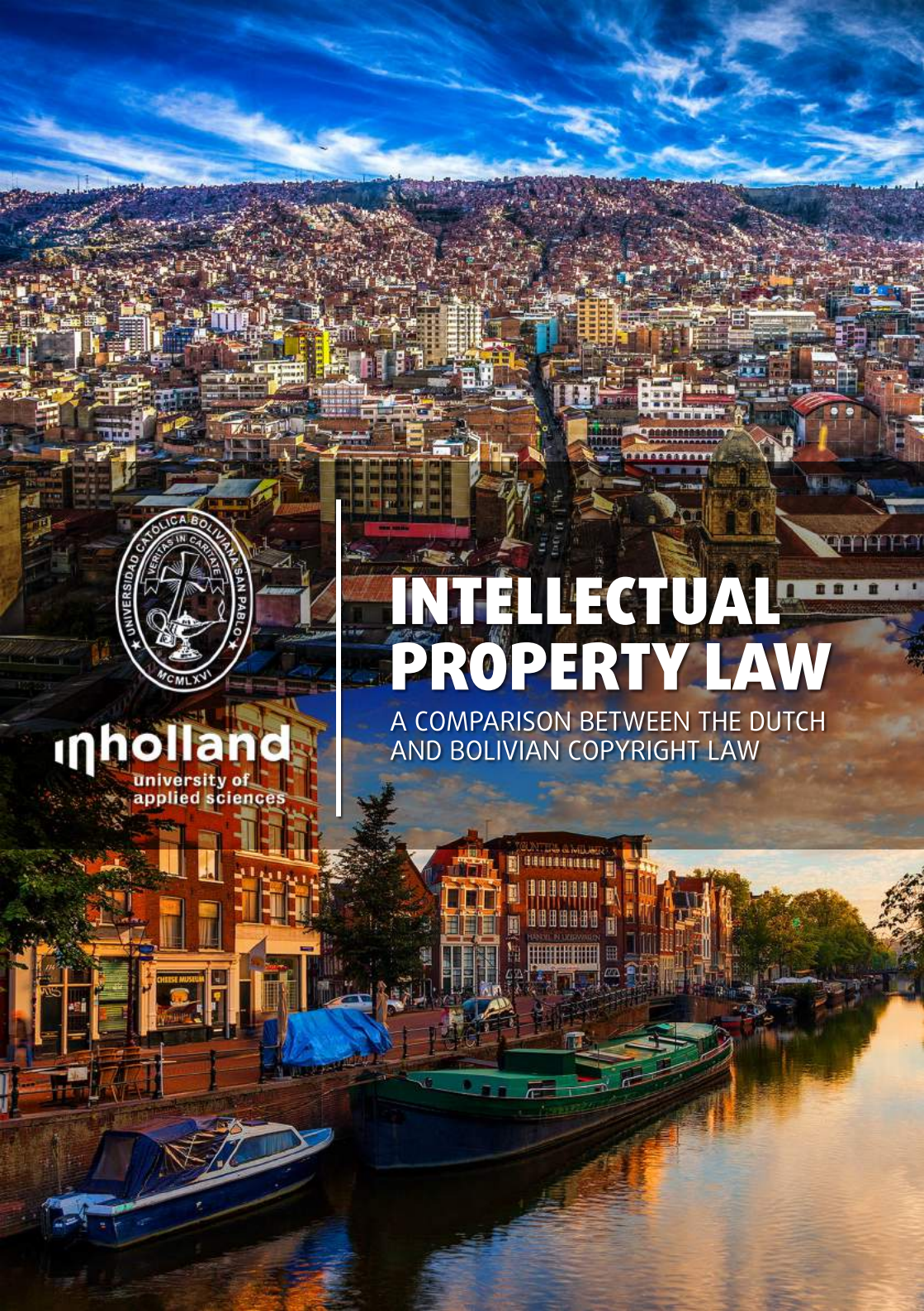


# INTELLECTUAL PROPERTY LAW

## A COMPARISON BETWEEN THE DUTCH AND BOLIVIAN COPYRIGHT LAW

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UNIVERSIDAD CATÓLICA BOLIVIANA "SAN PABLO"
VERITAS IN CARITATE
MCMLXVI

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La Paz, Bolivia. August, 2017

# Contents

# Chapter 1: Introduction

## 1.1 Intellectual Property Throughout European History

### The Rise of Intellectual Property

Legal protections for intellectual property have a rich history that dates back to ancient Greece and further (Suarez and Woudhuysen, 2013). As different legal systems were developing in their protection of intellectual works, there was a stepwise refinement regarding the understanding of what it was that was being protected (Suarez and Woudhuysen, 2013).

This chapter will deal with these topics focusing on European and particularly Dutch history of Intellectual Property Protection.

The first known evidence of intellectual property protection comes from Ancient Greece; in 500 BCE, in the Greek city of Sybaris (located in what is now southern Italy), "encouragement was held out to all who should discover any new refinement in luxury, the profits arising from which were secured to the inventor by patent for the space of a year" (Cramer, 1826). Any chef who created a unique culinary dish was granted exclusive rights for one year to encourage competition in his skill (Wilkins, 2000).

There are at least three other cases that recognize patent rights in ancient times; these cases are cited in Bruce Bugbee's work *The Genesis of American Patent and Copyright Law* (Bugbee, 1967). For

instance, Vitruvius (Roman author) exposed some false poets who had been stealing the words and phrases of others. The second and third cases also come from Roman times (first century CE) referring to evidences of Roman jurists discussing the different ownership interests associated with an intellectual work. However, these examples are considered very unusual; as far as is known, there were few institutions or conventions of intellectual property protection in ancient Greece or Rome (Suarez and Woudhuysen, 2013).

Many franchises, privileges, and royal favours granted concerning the rights to intellectual works started to appear from Roman times to the birth of the Florentine Republic (Moore and Himma, 2014). Patents could have emerged out of the need to develop new industries within the countries. Protection of the trade may have served as incentives to lure the foreigners to introduce new industries.

Although it is certain that the genesis of the patent system originated in Italy. The first known patent was issued on 19 June 1421, by the Republic of Florence to Filippo Brunelleschi, the famous architect for a new type of ship design (Nard and Moriss, 2004). It wasn't until 50 years later though, in 1474, that the first governmental act to systematize the granting of patents was approved (Schwabach, 2007). The Venetian statute, provided inventors "who shall build any new and ingenious device in this City, not previously made in our Commonwealth" (Venetian Patent Act, 1474) with the right to prevent others to make the same device.

**History of Intellectual Property in Europe**

Throughout the 15th and 16th centuries, there were various levels of protection for literary works in Europe (most enacted at local level).

In France, a system of privileges was adopted as early as 1498; a book privilege, granted to an author or publisher, was a commercial monopoly, a kind of patent (Epstein, 1991).

In Germany, grants to authors and artists for writings, musical compositions, and designs date back to as early as 1511 (Suarez and Woudhuysen, 2013).

By the mid-1500s the arrival of printing in hundreds of cities across Europe created local incentives for safeguarding the ownership of copies, but most forms of protection during this period were less than true copyrights as the notion of intellectual property today would be understood (Suarez and Woudhuysen, 2013).

The current notion of intellectual property - the concept that an idea can be owned - originated during the European Enlightenment (Hesse, 2002). It was only when people started to suppose that knowledge came from the human mind - rather than through divine revelation - that humans were seen as creators of new ideas.

It was during the eighteenth century that the words ‘ideas’ and ‘property’ were first connected to each other, and first forged a legal bond (Hesse, 2002).

The first major and well-known legislation was passed in 1623: the Statute of Monopolies allowed the author or inventor to retain their

ownership rights, and monopolies were no longer granted. This Act of the Parliament of England is known as the first statutory expression of English patent law. The law also guaranteed the inventor a 14 year period during which he owned the exclusive right to preside over his invention (Statute of Monopolies, 1623). Chris Dent, writing in the Melbourne University Law Review, identifies it as "a significant marker in the history of patents" with continuing importance, although it is neither the start nor end of patent law. The Statute of Monopolies dominated patent law for centuries; it was received into the laws of many common law jurisdictions and still forms the basis for the modern patent laws of those countries: for example, the patent law of Australia is dominated by the Patents Act 1990, which states that one test for if something is patentable is if it relates to "a manner of manufacture within the meaning of section 6 of the Statute of Monopolies".

Another significant legislation that aimed largely at copyrights came in 1710 with the Statute of Anne. Named after Anne, Queen of Great Britain, this was the first copyright statute in the Kingdom of Great Britain regulated by the government and courts (rather than by private parties), and the first full-fledged copyright statute in the world. This law granted authors rights in the recreation and distribution of their work. Like the Statute of Monopolies, the Statute of Anne similarly provided a 14 year term of protection but also gave the inventor the option of seeking a 14 year renewal term (Statute of Anne, 1710).

In 1883, the Paris Convention came into being. This international agreement was the first major step taken to help creators

ensure that their intellectual works were protected even if they were being used in other countries. The Convention is currently still in force and applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition (WIPO, n.d.).

Writers came together in 1886 for the Berne Convention which led to the first multilateral treaty to provide for reciprocal treatment of copyrights among sovereign nations. Under the Berne Convention the right of ownership was automatically granted to every creative work as well as songs, drawings, operas, sculptures, paintings and more (WIPO, n.d.).

Trademarks began to gain wider protection in 1891 with the Madrid Agreement. The system (still in force) makes it possible to protect a mark in a large number of countries by obtaining an international registration that has effect in each of the designated Contracting Parties - up to 98 members (WIPO, n.d.).

In 1893 the offices created by the Paris and Berne Conventions merged to become the United International Bureaux for the Protection of Intellectual Property (BIRPI); an international organization responsible for the running of the Paris and Berne Conventions together.

The BIRPI is the precursor of today's World Intellectual Property Organization (WIPO), which is an office of the United Nations (WIPO, n.d.).

The World Intellectual Property Organization was created in 1967 "to encourage creative activity, to promote the protection of intellectual property throughout the world" (Convention Establishing the World Intellectual Property Organization, 1967). It is a self-funding agency of the United Nations (with 189 member states) responsible for intellectual property services, policy, information and cooperation.

**History of Intellectual Property in The Netherlands**

Monopoly patents have been in existence in the Netherlands by the middle of the 16th century. The so-called ‘patents for inventions’ were regularly granted in the Low Countries from about 1550 onwards (Davids, 2008). Issuing patents was originally a privilege of the sovereign lords of the Netherlands; after the Dutch Revolt, however, the power to grant these rights became more widely diffused (Davids, 2008). During the time of the Dutch Republic, patents for inventions were in fact released at three different levels of authority: the central governing body of the republic (the States General), the estates of the separate provinces (which jointly formed the Republic), and town governments (Davids, 2008).

We can see that from 1589 onwards, 'patents for inventions' were regularly being granted and recorded in the deed books of the States General of the United Provinces of the Netherlands (History of patents, n.d.). 'Patents for trademarks and manufacturers' trademarks' also existed, such as “the right to sell brooches on a green piece of paper with the image of an angel” (History of patents, n.d.).

Between the increasing popularity of patenting in Venice and the huge expansion of the system in England, during the eighteenth century, it was the Dutch Republic that took the leading role in the development of this institution (MacLeod, 2002). While the English patent system was characterized by its simple registration, the Dutch approach was extremely different (MacLeod, 2002). A committee elected by the States General of the United Provinces verified all applications for patents: in the sixteenth and seventeenth centuries, one formed by men with relevant technical expertise was appointed for each individual case; in the eighteenth, a permanent committee was established (MacLeod, 2002).

In order to receive a patent for an invention, it was important that this invention was a new one to the country. In fact, the invention may have already been seen somewhere else in another country, but this was acceptable if a new industry could be established on the basis of this invention in the Netherlands (History of the patent system, n.d.). One thing is certain: even then, patents served as an economic resource in many countries. The criteria and costs for extending patents differed somewhat; it depended upon the granting authorities, from sovereigns to public bodies (History of the patent system, n.d.).

The history of copyright law in the Netherlands starts with early privileges and monopolies granted to printers of books.

In 1803, publishers were protected against reproduction of their books and music by other

publishers under the so-called ‘Book Act’ (‘Boekenwet’). During the period when the Netherlands formed part of the French empire (1810-1913), the subject of protection changed in accordance with French law and copyright became a right of the author. In 1817 is when the first Dutch Copyright Acts dates back, then called ‘Auteurswet 1817’. Also then it was still the publisher who benefited the most from the copyright, as authors assigned their rights to the publisher. In 1881, with the new ‘Auterswet 1881’, the copyright took shape as a right in favour of the author itself. After several amendments, the ‘Autheurswet 1912’ is the Copyright Act in force in the Netherlands today (Bos, 2017).

Initially the Act was used for books, but at the present time it is applicable to all sorts of creative expressions such as software, art and architectures. An idea as such is not however protected under Dutch Copyright Act, but only the expression of the idea in a material form (Bos, 2017).

Regarding the history of patents and patent law 1817 was a significant year for the Netherlands, this is when the first Patent Act came into force in the country; this Patent Act determined that patents could be valid for 5, 10 or 15 years, the necessary substantial fees could rise to 750 guilders (384€) (Davids, 2008). Complete descriptions of the invention had to be registered; when the applicant made his/her payment he/she received a certified copy of the patent which then became public. However, in 1869, the Act was abolished and the Netherlands acquired the image of a free-spirited nation.

The end of the 19th century was influenced by international collaboration.

The Netherlands was one of the participating countries in the Union of Paris and the Berne Convention; but a new patent act did not enter into force until 1910, the Patent Act 1910. From 1912 onwards, the year from which the patents were being granted, the number of patent applications steadily increased (History of patents, n.d.). In the 1960s and 1970s, the number of patent applications was between 14.000 and 18.000 (History of patents, n.d.).

The signing of the European Patent Convention in 1973 by 15 countries was a distinctive event. Two years later, an inventor or a manufacturer was able to make a single application for the first time and obtain a patent for 17 countries (History of patents, n.d.). The European Patent Office in Munich granted the patents and soon got branches in Rijswijk, Berlin and Vienna. The numbers of Dutch initial applications then surprisingly decreased (History of patents, n.d.). In 1995, this decrease led to a new act, the Patent Act 1995, which was amended in 2008. According to this act, it was possible to apply for patents more cheaply and more rapidly, without the need for a search into the state of the art, which took many years to complete, and without examining them (Patent Act 1995, n.d.).

On February 19th, 2013, the Convention on a Unified Patent Court was signed by the ministers in Brussels. This is one of the crucial final steps for the creation of a Unified Patent Court in Europe. The judgments of the new Unified Patent Court about violation or

nullification of European patents, will soon apply to all 26 EU Member States (except Spain); with the arrival of the Unified Patent Court one can also apply for unitary patent protection for European patents (History of the patent system, n.d.). For inventors this means a substantial simplification.

## 1.2 Intellectual Property Throughout Bolivian History 1825-2017

Piecing together a brief reference about the evolution of intellectual property in Bolivia, brevity notwithstanding, is a task of major difficulty due to two factors: 1) The almost absolute lack of historiographic development in the specific field and 2) The great struggle that, still today, is accessing primary sources of information. To illustrate these difficulties, a look through each one of the almost 14,000 laws located at SILEP's1 database was necessary. By doing this, the number of picked files (laws) was reduced to a bit more than a hundred so at least getting close to having a trustworthy historical account was possible.

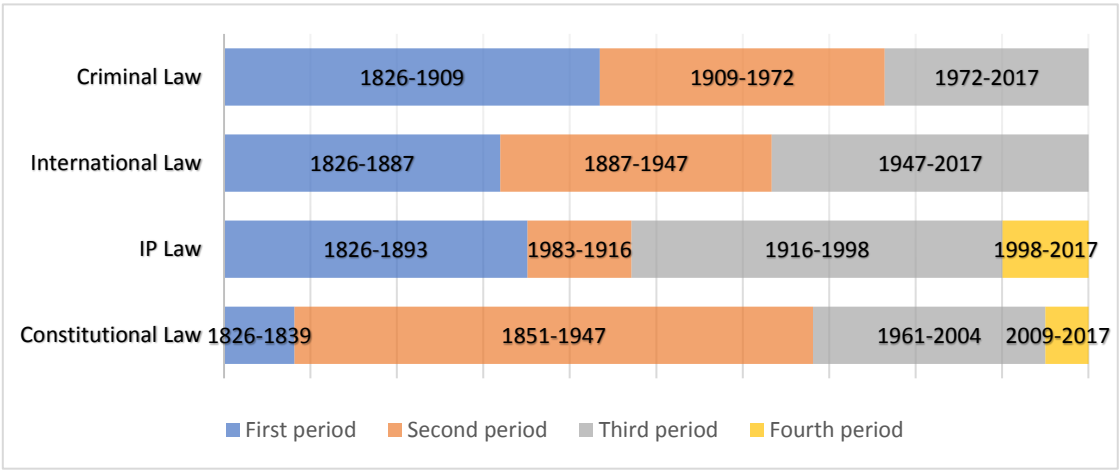
Once these initial difficulties were overcome, the following, rather short description addresses IP evolution in Bolivia with a law-centered approach. From this perspective, the standpoint taken is that of a state role. The issues to be discussed are: Constitutional law, international law, criminal law and, most importantly, IP specific laws.

At first glance, IP evolution in Bolivia over the course of its history - bearing in mind the changed made in specific law enforcement fields - can be divided into four periods. The following timeline chart clearly highlights these evolutions.

[1] *System of legal information of the Plurinational State*

Chart 1

Timeline: IP evolution in Bolivia by specific law enforcement field.




Source: self-made

One initial finding worth sharing is the uneven progress of each field throughout history. In other words, considering IP as a legal institution, there is a two-way dependency relation - IP defines the whole body of legal standards and it is also defined by it. Each part of the whole legal structure maintains, however, its own independence in relation to the other, hence the uneven progress.

**Constitutional law**

Bolivian legislation acknowledged intellectual property on a constitutional level from its very foundation in 1825 and its first constitution from 1826. In this way, constitutional history regarding the subject matter can be divided in four periods. The first period takes

place from the first constitution of 1826 until the reform of 1839. A second period extends from the reform of 1851 until 1947, with a third period from 1961 until the 2004 reform. The last period takes places with the reconfiguration of the Bolivian State [from the Republic to the Plurinational State] and its new foundation with the constitution of 2009.

The first period can be characterised by conceiving intellectual property as a constitutional guarantee expressed into the property of the inventor over his creation. This period also stablishes the longer lasting features of the constitutional literary content: its conception as an exclusive privilege, temporary duration, and the possibility of compensation due to the publication of trade secrets. This last feature allows us to foresee the incipient development of the legislation due to the plain confusion between intellectual property and trade secrets. After a silence thanks to the constitutional reform of 1843, which contains absolutely no disposition or regulation whatsoever, the second period initiates in 1851. Besides the distinctive elements of this period, this initial reform is particularly important due to the isolated acknowledgement of copyright which extends through the lifetime of the author and the general conception of intellectual property as a right. Among the main elements of this phase must be highlighted the expressed requirements of patentable subject matter: usefulness and novelty, inventiveness being a must, improvement or importation. Its nature constitutes neither a right nor a guarantee but an executive

power attribution [some constitutions state this specifically as a president´s attribution].

The third period spans from the reforms of 1947 up to 2004 with the only characteristic being that intellectual property was taken out from the constitutional text. The fourth and last period takes places in 2009 with the Bolivian re-foundation. Promulgation of the new Constitution brought along a series of cutting edge innovations. For instance, intellectual property was conceived as well as an individual right and a collective right, the objectives of which are to protect indigenous traditional and ancestral wisdom, especially traditional medical knowledge. This thereby confers to the state the obligation of registering the property on behalf of the indigenous nations. It is also the duty of the state to claim and register on its own behalf - if there´s no other claim - the intellectual property of the knowledge of ecosystems and biodiversity and the harnessing of both with the objective of preserving their existence. One final breakthrough regards health access, establishing that drug access cannot be restricted under intellectual property justification. Therefore, the Bolivian state has the responsibility of promoting generic drugs. The Annex A, Chart 1 covers briefly what has been expressed so far.

**International law**

Due to the inherent low dynamism of this field, evolution shows a steady slow growth rhythm. The first period can be characterised by absolutely no development because of the inexistence of international

documents regarding the subject matter. At a later stage, a second period contains the very same roots of international IP, the first documents being bilateral agreements. The first treaty ever signed by Bolivia dates back to 1887, which was an agreement between Bolivia and France about literary and artistic works, commerce and trademark. This treaty turns is historically relevant because it contains a clause for equal treatment between the contracting parties. Later, two similar treaties were signed, one with Great Britain in 1892 and one with Italy in 1890. Concerning multilateral agreements from the same period, Bolivia took part in the treaty of Montevideo from 1903 regarding copyrights, patents and trademarks and finally, the agreement of Caracas from 1912 about copyrights.

A third and final period is not precisely characterised by the contents of the agreements but for the hosting institutions. Even though agreements may have not been radically changed, they were signed in the framework of still active international organisations. The first one is the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works from 1947, hosted by the OAS. The Andean Community Decision 24 from 1970, subsequently modified by many others until the latest Decision 351 and other important agreements still active in Bolivian legislation will be addressed in later chapters.

**Criminal law**

Despite the previously mentioned two-way dependency relation, criminal law appears as the exception given that it cannot define the content of IP – it can merely embody its core content at a much slower pace because of the intrinsic nature of criminal law. Based on that premise, everything remains consistent with the lack of substantial modifications where for example, during the first period, which was governed by the Criminal Code from 1834 (better known as Criminal Code Santa Cruz), the possession of a printing press without the police being informed was considered criminal conduct. Also considered criminal was the printing of any text without the precise date stamped on it. As for trademarks, it criminalizes the use of third party trademarks without consent. Copyright and industrial property are mixed together. As a result, it is considered a crime to influence the exclusive privilege granted by law. One of the most interesting features from this period is the criminalization of the revealing of trade secrets punished with up to three years in prison.

A second period can be roughly characterised by the addition of some new features like the forging of trademarks and the aggravation of the penalty of recidivism. The third and last period has as a milestone the entry into force of the Criminal Code of 1972, which gathers the criminalisation into two criminal definitions shaped by the current guidelines of IP. The first one is against violations of copyright, the second against industrial property.

**Intellectual Property law**

Even though IP was widely acknowledged and protected by the time of the formation of the Republic, the first period (1826-1893) shows no specific development at all. This fact notwithstanding, during this time, IP regulations were deeply linked with Print law. Therefore, regulation stretches as far as copyright, but does not interact with issues related with Industrial propriety. Some interesting features during this period are the prohibition of reprinting of law, prohibition of publication of anonymous texts at the beginning and later the recognition of anonymity secrets as an unbreakable guarantee. The final interesting feature of this period is the appearance of the forerunner of legal deposits which first appears in the rules of print of 1862, which obliges the author to hand in a signed copy of his literary work to the Ministry of Government, the political chief, the prosecutor and the public library.

The second period in Bolivian history takes places between 1983 and 1916. One of the most significant characteristics of this period comes in the shape of the procedure of certifying a discovery. This law commanded any university of Bolivia to conduct the procedure in front of tribunal which included the university´s headmaster and two or more scientists, both of whom must take an oath of best knowledge and belief. This period is closed by the first actual law about IP from 1909, which mentions only artistic and literary pieces and scientific discoveries. In this law, the duration of the privilege was the lifetime of the author and thirty years to the heirs. Registry oversaw the Ministry of

Public Instruction and the rights and protection were generated by the registration.

Third period extends from 1916 the year of the first modern law of industrial privileges, henceforward the registry is in charge of the Ministry of industry where is created the office of IP. Regarding the industrial privileges law, between many important characteristics it defines for the first time as patentable subject matter: industrial products, new procedures and enhancements o products and procedures. Afterwards the registry can be divided in four steps: presentation of requirements (description in Spanish of the invention or discovery, illustrative drawings, a letter of request and a certified of payment), reception of the requirement, verification of opposition (if there are two simultaneous attempts of registry a judge will settle the better right) finally the concession with the Bolivian government´s liability release. The duration of the privilege will last up to fifteen years however the right may expire due to disuse for two years.

Law of trademarks of 1918 contains the early outlines of the modern IP structure. Most important content is: duration of the privilege for ten renewable years, however if it is not renewed on the three months before the lapse the right expires ipso iure.  the duty of pharmaceutical products of having a registered trademark, possibility of labor unions of registering their own mark, this law also lays down the principle of earlier in time, stronger in right regarding IP in the case of simultaneous attempts of registry, this law also starts the first attempt

of having an organized classification of products divided in twenty categories. Annex A, chart X shows the contend of that scheme.

Later, on 1956 a Supreme Decree transfers the office of IP to the Ministry of economy where it will be until 1998. Years ahead the following regulation only modifies issues related with the payment of fees which were modified because of multiple inflationary phenomenon and currency readjustments. It is, however an interesting fact that the fee for the registry of an invention patent (for example) has kept pretty much the same since 1960 when the fee, indexed to the actual currency was about Usd.103.68; todays fee is Usd.115.75. Finally, in 1977 the approval of the Commerce Code set the basis of the up to date structure of IP.

The fourth and last period takes place from 1998 with the creation of the Intellectual Property National Service (SENAPI) under the command of the Ministry of Productive Development and Plural Economy. Despite main features of the regulation will be deepened in chapters ahead, this period carries out a completely new characteristic: the effort of the recently approved laws to recover and save elements from Bolivian culture, ancient traditions and local products. Laws such as Quinoa Protection Law, Promotion and development of traditional handcraft and Protection of ancient traditional medicine set great examples of this new period of furtherance regulation of IP.

# Chapter 2: Copyright

## 2.1 Copyright in The Netherlands

Due to the growth and speed of the internet, instances of copyright infringement have increased excessively in the last decade. These days, unfortunately, violation and infringement of copyright is an everyday occurrence. In order to secure work and income, there are a number of ways in which copyright can successfully take action against the plagiarism and infringement of their copyright. The Dutch Copyright Act will be referred to as DCA. In this chapter the following aspects of copyright in the Netherlands will be discussed;

I. Formalities
II. The author
III. The work
IV. Content of copyright
V. Limitations
VI. Exploitation of copyright

**Formalities**

According to Article 1 of the Dutch Copyright Act: Copyright is the exclusive right of the author of literary, scientific or artistic work or his successors in title to communicate that work to the public and to reproduce it, subject to the limitations laid down by law. This means that the actual purpose of copyright law is to protect the creator of a

work against infringement, to ensure exploitation and to inspire new ideas (Novagraaf, 2017).

However, there are actual conditions to qualify for copyright protection. The conditions are:

- Lie in the field of literature, science or art;
- Have its own unique character (originality);
- Personal imprint of the maker;
- Be perceptible to the senses (Novagraaf, 2017).

In The Netherlands one is not required to apply for Copyright, as long as it qualifies to the conditions mentioned above (Auteursrecht, nd). Nor does this count for any other Berne Convention country. When one creates a text, a photo or any art one automatically obtain the copyright. Which means the author can register their work at the notary office. It is not necessary for the existence of copyright. This also counts for the Berne Convention; in this case the Netherlands has no choice. However, it is possible to register ones work to be able to prove this in court in case of infringement. To register it possible to do so at the *Benelux Office for Intellectual Property.* One other option is to go to the notary office or mail the work to oneself.

According to Hogan (n.d), the copyright owner has the right to take legal action against persons who infringe its copyrights (Hogan Lovells, n.d).

**The author: paragraph 2 articles 4 to 9 of the DCA.**

The copyright of the author consists of two parts:

- Exclusive exploitation right; enable the author to exploit his/her work.
    - Art 12. Communication
    - Art 13. Reproduction
- Moral right; according to article 25 of the DCA, this protects the personal integrity and integrity of the work itself.

*Moral rights*

According to (Visser & Van der Kooij, 2015), Art. 25 of the DCA, "*the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation".*

The Dutch Copyright Act, article 25 provides authors with exploitation and moral rights in their works. Based on the DCA the author of a work has the following moral rights:

- *"The right to oppose the communication to the public of the work without acknowledgement of one's name or other indication as author, unless such opposition would be unreasonable;*
- *The right to oppose the communication to the public of the work under a name other than one's own, and any alteration in the*

*name of the work or the indication of the author, in so far as it appears on or in the work or has been communicated to the public in connection with the work;*

- *The right to oppose any other alteration of the work, unless the nature of the alternation is such that opposition would be unreasonable;*
- *The right to oppose to any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his dignity as such"* (Lovells, nd)

According to the Dutch Copyright Act, on the death of the author, the abovementioned rights shall belong, until the expiry of the copyright, to the person designated by the author in his/her last will and testament or in a codicil thereto. One important fact is that moral rights **cannot** be transferred and moral rights can only be partly signed away, on the basis of article 25, paragraph 3. An author can renounce the moral right to have his or her name mentioned and to object to changes (Lovells, nd).

*The author*

The Dutch Copyright Act states that the author or its assignee, is the right holder and not the maker (auctor intellectualis). However, sometimes the author and the actual creator are the same person e.g. a sculptor; but not always the case.

According to article 6 of the Dutch Copyright Act; "*where a work has been made according to the design by and under the direction and*

*supervision of another person, that person is considered to be the author of the work".* In other words:

- The author is the one that delivers the intellectual achievement (writer of a song).
- Maker or creator is the on that actually creates the products.

Article 4.1 states; *"subject to proof to the contrary the author is considered to be the person whose name is indicated as the author in or on the work, where there is no such indication, the person who was announced as the author when the work disclosed to the public by whoever disclosed it to the public."* Meaning, unless there is proof to the contrary, the person who is named as author shall be deemed the author of the work. When someone proves the contrary, he/she needs to prove this with, this is called: Statutory presumption of authorship.

*Fictitious right holders:*

Article 7 and 8 of the Dutch Copyright Act is a form of a quasi authorship.

- Article 7 states; *"where labour which is carried out in the service of another consists of creating certain literary, scientific or artistic works, the person in whose service those works were created is considered to be the author unless the parties have agreed otherwise".*
- Article 8 states; *"where a public institution, an association, a foundation or a company discloses a work to the public as its own without indicating any natural person as the author, it is then considered to be the author of that work unless it is proved that, in*

*the circumstances, the disclosure to the public of the work was unlawful."*

According to article 7; the employer (normally a legal person) is deemed to be the author, unless otherwise agreed. According to article 8; a legal entity that communicates a work to the public it is deemed to be the author.

Article 5 which applies to when a complier is involved, states the following:

*"if a literary, scientific or artistic work consists of separate works by two or more persons, then, without prejudice to the copyright in each separate work, the author is considered to be the person under whose directions and supervision the work as a whole was created or, if there is no such person, the complier of the various works".*

Article 26 applies for when it is a joint copyright and states the following:

*"when two or more persons hold the joint copyright in one and the same work, any one of them may enforce the right, unless otherwise agreed".*

**The work: paragraph 3 article 10 of the DCA.**

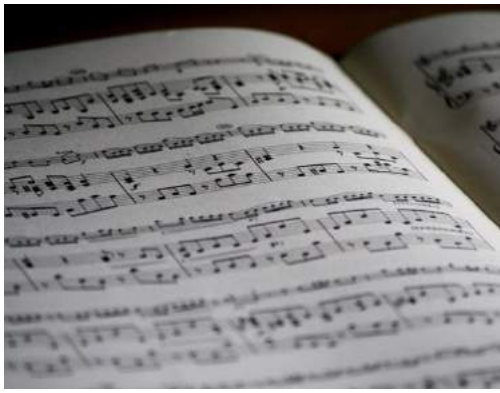
As mentioned above in the formalities, there are actual conditions to qualify for copyright protection. The key conditions are: own, original character, with a personal imprint of the creator.

What is qualified as ‘work’ according to copyright?

There is no straightforward answer to this question, however article 10 of the Dutch Copyright Act states a list as an act, literary, scientific or artistic works, to name a few;

- *“books, brochures, newspapers, periodicals and other writings;*
- *dramatic and dramatic-musical works;*
- *recitations;*
- *computer programs and preparatory design materials for such; and generally any creation in the literary, scientific or artistic domain, regardless of the manner or form in which it has been expressed.”*

As mentioned above, the copyright act protects only the original expression, or the original application of an idea. The test for originality as applied in case law is whether the work “reflects as an original



Brownsville Herald

DARDANELLES FORTS AT MERCY WARSHIPS' LONG RANGE GUNS

Turkish Strongholds Bombarded By The Combined British--French Fleet--Aeroplanes, Seaplanes, Cooperate.

SUMMER NORMAL FOR THIS CITY IS NOW CERTAIN

HUNDREDS WERE ARMED; NOTHING HAS HAPPENED

CATHOLIC CLERGY IN MEXICO CITY HELD FOR RANSON

RUSSIANS RENEW PRZEMYSL SIEGE WITH NEW GUNS

U. S. FIRMS ARE AIDING BRITISH IT IS CHARGED

STEAMER HITS MINE, SINKS; CREW SAVED

RANGER FORCE INCREASE IS TO BE MADE

CONSPIRACY HEARING AT CORPUS POSTPONED

COUNTIES MAY BE GIVEN RIGHT TO MAKE LOANS

ITALIAN PREMIER DOES

expression and the personal imprint of the author (Blenheim, 2013).

*Writing I*

**Letters and e-mails**

Letters, e-mails and faxes qualifies as works according to article 10 sub 1, under ‘other writings’. The copyright is then owned by the author (or his successors in the title); they are capable of publishing any letter, e-mail or faxes. However according to article 15; if a letter is not made public, citation right is not applicable, including any form of announcement, criticism or scientific treatise or publication for a comparable purpose. The receiver will have any right to show to other or make a copy of the work, unless the addressee has other reasons to believe that it was confidential.

*Writing II*

**Interviews**

If the author made personal choices e.g. formulates his/her own questions, selected his/her own topics to discuss and writes the interview downs he/she holds the copyright of the interview. Unless the content of the interview is a literal transcript, the interviewee is copyright owner.

*Writing III*

**Words and slogans**

In order to copyright any words or slogans, according to the Dutch Copyright Act it must be very original to be able to protect it. The longer

the word or slogan the more chance for protection. Any style, inventions, techniques or methods are not object of copyright protection, however the piece of art of that style or the book with a scientific theory is.

**Characters**

Article 10 of the Dutch Copyright Act states that Film & TV characters are protected. The copyright then rests on the description of a character in a book and not on the character itself. For example; Harry Potter, Fokke & Sukke, James Bond.

**Formats – performances – sports**

Formats are difficult to protect, al though changes to little details can be easily done. However, if one still wants to protect the format, one must write down everything in details for a better chance of protection.

Performances and musical improvisations are protected according to the Dutch Copyright Act; however, it must be more than just one's appearance or the character.

Games & sports are not protected by the Dutch Copyright; however, this counts for all over the world.

**Adaptations and Compilations**

According to article 10.2; *"reproduction of a literary, scientific or artistic work in a modified form, such as translations, musical arrangements, screen and other adaptations, as well as collections of different works are protected as separate works, without prejudice to the copyright in the original work."* One is authorized to create adaptations of translations, musical work and films and other works.

Article 10.3 states; "*collection of works, data or other independent materials arranged in a systematic or methodical way and individually accessible by electronic or other means are protected as separate works, without prejudice to other rights in the collection and without prejudice to copyright or other right in the works, data or other materials included in the collection."* Meaning that compilations are protected systematically ordered.

Any underlying work is protected and the originality still applies when compiling and creating adaptations. It is required to have a "creative collector's hand" for both adaptations and compilations. The actor's way of performing is protected by the Neighbouring Rights Act, and they do not have copyright on their own role.




Content of exploitation rights

The author has two exploitation rights:

1. Art 12. Communication to the public;
2. Art 13. Reproduction.

Copyright is the right to prohibit the party that wants to reproduce and communicate a work to the public. One will need the explicit consent of the right holder.

*Reproduction:*

Art 13. States "*the reproduction of a literary, scientific or artistic work includes the translation, musical arrangement, film or stage adaptation and generally any partial or total adaptation or imitation in a modified form which cannot be considered as a new, original work".* This means physical creation of one or more copies of work and translation or adaptation. Adaptation or imitation in a modified form cannot be regarded as a new, original work. Reproduction includes:

- Translation;
- Arrangement of music;
- Cinematographic adaptation or dramatization;
- Generally, any partial or total adaptation.

NOTE: a temporary reproduction in case of transmission in a network is not a reproduction.

*Communication:*

According to the DCA there are three types communication to the public:

1. *"Publish/communicate a work (in print, letter, upload text)*
    a. *distribution to a small group, as long as it is not in print yet (sending manuscript to the publisher), this can only be done by the author.*
2. *Distribution of copies (rule: for the first time, the consent of the author is required, thereafter the right is exhausted, except for lending and rental such as books or magazine.*
3. *Act of communication".*

Art 12.1 sub 1: The reproduction can include the work in modified form, e.g. a translation of a book. The author has the right to communicate regardless the form. (if one makes a film based on a book, still the author of the book should give permission).

The exhaustion rule was developed in a case law since 2004. Art 12b. explains that after a consent is given to distribute a copy of a work, the author has no more rights to the copies which have been brought into circulation. However, just like the Rien Poortvliet case; converting a calendar into separate pictures without the consent of the author is illegal.

*Renting and lending of a work (communication):*
According to art. 12.2 and 3: rentals means making something available for use for a limited period of time for direct or indirect economic or commercial advantage such as a dvd/video rental.
The author has a right of a remuneration each time the work is being lend and can also assign his/her rental rights, yet still keep the rights for a reasonable remuneration.

Art 12.3 explains what lending means. It means making the work available for use, for a limited period of time, by institutions accessible to the public, for no direct or indirect economic or commercial advantage (a matter of public interest).

*Recitation, performance or presentation:*
According to the DCA, this entails every form of public performance for example; a play in a theatre, also music in movie theatre, music supermarket or a radio in a pub.
In depth information about Music Copyright can be found in chapter 4.

Limitations
A work is the product of the mind, that is 'perceptible by the senses', not ideas or random words. How does one prove that the work is actually theirs? A so-called *Burden of Proof* will do. According to the Dictionary (2017), the definition is "*the obligation to establish a contention as fact by evoking evidence of its probable truth"*

(Dictionary, 2017). In litigation: a party who disputes ownership must prove that he is rightful owner. One will have to got I-Depot: BOIP, Benelux Office of Intellectual property.

The limited term of copyright is laid down in article 37 to 42 in the DCA. The main rule is: until 70 years after the death of the author.

- Joint copyright; until 70 years after the death of the longest living author;
- Pseudonym; until 70 years after first publication;
- Communication of not earlier published work; 25 years from first moment of communication, Article 45o in the DCA;
- Foreign work published in NL will not be protected longer than in the country of origin, article 42 in the DCA.

Exploitations of copyright

The author has a strong negotiating power towards commercial parties (distributors/ publishers/ production companies) because of his/ her exclusive rights.

Exploitation by communication and reproduction.

- License, where the copyright stays with the author but he/ she gives away a way to exploit the work.
- Exclusive rights can be assigned by a written deed. The author has a personal bond with his/her work, the moral rights stay

with the original author despite the assignment of the copyright (Bos, 2017).

As mentioned in the beginning of this chapter, a work is the product of the mind that is ‘perceptible by the senses’ so, not random works. This includes unfinished sketches, drawings, written concepts and mood boards.

Photos (collection or separate work) and art in a building is qualified as independent work.

*Copyright infringement*

If any case there has been a infringement of Copyright, the author can:

1. Write a strict letter stating the infringement
2. Litigation against the person

According to Hogan (n.d), the copyright owner has the right to take legal action against persons who infringe its copyrights. The Dutch Civil law and Dutch Copyright law provides amongst others the following remedies:

- An injunction
- Full damages
- Apart from damages, surrendering of the profits made from the infringement, to be accounted for by the infringing party
- Assignment or destruction of infringing products
- Cost order

- Disposal outside the course of trade or destruction of materials predominantly used for the manufacturing of the infringing products (Hogan Lovells, n.d).

Copyright is a special form of *unlawful act.* Different litigation types:

- Publishing or reproduction by another than the copyright holder, refer to the DCA Art. 26, for joint right holders.
- Infringement of moral rights, refer to the DCA Art. 25.
- Infringement of portrait rights, refer to the DCA Art. 30.
- Infringement of film rights, refer to the DCA Art. 45a.

Burden of proof.

The party that has been summoned to appear in court must show that he/she is the rightful owner in order to desist the claim. According to article 4 of the DCA; it is presumed that the one who communicates a work (or is indicated as the owner) will be the right holder.

This to be proven by for example; a contract, manuscript, expert opinion, I-Depot: BOIP, Benelux office of intellectual property.

Who can take action?

- The author or his successors in title according to article 4 to 9 in the DCA.
- The licensee.
- The printer or publisher in case of pseudonym.
- Co-author(s) in case of joint copyright according to article 26 in the DCA.

- The representative pursuant to assignment for example BUMA.
- Author's successors in title (by will) when moral rights are infringed according to article 25 in the DCA.

The following steps can be done to claim damages:

Ordinary Legal Remedies:

- A prohibition.
- Damages (also when copyright is already transferred).
- Share of the profits according to article 27.
- Publication of judgement for example in newspapers.

Specific legal remedies according to article 28 in the DCA.

- Take and claim as one's property.
- Take and destroying of the works such as piracy; cd's.
- Action for changes to the product in case of real estate, refer to article 28.5 in the DCA.
- Claim entrance money according to article 28.1 in the DCA.
- Obligation to keep records according to article 30b in the DCA.

Criminal Law: Articles 30b until article 36b in the DCA.

- Article 31: the infringement of exploitation rights. This means that any person who intentionally infringes another person's copyright is punishable with imprisonment for more than six months or with a fine of the fourth category.

- Article 31a: the intentional distribution or possession of infringing objects. Intentional distribution is:
    - Publicly offering the work for distribution;
    - Has to hand, for the purpose of reproduction or distribution;
    - Imports, forwards or exports; or
    - Keeps, in pursuit of profit

  An article that comprises a work infringing another person's copyright is punishable with imprisonment for a term of not more than one year or with a fine of the fifth category.

- Article 32a: the possession of equipment designed to remove technical protective devices or hack computer programs.
    - Publicly offering the work for distribution;
    - Has to hand, for the purpose of reproduction or distribution;
    - Imports, forwards or exports; or
    - Keeps, in pursuit of profit

Any means the sole intended purpose of which is to facilitate the removal or circumvention of any technological measure applied to protect a work as referred to in article 10 sub 12, without the consent of the author or his/her successor in title, is punishable with imprisonment for a term of not more than six months or with a fine of the fourth category.

- Article 34: acting contrary to an author's moral rights.
    - This means that any person who, in any literary, scientific or artistic work protected by copyright, intentionally makes any unlawful alterations to its title or the indication of the author, or impairs such a work in any other way that could be harmful to the reputation or honour of the author or his/her dignity as an author is punishable with imprisonment for a term of not more than six months or with a fine of the fourth category.
    - The act done is a serious offence.

- Article 35: the exhibition of portraits without consent, this is about the violation of privacy.
    - This means that any person who exhibits a portrait in public or discloses it to the public in any other manner without being authorised to do so, is punishable with a fine of the fourth category.
    - The act done is a minor offence.
- Article 35a and b: a BUMA offence.
    - 35a: States that Any person who acts as an intermediary as referred to in Section 30a, without having obtained the necessary permission from the Minister of Security and Justice, is punishable with a fine of the fourth category.
    - The act done is regarded as a minor offence.

- 35b: Meaning, any person who intentionally gives false or incomplete information in a written application or submission that is to be used to determine the compensation due for copyright in the business of the person acting as an intermediary in matters relating to music copyright with the Minister of Security and Justice's permission, is punishable with detention for a term of not more than three months or with a fine of the third category.

The act done is a minor offence.

## 2.2 Copyright in Bolivia

### Context

Within the Bolivian law, copyrights are protected by 1322 Act of 1992, in accordance to the Decision 351 of the Andean Community (CAN), the later much more extensive in content and scope of protection. For its implementation, the former Executive Power issued the regulations of the mentioned law (Supreme Decree 23907) and the decrees of organization and operation of the copyright register (27938 and 28152), in charge of the National Service of Copyright (SENAPI). Also applies the 1C annex of the Marrakesh Agreement, referred to trade-related intellectual property rights, and Berne Convention of 1886 for the protection of literary and artistic works.

### Moral Rights

Recognized by Bolivian law, it is based on the authorship of the work: the recognition of someone as the creator of the work. According to WIPO, the moral right allows the author to "claim the authorship of a work and the right to oppose any modification of the work that might harm the reputation of the creator" (WIPO, 2003, 19). The main idea of this law is to preserve the link between the work and its author (WIPO, 2016). According to the Berne Convention of 1886, moral type rights are independent of economic rights.

In this regard, the 1322 Act indicates this right refers to three faculties:

- Claim authorship of his work whenever, especially considering the name and the pseudonym of the author.
- Oppose any distortion, mutilation or other modification of the work.
- To keep the work unpublished or anonymous, this means to prevent the disclosure of the identity of the author. This should be specified in his will.

These faculties have the qualities of perpetuity, inalienability, imprescriptibility and inalienability (art. 14) according to the aforementioned regulation. This implies that the author will always be recognized as the generator of the work in any reproductions or acts of use. It also means that he/she can oppose any modification arising at any time. In this way, the moral right works as a limit of the right that can be acquired by anyone, since it is an independent, perpetual and inalienable right, so it restricts use of the right obtained.

It is worth to ask a question that arises when analyzing the opposition contrasted with the character of perpetuity. After the death of the author, who would wield this power, considering that it requires the person's own criteria? This question is answered by the Decision 351 of the Andean Community, which establishes the possibility of transfer moral rights to the successors in title. In case of absence of successors in title, the State and other institutions designated (in this

case the SENAPI) will be responsible for the protection of the moral rights of the author.

**Exploitation rights**

According to WIPO, exploitation right refers to the capacity of the author to obtain a economic compensation from people that exploit their works. The use given by them, in all cases, is restrained by the will of the author, who has full power of decision on the methods used for seizing the work. In general, exploitation rights involve the authorization of reproduction, interpretation, distribution and adaptation, according to the provisions of the annex 1C of the Marrakesh agreement, stating that the only copyright protection will protect expressions, not ideas or procedures.

Bolivian law specifies what is issued by WIPO, since exploitation rights also refer to the exploitation of the works. Article 15 of the 1C annex indicates that also the successors in title will have the Faculty of perform, authorize or prohibit aby expression of the protected work. This is consistent with Decision 351, which allows the transmission of economic rights through inheritance.

Regarding the authorization, the Bolivian law classifies acts of third parties into three categories:

- Right to play: multiplication and material fixation of the work by any means that allows making it known to the public.
- Right to transformation: carry out a translation, adaptation or an array, for example.

- Right of representation: communication of the work to the public by any process, such as the execution of musical works, public projection and transmission.

**Duration of rights**

The temporal scope of rights differs between exploitation and moral. As already mentioned, moral rights are perpetual, so the link between the author and his/her work is protected permanently, including its indemnity. Economic protection, on the other hand, has a temporary range that agrees with all the aforementioned rules. Decision 351, the Berne Convention and the Act 1322 determine that protection of the works will be extended for the life of the author and 50 years after his death. In this regard, it is worth mentioning certain particular aspects, such as protection in case of works of anonymous authorship, because it is not feasible to know the date of death of the author, limiting protection to 50 years from disclosure. At this point there is a contradiction between the law and the decision 351, which considers the timing from the first day of the year following its publication. In this case decision 351 is considered, by having greater normative hierarchy according to article 410 of the political Constitution of the State.

Other specific cases refer to works made by several authors. The 1322 law provides that the protection of rights will be 50 years since the death of the last co-author who die. If the author is a legal entity, the protection (by the same amount of time), shall apply from the

making, disclosure or publication of the work, considering that the term will be posted from the first day of the following year. Finally, considering collective, audiovisual and photographic works, phonograms, broadcasting programs and computer or computer programs, protection will be from the time of publication or, failing that, since its creation, according to the mentioned law.

**Formalities to obtain protection**

Bolivian law establishes a regime of protection independent of the completion of formalities, author's rights born with the creation of the work, not needing to register or any other requirement. It sets, however, the formal parameters to specify the property registry, which only increase the legal security of the owners (art. 2). The procedure is presented to the National Intellectual Property Service and includes the payment of a fee depending on the work to be registered, which range between 50 and 480 Bs (7-70 USD approximately); forms and letters that specify the general information about the work and the author; and the work as such, contained in the corresponding playback medium.

**Protection against infringement, burden of proof and aspects of the criminal law**

Regarding jurisdictional treatment of offences committed to what is concerned with copyright, 1322 law assigns to the ordinary criminal judiciary its knowledge and treatment (art. 65). Therefore, the intervention of the Court is limited to the criminal type against

intellectual property, as well as article 68 of the mentioned law. This does not mean that it excludes civil jurisdiction in order to repair damages established in the respective Civil Code.

The mentioned crime is based on three core elements: the authorization of the owners, the aim of profit of who carried out the Act and non-injury. The reproduction, publication distribution will be configured as a crime and plagiarism of any work that is protected by the legal framework. Criminal type extends to any subject that, even without having been played a piece, marketed copies of these works, either through import, export or simple storage.

However, Supreme Decrees 27938 and 28152 of organization and performance of SENAPI, pursuant to article 71 of the law mentioned above, include administrative processes of conciliation in order to solve civil controversies prior to the ordinary way, as part of the responsibility of the institution. These processes are framed in law 2341 of administrative procedure, with extra way, in the current procedural code. It is worth mentioning that the hierarchical superior authority is the Ministry of productive development and Plural economy.

# Chapter 3: International Copyright

## 3.1 International Copyright With Reference To European Legislation

Copyright is a conception of the legal system in each country around the world, and therefore there is no such thing as a universal copyright law. Nevertheless, during the years of Copyright existence different international treaties and conventions have been established in order to appoint a minimum set of requirements for the protection of the creators' rights of copyrighted works. (Van Der Kooij & Visser, 2015)

Nowadays, there are two principal international conventions protecting copyright: The Berne Convention directed by the World Intellectual Property Organization (WIPO) and The Universal Copyright Convention (UCC) developed by United Nations Educational, Scientific and Cultural Organisation (UNESCO). The Berne Convention was established by 173 countries around the world and it has formally mandated several aspects of modern copyright. (WIPO, n.d.) The Universal Copyright Convention was developed as an alternative to the Berne Convention for those states which disagreed with its aspects but still wished to be included in some form of multilateral copyright protection. (UNESCO, 2015)

Furthermore, there are some other international agreements that are imposing the principles of national treatment, automatic protection and independence of protection stated under the Berne Convention. For example under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) these rights also bind those World Trade Organization (WTO) Members nor party to the Berne Convention. In addition the TRIPS Agreement imposes an obligation of "most-favoured-nation treatment", under which advantages accorded by a WTO Member to the nationals of any other country must also be accorded to the nationals of all WTO Members. (WIPO, n.d.)

**WIPO**

Intellectual Property Rights had to be defended across the territorial boundaries of the nations, which made it necessary that an international body monitoring the goings-on in this field would be founded. The World Intellectual Property Organisation (WIPO) has filled in the void well enough. It was established way back in 1967 through Stockholm Convention in the wake of the Paris Convention of 1883 and the Berne Convention of 1886 (WIPO, n.d.). The WIPO Convention (Stockholm) states that WIPO's objective was "to promote the protection of intellectual property throughout the world […]" (WIPO, 1967, Article 3).

In 1974 WIPO came to be a specialized agency in the United Nations system. Although WIPO was originally established explicitly to

promote the protection of intellectual property, when it joined the UN family its objective had to be redefined as a public-importance or humanitarian goal. The agreement establishing WIPO's relationship to the UN restates WIPO's purpose as: "for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development…" (WIPO, 1974, Article 1).

WIPO seeks to establish international laws and treaties with respect to intellectual property that are uniform doughnut the world. The purpose of these laws is to ensure the cover of legal protection across international borders and to afford effective protection against violations. (Gross, 2014)

In September 2004, many prominent legal scholars, scientists, activists, public-interest NGOs, a 2002 Nobel Prize winner for physiology, a former French prime minister, and several thousand other concerned global citizens published the Geneva Declaration on the Future of WIPO. The Geneva Declaration called upon WIPO to reform its "culture of creating and expanding monopoly privileges, often without regard to the consequences." The declaration said that WIPO's "continuous expansion of these privileges and their enforcement mechanisms has led to grave social and economic costs, and has hampered and threatened other important systems of creativity and innovation." (Association for Progressive Communications, 2016)

WIPO, therefore, not only promotes international cooperation among nations in the area of intellectual property rights but also facilitates transfer of technology relating to the industrial property to the developing countries so as to accelerate their economic, social and cultural development (Beer, 2009 )

**BERNE Convention**

The Berne Convention is the oldest and the most important treaty. It was signed in 1886, but has been revised many times since then as a result of the technology development and the innovations in the fields covered by Copyright Law. Intellectual Property Rights had to be defended across the territorial boundaries of the nations, which made it necessary that an international body monitoring the goings-on in this field would be founded. (Van Der Kooij & Visser, 2015)

Applicability

The convention is applying to the member countries which formed a Union, and under the Article 3, the Act provides protection for the authors who are nationals of one of the countries of the Union, or where the work is first published (or simultaneously published) in a country that is a member of the Union.

For the purpose of the Convention, persons who are not nationals, but which have their habitual residence in a country of the Union, will be regarded as a national of the country (Article 4). The terms of the

Convention also provide an incentive for countries that are not part of the Union to protect the work by nationals of countries of the Union.

It states that where a country outside the Union does not provide adequate protection to authors, countries of the Union are entitled to not extend protection to nationals of that country, beyond that what is granted by the country.

Protection under Berne Convention

The Berne Convention provides that, at a minimum, copyright protection in all signatory countries should extend to “literary and artistic works”, including “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.” There are, however, different interpretations of this minimum requirement as in Netherlands, for example, the copyright is only granted to creative, original works. The creator of the work must have used some creativity or a certain creative decision must have been made. “Originality” is in Dutch practice a catch-all term referring to the fact that a work must have an “own, individual character” and “bear the personal stamp of the author”.

The Berne Convention establishes standards of protection by including the general previsions such as types of works protected, durations of protection, scopes of exceptions, limitations and principles like “national treatment” and “automatic protection”. (Digital single market, 2015)

The Convention is based on three principles:

1. Works originating in one of the Contracting States (the author of which is a national of such a State or works first published in such a State) must be given the same protection in each of the other Contracting States as the later grants to the works of its own nationals (principle of “national treatment”).
2. Protection must not be controlled upon compliance with any formality (principle of “automatic” protection).
3. International protection is independent of the existence of the protection in the origin country of the work (principle of “independence” of protection). If, however, a Contracting State provides protection for a longer term than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once the protection in the country of origin ceases.

The minimum standards of protection relate to the works, the rights to be protected, and the duration of protection:

1. Related to works, protection must include “every production in the literary, scientific and artistic domain, whatever the mode or form of expression” (Article 2(1) of the Convention).
2. Subject to certain allowed reservations, limitations or exceptions, the following are the rights that must be recognized as exclusive rights of authorization:
    - The right to authorize translations of the work.
    - The exclusive right to reproduce the work, though some provisions are made under national laws which typically

allow limited private and educational use without infringement.

- The right to authorize public performance or broadcast, and the communication of broadcasts and public performances.
- The right to authorize arrangements or other type of adaptation to the work.
- Recitation of the work (or of a translation of the work).
- The exclusive right to adapt or alter the work.

The Convention also provides “moral rights”:

- The author has the right to claim authorship.
- The right to abject to any treatment of the work which would be “prejudicial to his honour or reputation”.

Countries like United States of America, United Kingdom, Australia or Canada tend to minimize the existence of moral rights in favour of an emphasis on economic rights in copyright. (Rights Direct;, 2016)

Duration

Regarding the duration of the protection, the general rule which is a minimum condition is specifying that the protection must be granted until the expiration of the 50$^{th}$ year after the author’s death. There are, however, exceptions to this general rule.

In the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public, expect if the pseudonym leaves no doubt to the

author's identity or if the author discloses his or her identity during that period; in this case, the general rule applies. In the case of audio-visual (cinematographic) works, the minimum term of protection is 50 years after the work is made available to the public or – failing such an event – from the creation of the work. In the case of works of applied art or photographic works, the minimum is 25 years from the creation of the work.

Reproduction under Berne Convention

The exploitation of the work is also stated in the Berne Convention as the authors of literary or artistic works protected by the convention shall have the exclusive right of authorizing the reproduction of these works in any manner or form (Article 9, Berne Convention).

Accordingly with Berne Convention Article 1 of the Dutch Copyright Act states that the author or his or her successors have the exclusive right to publish and reproduce the work but does not provide a list of more specific forms of exploitation: a reproduction includes every adapted version of the work, as long as the adaptation does not qualify as a new original creation (Article 13, Dutch Copyright Act). Publication does not also include the communication or exposition of the work to a closed circle of persons such as a family.

Limitations and exceptions

The Berne Convention allows certain limitations and exceptions on economic rights regarding cases in which protected works may be

used without the authorization of the owner of the copyright, and without payment of compensations.

The limitations are commonly referred to as “free uses” of protected works, and they are specified in Articles 9(2) (reproducing in certain special cases), 10 (quotations and use of woks by the way of illustration for teaching purpose), 10 (reproduction of newspapers or similar articles and use of works for the purpose of reporting current events) and 11(3) (ephemeral recording for broadcasting purposes).

The Appendix to the Paris Act of the Convention also permits developing countries to implement non-voluntary licenses for translations and reproduction of works in certain cases, related to educational activities. In these cases, the described use is allowed without the authorization of the right holder.

Furthermore, the Berne Convention provides a three-step test in order to define special cases where the general principle that the prior authorization of the rights holder is necessary to make use of work does not apply. That is, in the public interest of maintaining a balance between the interests of rights holders and those of content users, copyright-protected works may in some cases be used without the authorization of the rights holder. The Berne Convention provides that an exception or limitation to copyright is permissible only if

- it covers only special case
- it does not conflict with the normal exploitation of the work

- it does not unreasonably prejudice the legitimate interests of the author.

Within that standard, exceptions and limitations **vary substantially from country to country** in number and scope, who is entitled to benefit from them, and whether or not they include an obligation to compensate the rights holders whose rights are so limited. (Rights Direct;, 2016)

**European Union and European Copyright Legislation**

The aims set out in the EU treaties are achieved by several types of legal acts such as directives, regulations, and decisions. Some apply to all EU countries, others to just a few.

An EU Directive is a form of legislation that is "directed" at the Member States. It will set out the objective or policy which needs to be attained. The Member States must then pass the relevant domestic legislation to give effect to the terms of the Directive within a time frame set in the directive, usually two years. (European Union)

Directives are often used to help enforce the free trade, free movement and competition rules across the EU. They can also be used to establish common social policies, and thus can affect employment issues, labour law, working conditions, and health and safety (European Union). Therefore they can significantly affect businesses – the ones regarding copyright are tight linked to any creative business

as they are presenting the grounds on which the “creators” can protect their work.

Directives can be used to set minimum EU standards to be applied at national level, but also leave member states free to apply more stringent national measures, in order to not conflict with free movement and free market rules. Furthermore, EU Directives, once adopted and passed into EU law can also have legal force even when not yet enacted in national legislation.

Copyright Directives

The EU copyright legislation is a set of ten directives introduced in the last decade of the twentieth century and the first years of the twenty first century. These Directives are:

- Directive on the harmonization of certain aspects of copyright and related rights in the information society ("InfoSoc Directive"), 22 May 2001
- Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property ("Rental and Lending Directive"), 12 December 2006
- Directive on the resale right for the benefit of the author of an original work of art ("Resale Right Directive"), 27 September 2001

- Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ("Satellite and Cable Directive"), 27 September 1993
- Directive on the legal protection of computer programs (“Software Directive”), 23 April 2009
- Directive on the enforcement of intellectual property right (“IPRED”), 29 April 2004
- Directive on the legal protection of databases (“Database Directive”), 11 March 1996
- Directive on the term of protection of copyright and certain related rights amending the previous 2006 Directive (“Term Directive”), 27 September 2011
- Directive on certain permitted uses of orphan works (“Orphan Works Directive”), 25 October 2012
- Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (“CRM Directive”), 26 February 2014

The directives harmonise essential rights of authors, performers, producers and broadcasters. (Van Der Kooij & Visser, 2015) By establishing harmonised standards, the EU law reduces national differences, ensures the level of protection required to foster creativity and investment in creativity, promotes cultural diversity and assures

better access for consumers and business to digital content and services across Europe. However, many of the European directives reflect Member States' commitments under the Berne Convention and the Rome Convention, as well as the obligations of the EU and its members under the World Trade Organisation "TRIPS Agreement" and the two 1996 World Intellectual Property Organisation (WIPO) Internet Treaties (Rights Direct;, 2016) – for example the Dutch law is based on the on the Copyright Act (1912), which was modified in 1985 according to the Paris Act of Berne Convention.

Directive on Copyright in the Information Society

The most important Directive is the 2001 Directive on Copyright in the Information Society which was to a large extent based on another international treaty, The World Copyright Treaty (WCT) of 1996. (Van Der Kooij & Visser, 2015) However, the final text is a result of over three years of thorough discussion and an example of co-decision making where the European Parliament, The Council and the Commission have all had a decisive input.

This Directive is focusing on the compliance of certain aspects of copyright and related rights in the information society and has two main objectives: to reflect technological developments in copyright law in Europe and to commute into the law of all the EU countries the provisions in the two WIPO treaties of 1996 (2001/29/EC).

Directive on Enforcement of Intellectual Property Rights

Another important part of the European legislation is the 2004 Directive on Enforcement of Intellectual Property Rights followed by the creation in 2009, of the European Observatory on Counterfeiting and Piracy.
The Directive requires all EU countries to apply effective, persuasive, and proportionate solutions and punishments against those engaged in reproduction and piracy, and aims to create a level playing field for right holders in the EU. It means that all EU countries have a similar set of measures available for right holders to defend their intellectual property rights. (European Commission , 2017)

Process of adaptation of the Directives

Although the Directives contained explicit guidelines for adaptation of national regimes, there have been a lot of irregularities along the process of adaptation. For example the Directive for Legal Protection of Computer Programs had substantial gaps in policy implementation which have slowed the legal harmonization among Member States.

Two examples of such gaps seen in the Dutch case illustrate the tension between national legislation and the "*Fortress Europe*" regime. A report on the Implementation and Effects of Directive 91/250/EEC on the Legal Protection of Computer Programs, submitted to the European Commission found that the Dutch policy of software differs from the instructions of the Directive by prescribing a wider scope for "expression" (European Commission, 2010). The explicit definition by which ideas and principles embedded in software do not

enjoy protection by Copyright Law has not been clearly defined and consequently the formal distinction between “idea” and “expression” appears to be somewhat vague in the Dutch legislation. (Harrison, 2008)

Therefore the directives are meant to impose a standardisation of the copyright within the Member States, but their application implies a lot of changes at a national level as sometimes they are opposed to the principles grounded by the nations or are made unclear by the current legislation. However, the European Union has been adapting the copyright rules to consumer behaviours in order to match Europe’s values of cultural diversity.

In the last years the EU has signed two other WIPO Treaties: The Beijing Treaty which refers to the protection of audio-visual performances and the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or print disabled. (Rights Direct;, 2016)

## 3.2 International Copyright With Reference To Bolivian Legislation

There have been many intends to harmonize copyright legislations through the years. The work is divided in two, the first part deals with the relation between Human Rights and the Intellectual Property system and the second is a comparation between International (Berne Convention and Trips Agreements) with regional (Andean Community Decision 351) and local (Bolivian Law 1322) copyright legislation in order to spot their differences.

**Human rights and copyright**

Different instruments in matters of human rights recognize the copyright to benefit from the protection of the moral and material interests. The American Declaration of the Rights and Duties of Man of 1948 accomplished to become the first instrument in matters of human rights to recognize the copyright to benefit from the protection of the moral and material interests (de la Parra, 2015, p. 289). It also opened the debate about copyright as a human right and was fundamental for the drafting of Universal Declaration of Human Rights of 1948 (de la Parra, 2015, p. 291), and finally for the International Covenant on Economic, Social and Cultural Rights of 1966. It should also be noted that several delegates who participated in the drafting of the Universal Declaration also participated in the International Covenant drafting (Busaniche, 2016, p.40).

There is a fundamental difference between a Declaration and an International Convenant. As Eleonor Rooselvet explains, who participated in the drafting of both, the first proposes an exhibition of values which countries pretend to achieve and the second is susceptible of legal application (quoted in Busaniche, 2016, p.40).

The International Covenant on Economic, Social and Cultural Rights, in article 15 establishes:

> 1. The States Parties to the present Covenant recognize the right of everyone:
>
> (a) To take part in cultural life;
>
> (b) To enjoy the benefits of scientific progress and its applications;
>
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
>
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
>
> 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and

development of international contacts and co-operation in the scientific and cultural fields.

In all instruments in matters of human rights mencioned, copyright is a component of the article that also has the rights to take part in cultural life and to enjoy the benefits of scientific progress and its applications as components. It is important to understand that scientific progress has its developments in the fields of the rights of education, health and culture. In both drafting groups, from the Universal Declaration and the International Convenant, there were intense discussions concerning the article's final draft. The great majority of those discussions were related to formal aspects and potential tensions between copyright and several human rights were completely ignored.

For Chapman (2001, p. 14), the particular final drafting of article 15 underscores four points:

Those components related to intellectual property were backed up by virtue of the accessory character to fulfill the realization of other rights based on a stronger moral basis.

The rights of authors were understood as preconditions for the right to culture as well as participation and access to the benefits of scientific advances.

The rights of authors should not limit cultural participation, but rather facilitate it. Scientific progress and access to science must also be facilitated.

Discussions on the wording of the copyright provision focused primarily on whether or not they should be included, rather than on their content and impact.

Then for Chapman (2001), copyright is conditioned to contribute to the common good and the well-being of society while ensuring protection of the moral and material interests of authors without this implying granting monopoly rights without any restriction.

There are different perspectives in doctrine when developing a relationship between copyright and human rights. Shaver (quoted in Busaniche, 2016, pp. 84-85) recognizes four possible approaches: the first assimilates human rights to copyright by stating that there is no conflict; the second considers there are some areas of conflict such as the right to health, food and education; the third asserts that the right to development is threatened by the harmonization and deepening of intellectual property systems because it does not allow the transfer of technologies or the emergence of young industries and suggests that intellectual protection systems are useful for developed countries but require limitations and exceptions for developing countries; and the fourth that states that the tension between the laws of intellectual property and human rights not only occurs in specific points, but in a systematic way, as these systems transform creativity, information, science and technology, public goods, in privatized goods.

It must be said that equating copyright as human rights is an erroneous position. Human rights protect moral rights and material interests but they can not be understood as the totality of intellectual

property rights or copyright (de la Parra, 2015). That is to say, human rights do not protect, among others, corporate trademarks, trade and industrial secrets, related rights, databases and all other legal entity or corporate rights (Busaniche, 2016, p.48).

The Committee on the Implementation of the International Covenant on Economic, Social and Cultural Rights, as the authorized interpreter of the Covenant, identifies the main difference between human rights and the intellectual property system in its General Comment 17:

> 2. In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope

of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.

3. It is therefore important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c).

In any case, it should be understood that not all aspects relating to copyright are human rights. And as long as there is a relationship between the two, by the principle of the primacy of human rights, any approach to copyright within legislation and the development of trade laws must take this principle into account. This would mean that at the moment of the drafting of trade laws one must take into account the rights to access to culture, health, scientific progress among others along with their implications in a scheme compatible with the protection of material and moral interests of the authors, while favoring the development of the former. This is because of the way in which copyright is conceived in the International Covenant on Economic, Social and Cultural Rights.

Comparison between the Berne Convention, the TRIPS agreement and the Bolivian system (Decision 351 and Law 1322)

The Bolivian system that regulates copyright is mainly composed of Decision 351 and Law 1322. Decision 351 is Andean and supranational community legislation that in Bolivia has constitutional supremacy (2009, article 411.II). Member States of the Andean

Community of Nations are: Bolivia, Peru, Ecuador, Colombia. In an attempt to harmonize copyright legislation to promote the development of internal market of the community, States began the process of concertation in 1991 to finalize the issuance of Decision 351 in 1993 (Cerda, 2011, p.235). The process was interrupted in 1991 pending the enactment of copyright laws in Venezuela and Bolivia, the latter enacted in 1992 (Cerda, 2011, pp. 235-236). This aspect explains the agreement between Decision 351 and Law 1322.

Decision 351 has its own prerogatives of any Andean Community decision that differentiates it from those of other regional integration processes. For example, Decision 351 differs from EU directives because:

They are of direct and immediate application without the need to develop their provisions in the domestic law of the member countries (Cerda, 2011, p.235).

They have binding effects and prevail over the domestic law of these countries, to exceptionally refer to domestic legislation to complement their development (Cerda, 2011, p. 235-236).

In addition to these characteristics, in order to improve international copyright compliance, the Andean Community decided to create a court with regional jurisdiction that functions as a dispute resolution mechanism (Cerda, 2016, p. 45).

Having said that, it is time to start the comparison of the Berne Convention, the TRIPS agreement with the Bolivian System. In order to develop this, it has been taken into account that this chapter develops

provisions related to international copyright. Therefore, while explaining the provisions of Decision 351, references are made to Law 1322, while they are compared to each other and to the Berne Convention and the TRIPS agreement. There is no mention of procedures, precautionary measures and criminal sanctions from Law 1322. The provisions that regulate the computer programs and collective administration of Decision 351 and Law 1322 aren't mencioned either.

The analysis categories chosen for the comparison are: subject matter of protection, scope of protection, owners of rights, content of copyright, duration of protection, limitations and exceptions, transfer and assignment of rights, neighboring rights, performers, phonogram producers, broadcasting organizations.

**Subject matter of protection**

The four regulations have the same subject matter of protection. Bolivian system also protects every creation that may be reproduced or disclosed by any known or future means, without being limited in the material support in which they can be fixed (Decision 531, 1993, art, 4; Law 1322, 1992, art. 6).

**Scope of protection**

Decision 351 grants a broader scope of protection than the established by Article 3 of the Berne Convention and Article 1 of the

TRIPS Agreement. It grants protection to all authors even if the country of origin of the creations does not protect the nationals of the Andean Community States (Cerda, 2011, page 46). And protection is even broader because it protects the rights of authors even when they are not protected in their country of origin (Cerda, 2011, 47).

In relation to the protection granted, the copyright is born at the time the work is created and the registration is only declaratory and not constitutive of rights (Decision 351, 1993, article 52, Law 1322, 1992, Article 2).

**Owners of rights**

Both the Berne Convention and the Bolivian system stipulate that in the absence of proof to the contrary, the person whose name, pseudonym or other identifying mark is visibly shown on the work shall be presumed to be the author thereof (Decision 351, 1993, art. 8; Berne Convention, 1886, art. 15.1; Law 1322, 1992, art. 9). They also stipulate the same in relation to anonymous works.

Decision 351 and Law 1322 contemplate that natural persons or legal entities have copyrights. They shall exercise original or derived ownership of economic rights in works created for them on commission or by virtue of employment relations, in the absence of proof to the contrary (Decision 351, 1993, art. 10). In the Bolivian State, public law entities and natural persons shall exercise derived ownership (Law 1322, 1992, art. 8).

The internal framework allowed by Decision 351 related to this point determines the following in Law 1322 of 1992:

10. In divisible productions, each joint author shall own the rights in the part he has authored, unless otherwise agreed. In works made in indivisible collaboration, the rights shall belong in common and in equal undivided shares, to the joint authors, unless other arrangements have been agreed.

11. The copyright in a work with music and lyrics shall be half-owned by the author of the lyric portion and half-owned by the author of the musical portion. Each of them shall be free to publish, reproduce and exploit his respective portion.

12. If the lyrics to a musical work are translated or adapted into another language, the translators or adapters shall be the authors of their own translations or adaptations and shall not acquire the owner's rights in the literary part, given that the author of the original lyrics shall retain his rights for all legal purposes.

13. The rights of economic use in a collective work, unless otherwise stipulated, shall be presumed to be transferred to the person who has published it under his name, without prejudice to each author's rights in his contribution.

Law 1322 also makes a distinction regarding works considered folklore. It defines folklore as:

the body of literary and artistic works created on the national territory by authors who are unknown or who do not identify themselves and who are presumed to be nationals of the country or members of its

ethnic communities and which is passed down from generation to generation, representing one of the fundamental elements of the nation's traditional cultural heritage (Law 1322, 1992, art. 21).

Works considered folklore shall be considered as works belonging to the national heritage (Decision 351, 1992, art. 22)

**Content of copyright**

Copyrights divide in moral rights and economic rights. The Convention does not develop the rights in a detailed manner as Law 1322 and Decision 351 do. However, it agrees with what is established, including with regard to droit de suit. Decision 351 grants the possibility of granting other moral rights (article 12) and economic rights (article 17) in their domestic legislation, a prerogative that has not been developed by Bolivia. A more detailed development of this right can be found in Chapter II.

**Duration of protection**

Three regulations agree in regards to the term of protection by establishing it not inferior to the life of the author and 50 years after his death (Decision 351, 1993, art. 18; Berne Convention, 1886, art. 7; Law 1322, 1992, art. 15). However, the terms of protection specified in the domestic legislation of the Member Countries shall be applied where those terms are longer than the terms provided for in the Decision (Decision 351, 1993, art. 59). According to Article 12 of the TRIPS agreements, when work is not photographic or applied art and

the calculation is different from that of a person's life, this protection should not last less than 50 years.

When the owner of the rights is a natural person, protection “shall not be less than 50 years counted from the making, disclosure or publication of the work, as the case may be” (Decision 351, 1993, art. 18). The Berne Convention of 1886 in its article 7 only determines this for the cinematographic works. The Convention also has determinations on the validity of the protection of works carried out in collaboration (article 7 bis) and on anonymous works (article 7.3), Law 1322 of 1992 agrees with these determinations and provides:

19. If the work belongs to different authors, the term of 50 years shall run from the death of the last joint author. The economic rights inthe collective audiovisual and photographic works, phonograms, broadcasting programs and computer or computing programs, shall last 50 years starting from their publication, exhibition, fixation, transmission and utilization, as appropriate, or, if they have not been published, since their creation. In those anonymous works not mentioned in Article 58(a) and in pseudonymous works, the economic rights shall last 50 years after the works have been made known, unless the identity of the author becomes known before this term expires, in which case the provisions of Article 18 shall apply.

The way to count the term is the same its the same in Decision 351 (1993, art.7), Berne Convention (1886, art 9) and Law 1322 (1992, art. 15).

**Limitations and exceptions**

Decision 351 gives more limitations and exceptions than Law 1322 and the Berne Convention. For its part, TRIPS agreements allow domestic legislation to develop all that concerns limitations and exceptions. All the limitations and exceptions provided by the Berne Convention coincide with those of Law 1322 and Decision 351, with minor variations. At the same time, Law 1322 contemplates limitations and exceptions that none of the other legal provisions considers.

As a matter of principle, limitations and exceptions to copyright should not prejudice the normal exploitation of works, nor should they cause unjustified prejudice to the legitimate interests of the right holder (Decision 351, 1993, art. 21).

Decision 351, article 22, establishes the existence of acts that will be lawful to carry out, without the authorization of the author and without payment of remuneration, and considers the following that are detailed in APPENDIX C1.

In some aspects, the limitations determined coincide with those given by the Berne Convention and Law 1322. Both provisions coincide in the limitations on citations (Berne Convention, 1886, art 10.1 and 10.3, Law 1322, 1992, article 24). The Berne Convention (1886, article 10.2 bis and article 10.2 respectively) also coincides with what is determined by clause g) of Decision 351 and with what is proposed by subsection b). As to the limits proposed by subsection (E) of Decision 351, the Berne Convention partially agrees, but the Andean legislation does not establish that the source must be clearly indicated and also

does not establish penalties for non-compliance as suggested by the Convention (1886, article 10.1 bis).

For its part, Law 1322 establishes limitations that arent contemplated by none of the other legal provisions:

25. Before the term of protection of a work has expired, the State may prescribe the use for public necessity of the economic rights in a work that is considered of high cultural value for the country, or of social or public interest, on payment of fair compensation to the holder of that right. To decree such use, the following is required: (a) that the work has been published; (b) that the copies of the last edition are out of print; and (c) that at least three years have elapsed since it was last published.

26. The heirs or successors in title may not object to third parties publishing already disclosed works of the decedent if they have let more than five years pass, calculated from the death of the decedent, without arranging for their publication. In such cases, if there is no agreement between the publishing third party and the heirs or successors in title on the conditions of printing or compensation, both shall be set by the procedure stipulated in Articles 31 and 35 of this Law.

**Transfer and Assignment of Rights**

Copyright is protected and exercised by third parties as proposed in Article 6 bis of the Berne Convention which gives a wide margin of development to the countries of the union.

Decision 351 establishes the transfer by succession in accordance with the provisions of the applicable legislation of each country (1993, article 29). Law 1322 (1992, article 27) provides that in the event that, in the succession of a joint author, his copyright does not accrue to any person or entity, it shall increase, by equal proportions, the shares of the other joint authors. The same increase shall apply when a joint author has validly waived his author's economic right.

On the author's death, the exercise of moral rights shall pass to his successors in title for the period referred before. Once the economic rights have lapsed, the State or designated agencies shall assume the defense of the authorship and integrity of the work (Article 11, Decision 351, 1993).

Also, the author may dispose of the original of his pictorial or sculptural work or figurative art work in general. In this case, unless otherwise agreed, the acquirer shall be considered not to have been granted any copyright in the author's work (Ley 1322, 1992, art. 28).

Decision 351 establishes that "the provisions on the transfer or assignment of economic rights and on licenses for the use of protected works shall be governed by the provisions of the domestic legislation of the Member Countries" (1993, art. 30). Bolivia has developed Law

1322 regarding this aspect in Title VII Transmission and Use Contracts. At the same time, with respect to the domestic legislation of Member Countries, Decree 351 states that they may not exceed the limits permitted by the Berne Convention or the Universal Copyright Convention, that relating to legal or compulsory licenses 351, 1993, art. 32). It also limits the transfer of the economic rights and authorizations or licenses of use to the forms of exploitation and other modalities expressly agreed to the provisions of the respective contract (Decision 351, 1993, article 32).

**Neighboring Rights**

Decision 351 (1993, art. 33) and Law 1322 (1992, art. 52) agree that protection given for neighboring rights shall in no way affect the protection of copyright in scientific, artistic or literary works. In case of conflict, the author's best interests shall always prevail. TRIPS agreements contain provisions on neighboring rights and provides that countries may set conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention, as regards to the provisions on performers, phonogram producers and broadcasting organisations (1995, article 6).

**Performers**

Performers shall have the right to authorize or prohibit the communication to the public of their live performances in any form and

the fixing and reproduction of their performances (Decisión 351, 1993, art. 34).

TRIPS agreements give rights not covered by the other provisions. Article 14.1 provides that performers may object to the fixing of their unfixed performances and the reproduction of such fixations, where they have not been authorized. They may also prevent the broadcasting by wireless means and the communication to the public of their live performances, if they have not been authorized.

Performers also have the next rights according to article 35 of Decision 351: demand that their names be mentioned at or associated with every performance that takes place and to object to any distortion or mutilation of their performances or other act prejudicial thereto that might adversely affect their prestige or reputation.

The duration of the protection of the economic rights of performers may not be less than 50 years and must be counted from the first of January of the year following the year in which the performance or their fixation took place, If this is the case (Decision 351, 1993, article 36, TRIPS, 1995, article 14.5).

**Phonogram producers**

Producers of phonograms have the following rights (Decision 351, Article 37, Law 1322, Articles 54 and 55): authorize or prohibit the direct or indirect reproduction of their phonograms, prevent the importation of copies of the phonogram made without the authorization of the owner of rights, authorize or prohibit the public distribution of the

original and every copy thereof to the public by sale, rental or any other means, charge remuneration for every use of the phonogram or copies thereof for commercial purposes, which remuneration may be shared among the performers on conditions laid down by the domestic legislation of the Member Countries. Of these, only the first on authorization or prohibition is contemplated by the TRIPS agreements (1995, article 14.2).

In additions, Law 1322 provides in article 55:

If a phonogram published for commercial purposes or a reproduction of such a phonogram is used with authorization for broadcasting or any other form of communication to the public, a single equitable remuneration shall be paid by the user to both the performers and the phonogram producer. The phonogram producer or his licensee may agree on the form for collecting the fees for communication to the public. Failing such agreement, the fees shall be collected by the phonogram producer or his licensees; half of the sum received shall accrue to the artists and performers, and the other half shall accrue to the phonogram producer.

Phonographic records and other devices or mechanisms that are used for a public performance via broadcasting, cinematography, record players or any other system of performance, shall give rise to the collection of fees for the benefit of the authors, artists and performers, and the phonogram producer (Law 1322, 1992, art. 56).

The duration of protection of the rights of producers of phonograms is identical to that established for performers (Decision 351, article 38, TRIPS, 1995, article 14.5).

**Broadcasting organizations**

Broadcasting organizations hold the exclusive right to authorize or prohibit the retransmission and fixation of their broadcasts, as well as the reproduction of a fixation of their broadcasts (Decision 351, 1993, art. 39, Law 1322, 1992, art. 57; TRIPS, 1995, art. 3)

The duration of protection is the same as that of other holders of neighboring rights (Decision 351, Article 41). TRIPS establishes a lower limit to these, and can not be less than 20 years (1995, article 14.3).

# Chapter 4: Music Copyright

## 4.1 Music Copyright in The Netherlands

### Collective Bargaining Societies in The Netherlands

If there is one thing that people have in common globally it is a love for music. Music functions as a sort of social glue – it brings people together and helps strangers become friends. Music is also a way to express oneself artistically. And as consumption of music grows, especially in terms of streaming, so too does the need for protection for artists and musicians – commensurately.

In the Netherlands, musicians are lucky enough to have a strong legal system in place that protects them and their work. Of course, opinions may vary, but in general, the protection of Dutch musicians is quite strong. In his article on Forbes, entitled *"Top 10 Countries Where Justice Prevails"*, Kenneth Rapoza ranks the Netherlands 5th globally in terms of overall global legal equality and power (Rapoza, 2014). This information lends credence to the notion that Dutch musicians and musicians releasing music in the Netherlands have a strong system protecting their interests. Helping enforce Dutch

(musical) copyright are the various Collective Bargaining Societies operating within The Netherlands. According to Paul A.C.E Van Der Kooij and Dirk J.G Visser, *"Collecting societies play a very important role in the process of the exploitation of copyright, especially in the field of music…"* (Kooij & Visser, 2015). There are numerous collective bargaining societies operating within the Netherlands, the most prominent of which are Buma/Stemra. Next to this there is also Sena, Lira, Pictoright and NORMA. However, only Buma/Stemra deals with music.

But what exactly is a collective bargaining society? Before answering this question, it is important to know that collective bargaining society is not the only name given to associations like this. They can also be known as collection agencies and copyright collection societies. In the rawest form, a collective bargaining society has as its goal to collect the money owed to artists, mainly musicians. According to the Zimbalam Team on BlogZimbalam, collection agencies are *"Collection agencies are organisations within the music industry that simply collect your Royalties. Every time your music is played on Radio, used on TV, Played in a pub or club, Performed Live, or sold, you are entitled to money. Without these agencies, collecting all the money that's owed you would be an impossible task"* (Zimbalan Team, 2011)**.** In essence, a collection agency is a musician's or artist's insurance that they will get paid for communication of their work. On the following page are highlighted the five main collecting agencies operating within The Netherlands. However, as stated previously, only

Buma/Stemra deals with music copyright – the other agencies highlighted merely serve to illustrate the fact that in the Netherlands, artists in general have their rights guarded.

- *Buma/Stemra:* Buma/Stemra is the main collective bargaining society in The Netherlands. According to the Buma/Stemra website, Buma was established in 1913 while Stemra was founded by Buma in 1936 (Stemra, n.d.). Although they are still two separate institutions, they collaborate to such an extent that their work is often referred to under the moniker Buma/Stemra. According to Peter van Liemt, who wrote an article about Buma/Stemra on Muziekbusiness.nl, Buma deals with communicating music to the public while Stemra is concerned with reproduction, or in other words, mechanical rights (Liemt, 2014). In essence, Buma/Stemra protects the rights of their artists to receive proper remuneration for the use of their work.
- *Sena:* Sena on the other hand protects the interests of performing artists and producers (Liemt, 2014). Because the copyright protection that is extended to performing artists and producers is different than that extended to artists, so too must the respective collective bargaining society be different. In their 'about' section on their website, Sena has included a comparison between themselves and Buma Stemra: "*Several parties are involved in the production of music: creators and makers. Buma/Stemra represents creators and ensures that affiliated composers, lyricists and publishers receive*

*compensation when their music is used (based on copyright). Sena represents makers and ensures that artists, session musicians and producers receive compensation when their music is used (based on neighbouring rights)"* (Sena, n.d.). Based on the above information, it is clear that although they both operate within the Dutch music industry, Buma Stemra and Sena are two very different collective bargaining societies.

- *Lira:* Lira is also a collective bargaining society but it is not concerned with music. Instead, they deal with the protection of the interests of authors and narrators of poems, stories, essays, columns, novels, sketches, series and films for TV, operas, musicals and much more (Lira, n.d.).
- *Pictoright:* Pictoright is also a collective bargaining society but, like Lira, is different to Buma Stemra. Pictoright protects the interests of visual artists such as photographers. The following is to be found in their 'About' section: "*Pictoright represents the interests of visual authors by exercise, promotion and protection of copyrights"* (Pictoright, n.d.). This means that Pictoright essentially does exactly the same as the societies listed above, only with an exclusive focus on visual artists.
- *NORMA:* While Buma Stemra, Sena, Lira and Pictoright all have a specific focus, NORMA focuses on all artists, including actors, musicians and dancers. On their website, NORMA states: "*NORMA is the rights enforcement organization for all performers. NORMA ensures that performers receive a fair*

*financial compensation for the use of their work. In the Netherlands and abroad"* (NORMA, n.d.)

Buma/Stemra is actually the odd one out of the group. This is because of the fact that they have a monopoly when it comes to the protection of musicians and their interests. According to Article 30a of the Dutch Copyright Act (hereinafter DCA), in order for a business to act as in intermediary in relation to the copyright of musical works, said business must obtain must obtain permission to act as such by the Minister of Security and Justice. Since Buma/Stemra is in fact the only such business in The Netherlands who have received this permission, one can conclude that they do indeed have a monopoly position with regards to Dutch copyright collection. However, this is not something people are happy about. In an article entitled *"Buma/Stemra verliest monopolie op Nederlandse markt"* (translated: *"Buma/Stemra loses monopoly of the Dutch market),* written by Tom Sanders in 2008, this monopoly position is something that belongs to the past. Writes Sanders: *"Competition Commissioner Neelie Kroes has forced societies like the Dutch Buma/Stemra to give up their monopoly. Artists can choose now themselves which organisation now represents them…"* (Sanders, 2008). While this article is nine years old at the time of this writing, it proves that a collection society with a monopoly position has gradually transitioned into something that Dutch artists and the Dutch music industry do not want nor accept. This does not detract from the power of Buma/Stemra. They are still the largest music

collecting society in The Netherlands, by a country mile. In the section below will be discussed exactly how much power they and the other Dutch collecting societies have.

**The Legal Power of Dutch Collecting Societies**

As is evidenced by the paragraphs above, these societies have quite an impact on the Dutch creative industry, especially Buma/Stemra. However, exactly how much legal power these societies have is hard to quantify. The most important question to answer in order to discern how much power they actually have is to ask what exactly these agencies are entitled to do, and if they actually perform their duties.

As Buma/Stemra is, without a doubt, the most powerful such society in The Netherlands, they will be used as the basis for the following points. According to Peter van Liemt, Buma/Stemra's duties are the following (translated and edited from Dutch): *"The group consists of two organisations; the Buma association and the Stemra foundation. Buma's role is to publish music (for example, on the radio, TV, internet, or as a performance) and Stemra deals with reproduction of music (for example, CDs or DVDs). Together, they serve the interests of composers, writers and publishers associated with them. When the music of their members is used, they ensure that the right holders receive compensation. Buma/Stemra also collects fees for foreign sister organisations (for example, when Ben Howard's music is used in the Netherlands)."* (Liemt, 2014). As evidenced by the above,

Buma/Stemra deal with enormous quantities of music, both domestic and international. The above also reinforces the notion that Buma/Stemra's monopoly is somewhat omnipresent on the domestic level (of course, they can't be expected to have an international monopoly as this would render useless foreign collecting societies). Since they have this monopoly, it is expected that they perform their duties, which are summarized below:

- Protect the rights and interests of Dutch musicians (foreign musicians count as well, if their music is used on Dutch soil);
- Handle publications rights on behalf of musicians;
- Handle reproduction rights on behalf of musicians;
- Ensure that musicians, foreign and domestic, receive the compensation they are entitled to (Buma/Stemra, n.d.).

One could argue that, given Buma/Stemra's monopoly position, there is a limitation for Dutch musicians. Buma/Stemra might not represent a given artist the way this artist feels appropriate. This artist may want a different type of protection or may prefer different parameters about their entitlement to remuneration. Be that as it may, Buma/Stemra does offer solid protection to the artists under their protection.

But is this actually the case? Does Buma/Stemra actually perform their duties? Does their system of protection leave something to be desired? Finding actual accounts of the organisation not performing their duties or even performing their duties in a questionable manner is a challenge. However, some cases are to be found, including a 2009 article on Tweakers.net, highlighting issues

with Buma/Stemra's obligation to distribute certain fees. The article, entitled *"Authors and publishers express strong criticism of Buma/Stemra"* and written by Dimitri Reijerman covers how almost 290 composers criticised Buma/Stemra's prototype 'finger-printing' system. States the article (translated and edited from Dutch): *"Composers and publishers of music stated in a complaint letter that they had not received hundreds of thousands of Euros, entitled to them by Buma/Stemra. A poorly functioning "fingerprinting system" is partly to blame."* (Reijerman, 2009). This finger print system, which helps identify music quicker, should ideally make the process of remuneration easier. However, as evidenced by the article, this was not the case. To Buma/Stemra's credit, this fingerprinting system is quite interesting. According to their website, *"A fingerprint is made from each musical work, which is stored in a database. Each musical work that is broadcast, via cable, satellite or ether, is compared with the fingerprints in the database. If there is a match, the broadcast data is automatically registered"* (Buma/Stemra, n.d.). This was a response to a question asking how Buma/Stemra keep track of what radio and TV channels broadcast throughout the year.

However, this is not the only instance of Buma/Stemra not performing the way they're expected to. In 2011, Thomas van der Kolk, writing for De Volksrant, highlighted some issues within Buma/Stemra that were actually brought to light by high-ranking employees. States the article (translated and edited from Dutch): *"In May of this year, Buma/ Stemra board members Henk Westbroek and Hans Kosterman,*

*in an interview with De Volkskrant, called into criticism higher management of the organisation. According to them, higher management was insufficiently transparent, publishers were not being represented properly and there is a lack of external surveillance of the organisation's activities. 'Administrative insanity', according to Henk Westbroek and Hans Kosterman"* (Kolk, 2011) . What's interesting about this article is that the criticism comes from within the organisation itself and not from those they are obliged to protect.

With the above in mind, it is easy to see how the organisation's monopoly is easy to criticize, especially if it is revealed that they aren't performing as expected.

With everything written so far in mind, it is important to consider what Buma/Stemra is entitled to do to those who infringe or violate the copyright of their members. The Dutch Copyright Act protects exploitation and reproduction rights of Dutch artists (amongst other rights, see beginning of Part 2 of this section), and it is Buma/Stemra's job to assist in enforcing this protection. As with any country following copyright law, there are consequences and punishments for those who infringe or violate the rights of others. According to Beroepkunstenaar.nl, which is a website dedicated to helping artists navigate the business side of the creative industry created by the Amsterdam School of the Arts, there are varying forms of punishment for those who infringe or violate copyright. *"The Public Prosecution Service offers the option of criminal prosecution in case of intentional infringement. Some infringements are even considered*

*crimes. The court may impose a prison sentence of no more than four years or a fine"* (Beroepkunstenaar, 2013). The Dutch Copyright Act explains the various forms of crime and pertaining consequences in more detail, but this excerpt serves a useful purpose, namely highlighting that The Netherlands takes copyright and the defence thereof seriously.

In order to further substantiate the points made, relevant articles of the Dutch Copyright Act will follow below.

To discern what articles refer to punishments of criminal behaviour, an interesting aspect to look at is what people are allowed to do. According to Articles 16b and 16c, there are certain situations in which reproduction is allowed:

- Article 16b: Reproduction shall not be regarded as an infringement of the copyright in a literary, scientific or artistic work if it is restricted to a few specimens intended exclusively for personal exercise, study or use by the natural person who has carried out the reproduction without any direct or indirect commercial motivation or has caused it to be carried out exclusively for his own benefit.

With this in mind, it can be concluded that certain forms of reproduction are permitted, provided they follow the law. This is

interesting because it allows for comparison with reproduction that is illegal.

At this point, looking at exactly how the Dutch Copyright Act protects those whose works have been infringed will shine light on various aspects. Authors who have had their work copied or distributed unlawfully can legally request a number of things, highlighted by the relevant articles below:

- Article 27
    - 1. Notwithstanding the assignment of his copyright wholly or in part, the author shall retain the right to bring an action for damages against persons who infringe the copyright.
    - 2. After the death of the author, the right to bring actions for damages as referred to in paragraph 1 shall belong to his successors or legatees until the copyright expires.
- Article 27a: In addition to claiming damages, the author or his successor in title may request the court to order anyone who has infringed the copyright to hand over the profits originating from the infringement and to render account therefore
- Article 28
    - 1. Copyright shall entitle the right-holder to claim as his property any goods that are not filed in the public records and which have been communicated to the public in violation of copyright or are unauthorized

reproductions, or to apply for them to be destroyed or rendered useless. The right-holder may bring a claim for the handing over of the said goods so that they can be destroyed or rendered useless.

- 2. The same right to claim goods exists:
  - a. with respect to entrance money paid by persons attending a recitation, performance, exhibition or presentation, which infringes copyright;
  - b. with respect to other monies that may be assumed to have been obtained by or as a result of an infringement of copyright.
- 3. The same right to apply for the destruction or rendering unusable of goods shall apply to goods that are not filed in the public records and which have been used to effect an infringement of copyright. The right-holder may apply for the handing over of the said goods so that they can be destroyed or rendered unusable.
- 4. The provisions of the Code of Civil Procedure concerning seizure and execution for the purposes of handing over goods that are not filed in the public records shall apply. In the event of accumulation of seizures the person seizing pursuant to this article shall take precedence.

- 5. The court may order that the handing over be conditional on payment by the plaintiff of a compensation to be determined by the court.
- 6. In the case of immovable property, ships or aircraft which infringe copyright, the court may order, on the claim of the right-holder, that the defendant make such alterations as are necessary to end the infringement.
- 7. Unless otherwise agreed, the licensee shall have the right to exercise the rights referred to in paragraphs 1 up and to included 6 in so far as their purpose is to protect the rights he is entitled to exercise.
- 8. The same right to apply for the destruction or rendering unusable of goods, and to have those goods surrendered for destruction or to be rendered unusable, shall apply to the equipment, products and components as specified in Article 29a, and to the reproductions of works as specified in Article 29b, not being property subject to registration.

With the above articles in mind, it becomes clear exactly how a Dutch artist will be protected should their exploitation and reproduction rights be violated.

To conclude this section with an important point, the actual workings of Buma/Stemra will be discussed – how do they go about

every day business and how do they check for infringements? These are tough questions to answer, giving the complexity of the organisation. However, one question that can be answered is how Buma/Stemra deal with plagiarism disputes. On the 'About' section of Buma/Stemra's website, they highlight the organisation they have created to this end, entitled the Standing Committee for Plagiarism: *"Buma/Stemra has set up a permanent committee to look into disputes relating to plagiarism (Vaste Commissie Plagiaat). The committee consists of music experts and individual lawyers and assesses disputes between composers, lyricists and music publishers who are affiliated to Buma/Stemra* (Buma/Stemra, n.d.). Furthermore, the committee can make recommendations to parties, which are non-binding, unless this was agreed differently between the parties and Buma/Stemra – this means that the parties can bring the matter before the courts if they're not satisfied with the solution and recommendation offered by Buma/Stemra.

The above is an example of how the organisation deals with plagiarism disputes. However, it is also interesting to see how the organisation supports and promotes music. To this end, they established Buma Cultuur. According to Buma/Stemra's website, *"Buma/Stemra is involved in promoting the Dutch music product by organising, financing and subsidising numerous events. These activities are handled by Buma Cultuur. This helps to focus attention on Dutch music productions, both nationally and internationally, which in turn helps music authors improve their sales"* (Buma/Stemra, n.d.).

This is an example of how Buma/Stemra actively tries to promote and maintain the (Dutch) music industry and show people how they are involved in such aspects. On the dedicated website of Buma Cultuur, they state their mission as: "*Buma Cultuur supports and promotes Dutch music copyright in both The Netherlands and key export markets for Dutch music. The aim is to increase the percentage of Dutch music in the Dutch market and foreign markets"* (Buma Cultuur, n.d.)

Finally, it is interesting to look at how Buma/Stemra deals with piracy. To this end, they cooperate with Stichting BREIN, which is an organisation that helps formalise the cooperation between holders of neighbouring rights and holders of copyright (Buma/Stemra, n.d.). On BREIN's website, they state what their mission and and procedures are, amongst other things. Their mission is as follows:

1. BREIN develops anti-piracy policy and directs and co-ordinates the fight against piracy.
2. BREIN addresses both the wide-spread piracy by individuals and the large-scale piracy by criminal organisations.
3. BREIN focuses both on the traditional offline trade in pirated products and the rampant online piracy on the internet.
4. BREIN investigates, takes civil action and supplies information and expertise for criminal, administrative and fiscal action. Criminal investigations are carried out by the anti-piracy team of the FIOD-ECD (Fiscal and Economic Crime Service), which operates under the supervision of a special unit of the Public Prosecution Service.

> BREIN and FIOD-ECD also work closely with Customs to intercept import and transit of pirate products (BREIN, n.d.)

BREIN also has a stable anti-piracy programme in effect, which is described as the following:

1. Prevention and security
2. Legislation
3. Investigation: online and offline; private and criminal
4. Litigation: civil; criminal; administrative; fiscal
5. Sentencing
6. Training
7. Education
8. PR (BREIN, n.d.)

As can be seen, Buma/Stemra has a lot of moving parts, which makes management of the organisation, and their relationships with other organisations, a challenge. However, things seem to be working for everyone involved.

**Supervision**

As with many such institutions, a form of supervision is required to ensure that operations are kept ethical and proper. For collecting societies in The Netherlands, this organisation is known as VOI©E. According to their website, VOI©E ensures that collection agencies (such as Buma/Stemra) pay their artists a reasonable fee for

the use of their work. Also, VOI©E strives to educate people about the exercise of copyright and related rights and to improve information on the work of these collecting agencies (VOI©E, n.d.).

Also, according to their website, VOI©E acts on behalf of the agencies as a point of contact for questions about the exercise of copyright and related rights, on a collective basis. In addition, VOI©E acts as the contact point for criticism or complaints (VOI©E, n.d.).

Seventeen active collecting agencies in the Netherlands are members of VOI©E. The condition for membership of VOI©E is that the agency meets the criteria of the CBO Certificate (CBO is short for 'collectieve beheersorganisaties', which is Dutch for collecting agency). This cerificate, known as a Keurmerk, contains standards for quality and transparency. These criteria are both testable and concrete. A large part of this Keurmerk is also the guidelines for the maintenance of integrity and good governance (VOI©E, n.d.).

As can be seen from the above paragraphs, the success, and indeed the popularity of a Dutch collecting society is contingent upon their approval of VOI©E. If a collecting agency doesn't receive this certificate, or Keurmerk, it could be disastrous. It would make people distrust the agency in question, and artists would begin to doubt whether they were in good hands or not.

However, VOI©E is not the only supervisory board of collecting societies in the Netherlands. The Copyright Supervisory Authority ('Het College van Toezicht Auteursrechten', in Dutch) is a similar body, with similar functions. According to their website, the

authority (abbreviated to ‘CvTA’) is responsible for the supervision of a number of collective management organisations. Furthermore, the authority ensures that collecting societies maintain a transparent financial operation, collect the money owed to their artists lawfully and at reasonable cost, distribute funds on time, be properly equipped to perform their duties and make use of transparent tariff structures (Het College van Toezicht Auteursrechten, n.d.)

In conclusion, it is clear that Dutch Copyright makes efforts to stay as transparent as possible. At first glance, it seems hard for artists to get ripped off by Dutch copyright organisations and any related organisation. Whether this is true is hard to say, but this appears to be the case, which is commendable given the complexity of the music industry and artistic industry in general.

## 4.2 Music Copyright in Bolivia

Music is a global passion since almost everyone listens to songs whether on the radio, on television, on the internet, in concerts, or just on the street. All of these songs, which every person listens to every day, were born from the mind of an artist or a composer, from his own genius and hard work, and because of that, the execution of these songs has to be monetarily remunerated. Most of all, because artists and composers live of their music, it's their work, they can't just give it just for free.

In view of this need arises the copyright, which "is the right every person has over the work he produces and especially to which he can use in all the forms authorized by law." (Ossorio, p. 302). Therefore, copyright has been created in order to generate an incentive for artists and composers to continue composing music, and for others to invest in the musical works created and in the exploitation of them, through an economic remuneration by the continuous reproduction of each musical work.

A playwright can consent his work to be performed on stage under certain agreed conditions, a writer can negotiate a contract with a publisher for the publication and distribution of a book, and a musician can agree to have performance recorded on compact disc or any musical execution device. These examples illustrate how the owners of the rights can exercise them in person. But individual

management of these rights is practically impossible for certain types of use, because an author can't contact every single radio or television station to negotiate licenses and remuneration for the use of his works. Besides that, it is not practical for a broadcasting organization to seek specific permission from every author for the use of every copyrighted work. The impracticability of managing these activities individually - both for the owner of rights and for the user - creates a need for collective management organizations (CMOs) – also called bargaining societies - who will be in charge of ensuring that creators receive payment for the use of their works.

But, ¿What is a collective management? WIPO (World Intellectual Property Organization) defines them as organizations acting in the interest and on behalf of the owners of rights, in the execution of their music and on the monetary remuneration. This is mainly because the creator of a work has the right to allow or to prohibit the use of his works but can't do it just by himself as it was explained before. Bolivian artists, as any artist in the world, also depend on the work of collective management organizations for the execution of their music and respective payment. Therefore, on this part of the investigation it will be shown how the CMO's work in Bolivia and the importance they have on the Bolivian society.

**Collective Management Organizations in Bolivia**

CMO's2 in Bolivia have very little history as established institutions with legal power and society approval. Until the early 1990s, Bolivia didn't have a copyright law, so it was difficult for any Bolivian artist or composer to protect their work and collect their corresponding economic rights. Because of this, most of the musicians of that time had to register their musical works CMO's from other countries.

With this difficulty, a large majority of these artists decided to undertake the work of creating a bill on Copyright, and also establish a Collective Management Society that could be responsible of protecting the rights of the latter, founding SOBODAYCOM (Sociedad Boliviana de Autores y Compositores) in 1991 as an established institution.3

After completing the bill and presenting it to the Bolivian Parliament, in 1992 president Jaime Paz Zamora would promulgate this law called as the "Copyright Law" (No. 1322). It became the main law on which the CMO's are going to be established as recognized institutions – such as SOBODAYCOM- (art. 64) with also the Supreme Decree 23907, filling since that moment a legal vacuum that Bolivia was suffering over musical copyright for many years. The Supreme Decree establishes there will be one CMO for each artistic area (ART. 27). With the years, Bolivia has recognized besides SOBODAYCOM, two more CMO's: ASBOFOPROM (phonograms and videograms) and

[2] From here this will be the way the investigation will refer to Collective Management Organizations.

[3] SOBODAYCOM exists since the 1940s, but it didn't have legal power for working as CMO until the 1990s

ASBAIEM; the three protect the different artistic products (literature, music, TV, radio, movies and playwrights)

In 1995, SOBODAYCOM will achieve international approval as a CMO, when the Confederation of Societies of Authors and Composers (CISAC) accepted it as an associate member by unanimity. In 1996, the Bolivian State would recognize SOBODAYCOM as the only CMO in the country for the control of music execution and respective payment. (Hinojosa y Poma, 2014, p. 24).4

**SOBODAYCOM**

The Bolivian Society of Authors and Composers of Music (SOBODAYCOM), is a private civil society and non-profit collective management, which is responsible for the administration of the copyright of both the national and foreign musical repertoire. (art. 2)5

**Objective**

This CMO aims to promote the effective defense of the Moral and Patrimonial Rights of the Authors and Composers in Bolivia,

[4] Since SOBODAYCOM is the most important CMO in regard of music protection, one can say they have A monopoly about it. That can be good and bad at the same time. First of all it can be good because the author will only have its corresponding money accumulated on one CMO, and also because all the CMO's around the world will deposit the corresponding money to this institution, avoiding problems in the distribution of royalties. In the bad side, being the only CMO, gives the chance to create arbitrary tariffs –not saying SOBODAYCOM does this- and not giving chance to search for other option, and also don't give the chance to artists and musicians to search for other CMO that could give them different benefits.

[5] SOBODAYCOM (Sociedad Boliviana de Autores y Compositores Bolivianos) internal statute

through efficient mechanisms of collection, administration and distribution of the rights generated by any use of a musical work. This is exercised in everything related to its musical execution, communication to the public, theatrical performance, broadcasting, transmission by wire, cable, internet or any other conductor, directly or relayed, by computer means, mechanical, electrical or printed reproduction , Filming, television, recitation, private copying, editing and publication in general, by any means created or to be created. (Art. 3)

**Legal power**

To achieve the main objective SOBODAYCOM has the legal power to:

Create tariffs and/or remunerations of the managed repertoire.

Grant, regulate, deny and/or authorize the use of the musical repertoire.

Representation of national members and foreign members from institutions with whom agreements are maintained. For the purposes, SOBODAYCOM will have the broad power and without limitations that the “Copyright Law” grants in order to ensure the integral respect of the moral and patrimonial rights that it administers. Also, the perception of the pertinent tariffs, power that extends also to initiate, pursue legal, judicial or administrative actions.

Conclude bilateral, multilateral or collective common defense agreements, and to represent similar societies from the country or abroad.

Boost diffusion of Copyright and the Collective Management of these Rights, as well as awareness to the public and users.

Act according to National Legislation, International Agreements and legal and regulatory norms that protect the copyright in the Bolivian State.

Promotion of charitable activities or services for its members.

Promotion of a greater musical production based on the excellence of creation and development. (art. 3)

Also they can

Demand from users the payment in time and in form of the tariffs.

Checking and verifying the accuracy of the evidence submitted by the users, including documentation supporting the settlements reported by themselves.

Perform the control of income of persons, sale of works and tickets or other forms of contribution; the correct use of authorized works according to the tariffs imposed.

To retain, as established by international norms and practices, 30% of total revenues, for administration and operating expenses.

To interpose the actions that they deem appropriate in front of correspondent authorities, to prohibit the use of repertoire and work that is not authorized.6

To achieve these objectives, SOBODAYCOM will develop as many actions as necessary under the protection of the “Copyright Law”

[6] Supreme Decree 23907 (art. 27)

and the current regulation, the Internal Statute, and its Rules of procedure. In that understanding, SOBODAYCOM has wide legal capacity to act and to exercise its rights and attributions, to acquire or transfer, encumber or lease goods, immovable or movable property onerous or for free, as well as to conclude contracts and agreements that make to its legal nature. (art.5)

SOBODAYCOM also has the obligation to document all the work that manages, which consists on the creation of a database with all the information regarding the work: identification number, CISAC number, author or composer name, other rights holders and percentages. It must have all these data constantly updated, for this it will consult the different platforms that collaborate in this -CISNET, LatinNET- and others. At the same time, SOBODAYCOM is in charge of providing the data to the other CMO‘s in the world about the information of their national authors and composers.

**Payment Capacity**

SOBODAYCOM has the capability of gather money from places where the artist or composers’ musical creation has been played. There are different modes of payment depending on the situation.

For all musical work on which SOBODAYCOM has the correspondent declaration of work, the payment will be made according to that declaration.

Members of SOBODAYCOM, whose work wasn't declared, their payment will be made after the society receives the corresponding declaration.

In regard to foreign works, are going to be paid the ones who are in SOBODAYCOM's database. On music not- registered on the database, but which author's nationality is known, the money will be given to the corresponding collective management of origin.

On works by composers not associated to SOBODAYCOM, they will receive their corresponding payment if they approach in the given time to claim for this. If not, the money will be transferred to the CMO heritage and incorporated to its administrative resources.

In the case of works mentioned in worksheets only by their title, these works are not going to get paid, unless they become a recognized success.

On unrecognized works, it will be transferred to a "Distribution Reserve Fund" and will be managed by the same rules as for "no associated authors".

Decision 351 establishes that the payment must be proportional to the times the musical work has been played (art. 44). 7

**Works Valuation.**

[7] The Bolivian Society of Authors works with the international BMAT system, Which will help to improve the distribution of royalties collected in Media, since it identifies each work as unique Through a personalized fingerprint, so that they can establish Transparent and accurate dissemination of works in the media

During the process of distribution of each item, the value of the work corresponds to the number of time the song is played. SOBODAYCOM will be able to give a special valuation to those songs that are in the most recognized rankings published by specialized magazines or means of diffusion.

**Distribution.**

The distribution of the amounts of money collected is effected by the following items:

**Public musical execution**

Live performance in public spaces (Festivals, discotheques, folk pubs, etc).

Live performances in private spaces (weddings, prestes, baptisms, parties, etc.)

Mechanical execution of music on phonograms or videograms.

Concerts made by foreign or national artists, or very popular bands. 70% will be distributed to the main band and 30% to the other groups. Same to international groups.

**General Use**

Music played on public broadcasts.

Radio, Open television and cable television.

Phonographic supports

**Audiovisual media**

Digital Media: Ring Tones - Back Tones - Real Tones - etc.

Inclusion of music in audiovisual works (Synchronization)

Inclusion of music in advertising ads8

Venue, Arena or Stadium Concerts. These are mega-concerts and events that attract large numbers of people. The distribution is done by payroll. The amount collected in each of these types of concerts is divided between the works mentioned in the worksheet or in the recording made by SOBODAYCOM.

General Use. In the particular case of general users (local malls, galleries and any other type of place where music is used to soften the environment), the total of the proceeds will be distributed proportionally among the works that emerge from radio and TV sampling.

Public broadcast (Radio, Open Television and television for subscribers).

Radio. The distribution is made on the basis of the forms presented by the broadcasters and a statistical sampling performed by SOBODAYCOM or a company contracted for this purpose, collecting the repertoire used by the broadcasting organizations according to a method established and predetermined by the administration that

[8] SOBODAYCOM has different tariffs for the authorization on each type of events regulated; they have to be paid before the event happens. The different tariffs can be seen in http://www.sobodaycom.org/index.php/tarifario. The events are paid in UDA's, that are a general type of monetary system CMO's uses around the world.

follows statistical principles that allow the sample to be as close to reality.

Television and Cable TV. The distribution is made on the basis of a statistical sampling performed by SOBODAYCOM or a company hired for this purpose, collecting the repertoire used by the companies according to a method established and preset by the administration that follows statistical principles that allow the sample to be as close to reality as possible.

**Phonographic and Audiovisual Reproduction.**

Phonographic production. rights will be distributed based on the information provided by the phonographic producer, as established by Law 1322 and its Regulations. The lack of information for the distribution of these rights can't be supplied by any other means.

Synchronization of musical works in audiovisual works. The distribution is made according to the corresponding contract or authorization.

National Patrimony and Public Domain works. The distribution will be governed according to Law 1322 and its regulations.

But talking with a member of the CMO, even though they try to cover every event in Bolivia, it is true that a lot of parties in this country happen in the country area, but as they act and are regulated by their own customs, it is pretty difficult for the CMO to collect the money of the parties that happen over there. That means that the legal power only gets to the cities, but it is difficult to act in the country area. This

means, that not everybody is treated in the same way, because some people don't pay anything for the unauthorized music they're playing and also they don't get punished for it.

**Members**

Any person who has acquired the status of member will be protected by SOBODAYCOM. They can be natural or legal person, National or Foreign.

Members are divided into four classes:

Founders (those who are registered in the Constitution Act)

Meritorious. For impeccable authorial trajectory and contribution to society.

Assets. Those who apply to enter the society and who fulfill all the requirements imposed by the society

Adherents. Those who having applied for membership, fulfill all the requirements but haven't generated copyright for 5 years. (art.19)

**Benefits**

General Benefits

Being part of the Bolivian Society of Authors and Composers (SOBODAYCOM) generates several benefits (art 8):

- Payment of royalties with respect to the public use of works by the author.
- Protection and representation of the author's works both nationally and internationally.

- Medical Insurance (National Health Fund).
- SAF (Social Assistance Fund for Elderly and Disabled Partners)
- Mausoleum
- Free Legal Advice on Intellectual Property, Copyright, Related Rights and General Issues.
- Physical Presence (through the regional delegations) in seven of the nine departments of the State.
- Conciliation Council and Disciplinary Tribunal
- The use of the "Julio Bracamonte Auditorium" for meetings, disc presentations, press conferences, courses, seminars and others.
- Exhibition and advertising of events in Social Networks and Websites
- Bonds
- Filling and processing of works registration at SENAPI (Servicio Nacional de Propiedad

Also each kind of member is going to have specific benefits, rights and obligations which difference them from the others, but is not relevant to talk about them in this investigation. 9

**Legal Action**

Criminal action

When using any music work not authorized by Sobodaycom, a complaint can be made by the CMO against the person involved.

[9] SOBODAYCOM (Sociedad Boliviana de Autores y Compositores Bolivianos) internal statute (art. 19 – 21)

The criminal code in its article 362 establishes that any person who uses a protected work for any personal benefit or in detriment of the owner, and executes it in any diffusion space, will be sentenced from 3 months to two years in prison and a fine of sixty days.

But, to avoid an ordinary process that could many years, it is possible to carry out a conciliatory administrative process and prior arbitration, which is under the jurisdiction of the National Copyright Office10.

First, there is a conciliatory process, which can be requested by any of the parties. The Management holds a public hearing 48 hours later, and dictates sentence after the evidence has been presented.

If this fails, it is passed to arbitration process, which takes place in no less than 15 days. After the evidence has been presented, the arbitrator shall issue an arbitration award, which may be accepted by the parties or not, deciding to carry out an ordinary proceeding.

**Civil Action**

Besides the criminal action, the owner of the musical work property can start a civil process demanding liability for damages. In this process the author will demand a monetary compensation due to the loss and the private gain suffered by the unauthorized use of the musical work. This process also has a conciliatory process that could prevent an ordinary one that could take years to finish.

[10] Entity of the Ministry of Cultures

**International control**

Each CMO, besides their intern legislation, is being controlled by international Treats and International institutions. They help the CMO to fulfill not only by national standards, but also to international standards, which help them be better.

**CISAC**

CISAC - the International Confederation of Societies of Authors and Composers - is the first network of societies of authors of the world (also known as organizations of collective management, or OGC). CISAC seeks to protect the rights and promote the interests of creators around the world. It enables collective management organizations to transparently represent creators around the world and to ensure that rights are recognized and fairly remunerated to authors for the use of their works anywhere in the world.

CISAC works to protect the rights and promote the interests of creators from all regions of the world and from all artistic fields: music, audiovisual, dramatic arts, literature and the visual arts.

Each year the International Confederation of Societies of Authors and Composers is in charge of carrying out the international review of Professional Rules, which means that it corroborates that the working guidelines of the management company adapt to the international parameters.

**ALCAM**

ALCAM is an alliance made up only of Latin American composers and songwriters who work daily to foster and raise awareness about the legitimate moral and patrimonial right that every artist has over his work and to receive fair remuneration for his creative work. It puts value to the work of these authors and composers of music and defends the contribution they make with their work to the cultural development of all the communities to which they belong.

**International Legislation**

Berne Convention for the Protection of Literary and Artistic Works. It deals with the protection of works and the rights of authors. Founded on three basic principles: Works originated in one of the associated States must be subject of the same protection that each State grants to its own works. Second, protection should not be subject to compliance with any formality. Third, protection is independent of the existence of protection in the country of origin of the work. (art. 11 bis and 13)

“Decision 351” by the Andean Community of Nations. Its purpose is to recognize effective and adequate protection for authors and other right holders, on works of genius, in the literary, artistic or scientific field, regardless of literary or artistic merit or their destination. By means of this no country can grant less protection to a foreign country than to its nationals. It gives a general idea of how CMO’s have to be established, how they’ll going to work in their respective country and in association

with the other CMO's, and also the rights and obligations they have with their members. (arts. 43 -50)

# Chapter 5: Trademark Protection

## 5.1 Trademark Protection in The Netherlands

### 1. Introduction

The following information refers to the protection of trademarks in The Netherlands. The Netherlands is a part of the Benelux Union, which is a politico-economic union within three neighbouring European states: Belgium, Netherlands and Luxembourg since 1947 (governement.lu, n.a.). Hence, this section of this report refers to both Dutch and Benelux laws. According to Dutch law, a trademark is a sign that distinguishes products or services from the competitors, it is a distinguishing sign. In the Netherlands, it is possible to register for three types of trademark (RVO, n.d.). These are:

a. Benelux Trademark: Trademark that is valid in the Benelux area including Belgium, the Netherlands and Luxembourg. It is possible to register for this trademark immediately at the Benelux Office for Intellectual Property (BOIP) in The Hague and will last for 10 years with the possibility of indefinite renewal.

b. Community Trademark: This type of trademark is valid within the entire European market and gives strong, exclusive rights for the region. It is possible to register for this trademark immediately at the European Intellectual Property Office (EUIPO) and will last for 10 years with the possibility of indefinite renewal.
c. International Trademark: This trademark offers protection in many countries throughout the world that are affiliated with the Madrid Agreement or the Madrid Protocol. It is possible to register via a trademark agency in the applicant's country of origin. It is possible to register for this trademark at the World Intellectual Property Organisation (WIPO).

**2. The Brand/Trademark**

**a. Concept**

BOIP identifies trademarks as individual and collective trademarks. An individual trademark is the most common trademark type that is used and is possible to be distinguished by the offering of products or services of a company than from others. According to BOIP, 99% of trademarks are individual trademarks. A collective trademark is a type of trademark that distinguishes one or more common characteristics of the products or services. The holder of this type of trademark does not take use of the trademark itself but makes sure to supervise the use of that trademark by individuals who have the right to use this trademark. The right of the use of a collective

trademark is determined in the ‘regulations for use and control of the trademark’ during the application for the trademark (BOIP, n.d.). BOIP and WIPO use an international standard of classification to classify different types of trademarks: The International Nice Classification (NCL). The International Nice Classification, established by the Nice Agreement (1957), is an international classification of products and services applied for the registration of marks (WIPO, 2016). The trademark applicant is asked to classify the type of the product or service he/she is registering the trademark for. This enables to have a clearer scope of the trademark protection. The NCL is part of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (as amended on September 28, 1979) (WIPO, n.d.). The International Nice Classification comprises of 45 classes, of which 34 apply to products and 11 to services (BOIP, n.d.). When registering a trademark, BOIP for the Benelux region, in official documents and publications about each registration must indicate the classification number of the 45 classes to which the products or services belong to (WIPO, n.d.).

**b. Brand Functions**

According to Dutch Law, the purpose of trademark law is brand protection. Without trademark, it would be difficult for a consumer to choose from various brands because it would be easy for the characteristics of a brand to be used by other brands. Trademark exists

in order to make sure every brand has its own characteristics with their own products or services (BOIP, n.d.)

The Benelux Office for Intellectual Property distinguishes trademarks in five areas (BOIP, n.d.). These marks are:

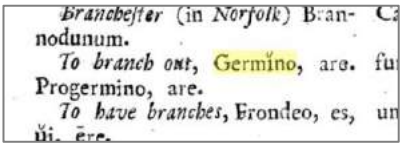
1. Word marks: The name by which the product or service is on the market can be a trademark.
2. Device marks: Logos, labels, typography or a special layout can be a trademark.
3. Shape marks: The shape of a product or packaging can be a trademark.
4. Colour marks: Single colour or a combination of colours can be a trademark.
5. Sound marks: A sound may be regarded as a trademark and be eligible for registration.

## 3. Legislation on trademarks in The Netherlands

### a. Antecedents of the first registered trademarks in The Netherlands

According to BOIP, first signs of trademark in The Netherlands lay back to year approximately 1802. This law was a French law developed after the French revolution in the 1800's by Napoleon Bonaparte and was known as the "Germino Law" (BOIP, 2017). The definition of 'Germino' in today's English translates 'to branch out and one of the earliest founding's of the definition of Germino is found in a

publication in 1890 (O., 1890). No samples of the first use of trademark in this year are available according to a conversation with an employee of BOIP (BOIP, 2017).


Branchester (in Norfolk) Bran- Ca
nodunum.
To branch out, Germino, are. fu
Progermino, are.
To have branches, Frondeo, es, un
ŭi. ēre.

*Definition of Germino, The Law French Dictionary* (O., 1890)

After 78 years of the first signs of trademark in The Netherlands, the Trademark Law 1880 was created. This was followed by a replacement act enforced by the Dutch Patent Agency named "The New Trademark Law" in 1893. After 78 years following this act and after the formation of the Benelux Union, the "1971 Benelux Trademark Law" replaced all previous laws (BOIP, 2017).

### b. Constitutional framework

The Constitution of the Netherlands is one of the two fundamental documents governing the Kingdome of the Netherlands and was adopted in 1815. The most recent change was made in 2002. The Constitution of the Netherlands does not contain requirements regarding intellectual property rights. However, Article 14 guarantees the right to property (WIPO, 2002).

> *"Article 14 1. Expropriation may take place only in the public interest and on prior assurance of full*

*compensation, in accordance with regulations laid down by or pursuant to Act of Parliament. 2. Prior assurance of full compensation shall not be required if in an emergency immediate expropriation is called for. 3. In the cases laid down by or pursuant to Act of Parliament there shall be a right to full or partial compensation if in the public interest the competent authority destroys property or renders it unusable or restricts the exercise of the owner's rights to it."*

The Constitution of the Kingdom of the Netherlands, Article 14 (WIPO, 2002)

Constitutional framework outside The Constitution of the Kingdom of the Netherlands is included within the Benelux region, where BOIP uses regulations and law provisions written on the Benelux Treaty on Intellectual Property (BTIP) and on the Implementing Regulations of this act. In the Benelux, it is the final decision of the court to partake decisions on copyright disputes and not BOIP; however, BOIP can monitor and take preliminary action to solve the trademark conflict without parties going to court (BOIP, n.d.).

### c. Trademark regulations in The Netherlands

A trademark needs to be registered since the trademark holder will not have any rights with no registration. When a trademark is being registered, the holder is registering the names that are used to market

their products and/or services. In the Benelux, small companies register the name of their product or service with the name they registered either with the Kamer van Koophandel (Chamber of Commerce) in The Netherlands or at the Kruispuntbank (Central Database for Enterprises) in Belgium. Larger companies however have a larger range of products and/or services, and they need to register each of their unique products and/or services individually for their trademarks. It is also possible to register a visual instead of just the name of a product and/or service. One of the famous examples of this in in the world is by the colours, which the Dutch company 'The Royal Dutch Shell' uses (BOIP, n.d.). It is mentioned in the website of Shell "The red and yellow logo - that everyone immediately recognizes - fits in the series famous logos such as Coca Cola, Philips, Mercedes and McDonald's (Shell, n.d.)."

Generally, a strong trademark is known to have distinct features such as being original, fanciful, unexpected and out of the ordinary. According to BOIP, the stronger the trademark carries the following factors, the more legal protection it receives (BOIP, n.d.; Garcia, n.d.):

1. The mark distinguishes itself from the rest of its competitors
2. The mark is easily recognisable to the target group
3. The mark is memorable to both customers and potential customers
4. The mark is informative in terms of informing customers what to expect about the product and/or service

5. The mark responds to and communicates with the customer

The following conditions need to be met in order for BOIP to register the mark at their database (BOIP, n.d.):

1. The mark cannot be too broad from the actual product or service itself. The European Court of Justice defines this as “the ‘unusual variation as to syntax or meaning’ that makes the whole sufficiently distinctive to serve as a trademark (BOIP, n.d.).” The ‘BOIP: Protecting trademarks in the Benelux region’ document refers to an example of this by the name ‘Biomild’ for a yoghurt brand. ‘Bio’ stands for the yoghurt being produced biologically and ‘mild’ merely says something about the taste of the product. However, when the two words are put together, the name does not constitute with the product and BOIP does not accept these kinds of trade names.
2. The BOIP refuses brand names that are not distinctive. BOIP defines distinctive trademarks as “fantasy names, distinctive logos, and a name that does not describe the product or service for which it is used, such as the trademark ‘Apple’ for computers, etc. (BOIP, n.d.)” In addition BOIP is “required to reject the registration of descriptive trademarks, as general words cannot be monopolised (BOIP, n.d.).”
3. The BOIP refuses trademarks that are misleading. For example, it is not possible to register an image of an airplane as a trademark for a bus company since the visual does not

represent and is misleading about the product and/or services of the brand.

4. The BOIP refuses trademarks that consist of national symbols such as flags, coat of arms or another official emblem (BOIP, n.d.; BOIP, n.d.). According to the 'BOIP Protecting trademarks within the Benelux region' document, the most common reason for refusing a trademark in the Benelux region is because of the use of the flag of the European Union in a visual (BOIP, n.d.).
5. The mark needs to be in contrary to public order or morality (BOIP, n.d.). This is stated in Article 6quinquies (b)(iii), Paris Convention:

> *"Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases: when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order* (WIPO, n.d.)*."*

However, there is no clear definition of 'public order' or 'morality'. These two definitions are both "notions in motion and evolve through time and space (Reingraber, 2012)." An example of this is that what was considered right towards public order and morally correct 30 years ago might not be deemed

likewise today. In addition, what is considered right towards public order and morally correct actions can be different in different societies. BOIP does not have a clear substantiation of these linguistic, historic, social and cultural reasons (Reingraber, 2012).

6. In terms of wines or spirits: the trademark needs to include a geographical indication identifying wines or spirits, where the goods do not have that origin (Haak, n.d.)
7. Article 6bis, Paris Convention regarding 'Well Known Marks' indicates that if a trademark creates confusion with a well-known trademark or belongs to a non-consenting third party it is possible for BOIP to refuse the registration of the mark (WIPO, n.d.; Haak, n.d.).
8. BOIP can refuse the registration of the mark if it comprises of only signs, words or indications, which took part in everyday language, or if the mark comprises of a shape which mirrors the nature of the product (Haak, n.d.). For example, it is not possible to hold the trademark of an image a carrot since it is a product of everyday use and mirrors directly the product which is being marketed.

   BOIP gives an example that orange is not a worthy trademark for a company marketing fruit juice but based on research it is a more acceptable trademark for a telecommunications company.

An example of this use is Ziggo; the largest cable operator in the Netherlands (BOIP, 2016).


*Logo of Ziggo* (Ziggo, 2017)

Belgacom is a mobile phone operator based in Belgium. Belgacom created a new colour mark filed with colours those changes from purple to light blue. This mark was rejected by BOIP since this new logo is not distinctive overall since it does not carry any specific features of the actual product or services Belgacom offers (Chiever, 2016).

*Rejected mark of Belgacom* (Chiever, 2016)

## 4. Benelux Office of Intellectual Property (BOIP)

The Benelux Office of Intellectual Property (BOIP) is the official organisation for the registration of trademarks and designs in the Benelux Union, consisting of Belgium, Netherlands and Luxembourg (BOIP, n.d.).

### a. Brand registration process

Before applying to register and protect a trademark with a brand name and/or logo online, it is important to distinguish what can and cannot be registered as trademark and to check if the mark is currently taken by another party.

In the Netherlands, it is possible to check trademark databases to see if any mark has been registered or applied to similar products or services. This is possible by checking the following trademark databases (Netherlands Enterprise Agency, n.d.):

- Benelux trademark database (consists of Benelux state trademarks and international trademarks of which the Benelux countries have been designated)
- European trademark database (consists of community trademarks which are registered with EUIPO)
- TMView (consists of trademarks from EU member states, the EUIPO and the WIPO)
- International Trademark system

After registration in one of the intellectual property office, no one else can use the trademark without prior consent of the trademark holder.

It is possible to check if a trademark or design of the trademark holder is being infringed by contacting BOIP and using their relative services to monitor a trademark (BOIP, n.d.). If a party is found infringing a trademark of another party, BOIP allows the trademark holder to submit an 'Opposition Form.' This procedure is a straightforward and an inexpensive method of protecting the trademark rights of the trademark holder. This first initial step is a method governed by BOIP and is without court intervention (BOIP, n.d.). This opposition procedure allows the trademark holder to oppose the registration to solve the trademark conflict. If necessary, the trademark holder can also go to court and take court actions.

## 5.2 Trademark Protection in Bolivia

The present text refers to the protection of trademarks in Bolivia, for a greater understanding of the subject it is necessary to refer to the concept of intellectual property. According to the World Intellectual Property Organization (WIPO) "Intellectual property relates to creations of the mind: inventions, literary and artistic works, as well as symbols, names and images used in commerce. Intellectual property is divided into two categories: Industrial property, which

covers patents of invention, trademarks, industrial designs and geographical indications; Copyright, which covers literary works (for example novels, poems and plays), films, music, artistic works (for example drawings, paintings, photographs and sculptures) and designs Architectural.

Similarly, WIPO points out that intellectual property rights are any other property right that allows the creator, or owner of a patent, trademark or copyright, to enjoy the benefits deriving from his work or Investment made in connection with a creation; The right to intellectual property is enshrined in Article 27 of the Universal Declaration of Human Rights, which contemplates the right to benefit from the protection of moral and material interests resulting from the authorship of scientific, literary or artistic productions.

Having made the clarification that the brands are protected as Intellectual Property, in this text the antecedents of the brand will be presented; Its concept; Types and functions of the brand; The legislation established in Bolivia with respect to trademarks and specifically the term of protection, the parameters that can and cannot register as a trademark; The process for trademark registration; And Bolivian cases related to trademark protection. The purpose of this report is make to known the existing Bolivian legislation regarding the registration of trademarks.

**The brand**

In the next section we present the etymology of the word brand, concept, characteristics, functions and types, these are developed in the following section.

**Concept**

In relation to the concept, many definitions are given to the brand, from authors, organizations related to Intellectual Property and even Bolivian legislation, here are some of:

According to WIPO: "The brand is a distinctive sign indicating that certain goods or services have been manufactured or supplied by a particular person or company"

Otamendi (2006) points out that "the brand is the sign that distinguishes one product from another or a service from another".

Chijane (2011) indicates that the brand is "any sign capable of distinguishing the goods or services of one natural or legal person from another".

According to Andean Community of Nations (CAN) decision 486, Article 134 defines the brand as "any sign that is capable of distinguishing products or services on the market may be registered as trademarks capable of graphic representation".

According to the Uruguay Round Agreement, Trade-Related Aspects of Intellectual Property Rights, Article 15, states that "any trade mark or combination of signs are able to distinguish the goods or services of a company from other companies ".

According to the General Law on Trademarks and Industrial and Commercial Registers dated January 15, 1918, of Bolivia, a trademark is "any sign, emblem or denomination characteristic and peculiar, with which one wishes to specialize the artifacts of a factory, the objects of A trade, the products of the land and of the agricultural, forestry, cattle and extractive industries. "

The Bolivian National Intellectual Property Service (SENAPI) establishes that brand is "a sign used to distinguish and differentiate products or services in the market".

All the above mentioned concepts agree that the brand is a distinctive sign that is able to differentiate a product or service from other companies or businesses; Morales Guillen (1999) referring to the products and services that are given in the concepts of brand indicates that: the product is the designation of anything that is likely to circulate in the market, whatever the nature, industry, the handicraft, agriculture, livestock, that is, any product; espect to the service, says that it is the provision by a company to a clientele of certain activities: work, rental, custody, information, transportation, lodging, insurance, bank operations, radio or television broadcasts, , entertainment and any other economic activity Profit-making, excluding the manufacture or sale of products.

Regarding the term differentiation that is repeated in the concepts of brand, it should be noted that the General Law on Trademarks and Industrial and Commercial Registers dated January 15, 1918 (Bolivia) does not emphasize the brand as a sign of

differentiation, but specialization, that is to say, that the legislation of 1918 sought to recognize that the items of artifacts of a factory, the objects of a trade, the products of the land and of the agricultural, forestry, cattle and extractive industries are recognized by the specialization of these areas. For the date of the law (1918), it can be concluded that this concept of brand did not include all the items, however this approach is no longer applied since the SENAPI manages a concept of brand from the point of view from the differentiation of products or services.

**Brand Functions**

• Indication of origin

With an indication of origin, Otamendi (2006) points out that this implies identifying the origin of the product and that the consumer public knows who the manufacturers of the product are, the author, referring to these points, clarifies that today the identification of origin Product becomes a secondary role because the products are not necessarily from the source they indicate since the owner of the brand may have marketed his product and brand to a third party, so the indication of origin would be more concerned with the consumer to product manufacturers.

• Distinction of products or services

Otamendi (2006) points out that this function is essential for the brand because it allows the product or service, once placed on the market, to be differentiated by the consumer. This function of the brand

facilitates the consumer's life by allowing them to identify a product or service already known or that has been advertised; the distinctive character of the trade mark not only benefits consumers, but also makes it possible to differentiate a product or service line within a company.

• Warranty

This guarantee function, according to Otamendi (2006) implies to offer a uniform quality to the consumer, so that the external customers can trust the constant quality of the products bearing the brand.

• Advertising

The efforts of the owner of a trademark would be futile if it did not provide the necessary resources to make the brand known to the target public, since the only link between the consumer of the product or the service and its owner is the trademark, since through this the companies will obtain economic remunerations. Likewise to greater publicity the brand will have a differentiated market positioning and therefore the profits of the companies.

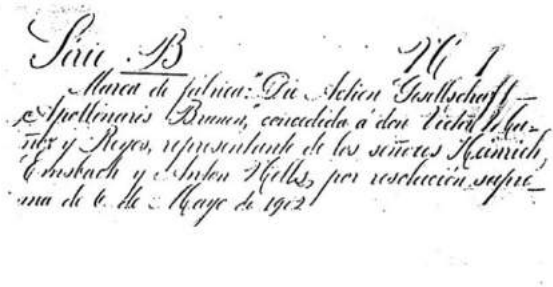
**Legislation on trade marks in Bolivia**

Antecedents of the first registered trademarks in Bolivia.

According to Surco (2014) in the history of Bolivian legislation the registration of trademark concession had two periods that can be separated from the Trademark Regulatory law of january 15, 1918, the concession of trademarks before the existence of the aforementioned

law was granted by supreme resolution issued by the President of the Republic of Bolivia and had the "B" series as identification; one of the trademarks registered at that time is the brand APOLLINARIS (label), which distinguished a natural mineral water, the holder of the record is the signature was DIE ACTION GESELLSCHAFT APOLLINARIS BREMEN, represented in Bolivia by Víctor Muñoz Reyes, said trademark was granted by supreme resolution on may 6, 1902.

Trademarks registered in Bolivia "APOLLINARIS" Prior to the Law of January 15, 1918



Serie B No 1

Marca de fabrica: "Die Action Gesellschaft Apollinaris Bremen" concedida á don Víctor Muñoz Reyes, representante de los señores Kaimich, Enstbach y Anton Wells, por resolucion suprema de 6 de Mayo de 1902


Source web site: http://www.orpan.com.bo

Having passed the Regulatory Law of Trademarks on january 15, 1918, the first trademark registration concession was granted on July 18, 1918, that is, six months after the approval of the law, this mark was the " PORTO CASTILLO G "Class III, aimed at distinguishing port wine, this is the record No. 1 of Series C, the holder of this brand was GUTIERREZ HERMANOS, with address in Jerez, Spain, at that time the office charge of the trademark registration concession was called INDUSTRIAL PROPERTY OFFICE and the Chief was Dr. Isaías Rivero.

**Constitutional framework**

In the Bolivian Constitution of 2009, in the sixth chapter abouth education, interculturality and cultural rights, specifically article 102 states that "The State shall register and protect the intellectual, individual and collective property of the works and discoveries of the authors, Artists, composers, inventors and scientists, under the conditions determined by law."

In this constitution is the first time that Intellectual Property is recognized as a cultural right and is protected by the supreme Bolivian norm, it must be remembered that within intellectual property there are two categories and one of them is industrial property, Within which are the marks. The fact that the Bolivian Constitution includes in its text intellectual property guarantees the protection of trademarks, and therefore all Bolivian regulations protect this right since the supremacy of the constitution prevails.

**Trademark regulations in Bolivia**

At present our country, in matters of industrial property has supreme national laws and decrees, among others, and the most important are:

The trademark law of January 15, 1918, which was promulgated during the government of president José Gutiérrez Guerra and is still in force.

Code of Commerce, DL No. 14379 of February 25, 1977, mainly in its part related to industrial property, article 463 and following.

Supreme Decree No. 20791 dated May 10, 1985, which brings into effect the international classification of goods and services for the registration of Marks.

Other agreements and decisions to which Bolivia belongs are: Decision 486 of the Andean Community of Nations (CAN); Uruguay Round Agreement: TRIPS (Aspects of Intellectual Property Rights Related to Trade); Paris Convention (acceded on 4 August 1993 and entered into force on the same date); And Berne Convention (acceded on 4 August 1993 and entered into force on the same date).

Having pointed out Bolivian regulations, we then proceed to develop some of them.

General Law on Trademarks and Industrial and Commercial Registers of January 15, 1918.

This law continues in force in Bolivian legislation, the most relevant aspects of this law are as follows:

Brand concept: By brand is meant any sign, emblem, denomination or peculiar characteristic with which they want to specialize the artifacts of a factory, the objects of a trade, the products of the land and the agriculture, forestry, cattle raising and industries extractive.

Can be used as trademarks: Names and denominations in a distinctive form, words or titles of fantasy, numbers and letters in special drawing or forming combinations, tags, labels, emblems,

monograms, covers, stripes, stamps, engravings, shields, figures, printed and embossed currencies, watermarks, vignettes, containers, or any other similar typical sign.

Cannot be used as trademarks:

The letters words, names or distinctions of the State

Weapons shields or national and foreign flags, unless special authorization

The terms and phrases that have passed to the current and general use, determining a product, relative to the same

Drawings or expressions that are immoral or offensive to persons or institutions

The portraits and proper names of the people, without their permission or that of their heirs up to and including the fourth degree

The usual shape or color of the products

The signs, designations, drawings or other items listed in Article 1 which are not novel in relation to the product to be distinguished

The marks that by general use have been incorporated into the public domain.

Likewise, those that offer similarity to previously registered trademarks may not be used as trademarks, leading to confusion. The simple variations of letters or details, retaining the similarity of the whole, are included in this prohibition.

Registration of special marks: the right to register special marks to trade unions and trade associations is recognized, for the benefit of its adherents, who must use them together with the individual brand itself.

Term of protection of the trademark registration: the term established for the protection of trademarks is ten years, which are counted from the date of granting the trademark, in addition the owner of the trademark can renew the registration of the trademark indefinite way for the period of ten years in order to continue enjoying the respective legal rights.

Extinction of the brand:

Application of the interested part

When the term of law has expired without having undergone the renewal

When it is declared by the competent authority that a trademark is not registered

Where the mark contains false designations in relation to the nature of the article, the place or country in which it has been manufactured or expanded and to medals, diplomas, rewards, honorary distinctions awarded at exhibitions or competitions.

Transfer of the mark: the ownership of the mark can be transferred to the heirs and can also be transferred by contract or provision of last will. In order for this transfer to be valid and may have effects against third parties, you must register with the Industrial Property Office (SENAPI).

Application of the mark: According to article 37 of the present law the mark can be consigned to specific categories11.

[11] See appendix 1: Application of the mark to specific categories.

In this section it is necessary to clarify that the marks in Bolivia are established in the specific categories, additionality to these categories we uses the NIZA classification. According to WIPO, NIZA is a classification of goods and services for the registration of trademarks and service marks.

In Bolivia, the use of the NIZA classification of products and services for the registration of trademarks entered into force on May 10, 1985 through Supreme Decree No. 20791.

Regulation of internal procedure of industrial property and enforcement of the national intellectual property service (SENAPI).

This regulation establishes the procedure for opposing the trade mark, this means that a third party is allowed to present arguments against registration of a trade mark application, due to the existence of previous rights or reasons based on absolute grounds. This procedure allows the proprietor of a mark to oppose a mark with the same characteristics.

Code of Bolivian Trade

The Bolivian Trade Code of February 25, 1977, establishes in its second book a specific section for trademarks, specifically this is in the fifth chapter dealing with the mercantile company and its elements. This code contained the following:

Right to use: The right to exclusive use of a trademark or distinctive sign, is acquired prior to compliance with the requirements indicated by legal provisions on the subject and its registration in the corresponding register.

Unregistered trademarks: The use of a trademark not legally registered does not grant a right over it.

Disuse of trademarks: The unused trademark may be canceled at the request of any merchant with self-interest, provided that it has been unused for more than five uninterrupted years.

Distinctive signs: Any material medium, sign, emblem, drawing or name that by its special characters distinguish a product or merchandise from the like of its kind or species, may be used as a trademark, provided that they comply with the pertinent legal requirements. With respect to the legal requirements, these will be explained later.

Transmission: The owner of a trademark may authorize the use of it to third parties, but these cannot, in turn, assign them again to any title, unless otherwise agreed. This section is complementary to the 1918 law, since it establishes that the mark can be transmitted to the heirs and at the same time transferred by contract or provision of last will; In the commercial code is complemented

Transmission: The owner of a trademark may authorize the use of it to third parties, but these cannot, in turn, assign them again to any title, unless otherwise agreed. This section is complementary to the 1918 law, since it establishes that the mark can be transmitted to the heirs and at the same time transferred by contract or provision of last will; In the commercial code this provision is supplemented by prohibiting the transfer to a third party of a mark that was obtained by

any of the forms of transmission, unless there is an agreement to the contrary.

Misuse or imitation: The owner of a trademark can denounce the improper use or imitation of it and request the prohibition of its use, as well as claim compensation for damages, without prejudice to the corresponding criminal action.

**National Intellectual Property Service (SENAPI)**

In Bolivia, the entity in charge of trademark registration is the National Intellectual Property Service (SENAPI), this is a decentralized public institution that depends on the Ministry of Productive Development and Plural Economics, with competence of national scope, has autonomy of administrative, legal management and technical; with the mission of administering in a decentralized and integral manner the intellectual property regime in all its components, by strictly observing the legal regimes of Intellectual Property, monitoring its compliance and effective protection of exclusive rights Industrial property, copyright and related rights, constituting itself in the national office competent with respect to the international treaties and regional agreements subscribed and adhered by the country, as well as of the common norms and regimes that in the matter of Intellectual Property Have been adopted within the framework of the Andean integration process.

This institution was created on september 16, 1997 in the framework of law 1788, as a decentralized body, in charge of administering the Intellectual Property regime in Bolivia, its organization and functions are established by mandate of DS25159 of September 4 1998 which is superseded by DS27938 of 20 December 2004 and in turn modified in part by DS28152 of 17 May 2005.

**Brand registration process**

The people who can register a brand are micro, small and large enterprises of Bolivia, associations of producers, manufacturers and providers of legally established services; these people should go to the website (http://www.senapi.gob.bo) to obtain the registration forms and later to the institution.

To carry out the registration of trademark must follow the following procedure:

Background search: this implies that the person requesting the registration of a trademark must first make sure that the mark that wants to register does not exist, for this the interested person must submit:

Letter requesting background check

Distinctive sign background search form

Proof of bank deposit Bank Union account (Account name: SENAPI, Account number: 1-4668220).

Application for registration of distinctive signs and trademarks: Having searched the background and not having similar marks the interested person must submit the following documentation:

Form of Distinctive Signs PI-100 which is filled online via internet, once the data has been saved it must be printed from the first sheet three copies, from pages three to six a single copy is printed on the front and back. In case the trademark to be registered has a figurative sign or logo, the logo image must be attached in the following format: 4x4 cm size image, JPG file type and RGB format, to be printed together with the color form.

Powers necessary, if one person is a photocopy of I. D. (In case of representation powers necessary in original or legalized copy.)

If it is the case Certificate of Priority in the country of origin.

Payment to the fiscal account of SENAPI BANCO UNION CTA. 1-4668220

Payment to the account of the OFFICIAL GAZETTE OF BOLIVIA BANK UNION CTA. 1-293633.

Proof of payment of original fees and photocopy

Letter or memorial

All documentation must be presented in a Yellow Folder, with the label of the mark to be registered, International class and name of the applicant in the same order and properly foliated.

Having submitted this documentation, the interested party must wait 6 to 8 months for SENAPI's response.

# Chapter 6: Conclusions

## 6.1 Introduction

History recalls a common heritage left from ancient Western civilizations - Greece and Rome, for example. The roots of such civilisations can be seen in many existing countries, the Netherlands and Bolivia being two of them. However, this common legacy concerning the earliest and most primitive vestiges of IP doesn't portray any defining or characteristic features. The first reason for this is because of the historical evolution of the conceptual framework which has followed its own course until today's current state. This legacy, a common root among several countries, doesn't depict a resemblance, nor a difference worthy of interest. Rather, it presents a unifying theme to promote the comparison of the evolution in both countries.

From a continental perspective, Europe began IP development (at least in an early form) in the 15th century or more specifically, in 1498 which happens to be only six years after the discovery of America. By the 18th century, European countries grew to a conceptualization and regulation of IP more akin to that of the present today. During the same period, South America was still a Colony and it would continue to be one until the 19th century when, in the city of Chuquisaca (Bolivia), the first liberty cry to begin the independence processes from the Spanish crown in South America would be heard.

Bolivia got its independence in 1825, a bit more than fifty years before the signing of the Paris Convention, an international agreement which still today shapes Bolivian IP regulation.

There is indeed a great gap between the development achieved by the two countries in question which, to a certain extent, can be explained by the continental historic background of each. Whilst Bolivia was still a dependant part of the Spanish colony, the Netherlands was already gathering knowledge and modelling a more evolved conceptualization and regulation of IP. Later, when countries of South America reached their freedom, Bolivia among them, naturally they looked to find a role model in the Western nations, the gathered knowledge of which became the foundation used to develop a regulation system.

Thereby, regarding some similarities about industrial property, it becomes apparent how both countries, Bolivia and the Netherlands, used a board of experts (a committee in the case of the Netherlands and a university expert in the case of Bolivia, in the early stages). Likewise, both countries shaped their regulation based on territoriality. Regarding copyright, both countries started focusing the attention of their regulation over the printers. However, due to different reasons, the Netherlands was safeguarding interest and rights of printers. Bolivia, on the other hand, was trying to preserve domestic order from subversive publications. Notwithstanding the above, both countries ended up focusing on protecting authors' rights.

Over the course of the following years, both countries took priority directives that shaped their IP regulation to their current form. Those directives were taken and can only be understood in the frame of larger historical processes and contexts. Today's IP in the Netherlands can only by explained through the understanding of the European Union. Therefore, regulation is focused on the scope of improving integration through a unified and simplified European system. Bolivia on the other hand, not having part in any regional integration projects as strong or steady as the EU, has a lot of room to create its own IP protection system in the margin between its own needs and the requirements of community law. This also gives the opportunity for Bolivian IP to reinstate upon itself forgotten ancestral knowledge and traditions that need to be better preserved on the behalf of nationals through IP protection laws.

## 6.2 Copyright

About copyright, it must be said that there is an international legal framework that works as a base for all countries that signed the proper international instruments. In the cases of Bolivia and Netherlands, the common instrument is the Berne Convention. This document has established rules followed by most countries in the world; even the later international instruments have been built taking and developing the Berne Convention's rules, like CAN's Decision 351 about copyright, for example. Therefore, by analyzing Dutch and Bolivian law, many similarities can be found.

The most important match is the origin of copyright protection. As mentioned before, there are no formal prerequisites in order to get it: by creating a work or art allowed to be protected, it gets the complete legal protection. This is established in both legal frames of the Berne Convention. Registering any work implies a reinforcement of the protection in case of need of proof; it stands as an effective way to provide evidence of the existence of the right. The same relation is identified when considering the two parts of copyright: moral rights and exploitation rights, even though there are some slight differences between laws.

The duration of the protection given by the Dutch law is something to be mentioned, because it is extended up to 70 years instead of the 50 established by Berne Convention. This disposition demonstrates the possibility of each country to enhance author rights.

In case of Bolivian law, moral right is perpetual, including the opposition to any modification of the work. Both law systems improve the right basis given by the mentioned international instrument.

It must also be said that Dutch copyright legal frame is more extensive than the Bolivian one. As an example, copyright infringement has a complete procedure in Netherlands, while Bolivian law only mentions legal conciliation procedures that will solve the conflict, besides the ordinary process that has no special features compared to any civil process. Dutch law includes what can be asked during litigation, those who are capable of taking action, steps to claim damages and possible remedies for the conflict. The same is observed when identifying the works that are protected by copyright, the elements of moral right, who is considered as author in different scenarios and what reproduction or communication means, related to moral right.

## 6.3 International Copyright

Inholland and Universidad Catolica have approchead International Copyright from different angles. Inholland's work centres on the historical and political points of view of the attempts to harmonise the International Copyright legislation, emphasizing European and Dutch legislation. For its part, Universidad Católica's work is divided in two. The first part deals with the relation between Human Rights and the Intellectual Property system and the second is a comparison between international (Berne Convention and Trips Agreements), regional (Andean Community Decision 351) and local (Bolivian Law 1322) copyright legislation in order to highlight their differences.

However, through the comparison of these two works, some interesting conclusions can be reached. In order to develop this part of the work, the findings will be divided into three sections. The first deals with international legislation, the second with the regional legislation and the third will be a brief comparation between the Dutch and Bolivian system.

**International legislation**

Both states have ratified and are part of the Berne Convention, which is the main international copyright reference. However, the Netherlands is also part of other international agreements. The Bolivian legislation is in perfect harmony with the Berne Convention as well as

the Dutch legislation. However, the Dutch legislation is more directly linked with another international treaty: The World Copyright Treaty (WTC) of 1996. The WTC served as the basis for the Directive on Copyright in the Information Society of 1996, which is the most important period of copyright in the European Union. This directive reflects technological developments in copyright law in Europe and a commute to the law of all EU countries in the two WIPO treaties of 1996. Bolivia has not ratified this agreement and does not have in its regional legislation (Decree 351) or local legislation (Law 1322) aspects that are specific to new technological advances. However, there are opinions that affirm that existing instruments are adaptable to these new technologies. The Netherlands is also a member state of other international treaties: The Beijing Treaty (2012), which refers to the protection of audio-visual performances and the Marrakesh Treaty (2013), which facilitates access to published works for persons who are blind, visually impaired or print disabled. The regulations of the Marrakesh Treaty and the Beijing Treaty have no parallel in Bolivian regional or local legislation.

**Regional legislation**

The experiences of legislative harmonisation in the Netherlands and Bolivia in a regional context have been clearly different. The most important attempt to harmonise regional legislation in South America occurred within the framework of the Andean Community of Nations. Decision 351 regulates copyright and related rights for member States

of the Andean Community. This provision gives a detailed general framework but at the same time it allows a broad margin to member states to develop related internal legislation. Decision 351 and Bolivian Law 1322 were developed at the same time. This results in a constant dialogue between these two projects, resulting in two different provisions - the regional and the local, which coexist in perfect harmony. Decision 351 is the only Andean Community decision on copyright. In contrast, the European Community process has ten different copyright-related directives covering different subjects including aspects of copyright and related rights in the information society, aspects of rental right and lending right and on certain rights related to copyright in the field of intellectual property, aspects of coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, aspects of legal protection of databases and aspects on certain permitted uses of orphan works. However, this difference in legislative production doesn't mean a broader protection. Directives and Decision 351 try to regulate copyright in many of its aspects, the main difference being that Decision 351 doesn't reflect on technological developments in the information society but, as was said before, there are opinions that affirm that Decision 351 can be adaptable to these recent developments.

Andean Community decisions operate differently compared to directives of the European Union. Both directives and decisions allow a margin of development to the member states of the community

processes. But unlike decisions, directives are not of direct application by rule. In order for the directives to be in force, the Member States of the European Union must pass domestic legislation to give effect to the terms of the Directive within a time frame set in the directive, which is usually two years. But directives can also be in legal force even when not yet enacted in national legislation. There is also another difference in the hierarchy that they have. Decision 351 has binding effects and prevails over the domestic laws of these countries, referring exceptionally to domestic legislation to complement their development. In Bolivia, Andean Community decisions have constitutional hierarchy and sometimes they can even be applied above the national constitution.

Some other differences between Dutch and Bolivian system follow below.

Some other differences can be pointed out between the Bolivian and Dutch system through comparison of the works. Here are two examples:

In Bolivia, the subject matter of protection are literary and artistic works that may be reproduced or disclosed by any known or future means without being limited in the material support in which they can be fixed (Decisión 531, 1993, art, 4; Ley 1322, 1992, art. 6). In the Netherlands, these requirements are the same but there is a different interpretation of its meaning. For example, the copyright is only granted to creative, original works. The creator of the work must have used some creativity or a certain creative decision must have been

made. “Originality” is in Dutch practice a catch-all term referring to the fact that a work must have an “own, individual character” and “bear the personal stamp of the author”.

An important difference exists in the scope of protection. Decision 351 grants a broader scope of protection than EU directives, the Dutch Copyright Act or any other international treaty such as the Berne Convention or the Trips Agreements. Decision 351 grants protection to all authors even if the country of origin of the creations does not protect the nationals of the Andean Community States (Cerda, 2011, p. 46). And protection is even broader because it protects the rights of authors even when they are not protected in their country of origin (Cerda, 2011, p. 47).

## 6.4 Music Copyright

Bolivia and the Netherlands, as countries who seek the legal security of their citizens, share their goals of protection of musical intellectual property of their artists and composers, because it is difficult for an artist/composer to collect and control their intellectual property, so each nation has recognized Collective Managements or Collecting Agencies that are responsible for both the usage authorisation of work and the money collection and distribution.

Both countries have recognized one CMO as the most important for the musical intellectual property: the Netherlands has recognized Buma/Stemra, and Bolivia has recognized SOBODAYCOM. The important thing about these CMOs is that they have both generated a monopoly over musical protection, because, if any artist would like to protect their musical creation, they they must become members of these CMOs. These entities have collected the most amount of music from their respective country, and generated the tariffs every person has to pay in order to use other people's musical property.

In the Netherlands, Buma/Stemra is the combination of two different foundations, specialized in different areas – one in charge of music publishing and the other of music reproduction. The two seek to offer a better service to every artist regarding their needs. Meanwhile, in Bolivia, SOBODAYCOM is a CMO that was founded by the same artists and composers in order to recollect and distribute the

corresponding royalties, so Bolivian artists/composers can stop depending on CMOs from other countries.

Both CMO's give general benefits to their members when they sign up, such as: protection of rights and interests of their members, handling of the public reproduction and execution of any musical work protected by them and collecting the corresponding royalties earned by the musician and distribution of this to every artist or composer whose work has been used.

Both CMO's save the musical works by a fingerprint system, which enables authorities to recognise when are they being played anywhere in the world at any time.

Unfortunately, members of both CMO's have been complaining about these entities, arguing they haven't received the remuneration they deserved. These entitites claim that this is due to failures of the fingerprint system. This it is something they need to improve in the future in order to not lose credibility.

Regarding the prosecution of the unauthorised use of music, laws have distinct rules on prison sentences. The Netherlands usually sentences perpetrators with a four-year sentence for unauthorized use of intellectual property. Bolivia gives a prison sentence of two and a half years, plus a fee. The Netherlands is a little stricter in terms of enforcement, but that doesn't mean any of these gives less importance to the use of intellectual property.

The Dutch law has an article that covers when music can be reproduced without authorization by the CMO. There's no article about

the permission of unauthorized music reproduction, but one can deduce that if nothing is stated on SOBODAYCOM's tariff chart, then reproduction or execution is allowed.

The Dutch law also establishes the musical reproduction on airplanes, boats and cars, and obliges the person in question to do as many modifications as possible until no rules are infringed. Bolivian law and SOBODAYCOM does not express an action about this, which makes it very difficult to control. Therefore, it is important to develop a system that can control these aspects.

Burma/Stemra has developed a Plagiarism Committee as an arbitration tool which covers disputes between composers and artists - it helps to avoid the necessity for the parties to go through an ordinary process that can take time and money. SOBODAYCOM hasn't developed a plagiarism committee yet, so in case this kind of dispute happens between musicians, the only way to solve it will be by an ordinary process or a conciliatory process developed by the Public Law.

SOBODAYCOM has been facing problems trying to collect the corresponding royalties in Bolivia – in this country, a lot of parties and events happen where music is played. This means that the legal power doesn't apply there, and artists/composers doesn't receive their royalties. It's important that a more secure system is developed over there, because if the money doesn't get collected it would mean SOBODAYCOM is not doing its job right. It seems the Netherlands has

no problem regarding this because of its position of fifth place in the ranking of countries with a strong legal system.

Both systems handle the ordinary process in a different way. Bolivian Law has established a conciliatory process and an arbitration process relevant to certain parts of the acussations so the parties can avoid going through an ordinary process and possibly save years for a process that maybe doesn't necessitate the kind of time, effort and money that would be invested. But, if these substitution processes do not go well, the ordinary process will always be available. In the Netherlands, the unauthorized music reproduction crimes go before a judge and he will act as a conciliator and try to avoid the process unless the process is necessary. Besides that, both systems let the artist who was affected go for a monetary remuneration that has been created by this unauthorized use. Therefore, this property is defended both by the civil and the criminal law.

The Netherlands manages a better system of music promotion by their CMO, because they finance, organise and subsidise different events that help promote their artists, domestically and internationally, helping the musicians to increase their sales. In Bolivia, SOBODAYCOM acts more as a collecting and distributing CMO, which doesn't happen for Bolivian artists, so it is important to use funds to promote artists not only in Bolivia but also in other countries, because Bolivian artists need more promotion to get known by other people, and as this CMO is made by musicians, this is an aspect they should consider.

The Netherlands has also a system for piracy protection, something Bolivia has never been able to combat, mostly because the Bolivian culture has accepted piracy as something “traditional”. However, this is not exclusive to music – it also concerns movies, literature and more. Bolivia as a country needs to apply this as soon as it can, because it affects not only to the artists but it also affects the record companies (Bolivia has almost none), record stores and their own citizens (mostly because it promotes an illegal business that doesn’t pay taxes or stimulate the economy), which can’t be accepted.

## 6.5 Trademark Protection

The conclusions on the subject of trademarks in the Netherlands and Bolivia are presented below:

Institution in charge of trademark registration

The economic, political, legal and social integration of the European Union allows the registration of marks that can be carried out in institutions that validate the registration of marks for that region. The Netherlands belongs to the economic policy union BENELUX which is made up of Belgium, the Netherlands and Luxembourg. This union allows the registration of marks between these countries.

Registration of marks in the Netherlands also depends on the type of mark. For the BENELUX brand, registration is made before the mark in the Benelux Office of Intellectual Property (BOIP). For the Community trademark, registration of this mark is valid throughout Europe and can be registered at the European Intellectual Property Office (EUIPO). Finally, for the International trademark, registration is possible before the World Intellectual Property Organization, as long as it is affiliated with the Madrid Protocol.

In Bolivia, the registration of trademarks is done only before the National Intellectual Property Service (SENAPI).

It can be concluded from this section that the political, economic and legal integration existing in Europe allows effective protection of the marks, since it allows a greater control of the registry of marks and

avoids the duplications of marks, which protects these marks the consumer of products or services.

**Brand protection time**

The trademark protection time, both in the Netherlands and Bolivia, is 10 years and both with the possibility of indefinite renewal.

**Legislation**

The protection of trademarks in Bolivian legislation is found in the Bolivian Constitution, specifically the registration and protection of intellectual property; in the Netherlands, the right to property is guaranteed in its constitution.

The current legislation on the protection of trademarks in Bolivia is that of the Trademark Law of 15 January 1918 and in the Netherlands the Trademark Law of BENELUX of 1971.

With regard to legislation, it can be concluded that the Dutch Constitution does not recognize the registration or protection of intellectual property, but only the right of property. The recognition, registration and protection of intellectual property in the supreme norm of a country is fundamental to ensure the intellectual creations of individuals, which protects the consumers as well.

Likewise, establishing a legal regulation for three countries for the registration of trademarks allows the process to be sped up and effective protection of the trademark is ensured. This aspect does not occur in Bolivia, however. If Latin American Integration is absent, it

must be ensured that intellectual property is guaranteed throughout the region.

**Trademark**

In order to register trademarks in the Netherlands before applying for registration of the mark, the applicant can verify in a database if there is a trademark with similar characteristics. The databases can be of the union BENELUX, the base European trademark data, international trademark systems and TMView (database of EU Member States, EUIPO and WIPO). In the case of Bolivia, the person requesting the registration of a trademark must first present a letter requesting the search for a background, a search form and make the corresponding payment.

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# Appendixes

## APPENDIX C1

### Limitations and exceptions given by article 22 of Decisión 351

*(a)* quote published works in another work, provided that the source and the name of the author are given, and on condition that the quotations are made in accordance with fair practice and to the extent justified by the purpose;

*(b)* reproduce by reprographic means for teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works, on condition that such use is made in accordance with fair practice, that it does not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby;

*(c)* reproduce a work in single copies on behalf of a library or for archives whose activities are not conducted for any direct or indirect profit-making purposes, provided that the original forms part of the permanent stocks of the said library or archives and the reproduction is made for the following purposes:

(i) to preserve the original and replace it in the event of loss, destruction or irreparable damage;

(ii) to replace, in the permanent stocks of another library or archives, of an original that has been lost, destroyed or irreparably damaged;

*(d)* reproduce a work for the purposes of judicial or administrative proceedings, to the extent justified by the purpose;

*(e)* reproduce and distribute through the press, or transmit by broadcasting or public cable distribution, articles on topical subjects and commentaries on economic, political or religious subjects published in newspapers or magazines, or broadcast works of the same

nature, insofar as reproduction, broadcasting or distribution to the public have not been expressly reserved;

*(f)* reproduce and make accessible to the public, in connection with the reporting of current events by means of photography, cinematography, broadcasting or cable distribution to the public, works seen or heard in the course of such events, to the extent justified by the informatory purpose;

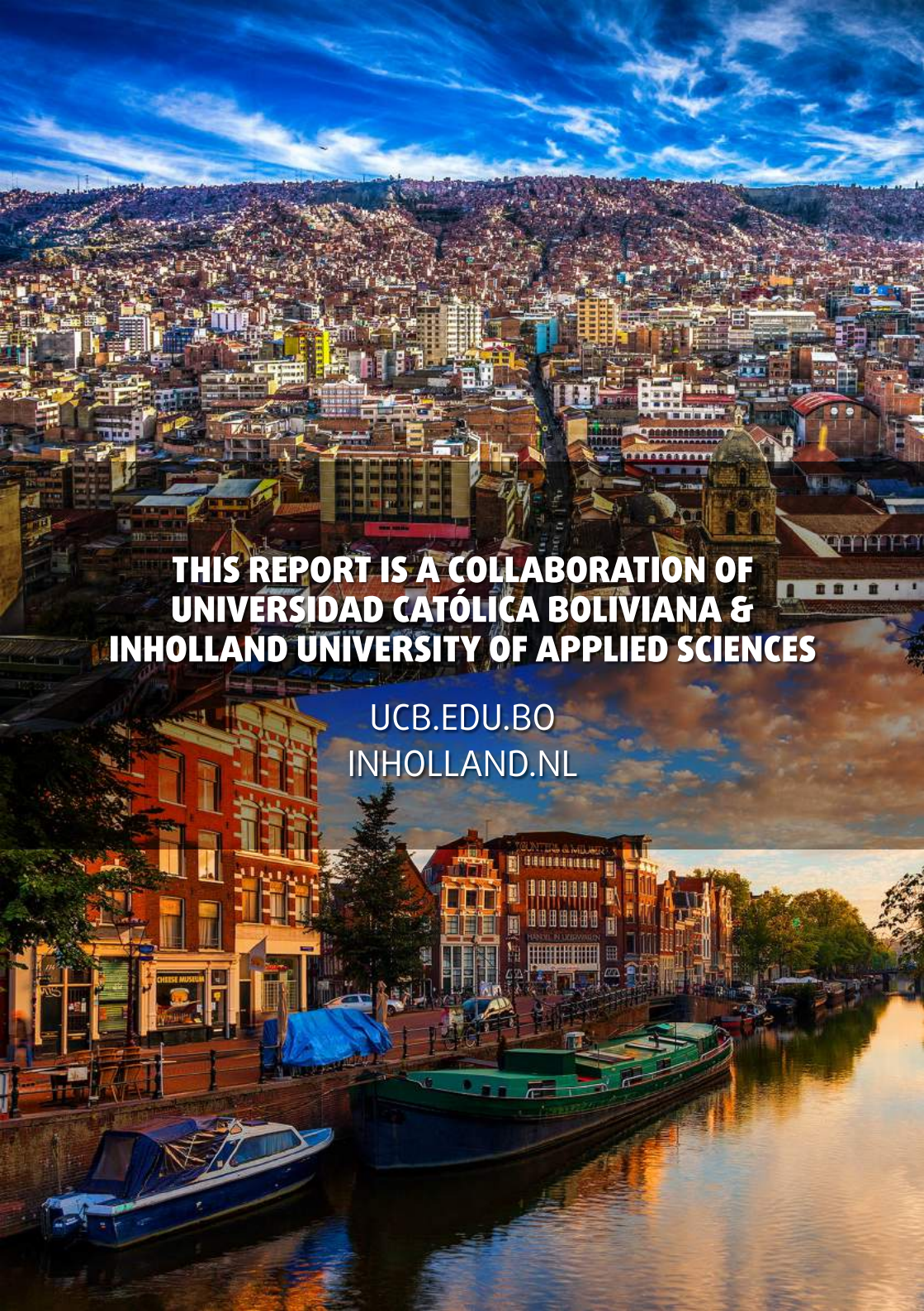
*(g)* reproduce in the press or by broadcasting or transmission to the public political speeches and also dissertations, addresses, sermons, speeches delivered in the course of judicial proceedings or other works of similar character presented in public, for the purpose of reporting current events, to the extent justified by the purpose and subject to the right of the authors to publish collections of such works;

*(h)* undertake the reproduction, transmission by broadcasting or cable distribution to the public of the image of an architectural work, work of fine art, photographic work or work of applied art located permanently in a place open to the public;

*(i)* in the case of broadcasting organizations, make ephemeral recordings using their own facilities and for use in their own broadcasts of a work in respect of which they have the right of broadcasting; the broadcasting organization shall be obliged to destroy the recording within the time or under the circumstances provided for in national legislation;

*(j)* effect the performance or execution of a work in the course of the activities of an educational institution, by the staff and students of the said institution, provided that no charge is made for admission and no direct or indirect profit-making purpose is pursued, and that the audience consists solely of the staff and students of the institution or relations or guardians of pupils and other persons directly associated with the activities of the institution;

*(k)* in the case of a broadcasting organization, make a transmission or retransmission of a work originally broadcast by it, provided that the public transmission or retransmission occurs at the same time as the original broadcast and the work is broadcast or transmitted publicly without any alteration.



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