autor en Mexico: legislación peninsular, Indiana y criolla* [*Antecedents of Copyright in Mexico*], INFORMACIÓN, CULTURA Y SOCIEDAD [I.C.S] 85, 99 (2014) (Mex.).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See Peeler, *supra* note 9 ("The doctrine of moral rights has been incorporated into the intellectual property regimes of many countries in varying degrees . . .").

<sup>46</sup> See Morán Reyes, *supra* note 42; see BURR, *supra* note 39, at 148.

<sup>47</sup> LFDA art 13 (Mex.).

<sup>48</sup> See generally *id.*

<sup>49</sup> *Id.* at art 11.

<sup>50</sup> *Id.* at art 18.

<sup>51</sup> *Id.* at art 19–20; see also ZAMORA ET AL., *supra* note 8, at 661–62.

<sup>52</sup> *Id.* at art 21.

<sup>53</sup> LFDA cap. III (Mex.).

involves the reproduction, publication, and editing of the creation.<sup>54</sup> The most crucial difference between moral rights and patrimonial rights is that patrimonial rights can be transferred by the author to someone else, either through sale, assignment, or some other legal process.<sup>55</sup> However, the transfer of patrimonial rights comes with a few stipulations.<sup>56</sup> First, and most importantly, the patrimonial title holder does not acquire the author's inherent moral rights even though they have acquired the patrimonial rights.<sup>57</sup> The author must also be compensated for the transfer of patrimonial rights and its subsequent economic benefits in some way.<sup>58</sup> And finally, the transfer of patrimonial rights cannot be in perpetuity.<sup>59</sup>

*B. American Chain of Title Compared to the Mexican Cadena de Títulos*

If not for the American work-made-for-hire agreements, the process to make a film would require more risk and time—and likely more frustration.<sup>60</sup> Without these agreements, producers would need to create a chain of title.<sup>61</sup> Each personalized agreement is an essential part of the movie-making copyright procedure because it ensures ownership rights are given to the movie producer.<sup>62</sup> Ultimately, it is the producer who must prove that she owns what she claims to own.<sup>63</sup> Thus, from the creation's inception to the time the producer gets ahold of it, the producer strives for clean title by verifying every change in ownership throughout the documentation trail.<sup>64</sup>

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<sup>54</sup> LFDA art 27 (Mex.).

<sup>55</sup> *Id.* at art 24; *see also* ZAMORA ET AL., *supra* note 8, at 662.

<sup>56</sup> *See* ZAMORA ET AL., *supra* note 8, at 661.

<sup>57</sup> LFDA art 27 (Mex.). A work-made-for-hire agreement is the exception to this rule, which will be fully discussed in Part III Section D titled "Sequel."

<sup>58</sup> LFDA art 30–31 (Mex.).

<sup>59</sup> *See* LFDA art 33 (Mex.).

<sup>60</sup> *See generally* Hillary S. Bibicoff, *Acquisition of Rights in Properties for Motion Picture*, LICENSING J., 1–10 (2003).

<sup>61</sup> *See* MICHAEL C. DONALDSON & LISA A. CALLIF, CLEARANCE & COPYRIGHT: EVERYTHING YOU NEED TO KNOW FOR FILM AND TELEVISION, 442 (4th ed. 2014).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

The necessary documentation for a chain of title may vary because the trail leading up to the final stage can get very tangled depending on the circumstances of each creator and her work.<sup>65</sup> Each document or contract must prove three crucial elements: (1) the person is the creator of the work; (2) the work is an original creation; and (3) the person is the only one that holds rights to it.<sup>66</sup> In an ideal world, the author would create the final product she wishes to contribute to a film and fill out the necessary paperwork to transfer the rights to the company. The reality, however, is rarely that straightforward.<sup>67</sup> Regardless of how many links it takes to get to the producer, each link must be verified and strong.<sup>68</sup>

The best way to understand the chain of title is by using a movie script as an example.<sup>69</sup> Scripts are an essential component needed for a successful movie.<sup>70</sup> It is entirely possible that a writer's script is wholly crafted by that one writer, in which case it would be considered an original creation with its own set of copyrights attached.<sup>71</sup> However, it is also entirely possible that the script is made up of underlying works that were merged into the movie script's adaptation.<sup>72</sup> If that is the case, then it is critical that the producer acquire all the rights of the underlying works, as well as the screenwriter's rights to the script, through the appropriate documentation.<sup>73</sup> Because the chain runs from the original owner all the way up to the producer, it is important that each link—from the creators of the underlying works to the screenwriter to the producer—is clean.<sup>74</sup> This paper trail has to detail the chronological assignment of each

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<sup>65</sup> *See id.* at 446.

<sup>66</sup> *Id.* at 442.

<sup>67</sup> *See* DONALDSON & CALLIF, *supra* note 61, at 446.

<sup>68</sup> *Id.* at 449.

<sup>69</sup> BERTRAND MOULLIER & RICHARD HOLMES, WORLD INTELL. PROP. ORG., RIGHTS, CAMERA, ACTION! 9 (2008), <https://www.wipo.int/publications/en/details.jsp?id=256&plang=EN>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Gordon Firemark, *Chain of Title: What it is, Why it Matters*, FIREMARK (June 15, 2012), <https://firemark.com/2012/06/15/chain-of-title-why-matters/>.

creator's rights in order for the producer to properly find financing for that movie production.<sup>75</sup>

Although the U.S. movie production business model is unique to the American industry and does not reflect the industry norm on a greater, international scale,<sup>76</sup> Mexico's original copyright model similarly requires that a creator's copyrights be assigned up the chain of title—formally referred to as *la cadena de títulos*.<sup>77</sup> The difference between the Mexican *cadena de títulos* and the American chain of title is that Mexican corporations cannot be authors in the same way that American corporations are considered authors once the rights are transferred.<sup>78</sup> However, before the hybrid law was enacted in 1996, a corporation would be considered a copyright holder if the rights were properly assigned up the chain.<sup>79</sup> Similar to the American system, the Mexican company would need to show that the author of the work contractually assigned the rights through a strong *cadena de títulos*.<sup>80</sup>

Because a chain of title process can be complex at times, it is laden with risks; it is for that particular reason that the U.S. work made for hire contract provision, found in 17 U.S.C. § 101 Copyright Law, is more favorable.<sup>81</sup> In a work made for hire situation, the producer bypasses the long and arduous chain of title in favor of immediate ownership and full rights.<sup>82</sup> As will be discussed in later parts of this Note, Mexico's hybrid law similarly allows for movie producers to take a safer work-made-for-hire approach, while other types of copyrighted works must continue to go through *la cadena de títulos*.<sup>83</sup> This function is strategic and necessary to ensure

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<sup>75</sup> *Id.*

<sup>76</sup> MOULLIER & HOLMES, *supra* note 69, at 6.

<sup>77</sup> *Some Basics About Copyright Law in Mexico*, REYES FENIG ASOCIADOS (July 7, 2008), <https://reyesfenigeng.wordpress.com/2008/07/07/some-basics-about-copyright-law-in-mexico/> [hereinafter REYES FENIG ASOCIADOS].

<sup>78</sup> *See id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See* Bibicoff, *supra* note 60, at 10. Of note, in order for a producer to realistically have the ability to get financial backing, they “should have the [o]ption to acquire virtually all Rights in the Property.” *Id.* To facilitate that acquisition, a work-made-for-hire agreement should be utilized, so that the producer will retain all property rights. *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See generally* LFDA (Mex.).

that this valuable creation composed of various other creations has an easily identifiable owner because the agreement makes the ownership of the creative work explicit.<sup>84</sup>

### III. THE SCRIPT

#### A. *Trailer: Mexico's Original Copyright Law*

For purposes of this section, Mexico's copyright law will be examined as a whole and with respect to all creative works prior to the hybrid law's enactment. The original owner of a copyrighted work that is afforded protection under Mexican moral rights law is the *natural* person who created the artistic or scientific piece.<sup>85</sup> These individuals are given a package of rights that contains both moral and patrimonial rights.<sup>86</sup> Although copyright owners inherently obtain both moral and patrimonial rights, there are different privileges and rules of transferability bestowed to each classification.<sup>87</sup>

The original owners protected under Mexican copyright law are perpetually the owners of all moral rights.<sup>88</sup> Traditionally, in no way can these rights be taken from the owner and extended to any other individual.<sup>89</sup> Moral rights allow an author to decide how and when a work is disclosed to others, or the author may choose to disclose the work anonymously without fear that her ownership will be stripped if the work is not publicly claimed.<sup>90</sup> This right to demand or refuse recognition is commonly known as "paternity rights."<sup>91</sup> "Integrity rights" are also part of moral rights.<sup>92</sup> These rights allow

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<sup>84</sup> Jean Murray, *What Should Be Included in a Work For Hire Agreement*, BALANCE SMALL BUSINESS, <https://www.thebalancesmb.com/what-should-be-included-in-a-work-for-hire-agreement-4587459> (last updated Oct. 28, 2020).

<sup>85</sup> Luis Schmidt, *Ownership of Rights in Mexican Copyright Law*, OLIVARES (Aug. 2001), <https://www.olivares.mx/ownership-of-rights-in-mexican-copyright-law/> (emphasizing how critical it is to understand that an "author" is the "flesh and blood person" who created the work).

<sup>86</sup> LFDA art 11 (Mex.).

<sup>87</sup> LFDA cap. II–III (Mex.); *See also* INT'L COMPAR. LEGAL GUIDE, COPYRIGHT 2021, 73–74 (7th ed. 2020) [hereinafter COPYRIGHT 2021].

<sup>88</sup> LFDA art 18–19 (Mex.).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at art 21.

<sup>91</sup> COPYRIGHT 2021, *supra* note 87, at 74.

<sup>92</sup> *Id.*

an author to prohibit any form of modification or mutilation of the work in order to protect its merits and thus protect the author's reputation.<sup>93</sup> Finally, moral rights allow an author to amend her own work or withdraw it from the public altogether, as well as to object to credit as the author of a work that she did not in fact create.<sup>94</sup>

Unlike moral rights, patrimonial rights<sup>95</sup> are transferrable.<sup>96</sup> Patrimonial rights may be transferred either through assignment or licensing.<sup>97</sup> Assignment implies that the derivative owner, or *causa-habiente*, is granted the full transfer of the rights, whereas a licensing agreement bestows a limited or partial transmission of the

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<sup>93</sup> LFDA art 21 (Mex.).

<sup>94</sup> *Id.*

<sup>95</sup> The title holders of patrimonial rights may authorize or prohibit:

- I.       Reproduction, publication, editing or material fixation of a work [...].
- II.       The public communication of the work in any of the following ways:
  - a.   public presentation, recitation and public performance [...];
  - b.   public showing by any means [...]; or
  - c.   public access by telecommunication.
- III.      The transmission or broadcasting of their works by any process, including the transmission or retransmission of the works [...].
- IV.      The distribution of the work, including sale or other forms of transfer of the ownership of the physical material in which it is embodied, and also any form of transfer of the use or exploitation thereof [...].
- V.       The importation into [Mexico] copies of the work made without their authorization.
- VI.      The disclosure of derived works, in any of the forms that such works may take, including translations, adaptations, paraphrased versions, arrangements and transformations.
- VII.     Any public use of the work except in cases expressly provided for in this Law.

*Id.* at art 27. This article was directly translated by the Mexican Government of-  
ficial website. *Federal Copyright Law*, GOBIERNO DE MÉXICO, [https://www.in-dautor.gob.mx/documentos/marco-juridico/L\\_Fed\\_Derecho\\_de\\_Autor\\_\(English\).pdf](https://www.in-dautor.gob.mx/documentos/marco-juridico/L_Fed_Derecho_de_Autor_(English).pdf) (last visited Apr. 13, 2022).

<sup>96</sup> *Id.* at tit. III.

<sup>97</sup> Schmidt, *supra* note 85.

rights.<sup>98</sup> In order to transfer the rights from the natural owner to the derivative owner, certain formalities must be met.<sup>99</sup> Agreements between parties for the exchange of economic benefits classified under patrimonial rights must be registered in Mexico's *Registro Público del Derecho de Autor* (Public Copyright Register).<sup>100</sup> Otherwise, the assignment or license is unenforceable.<sup>101</sup> It should be noted that the transfer of patrimonial rights is limited.<sup>102</sup> Eventually, patrimonial rights must transfer back to the original creator.<sup>103</sup> Agreements to grant economic rights absent any explicit term provision are limited to only five years.<sup>104</sup> If a term is explicitly provided, but it exceeds a total of fifteen years, then it will only be enforced under exceptional circumstances that justify such a lengthy term.<sup>105</sup>

*B. Antihero: The Berne Convention and the (Almost) Universal Acceptance of its Copyright Provisions*

i. The Berne Convention's Basic Principles

Mexico's copyright law was primarily structured to comply with the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention").<sup>106</sup> As the name suggests, the Berne Convention bestows protection and rights to authors of creative works.<sup>107</sup> Originally adopted in 1886, there are now 179 State members that have adopted the Berne Convention's basic principles for international copyright protection<sup>108</sup>—one of which is

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<sup>98</sup> *Id.*

<sup>99</sup> LFDA tit. III, cap. I (Mex.); *see also* COPYRIGHT 2021, *supra* note 87, at 73.

<sup>100</sup> LFDA art 32 (Mex.).

<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at art 33.

<sup>103</sup> *See id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> ADRIANA BERRUECO GARCIA, NUEVO RÉGIMEN JURÍDICO DEL CINE MEXICANO 119 (2009), <http://ru.juridicas.unam.mx/xmlui/handle/123456789/11615>.

<sup>107</sup> *Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELL. PROP. ORG. [WIPO], <https://www.wipo.int/treaties/en/ip/berne/> (last visited Apr. 11, 2022).

<sup>108</sup> *Berne Convention*, COPYRIGHT HOUSE, <https://copyrighthouse.org/countries-berne-convention> (last visited Apr. 11, 2022).

Mexico.<sup>109</sup> Not only has the Berne Convention been implemented in 179 countries, it is also considered the most influential copyright treaty since its inception in the late nineteenth century.<sup>110</sup> The basic principles of the Berne Convention create the minimum protection standard that countries must provide to individuals with respect to creative rights.<sup>111</sup> Under its minimum standards of protection, moral rights are to be granted to creators to ensure authorship so that their reputation is not dishonored through any third-party modifications or deformations.<sup>112</sup> The minimum standard also determines the duration of the protections.<sup>113</sup>

To clarify, the Berne Convention's reach covers works of any form, including those found in the cinematographic industry.<sup>114</sup> In fact, it specifically imparts its protections on motion pictures in its own separate article.<sup>115</sup> This emphasis on motion picture protections by the Berne Convention is significant because it puts into perspective just how pliable Mexico was when drafting and implementing the work-made-for-hire hybrid copyright exception into its laws.<sup>116</sup> And, as a preview, one should also hone in on why the U.S.

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<sup>109</sup> *Berne Notification No. 112*, WIPO, [https://www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_112.html](https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_112.html) (last visited Feb. 7, 2021); *WIPO-Administered Treaties*, WIPO, <https://wipolex.wipo.int/en/treaties/parties/remarks/MX/15> (last visited Mar. 7, 2021) (recording Mexico's accession on May 8, 1967).

<sup>110</sup> Samuel Jacobs, *The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today*, 23 MICH. COMM. AND TECH. L. REV. 169, 169 (2016).

<sup>111</sup> *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WIPO, [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html) (last visited Feb. 7, 2021) [hereinafter *Summary of Berne*]. The three basic principles that the Berne Convention encompasses include the "national treatment" principle, the "automatic" protection principle, and the principle of "independence" of protection. *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* ("In the case of audiovisual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public ("release") or – failing such an event – from the creation of the work.").

<sup>114</sup> Berne Convention for the Protection of Literary and Artistic Works art. 2, Sept. 9, 1886, 828 U.N.T.S. 221 [hereinafter *Berne Convention*].

<sup>115</sup> *Id.* art. 4.

<sup>116</sup> See generally Rodrigo Gomez Garcia, *El Impacto del Trato de Libre Comercio de América del Norte (TLCAN) en la industria audiovisual Mexicana (1994-2002)* 135 (Dec. 2006), (unpublished Ph.D. thesis, Universidad Autónoma

copyright laws differs from the Berne Convention's minimum standards despite the United States' active State membership, which this Note will closely analyze below.

ii. The Berne Convention's Cinematographic Considerations

Although the Berne Convention's principles closely align with the civil law system,<sup>117</sup> it also allows a certain flexibility for the niche industry of audiovisual works, which is found in Article 14 *bis*.<sup>118</sup> Article 14 and Article 14 *bis* were formulated at the Stockholm Revision of the Berne Convention in 1967.<sup>119</sup> The objective of these articles, particularly Article 14 *bis* which is the article this Note closely analyzes was to bring closer together what the Berne Convention identified as three different international legal systems that member States fall within.<sup>120</sup> The first system, known as the "film copyright system," ensures that authors of works that make up a film enjoy copyright in their respective contributions and must grant permission to use the works contractually to the film producers.<sup>121</sup> The second system treats a film as a work of joint authorship of many artistic contributions in which the producer must take assignments of the creators' contributions in order to exploit the film.<sup>122</sup> Lastly, the third system, known as the "legal assignment system," is similar to the second system in that it treats the film as a work of joint authorship, but differs in that it presumes a contract between the authors and the producer assigning the right to exploit the film.<sup>123</sup> In its attempt to bridge the three legal systems, the Berne

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de Barcelona [UAB]) (on file with Dipòsit Digital de Documentos de la UAB), <https://ddd.uab.cat/pub/tesis/2007/tdx-1212107-155114/rgg1de1.pdf>.

<sup>117</sup> *Summary of Berne*, *supra* note 111.

<sup>118</sup> WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, at 85, WIPO Publication. No. 615(E) (1978), [https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo\\_pub\\_615.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf) [hereinafter *Berne Guide*]. The distinction between Article 14 and Article 14 *bis* is that the former is for an author's pre-existing works that the film is based on and adapted from, whereas the latter is for those works of contributions which only come into existence during the making of the movie. *Id.* at 83. This Note will primarily focus on the works encompassed by Article 14 *bis*.

<sup>119</sup> *Id.* at 82.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Berne Guide*, *supra* note 118.

Convention added a rule covering the interpretation of contracts known as the "Presumption of Legitimation."<sup>124</sup>

Due to the fact that motion pictures are essentially the accumulation of many creative works, Article 14 *bis* concedes that the individual works should be construed as one original work; consequently, the owner of the work—in this case the movie producer—may enjoy the same rights as any other author.<sup>125</sup> The Presumption of Legitimation recognizes that, unless an agreement states otherwise, an author who has contributed her artistic work to a motion picture has agreed to waive any objections to the producer's right to exploit<sup>126</sup> the movie, which innately includes the work contributed to it.<sup>127</sup> This is meant to allow movie producers complete freedom to do what is necessary to ensure the international circulation of the film.<sup>128</sup> The execution of the Presumption of Legitimation also depends on which country the movie producer is from, which primarily affects whether or not there must be a written agreement that adequately defines the conditions of engagement of authors bringing contributions to the making of the film.<sup>129</sup> With such a compromise, one might wonder why Mexico would create its own compromise between Mexican and American legal copyright ideologies. But a closer look at how the Berne Convention's Article 14 *bis* was received by the United States will show that it was not enough of a compromise for the United States.<sup>130</sup>

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<sup>124</sup> *Id.* at 82–83.

<sup>125</sup> *See* Berne Convention, *supra* note 114, art. 14 *bis*, ¶ 1; At first glance, this seems very similar to the American way of approaching audiovisual copyright laws. *Cf.* 17 U.S.C. § 101 (allowing American movie production companies to hold copyrights through work made for hire). However, this Note will later demonstrate that Article 14 *bis* strengthens the moral rights approach that is considered a hallmark concept of the Berne Convention. *Berne Guide*, *supra* note 118, at 88.

<sup>126</sup> *Berne Guide*, *supra* note 118, at 86 ("The methods of exploitation in question are set out: reproduction [ . . . ], distribution [ . . . ], public performance [ . . . ], communication to the public by wire [ . . . ], broadcasting [ . . . ], other public communication [ . . . ], sub-titling, [and] dubbing of tapes.").

<sup>127</sup> Berne Convention, *supra* note 114, art. 14 *bis*, ¶ (2)(b).

<sup>128</sup> *Berne Guide*, *supra* note 118, at 87.

<sup>129</sup> *Id.*

<sup>130</sup> *See* Jacobs, *supra* note 110, at 189.

### iii. United States' Take on the Berne Convention's Cinematographic Considerations

Although one may consider the Berne Convention's loosened regulations on creative film contributions that are covered by the Presumption Legitimation a major concession, the United States did not deem this enough.<sup>131</sup> The execution of the Presumption of Legitimation based on the movie producer's country can be challenged by another country's own interpretation of the presumption.<sup>132</sup> For instance, if a producer's country does not require a legal instrument detailing the conditions of engagement and the movie is then exploited in another country that similarly does not require a legal instrument, then a producer may enjoy the benefits of the Presumption of Legitimation.<sup>133</sup> Things get complicated, however, if the producer decides to exploit the movie in a country where a written agreement is required because then the presumption has no effect unless there is a written contract in the producer's country.<sup>134</sup>

Article 14 *bis*, paragraph (3) also states that the Presumption of Legitimation does not apply to "authors of scenarios, dialogues, and musical works" that are contributed to the making of a movie.<sup>135</sup> Considering movies—particularly good movies—are built on the backs of poignant movie scores and stirring character dialogue,<sup>136</sup> this is a pretty debilitating caveat to include. The reasoning behind this provision is that those types of creations can exist and thrive as an independent work without needing to attach itself to a film.<sup>137</sup>

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<sup>131</sup> See *id.* (pointing out the United States' century or more delay in adopting the Berne Convention).

<sup>132</sup> *Berne Guide*, *supra* note 118, at 87.

<sup>133</sup> *Id.* at 87–88.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 88.

<sup>136</sup> David Mitchell-Baker, *The Importance of a Soundtrack to a Film*, EDGE (Mar. 12, 2017), <https://www.theedgesusu.co.uk/features/2017/03/12/the-importance-of-a-soundtrack-to-a-film/> (noting how scores set a movie's tone by building tension and conveying emotion); see also *Dialogue*, ENCYCLOPEDIA, [https://www.encyclopedia.com/literature-and-arts/language-linguistics-and-literary-terms/language-and-linguistics/dialogue#HISTORY\\_OF\\_DIALOGUE\\_IN\\_AMERICAN\\_FILM](https://www.encyclopedia.com/literature-and-arts/language-linguistics-and-literary-terms/language-and-linguistics/dialogue#HISTORY_OF_DIALOGUE_IN_AMERICAN_FILM) (last updated Feb. 24, 2021) (warning readers not to minimize the importance of dialogue and its power over film viewer's perception).

<sup>137</sup> See *Berne Guide*, *supra* note 118, at 89. Although it affects authors of scenarios, scripts, and music, all other creative forms such as cameramen, costumiers, and cutters fall within the provision's limitations. *Id.*

Finally, of all the rules and regulations found in the Berne Convention, it was the moral rights provision found in Article 6 *bis* that the United States found the most objectionable when deciding whether to join as a State member.<sup>138</sup> Article 6 *bis*, which was introduced as far back as the Convention in Rome in 1928, states that copyright benefits include moral rights, and not just economic rights.<sup>139</sup> The Article 6 *bis* provision goes against the United States' highly favored utilitarian approach to 17 U.S.C. § 101 Copyright Law because it derives from the idea that the work is a reflection of the creator personally, which should not be separated from the creator.<sup>140</sup>

In an effort to join the Berne Convention's Union—yet retain the already-established American copyright structure—the United States signed on as a State member and passed the Berne Convention Implementation Act (the “BCIA”) arguably simultaneously.<sup>141</sup> In essence, the United States adopted a selected or tempered version of the Berne Convention by utilizing the BCIA as a minimalist approach to ratify the Berne Convention treaty.<sup>142</sup> Despite the Berne Convention's explicit provision stating that all signatories must give artistic authors both economic and moral rights, the United States refused to incorporate any form of moral rights into its laws with the ironic explanation that its existing laws already meet the minimum standard.<sup>143</sup> Ultimately, one can see that although most countries have found a way to wholly embrace the rules and concepts of the Berne Convention, the United States has maintained its independence from Berne Convention principles while obtaining the title of State member.<sup>144</sup> And yet, this Note will demonstrate how the Berne Convention operates as the foundation of NAFTA's copyright obligations.<sup>145</sup>

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<sup>138</sup> See Jacobs, *supra* note 110, at 170–71.

<sup>139</sup> Berne Guide, *supra* note 118, at 41.

<sup>140</sup> *Id.*; See Jacobs, *supra* note 110, at 170–71.

<sup>141</sup> Jacobs, *supra* note 110, at 171.

<sup>142</sup> See *id.*

<sup>143</sup> *Id.* at 174, 181 (describing how judicial interpretation has continuously stayed away from moral rights, further emphasizing the Berne Convention's mere “rhetorical role” in American copyright laws).

<sup>144</sup> *Id.* at 171 (calling the BCIA a watered down implementing legislation”).

<sup>145</sup> DOROTHY SCHRADER, CONG. RESEARCH SERV., 94–59 A, INTELLECTUAL PROPERTY PROVISIONS OF THE NAFTA 6–7 (1994).

C. *Guest Star: NAFTA and its Implications on Copyright Laws*

The idea of a three-way treaty between the North American nations began in 1980 during President Ronald Reagan's presidential campaign.<sup>146</sup> One of his claims to convince the American people to elect him as the fortieth president was the possibility of establishing a "common market" throughout the continent.<sup>147</sup> Although this would not be the first common market on the international stage, this particular treaty would be the first between all three North American countries.<sup>148</sup> Despite the anticipation of creating this common market, NAFTA did not come about until nearly a decade later.<sup>149</sup> During this gap, the United States negotiated and signed into law a bilateral free trade agreement with its neighbor to the north.<sup>150</sup> After two years of negotiations, the Canada-U.S. Free Trade Agreement went into effect in 1989.<sup>151</sup>

Interested in joining the collaboration, Mexico president, Carlos Salinas de Gortari, extended a request to then United States president, George H.W. Bush, in June 1990 to enter into a free trade agreement.<sup>152</sup> It was then that President Bush opened up negotiations for what would become the North American Free Trade Agreement between Canada, the United States, and Mexico.<sup>153</sup> NAFTA went into effect in 1994, creating a trilateral common market and replacing the Canada-U.S. Free Trade Agreement altogether.<sup>154</sup> This section will analyze the relevant negotiations that led up to NAFTA, the language in NAFTA pertaining to the audiovisual industry, and positive and negative commentary on NAFTA's enactment.

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<sup>146</sup> Kimberly Amadeo, *History of NAFTA and Its Purpose*, BALANCE, <https://www.thebalance.com/history-of-nafta-3306272> (last visited Mar. 7, 2021).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* This treaty was the natural result of the Trade and Tariff Act in 1984 under the Reagan administration, which created a way to streamline negotiations for bilateral free trade agreements. Amadeo, *supra* note 146.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

Before President Bush, President Salinas, and Canadian Prime Minister Brian Mulroney could sign NAFTA into law, extensive discussions and negotiations took place among the three players.<sup>155</sup> The purposes behind the three-way treaty can be found under the preamble, which itemizes the goals that the countries hoped to achieve with this common market.<sup>156</sup> These broad and noteworthy reasons are worth examining together as a whole, but—for purposes of this Note—three stick out among the rest: (1) “Contribute to the harmonious development and expansion of world trade and provide a catalyst to broader international trade;” (2) “Establish clear and mutually advantageous rules governing their trade;” and (3) “Foster creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights.”<sup>157</sup> These resolutions narrowed into the more actionable goals that are found in Article 102: (a) to allow for easier movement across borders for both goods and services, (b) to increase investment opportunities, and (c) to provide “adequate and effective” intellectual property protection for products throughout the different territories.<sup>158</sup> These objectives constitute the foundation of NAFTA.<sup>159</sup> But who exactly decides what is “adequate and effective” in terms of intellectual property protection, and how did these negotiations lead up to NAFTA’s enactment in 1994?

The relevant section for this analysis is NAFTA Chapter 17, entitled “Intellectual Property,” which begins by stating that parties to the agreement must at a minimum adhere to the regulatory protections of Chapter 17, as well as the substantive rules dictated by the Berne Convention (along with a few other conventions).<sup>160</sup> But as previously discussed, the United States has never—and, very likely, will never—fully accept what is arguably one of the Berne Convention’s most substantial ideologies—the moral rights system that

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<sup>155</sup> Peter Bondarenko, *North American Free Trade Agreement*, ENCYC. BRITANNICA, <https://www.britannica.com/event/North-American-Free-Trade-Agreement> (last visited Feb. 7, 2021).

<sup>156</sup> See North American Free Trade Agreement, pmb., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at art. 102.

<sup>159</sup> Max H. Hulme, Note, *Preambles in Treaty Interpretation*, 164 U. PA. L. REV. 1281, 1300–01 (2016).

<sup>160</sup> NAFTA, *supra* note 156, ch. 1701.

Mexico, like most civil law countries, favors.<sup>161</sup> The first indication that the United States' economic utilitarian ideologies would not easily bend in this treaty is evident in NAFTA Annex 1701.3 where the treaty expressly exempts the United States from enforcing Article 6 *bis* of the Berne Convention and the moral rights that stem from it.<sup>162</sup> Tellingly, this provision applies only to the United States, whereas Canada and Mexico must continue to adhere to and respond to violations of Article 6 *bis* of the Berne Convention between themselves.<sup>163</sup> There could any number of reasons why the United States negotiated the explicit exemption language of Annex 1701.3—one possibility being it simply does not recognize moral rights for their own nationals and it could not obligate itself to protect those very rights to Canadian and Mexican nationals.<sup>164</sup> Regardless of the reasons, the results remain the same: Canadian and Mexican nationals are at a disadvantage because they are not afforded moral rights protection in the United States; yet, U.S. nationals are afforded moral rights protection in Mexico and Canada.<sup>165</sup>

Along similar lines, NAFTA Article 1705.3 provides that the holder of economic rights to copyrighted works can freely contract with another to transfer the economic rights.<sup>166</sup> The person who

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<sup>161</sup> Gomez Garcia, *supra* note 116, at 155–56.

<sup>162</sup> NAFTA, *supra* note 156, annex 1701.3 (“Notwithstanding Article 1701(2)(b), this Agreement confers no rights and imposes no obligations on the United States with respect to Article 6 *bis* of the Berne Convention, or the rights derived from that article.”).

<sup>163</sup> Sharon Leslie Goolsby, *Protection of Intellectual Property Rights under NAFTA*, 4 L. AND BUS. REV. OF THE AM. 5, 53 (1998).

<sup>164</sup> Noreen Wiscovitch Rentas, Note, *Moral Rights Exclusion in the North America Free Trade Agreement and the General Agreement on Tariff and Trade: A Legal Proposal for the Inclusion of Moral Rights in Future Free Trade Agreements in Latin America and the Caribbean*, 35 *Revista de derecho puertorriqueño* 97, 118 (1996).

<sup>165</sup> *Id.* at 119. U.S. nationals are afforded moral rights from Mexico and Canada because they afford those same rights to their own nationals; NAFTA Article 1703's “national treatment” provision requires each party to accord nationals of other parties “treatment no less favorable than that it accords to its own nationals . . .” NAFTA, *supra* note 156, art. 1703.1; *see also* Wiscovitch Rentas, *supra* note 164, at 119.

<sup>166</sup> Each party shall provide that for copyright and related rights:

(a) any person acquiring or holding economic rights may freely and separately transfer such rights by contract for purposes of their exploitation and enjoyment by the transferee; and

acquires these rights must also be free to exercise the economic rights under its own name to the full extent of those benefits.<sup>167</sup> Notably, this provision expressly applies to employment contracts for the creation of works.<sup>168</sup> Essentially, the language in Article 1705.3—particularly subsection (b)—allows for employment contracts, such as work-made-for-hire agreements, in order to provide employers the economic rights of the underlying creative works and the ability to fully exploit those rights.<sup>169</sup> This is the first provision of its kind to be incorporated into a bilateral (or in this case, trilateral) treaty of which the United States is a party.<sup>170</sup> And this contractual freedom is a huge win for the United States, whose entertainment industry relies on work-made-for-hire agreements to ensure that producers are considered the authors and first owners of a copyrighted work.<sup>171</sup> As the next section makes clear, it is this provision and its language that is later reflected in Mexico’s hybrid copyright law.<sup>172</sup> Notably, the use of “its” in NAFTA Article 1705.3 to describe a “person” who acquires rights “in *its* own name” through a contract further demonstrates that business entities were meant to apply under this article’s provision.<sup>173</sup> The choice to include the “its” language is important because many of the United States’ leading entertainment-copyright industries operate through work-made-for-hire agreements in which the employer, typically a

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(b) any person acquiring or holding such *economic rights by virtue of a contract*, including *contracts of employment underlying the creation of works* and sound recordings, shall be able to exercise those rights in *its* own name and enjoy fully the benefits derived from those rights.

NAFTA, *supra* note 156, art. 1705.3 (emphasis added).

<sup>167</sup> NAFTA, *supra* note 156, art. 1705.3.

<sup>168</sup> SCHRADER, *supra* note 145, at 9.

<sup>169</sup> See NAFTA, *supra* note 156, art. 1705.3.

<sup>170</sup> SCHRADER, *supra* note 145, at 9.

<sup>171</sup> *Id.*

<sup>172</sup> See Gomez Garcia, *supra* note 116, at 156.

<sup>173</sup> See SCHRADER, *supra* note 145, at 8–9 (explaining how an employer can contract for a creator’s rights).

production company,<sup>174</sup> is frequently the author and first owner of a copyrighted work.<sup>175</sup>

The clear incompatibility that this Note has so far examined between American and Mexican copyright laws tapers down to this treaty and the negotiations involved in its creation.<sup>176</sup> A major reason that the parties—particularly the United States and Mexico—could reach a formalized agreement through NAFTA was that Mexico tailored its laws to fit American standards of intellectual property.<sup>177</sup> In fact, where Mexico’s adaptation of American ideologies is apparent, so too is the lack of reciprocity from the United States to conform to Mexican principles.<sup>178</sup> One of the biggest critiques that Mexico faced post negotiations was that its government caved too eagerly to the whims of the United States, rather than take a more offensive approach to the negotiations, which created cultural consequences that critics argue left Mexican identities in the audiovisual field vulnerable.<sup>179</sup> Although the enactment of the treaty was not cause for lamentation, many believe that Mexico’s haste in the negotiations resulted in the acceptance of the “American way of life” in its attempt to commercialize itself as a society on an international scale.<sup>180</sup>

Inversely, commentators have noted the benefits that Mexico has received from becoming a party to NAFTA and into what is widely known as the highest level of intellectual property protection on the international stage.<sup>181</sup> A direct benefit Mexico received was the United States’ concession to provide protection to motion pictures produced in Mexico that were previously declared part of the

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<sup>174</sup> *Films and television broadcasts*, U. OF MELB., <https://copyright.unimelb.edu.au/shared/types-of-copyright-material/films-and-television-broadcasts> (last visited Apr. 12, 2022).

<sup>175</sup> See SCHRADER, *supra* note 145, at 8.

<sup>176</sup> Gomez Garcia, *supra* note 116, at 156.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 135.

<sup>180</sup> *Id.* at 147. “American way of life” has also been referred to as *Americanización* for situations where typically the younger generation of middleclass Mexicans think that the U.S. model is the surest and best way for Mexico to reach an international mentality. *Id.* n.43.

<sup>181</sup> SCHRADER, *supra* note 145.

public domain and left unprotected by American copyright law.<sup>182</sup> Although this is colloquially referred to as NAFTA's Restoration Provision, the works it covers were never protected pursuant to 17 U.S.C. Section 405 Copyright Law.<sup>183</sup> In order to be eligible, a motion picture must either have been originally fixed in Mexico and had fallen into the U.S. public domain because it was first published between January 1, 1978, and March 1, 1989, or the work had fallen into the U.S. public domain during that same time frame without the required copyright notice, regardless of where it was first fixed.<sup>184</sup>

The implications of allowing such a broad range of works to now fall under the protective umbrella of American copyright law was a high point of debate for the Mexican government.<sup>185</sup> This win allowed Mexico to avail itself to a huge, untapped market of Spanish-speaking viewers that was previously inaccessible.<sup>186</sup> And this was not the only boost that Mexico's economy received upon its entrance into the agreement.<sup>187</sup> Taking a broadened view of NAFTA's impact across all industries, Mexico was able to reduce its public debt, stabilize inflation, and liberalize trade overall.<sup>188</sup> Regardless of negative commentary regarding Mexico's entry into the treaty, it is evident that NAFTA has had positive impacts on Mexico, as a country and particularly for its creative nationals.<sup>189</sup> It has been beneficial to such an extent that Mexico revised its copyright law to allow for a work-made-for-hire sliver within its otherwise absolute civil law ideologies.<sup>190</sup>

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<sup>182</sup> NAFTA, *supra* note 156, annex 1705.7.

<sup>183</sup> Goolsby, *supra* note 163, at 23, 25.

<sup>184</sup> *Id.* at 24.

<sup>185</sup> SCHRADER, *supra* note 145, at 11.

<sup>186</sup> *Id.*

<sup>187</sup> See Andrew Chatzky, James McBride & Mohammed Aly Sergie, *NAFTA and the USMCA: Weighing the Impact of the North American Trade*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/naftas-economic-impact> (last updated July 1, 2020).

<sup>188</sup> *Id.*

<sup>189</sup> See *id.*

<sup>190</sup> See generally Smith, *supra* note 11.

*D. Sequel: Introducing the New LFDA Copyright Law and its Work-Made-for-Hire Exception*

The previous sections outlined the incompatibilities between the two respective copyright laws and how the NAFTA negotiations forced both the United States and Mexico to compromise in some respects. As noted, Mexico's compromises were more pronounced, which is made apparent by the changes made to its law in order to conform to the United States' ideologies.<sup>191</sup> This conformity set the stage for the hybrid law's grand entrance in 1996.<sup>192</sup> The 1996 *Ley Federal de Derechos de Autor* replaced the 1956 law and its subsequent reforms.<sup>193</sup> With just a four-year difference from the time NAFTA was signed to the LFDA's adoption, the new law appears to be the Mexican Congress' attempt to better conform with NAFTA's intellectual property protections, including Chapter 17 of the treaty.<sup>194</sup>

Tellingly, Article 1 of the LFDA begins by describing the purpose of the law, which explicitly allows protections for "publishers, producers and broadcasting organizations."<sup>195</sup> This is worth highlighting because Mexico traditionally had not considered corporations as owners of copyrights in the same way that a human being who creates something is considered an owner.<sup>196</sup> Although corporations are now allowed to own rights as derivative owners under the LFDA, they are still not considered *original* owners.<sup>197</sup>

Articles 68 through 72 of the LFDA spell out provisions relating to audiovisual production contracts.<sup>198</sup> These contracts are the ones that integrate original works into the producer's audiovisual project through *la cadena de títulos*.<sup>199</sup> Article 68 states that under an

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<sup>191</sup> Gomez Garcia, *supra* note 116, at 156.

<sup>192</sup> *Id.*

<sup>193</sup> Gomez Garcia, *supra* note 116, at 156; GARRIGUES, *supra* note 15. Once again, it should be noted the 1996 LFDA was reformed once more in 2020, but the substantive changes to the law have not impacted the topics discussed in this Note. GARRIGUES, *supra* note 15. Therefore, the legal provisions discussed are still current and applicable. *See id.*

<sup>194</sup> Smith, *supra* note 11.

<sup>195</sup> LFDA art 1 (Mex.).

<sup>196</sup> Schmidt, *supra* note 85.

<sup>197</sup> *Id.*

<sup>198</sup> LFDA cap. VI, art 86–72 (Mex.).

<sup>199</sup> *See id.* at art 68.

audiovisual production contract, an author's patrimonial rights—which include the authority to reproduce and distribute the work—shall be exclusively granted to the producer.<sup>200</sup> Unless the contract states otherwise, the creator cannot hinder the producer's exercise of these rights.<sup>201</sup> On top of that, if the contract is silent as to the patrimonial rights, they are implicitly reserved for the producer in order to facilitate the integration of the work into the overall film.<sup>202</sup>

One major difference between the transfer of patrimonial rights through *la cadena de títulos* for audiovisual contracts and the transfer of patrimonial rights for any other type of copyrightable work is that these audiovisual contracts are exempted from the term regulations outlined in Article 33 and discussed in Section III(A) of this Note.<sup>203</sup> This article states that patrimonial rights must revert back to the original author.<sup>204</sup> Simply put, producers acquire the patrimonial rights indefinitely.<sup>205</sup>

The civil and common law approaches to copyright law begin to blur in Article 83 of the LFDA.<sup>206</sup> Work-made-for-hire principles are also found in this article.<sup>207</sup> The Mexican synthesis of the United States' work-made-for-hire approach is evident in the use of the

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> BERRUECO GARCIA, *supra* note 106, at 126.

<sup>203</sup> *See* LFDA art 33 (Mex.). Article 33 of the LFDA states that if a contract to transfer patrimonial rights is silent as to term, then the term will be limited to five years; additionally, any term over fifteen years requires justification. *Id.*

<sup>204</sup> BERRUECO GARCIA, *supra* note 106, at 126.

<sup>205</sup> BERRUECO GARCIA, *supra* note 106, at 126. This new indefiniteness to patrimonial rights is drastically different from the limited transferability rights discussed in Section III(A) of this Note. *See* LFDA art 33 (Mex.).

<sup>206</sup> *See* LFDA art 83 (Mex.).

<sup>207</sup>

The provision states in part:

Unless otherwise agreed, the person, whether natural person or legal entity, who *commissions* the production of a work or produces such a work with others working for remuneration shall enjoy the ownership of the [*patrimonial*] rights therein, and *the rights relating to the disclosure and integrity of the work* and the making of collections involving this type of creation shall accrue to him.

*Id.* (emphasis added)

word “[*comisión*],” or “commission[.]”<sup>208</sup> Another interesting provision is the clause that allows the commissioner of a work to acquire the ownership of “the rights relating to the disclosure and integrity of the work.”<sup>209</sup> That is the creator’s integrity moral right.<sup>210</sup> Basically, the provision prohibits the creator who is employed under the work-made-for-hire agreement from opposing any modifications the commissioner makes.<sup>211</sup> However, the creator’s surrender of this right to oppose the work’s modification does not technically mean that the integrity moral right is transferred along with the patrimonial rights.<sup>212</sup> Otherwise, it would go against Mexico’s sacred principle that moral rights are inalienable.<sup>213</sup> In doing this, Mexico creates the ideal situation where the commissioner, such as a movie producer, is given the freedom and space to do with the underlying work what is necessary to create the film without legally transferring the untransferable moral rights from the original creator.<sup>214</sup>

This creative loophole instilled in Article 83 was Mexico’s way of allowing production companies to commission work with the assurance that they can effectively execute the audiovisual projects, while continuing to protect the highly valued moral rights principles.<sup>215</sup> Article 83 manages to stylistically convey this by distinctly stating that producers are granted “patrimonial rights,” while only referring to the integrity moral right by its purpose.<sup>216</sup> Ultimately, the result is that producers are granted the commissioned creator’s patrimonial rights without the need for a transfer, as well as complete control over the creator’s integrity moral right.<sup>217</sup>

Additionally, in Articles 22 and 95, the LFDA allows an audiovisual producer to exercise authority over the moral rights to a final audiovisual project whose creation is made up of various artistic creations, without prejudicing the rights that originally attached to the

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<sup>208</sup> *See id.*

<sup>209</sup> *Id.*

<sup>210</sup> *See id.*; *see also* Schmidt, *supra* note 85.

<sup>211</sup> Schmidt, *supra* note 85.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See id.*

<sup>216</sup> LFDA art 83 (Mex.).

<sup>217</sup> *Id.*; Schmidt, *supra* note 85.

creators of those individual works.<sup>218</sup> This provision denotes that Mexico's law recognizes an audiovisual project as an original piece despite the fact that it is created from collaborative works.<sup>219</sup> This recognition of audiovisual productions as an original work imitates Article 14 *bis* of the Berne Convention.<sup>220</sup> This is the reason why producers or production companies can be regarded as "original" owners of patrimonial rights, as opposed to just derivative owners, through the use of work-made-for-hire contracts.<sup>221</sup> This is the only exception to the longstanding rule that only natural persons can be original creators of a copyrighted work.<sup>222</sup>

So, what is left? The LFDA does not leave the original creators without protection.<sup>223</sup> For starters, the producer does not receive unlimited, exclusive patrimonial rights.<sup>224</sup> The patrimonial rights that the creator gives up once the piece is commissioned by the producer is the right to object to the reproduction, distribution, and representation to the public (among a few others).<sup>225</sup> These core patrimonial rights are automatically granted upon the execution of a work-made-for-hire contract.<sup>226</sup>

Also, by ensuring that a creator retains the power to exercise her paternity moral rights,<sup>227</sup> the LFDA explicitly reserves her right to get credit for the contribution to the final production piece.<sup>228</sup> This reserved right is much more beneficial to creators that fall under the LFDA compared to those that fall under 17 U.S.C. § 101 because, under American copyright law, creators commonly have to negotiate to include their name in the movie credits.<sup>229</sup>

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<sup>218</sup> LFDA art 22, 95 (Mex.).

<sup>219</sup> *Id.*; see also BERRUECO GARCIA, *supra* note 106, at 118.

<sup>220</sup> BERRUECO GARCIA, *supra* note 106, at 118.

<sup>221</sup> Schmidt, *supra* note 85.

<sup>222</sup> *Id.*

<sup>223</sup> See generally LFDA (Mex.).

<sup>224</sup> *Id.* art 99.

<sup>225</sup> *Id.*

<sup>226</sup> Schmidt, *supra* note 85.

<sup>227</sup> *Id.*

<sup>228</sup> LFDA art 83 (Mex.). Creators who are commissioned by producers under Article 83 "shall have the right to the express mention of his status as author [ . . . ] in the creation of which he has been involved." *Id.*

<sup>229</sup> See generally FOLLOWS, *supra* note 40.

Finally, in 2003, a reform of the LFDA was made to include Article 83 *bis*, which states that if a contract is ambiguous as to the terms of a commissioned work, then the interpretation of the contract will be one that is most favorable to the original creator.<sup>230</sup> This provision was added to the law after critics and attorneys alike believed that Article 83 alone could be used as a trap for creators who signed the work-made-for-hire contract without the specialized knowledge of someone with more experience as to how the law works.<sup>231</sup> After careful analysis of the LFDA, and the relevant provisions discussed, it is evident that Mexico's hybrid law for audiovisual productions contemplated protections for both the producers and the creators in an effort to merge the strongest elements of both Mexican civil law and the regulations outlined in NAFTA.<sup>232</sup>

#### IV. THE PRODUCERS: REASONS FOR SHOOTING AMERICAN RUNAWAY PRODUCTIONS IN MEXICO IN ADDITION TO THE HYBRID LAW

Thus far, this Note has examined the roots and legal makeup of Mexico's hybrid law. Now, this Note will focus on additional factors that make shooting American runaway film productions in Mexico a good business strategy. This shift in perspective is crucial because it is the producer—whose role is closest to the project's heart—who ultimately must balance the talent, rights, and money in a profitable and successful way.<sup>233</sup> Thus, the purpose of Part IV is to highlight additional benefits, beyond the benefits of the hybrid law, that incentivize the savvy movie producer to take her operations south of the border.

A producer must consider many factors when deciding where and how to produce a runaway movie production, one of which might be the accessibility of a remote location.<sup>234</sup> One of Mexico's

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<sup>230</sup> LFDA art 83 *bis* (Mex.); *see also* BERRUECO GARCIA, *supra* note 106, at 128.

<sup>231</sup> BERRUECO GARCIA, *supra* note 106, at 128.

<sup>232</sup> *See generally* LFDA (Mex.).

<sup>233</sup> MOULLIER & HOLMES, *supra* note 69, at 6.

<sup>234</sup> *See The Ultimate Pre Production Checklist for Film & Video [FREE Checklist]*, STUDIOBINDER (Apr. 1, 2019), <https://www.studiobinder.com/blog/ultimate-pre-production-checklist/>.

main benefits is its varied terrain and beautiful scenery.<sup>235</sup> From beaches to mountains or urban to rural, Mexico's geography offers production companies options to choose from depending on the scenery the producer is looking for.<sup>236</sup>

Beyond just the natural features,<sup>237</sup> Mexico boasts beautiful man-made structures that call to a director's artistic eye.<sup>238</sup> Central Mexico, in particular, possesses multiple pyramidal wonders, such as the Teotihuacan's Sun and Moon Pyramids an hour away from Mexico City, the Xochicalco pyramids located near the Lagunas de Zempoala National Park, and the Great Pyramid of Cholula near the colonial city of Puebla.<sup>239</sup> The geographical wonders can be seen in a long list of international films, including *Resident Evil: Extinction* (2007), *Apocalypto* (2006), and *Predator* (1987).<sup>240</sup> Some areas of Mexico have seen more action than others; Durango, a state located in northern Mexico, is dubbed the "Land of Cinema" due to its record of hosting over 120 film productions over many decades, including *Ben-Hur* (1959), *The Good, the Bad and the Ugly* (1966), and, even more recently, *The Revenant* (2015).<sup>241</sup>

One particular location that has dominated as a premier location for runaway film productions since its construction—specifically built for James Cameron's *Titanic* in 1997—is Baja Studios located in Baja California.<sup>242</sup> The fifty-one-acre oceanfront studio has been home to many movie and television productions.<sup>243</sup> Baja Studios' all

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<sup>235</sup> *Why Mexico?*, FILM IN MEXICO, <https://www.filminmexico.com/filming-in-mexico/why-mexico/> (last visited Feb. 7, 2021).

<sup>236</sup> *Id.*

<sup>237</sup> *Mexico*, EMERGE FILM SOLUTIONS, <https://emergefilmsolutions.com/country/mexico/> (last visited Feb. 7, 2021) [hereinafter EMERGE FILM SOLUTIONS] (including, but not limited to, "cave systems, desert landscapes, Pacific and Caribbean waters, beaches, waterfalls, [and] jungles).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> Anna Marie de la Fuente, *Film, TV Shoots in Mexico on the Rise*, VARIETY (Mar. 13, 2017, 8:51 AM), <https://variety.com/2017/film/global/shooting-mexico-film-tv-production-rise-1202007628/?jwsourc=cl>.

<sup>243</sup> *Id.*; JORGE MARIO MARTÍNEZ PIVA ET AL., U.N. ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, THE MEXICAN FILM INDUSTRY AND ITS PARTICIPATION IN THE GLOBAL VALUE CHAIN, at 32, U.N. Doc. LC/L.3274-P LC/MEX/L.981, U.N. Sales No. S.10.II.G.79 (Oct. 2011),

“self-contained facility”<sup>244</sup> is a major selling point that has made it one of the most popular production studios internationally.<sup>245</sup> The studio houses a water tank capable of holding over twenty million gallons of filtered sea water, making it an ideal location for water-related projects.<sup>246</sup> Baja Studios additionally offers plenty of office space, dressing rooms, and other filming facilities, as well as local hotels and restaurants that crews can enjoy during their stay, which together creates the ultimate runaway production destination.<sup>247</sup> And while these geographical benefits are available to all international runaway productions, they are especially beneficial to Hollywood, whose proximity to Mexico adds an additional incentive.<sup>248</sup>

Because of Mexico’s popularity and versatility as a film production location, producers can also find top-quality film production services, crew, and talent that facilitate an easier transition to remote filming.<sup>249</sup> Looking for local crew and talent can make the process easier, and it is not hard to find these individuals, particularly in location hotspots.<sup>250</sup> Even if a producer decides to bring a sizeable group from Hollywood, the bilingual residents can supplement spots on the crew.<sup>251</sup> Mexican crews commonly assist in international productions and, therefore, offer quality services for directing, styling, and everything in between.<sup>252</sup>

Along with human capital, production companies can find both standard and specialized equipment necessary to film.<sup>253</sup> Nevertheless, if a producer wants to bring her own equipment to take advantage of the close proximity to Mexico, then she can benefit from Mexico’s status as an ATA Carnet country.<sup>254</sup> A Carnet is an

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[https://repositorio.cepal.org/bitstream/handle/11362/4916/1/S20111039\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/4916/1/S20111039_en.pdf) (including *Tomorrow Never* (movie), *Pearl Harbor* (movie), *The Expendables* (TV movie), and *Tremors* (TV show)).

<sup>244</sup> EMERGE FILM SOLUTIONS, *supra* note 237.

<sup>245</sup> MARTÍNEZ PIVA ET AL., *supra* note 243.

<sup>246</sup> *The Studio*, BAJA FILM STUDIOS, <http://www.thestudiotour.com/wp/studios/baja-film-studios/> (date accessed February 20, 2021).

<sup>247</sup> MARTÍNEZ PIVA ET AL., *supra* note 243.

<sup>248</sup> De la Fuente, *supra* note 242; *see also The Studio*, *supra* note 246.

<sup>249</sup> MARTÍNEZ PIVA ET AL., *supra* note 243, at 32–33.

<sup>250</sup> De la Fuente, *supra* note 242.

<sup>251</sup> *Id.*

<sup>252</sup> EMERGE FILM SOLUTIONS, *supra* note 237.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

internationally recognized document that expedites a convenient import and export of merchandise for temporary projects.<sup>255</sup> It allows for easier clearance of customs in eighty–seven countries.<sup>256</sup> By using a Carnet, production companies can avoid paying duties and import taxes on equipment and other merchandise, as well as serve as a U.S. Certificate of Registration when production is complete and it is time to return home.<sup>257</sup>

The Carnet is one of the many government incentives that Mexico has implemented in an effort to internationally promote the country as film friendly.<sup>258</sup> The costs to film in Mexico are considered competitive compared to the United States, where filming costs are much more expensive.<sup>259</sup> Tax incentives, such as the sixteen percent value–added tax (“VAT”) refund, are available to eligible production companies.<sup>260</sup> Government entities such as *La Comisión Mexicana de Filmaciones* (COMEFILM) and *El Instituto Mexicano de Cinematografía* (IMCINE) offer programs to help in the proliferation of international audiovisual and motion picture projects.<sup>261</sup> One particularly enticing program offered by COMEFILM is the VAT 0% Incentive for non–Mexican productions, rather than the usual sixteen percent.<sup>262</sup> Additionally, Hollywood producers may take advantage of a few avenues available for acquiring visas or work permits depending on the project and estimated time spent in the country.<sup>263</sup> For instance, crewmembers with valid western passports can enter and stay in Mexico for 180 days without a visa.<sup>264</sup>

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<sup>255</sup> *What is a Carnet?*, BOOMERANG CARNET, <https://www.atacarnet.com/what-carnet> (last visited Feb. 7, 2021).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *See generally* EMERGE FILM SOLUTIONS, *supra* note 237.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *See generally* COMISIÓN MEXICANA DE FILMACIONES, <http://www.comefilm.gob.mx/> (date accessed Feb. 7, 2021); *See generally* *El Instituto*, INSTITUTO MEXICANO DE CINEMATOGRAFÍA, <http://www.imcine.gob.mx/imcine/el-instituto/> (date accessed Feb. 7, 2021).

<sup>262</sup> *Funds and Incentives in Mexico*, COMISIÓN MEXICANA DE FILMACIONES, <http://www.comefilm.gob.mx/wp-content/uploads/2017/06/Funds-and-incentives-Mexico-2017.pdf> (last visited Feb. 7, 2021).

<sup>263</sup> *Visas*, FILM IN MEXICO, <https://www.filminmexico.com/travel/visas/> (last visited Feb. 7, 2021).

<sup>264</sup> EMERGE FILM SOLUTIONS, *supra* note 237.

Viewing all these benefits in a vacuum, it is easy to see why Mexico would be considered a top choice for a runaway production project.

Despite these incentives and the relatively low cost for production compared to those incurred in the United States, Mexico still struggles to compete with other foreign competitors in this realm, particularly against Canada.<sup>265</sup> Because of the United States' location between the countries, Hollywood producers can benefit from the proximity factor for either neighboring nation.<sup>266</sup> Canada's shared language with the United States also establishes it as Mexico's worthy adversary as a runaway production location.<sup>267</sup>

Another reason U.S. film producers may chose Canada over Mexico is Mexico's lack of security and the subsequent risk that imposes on American companies.<sup>268</sup> Mexico is home to some of the world's most dangerous cities, with Tijuana notoriously ranked as the most violent city in the world due to a longstanding drug war.<sup>269</sup> Admittedly, most violence is confined to those involved in drug-gangs, and it has not prevented foreign companies from taking advantage of Mexico's attractive environment.<sup>270</sup> This concern is just one of the many factors that production companies must consider when deciding whether to produce in Mexico.<sup>271</sup>

## V. ROTTEN TOMATOES:<sup>272</sup> REVIEWS OF MEXICO'S AUDIOVISUAL COPYRIGHT LAW

This Note refers to Mexico's updated LFDA copyright law as a "hybrid" because by definition the term hybrid means "something

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<sup>265</sup> MARTÍNEZ PIVA ET AL., *supra* note 243, at 35.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Kate Linthicum, *Five of the Six Most Violent Cities in the World are in Mexico, Report Says*, L.A. TIMES (Mar. 14, 2012, 11:10 AM), <https://www.latimes.com/world/la-fg-mexico-tijuana-violence-20190314-story.html>.

<sup>270</sup> *6 Reasons Why Mexico is Safer than You Think*, MEXPERIENCE (July 9, 2020), <https://www.mexperience.com/6-reasons-why-mexico-is-safer-than-you-think/>.

<sup>271</sup> *See generally* EMERGE FILM SOLUTIONS, *supra* note 237.

<sup>272</sup> *About Rotten Tomatoes*, ROTTEN TOMATOES, <https://www.rottentomatoes.com/about> (last visited Mar. 5, 2021) ("Rotten Tomatoes . . . [is] the world's most trusted recommendation source[] for quality entertainment.").

that is a combination of two different things, so it has qualities relating to both of them.”<sup>273</sup> As the previous sections have demonstrated, Mexico’s synthesis of its longstanding moral rights traditions with the American copyright ideologies created a unique law that retained qualities from both legal approaches.<sup>274</sup> In doing so, Mexico yielded a few basic elements of its traditional laws to make room for the hybrid law’s structure.<sup>275</sup> Part V will acknowledge both the positive and negative commentary that naturally followed the enactment of this unique, hybrid law.

Criticism about the hybrid law stems back to when NAFTA was first enacted.<sup>276</sup> Recall how some critics found Mexico’s tactics during the NAFTA negotiations inadequate.<sup>277</sup> Mexico was criticized for its defensive stance and its urgency in acquiescing to American demands.<sup>278</sup> To some, these concessions not only changed legal standards, but also cultural implications.<sup>279</sup> The notion of culture was redefined based on the ideologies implemented into NAFTA and later into the hybrid law.<sup>280</sup> For instance, Mexico embraced a certain level of global capitalism that it had not accepted prior to NAFTA, especially in the intellectual property sector.<sup>281</sup> This is a sharp turn from the moral rights principles Mexico has maintained since the beginning of its copyright law.<sup>282</sup> Global capitalism is commonly signaled by free trade, which was one of the main selling points of NAFTA.<sup>283</sup> One view on global capitalism is that impersonal forces impact the lives of ordinary people,<sup>284</sup> while increasing

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<sup>273</sup> *Hybrid*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/hybrid> (last visited Mar. 6, 2021).

<sup>274</sup> *See generally* LFDA (Mex.).

<sup>275</sup> *See generally id.*

<sup>276</sup> *See* Gomez Garcia, *supra* note 116, at 156.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 135, 147.

<sup>279</sup> *Id.* at 157.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *See* ZAMORA ET AL., *supra* note 8, at 661.

<sup>283</sup> *Global Capitalism*, SCIENCEDIRECT, <https://www.sciencedirect.com/topics/psychology/global-capitalism> (last visited Mar. 6, 2021).

<sup>284</sup> *Id.*

the freedom and flexibility of corporate entities.<sup>285</sup> Applying this view, commentators in opposition of the hybrid law have argued that the LFDA and its work-made-for-hire exception to the moral rights principles have negatively impacted ordinary creators, while expanding the power and reach of production companies.<sup>286</sup>

Another critique circulating the LFDA pertains to the text itself and how the words used negatively affect the creator.<sup>287</sup> The chapter of the LFDA that refers to *la cadena de títulos* states that authors “ceden” or “assign” their patrimonial rights exclusively to producers.<sup>288</sup> The legal ramifications that attach to the word “[ceder]” have been criticized as an unfortunate and legally incorrect way to describe the transfer of the patrimonial rights because the nature of the word “ceder” greatly conflicts with protections afforded to the original creators.<sup>289</sup> Assignment agreements by design purport to grant derivative owners the full transfer of the patrimonial rights.<sup>290</sup> These critics argue that a more appropriate term for the transfer of the rights would be “license” or “licenciar” because it would better preserve the author’s rights to her work.<sup>291</sup>

Despite the negative commentary, time has proven that the hybrid law has enhanced Mexican copyright regulations, which have previously been considered lacking.<sup>292</sup> Like many developing countries, Mexico was pressured to upgrade its intellectual property regulations.<sup>293</sup> Mexico acquiesced by conforming to the intellectual property provisions laid out in NAFTA.<sup>294</sup> By adopting principles from NAFTA into Mexican copyright law, Mexico demonstrated its commitment to copyright reform to the United States and to other nations.<sup>295</sup> And, ultimately, these standards benefit Mexico because

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<sup>285</sup> Nicki Lisa Cole, *5 Things That Make Capitalism Global*, THOUGHTCO., <https://www.thoughtco.com/global-capitalism-p2-3026336> (last updated Apr. 22, 2018).

<sup>286</sup> *See id.*

<sup>287</sup> *See* BERRUECO GARCIA, *supra* note 106, at 125.

<sup>288</sup> LFDA cap. VI, art 86–72 (Mex.).

<sup>289</sup> BERRUECO GARCIA, *supra* note 106, at 125.

<sup>290</sup> Schmidt, *supra* note 85.

<sup>291</sup> BERRUECO GARCIA, *supra* note 106, at 125.

<sup>292</sup> ZAMORA ET AL., *supra* note 8.

<sup>293</sup> Smith, *supra* note 11, at 514.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 516.

the laws protect foreigners, who primarily publish and sell the most in Mexico's cinematographic market.<sup>296</sup> Assuming that the Mexican economy continues to rely on export-led growth, it is important that Mexico continue to keep up with what foreign countries deem adequate copyright protections.<sup>297</sup>

Looking solely at the U.S. principles of copyright law, one can see that the goal is to strike a balance between protecting a creator's property rights and achieving societal benefits.<sup>298</sup> This pragmatic view stems from a utilitarian approach, which this Note has previously discussed.<sup>299</sup> Generally speaking, well-rounded American copyright regulations prompt developing nations like Mexico to create more sophisticated standards and gain competitive footing on the international stage.<sup>300</sup> While the hybrid law does not go as far as the U.S. copyright law in terms of finding a balance between property rights and societal benefits, it did create an easier process for production companies to create their movies without requiring that a creator give up her moral rights in the name of movie making.<sup>301</sup> In taking steps to harmonize the legal structures between Mexico and the United States, Mexico has demonstrated its hopes to keep up with worldwide standards of intellectual property, while remaining loyal to its roots.<sup>302</sup>

## VI. AND . . . THAT'S A WRAP!

Historically, Mexican civil law and American common law clashed. Both countries developed laws based on their own paths and traditions. And yet, Mexico defied those same tradition by

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<sup>296</sup> Jose Antonio Torres Reyes, *Una aproximación a los derechos de autor y su impacto en las bibliotecas, archivos y centros de información en el contexto mexicano*, 2 (Sept. 7–8, 2006), (unpublished conference paper, Segundo Foro Social de Información, Documentación y Bibliotecas) (on file with ResearchGate), [https://www.researchgate.net/publication/28807316\\_Una\\_aproximacion\\_a\\_los\\_derechos\\_de\\_autor\\_y\\_su\\_impacto\\_en\\_las\\_bibliotecas\\_archivos\\_y\\_centros\\_de\\_informacion\\_en\\_el\\_contexto\\_mexicano](https://www.researchgate.net/publication/28807316_Una_aproximacion_a_los_derechos_de_autor_y_su_impacto_en_las_bibliotecas_archivos_y_centros_de_informacion_en_el_contexto_mexicano).

<sup>297</sup> Smith, *supra* note 11.

<sup>298</sup> Walz-Chojnacki, *supra* note 14.

<sup>299</sup> *Id.*

<sup>300</sup> *See id.*

<sup>301</sup> *See generally* LFDA (Mex.).

<sup>302</sup> Schmidt, *supra* note 85.

creating a hybrid law that synthesized the civil law moral rights system with the American utilitarian ideologies. In doing so, it afforded more flexibility to movie producers, both from Hollywood and beyond. An analysis of Mexico's hybrid copyright law is incomplete without an examination of the tensions between the various legal frameworks and provisions relevant to the hybrid law's formation. Understanding this tension serves to highlight the creative solution Mexico found in harmonizing these legal structures specifically for an industry that values artistic expressions, yet heavily relies on the ability to make pragmatic, business savvy decisions.