OWNERSHIP OF COPYRIGHT IN WORKS CREATED IN EMPLOYMENT RELATIONSHIPS: COMPARATIVE STUDY OF THE LAWS OF COLOMBIA, GERMANY AND THE UNITED STATES OF AMERICA

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INTRODUCTION

Great quantities of copyrighted works around the world are produced in the context of labor law Relationships. The ownership of these works has been regulated in different ways by the national laws of each country, and the only attempt of legal harmonization has been found in the European Community regarding computer programs created in the course of employment. The sovereignty and territoriality principles by with each country can enact its own laws in its territory to rule on the ownership question has been applied by countries. As an example, Germany and United States have regulated the subject in their respective national copyright laws. Nonetheless, there are similarities in the ways that these two countries regulate the ownership of economic rights. In other countries, such as Colombia, lawmakers have established a legal rule regarding the ownership of moral rights in copyrighted works, but have not ruled on the important issue of the economic rights in such works. This ambiguity has caused legal uncertainty, raising the question as to whether these types of rights belong to employees or employers.

This paper will make a comparative study of the laws of Colombia, Germany and the United States of America, taking into account the current issues that can arise in works created in employment relationships and the ensuing consequences. The structure of the comparison will be focused on the following two central points of analysis.

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First, this thesis will concentrate on the differences in the laws and case law of the three countries with regard to the ownership of the copyright in employment relationships. In order to determine how each country addresses the ownership question, other aspects such as authorship and the differences between the author's right system and the Anglo American Copyright system (i.e., the treatment of moral rights) will be analyzed as well. Likewise, the diverging theories underlying the author's rights systems in these countries, with Colombia being a dualistic system and Germany being a monistic system, and the effect of the silence of the parties to a contract with respect to the point of ownership, are both issues that must be explored to render a thorough understanding of the subject.

Secondly, not only the differences, but also the similarities between each system will be explored. In this regard, the paper will analyze whether, in works created in employment relationships, there is a tendency of the monistic and dualistic author's right systems to approach to the Anglo American Copyright System. In other words, any similarities between the laws and practices of Colombia and Germany and the American "work made for hire" doctrine will be addressed. Most important, if the philosophies by which the two main copyright systems were created are currently applicable to works created in employment relationships. This issue will address whether the interest in protecting the human being's original expression and thus the interests of the employed authors prevails over the interest in protecting the utilitarian character of the works.

Furthermore, the study will focus on the topic of ownership as it relates to specific kinds of works, such as computer programs regulated in the European Community Directive 91/250. On this point for example, the same approach will be followed, analyzing whether the German implementation of this directive is creating a tendency for the author's right system to become similar to the American copyright system.

Despite the fact that the focus of the paper is on copyright provisions, some aspects of labor law, such as scope of employment and employment relationships, will be analyzed in order to have a integral understanding of the topic. Since labor law provisions and copyright provisions are different fields of law, the difficulties that may arise in knowing which area of law to apply will be examined.

Finally, issues concerning to works created by independent contractors in Colombia, Germany, and the United States will be analyzed, in particular the same copyright provisions regarding the ownership of the works that can apply to employees and independent contractors. In a similar context, the treatment of works created by public servants or private employees may reveal similarities and differences to the treatment of public employees in these three countries.

I. WHY WORKS CREATED IN EMPLOYMENT RELATIONSHIPS?

When the topic under study has been analyzed in the legal literature, the usual terms by which the authors refer to it are: works made for hire,[1] works created by employees,[2] or works created in employment relationships.[3] This diversity of terms creates a difficulty to analyze the subject, as the significance of each expression may bring different results on the ownership point. For instance, the first option, work made for hire, is a popular term for common law countries in which the employer is considered the author and owner of the copyright. The problem using this term is that is of no use in continental tradition countries where in almost all the situations the authorship of the copyright vest in the employee, as well as the ownership of the moral rights. Regarding the second option, works created by employees, despite being common in the continental tradition countries, in which usually the authorship and ownership vest in the employee, one may find difficulty in establishing if the work is always created by an employee. In some cases, the original expression of the copyrighted work may come from the employer and the employee's freedom to produce the work can be limited by the employer's orders. For instance, an employer that is dictating a literary work to his secretary cannot be prevented from being the original author of the work, despite the fact the secretary fixed the expression of the copyrighted work. Thus, one must carefully observe the term *creation*, because in the context of an employment relationship, it can cause misleading interpretations such as, for example, that every function of an employee constitutes creation. For these reasons, it is more impartial to use the concept *works created in employment relationships*, since it addresses not only the employers' interests, but also the employees'.

II. WHAT IS AN EMPLOYMENT RELATIONSHIP?

Before entering into the analysis of the Copyright law, it is necessary to understand the concept of *employment relationships.*

The International Labor Organization (ILO) has identified three common elements in labor law contracts around the world.[4] Those elements are not always defined by the law or case law of each country. However, not only the ILO, but also the labor law doctrine in all the countries of the world, have established a

1. GOLDSTEIN, PAUL: International Intellectual property law. Cases and Materilas - New York : Foundation. 2D. 2008, at 214.

2. CHRISTINE KIRCHBERGER, ULRIKA NYH, SILVINA PENALOZA, HANNA SEPANEN and KERLI TULTS. Ownership of the Copyright and the Patent Right in Works Created by Employees. Finland, Sweden, Austria, UK, Estonia, and Argentina. Sanna Wolk (ed.) 2002, at 1.

3. Yu Du and Matthew Murphy. MMLC Group. *Intellectual Property in the Employer and Employee Relationship in China*. at: *http://www.hg.org/article.asp?id=5341.*

4. OIT. Contratos de Trabajo, at http://www.ilo.org/public/spanish/dialogue/themes/ce.htm#ci.

consensus on the existence of three elements.[5] The first element, called the personal element, means that only a natural person can be considered an employee.[6] Second is the subordination element by which the employer is entitled to give orders to the employees; this element involves a hierarchical aspect. The third and final element is the salary that employers pay to their employees as a retribution for their work.[7] Colombia is one of the countries by which said elements can be clearly found. Article 22 of the labor law code defines labor law contract as: "one in which a natural person promises to give his services to another legal or natural person, under continuous subordination (i.e., receiving orders from the employer), with remuneration in exchange for the services".[8]

When these three elements are present, there is a presumption of existence of a labor law contract. [9] In Colombia the main distinction of a labor law contract and other contracts is the so called subordination. In the course of services provided under civil law contracts, there are orders given to the person providing the services, but the autonomy that the provider of services has is broader than those in an employment contract.[10]

The term *employment* is not only linked to works created under a labor law contract. In most jurisdictions the term *employment* is a generic term by which not only labor contracts are included, but also contracts by which a person agrees to provide services to another are included.[11] Despite the fact that the focus of this study is the employment relationships in the narrow sense, meaning, labor law contracts, one cannot ignore other kinds of agreements that are included within the generic concept of employment. For instance, works created by independent contractors in the United States or works created under contracts to provide services in Colombia, are mandatory examples that show the broad understanding of the term *employment.* Likewise, these other kinds of relationships can provide answers in some cases to ownership issues in the labor law contract.[12] Thus, the following analysis will not only review labor law contracts, but also non labor law

5. Efren Cordova, Naturaleza y Elementos del Contrato de Trabajo. México. unam, Série B, Estudios Doctrinales Núm 188. 1997. Chapter 16, at 302.

6. Likewise, the employee has to be free on his decision to work, there cannot be any form of forced labor. On this point see id, at 306.

7. Cordova, supra note 5 at 306.

8. Original text of Article 22 reads: "Art. 22. – Definición. 1. Contrato de trabajo es aquél por el cual una persona natural se obliga a prestar un servicio personal a otra persona natural o jurídica, bajo la continuada dependencia o subordinación de la segunda y mediante remuneración (Código sustantivo del trabajo*)".* Text translated by the author.

9. The theory by which the presence of the three said elements form a labor law contract was born in Germany in the first quarter of the previous century, soon after the first labor laws were enacted. For further information See El derecho del Trabajo en España. Ideologías Jurídicas y Contrato de Trabajo. Madrid, Instituto de Estudios Sociales, 1981. at 127, 128, 129 & 130.

10. For further information see supra note 5, at 309.

11. Id, at 312.

12. For instance, as it will be mentioned in Chapter VII, in Colombia, to solve the legal gap on the ownership point, there are some theories who by way of analogy translate the ownership rules of the contract to provide services to the labor law contract.

relationships in each country by which employment and works are created.

III. LABOR OR IP LAWS?

One important question for the analysis is whether the ownership of the copyright in works created in *employment relationships* should be regulated by labor or intellectual property laws. As the present topic combines both fields of law, intellectual property provisions can be found in labor law statutes and vice versa. One may ask if it is better if only one field of law rules on the topic or if it is better that both fields can rule some part of the topic.

As we will see later, there are some issues that have been exclusively ruled by the labor or agency law. For instance, the definitions of an employee, a labor law relationship or the elements of a labor law relationship are usually found within employment statutes.

Regarding the central topic of study, some countries regulated the topic under a labor law statue. For example, Spain regulated the ownership of the copyright of the works created by employees in a labor law provision, the employees' statute.[13] However, after some years, the Spanish lawmakers followed the global trend of regulating IP topics exclusively in IP laws. Thus, the Spanish Intellectual Property Law derogated previous labor law rules and provided an answer to the ownership of the copyright in employment relationships.[14] As it will be shown in the next Chapters, Germany and the United States have regulated the ownership point on Intellectual Property laws (Copyright acts) following the mentioned global trend. In the case of Colombia, as there is not a specific answer to the economic ownership point, one cannot have certainty on whether the Author's Right law contains a provision that rules the topic.

IV. GERMANY. LEGAL RULES AND ANALYSIS

A. APPLICABLE LAW

Germany has many different laws regarding the Copyrights. However, for the purpose of this study, the analysis will concentrate mostly in the Copyright and Related Rights Act of 1965. Although this Act has been modified by several amendments, the most pertinent for analysis is the Amendment of June 9, 1993, by which the E.C. Directive on the Legal Protection of Computer Programs was implemented.

Regarding Labor Law provisions, Germany does not have a codified Labor Law Act. Instead, there are different legal sources such as the Federal Legislation,

13. A. Martin Valverde, F. Rodríguez- Sañudo y J. García Murcia. Derecho del Trabajo. Madrid. Ed. Tecnos, 14 Edición, 2005, at 642.
14. Id, at 642.

collective agreements, work agreements and case law.[15] Likewise, the Civil Code is another important provision as it defines employment relationship[16] in section 622 with the trilogy of elements previously analyzed.

Although the Civil Code sets forth the elements to define employment relationships, there is no definition of employee in Germany. However, German Courts have said that employee is a natural person that receives instructions on the way to do work[17]. Also, they have said that despite the fact that a person can be greatly autonomous in doing work, a clear indicia of classifying someone as an employee is the act of fulfilling a schedule ordered by the employer.[18]

b. the german continental law tradition

The philosophy of the classical author's right system created under the continental legal models is based on the idea that the work is always of property of the author. Consequently, the author can only transfer or license his economic rights, and not his moral rights, to third parties.[19] However, this is the Classical notion of the author's right system that is evident in France, representing some clear differences with Germany, where neither the economic and moral rights can be transferred.[20]

German Copyright Law is classified as continental law, as opposed to common law tradition. This enhances many differences among the Copyright system existing in Germany and non-continental countries such as the USA.

The first and the most important effect is that the continental tradition is based on the protection of rights of flesh and blood authors.[21] This means that the main goal of the continental legal family is protecting the rights of natural persons that create copyrighted works. The continental Tradition does not directly protect the legal persons as they are not human minds that produce works. However, despite the differentiation of natural and legal persons, the continental System protects some economic rights of legal persons by the so-called "neighboring rights".[22]

The second effect of the continental legal system in relation to copyright law is strongly related to the first. As the focus of the protection is centered on flesh and blood authors, the law protects not only the economic basis of their lives,

15. National Labor Law Profile: Federal Republic of Germany. Contributed by Liliane Jung. Last update, April 2001. at http://www.ilo.org/public/english/dialogue/ifpdial/info/national/ger.htm

16. Id.

17. Schricker. Urheberrecht Kommentar (2006) 3. Auflage, at 887 section 13.

18. Id. at 887 section 13.

19. Goldstein. supra note 1, at 214.

20. Id. at 214.

21. Adolf Dietz, German Chapter of the book Compilated by Nimmer, Melville. International Copyright Law and Practice. b. volume 2 1997/2000, at 19.

22. Juan Pablo Riveros Lara. Derecho de Autor en Colombia.. Ed Hojas e Ideas, at 38.

but also their intimate moral interests tied up in their works.[23] For this reason, as Dietz says: "The German term Urheberecht, usually translated into English by copyright or copyright law, is better translated by the French term droit d'auteur, meaning "author's right" or author's right law". [24]

Thus, the term *author* is a clue word in the continental system as it is focused merely on the protection of the personal and economic interests of the authors as natural persons.

c. The German Author's rights system and its effect on works created in Employment Relationships

The author's rights system structure was brought into practice in the German Law through Copyright and Neighboring Rights (Urheberrechtsgesetz, UrhG) in Article 11. This Article established that the ownership of the copyright belongs to the creator of the work, demonstrating how important it was for the German lawmaker to protect the traditional concept of author by giving him, in all cases, the ownership of the copyright. When Article 11 states that the "Copyright shall protect the author with respect to the intellectual and personal relationship with his work",[25] the personal aspect characterized in the author's right system is clearly shown. Even when there are matters by which the so-called works made for hire are present, the German law claims for the importance of recognizing the ownership to the natural person that creates the work.[26] As will be seen later in the United States analysis, the work made for hire doctrine allows that a person other than the creator of the work can be considered as the author. Hence, in the United States, despite the fact that in some situations an employer may not participate in the creation of a copyrighted work, he can still be considered as the author and owner of a work created by an employee. An important difference between these two countries lies in the consequences of these differing systems. In Germany, if the parties do not agree otherwise, the economic rights will always be employee's property. By contrast, in the United States, if the parties do not agree otherwise, the copyright will belong to the employer. As one can see, on the same *de facto* situation, the results in these two countries may be the opposite.

For some commentators, like Goldstein, there is no significant difference in the results between common law jurisdictions and civil law jurisdictions. In the words of Goldstein:

23. Dietz, supra note 21, at 19.
24. Id, at 19.
25. German Copyright Act of 1965 Article 11:
"Copyright shall protect the author with respect to his intellectual and personal relationship with his work, and also with respect to utilization of his work". Translation provided by WIPO. Text Available at: http://www.iuscomp.org/gla/statutes/UrhG.htm.
26. Dietz, supra note 21 at 20.

Civil law and most Common law jurisdictions take different roads to essentially the same result in assigning rights to works made in the course of an employment relationship. Common law countries provide that, absent an agreement to the contrary, copyright in works created in the course of employment initially vests in the employer, not the employee.[27]

Goldstein further explains: "Civil law countries generally reverse the common law presumption and provide that copyright in works created in the course of employment vests in the employed author, so that a transfer by the employee is required for the employer to obtain copyright."[28] Thus, in Goldstein's opinion, the difference lies in the way by which each system reaches the result, but not on the result as such, since usually the copyright ownership vest with the employer. We have to distinguish however, that in the author's rights system, what the employee transfers to the employer are not all rights upon the work. Only the economic rights are transferred and the employed author retains the moral or personal rights in the work.

d. two german particularities

Having addressed the generalities of the German Author's Right system, is the turn to focus on two characteristics in the German context of works created in employment relationships.

The first important aspect to point out is that German law treats works created under employment relationships as works created on commission.[29] Thus, a work created by an independent contractor in Germany will have the same copyright ownership as a work created by an employee. The copyright will still vest on the employee or independent contract, if there is no agreement otherwise. By contrast, as will be seen in chapters vi and vii, in the United States and Colombia, there are certain differences regarding the treatment of independent contractors and employees.

Second, the fact that Germany does not recognize initial ownership to employers does not mean that an employer cannot claim the rights of a copyrighted work created by an employee at his service. However, the way by which the employer can enjoy the economic rights is different in comparison to most of the countries with a continental law tradition. On this point, some commentators like Dietz said that this is due to the fact that Germany has the monistic theory of author's right, by which economic and moral rights are indivisible.[30] In words of Dietz:

German law governing copyright transfer is articulated in Subchapter 2 on "Copyright Licenses" within Chapter V of part I of the Copyright Act. The

27. Goldstein, supra note 1, at 214.
28. Id. at 214.
29. Dietz, supra note 21 at 47,48
30. Id, at 51. Not only the German law predicts the indivisibility of these two rights, but the term of both rights are the same, 70 years after the death of the author. By contrast, in others authors right tradition Countries like Colombia and France, the moral rights are perpetual, and the term of the economic rights last with time.

particular thrust of this law can only be understood against the background of the so-called monistic theory of German Copyright. According to this concept, copyright as a whole, that is, author's right, safeguard both the financial and the personal or intellectual interests of an author.[31]

On article 11 of the Copyright Act this monistic approach is applied when the article states: that the *"*Copyright shall protect the author with respect to his intellectual and personal relationship with his work, and also with respect to utilization of his work*"*. In Germany, this rule leads to the conception of the Copyright as a whole, by including in one body the "*personal relationships to the work"* (moral rights) and the "*utilization of his work*" (economic rights). This feature of the German system is another important distinction from the traditional author's right systems, such as France or Belgium. In these two countries, the economic rights are freely alienable and employees can transfer their economic rights to the employer in the employment agreement or otherwise[32].

As was mentioned above, the inalienability of the economic rights does not mean that the employer does not has rights to a work created by an employee. By the so called "*contractual right to use*", German law makes it possible for the employer to exercise the economic rights in the work.[33] The fact that the employer does not receive the ownership of these rights, because there is not a transfer of right, can raise some questions, such as whether the employer has standing to sue when there is a copyright infringement.[34]

The German Copyright Act only permits the transferability of the copyright by inheritance, but the law clearly states that no other means are possible. Article 29 of the Act provides:

"Copyright may be transferred in execution of a testamentary disposition or to coheirs as part of the partition of an estate. *Copyright shall not otherwise be transferable*".

Furthermore, the English translation of Article 31[35] expresses that the author may grant the exploitation right to use to another. For Dietz, this is what the literal translation of the German provision must be, as the English term "license" cannot be used here. In the words of Dietz: "Although used in some English translations, the English term '*license*' does not fully translate the German conception of such contractual transfer. The Copyright Act only speaks of the granting of 'simple or exclusive rights of use'".[36]

31. Id, at 51.
32. Goldstein, supra note 1, at 214.
33. Dietz, supra note 21, at 51.
34. The courts usually have decided if the licensee has the right to sue third parties for infringement. One of the examples by which the court gave the right to sue to a licensee is in one decision of the BGH of June 17 of 1992, (vgl. hierzu BGH GRUR 1992, 697, 698 F- Alf.). Despite the plaintiff in this case was not an employer. General rules of contracts will apply also if the plaintiff were an employer.
35. German Copyright Act. See also supra note 25.
36. Dietz, supra note 21, at 52.

The exclusive right of use is twofold. On the one hand, Article 31 (2) refers to the non-exclusive exploitation right to use. On the other, Article 31 (3) refers to an exclusive right to use. The main difference of both provisions is that in the latter, the exclusive right gives the power to the party to exclude others from use, even to the author. Dietz compares these two provisions to the traditional notions of exclusive and simple licenses. However, he states that in comparison to the German contractual right to use, the contractual terms by which the parties negotiate their interests are in the framework of the copyright contract law[37] located in subsection 2 of the Copyright act. The framework includes different rules oriented to protect authors in the contractual grants.

The first important rule of subsection 2 is the prohibition to grant uses that are not yet known at the time of a grant (Article 31 (4) German Copyright Act).[38] Second, Article 31(5) establishes the principle of "purpose-restricted transfer." This principle states that the author is not to be held to have granted more extensive rights that would be required by the purpose pursued in the grant[39]. Finally, Article 37[40] establishes that in cases of doubt concerning the extent of certain types of transfers, the authors retain specific rights. Usually, when the author grants the right to use, he reserves the rights to make it available to the public and to exploit derivative works. Likewise, when the author grants the right to reproduce, the author reserves the right to fix the work on sound or visual recording [41].

For the purpose this analysis, one has to take into account that these rules also apply to the employer who is the party that would receive the right to use the work created by the employed author. Hence, it is important to stress that, in technical terms, there is no transfer of rights to the employer in Germany and the employer receives a right to use the work. The power of exercise that the employer has will be represented by an exclusive right to use or a simple right to use.

As will be seen later, to constitute a work made for hire for independent contractors in the United States, the law requires a written agreement. Likewise, in the following chapter, we will see that in Colombian law as well, the transfer of economic rights requires a written agreement. By contrast, the German Copyright Act does not provide general formalities for the grant of the exploitation rights.[42] The only exception can be found in Article 40[43] which requires a written agreement for the granting of exploitation rights in future works. Perhaps a possible explanation for the flexibility of the German system is that, as there is not a transfer of right, there is no need for the law to establish a strict formality to protect the interest of the author. Despite some limitation to the author, such as the impos-

37. Id, at 52.
38. Id, at 53.
39. Id, at 54.
40. See supra note 35.
41. Dietz, supra note 21, at 54.
42. Id, at 53.
43. See supra note 35.

sibility to use the work in the case of an exclusive grant, he will still be considered as the author and owner of the work.

Finally, regarding other formalities such as the registration of transfer,[44] the German law does not impose any obligation to record transfers of copyrighted interests.[45]

By contrast, as we will see in Colombia and the United States, in some cases the process of registration may be necessary.

E. ARTICLE 43 OF THE GERMAN COPYRIGHT ACT

Article 43[46] of the German Copyright Act, together with Article 69b[47], are the most important provisions for the German law analysis as they regulate expressly the topic of works created in employment relationships.

As it was said before, the general rule in Germany is that the employee is the owner and author of the copyrighted work produced under the course of his employment. Likewise, if the employee wants to grant the right to use to the employer, he will have to do it by contract.

The copyright contract rules are established in subsection 2 (Exploitation rights) from Articles 31 through 42 of the Copyright Act. When Article 42 states that *"the provisions of this subsection shall also apply if the author has created the work in execution of his duties under a contract of employment or service"*, it is referring to the rules of subsection 2 analyzed before. However, the provisions of subsection 2 may not be applicable to employment relationships as the second sentence of Article 43 states: *"provided nothing to the contrary transpires from the terms or nature of the contract of employment or services"*. This second sentence has created some critics within the legal commentators. For example, Dietz states: "This somewhat vague and unsatisfactory final clause in Section 43 in practice merely serves as a means to make it easier to find and interpret implied clauses in favor of employers".[48] Furthermore, DIETZ remarks: "This provision may be read as containing a sort of indirect presumption to the effect that all rights necessary for the activities of the employer or the commissioning party have been granted".[49]

As we can see, it is not completely clear in Germany whether the employers have to expressly sign an agreement with the employees to receive the right to use the exploitation rights. The wording of the article may consequently produce situations wherein an implied grant is concluded.

44. We have to bear in mind that despite referring to registration of transfers in the citation. The proper term to be use in Germany would be registration of the grants of the contractual right to use the exploitation rights.
45. DIETZ, supra note 21 at 55.
46. Article 43 German Copyright Act. See supra note 35.
47. Article 69b German Copyright Act. See supra note 35.
48. DIETZ, supra note 21, at 50.
49. Id, at 54.

However, as already mentioned, there is a clear consensus that the Copyright as a whole, moral rights and economic rights vest in the employed or commissioned author.[50] Likewise, the rules of contracts of subsection 2 (e.g. prohibition to grant uses that are not known, principle of purpose restricted transfers, and favorability for the author in cases where it is unclear as to what type of grant) are applicable to the employed author and can help to minimize the effect of an implied clause that may grants rights to the employer, and hence, affects his interests.

1. The scope of Employment requirement

In addition to the grant of the economic rights that the employer has to receive from the employee, another important requirement in making a valid grant is that the work must be created in execution of the employee's duties. To determine the employee's duties or the scope of employment, labor law regulations, rules in union agreements and the labor law contract have to be analyzed.[51] Likewise, courts have said that factors such as location and the time by which the employee creates the work (working hours) are not suitable criteria for evaluating the scope of employment.[52] Thus, the functions that the employee has are the main factor to determine if a work was created under the scope of employment.[53] The previous rule does not imply that the employee cannot grant the economic rights from works created outside the scope of employment. However, some commentators have noted that under this hypothesis, the employee will not be remunerated just with the salary, and extra remuneration will have to be given to the employee.[54]

The general tendency regarding the employee remuneration is that it is given within the current wage. No additional remuneration is provided. This is a topic under discussion, as some commentators state that paying the employee with only the wage will infringe the general principle by which the author must receive reasonable compensation for the exploitation of his work.[55]

This is an issue for debate, since another argument that can arise under an extra compensation theory will be that not all the works that employees produce are protected under copyrights. In fact, most of the works are not protected. Thus fixing a mandatory extra remuneration as a general rule can be a fair retribution to the employed author for accomplishing the intellectual property protection of his creation. Likewise, if a mandatory extra remuneration is created, employed authors will have an incentive to create. Also, the progress of arts, which is one of the main objectives of copyright law, could be easily furthered by stimulating creation for employees.

50. Id, at 50.
51. Kirchberger, supra note 2, at 14.
52. Schricker, supra note 17, at 890 Section 23.
53. Dreier, Schulze. Urheberrechtsgesetz 2 auflage (2006), at 54 lines 24 to 25.
54. Schricker, supra note 17, at 905 section 65
55. Id, at 902 section 64.

On January 18 of 2002 the last version of the Employees' Invention Act was enacted in Germany.[56] The Act gives an extra remuneration to the employees that create patents. The employed inventors in Germany are not only remunerated by their salary, in virtue of the said act, Employed inventors received an extra sum that awards their creation, and at the same time creates an incentive for other employees to invent. Despite the fact, that the said act does not contain copyright provision, this is an example of an extra remuneration that may be reasonable to put into practice in the context of works created in employment relationships. As most of the times the employer exercise the economic rights, and the employee only receives its salary in return of his creations, an extra remuneration can be a fair solution to protect the interest of the employed authors.

2. The rights Granted by the employee

Typically in the employment contract, the employee grants the exploitation rights to the employer. If this is the case, preference has to be given to these agreements.[57] Likewise, when the employee grants the use of economic rights to the employer, these rights are given exclusively to him.[58] However, the tendency is that the parties do not agree on the ownership of the copyright in the contract, and the courts[59] find implied clauses that grant economic rights to the employer. In fact, some commentators state that there is a general obligation in the employment contract for the employee to grant economic rights to the employer.[60] For instance, Rojahn states that there are two arguments that may justify a general obligation for the employee to grant the economic rights to the employer. The first argument is that there must be an analogy with the Employees Inventions Act of 2004. In Section 18 and 19 of the Act, there is a general obligation for the employee to offer the license of rights to the employer.[61] Thus, Rojahn states that the economic rights of the employee in the copyrighted work should be licensed to the employer, as in the patent right. Both are intellectual property rights, so there should be a general obligation to offer a license.

The second argument is based on the labor law principle by which there must be a general relationship of trust between employee and employer.[62] Consequently, as Rojhan states, a demonstration of trust lies in the fact that the employee offered a license to the employer.

56. German Employees' Inventions Act of January 18 2002.
57. Kirchberger, supra note 2, at 14.
58. Dreier, Schulze, supra note 53, at 56 Lines 22 to 30.
59. The German Supreme Court have said that the there is a presumption to an implicit transfer of economic rights. Case Reference: RGZ 153,1/8. For further information see Schricker, supra note 17.
60. Schricker, supra note 17, at 894 sect. 38.
61. Id, at 921 section 101.
62. Id, at 921 section 101.

The topic of implied license has not only been analyzed by commentators but also addressed by courts. The Federal Court of Justice (decision reference: BGH GRUR 1974, 480/483) in fact went further and said that there was a presumption of a license when the employee has handed the work to the employer.[63]

Other criteria stated used to determine implied grants of economic rights, as stated by KIRCHBERGER, include looking objectively to the labor law contract and checking if the works created are related to the normal functions of the employer company. By contrast, the subjective elements, such as the intention of the employee to grant the economic rights, are not taken into account.[64]

Apart from looking to the labor law contract, another tool used to determine implied clauses that grant economic rights to the employer in lack of express agreements can be found in Germany in Union Agreements (tarifvertraege).[65] Some examples of Union Agreements in which economic rights are granted to the employer can be found in the following areas: press (newspaper, magazines), radio and television (public as well as private television companies), movie, theater and design.[66]

Fortunately for the employee, despite the implied grants of economic rights that a court may find or an employer may argue, some of the economic interests in the work can still be protected. As it was already mentioned there are different provisions in subsection 2 orientated to protect the interests of the author, such as the prohibition to grant uses that are not yet known at the time of a grant (Article 31(4) German Copyright Act);[67] the principle of purpose restricted transfer[68] and the principle of favorability to the author in case of doubts concerning the extent of certain types of transfers.[69]

Regarding the term by which the employee grants the use of the economic rights to the employer, Krasser states that the usual practice is that even after the end of the labor law contract, the employer keeps the economic rights.[70] Likewise, DREIER calls attention that the employee cannot use the economic rights in the course of a new employment contract with a new employer, if in a previous contract the old employer was exercising the economic rights. The old employer will still have the power to exercise the economic rights of the work created by the employee.[71] However, we have to take into account that, as the grant of rights is ruled by a contract, the employee can agree with the employer that after the

63. Id, at 894 sect 41
64. KIRCHBERGER, supra note 2, at 14.
65. ROJAHN, Urheber In Arbeits – Oder Dienstverhaeltnissen In Urheberrecht Kommentar, at 683
66. OLENHUSEN v., a. G., der Urheber- und Leistungsrechtsschutz der Arbeitehmeraehnlichen Personen, grur 2002, book 1at 15.
67. DIETZ, supra note 21, at 50.
68. Id, at 50.
69. Id, at 50.
70. KRASSER, Urheberrecht in Arbeits-, Dienst- und Aufragsverhaeltnissen (1999), at 97.
71. DREIER, SCHULZE, supra note 53, at 53 lines 20 to 25.

contract comes to an end, the grant is concluded. This will depend on the negotiation of both parties.

f, the E.C. Directive 91/250 on the legal protection of computer programs and the article 69 b) of the German copyright act

The E.C. Directive was issued in 1991 in response to the amount of differences existing in the legislation of the Member States regarding this kind of works. One of the differences in Member States' legislations was the authorship of this works. But the other one related to the topic under study, was works created in employment relationships.[72]

The main aim of the Directive however was to codify the special standard of protection to computer programs, as there were many differences in the level of originality required to protect this type of work.[73] Germany was in fact one of the European countries characterized by its high originality requirements for considering a work protected under copyright. The German legislation required the author's personal intellectual creation that was interpreted by courts with a narrow standard oriented to a high originality level for protection.[74]

In fact, before the Directive the German Supreme Court said in 1998 in *Computer Edge v Apple Computer*, that only "above average" creative result in the field of programming, an estimated 20 to 30 percents of all programs, would be eligible for protection.[75] Thus, the problem that German courts faced was in harmonizing the statutory standard of protection fixed in the Directive with the high originality standard. However, in implementing the Directive, the German government adopted the mandatory standards of the Directive in Article 69 of the German Copyright act.[76] Article 69a(3) of the German Copyright Act set the new originality standard by saying that the computer program has to express the "author's own intellectual creation" as is also stated in Article 1(3)[77] of the Directive.[78]

This topic is still under debate on the legal literature, because the interpretation of the terms *"author's own intellectual creation"* can vary between courts in different states.[79] However, for the purpose of this study, it is important to take into account that if an employee in Germany creates a computer program in

72. Dreier. The international Development of Copyright protection for Computer programs. 1993, at 225.
73. Dietz, supra note 21, at 33.
74. Dreier, supra note 72 at 221.
75. Id, at 227.
76. Scholz, Implementation of the European Community Software Directive in Germany. (1993) 34 Copyright World, at 36 .
77. Article 1 E.C. Directive for the legal protection of Computer Programs, at http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31991L0250&model=guichett&lg=en.
78. Dietz, supra note 21 at 33.
79. For further information regarding originality requirements and the E.C. Directive see Scholz, supra note 76, at 36.

the execution of his duties, the terms that have to be used to analyze the level of originality required for protection is the one established in Article 69(a) of the German Copyright Act; that is, the work must reflect the author's (employee's) own intellectual creation.

For the topic under analysis Article 2[80] of the Directive is the central focus of the analysis, as this Article contains the E.C. rule for Authorship and ownership in the employment relationships.

Article 69(b) of the German Copyright Act is the national implementation of article 2 of the EC directive. As already explained, there is an exception to the general rule of granting of economic rights, as the Article directly entitles the employer to economic rights. As in the case of works created by employees which are not computer programs, Article 69(b) requires that the works must be created in the execution of the employee's duties. In order to decide the scope of the obligations, the previous considerations under the subtitle, scope of employment, should be applied here, meaning that the labor law contract, the main area of business of the employer and union agreements, have to be taken into consideration.[81]

Just as in Article 42 of the German Copyright Act, Article 69(b) also applies to works created in the course of services contracts. However, one important difference with the directive should be made here, as the Directive do not regulate the topic of freelancers. However, Dreier states that the initial proposal of the directive was to include freelancers in article 2(3). In his words:

Contrary to the Commission's initial proposal, the directive does not specifically regulate the authorship of commissioned computer programs. The main reason seems to have been the intention not to impair too heavily the interests of freelance programmers, in order not to hinder programming activities in the EC. Consequently, in the absence of special regulation on the national level, authorship of commissioned works is vested in the person(s) who created the program and the exercise of the exclusive rights is left to contractual provisions.[82]

After reading the previous passage, another open question for analysis is: Why does the German lawmaker give the exercise of economic rights to the employer in service relationships if the Directive did not regulate this topic? Bearing in mind that the author's rights tradition of Germany by which the protection of the author may be considered bigger than in the Anglo-American Copyright System, the application of the same rules to the independent contractor may be considered contradictory.

Furthermore, Article 2 (3) of the Directive keeps silent on whether the fact that the employer exploits the economic rights means that he receives a license,

80. Article 2 E.C. Directive for the Legal Protection of Computer Programs. supra note 77.

81. Kirchberger, supra note 2, at 15.

82. Dreier. The Council Directive of 14 May 1991 on the Legal Protection of Computer Programs. [1991] 9 eipr, at 3.

a transfer of rights, or if it is an initial ownership of the exclusive right.[83] As will be mentioned later in Chapter VI, in the United States, the employer has the initial ownership of the copyright if there is a work made for hire. Hence, in the United States the third result would be applied. In the German case, the most similar result under these three options is that the employee grants a license[84] to use the work to the employer, but the employer would not have the ownership of the Copyright.

As previously stated, Article 69(b) establishes a clear rule that the economic rights in a computer program created by an employee can be freely exploited by an employer without the need for the employer to receive a contractual grant from the employee. The situation described in Article 69 is different from the situation of Article 43, in which the employee will have to agree with the employer the grant of the economic rights or the employer may have to find some implied argument[85] that will grant him the exploitation rights. The situation is oppositely different in computer programs, since Article 69(b) allows employers and employees to agree otherwise, meaning that the general rule wherein the exercise of economic rights vest on the employer can be changed by the consensus of the two parties. Thus, the employee will still have a way to freely exploit the economic rights in virtue of the Directive. Moreover, the basic principle by which the author of a work is protected by copyright is also applicable in the case of computer programs.[86]

Regarding the general practice of remuneration for the employee by the creation of computer programs, the tendency is the same as Article 43 (non computer programs works created by employees). There is no extra remuneration for the employee in addition to the salary that the employer pays, and the employee cannot demand licensing fees.[87] However, if the computer program is created outside of the employee's duties, and the employer is exercising his economic rights, the result is the same as in non computer program creations and an extra remuneration must have to be given to the employee.[88]

Despite the fact that the general practice in Germany is that the employee does not get an extra remuneration when he creates a computer program, one may conclude that under this hypothesis the practice should be different. The situation of computer programs sets forth a different hypothesis from the general rule of Article 43. In computer program created works, the employer has the power

83. Id, at 2.

84. However, as already mentioned the German Copyright Act does not refer to the term license, and the nearer English translation is a grant of the contractual right to use.

85. The implied arguments that the employer may alleged are in other words the determination of the scope of employment that was previously analyzed. On this regard, it was said that the labor law contract, the unions agreements and the main area of business of the employer are factors to take into consideration.

86. KIRCHBERGER, supra note 2, at 15.

87. DREIER, SCHULZE, supra note 53 Line 15 to 17 at 53.

88. Lowenheim. Schricker Urheberrecht Kommentar 3. Auflage at 1353 section 15.

to exercise all the economic rights.[89] Thus, in this case, it may be reasonable to consider an extra remuneration for the employee despite the fact that in practice it is not provided. As previously stated, the German Employee´s Inventions Act gives extra remuneration to employed inventors. In the case context of computer programs created by employees is even clearer to think about a similar mechanism, as the employer exercise directly the economic rights.

It is important to ask why the drafters of the Computer Programs Directive gave the employer the direct power to exercise economic rights. Some question to open the debate could be:

Was it because the employee has less autonomy in creating the works in a computer as opposed to other kinds of works? Or is it because the normal practice before the directive was that by implied clauses or express agreements the rights were exercised by the employer, and thus, the drafter of the Directive saw this de facto situation and put it into the law?

Furthermore, and most important, as it will be mentioned latter, the interests of the software industry companies which were usually based on an Anglo American Copyright System were taken into account in the negotiations of this directive.[90] The solution that the Directive took can be considered however, a fair solution as it allowed the exercise of the economic rights to the employer, without giving him the ownership of the copyright. It can be considered a fair balance between the two main systems of Copyrights: the Anglo American Copyright System and the Author's right System.

– The silence of the parties before the E.C. Computer Programs Directive

The Directive made a clear change to German copyright law in works created by employees depending whether the work is a computer program or not, as in the first case, without agreement of the parties the economic rights will rest with the employer. Before this Directive, silence of the parties in Germany did not give the economic rights to the employer. In other European Countries, the directive did not make any changes to the National law. That is the case of Spain, where before the Directive if employer and employee were silent about the ownership of a copyrighted work, the economic rights vested were transferred to the employer.[91] Thus, Spain did not suffered a change with the computer programs works, as before the Directive employers were exercising the economic rights of all kind of works created by employees if there was not agreement to the contrary.

89. Id. at 1351 sect. 11.

90. Dreier, supra note 72, at 221.

91. Alberto Valdés Alonso. Propiedad Intelectual y Relación de Trabajo: La Transmisión De Los Derechos de Propiedad Intelectual a través del Contrato de Trabajo: Artistas, Programadores Informáticos Y Producción Audiovisual De, Civitas, 2001, 1ª ED. at 32.

G. MORAL RIGHTS

As already mentioned, German law is based in the monistic theory of author's right by which both economic rights and moral rights are included in one body. Moreover, there are no assignments of these rights, and third parties can only acquire the exercise of economic rights by agreeing with the copyright owner on a contractual right to use. Regarding moral rights, the primary difference from economic rights is that they are completely inalienable and third parties cannot even exercise this type of right like they can with exploitation rights. Nonetheless, as will be addressed below, in certain types of works such as computer programs, some moral rights can be limited in their exercise.

The application of economic and moral rights is sometimes difficult to differentiate as the interests involved are related. As described by Dietz: *"It is therefore not very easy to state precisely whether, as a general matter, many provisions of the Copyright Act partake more of a moral or more of an economic nature".*[92] The said difficulty to distinguish in some cases if an economic or personal right is recognized is applicable as well to employees who, as already mentioned, are authors and thus owners of the moral and economic rights.

Regarding the point of moral rights in the E.C. Directive of Computer Programs, it is important to state that the directive remained silent on this point and left the power to Member States to regulate the topic.[93] The German lawmakers do not mention in article 69 b) any provision regarding moral rights, hence, there is no difference at least by law, on the application of moral rights in computer programs.

The German Copyright Act primarily recognizes the two classical moral rights: the right of paternity or right of recognition of authorship (Article 13) and the right of integrity (Article 14). The Act also recognizes another important moral right, the right of publication or right to control disclosure (Article 12).[94] Unlike the exploitation rights, as already explained, the moral rights are not alienable in any author rights system. Articles 43 and 69(b) of the Copyright Act, regarding works and computer programs works created in employment relationships, do not affect directly the moral rights in Germany. Nonetheless, as Kirchberger states, some moral rights can be limited in the exercise:

> … the author has the right of recognition of authorship. This right can, in general, neither be transferred nor waived. It can, however, be limited to the extent of the special nature of the employment.[95]

92. Dietz, Supra note 21, at 87.
93. Dreier, supra note 82 at 2.
94. There are other moral rights on the copyright act such as the right of revocation for non exercise (article 41) and Right of revocation for changed conviction (article 42) however, in the chapter of moral rights, the mentioned 3 previous rights are the three rights classified as moral for the act.
95. Supra note 2, at 15.

Moreover, when Kirchberger refers to the effect of the computer programs Directive on moral rights, she states:

… the regulation deals solely with the economic rights and does not affect the moral rights of the creator as such. The execution of the personal rights can however be limited. The author's right to prohibit any distortion or any other mutilation of the work is often limited as computer programs are usually further developed and a prohibition to alter software programs would reduce the employer's possibility to do so.[96]

After reading the previous conclusion of Kirchberger, one may question if the differences between an author's right system and a pure copyright system are really clear. If one of the main difference of the copyright system from the author's right system is that the latter protects moral rights, it is important to evaluate how effective is this protection. On this regard, Prof. Lehman has commented on the difficulty to protect Moral Rights in computer program works. In his words: "Thus, given the rather industrial character of computer programs, in practice moral rights only play a subordinate role, and it has been argued that legally they should also have to stand back". [97]

Another argument that has been raised to explain the reason why the integrity right is limited lies in the possibility of this right being waived.[98] On this point, Dietz states: "the fact that the obligation to respect the integrity of a work subject to a license under Section 39 is made dependent on the condition that there is no agreement to the contrary shows that this moral right, to some degree at least, can be contractually waived".[99]

Thus, despite the effect of new technologies that affect the integrity moral right, the fact that this right can be waived creates the possibility for companies to alter the works of their employees without their authorization.

Despite the weaknesses of the moral rights that can be presented in some works, in some situations there are authors that underline the importance of this right. For example, in the following phrase, Dietz calls attention to the importance of the moral right of public disclosure: *"The separate statutory recognition of this right stresses the importance of this moral aspect of copyright law, which guarantees that no person other than the author himself is allowed to decide whether and in what way his work shall be disclosed, eventually to the public".*[100] Applying Dietz's statement to this study, the employed author is the only one that can decide the public disclosure of the work. However, this phrase can be clear under the hypothesis of an independent author in which the employer can exercise many of the exploitation rights and even, the employee has limitations on exercising his moral rights. Thus, another

96. Id. at 15.
97. Lehman. The legal protection of Computer Programs in Germany: A Summary of the present situation. (1988) 19 iic 473, at 478.
98. Dreier, Schulze, supra note 53, at 54 Lines 8 to 10.
99. Dietz, supra note 21, at 90.
100. Id, at 88.

question for the debate is whether the right of public disclosure is limited in the exercise in the course of employment, and whether, for example, the employee cannot impede the employer to disclose a work in an unauthorized way.

Exercising the Right of Authorship, the author can determine whether his work is to bear his name, signature or other designation and what designation is to be used.[101] In this situation, the same question raised earlier will be applied. In the case of an individual author, he will decide to put his name. However, in the course of employment, it is important to check if an employee has the power to decide this matter and request to the employer that his name should appear on the work. As already seen in the analyzed Computer Programs Directive, the computer industry was influencing the adoption of the Directive in order to give legal persons (employers) the exercise of economic rights. Thus, the right of authorship is in practice claimed to a far lesser extent than is possible because of the interest of the software house in question.[102] One may conclude that the possibility for legal persons to exercise the economic rights in computer programs, gave a back door to the computer industry to limit the exercise of moral rights.

It is worth inquiring if in the computer software that we usually use, we can see the names of the employees who actually created those works. At least in the software created by Microsoft, an American Company, the names of the software developers are not mentioned. If one sees the product package or the dvd's or cds in which these programs are contained, there are no indications of the names of the employees who create those works. This is probably due to the fact that the copyright system in America does not recognize this moral right. Thus, the task will be to see if software created in an employment relationship under German law shows the name of the author or authors.

A paradoxical situation is found in France, where limitations on moral rights are not only present in the usual practice as in Germany, but also the law provides a limitation. Article 46 of the French Author's right law provides that "unless otherwise stipulated, the author may not oppose adaptation of the software within the limits of the rights he has assigned nor exercise his right to correct or to retract".[103] This rule can be considered as paradoxical because it contradicts France's reputation for staunchly protecting all of the author's moral interests. However, within Article 46 a 'personal rights protection' is not reflected, as parties waive their moral rights of integrity and revocation in the case of silence.

Furthermore, in spite of the previous critics of the application of moral rights in the studied topic, there are some cases in which there is a clear application of moral rights in Germany that can make a clear differentiation between the author's right system and the copyright system. For instance, German cases[104] dealing with the

101. Id, at 88
102. Dreier, supra note 72 at 221.
103. French Copyright Law of 29/03/1972.
104. For further Information see supra note 21, At 89, 90, 94, 95 & 96.

integrity moral right in architectural and cinematographic works are famous examples of the application of this right. However, there are not known cases dealing with the application of moral rights in works created in employment relationships that can lead to the conclusion that there are big differences between author's right system and copyright systems. Thus, the legal theory can be different as the German law recognizes different moral rights. Nonetheless, the practice can bring very similar situations as the ones found in the Anglo-American Copyright System, where the employer is in most of the cases the one that exercises the economic rights.

After analyzing the current practice on moral rights, a question for future policy making is whether the legal system's philosophy regarding author's rights will recognize, not only the economic, but also the moral rights of employers. Examples of this can already be found globally. For instance, the Japanese Copyright Act in its Section 15 provides for the transferability to the employer of, not only the exploitation rights, but also the moral rights.[105] This provision was made in order to centralize the rights of author on the employer and to facilitate exploitation.[106]

Finally, it is important to bear in mind that as Germany has the monistic theory of author's right, the duration of the moral right is the same as in the economic rights. Article 64 of the Copyright Act establishes that the duration of the rights is seventy years after the author's death. Thus, the heirs of the employee will only have 70 years of moral and economic rights. The heirs will not have a perpetual moral right as in the case of countries with dualistic theory of moral rights. As will be addressed below, Colombia adopted the French author's right system, in which moral and economic rights are divided, and thus, the heirs of an employee in Colombia will enjoy the perpetual moral right.

H. WORKS CREATED BY PUBLIC SERVANTS

The Works created by employees working for the German government are initially owned by employees, as is also the case with employees working in the private sector. On this point, German law keeps in line with the philosophy of the French author's right system, and does not recognize government or corporate works initially owned by legal entities.[107] It is important to specify that the list of Government works in Article 5 of the German Copyright Act, which states those works not protected under copyright. Thus, what is protected are the works not listed in Article 5.[108] Nonetheless, as it happens to the private employment relationships[109],

105. Edited By Peter Ganea, Christopher Heath and Hiroshi Saito, Japanese Copyright Law. Writings in honour of Gerhard Schricker.. Kluwer Law International (2005) at 36.

106. id, at 36.

107. Dietz, supra note 21 at 48.

108. For instance in the case of the bgh of October 9 of 1976 an informational pamphlet published by a government organization was protected by copyright, as it was not under the list covered in article 5.

109. German translation: Arbeitsverhaeltnis.

in the public employment relationships,[110] the ownership of these works belongs to the employees and the government can only receive the exploitation rights to use the work.[111]

The German provision highlights a difference in comparison to United States and Colombia, where the State is the owner of the copyright in the United States and of the economic rights in Colombia, despite the Colombian author's right system.[112] Consequently, another particularity of the German system lies in the fact that the copyright is given to the employed author and his interests prevail over the economic interests that the State may have on the work created by the public servant. An open question for debate will be why does article 69 (b) of the German Copyright gave the economic rights to the employer? If one may think that the interest of the state is more important that the interest of an employer that orders the production of computer programs?

V. UNITED STATES. LEGAL RULES AND ANALYSIS

In a different sense from Germany and Colombia, which are continental law systems characterized by statutes as the only primary source of law, the United States is a common law system in which case law is the main source of law. In fact, in the United States, common law principles first established that the ownership of the copyright presumptively belongs to the person that commissioned a work.[113] This rule was later brought under statute in the Copyright Act of 1909 that established that the employer is the author and initial holder of works made for hire.[114] However, as Garlock says, the 1909 statute did not define terms such as employer or work made for hire.[115] It was not until the 1976 Copyright Act that in the United States the term *work made for hire* appeared in a statute.

This study will focus on the analysis of section 201 of the 1976 Act which is the current applicable law. An examination of the background surrounding the enactment of the law is essential as starting point.

Despite the fact that the topic under study is 'works created under employment relationships', in Germany and in Colombia, the term 'employment' is a generic term in which not only labor law contracts but other type of private law contracts can be included.

In the United States one of the examples of a private law relationship by which great amount of works are produced, is the case of works created by independent contractors. These types of contractors are not subject to the normal direction and

110. German translation: Dienstverhaeltnis.
111. DIETZ, supra note 21, at 35.
112. On chapters VI & VII the American and Colombian provisions will be analyzed.
113. See. DILLMAN V. WHITE, 102 Fed. 892 (C.C.D. Mass 1900).
114. STEVE E GARLOCK. The work made for hire doctrine under the copyright Act of 1976: What about the independent contractor? 1988. Washington University Law Quarterly vol 66.423. at 423.
115. Id, at 423.

supervision that can be seen in a labor law contract. However, since the Bratlleboro case[116] in 1966, the second circuit applied the work for hire doctrine to independent contractors.[117] Years later, in 1974, in the Siegel case[118] the second circuit developed a test to determine when an independent contractor was included into the 'work made for hire' doctrine. This was the so called 'instance and expense test' by which the employer was considered as the owner of the copyright if the employer was the motivating factor to produce the creation.[119] Under this test, the employer did not need to direct and supervise the work he ordered. Simply having the right to control the process was enough to make him the copyright owner.[120]

Furthermore, in Murray v. Gelderman,[121] the fifth circuit extended the work for hire doctrine under the 1909 act. In opinion of Garlock, after this case: "the common law interpretation of the work made for hire doctrine under the Copyright Act of 1909 developed into a virtually irrebuttable presumption that anyone who paid another to create a copyrightable work was the statutory author and thereby entitled to a copyright in the product".[122]

Thus, notwithstanding that the work made for hire was not defined in the 1909 statute, courts in the USA created this doctrine to give an answer to the ownership of the copyright question. Not only the direction and supervision factors were taken into account to determine a work made for hire, also the economic factor by which the one who paid the work can be considered the author were important elements for Courts to determine a work made for hire. The utilitarian aspect of copyright law, characterized by a copyright system, was clearly shown by giving the ownership of the copyright to the person that paid another one for the production of a work, even without having any labor law contract. This utilitarian aspect is also represented by the fact that the employer is considered the author of the work. The employee who may be sometimes the original creator of the work is not considered to be the author in the United States, as happens in continental systems such as Germany and Colombia.

However, in the United States, as Nimmer points out, there have been problems caused by naming an employer the author. In words of Nimmer, "According to some commentators, a constitutional question arises, given the notion of 'author' in the Copyright Clause, as to whether the employer is considered the 'author' of a work by operation of law or as the transferee of the Actual creator. See *Scherr vs. Universal Match Corp*".[123]

116. Bratlleboro Publishing Co. v. Winmill Publishing Corp, 369 F.2d 565 (2d Cir) (1966).
117. Garlock, supra note 114, at 424.
118. Siegel v. National Periodical Publications, Inc., 508 F.2d 909 (2d Cir. 1974).
119. Garlock, supra note 114, at 424
120. Id, at 424.
121. Murray v. Gelderman 566 F. 2d 1307 (5th Cir. 1978).
122. Garlock, supra note 114, at 424.
123. Nimmer, Melville, International Copyright Law and Practice. B. Volume 2 1997/2000. United States Chapter, at 48.

Despite criticism of naming an employer as the author of a work created by an employee, the fact that in the United States moral rights do not exist like those of a continental law system, can bring a justified explanation to this matter. The employee in the continental system will always be the author of the work, mainly because the employee is the owner of the moral rights in the work that are not transferable. There are only transfers or licenses of the economic rights in the work, but the employee will retain the moral rights, hence, the author title.

A. SECTION 201(B) , AND IOIOF THE COPYRIGHT ACT OF 1976 AND THE 1909 COPYRIGHT ACT

As in the 1909 Act, section 201 (b) of the 1976 Act established that the employer is the author. [124] Likewise it recognized the exception to the general ownership rule, as it gave the possibility to the parties to agree otherwise, meaning that not only the employer or person from whom the work was prepared can be the owner of the copyright, but also others can be designated e.g. the employee.

Section 101 of the 1976 Act created a big change in comparison to the 1909 Act as it was the first time that the *'work for hire'* term was defined. [125] The definition included works created in employment relationships, a topic which was already covered by the 1909 Act. The most significant difference from the 1909 Act is that the definition of 'work made for hire' also included the works ordered or commissioned for use in nine categories of works.

Note that the nine categories of works do not apply to employees. If an Employee creates a different kind of work he can still be considered within the doctrine of work made for hire. The works of section 101 are only applicable to independent contractors, and are the only type of creations by which an independent contractor can be deemed to be considered within the doctrine of work made for hire. In fact, in the case May v. Morganelii-Heumann & Associates, the court stated that the list provided in the section 101 (2) was a closed and exhaustive list. [126]

124. "Works Made for Hire. — In the case of a work made for hire, *the employer* or other person for whom the work was prepared *is considered the author* for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright*".*

125. *"A 'work made for hire' is —*

(1) a work prepared by an employee within the scope of his or her employment; or

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

126. May vs Morganelii-Heumann & Associates. 618 F2D 1363 C.A.Cal., (9th

There is however the two following formalities that the 1976 Act included in the definition, in order to consider a copyrighted work as a work made for hire:

1- The parties have to agree that the work will be a work made for hire

2- The agreement of the parties must be in a written instrument and signed by them.[127]

It is important to take into account that in the first hypothesis of section 101 by which the work is created by an employee, there is no transfer of the copyrighted work as the employer is considered the author. However, for some commentators[128] there is in fact a transfer, but in this case the transfer is operated by law as section 101 gives the ownership of the copyright to the employer. The discussion about whether there is a transfer or not is, however, impractical as the consequence will always be that if the employee and employer do not agree otherwise, the ownership of the copyright will vest on the employer. By contrast, in the majority of the countries with author's right systems the discussion of the transfer of rights is of extreme importance, as at first glance the employee is considered the author, and the employer can be the owner of the economic rights in virtue of a transfer of rights. As we already see, the German case is even more oriented to protect the author as the transfer of economic rights is not possible, and only by licensing an employed author can transfer his rights.

A recommended formality to be fulfilled is the record of the transfer document in the Copyright office[129] to give third parties notice of the transfer.[130] Despite the fact that registration is not a requirement for the existence of a work made for hire, this is a step by which owners of the right can easily prove the ownership of the work and claim rights over third parties (i.e. priorities).[131] In countries like Colombia, as we will see in Chapter VII, the registration requirement has the same effect.

Regarding the duration of the right in the United States for works made for hire, the duration of the copyright will be 95 years from the first publication or 120 years from creation, whichever of the two terms is shorter.[132] By contrast, in other countries under analysis, as we already saw in Germany, the copyright term is considerably different. Likewise, as it will be mentioned in the following Chapter, the term that Colombia has differs from Germany and United States.

Cir. 1980) see at 1368. In this case the appellant (May) was considered by Court as an independent contractor per-se. The drawings that he created were not works included in the list of section 101 (2) see at 1369.

127. Nimmer, supra note 123, at 54.

128. Id, at 54.

129. On this regard section 205 (c) of the 1976 Copyright Act requires that the document adequately identifies the work which it relates and that a registration has been made for a work.

130. US Copyright Office. Circular 1. Notice of Copyright, at http://www.copyright.gov/circs/circ1.html#noc.

131. Id.

132. Circular 15 (a) of the United States Copyright office provides a summary of the provisions related with the duration of the copyright under the Copyright Act of 1976, see at: http://www.copyright.gov/circs/circ15a.html.

B. THE REMAINING PROBLEM OF THE INDEPENDENT CONTRACTOR AFTER THE COPYRIGHT ACT OF 1976

The fact that the Copyright Act defined the term 'work made for hire' do not solve the problem of determining when a work created by an independent contractor was considered a work for hire. After the expedition of the 1976 Act, Garlock states that three different interpretations of the ownership of the works created by an independent contractor were made. [133]

The first interpretation was the so-called "Conservative Approach", and it consisted in applying the previously mentioned instance and expense test, and the right to control test used by courts when the 1909 Act was in force.[134] If the independent contractor made the work by the instance and expense of the buyer, and by his control, the work was considered as a work for hire.[135] However, under this first approach the instance and expense and control tests were not enough. The works produced must fall also within the categories established in the section 101 (2) and there must be a written agreement in which the parties agreed that there was a work for hire.[136] In opinion of O'Meara this first approach was intended to protect independent contractors from the expansive common law doctrine of 1909 by which the instance and expense test and the control test were enough to consider an employer as the copyright owner.[137]

The second interpretation[138] was made in the Aldon Accessories vs. Spiegel case.[139] The court ruled in this case that if an independent contractor is controlled and supervised by the party who ordered the work, then an employer/employee relationship exists, and section 101 of the 1976 Act has to be applied.[140] This ruling was followed in two other cases: Evans Newton Inc v. Chicago Systems software[141] and Brunswick Beacon v. Schoch-Hopchas Publishing Co.[142] As in the Aldon v. Spiegel case, in these two cases the courts ruled that if supervision and direction were present, the relationship between the two parties will be deemed to be an employee/employer relationship and section 101 (1) will be applied. This interpretation is broader than the conservative interpretation and can be considered as very similar to the common law that existed during the 1909 Act. In this second interpretation courts did not take into account subsection (2) of section 101 and gave most importance to the traditional elements of an employer/employee relationship, that is, control and supervision. This issue will be

133. Garlock, supra note 114, at 425.
134. Id, at 425.
135. Id, at 425.
136. Id, at 426.
137. William O'Meara "Works made for Hire" under the Copyright Act of 1976.. Aus: Creighton Law Review. Vol. 15, 1981 - 1982, 2, at 533.
138. Garlock, supra note 114, at 426.
139. Aldon Accessories Ltd. v. Spiegel, Inc. 738 F. 2d 548 (2d Cir. 1984).
140. Garlock, supra note 114, at 426.
141. Evans Newton Inc. v. Chicago Systems Software, 793 F.2d 889 (7th Cir. 1986).
142. Brunswick Beacon v. Schock-Hopchas Publishing Co. 810 F. 2d 410 (4th Cir. 1987).

explained in chapter VII when explaining the labor law principle of reality over forms. However, it is important to take into account that a similar situation comes into play here. Although an independent contractor is not an employee and in the formal legal language is not included within the labor law lexicon, the presence of control and supervision are realities that turn the formality (the independent contractor title) into an employee. In other words, the existence of control and supervision during the creation of a work will prevail over the fact that the person who created a work was called an 'independent contractor'. Thus, the independent contractor will be under the work made for hire doctrine because he will be considered an employee.

The third interpretation for the application of work made for hire in the independent contractor hypothesis[143] was given by the Fifth Circuit in the so called Easter Seal Society case.[144] The fifth circuit stated that section 101 (1) of the Act will be applied to the independent contractor only if he is an employee within the terms of agency law. Regarding section 101 (2) it will be applied only if the works fall into the ten categories of works and there was a written instrument signed by the parties stating that the work was considered to be for hire. The change of this third interpretation was that to determine who was an employee the fifth circuit remitted the question to the section 220 of the restatement of agency law of 1958 that defined the term servant and do not use the previous tests of instance and expense nor the control test. In words of Garlock: "In support of its own literal interpretation, the fifth circuit relies primarily on the Actual language of the statute." [145] Further, Garlock states: "The court also favors this literal interpretation because it unites the work made for hire doctrine with the comparatively settled law of agency". [146]

Summarizing the third approach, the definition of employee was determinative to establish an answer for the problem with the independent contractor. If the elements of the definition of servant were present, the independent contractor will be deemed to be an employee for purpose of the work made for hire. It is interesting how the fifth circuit in this case used agency law and not the pure IP statute, the Copyright Act of 1976. Should the ownership of the copyright created by employees be regulated by an IP statute or a labor statute? This is a policy question that we will see later in the Colombian analysis.

C. THE CCNV CASE

The Community for Creative Non Violence (CCNV) v. Reid case[147] has become the most important decision on the topic of 'work made for hire' in the United States.

143. GARLOCK, supra note 114, at 429.
144. Easter Seal Society for Crippled Children and Adults of Louisiana, Inc v. Playboy Enterprises. 815 F. 2d 323 (5th Cir. 1987).
145. GARLOCK, supra note 114 at 431& 432.
146. Id, at 431& 432.
147. Community for Creative Non-Violence vs.Reid. 490 U.S. 730. 109 S.Ct. 2166, U.S.Dist.Col., (1989) (Hereinafter CCNV case).

After this case, the previous three different interpretations were no longer used and the CCNV decision became the applicable law.[148] For Nimmer, with this case "*a definitive method of construing the 1976 Act on point became cast in concrete*".[149]

As this is an important case for our analysis, the following short mention of its facts will be made:

The CCNV ordered the production of a sculpture for James Earl Reid. The order stated that the sculpture must depict homelessness with precise words on the work. Furthermore, the order suggested variations during the process of elaboration and it also proposed humans as models from the sculpture. The legal problem began when the parties did not agree to whom the copyright would belong. Thus, the CCNV sued Reid claiming for a work made for hire on the production of the sculpture.[150]

In the CCNV judgment the Supreme Court did not use the exact elements of the definition of employee given in the Second Restatement of Agency law[151] that were used in the Easter Seal case.[152] By contrast, the Supreme Court did not tied up with the Restatement of Agency law to determine the definition of Employee, as the Supreme Court said that the elements provided in section 220 (2) of the Restatement were not determinative.[153] In the words of the Supreme Court:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. See Restatement ' 220(2) (setting forth a no exhaustive list of factors relevant to determining whether a hired party is an employee).31 *No one of these factors is determinative*.[154]

148. Nimmer, supra note 123, at 49.

149. Id, at 49.

150. CCNV case, supra note 148. See facts of case at 733.

151. It is important to take into account that since 2006 the current Agency Law is the third Restatement that replaced the Second Restatement of 1958. The CCNV case only analyzed the Second Restatement from 1958. See Third Restatement at http://74.125.39.104/search?q=cache:Cphn2VXToxQJ:www.wmitchell.edu/academics/curriculum/courses/assignments/Restatement%2520Third%2520of%2520Agency.pdf+restatement+third+of+agency+law&hl=en&ct=clnk&cd=2&client=firefox-a

152. As already see in Germany and as will be explained in the Colombian Chapter, the definition of employee that the law used is only establish by a labor law regulation. The fact that in the United States the Court creates a specific definition for employee for purpose of the work made for hire is a big difference between the countries under analysis.

153. CCNV case, supra note 148, at 751

154. Id, at 751.

The italicized part shows how the Supreme Court did not use the exact definition of the restatement of agency law.

The ratio decidendi of the present case ruled on Reid's benefit as the work was not considered for hire. Thus, it concluded that Reid was an independent contractor and not an employee.[155]

The United States Copyright office in the Circular # 9, by using the CCNV decision has classified the following three factors to determine when a work is made for hire:

1) *Control by the employer over the work* (e.g., the employer may determine how the work is done, has the work done at the employer's location, and provides equipment or other means to create work)

2) *Control by employer over the employe***e** (e.g., the employer controls the employee's schedule in creating work, has the right to have the employee perform other assignments, determines the method of payment, and/ or has the right to hire the employee's assistants)

3) *Status and conduct of employer* (e.g., the employer is in business to produce such works, provides the employee with benefits, and/or withholds tax from the employee's payment).*[156]*

Nonetheless, the Copyright Office in the said circular states that in the CCNV decision the Court do not settle on which factors were determinative in order to prove an employment relationship.[157]

Coming back to the CCNV case, the Supreme Court also studied the second approach made in the case Aldon Accessories v. Spiegel case already mentioned. The Supreme Court said that the control and supervision arguments that were made in that case, were not sufficient to determine if there was a work made for hire. In words of the Supreme Court:

The Actual control test, articulated by the Second Circuit in Aldon Accessories, fares only marginally better when measured against the language and structure of section 101. Under this test, independent contractors who are so controlled and supervised in the creation of a particular work are deemed "employees" under section 101(1).*[158]*

Thus, for the Supreme Court it was not enough that the employer had a formal control over the employee. There must be a direction and supervision like the one that was used later in the case of *Quintanilla v. Texas Television* case, meaning that the employer must supervise the manner and means in which the creator performs his job.[159]

155. CCNV case, Supra note 148, at 742.

156. US Copyright Office Circular 9. See at: http://www.copyright.gov/circs/circ9.html.

157. Id. The circular also underline that as the CCNV decision states; supervision alone is not enough to establish a work made for hire, and that if all or mostly all the elements are proved there is a work made for hire.

158. CCNV case, supra note 148, at 742.

159. Quintanilla v. Texas Television 139 F.3d 494C.A.5 (Tex.), (5th Cir. 1998), at

Finally, despite the fact that the Supreme Court reached the conclusion that Reid's sculpture was not a work made for hire, this did not mean that the only owner of the work was Reid. The court, however, suggested that that this could be a case of joint authorship as the CCNV also contributed in the creation of the work.[160]

It is important to point out that when American courts conclude that there are not works made for hire, the joint authorship solution is not always the outcome. There are cases in which the authorship can be deemed only on the independent contractor or the employee.[161] In some countries, like Mexico, there is a especial situation as the result is not joint authorship, the general rule is that the employee is the author, but the economic rights are shared equally between the employer and the employee.[162] Thus, another question for debate will be whether it is fairer to rule the ownership question by creating a 50/50 rule and give both employer and employee economic benefit from the work.

After the CCNV decision, the case law on the work made for hire has not gone through major changes as in previous times. In fact, there are cases that back up the CCNV decision like *Carter v. Helmsley Spear.* In this case it was said that despite the parties having signed a labor law contract, it is important that the elements of the works made for hire determined in the CCNV decision are present.[163] We can see here, how the already mentioned principle of the 'reality over the forms' comes into play again. Earlier, we talked about the situation in which an independent contractor can be considered an employee. In the previously cited case we find the opposite situation. The formality would be that the parties agreed there was a labor law contract, and the reality would be that there was not an employee/employer relationship for the purpose of the work made for hire, since its elements were not present.

D. CRITICS AFTER THE CCNV CASE

The legal uncertainty of what is considered a work made for hire was minimized with the CCNV case. However, there are still questions and critics of the work made for hire doctrine. In fact, the Copyright office in the already mentioned Circular 9, stated that as there is "no precise standard for determining whether or not a work is made for hire under the first part of the definition, consultation with an attorney for legal advice may be advisable".[164] This shows that the definition of the work made for hire term is not definitely clear.

497. In this case the appellant (QUINTANILLA) claimed that he was the exclusive owner of the copyright in a videotape because he supervised the work that Texas TV made for the creation of this work. See complete background of the case at 495 & 496.

160. CCNV Supra note 147, at 2168 & 732.

161. For instance, in the case WILLIAM V. WEISSER, the ownership of the work was only for the employed professor. See infra note 169.

162. Mexican Federal Author's right Law Art 84.

163. CARTER V. HELMSLEY SPEAR 71 F. 3d, C.A.2 (N.Y.), 1995. (2nd Cir. 1995). See at 85 & 86.

164. Circular 9, See supra note 156.

Some commentators, like Assaf, say that the elements of determining a work made for hire fixed in the CCNV decision, have caused legal uncertainty. The main reason for this conclusion is that the test used by the Supreme Court is based on Tort Law principles which are not compatible with the philosophy of Copyright Law.[165]

Furthermore, Assaf does not only criticize the current test fixed on the CCNV decision. He also proposes the following ideas to transform the work made for hire doctrine using arguments focused on copyright principles rather than agency law:

My proposal is that the 'work made for hire' doctrine should be applied from the vantage point of Copyright Law. The test should focus on incentives to create on the one hand and public access to created works on the other. These are the goals of Copyright Law as stated in the Constitution. Thus, the new test should re-interpret the term 'employee' in a manner that complies with the needs of Copyright Law. Most importantly, 'employee' should be interpreted to give the first entitlement to the party most apt to achieve the goals of the Constitution: Instead of using agency test factors such as employee benefits and tax treatment, the courts should consider factors such as the parties' relative incentive to create new works, public accessibility, transaction costs, and the parties relative ability and motivation to disseminate works to the public. The partnership of individual creativity with the employer's resources yields a significant engine for creative production in society. Revising the 'work made for hire' test would re-align this important issue with the rest of intellectual property law.[166]

As we can see, despite the existence of the CCNV decision, there are however some critics in the United States regarding the 'work made for hire' doctrine. We would be right in stating that the general topic under study, in some cases when the law applies, the outcome is not entirely certain in the United States. The reason is mainly because finding a consensus between the definitions and principles of Copyright Law and Labor Law has not been an easy task. This conflict between the two fields of law is not only present in the United States. As we will see in the next Chapter, the Colombian situation can be seen as even more ambiguous, as there is a legal gap on the ownership point that has created a series of positions, some coming from the labor law side and others coming from the author's rights side.

e. Common Examples of works that fall under the Work for Hire Doctrine

– The Copyright office in the cited Circular 9, states that nowadays, the common examples of works of hire are the following:

165. Assaf Jacob. 2008. tort made for hire - reconsidering the ccnv case. Preliminary Draft, Later version pending. See at 1. Available at: http://works.bepress.com/assaf_jacob/1.

166. Id. at. 1 & 2.

A software program created within the scope of his or her duties by a staff programmer for Creative Computer Corporation.

A newspaper article written by a staff journalist for publication in the newspaper that employs him.

A musical arrangement written for XYZ Music Company by a salaried arranger on its staff.[167]

The first example proposed by the Copyright Office is of extreme importance and relevant around the world. As we already see in the German Chapter, the European legislator gave the ownership of the economic rights to the employer in this particular kind of works. Despite the fact that the directive only gives economic rights to the employer, this is the most similar provision to the work made for hire system in relation to countries which have a continental law system (e.g. Germany). The question will be whether the author's rights system is becoming more similar to the copyright system or if the situation is vice versa, with the copyright system creating more traditional author's right provisions. In our analysis we will continue to see more similarities between the two systems to finally determine which is the prevailing one.

F. THE IMPORTANCE OF THE SCOPE OF EMPLOYMENT ELEMENT TO DETERMINE A WORK MADE FOR HIRE

In the WILLIAM vs. WEISSER case the court ruled that if a professor writes his lecture during business hours and without any kind of supervision, that work is not considered to be for hire, despite the fact the professor is an employee of the University working in business hours.[168] The requirement that the created work be bound within the scope of the labor law contract, is put into practice in this case. On this point Nimmer says that: "*Given the requirement that works for hire fall within the scope of employment, it follows that if an employer and employee agree that even works prepared outside such scope will be considered works for hire, those provisions of the contract are invalid.*"[169] Thus, if an employer wants to allege the rights on a work created by an employee, it is a mandatory requirement that the work falls within the scope of the contract. The protection of the employee's rights that Nimmer suggests would prevail over the freedom of the parties. At a first glance, the copyright system in comparison to the author's rights system can be considered as less protective to the employed author. Thus, this kind of protection is paradoxical and we could ask ourselves whether there are similar commentators in line with Nimmer, applying this argument to the author's right system.

167. Circular 9, supra note 156.

168. WILLIAM v. WEISSER, 273 Cal. App. 3d 726 Cal. Rptr. 542, (Cal. Ct. App. 1969) at 739, 742.

169. Nimmer, supra note 123, at 50.

G. SALARY AS AN ELEMENT IN DETERMINING THE EMPLOYMENT RELATIONSHIP

In the CCNV decision, one of the elements in determining the employment relationship was the "method of payment to the hired party".[170] Thus, as in the continental labor law traditional doctrine, not only the existence of control and supervision, but also the fixation of a salary is considered an indication of the existence of the labor law contract. However, in *Brown v. Cosby*[171], it was stated that despite the presence of a fixed salary, if an employer does not pay the salary to an employee, there is a breach of contract that will not give the ownership of the copyright to the employer.[172] This case was ruled before the CCNV decision. Thus, it would be interesting to ask ourselves if, under current law, the same consequence would apply or the employee will simply have to enforce the right to get paid and loose the right on the created work. As we can see, this is another ruling in order to protect the employed author, which at first glance would be more likely found in an author's right system. In the law of continental systems, however, there are no labor or IP law provisions like this. The stated common law rule can be considered not only as a fair price to an employee that do not get paid, but also as a method of penalizing the employer for not fulfilling his labor law obligations, despite the fact that there are in each country other ways to punish the employer for not paying the employee.[173]

VI. COLOMBIA. LEGAL RULES AND ANALYSIS

we begin the Colombian legal analysis by stating that the two topics of study under examination, employment and copyright, are protected under the Colombian Constitution of 1991. The constitution of Colombia guarantees a right of employment and protection of one's IP.

The term 'employment' is defined in article 25 of the Constitution. Under this provision employment is a constitutional right, and it is an obligation for the state to protect all forms of employment. The first question that we have to raise after reading the previous provision is: what does the Constitution meant by '*all forms of employment*'?[174] The answer for this is the same as in Germany and in the

170. CCNV case, supra note 148, at 151.

171. BROWN V. COSBY 433 F. Supp. 1331 D.C.Pa. 1977. (Distr. Ct. 1977) see at 1343 & 1344.

172. NIMMER, supra note 123 at 51.

173. In comparative labor law, the employer usually has to pay high interests for not paying salaries. For instance, In Colombia if an employer does not pay the employees its monthly salary, the law 789 of 2002 establishes that the employer will have to pay the employee two times of the salary and for two years, and after that time a financial interest will be charged. Thus, another policy question for debate is if labor law illegal behaviors can be punished by affecting other type of rights, like in the present cases, IP rights.

174. Art. 25 of the Colombian Constitution reads: *"Art. 25* - El trabajo es un derecho y una obligación social y goza, *en todas sus modalidades* (All forms of employment), de la

United States; *employment* is a generic term, encompassing labor law contracts and private law contracts.[175]

In addition, article 61[176] of the Constitution creates an obligation for the Colombian state to protect Intellectual Property rights. This provision does not distinguish between the three traditional IP rights of copyrights, patents and trademarks, but the legal doctrine includes these concepts under the generic concept of Intellectual Property rights.

With referal to the Copyright tradition that has been used in Colombia, the same analysis that was made in Germany applies here, as Colombia is a continental law system. Thus, the proper way to name the right which an employee may have for the works created is *author's' right* and not copyright. However, as it was previously said, in the German analysis, for practical reasons the term copyright may be used here as well.

Although the aim of this analysis is not to consider what constitutes an employment contract in the analyzed countries, some generalities of the Colombian law can be pointed out:

As mentioned, the traditional three main elements of the labor law contract that have been analyzed in United States and Germany are present also in Colombian law in the article 22 of Labor Law Code.[177]

Likewise, as stated above, the term *employment* is a generic term in civil law relationships, in which is included the situation where persons provide services to others. In Colombia the most common civil legal law relationship in which copyrighted works are created is the so called *contract to provide services* or *contract of services* , a literal translation from the Spanish term: *Contrato de prestación de servicios*. The elements of this type of contracts are not defined in a specific provision, but it is of frequent application as it is a legal way by which the one that orders a work is not legally obliged to pay different sums usually related to the Colombian Social Security Regime. However, it is important to take into account that the person who wants to receive the services does not treat the provider as an employee, otherwise he will run the risk of being under a labor law contract even without even signing one as the substantive reality prevails over the practice.[178]

The contract to provide services is not specifically defined in a legal provision; however, there are rules that explain its origin and its philosophy. The first rules

especial protección del Estado. Toda persona tiene derecho a un trabajo en condiciones dignas y justas".

175. e.g. In the United States what is known as '*work for commission*' may be included within the work made for hire 101 provision. See supra note 125.

176. "Art. 61.- El Estado protegerá la propiedad intelectual por el tiempo y mediante las formalidades que establezca la ley".

177. Colombian Labor Law Code, See supra note 8.

178. The real conditions of a legal relationship prevail over the forms that the parties select. Thus, it is a recognized principle of labor law that even if parties sign other types of agreements, if the three elements mentioned above are present, the contract is deemed to be a labor law contract. See supra note 5, at 302.

that mentioned the topic were Articles 2053 and 2063 of the civil code.[179] The first refers to the lending of services to create a tangible work and the latter refers to intangible forms.

The Colombian Commercial Code also includes provisions related to contracts for services. The most important is article 968.[180] However, the only legal norm that has an approximate definition of the contract to provide services can be found in article 32 paragraph 3 of the Law of States' Contracts. For our purpose, the important element of this definition is the express exclusion of labor law contracts when it states: "*in any case, these contracts do not create labor law relationships*".[181] The cited provision clearly shows the legislator's intention to differentiate this contract from labor law contracts.

The previous rules are the basic legal provisions by which a person in Colombia can create work for an employer or for someone that has not the title of employer, but receives the services under a non labor law relationship.

a. the gap in colombian law regarding the ownership of economic rights in works created in employment relationships

None of the Colombian legal rules above provide a clear answer regarding the ownership of the copyright of works created by employees. The only reference that can be found in the Labor law code in relation to IP is related to the employee obligation to maintain confidentiality.[182] Neither the civil code nor the commercial code established a legal rule that provides a clear answer about the ownership of the copyright in Works created by employees.

The Colombian Author's Right Law number 23 of 1982 has in its article 20[183] a specific rule concerning the ownership of the copyright in contracts to provide services, however, the law does not mention any express rule about the situation under an employment contract.

A literal translation of article 20 will be:

When one or more authors during a contract to provide services make a work under the directions of a natural or legal person, the author or authors will only receive the fees that they agreed by contract. Just by this fact, the author or

179. Colombian Civil Code of 1873

180. Colombian Commercial Code of 1971

181. Law of State's Contracts # 80 of 1993. Art "3. Contrato de prestación de servicios… En ningún caso estos contratos generan relación laboral ni prestaciones sociales y se celebrarán por el término estrictamente indispensable".

182. Colombia Labor Law Code in its Articles 58 provides an obligation for the employee of not disclosing confidential information to third parties. In Article 62 (8) it is stated that revealing trade secrets and confidential information can lead to termination of the labor law contract. It is important to clarify that trade secrets and know-how are different concepts, but the Colombian provision refers to both. Thus, the employee will have to show loyalty to his employer by not revealing to third parties this kind of information.

183. Article 20 Author's Right Law number 23 of 1982.

authors transfer their rights on the work, without prejudice of article 30 letters a) and b).[184]

Two consequences will derive from this provision:

1- That just by signing the contract, the provider of the services will transfer the economic rights.

2- As Colombia is an Author's Right system, the dualistic theory of rights by which the law differentiates between Moral and Economic rights will be applied here. Thus, the author in this case will retain the moral rights of integrity (a) and paternity (b).[185]

In spite of the previous provision, according to some commentators, like Fernando Zapata López, article 183 of the law under study, fixes a formal requirement to make the transfer of the economic rights effective in the course of the contract to provide services.[186]

Article 183 states that every act, in which there is a partial or total transfer of the author right, must be made by public instrument or by a private document certified by a Notary.[187] In addition, to have effect on third parties, the documents have to be registered in the National Office of Author's Right.[188] On this regard there is a big difference with United States and Germany. As previously mentioned on these two countries, the registration of a transfer or a grant at the respective Copyright Office is not a mandatory requirement for the validity of the transfer.

In Zapata´s opinion, article 20 does not establish a legal presumption of transferal of the economic rights.[189] The argument that he relies on to reach this conclusion is that legal presumptions are formed by facts, and in the present case this legal presumption is created by a contract (the contract of services) but not by a fact, so technically it is improper to talk about a legal presumption under this analysis.[190] Moreover, he states that what article 20 is establishing is the effect of signing a contract to provide services, but this does not mean that the parties do not have to fulfill the formalities established under article 183.[191]

Thus, the questions to ask after reading these two legal provisions are:

184. It is important to note that article 20 starts with the word 'authors', this is without doubt an example of an author's right provision where there is no need to distinguish the transfer of the moral rights as it is implied that the moral rights are inalienable and the author or authors will retain them.

185. Despite the fact that the Author's right Law recognizes other types of Moral Rights, these are the only moral rights that the law recognizes to the author that creates a work under a contract to provide services.

186. Zapata López Fernando. El derecho de Autor y la Marca. Universidad Externado de Colombia. Revista de Propiedad Intelectual. Centro de Porpiedad Intelectual Primer Semestre 2001. Revista 2, at 21

187. Article 183 Colombian Author's Right Law number 23 of 1982.

188. Id.

189. Zapata, supra note 187, at 9

190. Id, at 9. This opinion has been criticized in the opinion of the Colombian Consejo de Estado stating that a contract is a fact, so a presumption can exist. See infra note 201 at 14

191. Zapata, supra note 187 at 9.

Why does the law mention in article 20 that simply by signing the contract to provide services, the economic rights will be transferred, if later, in article 183 it establishes an extra requirement for the economic rights transfer?

Does articles 20 and 183 have to be used in order to solve the economic rights problem, or other legal arguments can be used?

There has been different interpretations to resolve this question. However, for the purpose of the study, only the following 4 main approaches are going to be mentioned:

1. The application of the Latin maxim the special law prevails over the generic law 'lex specialis generalem deroga'

The author Carlos Hernán Godoy states that article 183 does not apply to contracts to provide services.[192] He uses the legal principle by which the special law prevails over the generic law *lex specialis generalem deroga* in order to solve the ambiguity.[193] The special provision is Article 20 by which the lawmaker was only regulating the contract to provide services. Thus, in Godoy's opinion there will be no need to require a public instrument or other formalities for a transfer of economic rights in the course of a contract to provide services.[194] Notwithstanding the need for the requirements of article 183 in a contract to provide services, Godoy emphasizes the importance that the three following conditions of article 20 are fulfilled in order to transfer the economic rights:

1- The contract has to include a clear work plan. The reason for this is to avoid situations in which undefined rights shall be transferred. This is of importance because if the author agreed to broad work, then he may run the risk of lost economic ownership on works that were not meant to be transferred.

2- The elaboration of the work should be under the risk of the person that orders it.

3- The price that the parties agree must be clearly specified in the contract.[195]

If as Godoy says, the lawmaker is referring to contracts different from the agreement to provide services in article 183, the question for our purpose will be, what if one of these types of contracts was a labor law contract?

192. Carlos Hernán Godoy. El Contrato Laboral y de Prestacion de Servicios ¿Herramienta Idónea Para La Transferencia de Derechos?. Conferencia para el Semniario Internacional organizado por la pontificia Universidad Javeriana, at 7.

193. Id, at 7. The law 57 of 1887, is the Colombian law to solve conflicts between laws. Article 5 (1) states that when there are incompatible provision within the law codes, the legal provisions that refer to an specific matter will prevail over the ones that have a general character.

194. Id, at 7.

195. Id, at 9.

Regarding this question GODOY states that article 20 is not applicable to the labor law agreement,[196] because of the following two arguments:

– In spite of the fact that the text of article 20 is ambiguous because it refers to contract of services, the word fees (*honorarios* in Spanish) marks a clear distinction between the contract of services and the labor law contract, as in the latter the money that the employer pays to the employee is by essence called a wage, but never fees. If the law maker distinguished the word fees, it should be inferred that it was referring to service contracts.[197]

[a] There is not a specific rule for the labor law agreement on the Author's right law. This fact means that we have to apply the general provision of article 183. The wording of Article 183 states that "every act" ("*Todo acto*" in Spanish) of transfer must fulfill the requirements established herein. When the law refers to 'every act' it must be interpreted as every act different from the contract of services where there is a specific rule.[198] Thus, in Godoy's opinion article 183 applies to the labor law agreement, and if the employer wants to receive the economic rights, the agreement will have to fulfill the two requirements already mentioned, that is: it has to be made by public instrument or in a private document certified by a notary, and will have to be registered in the Author's Right National Office to have effects on third parties.

To summarize GODOY's approach: There is no specific provision in the civil, commercial and author's right law that will tell us to whom the economic rights should belong in an employment relationship. As there is no special provision, article 183 is the general rule that we will have to apply for the labor agreement.

2. Transferability of the economic rights in virtue of Article 20 of the author's right law.

The Colombian Consejo de Estado[199] in the year 2003 provided an opinion[200] to the question of the application of articles 20 and 183 in the employment relationships. The opinion can be considered as opposite to Godoy's interpretation mentioned above. This is because the *Consejo de Estado* avers that article 20 is enough to say that the employee transfers the economic rights to the employer. By the sole fact

196. Id, at 13.
197. Id, at 15.
198. Id, at 14.
199. The literal translation in English of *Consejo de Estado* will be *State adviser.* This organ is the head of the administrative Jurisdiction in Colombia. One of its functions is to give opinions on legal questions that the government makes. The initiative to consult this issue came from the Minister of Justice. It is important to clarify that despite the fact that usually the citizens, courts and other institutions follow these opinions, they are not binding and only constitute recommendations. See Juan Carlos Galindo Vácha, Lecciones de Derecho Procesal Administrativo, Publicado por Pontificia Universidad Javeriana, 2006. See at 190.
200. Consejera Ponente SUSANA MONTES, consultancy number 1538 of October 23 of 2003.

of having a labor agreement the employer can receive the economic rights on the work, and there is no need to fulfill the requirements of article 183.[201]

The following are some of the main reasons that the Consejo de Estado uses to justify the opinion:

– Despite the fact that there is no internal law that refers to the situation in the labor law contract, there must be an harmonious interpretation with the following articles of the author's right law: Article 4 of the author's right law permits in some situations that a legal or natural person has the economic rights when he, she or it orders the production of the work at his own risk. Article 92 establishes that if in the course of an employment contract, a collective work is created, and if it is impossible to determine the ownership, the property of the economic rights will belong to the person that ordered the work. Thus, the said harmonic interpretation will apply if the lawmaker regulates the situation in these rules; they have to be applied to the employment contract too without seeing if the created work is collective or not. The result is that the economic rights of the employee are transferred to the employer with the sole act of signing the labor contract[202].

– The Colombian Constitutional Court in the judgment C- 278 of 1996 said that article 20 of the author's right law was enough to transfer the economic rights to the natural or legal person who ordered the work. This judgment was confirmed in a later case (C- 155 of 1998). These judgments must be also extended to the labor law contract.[203]

– The Andean decision # 351 of 1993 in its article 10 provides the same legal presumption of transfer of economic rights, not only when there is a work that is ordered in the course of a civil relationship, but also in a labor law agreement.[204]

Regarding the application of the previously mentioned article 183 of the author's right law, the *Consejo de Estado* states that this norm could be a mistake by the lawmaker, because the truth of the matter is that the transfer of economic rights in civil law and labor law agreements by which an employer or non employer orders a work, do not require the formalities established in article 183.[205]

3. The favorability principle of the labor law and Author's Right Law

This approach does not use articles 20 or 183. On the contrary, under these interpretations the favorability principles established in the Author's right law and the labor law code are the legal arguments that give the employee the ownership of the economic rights.

Regarding the favorability in the labor law code, Riveros states that the gaps of the legislation may not be interpreted in a manner which is contrary to the inter-

201. Id, at 7.
202. Id, at 10.
203. Id, at 15.
204. Id, at 18.
205. Id, at 13.

ests of the employee who produced the work in an autonomous way or produced the work in accordance with a given plan.[206] The favorability principle protected under labor law bestows on the employee a claim over the economic rights of a work when there is no agreement in which the employee has transferred such rights to the employer.[207]

Likewise, article 257 of the Author's Right Law establishes that any doubt regarding the application of the law will be interpreted in favor of the author. As this is clearly a case where there is not a specific rule that gives an answer, and as the employee in Colombia is the author, he will be the one that benefits from this principle.[208] By contrast, as it was explained in the previous Chapter, the author in the United States is the employer. Thus, there will be an important difference in this point as the application of the said principle in the United States will be in favor of the employer.[209]

4. Labor law approach in favor of the Employer

As the previous interpretation this approach does not use article 20 or 183, it states that the philosophy under the labor law norms implies that every work created by an employee should be property of the employer.

One of the proponents of this philosophy is the Argentinean professor Delia lipzyc who recognizes that despite the difficulty of finding an answer to the question of ownership of works created in employment contracts, the principles of labor law should prevail over the principles of author's law.[210] According to the general principles of labor law, every fruit produced by an employee must belong to an employer, although the moral rights will be always remain the property of the employee.[211] The Colombian Professor Arcadio Plazas, shares Lipzyc's approach, and adds that one must differentiate between authorship and what he calls title of rights[212]. The authorship of a work can only vest with the employee, as he is the one who creates the work. The second element, title of rights, belongs to the employer, so the employer will be the direct owner of the economic rights unless the employer agrees differently with the employee.[213] Moreover, Plazas states that employer and employee both satisfied their immediate economic interests because, on the one hand, the employee received a wage for his work and, on the other hand, the employer received the fruits of the works for which he was paying.[214] Another

206. Riveros, supra 22, at 124.
207. Id. at 124.
208. dnda, Consultancy # 12879 2001. at 56.
209. For the application of this Principle in the United States, see supra 1, at 222.
210. Lipzyc, Delia, Derechos de Autor y Derechos Conexos. Ediciones unesco at 93.
211. Id. at 93.
212. Plazas, Arcadio, Estudio sobre derecho de autor, reforma legal Colombiana, Bogotá, Temis, 1984, at 220.
213. Id. at 220.
214. Id, at 220.

justification that Plazas uses to support the idea of the ownership of the economic right residing with the employer, is the fact that the employees create copyrighted works, not only according to instructions given by the employer, but also with material tools provided by the employer. Thus, the effort of the employer should be recognized by giving him the ownership of the economic rights.[215]

The previous four theories concerning the ownership of the copyright in works created in employment relationships created can be summarized as follows:

1- Article 20 of the author's right law is not enough to transfer the economic rights to the employer. For an employer in order to be the owner of the economic rights, he has to fulfill the requirements provided in article 183 of the author's right law. By contrast, in the contract to provide services there is no need to fulfill the requirements fixed on article 183. However, some commentators like Zapata[216] argue that even in the contract to provide services the formal requirements of article 183 have to be fulfilled in order to transfer the right to the person that ordered the work.

2- In virtue of article 20 of the author's right law, it is clear that an employee is an author that retains the moral rights, however the economic rights are automatically transferred to the Employer. The same conclusion applies to the contract to provide services.

3- The principles of favorability of the labor law code and the author's right law give the employee the economic rights on its creation. The employer will only have the ownership of the economic rights if the employee decides to transfers them to him.

4- The labor law should prevail over the author's right in this case, and the economic rights should belong to the employer for the sole fact of signing a labor contract with an employee.

b. works created by public servants

Notwithstanding that the Author's right law did not provide a legal answer for the ownership of the economic rights in works created in private employment relationships, Article 91 regulates the subject in works created by public servants.

In this situation, we are under the hypothesis that an employee from the state creates a protected work. The legal consequence is that the State is the owner of the economic rights. This provision can probably contains one of the few exceptions of the moral rights in the law, as it says that "the moral rights will belong to the authors (the employees) as long as their exercise is compatible to the legal duties and rights of the public offices involved".[217] The philosophy under the norm is protecting the public interest of the state, however, there are no known cases related

215. Id, at 220.
216. Zapata, supra note 187.
217. Article 91 Colombian Author's Right Law # 23 of 1982.

to this matter in which a public company has claim something from an employee because of an incompatible exercise of the moral right.

The situation in Colombia regarding works created by public servants is more similar to the Anglo America Copyright System as the State is the owner at least of the economic rights. By contrast, and despite the fact that Germany is an author's right system like Colombia. The ownership in works created by public servants in Germany is different, as the economic and moral rights vest with the public servants.[218]

VII. CONCLUSIONS

A. MAIN DIFFERENCES IN THE LAW OF THE ANALYZED COUNTRIES

As Germany and Colombia are countries based on the author's right system, the employee will always be considered the author of a work created under the scope of employment. Likewise, the employed author will always be a natural person. By contrast, in the United States, the employer is considered the author of a work created under the scope of employment, and he can be a legal entity or a natural person.[219]

With respect to the issue of ownership, since Germany and Colombia are both based on the author's right system, the employee will always be the owner of the inalienable moral rights in these countries. Since there is no express recognition of moral rights in the United States, the employees cannot enjoy such types of rights.

Since Germany is a monistic author's right system, the moral rights and the economic rights are represented in one sole right that belongs to the employee.[220] Consequently, an employee in Germany can only grant the right to use the economic rights, since he will always be considered the owner of economic rights , and no transfer will be possible. By contrast, Colombia is classified under the dualistic theory of moral rights by which moral and economic rights are not merged into a unitary right, and thus, the employee can transfer or license the economic rights to the employer.[221]

The silence of the employer and employee regarding the ownership of the copyrighted works may also bring different results in each country. In the United States, the general rule is that if the parties did not agree to anything otherwise, the employer will be the author and owner of the work. In Germany, if the parties were silent, the employee will exercise the economic rights. However, an important exception to the general rule in Germany can be found in computer programs created by employees.[222] In this case, the silence of the parties will give the exercise of the economic rights to the employer. In Colombia, the law does not tell where

218. See works created by public servants in Germany in Chapter V (H).
219. See supra note 124.
220. See supra note 31.
221. See art 20 Colombian Author's Right Law.
222. See article 69 (b) German Copyright Act.

an employee and employer are silent on the topic of economic rights, resulting in different interpretations by commentators. Some commentators prefer to give the ownership of the economic rights to the employer while others aim to vest the employee with these rights.

Finally, regarding the duration of the copyright, Colombia has the longer protection, since the economic rights last 80 years after the death of the employee or 80 years after the death of the employer if the economic rights were transferred to him and the employer is a Natural person.[223] With respect to the moral rights, since Colombia follows the dualistic author's right system, the duration of these rights is perpetual. The monistic theory of author's rights in Germany has a different result, whereby the moral and economic rights last 70 years after the employee's death.[224] The United States provides the minimum protection, as the right lasts 95 years from the publication of the work or 120 years from the creation of the work, without taking into account the death of the employer.[225] This can be considered as one clear difference revealing how important is for an author's right system to observe the interests of the authors by giving them longer terms than in a copyright system.

B. THE TENDENCY OF THE AUTHOR'S RIGHT LAW SYSTEMS LIKE GERMANY AND COLOMBIA TO BECOME SIMILAR TO THE ANGLO AMERICAN COPYRIGHT SYSTEMS

The fact that the German law recognizes the employer's ability to exercise economic rights in computer programs, leads to a clear approximation to the American work made for hire doctrine. The employer in Germany is not the author, but the power to exercise the economic rights in these works is enough to reveal a similarity to the Anglo American system, as the economic interests of the employer prevail over those of the employee, who in most cases is the natural person creating the copyrighted work. Likewise, for other types of works, the usual practices in Germany can lead to the same conclusion. In most of the cases, not only have employees granted the use of the economic rights to the employer, but by "implied clauses" or presumptions, the employer finds a means of exercising the economic rights.[226]

Despite the fact that the E.C. computer programs directive leaves the regulation of moral rights to the national law of each member state, the reality in Germany is that the use of the moral rights in software created by employees is being diminished,[227] revealing another similarity to the Anglo American Copyright system where these types of rights are not recognized.

223. See articles 29 & 30 Colombian Author's Right Law. Regarding Legal Persons article 27 establishes a term of 30 years after the first publication of the work.
224. See article 64 German Copyright Act.
225. See supra note 132.
226. See Dietz, supra note 48.
227. See Kirchberger, supra note 95.

The E.C. computer programs directive also left another issue to the member states, that of computer programs created by independent contractors. On this regard, Germany gave the exercise of the economic rights to the person that orders the work,[228] highlighting another similarity to the Anglo American Copyright system in which the copyright vests in the person that ordered the work, if the conditions of a work made for hire are present.

In the case of Colombia, it is difficult to take a position regarding an approximation to the Anglo American copyright system regarding works created by employees serving private companies. This is due to the fact that the law does not provide a clear answer, and legal commentators have expressed different interpretations about the ownership of the economic rights in employment contracts. By contrast, in works created by public servants, the law in Colombia is clear and shows an approximation to the Anglo American Copyright system, since the economic rights vest in the Nation. Likewise, the moral rights in such public employment contracts are limited, as their exercise is permitted if they do not conflict with the normal exploitation of the work. [229]

Thus, it can be considered paradoxical that two author's right systems like Colombia and Germany do not have uniform rules on the topic, and by contrast, both countries have strong similarities to the Anglo American copyright system. If the Colombian lawmakers decide to amend the law and fill the legal lacunae, the philosophy of the author's right system should not be forgotten. The economic and moral interests of the employed authors have to be conserved. Otherwise, it would be inconsistent to call the system an author's right system which was created to protect the original creation of the human being. Likewise, lawmakers should consider solutions to protect the interests of the authors in industries where employees cannot freely exercise moral and economic rights (i.e. computer programs). Some solutions may lie in creating mechanisms that give extra remuneration to the employees for their work, as is the practice in Germany with inventions created by employees.[230] Another fair and probable solution that can balance the interests of employees and the employers in these kinds of works may consist of dividing the ownership of the economic rights by half, as is the practice in countries like Mexico.[231] One must not forget that it is not every day that an employee is creating works that are protected under copyright. The creation should be rewarded, and in most of the cases the salary is not a great enough incentive. Mechanisms to simultarneously reward authors and stimulate creation are necessary.

228. See Dietz, supra note 29.
229. See supra note 218.
230. See supra note 56.
231. See supra note 163.

c. other types of similarities between the countries under study: scope of employment, employment relationships and the use of ip statutes

In the three countries analyzed, one may conclude that the expression "scope of employment" has a similar meaning. The important indicator in considering whether a work was created under the scope of employment lies in whether the employee created the work in execution of his duties. Other factors, such as the creation of the work in the place of work or during working hours, are subsidiary facts that are not clear indicia to prove that a work is created in an employment relationship.

Likewise, the understanding of a labor law relationship is similar in Colombia, Germany, and the United States. The element of dependency, characterized by the fact that the employer gives orders to the employee in how to do their work or fulfill a schedule, is present in all three countries. Similarly, the principle of reality over the forms[232] is applied in the three countries, as it does not matter if one party uses a different formality from a labor contract to order another party to produce work. If elements such as supervision, control, or dependency are present, the reality shows that there is in fact a labor relationship.

Naturally, in all the countries, it is mandatory to observe labor law provisions such as labor law contracts, labor law codes, and union agreements. This fact has created critics in the United States who believe it is a mistake of courts to take into account agency law in the "work made for hire" doctrine.[233] Nonetheless, one may affirm that the tendency at least in Germany and in the United States has been to regulate the issue of ownership mostly by using Copyright justifications and the National Copyright acts. Since Colombia has not provided a clear answer to the ownership question, if the lawmakers decide to fill in the legal gap, it would be recommendable to follow the legal trend and amend the Copyright provision, that is, the author's right law.

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232. See supra 179.
233. See supra note 166.

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