

## Venezuela

# New Organic Labour Law initiates changes to IP legislation

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### The new law

#### Background

The concept of copyright provides protection to creators of original and innovative works. Other related rights also stimulate and encourage creators – whether by acclaim or financial reward – leading to an environment which promotes culture, knowledge and entertainment throughout the world.

Article 2 of the Convention Establishing the World Intellectual Property Organisation, concluded in Stockholm on July 14 1967, stipulates that ‘intellectual property’ is understood as rights relating to: “literary, artistic and scientific works, phonograms and broadcasts, inventions in all fields of human activity, scientific discoveries, industrial drawings and designs, trademarks, brands and service marks as well as trade names, protection against unfair competition and all such other rights relating to intellectual activities in industrial, scientific, literary and artistic fields.”

Literary, musical, scientific and artistic works are protected by copyright. Patents, trademarks, industrial drawings, designs and protection against unfair competition are extensively covered under industrial property laws.

The protection inherent in these rights is laid down in Chapter VI of the Constitution. Article 98 states that: “Cultural creation is free... The state will recognise and protect intellectual property on scientific, literary and artistic works, inventions, innovations, names, patents, trademarks and slogans in accordance with such conditions and exceptions as provided for in the

laws and in international treaties signed and ratified by the Republic in this field.”

Article 98 also identifies the goods to be protected and states that they are subject to such “conditions and exceptions as provided for in the laws and in international treaties signed and ratified by the Republic”.

A new Organic Labour Law was enacted in Venezuela on May 7 2012. The previous Organic Labour Law, dated June 19 1997, was repealed by way of publication in *Official Gazette* 6.076. The new law was enacted in order to authorise the executive power to issue decree-law orders in matters delegated within the Council of Ministers. Article 236(8) of the Constitution and Article 1º(9) of the law entitle the president of the republic to issue and announce decree-law orders in different areas.

#### Definitions

Article 322 of the new Labour Law (in part, equivalent to Article 80 of the repealed law) classifies inventions, innovations and improvements and considers them to be service derived, free or occasional. The free or occasional worker refers to individual or legal entities that have been hired to perform a specific task for a determined period of time. In this particular case, there is no labour relation or labour contract established with an indefinite period.

However, the new law excludes the company-related consideration as included in Article 80 of the former law, as this definition has been inserted into Article 322 of the new law.

Article 323 defines ‘inventions, innovations or service improvements’ (largely similar to Article 82 of the repealed law).

Article 324 defines the concept of ‘free or occasional inventions, innovations or improvements’, which are considered to be

those arising from the efforts and talents of an inventor who has not been hired especially for that purpose. Article 83 of the repealed law contains the same definition, but mentions only an inventor “not hired” specifically for that purpose.

### **IP ownership under employment contracts in the public and private sectors**

One of the most significant changes to IP law arises from Articles 325 and 326 of the new Labour Law. Article 325 states that “intellectual production generated under a labour relationship in the public sector or financed through public funds giving rise to intellectual property rights... will be considered of the public domain”.

Article 326, referring to inventions, innovations and improvements in the private sector, states that a creator retains his or her rights in an unlimited fashion and throughout his or her life for each invention, innovation or improvement, and that employers are authorised to exploit the work only during the working relationship or under a licence agreement signed by the creator and the employer.

However, an inventor will be entitled to a proportion of the revenue generated by the use of his or her invention, innovation or improvement if the reward which he or she receives is disproportionate in this regard.

On termination of the working relationship, the employer will be entitled to acquire ownership of the creation within 90 days of notification, which an employee may serve through a labour inspector or labour judge.

### **Other amendments**

Article 327 refers to ownership of free or occasional inventions and matches repealed Article 85 of the former law, as both provide that the ownership of such inventions is retained by the inventor. Both articles agree in terms of an employer’s right to acquire ownership within 90 days of being served a notice by an employee through a labour inspector or a labour judge.

Article 328 refers to inventors’ moral rights – that is, the knowledge which a creator has about his or her works or inventions. Such rights are inalienable, unwaivable and not susceptible to expropriation, liens or

prescription. The right to knowledge is partly linked to Article 86 of the repealed law, which required the creator of an invention or improvement to be named.

Article 329 refers to the name of an invention, improvement, work or composition and to a fair reward by whoever uses it in the event of non-dependent employees; this article is identical to Article 87 of the repealed law.

The law encompasses all intellectual creations (not merely inventions), as Article 321 refers to “every intellectual production” – whether intellectual or related activities, inventions, industrial designs or trademarks.

The new law does not define the concept of ‘public domain’ and it does not indicate the scope or limitations thereof; this and other concepts must be defined, and more details are expected to be laid down in a supplementary regulation to the new law and in future copyright law and industrial property law.

### **Comment**

Only a few articles have been modified from the previous law, but the significant changes that have been made regarding IP creations and inventions represent a better outlook for the public sector and reinforce the empowerment of governmental industries and organisations that has developed in Venezuela over the past 12 years. The importance of the public sector as a key factor in Venezuela’s economy has been clearly emphasised. On the other hand, these new modifications favour the right of ownership of a creation within the private sector.

The modifications to the Labour Law were not limited to the IP spectrum. There are major changes in other areas that are likely to alter significantly the relationship between employers and employees, in both the private and public sectors.

### **Venezuela joins Mercosur**

Venezuela joined Mercosur – the Southern Common Market – on July 31 2012 after several failed attempts since 2005. Initially, the Brazilian government did not support Venezuela’s inclusion in the agreement due to concerns that the bloc would become polarised under Venezuela’s influence. The Paraguayan government rejected Venezuela outright as a new member. However, once President Lugo had left

office, Venezuela seized the opportunity to join.

Venezuela must now implement substantial but progressive changes into its legislation and commercial procedures and practices set forth by this multilateral organisation in order to integrate with the new community law.

Mercosur was originally created on March 26 1991 under the Treaty of Asuncion, which was enacted on January 1 1992. Its founding members were Argentina, Brazil, Uruguay and Paraguay. The treaty's primary objective is the acceleration of economic processes, along with social justice.

The Andean Community of Nations commenced operating in 1969, and has many characteristics in common with Mercosur: they were both conceived in a sub-regional instance of integration, embracing the Latin American community as a whole. The Andean Community of Nations was not the only organisation dealing with regional agreements in Latin America: the Latin American Integration Association (created in 1980) is an example of another attempt to forge integration in this region, as were the bilateral commercial agreements between Argentina and Brazil from 1986. There is no doubt that Mercosur served as a paradigm of reference for the creation of the European Union.

The incorporation of Venezuela into Mercosur encompasses issues related to access to the common market, and also other legal issues connected with the trade regime (including but not limited to intellectual property, investments, competition policies, financial services, telecommunications, electronic commerce, labour issues, environmental measures, systems of commercial defence and dispute resolution), taking into account that Mercosur has a solid foundation based on the following principles:

- the free circulation of goods, services and productive factors through the elimination of customs duties and restrictions to the circulation of merchandise, as well as any equivalent measures;
- the establishment of a common external tariff, along with the adoption of a common commercial policy that regulates relations with third states or groups of states;
- the coordination of positions within international or regional forums that deal

with economic and commercial matters; and

- the commitment of members to harmonise their legislation in key areas in order to achieve the strengthening of the integration process.

IP rights – especially related industrial property rights – are also grounded in macroeconomic development and social justice (as stated in the treaty). Therefore, it is worth analysing whether the Venezuelan trademark and patent laws are considered pertinent areas in order to achieve the strengthening required for the integration process. All these are key elements that cannot be separated from economic activity. These factors exert influence as a whole, and the evolution of the nation depends on the way in which the government handles legislative and economic policies.

Venezuela's inclusion in Mercosur might be a factor that alters the Venezuelan economy, as well as the socio-economic relationship between the bloc. There is confusion and concern across the private sector that being a member of Mercosur will weaken Venezuela's internal economic system and diminish gross domestic product levels. This situation is derived from the fact that joining this bloc might not represent an advantage for local production. In recent years the tendency of the Venezuelan state to control different production sectors excessively, leading to a degradation of local industries, has raised concerns. As a result of the application of these restrictive measures, Venezuela was not welcomed into Mercosur with open arms, since other members of the bloc have developed policies that favour and increase the scope of action of the private sector. *iam*

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Geovanny Azuaje graduated from *Universidad Central de Venezuela* in 2006. He joined Hoet Peláez Castillo & Duque in March 2011. He has extensive experience in the area of intellectual property, including 11 years at the Trademark Office, where his activities comprised the revision and classification of trademark application briefs, and the formal examinations of patents, utility models and industrial designs. Mr Azuaje also worked as a legal assistant at Seintex Consultores (2000), where he participated in a project aimed at streamlining the Supreme Court Board of Appeals system. As a legal assistant at CorpBanca (1997-1999), he gained experience in monitoring judicial and labour cases handled by different courts located in the Caracas jurisdiction. Mr Azuaje has attended various courses on intellectual property (formal examination substantive trademark review, formal examination substantive patent review, legal aspects and formal procedures about copyright). He is a member of the Caracas Bar Association.