

COPYRIGHT, DIGITAL LIBRARIES AND ACCESS TO INFORMATION

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SUMMARY: I. *Introduction*. II. *The Double Discourse of Copyright Legislation*. III. *Legal Instruments*. IV. *Intellectual Property in the International Legal Framework*. V. *Intellectual Property in the Mexican Legal Regulation*. VI. *Current Needs*. VII. *Conclusions*. VIII. *Bibliography*.

I. INTRODUCTION

This research is motivated by the current globalization that has generally been allowing and demanding greater access to information. In addition to the current pandemic due to the SARS-CoV-2 virus, new modalities and workspaces were imposed globally, including teaching and research. The healthy distance, and the suspension of face-to-face activities focused attention on digital libraries, which have a series of problems such as the lack of balance between the interests of the owners of the copyright of their works and the interests of the users who demand access its content. In addition to this, due to the great inequality between different sectors of the country, only certain segments of the population have sufficient conditions to be able to access academic, cultural and knowledge content digitally, giving rise to a digital divide among students, which violates the right to education and information.¹

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¹ Torres Vargas, Georgina Araceli, "Brecha digital y derechos humanos", en Hernández Pacheco, Federico (coord.), *El impacto de las bibliotecas jurídicas en el desarrollo nacional*, México, UNAM, Instituto de Investigaciones Jurídicas, 2021, pp. 107-116, available at: [7.pdf \(unam.mx\)](#).

Libraries, as intermediaries, and providers of the content of the works through licenses agreed with the owners of the exploitation rights of the authors' works, are entrusted with the social function of making such works available to the population. However, at the international and national levels we still have protectionist systems for authors, which do not establish sufficient limitations and restrictions so that these cultural centers can fulfill their objective of disseminating knowledge.

Copyright is considered the set of prerogatives that the law recognizes to those who produce literary, artistic, and scientific works. Copyright is one of the two great branches of intellectual property; the other is industrial property law. Copyright is responsible for protecting works that belong to the literary and artistic field, if they constitute original creations and are acts of a natural person, the author, who is granted a monopoly on the reproduction and dissemination of the work.²

Globally, the World Intellectual Property Organization's 1996 World Copyright Treaty set the standard for granting authors rights for distribution, rental, and communication to the public. In Mexico, the Federal Copyright Act (*Ley Federal de Derecho del Autor*), the Federal Act for the Protection of Industrial Property (*Ley Federal de Protección a la Propiedad Industrial*), as well as laws administered by the National Institute of Copyright (*Instituto Nacional del Derecho de Autor*) and the Mexican Institute of Industrial Property (*Instituto Mexicano de la Propiedad Industrial*) are those who regulate the use of copyright. The problem lies in the omission by such legal instruments to have a content that proportionally balances the interests of authors and consumers; and, in the same sense, the regulations do not contemplate the digital content of the authors who, through license contracts, share the exploitation rights with digital libraries, but without the due regulation of limitations and exceptions to the authors to be able to socialize knowledge.³

This research work aims to clarify the current legal regulation between authors and libraries, specifically regarding digital content. As well as making the necessary observations of the current needs to regulate the capacity of the receiving users of the informative content to be able to access knowledge.

² Quintana Adriano, Elvia Arcelia, *Ciencia del Derecho Mercantil. Teoría, doctrina e instituciones*, 5a. ed., México, Porrúa, 2020, p. 50.

³ Cárdenas Zardoni, Horacio, "La compleja relación entre la biblioteca universitaria y la Ley Federal de Derechos de Autor: implicaciones y responsabilidades en la producción y fotocopiado de materiales", *Biblioteca Universitaria*, México, vol. 19, núm. 1, junio de 2016, pp. 33-50, available at: <https://bibliotecauniversitaria.dgb.unam.mx/rbu/article/view/139/130>.

II. THE DOUBLE DISCOURSE OF COPYRIGHT LEGISLATION

The current national and international normative regulation regarding Copyright poses a double discourse. In the protectionist aspect of the author, it foresees and makes available legal mechanisms to protect their authorship, and fully enjoy their economic rights; under the argument of the need to promote the development of works, articles, researches, etc. At the same time, it limits the enjoyment of the author of his patrimonial rights in his aspect of socializing knowledge; this with the assumption that being scientific content should be made available to the public for free, ensuring access to knowledge and culture. These contrary positions do not allow one or another position to be fulfilled in its entirety.

Internationally, it has been pointed out that, in general, authors lack legal limitations and restrictions on their authorship and property rights. However, given the significance and weight that has been given to access to information and cultural rights⁴, the enjoyment of economic compensation has been limited to authors of articles, reports, and scientific researches. Likewise, it highlights the intention of making information available to the public through the “Libraries” or Cultural Centers, since their purpose and function is to socialize knowledge.

According to the World Intellectual Property Organization (WIPO) Copyright Treaty, authors have the exclusive right to authorize any communication to the public of their works by wire or wireless means⁵. At the same, it is established that the object of protection and enforcement of intellectual property rights contribute to promoting technological innovation, transfer, and diffusion of technology reciprocally to producers and users of knowledge, for which, at a general level, it favours social and economic well-being.⁶ The argument of this protectionist system of the author is based on the following points:

- Need to promote innovation and creativity.
- Facilitate dissemination of information, knowledge, technology, culture and arts.

⁴ Declaración Universal de Derechos Humanos, available at: https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/spn.pdf.

⁵ OMPI Tratado de la OMPI sobre Derecho de Autor, available at: <https://www.wipo.int/treaties/es/ip/wct/index.html#:~:text=El%20Tratado%20de%20la%20OMPI,se%20conceden%20determinados%20derechos%20económicos>.

⁶ *Idem*.

- Promote competition, open and efficient markets, through intellectual property systems, respecting transparency, and due process, considering the interests of interested groups, including rights holders, service providers, users and the general public.

At the national level, the Federal Copyright Act recognizes the creator of literary and artistic works the enjoyment of moral and patrimonial rights. Said authors may make their works public knowledge, through:

- *Dissemination*. A work is made accessible by any means to the public by any means.
- *Publication*. Tangible reproduction, making copies available, or electronically.
- *Public communication*. It makes it available by any procedure that disseminates it, accessing these in the place and time that the members choose.
- *Performance or public performance*. Present a work by any means, without restricting it to a private group or family circle.
- *Distribution to the public*. Makes the work available with lease, sale or any other form.
- *Reproduction*. Make tangible copies, including permanent or temporary storage, even trying to make two-dimensional or three-dimensional.

Sanllorenti *et al*, address libraries as cultural centres that collect, preserve, and disseminate information for the benefit of society, promoting the common good⁷. However, to fulfill its purpose, it implies copying, distributing, and publicly communicating works, which are mostly part of international trade. This balance can only be achieved by balancing the interests of the author and those of the public interest, as well as developing and applying more exhaustive legislation that considers the impact of new technological and digital resources.⁸

Serrano Fernández similarly concludes that the reforms must balance the interests of the holders of exploitation rights and the interests of citizens to access protected content for uses, in accordance with the contractual con-

⁷ Sanllorenti, Ana María; Pelaya, Lucía y William, Martín, “Instrumentos para la gestión del derecho de autor en repositorios de acceso abierto”, *Revista Interamericana de Bibliotecología*, Colombia, vol. 34, núm. 3, enero-junio de 2011, pp. 313-328, available at: <https://www.redalyc.org/articulo.oa?id=179022762006>.

⁸ *Ibidem*, p. 325.

ditions.⁹ Regarding digital content, regulation must be addressed by establishing a legal framework that sets the terms that respect the license and use contracts for works, so that libraries have them in a reasonable manner.¹⁰ Likewise, this balance must consider the needs of these spaces since several of them depend on the dissemination of photocopied or digital material to cover expenses.¹¹

III. LEGAL INSTRUMENTS

Such mentioned international and national legal instruments ended up giving way to criticism and proposals for reform of the legal regulation of Copyright. These changes are even more necessary due to the transformation that the COVID-19 pandemic has meant, particularly in the educational aspect, with a greater use of digital resources, thus beginning to point out the need to weigh and regulate in a more balanced way the interests, rights and benefits of authors as well as users who consult their contents.

Fernández-Molina analyses the problem of the privatization of access to information, since the owners of copyright decide who, when and the conditions under which users can access the information. In the same way, libraries are limited in fulfilling their function of facilitating citizens' access to information. Such problems, she argues, are materialized when the authors can annul the restrictions and limitations to which they are subject, when contracting licenses of electronic resources with information providers (libraries) since they set the conditions of use of their information.¹²

This highlights the fact that, if the authors exceed the limits in the exercise of their economic rights, then the public that can access the scientific knowledge they discover will be greatly reduced, thus privatizing the right to culture. This is a delicate situation for a country like Mexico, which is an importer of copyrighted products and does not have the infrastructure to benefit authors and library users with such protection.

Although these rights of both parties seem contrary, the truth is that they are complementary. The researcher, author of the texts, articles, in-

⁹ Serrano Fernández, María, "El actual marco legal de los límites a los derechos de autor, en favor de las bibliotecas", *Boletín Mexicano de Derecho Comparado*, México, año XLVIII, núm. 143, 2015, p. 827.

¹⁰ *Ibidem*, p. 828.

¹¹ Cárdenas Zardoni, Horacio, *op. cit.*, p. 34.

¹² Fernández-Molina, Juan Carlos, "Derecho de autor y bibliotecas digitales: en busca del equilibrio entre intereses contrapuestos", *Transinformação*, vol. 20, issue 2, August de 2008, p. 129.

formative, cultural, and scientific notes, is mostly financed by research institutes, or by public entities, which receive funds, donations or even budget items for the development, promotion, and support of knowledge. Therefore, allowing researchers to receive financial rewards is fully compatible with continuing to socialize access to information, without the public contributing directly financially. The foregoing, of course, with its due specification in the normative regulations.

The cited authors agree that Open Access must be made available to the population, backed by public policies that support the open dissemination of science. The ways in which science is used must also change. The institutions must have mandates that require the self-archiving of scientific knowledge, and promote the growth of open repositories, and, at the same time, the States must condition the granting of funds.

IV. INTELLECTUAL PROPERTY IN THE INTERNATIONAL LEGAL FRAMEWORK

The World Intellectual Property Organization signed the World Copyright Treaty of 1996, entering into force in 2002; derived from the Act of the Bern Convention for the Protection of Literary and Artistic Works. The present Treaty of 1996 in its article 2o. contemplates the protection of ideas, procedures and methods of operation or mathematical concepts.

The Treaty grants to the authors the rights for:

- 1) Article 6. Distribution: The right to authorize the making available to the public original and copies of the work through sale or transfer of ownership
- 2) Article 7. For rent: The right to authorize commercial rental to the public of the original and copy of 3 types of works: computer programs, cinematographic works, works in phonograms
- 3) Article 8. Communication to the public: The right to authorize wired or wireless communication to the public, making the works available, which can be accessed by members of the public, at the chosen place and time.

On the other hand, the parties agree to be bound to provide effective legal protection and remedies against authors who circumvent technological measures when unauthorized acts by the authors are restricted by law. In the same sense, article 14 of the Treaty contemplates that they undertake to

adopt the necessary measures to ensure the application of the treaty, through compliance procedures and effective measures against violations of rights, including agile resources to prevent violations and resources that are an effective means to dissuade infractions. Any party that signs this Treaty shall enjoy the rights and assume the obligations, in accordance with article 18.

In the aspect of Intellectual Property Rights, article 20.2 indicates the objective of protecting the rights of the author, seeking to contribute to promoting technological innovation, transfer and diffusion of technology. At the same, it contemplates a reciprocal benefit of producers and users, balancing rights and duties, and consequently favours social and economic well-being.

The background, or historical foundation of the celebration of this treaty is reflected in article 12, in which they point out as necessary to promote innovation and creativity; facilitating the dissemination of information, knowledge, technology, culture and arts; promoting competition, open and efficient markets with intellectual property systems, respecting principles of transparency and due process, under the group interests of copyright holders, service providers, users and the general public.

However, like all regulations, it must be regulated by an authority, which article 12 designates the Intellectual Property Rights Committee, made up of government representatives. This committee will have the following powers:

- 1) Exchanging information on intellectual property rights issues. By contributing to innovation, creativity, economic growth and employment, the protection of intellectual property.
- 2) Developing national and international intellectual property legislation and policy.
- 3) Protecting and observe intellectual property rights when it benefits the economy, trade (through contributions).
- 4) Observing intellectual property in small and medium-sized science, technology and innovation companies, as well as generation, transfer and diffusion of technology.
- 5) Providing approaches to reduce infringements of intellectual property rights, and strategies that eliminate underlying incentives for infringements.
- 6) Developing education programs, and intellectual property awareness and capacity building.
- 7) Implementing multilateral intellectual property agreements such as those administered under the auspices of WIPO.

- 8) Strengthening the enforcement of intellectual property rights, promoting collaborative operations in customs, and exchanging best practices.
- 9) Exchanging information on industrial secrets, and economic loss due to misappropriation of said secrets.
- 10) Discussing procedural fairness proposals in patent litigation, including when selecting forum or jurisdiction.
- 11) Seeking satisfactory solutions before imposing measures based on requests for recognition or protection.
- 12) Seeking cooperation for technical assistance in industrial secret protection, identifying opportunities to increase cooperation on protecting and observing intellectual property rights in trade matters.

From a perspective of recognizing the regulatory needs that prevail globally, it is that the parties to article 12 continue to recognize the lack of due and beneficial legal regulation in the regulations, since they point out the importance of improving the quality and efficiency of their systems, of patent registration and simplify and integrate procedures and processes of its patent system. The parties undertake to seek the cooperation of exchange and use of the search and examination work of the parties, among which are:

- 1) Making search and examination results available to patent offices.
- 2) Exchanging information on quality assurance systems and quality standards related to patent examination.
- 3) Reducing the complexity and cost of obtaining a patent registration.
- 4) Reducing differences in patent office procedures.

Each party shall ensure enforcement procedures that allow effective measures to be taken against actions that infringe intellectual property rights, including prompt remedies to prevent infringements and remedies as an effective means of dissuading future infringements, in accordance with article 14.

The procedures that the treaty obliges the parties to adopt are aimed at avoiding obstacles to legitimate trade, providing safeguards against their abuse. Such enforcement procedures and civil and administrative resources are administered with article 14, in which it accepts infringements of trademarks, copyright, and rights in the digital environment. These procedures must be fair and equitable. Taking into consideration the proportionality

between the seriousness of the infringement of the law and the resources and applicable sanctions and interests of third parties.

V. INTELLECTUAL PROPERTY IN THE MEXICAN LEGAL REGULATION

In accordance with the Control of Conventionality, Mexico, by signing the WIPO Treaty, acquired a hierarchy subordinated to the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*), and superordinated to the General and Federal Acts. However, for the State, the natural person who creates a literary and artistic work is highly relevant to protect and procure it, since it provides society with generating the results of their time, dedication and discoveries or inventions.

For this reason, the Federal Copyright Act was enacted, which in its article 11, the State recognizes the creator of literary and artistic works and grants its protection in prerogatives and privileges of its moral and patrimonial rights. However, for the problem analyzed in this work, the cited articles do not contemplate the assumptions of article 13, in which it states the works with respect to which the copyright will fall to them:

- 1) Literary;
- 2) Musical (with or without lyrics);
- 3) Dramatic;
- 4) Dance;
- 5) Pictorial or drawing;
- 6) Sculptural and plastic;
- 7) Caricature or cartoon;
- 8) Arquitechtonic;
- 9) Cinematographic and audiovisual;
- 10) Radio and television shows;
- 11) Computer programs;
- 12) Photographic;
- 13) Works of art, including graphic or textile design, and
- 14) Compilation, made up of collections of works, such as encyclopedias, anthologies, and of works or other elements such as databases, provided that said collections, due to their selection or the arrangement of their content or materials, constitute a creation intellectual.¹³

¹³ Ley Federal del Derecho de Autor, artículo 13, available at: https://www.diputados.gob.mx/LeyesBiblio/pdf/122_010720.pdf.

As can be seen, scientific articles are not expressly contemplated, which in the first instance is an indication that the legislator wishes not to privatize or increase the cost of access to scientific culture.

The work can be made known to the public by disclosure, publication, public communication, performance or public performance, distribution to the public and reproduction.

VI. CURRENT NEEDS

Once we have in perspective the International Instrument and the national act on Copyright, specifically the relationship between Libraries and Copyright, we must bear in mind that science must have open communication and wide dissemination. The mechanics of the functioning of the development of scientific knowledge occurs with the contribution of society in general with the payment of its taxes, received by the financial institutions of the research; these, in turn, are granted to researchers, and these finally deliver the results of their research to society through scientific articles.

However, it becomes more complex when publishers begin to condition access to repositories by aspects of exploitation of the content, or to allow partial access. For this reason, we reach the conclusion of the figure of the Open Access Repositories, which encourage the use of “Creative Commons” licenses, establishing modalities of use, and the obligation to deposit their works in open repositories, which promote open access.

The open access model explored by Sanllorenti et al, places an Institutional Repository in which the authors partially give their patrimonial rights, authorizing the deposit of their works, in which they have the power to determine the permitted modes of use. It should be borne in mind that this open access must be backed by public policies that support the open dissemination of science, which reduce the appropriation of knowledge, through institutional mandates for the public self-archiving of culture. In the first instance, conditioning the granting of funds that researchers enjoy, against delivery of the deposit of their works in open deposits, thus avoiding the exclusive transfer of rights. But respecting the mutual possibility of dissemination and preservation of the results of scientific research.

The argument of this Open Access Model finds support in the funding entities that reinforce the Open Communication Model through provisions and mandates. The background of this Model is to raise awareness, while still stimulating researchers. They are required to self-archive their productions in repositories, through institutional Open Access mandates.

These mandates refer to the type of link between the Academy and the Funders.¹⁴

The benefits that have been generated by increasing this Open Access are granting of funds as scientific research works are deposited. However, they are accompanied by counter deliveries of work. On the opposite way, scientific research institutions establish policies, create and maintain the technical specifications to be met in an open repository, such as: the types of documents and information they deposit, the exceptions to the obligation to deposit, the sanctions for non-compliance with legislative provisions.

The general perspective of this Open Access Model is the collective reappropriation of research results. In this reappropriation process, the legal instrument used is the Addenda. The addenda are annexes to the Edition Licenses, in which the author individually retains their exploitation rights (use, reproduction, publication, distribution, dissemination and recognition). It is an individual negotiation tool between publishers and authors, through which the researcher retains his right to deposit his work in Open Access, but at the same time acknowledging the editorial source and hyperlink to the edited version. In essence, the author retains his rights for didactic purposes, for research and repositories.¹⁵

Once the deposit in an open access repository is authorized, through contracts, agreements or authorizations that establish the preservation and access to their works, it will be specified:

- The authorship: Holder of the right authorizes the digital publication
- Patrimonial Rights: Whoever enjoys the right of exploitation must specify their transfer (right of publication, digital publication for reading, printing, downloading, dissemination, reproduction, editing and translation) and conditions to whom they authorize as co-owner to upload their work to repository. In the same way, you must declare that you comply with your obligations. And exempt and indemnify the institution in case of demand, for retaining, editing, using and reproducing the deposited work.
- And the conditions of deposit: It involves storing, incorporating, adapting, migrating format, preserving, making copies, disseminating digital works, editing interventions to preserve and allow long-term access and access conditions.

¹⁴ Sanllorenti, Pelaya y William, *op. cit.*, p. 325.

¹⁵ *Ibidem*, p. 319.

Another aspect of current relevance, and related to the bases of open access, is that of Digital Libraries, starting and taking up again that Copyright has as its object the promotion of creating and disseminating intellectual works, supporting the subject that provides that knowledge. Scientist through the benefit of exploiting his work, and in turn facilitating access to society through these Culture Centers that collect, preserve, and disseminate information for the benefit of society, promoting the common good.

To accomplish this goal, it is often necessary for you to facilitate the copying, distribution, and public communication of your works. However, it is limited in its margin of action since intellectual works are part of international trade. Therefore, libraries have the duty to respect the guidelines present in the Federal Copyright Act and the General Libraries Act (*Ley General de Bibliotecas*):

- They must respect international guidelines.
- Must not unjustifiably harm the legitimate interests of the author.
- Must require the author to respect your limitations and exceptions.
To preserve the balance of Copyright, without allowing absolute preponderance of the owner.
- Can reproduce for research purposes, without it being for personal study, or for your own services, by specialized facility terminals.
- Can reproduce for preservation.
- The work must be available to the public.

Then it can finally be pointed out that Copyright is limited to defend fundamental rights and for public interest (education, culture, and research). Since the legal framework is aimed at being able to control the development and evolution of science through the impact that publication and access to articles have on people.

Proposals for legal initiatives in relation to the balance of interests of holders of exploitation rights and users of scientific knowledge:

The proposals for initiatives and law reforms that have been presented at a global level are based on the Principle of Technological Neutrality, which refers to the balance that the legal norm must achieve in the interests of owners and users. The argumentation of these opinions that the doctrine has issued is motivated by the restrictive criteria for a library to act and fulfil its object mentioned in previous paragraphs.

Fernández-Molina addresses that the Electronic Resources Licenses, which are contracts entered into by the information provider with the library, which set the conditions of use of the information, grant powers to

the author to annul contracts, bringing as a consequence the problem of privatizing access to information, since in essence it is the author who decides when, who and the conditions under which its content can be accessed.¹⁶

On the other hand, Torres Vargas also points out that access to the use of information and communication technologies is inequitable, given social inequalities. However, this problem, about the Digital Divide and Copyright, must be analysed from a Fundamental Rights perspective, in which, with a perspective of interrelated, interdependent and indivisible human rights, they close the distance of the digital divide.¹⁷

In the same sense, it has been pointed out that it is a new generation of Human Rights that substantially changes the model of the State, having the social fact of the transformations that technology came to apply in the life of mankind, and consequently the means of acquisition of new knowledge. It should be noted that even constitutionally, article 6 of the Constitution already contemplates the Right to Information, which indicates the following:

“The right to information will be guaranteed by the State... everyone has the right to free access to plural and timely information, as well as to seek, receive and disseminate information and ideas of all kinds through any means of expression”.¹⁸

However, once again it is observable that the actual application of the content of the constitutional norm is only applicable to a particular community. Among these obstacles to digital inclusion, we find the following:

- Cognitive capacities for the use of digital tools.
- Informative poorness.
- Censorship.
- Social change and global market that destroys and misinforms public information.

Gómez Navarro classifies the levels of digital divide into 3 categories:

A) Access:

- a) Motivational Access Phase
- b) Phase of Physical Access to Technologies
- c) Literacy Phase

¹⁶ Fernández-Molina, Juan Carlos, *op. cit.*, p. 129.

¹⁷ Torres Vargas, Georgina Araceli, *op. cit.*, p. 107.

¹⁸ Constitución Política de los Estados Unidos Mexicanos, artículo 6o., available at: <https://www.diputados.gob.mx/LeyesBiblio/pdf/CPEUM.pdf>.

- B) Usage.
- C) Appropriation of ICTs.¹⁹

These digital gaps have been reflected and mentioned in international positions on the issue of the impact on the Right to Education by the digital gap.

The importance here in terms of education, and for which reforms have been encouraged that can protect and guarantee in an integral way the right to education, in accordance with Copyright, and the fulfilment of its social purpose of libraries, is that education makes it possible to reduce social inequalities and improve living conditions, since education is aimed at forming skills according to the global social context. Reasons for which it has been demanded to update and improve the quality of the practices and contents of the educational system for the new information society that currently prevails.

Therefore, it can be concluded that by gradually reducing inequitable access to technologies and consequently the digital divide, human dignity may benefit, by favouring the integral development of people. Only then can the right of access to information and the right to education be guaranteed in a socially effective way.

VII. CONCLUSIONS

From the present investigation, we obtain the result that the Exploitation Licenses cover the investigation, reproduction, conservation and making available of the content in magazines, books and digital sources in libraries. The legal reforms that the countries adopt must balance the interests of holders of exploitation rights, and the interests of citizens to access protected content for uses, in accordance with reasonable contractual conditions. At the same time, it must ensure that the differences in the digital divide are resolved.

The Mexican Institute of Intellectual Property as an administrative authority has social and economic relevance by speeding up conflict resolution by serving as an arbitrator, as well as being able to declare null the clauses of the licenses that restrict or annul the terms in which it regulates the limits of the right of exploitation. Just as electronic books are already beginning to be regulated, setting the legal framework of the terms to be respected in license contracts, or use of works for libraries to reproduce and make them available to the public.

¹⁹ Gómez Navarro citado en Torres Vargas, Georgina Araceli, *op. cit.*, p. 108.

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