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Spanish Law in 2010-2012: The influence of European Union Law and the Impact of the Economic Crisis

Juana Marco Molina

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**SPANISH LAW IN 2010-2012:
THE INFLUENCE OF EUROPEAN UNION LAW AND THE
IMPACT OF THE ECONOMIC CRISIS**

Juana Marco Molina^{*†}

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* Professor of Private Law (*Catedrática de Derecho civil*), University of Barcelona.

† Translated from Spanish by Yovanna Vargas, with assistance from Laura Castaing, Jennifer Lane, and Alexandru-Daniel On.

- B. Delimitation of the Concept of “Communication to the Public” of the Work; ECJ Judgment of 21 October 2010: *Padawan S.L. v. Sociedad General de Autores y Editores de España* 438

This Chronicle covers recent legislative developments in Spain for the period 2010-2012.

I. APPLICATION OF LAWS: MUTUAL LEGAL ASSISTANCE BETWEEN SPAIN AND THE UNITED STATES OF AMERICA

Because it also concerns the law of the United States of America, reference should be made to the entry into force on February 1, 2010¹ of the Agreement² related to the application of the Mutual Legal Assistance Treaty in Criminal Matters between the United States of America and the Kingdom of Spain.³

This new agreement increases the possibilities to exchange financial information between the two States in the context of a criminal investigation.

Also, article 16 bis 1(a) of the Treaty sets forth the obligation of the Requested State to ascertain if the banks located in its territory possess information about the existence of bank accounts whose holder is a natural or juridical person⁴ suspected or charged with a criminal offense. The Requested State shall not deny the request for assistance on the grounds of bank secrecy.

The Agreement also includes a provision that joint investigative teams may be established between the two States (article 16 ter) for the purpose of taking testimony, expert opinion or any other investigative activities. The measures taken by the

1. Published in B.O.E. n. 22, Jan. 26, 2010.

2. In fact, it is an instrument that executes particularly for each of the Member States of the European Union, a broader agreement concluded between the European Union and the United States (*see* Art. 3.2(a) of the Agreement on Mutual Legal Assistance between the European Union and the United States of America, signed on June 25, 2003); 2003 O.J. (L181) 27, 34.

3. The treaty was signed on November 20, 1990.

4. The Treaty uses the term “legal person.”

members of the joint investigative team may be executed directly in any of the States without the other State having to submit a request for mutual legal assistance (article 16 ter, 4).

II. LAW OF PERSONS

In the area of the Law of Persons, three new developments took place. The first two exemplify the legislators' effort to adapt to the changes resulting from the new options—often driven by medical and scientific progress—promoting the individual freedom to decide one's own sexual orientation (and even gender designation), and consequently, in deciding the composition of one's own family.

A. Ratification by Spain of the International Convention on the Recognition of Decisions Recording a Sex Reassignment

Regarding sexual orientation, on July 16, 2011,⁵ Spain ratified the Convention⁶ on the recognition of decisions recording a sex reassignment. This Convention, drafted by a European Intergovernmental Agency,⁷ is a multilateral agreement that sets forth the mutual recognition between the signatory States of judicial or administrative decisions recording a person's sex reassignment that have occurred in a Contracting State. The sex reassignment affecting the citizen or resident in a Contracting State shall be recognized in the other Contracting States if two conditions are met:

1. A physical alteration (i.e., by means of surgery) of the person concerned has been made; and

5. B.O.E. n. 36, Feb. 11, 2011.

6. Convention of September 12, 2000.

7. The International Commission on Civil Status is based in Strasbourg, France. It was founded on September 29-30, 1948 in the post-war context of the time. It is intended to facilitate the cooperation between States for the mutual recognition of vital records (including, among others, birth, marriage, divorce or death certificates) or any other official documents indicating the civil status of persons.

2. That the physical alteration shall be officially recognized in the Contracting State through the recordation of the judicial or administrative decision recognizing a person's sex reassignment in the Civil Status Registry.

B. The New Provisions Concerning Registration in the Civil Registry of the Filiation of Children Born Abroad by Means of Surrogate or Substitute Motherhood

The second legal development includes the question of the so-called "surrogate" or "substitute motherhood".⁸ In Spain, surrogate motherhood agreements are still legally prohibited (Article 10.1, Law on Assisted Human Reproduction Techniques).⁹ Thus, when the birth of a human being results from this form of pregnancy, only the gestating woman will be recognized as the mother, never the woman who, alone or coupled with her partner, agrees to the surrogacy.¹⁰ Even if the contracting party is a male, the legislation does not allow the possibility of considering him the father.

Notwithstanding, neither courts nor administrative authorities in Spain have been able to turn their backs to the situation of children born abroad by surrogacy, in cases where a Spanish citizen has entered into a surrogate motherhood contract in a State where legislation permits this kind of contract. The problem might arise when, once the child is born in the State where the contract was entered into, the Spanish person or couple who executed the contract intend to register the child as his or theirs¹¹ in the Civil Registry of Spain (Civil Registry).

8. The common colloquialism used is "rent-a-mother" or "rent-a-womb".

9. Law 14/2006 of May 26, related to assisted human reproduction techniques. Art. 10.1 prescribes: "The contract wherein it is agreed that the pregnancy, with or without payment, will be carried by a woman who gives up the maternal filiation in favor of the other party or a third party shall be null and void." B.O.E. n. 126, May 27, 2006.

10. Art. 10.2, Law 14/2006, *supra* note 9: "The filiation of children born by surrogacy shall be determined by birth."

11. In many cases, the child born by surrogacy is, indeed, a biological child of the contracting parties because the gestating mother has been fertilized with

This practice has increased notably since the Spanish Civil Code was amended in 2005 to allow and recognize same-sex marriage.¹² Since then, many male same-sex couples who can only achieve paternity by contracting with a surrogate mother and fertilizing her with sperm or by any human reproductive material of either of them, have been denied—by both the Civil Registry and the courts—their attempts to establish the paternity of the child born by surrogate motherhood.¹³

An administrative provision recently enacted has attempted to remedy this situation. It is a provision made by the General Directorate for Registries and Notaries on October 5, 2010 concerning “the registration regime of the filiation of children born by surrogacy.” The Directorate General of Registers is a branch of the Ministry of Justice, serving as the hierarchical superior of the Spanish notaries and registers. Because it is a non-judicial administrative body, its decisions on the validity of the acts recorded in the Spanish registers¹⁴ have no judicial or normative value; they simply contain expert or doctrinal value and consequently are merely advisory.

These provisions, otherwise, are binding for the Spanish Registers because they are public officers of this agency. Therefore, in the exercise of this function, the Directorate General, with the purpose to preserve the best interest of children born abroad by means of surrogate motherhood, has recognized that, in

gametes or reproductive cells of the man or the woman, or of the male or female same-sex couple who contracted the surrogacy.

12. The recognition of same sex marriage in Spain is established in Law 13/2005 of July 1, which amended the Civil Code with respect to the right to marry; B.O.E. n. 157, Jul. 2, 2005.

13. An example of judicial decision rejecting such registration is the judgment of the Court of First Instance No. 15 of Valencia, September 15, 2010; Juz. Prim. n. 15 de Valencia, s. n. 193/2010.

14. The Directorate General of Registers safeguards the legality of issues relating to civil status, which are recorded in the Civil Registry, as well as the validity of the acts of disposition or agreements over immovable property, which are recorded in the Land Registry.

certain circumstances, those children can be entered in the Civil Registry as children of male applicants.¹⁵ Two conditions must be met:

The first condition is formal. It requires that the filiation of the child born be accredited by a foreign judgment following exequatur proceedings¹⁶ in Spain. In any case, an administrative decision or medical certificate produced abroad will not be sufficient to obtain recognition in Spain.

The second condition is substantive. It requires the verification by the Spanish Register, by way of the examination of the documentation submitted by the applicants, that the rights of both the child and the surrogate mother have been sufficiently guaranteed. In particular, it should be verified that the surrogate mother has the ability and natural capacity to understand and voluntarily renounce her maternity, and that the renunciation is made in the absence of any vice of consent (error, fraud or duress).

C. The New Civil Registry Act

Finally, the third development in the area of the Law of Persons is the enactment of the new Civil Registry Law in July 21, 2011.¹⁷ Its entry into force will be delayed until 2014 due to the importance of the changes introduced by the law.¹⁸ The Civil Registry is the public record of acts affecting the civil status and, accordingly, the legal capacity of a person to exercise rights. The reform, undertaken for the reasons indicated below, includes a

15. Or persons, irrespective of their sex, who contracted surrogacy abroad.

16. The European Commission of Justice provides this definition of exequatur: a concept specific to private international law referring to the decision by a court authorizing the enforcement in that country of a judgment, arbitral award, authentic instrument or court settlement given abroad. Available at: http://ec.europa.eu/justice/glossary/exequatur_en.htm (last visited on June 13, 2013).

17. Civil Registry Act, Law 20/2011, B.O.E. n. 175, Jul. 22, 2011.

18. This law replaces the prior Civil Registry Law [hereinafter CRL] of June 8, 1957 (B.O.E. n. 15, Jun. 10, 1957). However, most likely because it introduces significant changes, its entry into force is postponed until July 22, 2014 (so ordered by the 10th Final Disposition of the new law, *supra* note 17).

modification of the Spanish Civil Code concerning the acquisition of legal personality.¹⁹

This important legislative reform is justified for several reasons, which primarily have to do with the internal organization of the Registry and the system of information management contained therein.

Prior to this revision, the Civil Registry was a unitary body with several Registry offices distributed throughout the Spanish territories. Each office had custody of the books containing the records of the essential facts affecting the life of a person. The criterion for classification of the registry information was not by individuals or persons, but rather by the legally relevant fact: there was a registry for birth, another for marriage, a third registry for death, and another for tutorship and legal representation. In addition, the registrar or person responsible for each office of the Civil Registry was a member of the judiciary (the “Civil Registry Judge”).

1. The first reason for this reform was the conversion of the former Registry maintained in books into a data retrieval system or electronic record, which will act as a database. In turn, this system allows administrative decentralization: citizens may apply for recordation of registerable facts affecting them at any Registry office and not only, as it was until the reform, at the office in the location where the fact occurred (e.g., place of birth). Despite this new decentralized organization, the unity of performance is guaranteed in all the offices, both by decisions and instructions issued by the aforementioned Directorate General of Registers²⁰ and by the possibility to appeal decisions made by the officials of the Registry offices to the Directorate General.²¹

19. Art. 30, Spanish Civil Code [*Código Civil*, hereinafter C.C.].

20. As mentioned in the previous paragraph B, the Directorate General of Registers operates under the Ministry of Justice, which is responsible for the most important legal records of Spain (The Civil Registry and the Land Registry).

21. Art. 85 CRL, *supra* note 17.

2. The second change affects the very officials who are in charge of the Registry offices. Previously, the official in charge of each Registry office was a judge. In order to clearly separate the judicial function and the purely administrative function of the Registry, this task is now assigned to officials of the Civil Service, although they must have a law degree.²² Notwithstanding, registration activity ultimately remains under judicial control because the decisions of the Directorate General of the Registers may be challenged by any interested party in civil court.²³

3. The main change introduced by the 2011 legislative reform affects systematic management, or the systematization, of Registry information. Fundamentally, it is intended that the Registry will become a historical or personal record for each Spanish citizen. To do this, the hitherto existing classification system based upon the fact (consisting of all births, marriages, deaths, tutorships or other forms of legal representation that were grouped in the same book) is replaced by a classification of persons or individuals, so that all the facts affecting their civil status²⁴ will be grouped in the section or individual Registry²⁵ that is assigned to each person within the General Registry.

4. Finally, the greater importance ascribed by the new Civil Registry Law to the person or individual has resulted in two changes of material or substantive law:

a. The first change is the reform of article 30, Civil Code of Spain, concerning the commencement of legal personality, or recognition of the natural person, as a subject of law.²⁶ Until now, our Civil Code maintained the Romanist rule that birth alone does not determine the legal personality or juridical recognition of being

22. Second Additional Disposition CRL, *supra* note 17.

23. Art. 87 CRL, *supra* note 17.

24. Starting with the first registration, which is the act of birth.

25. Articles 6 & 44.3 CRL, *supra* note 17.

26. The amendment of the Civil Code is provided by the 3rd Final Disposition CRL, *supra* note 17. Despite the fact that this law will not enter into force until 2014, the amendment of Art. 30 of the Spanish Civil Code has immediate effect.

born as a person. In addition to the act of birth, one additional requirement was that the newborn would be recognized as having legal capacity and, accordingly, the capacity to have rights and duties, if the child survived at least twenty-four hours after separation from the mother's womb.

From now on, the recognition of the juridical personality of the individual is simultaneous to his birth, since the new article 30 of the Civil Code states that "legal personality is acquired from the moment the child is born alive, after complete separation from the mother's womb."²⁷

b. In the second place, and with the same purpose of strengthening the rights of the newborn child, the new Civil Registry Law of 2011 has abolished the right, previously recognized to the mother, of "disavowal" or denial of her maternity by a unilateral declaration recorded in the Registry, without contesting the filiation in court.²⁸ The only requirement for extrajudicial action to deny maternity was for the mother to make the declaration at a time very close to the birth and registration.²⁹

As mentioned above, such unilateral right has been repealed in the new Registry Law of 2011, which thereby recognizes a

27. This is because it was necessary for the newborn to survive at least twenty-four hours from the time that the umbilical cord was cut. This requirement was intended to prevent important juridical effects, such as the devolution of succession rights from one family line in favor of another, caused by the birth of children with little chance of survival.

28. Such a unilateral right of the mother was the counterpart of the possibility that the birth registration could take place without her participation since anyone who has certain knowledge of the birth is urged to report it to the Registry (art. 42 CRL, 1957, *supra* note 18). Moreover, it is mandatory for the doctor and other healthcare personnel attending the birth to report it to the Registry (art. 44 CRL, 1957).

29. The alleged mother shall make the declaration of disavowal or denial of maternity within 15 days following the notification from the Registrar informing her of the registration of maternity. *See* art. 47.3 CRL, 1957, *supra* note 18:

[t]he reference of this filiation can be suppressed by a judicial decision or by disavowal of the person who appears as the mother formalized before the Registrar, which shall be entered in the margin of the birth certificate. This disavowal cannot be made beyond 15 days of that notification. . . .

As above-mentioned, the prior act, which shall be in effect until 2014 (*see supra* note 18), was enacted on June 8, 1957.

previous jurisprudential rule.³⁰ Under this previous judicial interpretation, article 47.3 of the 1957 Civil Registry Law was unconstitutional, and therefore unenforceable, because the registration (and thus official recognition) of filiation depended exclusively on the will of the mother, to the detriment of the newborn child. Conversely, upon the entry into force of the new 2011 Civil Registry Law, the only way to cancel the registration of maternity will be by way of court judgment, which the alleged mother can only get by demonstrating to the courts (with proof and with guarantees for the rights of the newborn child inherent to the judicial process) that maternity was falsely attributed to her.

III. FAMILY LAW

In the area of Family law, the main legislative development has been the entry into force on January 1, 2011 of Law 25/2010 of July 29, 2010, promulgating Book II of the Catalonia Civil Code (*Codi Civil de Catalunya*),³¹ related to Persons and the Family.

A. Spain as a Multi-legislative State, with Coexisting Territorial Civil Law Systems

Catalonia, like the Basque country, Aragon, Navarre, the Balearic Islands and Galicia, is one of the regions or autonomous communities of Spain that has its own civil law, embodied in a civil code, which applies to the exclusion of the Spanish Civil Code within the Catalan territory.³² Spain is, therefore, a multi-

30. This line of case law originates from the Supreme Court Judgment of Sept. 21, 1999, T.S., s. n. 776/1999.

31. The Civil Code of Catalonia is being promulgated in stages. The first Act or Preliminary Act was enacted in 2002 (Law 29/2002 C.C. CAT., Dec. 30, 2002). At this time, the code is almost complete. Only Book VI, related to Obligations and Contracts, is missing and still in progress. The full text of the Civil Code of Catalonia is available in Spanish at <http://civil.udg.es/normacivil/cat/CCC/ES/Index.htm> (last visited May 5, 2013).

32. Art. 111-3.1 & 111-5 C.C. CAT. These provisions of the Civil Code of Catalonia show that, with respect to those civil matters over which the Catalan legislature has authority and which have been regulated by it, the law applicable in the territory of Catalonia is Catalan civil law. The Spanish Civil Code (1889)

legislative State in which a plurality of territorial civil laws exists. However, there are certain civil matters which are governed by a uniform civil law, since they are reserved to the legislative authority of the State and, accordingly, forbidden to the territorial legislative powers. Relevant provisions are found in article 149.1, rule 8, of the Spanish Constitution (*Constitución Española*).³³

B. The New Book II, Of Persons and Family, the Civil Code of Catalonia: Its Regulation of Matrimonial Regimes

With regards to family law, the Constitution grants to the State of Spain the exclusive power to legislate on the form of the marriage celebration and the capacity to marry. Therefore, although it aims at the complete regulation of family law,³⁴ Book

is, in turn, applicable to those territories of the State which do not have their own civil law. In addition, in certain civil matters (referred to in art. 13.1 C.C.), it is the common or uniform code that is applicable in of all the territories of the State, including those who have a special civil law.

33. Art. 149.1 of the *Constitución Española* [hereinafter C.E.] establishes those matters which can only be regulated by the State of Spain, and accordingly, those which are forbidden to the legislative authority of the autonomous communities or regions of Spain. Thus, matters not included in this list may be regulated by an autonomous or regional legislature. Although art. 149.1, rule 8, C.E. also reserves to the State "civil legislation", that same rule recognizes the legislative power of certain Spanish regions for the "conservation, modification, and development" of their own civil law. Even so, art. 149.1, rule 8, C.E. provides that certain matters are also exclusively reserved to the legislative authority of the State and may not, therefore, be included in the territorial or regional civil laws. Among those civil matters reserved to the State, art. 149.1, rule 8, C.E. includes the "grounds of contractual obligations," a limitation that has been much discussed by the State as well as by the regional powers before the Spanish Constitutional Court. The Constitutional Court (for instance, in judgment 71/1982, Nov. 30, 1982) stated that with this limit the intent is to preserve the unity of the market within Spanish territory. This limit would play, therefore, a similar role as the commerce clause (U.S. CONST. art. I, § 8) which, in the United States Constitution, limits the competence of States in matters of private law.

34. In addition, the Civil Code of Catalonia strives toward regulation adapted to new models of family (for example, single-parent families), as established by art. 231-1, which, significantly, bears the heading "the heterogeneity in the family." According to this provision, "The family enjoys legal protection provided by law, protecting without discrimination family relationships arising from marriage or stable cohabitation in couples, and families formed by a single parent with his/her descendants."

II of the Civil Code of Catalonia must be enacted without those matters upon which the Catalan Legislature is forbidden to take legislative action.

One of the issues that, in Catalonia, has its own regulation distinct from the Spanish Civil Law relates to “matrimonial agreements”, which are contracts between spouses or between persons who will contract a future marriage in order to regulate the economic regime of the marriage.

Although there were obstacles to grant matrimonial agreements in Spanish law until 1975 (until that date the Spanish Civil Code prevented the execution of post-nuptial agreements, because of possible psychological influence of the husband over the wife),³⁵ in Catalonia, vast autonomy has always existed to grant matrimonial agreements, allowing them both prior to and after the celebration of the marriage. Moreover, the content of the agreements has been and continues to be very broad. In Catalonia, beyond the choice of the economic regime, these agreements have been intended to articulate everything related to the whole regime applicable to the community of family life. Thus, as detailed below, matrimonial agreements are not unitary transactions, but rather a group of transactions (i.e., a set of multiple transactions and statements).

The primary, but not the only, purpose of the matrimonial agreement is to determine the “matrimonial economic regime,” which can either be of separate property or of community property; only the latter creates the existence of common marital property. In Catalonia, in the absence of a consensus between the contracting parties or spouses in the agreement, the matrimonial economic regime is that of separate property, as provided by law.³⁶ However,

35. As reflected in the Statement of Purpose (§ IV) of Law 14/1975 of May 2, which amended the Spanish Civil Code to eliminate restrictions on a married woman’s legal capacity; B.O.E. n. 107, May 5, 1975.

36. Art. 231-10.2 C.C. CAT. On the contrary, in Spanish law, in the absence of a regime chosen by the parties themselves in the matrimonial agreement, the

the agreement on the economic regime is not the only content of the matrimonial agreement. On the contrary, it is common that the contracting parties (the persons who intend to contract marriage, if the agreement is pre-nuptial), or the spouses (in a post-nuptial agreement or an agreement concluded after the marriage ceremony), may waive that part of the agreement and maintain the regime of separate property already provided by law, since that is the one best in keeping with the current social reality (the full integration of women into the labor market and, accordingly, of their economic autonomy).

Thus, in Catalonia, the agreements tend to be designed to mitigate the effects of the separation of property, permitting a certain connection between the personal patrimonies of both spouses. The principal means for achieving this has been by mutual donations which, for reason of marriage or future marriage, the contracting parties or spouses make, either between themselves or in favor of their—usually—future descendants. For the same nuptial reasons, donations may also be made by third parties (usually, the relatives of one or either of the contracting parties or spouses) to the contracting couple or their future descendants. Indeed, at times the object of these donations is not only specific property, but is, rather, a universality: applied to all or part of the patrimony of the donor, who, at the time of the donation, irrevocably institutes as heir the son or daughter who marries and/or his or her future descendants. In the latter case, we are dealing with the *heretament* or successoral contract³⁷ which up to

matrimonial property regime shall be one of community property, which involves the creation of a common patrimony of the spouses (art. 1316 C.C.).

37. Indeed, the *heretament* or typical successoral contract in Catalan civil law requires kinship between the contracting parties (art. 431-2, C.C. CAT.).

this point was necessary to include in the instrument of the matrimonial agreement.³⁸

Aside from that specific type of *heretament* or successoral contract, the remarkable thing is that, by the fact they are included in the instrument of matrimonial agreement, donations for reason of marriage are more binding than ordinary donations. They are non-revocable on a variety of causes that ordinarily³⁹ make it permissible for the donor to revoke them unilaterally (e.g., by the subsequent birth of a child) after donation. Rather, donations contained in the matrimonial agreement are revocable only on a single ground: the failure by the donor to perform a charge stipulated in the act of donation to the benefit of the donee-spouse.⁴⁰ The reason for this provision is the legal assumption that these kinds of donations are not strictly gratuitous or exclusively intended to benefit the donee. On the contrary, the law assumes that all donations contained in the instrument of matrimonial agreement have been made correspondingly or in recognition of the attributions made in turn by one contracting party or their family to the benefit of the other contracting party or their relatives. They are, therefore, mutual and reciprocal attributions. It is precisely that *quasi-onerous* or reciprocal character peculiar to donations in the marital agreement that determines the restriction of the unilateral power to revoke or leave them without effect.

Another provision related to this rule is article 231-23, concerning the modifications of the marital agreement. When, in addition to the contracting parties, third parties (i.e., relatives who make donations on behalf of the spouses or their descendants) have participated in the marital agreement, the agreement may only be amended with the participation of all persons involved in its initial formation. The only declaration in the agreement which does not

38. Currently, the Catalan Civil Code allows the *heretament* to be recorded in a deed or notarized document that is not a matrimonial agreement (art. 431-7 C.C. CAT.).

39. Art. 531-15 C.C. CAT.

40. Art. 231-25 C.C. CAT.

require unanimous modification is the agreement on the choice of the economic regime: the spouses are free during the marriage to modify the economic regime established at the time of the marriage contract. However, since the amendment can be used to defraud the rights of creditors of either spouse,⁴¹ such modification shall be enforced against them only from the date of its publication in the Civil Registry.⁴²

As mentioned above, the content of the matrimonial agreement is not limited to setting up the economic regime of marriage, but, because it may be comprehensive, it may be used to regulate various issues raised by the community of marital life. Although, traditionally, the content of the agreement has been eminently patrimonial or economic, current regulation does not preclude the inclusion of strictly personal marital or family issues.⁴³ Furthermore, it seems that the current Catalan Civil Law is even favorable to such a possibility, given its purpose to provide non-judicial means to solve family conflicts, attempting to resolve them within the family's own sphere by the agreement of the parties themselves.⁴⁴ Therefore, there could also be a place in the agreement for stipulations of a personal nature, such as marital agreements relating to the exercise of parental authority,⁴⁵ the

41. For instance, matrimonial creditors might be disappointed in a reduced guarantee (the patrimony of the debtor), if the original matrimonial regime of community property is replaced by a separate property regime.

42. Art. 231-23.2 C.C. CAT. In addition, modification of the matrimonial agreement must be recorded in the Registry of Commerce if either of the spouses is a merchant or employer, as well as in the Land Registry, if one or both are the owner of immovable property.

43. Note that art. 231-19.1 C.C. CAT. allows including in the matrimonial agreement all lawful pacts that the contracting parties consider pertinent.

44. As established by art. 233-6 C.C. CAT., which includes family mediation in the case of marital crisis and, therefore, invites spouses at any stage of the proceedings to try to resolve their differences through consensus guided and managed by a professional mediator.

45. Art.236-9 C.C. CAT. allows, during cohabitation, the parents, whether married or not, to agree on different approaches to the exercise of parental authority, such as the exercise by only one of them with the consent of the other.

recognition of a non-marital child of either spouse,⁴⁶ or the husband's consent that, during his life, and even after his death, his wife can receive assistive (or *in vitro*) insemination using his reproductive material.

Despite the potential scope of the content of the agreements, an impassable restriction is imposed on them legally, which is the respect for the equal rights and duties between the spouses. The application of such a restriction raises two issues:

First, it is necessary to provide the restriction with a new meaning. Originally, this restriction intended to prevent discrimination on grounds of sex (particularly, discrimination against women) within the marriage. However, since in 2005,⁴⁷ when same-sex marriage became legal in Spain, the goal of equality between spouses must apply to both heterosexual and homosexual marital unions. Therefore, it is no longer intended to prevent only discrimination due to sex, but also on any other grounds of discrimination that, in a same-sex marriage, might arise from a certain diversification of roles.

Second, it is questionable whether the indicated restriction permits the contracting parties or spouses to make an unequal distribution of marital rights and duties. Despite the above-mentioned restriction, a myriad of specific rules of family law in Catalonia give rise to the possibility that an asymmetrical or unequal distribution of rights and duties agreed upon by the spouses themselves is legally supported.⁴⁸

46. In fact, art. 231-26(a) already includes that kind of recognition as possible content of the matrimonial agreement.

47. Pursuant to Law 13/2005 of July 1, related to the right to marry, *supra* note 12.

48. Thus, for instance, reference should be made to art. 236-9 C.C. CAT., empowering parents to unevenly distribute between them functions inherent to parental authority, which may even include an agreement that such power will be exercised by one of the parents. In addition, spouses are allowed to confer on only one of them the management and disposition of common property (art. 569-30). Also, in the case of dissolution of the matrimonial regime, the unequal distribution of earnings or common property is allowed in the agreement (art. 232-15 – 232-38.1). Finally, without intending to be exhaustive, it should be

Now, given the strict requirement of reciprocity prevailing in the content of marital agreements,⁴⁹ in order for that kind of agreement to be considered valid and effective, it should be verified that every disadvantage or individual renunciation has in return some other advantage or gained superiority for the spouse who assumes the disadvantage. Thus, this strict requirement of reciprocity shall be understood as synonymous with balance, and not as rigorously symmetrical or quantitatively equal. Furthermore, any kind of confusion or communication between the personal and patrimonial spheres should be prevented. For instance, a renunciation to exercise paternal authority made in exchange for a price or a patrimonial right should not be accepted.

Under the terms and within the above-mentioned limits, nuptial or matrimonial agreements bearing unequal content should then be accepted. Because, since 1975,⁵⁰ marriage no longer affects the legal capacity of the spouses, legislation, at the present stage of legal development, should have abandoned excessively protective attitudes, and should be limited to ensure that those entering into nuptial agreements do so under conditions of free will and informed consent. To this effect, according to Catalan jurisprudence, the ordinary rules to eradicate the vices of consent are sufficient.⁵¹

noted that even those rules which in the event of matrimonial crisis aim to protect the most disadvantaged spouse, a waiver or agreement to the contrary is permitted. For a more detailed analysis, please see Juana Marco Molina, *Los capítulos matrimoniales* in 4 TRATADO DE DERECHO DE LA FAMILIA 181-212 (M. Yzquierdo & M. Cuena eds., Aranzadi, Cizur Menor (Navarra) 2011).

49. Art. 231-20.3 C.C. CAT.: "The agreements [in anticipation of marital rupture] of exclusion or limitation of rights should have a reciprocal basis and clearly define the rights that are limited or waived."

50. Since Law 14/1975, *supra* note 35, which reformed the Spanish Civil Code to remove previous restrictions on a married woman's legal capacity.

51. In this regard, the judgment of the Superior Court of Justice of Catalonia of July 19, 2004, is particularly significant. The mentioned judgment recognized the validity of certain agreements in anticipation of marital rupture in which the wife renounced the use of marital home in favor of her husband. Pursuant to this decision (see the judgment's 4th legal basis) such matrimonial agreement should be complied with because "it is an agreement between adults with full capacity

Finally, it should be noted that one of the most innovative features found in the matrimonial agreements are those agreements between the contracting parties or spouses in anticipation of a marital rupture.⁵² The Catalan Civil Code not only supports these agreements, which in Catalonia are binding on the contracting parties without court approval or endorsement,⁵³ but also deals with the rules related to their formation and effectiveness, having been greatly influenced by American law; in particular, by the principles formulated by the American Law Institute relating to marital rupture.⁵⁴

For instance, a rule such as article 231-20.1 is derived from American law, which provides that the agreements in anticipation of marital rupture are only valid if they have been agreed upon at least 30 days prior to the celebration of the marriage. This rule, based on American jurisprudence,⁵⁵ is an expression of legal protection of the contracting parties when matrimonial agreements are entered into too close to the date of the wedding, since it may

. . . [wherein] the parties cannot be detached . . . since that agreement binds them, as it is the case with any contract.” It was sufficient to use the rules on vices of consent to verify that the spouse at a patrimonial disadvantage signed the agreement of their own free will and with informed consent; T.S.J. Cataluña, s. n. 23/2004.

52. According to art. 231-20.1 C.C. CAT., it can be included either in the notarized instrument of matrimonial agreement or in a notarized document independent and disassociated from the matrimonial agreement.

53. In contrast, the Spanish Civil Code only confers efficacy to matrimonial agreements regulating the effects of separation, divorce, and annulment of marriage after they have been reviewed and signed by the judge, before whom these cases of matrimonial crisis are presented (art. 90.2 C.C.).

The difference between the Catalan and the Spanish regulation is certainly due to the above-mentioned purpose of the Catalan Civil Code to provide non-judicial solutions for family conflicts and promote as much as possible a resolution by agreement between the parties concerned. Even so, there are certain matters for which the Civil Code of Catalonia maintains judicial control. Therefore, art. 233-5.3 C.C. CAT., subjects to judicial review the agreement on the custody of and relationship with the child, as well as regarding the child support that should be provided to them after the marital rupture, in order to verify if these agreements are in accordance with the best interest of the child.

54. AMER. LAW INST. (ALI), PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

55. *See id.* at 966.

increase the risk of intimidation where one of the parties threatens not to marry the other party if the latter does not endorse the proposed prenuptial agreement.

Unlike the remaining provisions of the agreements, which, if prenuptial, enter into force on the date of the marriage,⁵⁶ the agreements in anticipation of rupture only become binding when and if the regulated situation occurs—that being the rupture of the marriage. It may be that, when the rupture occurs, such agreements are no longer suitable to adequately address an unforeseen subsequent event and circumstances very different from those that surrounded the agreement. For that reason, the Civil Code of Catalonia permits the injured spouse to challenge it by showing that an unforeseeable and unpredictable change occurred regarding circumstances relevant at the time the agreement was made.⁵⁷

Even without naming it as such, article 231-20.5 brings into family matters an institution as strictly patrimonial as the *rebus sic stantibus*, typical of synallagmatic or bilateral contracts, which impose reciprocal benefits to the contracting parties. This is because, like in the donations discussed previously, the marital agreements, and in particular those in anticipation of rupture⁵⁸ contained in the marital agreements, tend to be linked by strong ties of interdependence or reciprocity thus justifying the application of that clause. Accordingly, the promise, renunciation, or attribution that is carried out by one of the parties in favor of the other can be maintained only if the circumstances at the time of the execution of the agreement continue to support the continuous justification of the reciprocal promise or concession made by the other party.

Despite the aforementioned influence of the passage of time and the consequent change of circumstances to the effectiveness of the agreements in anticipation of rupture, it is necessary to

56. Art. 231-19.2 C.C. CAT.

57. Art. 231-20.5 C.C. CAT.

58. Art. 231-20.3 C.C. CAT.

emphasize that the agreements that were formed after the marital rupture has occurred are weaker than those formed before the marital rupture, despite the fact that they are more recent; thus, it is recognized that each one of the spouses has the right to unilaterally withdraw from them.⁵⁹ Indeed, underlying the rule is the legal recognition that post-rupture agreements are usually made in a moment of particular emotional distress.

IV. CONTRACT AND PROPERTY RIGHTS: THE LEGISLATIVE RESPONSE TO THE ECONOMIC CRISIS

Regarding the law of contract and the law of property rights, the main legislative developments have been directly related to the financial crisis that Spain has faced since 2008, particularly by the most economically vulnerable strata of society. During this period, hundreds of thousands of people,⁶⁰ most of them unemployed,⁶¹ have been evicted from their homes because they found it impossible to fulfill the contracted obligations assumed in order to finance the acquisition of immovable property.

The financial crisis created an urgent imperative for public intervention,⁶² which was necessarily translated into the adoption

59. Precisely, such unilateral right to withdraw exists when the spouse who wants to exercise it signed the agreement without independent legal counsel (Art. 233-5.2 C.C. CAT.).

60. According to Reuters, an estimated 400,000 properties have been repossessed between 2008 and 2012; www.reuters.com/article/2012/11/15/us-spain-evictions-idUSBRE8AE10A20121115 (last visited Aug. 8, 2013).

61. According to estimates made by the government itself, the number of unemployed people in Spain for the first quarter of 2012 hovers around 23% of the labor force, reaching almost 50% for those age 25 and younger. Moreover, such as is recognized in one of the legal provisions that I discuss later, this situation of unemployment very often affects all members of the family, as thus recognized by art. 3.1(a) of Royal Decree-Law 6/2012 of March 9, concerning urgent measures for the protection of mortgagors without resources; B.O.E. n. 60, Mar. 10, 2012).

62. The regulation itself is motivated by this state of affairs, recognizing without reservation the seriousness of the situation. Thus, for instance, the penultimate paragraph of Royal Decree-Law 6/2012, *supra* note 61, states that:

The adoption of the measures referred to in this Royal Decree-Law is essential in order to protect a social group in a situation of special vulnerability in the economic context generated by the crisis. The

of laws. In Spain, unlike in common law countries, the legal system does not allow courts to create a law without statutory support.⁶³ Judicial attempts to remedy this situation by interpretation, even forcibly, have been ultimately proven to be insufficient in the current legal framework, as well as dangerous to the legal security and the necessary social confidence that contractual obligations will be performed: *pacta sunt servanda* (“agreements must be kept”).

When analyzing the legal measures taken, it is therefore essential to take into account the socio-economic context mentioned above. The same context of urgency and necessity also justifies the fact that the main measures have been taken, not by Spanish Parliament (*Las Cortes Generales*), but directly by the Executive Branch, which for reasons of extraordinary urgency and necessity, may issue regulatory provisions which have the force of law: the decree-law.⁶⁴ After its promulgation by the Executive Branch, it must be ratified by the Parliament,⁶⁵ which has to determine whether the actual circumstances existing at that time justified such extraordinary provisions.

A. Contract Law: Labor Reform

In the area of contract law, the most significant measure was the “labor reform”, undertaken by Royal Decree-Law 3/2012 of

effects of unemployment on Spanish families and their social situation have produced damage for which government intervention cannot be further delayed. . . .

63. In Spain, the judges are not bound by precedent (our system does not recognize the principle of *stare decisis*), but, as stated in art. 117.1 C.E., judges are bound solely by legislation (*imperio de la ley*). The jurisprudence of the Supreme Court is not, therefore, a source of law or legal norm under Spanish law, but only has persuasive interpretative value (art. 1.6 C.C.) and is a guide for probable future determination, but is neither certain nor immutable for future litigation.

64. Art. 86 C.E.

65. The ratification, which must be made within 30 days of the promulgation of the decree-law, falls within the authority of the *Congreso de los Diputados*, which is the lower House in the Spanish Parliament.

February 10,⁶⁶ containing urgent measures for the reform of the labor market. This provision, which first and foremost seeks to combat unemployment, introduces flexible modifications aimed at regulating the employment contract in order to encourage small and medium-sized companies to hire workers.

This flexibility was undoubtedly necessary, since the rigidity of the labor law framework has been identified as one of the main reasons for the high rate of unemployment in Spain. This is because Spanish labor law (primarily contained in “The Workers’ Statute”)⁶⁷ is still very attached to the achievements of the labor movement in the beginning of the 20th century and is, therefore, extremely protective of the rights of workers, often to the detriment of the employer, who desires the ability to adapt in order to serve the financial needs of the company.

Hence, the above-mentioned legislative reform provides flexibility and acceleration of the possible renegotiation of individual employment contracts, especially concerning the causes and consequences of dismissal, even to the detriment of collective agreements (i.e., contracts between a trade union and the group of companies in a certain sector of economic activity), which so far have predetermined the conditions that could be agreed upon individually between workers and companies in that sector.

The most notable changes caused by the Royal Decree-Law 3/2012 with regard to the previous legal framework are as follows:

1. First, as a main instrument for flexibility in hiring, and at the same time for the promotion of employment, it creates a new form of employment contract of indefinite duration that can only be used by companies with fewer than fifty workers.⁶⁸ This category of

66. Royal Decree-Law 3/2012, B.O.E. n. 36, Feb. 11, 2012.

67. Royal Decree-Law 1/1995 of March 24, approving the consolidated Workers’ Statute [*Estatuto de los Trabajadores*, hereinafter E.T.], B.O.E. n. 75, Mar. 29, 1995.

68. It is taken into account that small and medium-sized enterprises (called “PYMES”—*pequeñas y medianas empresas*), which represent the majority of Spanish production, suffer the consequences of the economic crisis with greater intensity.

companies is allowed to hire workers for an indefinite time by subjecting them to a trial period longer than the ordinary trial period. While the ordinary trial period is six months,⁶⁹ in this new type of contract, in the favor of small enterprises, the probationary period is extended to one year.⁷⁰ Within that period, both the employee and the company may unilaterally terminate the contract without justification or cause, or payment of additional compensation for termination. Additionally, the companies are entitled to tax incentives when workers are under the age of thirty or unemployed persons registered at the Employment Office.

2. Second, the new legislation brings two new substantial changes with regards to dismissal:

a. The first change consists of a broader consideration of the possible causes of dismissal, especially the “objective dismissal”, which is founded on “economic, technical, organizational or production causes.” At the same time, this also applies to collective dismissals, which must impact at least 10% of the workers in the company.⁷¹

Particularly significant is the dismissal on economic causes or based on the performance of the company. It is deemed that those “economic causes”⁷² are present where the performance of the company shows a negative economic situation, in cases such as current losses and anticipated losses or a persistent decrease in their level of income or sales. In this regard, two aspects should be stressed: First, based on the intention to facilitate the ability of the company to act in such circumstances, even though there is still *ex post* judicial review to determine the veracity of such circumstances, the company is exempt from obtaining approval from the administrative authority, which, until now, had to

69. Art. 14 R.D.-L. 3/2012, *supra* note 66.

70. Art. 4 R.D.-L. 3/2012, *supra* note 66.

71. Art. 18, para. 2 & 3, R.D.-L. 3/2012, *supra* note 66, amending Arts. 51 & 52 E.T., *supra* note 67.

72. Art. 51 E.T., *supra* note 67.

authorize this type of dismissal.⁷³ Second, although the formulation of the reasons for dismissal does not vary substantially from the previous legislation, the previous references to the reasonableness and the prospects for success of the measure are eliminated from the provision⁷⁴ in order to ensure that the courts will look at only the existence of the cause and refrain from making judgments relating to the management of the business, as they had done on previous occasions.

Another modification related to those mentioned above—whose effectiveness has yet to be proven is that in counterpart to the broad and flexible causes for dismissal, the provision at the same time prevents dismissal by granting greater freedom to the companies to unilaterally modify the conditions of work.⁷⁵ Thus, for instance, they are allowed to modify essential contractual terms such as the wage amount, distribution of working hours, geographic relocation and even functional reallocation of workers.⁷⁶ Moreover, such unilateral modifications are also allowed without prior administrative authorization. Above all, the company may also make changes contrary to conditions previously set in the collective agreement applicable to the sector to which the company belongs.⁷⁷

b. The second change consists in trying to reduce the economic cost of dismissal for companies, also known as “low-cost dismissal.”⁷⁸ Thus, for contracts concluded after the Royal Decree-Law entered into force, in the case of individual dismissal (when it

73. Art. 13 R.D.-L. 3/2012, *supra* note 66, amending Art. 47 E.T., *supra* note 67.

74. Art. 51.1 E.T., *supra* note 67.

75. Arts. 8 & 12 R.D.-L. 3/2012, *supra* note 66, which reorganized arts. 22, 39 & 41 E.T., *supra* note 67.

76. That functional reallocation or unilateral power exercised by the company to change the functions or tasks of the worker includes even the possibility to assign to him or her lower-skilled functions than those corresponding to the professional group to which the worker belongs.

77. Art. 14, para.1, R.D.-L. 3/2012, *supra* note 66, amending art. 82.3 E.T., *supra* note 67.

78. In Spanish, “*abarataamiento*”, a term used in social media.

is unfair or unjustified), the current severance payment of forty-five days' salary per year of service is replaced by a severance payment of thirty-three days' salary per year of service, to be paid in installments over a maximum period of twenty-four months.⁷⁹ In contrast, with collective dismissal on economic or any other objective cause, the severance payment will be, as a general rule, of twenty days' salary per year of service, and may be paid in a maximum of twelve monthly installments.⁸⁰

3. Lastly, the labor reform emphasizes the importance, as mentioned above, to ensure that individual employment contracts, as well as specific collective agreements of each company, prevail over sectorial or professional agreements between Trade Unions and employers of a particular sector. The legislature presents this measure as an attempt to further "conventional decentralization in order to facilitate the negotiation of working conditions at the closest, most appropriate level to the actual circumstances of the company and its employees."⁸¹ Naturally, from the unions' point of view, these kinds of measures are seen as an attack on the bargaining power of the labor representatives, to the detriment of the requisite bargaining power of the workers themselves.

In any case, the main changes in this area have basically been as follows:

a. It is possible to modify or revise a sectorial collective agreement during its period of performance, thus changing the agreement's previous stability until the next negotiation. Now, however, article 86.1 E.T.⁸² allows either party (employees' representatives or employers' representatives) to push for its renegotiation.

79. Art. 18, para.7, R.D.-L. 3/2012, *supra* note 66, modifying art. 56.1 E.T., *supra* note 67.

80. Art. 53.1(b) E.T., *supra* note 67.

81. As per the Statement of Purpose, para. IV, R.D.-L. 3/2012, *supra* note 66.

82. Modified by art. 14, para. 5, R.D.-L. 3/2012, *supra* note 66.

b. Second, the survival of the collective agreement is abolished; until now the law provided that, after the maximum time allowed to negotiate has expired without reaching an agreement, the collective agreement remains in force indefinitely. Now, however, two years after the denunciation of the collective agreement by either party, without having reached a new agreement or being issued an arbitral award, the denounced agreement would no longer be valid.⁸³

c. Finally, in order to facilitate the decentralization of collective bargaining already mentioned above,⁸⁴ it is established, for the first time, that the company agreement takes precedence over the sectorial collective agreement,⁸⁵ providing the company the flexibility to adapt working conditions to economic and organizational needs, as well as to the changing market situation.

B. Property Rights Law: “Giving in Payment” or Allowance for Alternative Satisfaction⁸⁶ Granted to the Debtor Who Loses His House in a Foreclosure Proceeding

One of the most-debated issues of 2011 is the so-called “giving in payment,”⁸⁷ meaning that the debtor who gave his immovable property (usually his own house) to the creditor as a mortgage can be released from the obligation (or obligations resulting from the mortgage loan contracted for the acquisition of that property) if the mortgage property is adjudicated to the mortgage creditor. Such an adjudication takes place when, in the course of the foreclosure proceeding, the sale by public auction of the object of the guarantee is not completed due to a lack of bidders or interested

83. Art. 14, para. 6, R.D.-L. 3/2012, *supra* note 66, modifying art. 86.3 E.T., *supra* note 67.

84. As mentioned both in the previous paragraph 2 and at the beginning of this paragraph 3.

85. Art. 14, para. 3, R.D.-L. 3/2012, *supra* note 66, modifying art. 84.2 E.T., *supra* note 67.

86. In Spanish, “*la facultad solutoria alternativa*.”

87. As we shall see, the use of the term “giving in payment” (*dación en pago*) in the context of this reform is technically inaccurate.

persons.⁸⁸ In this event, according to Spanish Procedural Law,⁸⁹ the creditor may request the court to adjudicate the mortgaged property to him.

Such adjudication does not extinguish the obligation or obligations secured by the mortgage. Instead, according to Spanish law, the creditor may continue to claim from the debtor the portion of the debt that is not satisfied (i.e., remains unpaid) after the sale of the adjudicated immovable property. This means that since the foreclosure does not alter the unlimited personal liability of the debtor,⁹⁰ the creditor may continue to try to collect the amount due (the unsatisfied debt) from the debtor's remaining assets.⁹¹

Thus, it has become a widespread and socially criticized practice that, after the adjudication of the property at a price that may be well-below the appraised value of the mortgaged property assigned by the creditor and stated in the mortgage contract,⁹² the creditor (usually a bank) then gets an additional benefit by transferring the property to a third party while still claiming the amount of the outstanding debt from the debtor, who is typically an unemployed person who has lost his house precisely because of the lack of income needed to satisfy the obligations arising from the mortgage loan taken in order to purchase the property.

88. Very often, auctions of immovables are deserted due to rampant falling prices in the Spanish real estate market, which, on the one hand, has been overwhelmed by the excessive construction activity of the previous two decades, and, on the other hand, by a lack of liquidity because of the general situation of indebtedness of individuals and companies.

89. Law 1/2000 of January 7, the Law of Civil Procedure (*Ley de Enjuiciamiento Civil*), referred to as L.E.C., B.O.E. n. 7, Jan. 8, 2000.

90. The Mortgage Law [*Ley Hipotecaria*, hereinafter L.H.], consolidated pursuant to the Decree of February 8, 1946. Art. 105 L.H. states that "The mortgage . . . will not alter the unlimited personal liability of the debtor provided in art. 1911 of the Civil Code." B.O.E. n. 58, Feb. 27, 1946.

91. According to art. 1911 C.C., "the debtor is liable for the performance of his obligations with all his property, present and future."

92. The mortgage contract has to be formalized in an authentic act or instrument before a notary in order for this right to be created or exist (art. 1875 C.C.).

This situation, although protected by the law in force,⁹³ has not only raised widespread social criticism for being incomprehensible to common citizens, but has also led to attempts to put an end to the problem by way of certain judicial decisions from lower courts. Thus, decisions such as those of the Court of First Instance of Lleida, December 29, 2011; of the Provincial Court of Girona, September 16, 2011; and above all, of the Provincial Court of Navarra, December 17, 2010 (which has had the greatest social impact), describe the conduct of the banks as “abuse of rights,” “an anti-social exercise,” or “an excess of authority”⁹⁴ regarding the rights derived from the mortgage.⁹⁵ Consequently, the courts deny the right of the creditor bank to pursue the collection of the outstanding amount of the mortgage on the remaining assets of the mortgagor.⁹⁶ These cited decisions reinforce the line of argument

93. In the already-cited art. 105 L.H. and art. 1911 C.C.

94. Article 7.2 C.C.

95. Indeed, art. 7.2. C.C. prohibits abuse of rights, antisocial exercise or excess of authority as follows:

The law does not support abuse of rights or antisocial exercise thereof. Any act or omission which, as a result of the author’s intention, its purpose or the circumstances in which it is performed manifestly exceeds the normal limits to exercise a right, with damage to a third party, shall give rise to the corresponding compensation and the adoption of judicial or administrative measures preventing persistence in such abuse.

96. As stated in the resolution of the Court of First Instance No. 5 of Lleida, December 29, 2011, ejecución hipotecaria 1895/2009 (which corresponds with other judicial decisions referred to in the text):

. . . [W]e must not forget that when the Bank granted the loan, it valued the property or estate at €19,242.55, and now intends to incorporate it into their assets for a value of €109,621.28, and to continue the enforcement process on the other assets of the debtors . . . *la doctrina de los actos propios* (compare with the doctrine of estoppel) applies here. If the bank, the dominant party in the contract of adhesion with the borrower, appraised the mortgaged property at a certain amount, it cannot then, if it does not want to contravene the above-mentioned doctrine, which has been repeatedly applied by jurisprudence, incorporate as its own the auctioned property without giving it the value that [the creditor bank] itself set. One of the foundations of this jurisprudential trend is the application of art. 7 of the Civil Code . . . because it is understood that the incorporation of this patrimonial asset at a lower value to which the party has acknowledged, and intends to continue the enforcement process, presumes an abuse of rights by the creditor . . . and allows an unjust enrichment of the Bank. Because the

that judgments should reflect the current economic and social reality, since, in effect, pursuant to article 3.1 of the Spanish Civil Code, “The law will be interpreted . . . according to the social reality at the time they should be applied. . . .”

Indeed, in view of the current economic situation of the country, judgments such as that the aforementioned Court of Lleida state that:

[T]he 2011 economic outlook has nothing to do with the economic outlook of 2006, 2007 and 2008 when the crisis was still emerging. Nowadays, the Spanish economy, as well as the world economy, suffers a deep economic crisis and for this reason, surely, the property adjudicated to the bank . . . now has a market value below the price agreed in the mortgage loan, but is it fair that the debtor suffers all the consequences of this fall? Would it not be fairer that the financial institutions also bear part of this decline? Economists are unanimous in considering that the real estate value losses have been caused by the financial institutions themselves with their mismanagement of the financial system. Hence, if the laws should be interpreted according to the reality at the time when they are applied (article 3 of the Spanish Civil Code) . . . [it] is not acceptable that the stronger party in the mortgage loan contract obtains an unjustified benefit with the further execution at the expense of the debtor as a consequence of applying the legal rules which aim to obtain reimbursement, not enrichment, of the creditor. . . .⁹⁷

However, the jurisprudence of the Supreme Court⁹⁸ rejects that judicial approach because it holds that if the foreclosure proceeding has been followed according to the legal procedure,⁹⁹ it

purpose of foreclosure is to obtain for the creditor, with the auction of the property, the collection of the outstanding debt, but not to obtain an unjust benefit such as that when the mortgaged property is acquired at a lower price than the value fixed by the parties . . . and continue the enforcement process on the other assets of the debtors.

97. The resolution of the Court of First Instance No. 5 of Lleida, December 29, 2011, ejecución hipotecaria 1895/2009.

98. In particular, the judgment of the Supreme Court of February 16, 2006, in its 5th legal basis; T.S., s. n. 128/2006.

99. Art. 131 L.H.

does not constitute an abuse of rights by the mortgagee to exercise the rights conferred by law in order to obtain admissible economic benefits in those transactions. In addition, the Court holds that preventing the mortgagee from exercising those rights would undermine the general confidence in the performance of contractual obligations.

Moreover, even the Constitutional Court, in its Decision 113/2011 of August 17, 2011, censured such a judicial approach, holding that those judges, critical of the use of the rules for foreclosure proceedings, exceed their interpretative role and force the existing legal framework, which, in a system of law such as that of Spain, can only be modified by the legislature, as the Constitutional Court also noted.

Perhaps that is the reason why the legislature itself¹⁰⁰ eventually decided to intervene in order to try to remedy, or at least alleviate, the severity of the above-mentioned social-economic situation. The measures taken are twofold:

1. First, the Royal Decree-Law 8/2011 of July 1,¹⁰¹ concerning measures in support of mortgagors, which introduces two provisions:

a. The aforementioned Law of Civil Procedure (L.E.C.) is modified to ensure that in foreclosure proceedings for default of payment, the debtor receives an adequate price for the immovable property that allows him to minimize the remaining debt. This way, in modifying article 671 L.E.C., it is anticipated that the adjudication to the creditor of a mortgaged property as a result of a foreclosure proceeding will never be at a price of less than 60% of its appraised value.

b. The threshold or legal limit of that which is exempt from seizure is raised. Usually, the general minimum value of what is

100. In fact, the executive branch itself uses its exceptional power to proclaim Decree-Laws, which, as mentioned in the previous paragraph, have the rank of law even though these decrees are issued by the executive power.

101. B.O.E. n. 161, Jul. 7, 2011.

unseizable for any debtor coincides with the minimum wage.¹⁰² Then, for mortgagors who have lost their habitual place of residence, this Royal Decree-Law raises the legal limit up to 150% of the minimum wage, and an additional 30% for each member of their family who does not receive income exceeding this minimum wage.¹⁰³

2. Subsequently, the Royal Decree-Law 6/2012 of March 9, concerning urgent measures for the protection of mortgagors without resources, seeks to curtail the social problem of evictions of people who have lost their housing in a foreclosure proceeding by means of establishing a voluntary system of mortgage debt renegotiation. This system consists in the introduction of a “Code of Good Practice,”¹⁰⁴ which can be voluntarily adopted¹⁰⁵ by financial institutions (banks and other savings institutions). It is not, therefore, an imperative measure, but merely a voluntary measure or *soft law*. Even so, the executive branch is confident that the majority of banks will adhere to the “Code,” both for reasons of professional prestige (the government would publish a list of participating institutions),¹⁰⁶ and, above all, to gain a competitive position in the market.

The measure is not created for the benefit of any mortgagor, but rather to favor those who, in accordance with the guidelines established by the Royal Decree-Law, can be considered particularly vulnerable, due to the suffering of extraordinary difficulty, to satisfy the payment of their mortgage obligations.¹⁰⁷ Article 3.1 of the Royal Decree-Law considers the debtor of a loan secured with a mortgage on his habitual place of residence to be in

102. In May 2013, the minimum wage was €645 per month; http://elpais.com/elpais/2013/05/31/inenglish/1370013481_405760.html.

103. Art. 1, R.D.-L. 8/2001, *supra* note 101.

104. The content of the Code of Good Practice is established in the Annex of R.D.-L. 6/2012; B.O.E. n. 60, Mar. 10, 2012.

105. Art. 5, R.D.-L. 6/2012, *supra* note 104.

106. Art. 5.3, R.D.-L. 6/2012, *supra* note 104.

107. Art. 1, R.D.-L. 6/2012, *supra* note 104.

such a vulnerable situation when all the following circumstances are met:

- a. That all members of the family unit¹⁰⁸ lack income derived from work or economic activities.
- b. That the mortgage payment¹⁰⁹ is greater than 60% of the net income received by all the members of the family unit.
- c. That all the members of the family unit lack sufficient property rights or any other property to satisfy the debt.
- d. That the credit or loan is secured with a mortgage on the only house owned by the debtor, and has been granted for its acquisition.

Hence, mortgagors who establish (by means of the documentation indicated in article 3.1) that they are in such a situation may request the following from the lending bank:

1. First, a novation or modification of the contract¹¹⁰ leading to a restructuring of the mortgage debt that makes its performance viable by the debtor in the medium and long term. It is necessary that the restructuring plan include¹¹¹ a four-year grace period on the repayment of the capital, an extension of the loan repayment term of up to 40 years, and a reduction in the rate of interest applicable, which, during the grace period, will be determined according to the Euribor index + 0.25%.
2. After applying these conditions, even if the mortgagor is able to pay, he may ask the lending institution for a remission or reduction of the capital to be repaid, which, at the choice of the

108. Persons considered as belonging to the family, in addition to the debtor, are his or her spouse or partner registered as such in a public register, and the children who reside in the house, regardless of their age (art. 3.1(a), R.D.-L. 6/2012, *supra* note 104).

109. This is the debt resulting from the mortgage loan, which requires periodic payments (e.g., monthly payments).

110. In fact, it is not a single contract, but two connected or related contracts: a contract of loan whose repayment is guaranteed with a mortgage on immovable property, and the contract establishing the mortgage, which is a real right. Typically, both contracts are formalized in the same instrument (a deed before a notary public); thus, it would include both the loan contract and the contract that establishes or creates the mortgage.

111. See para. 1(b) Code of Good Practice, *supra* note 104.

institution, can be 25% of the outstanding capital, or the amount paid in interest to that point, or a part of the value of the adjudication of the house.

3. Finally, if the mortgagor does not accept these new conditions, he may unilaterally impose on the creditor bank the “giving in payment,” whereby the mortgagor demands that the bank accept the transfer of the mortgaged property in payment of the outstanding debt, which will then totally and definitely extinguish the obligation.¹¹² Despite the fact that both the media as well as the general public call this option “giving in payment,” technically it is only giving in payment if the debt is extinguished by transferring an object that is different from the one which is owed,¹¹³ and occurs by agreement between the creditor and the debtor, simultaneously upon payment or performance.¹¹⁴ Since in this case, where no agreement exists, it is the debtor who unilaterally imposes the asset offered as satisfaction or payment to a performance (the transfer of the dwelling) different from the one which is due (the repayment of the loaned capital and interest), it is technically more accurate to refer to “unilateral allowance for satisfaction” provided by law to the debtor.

Despite this kind of “giving” or transfer of ownership of the dwelling to the creditor bank, the debtor can request to remain therein as a tenant for a period of two years, paying as annual rental 3% of the total debt at the moment the giving in payment occurs.¹¹⁵ An additional protective measure to the mortgagor who loses ownership of his house is that he may unilaterally impose a rental relationship upon his former creditor and new owner of the dwelling.

In a recent judgment of March 14, 2013, the European Court of Justice declared that Spanish legislation does not conform to

112. Paragraph 3, Code of Good Practice, *supra* note 104.

113. Or, more generally, through the completion of an act or performance different from that which was initially due.

114. Art. 1153 C.C.

115. Paragraph 3(c), Code of Good Practice, *supra* note 104.

European Union consumer protection law.¹¹⁶ It violates Directive 93/13/EC of April 5, 1993, to the extent that it does not allow the debtor, in the course of mortgage enforcement proceedings, to argue that some clauses of the mortgage loan are unfair contract terms and have this question judicially determined before enforcement proceedings are concluded. The debtor may later on obtain compensation if the terms are found unfair by the court having jurisdiction to do so, but this court cannot stay the enforcement proceedings. To comply with the aforementioned European judgment, the Kingdom of Spain has enacted the Law 1/2013, of May 14, 2013, amending both the Mortgage Law and the Law of Civil Procedure.

V. EUROPEAN UNION LAW: THE RECENT JURISPRUDENCE ON INTELLECTUAL PROPERTY

Because Spain has been one of the Member States of the European Union since 1985, it is necessary to include in this assessment the major developments related to the implementation of European private law. As the Spanish Constitutional Court has consistently stated,¹¹⁷ European Union (EU) law does not constitute international law for the Member States of the EU, but, at least in certain aspects, the EU legal system can be considered part of the domestic law of the Member States. In particular, EU directives make the integration of the EU legal system into domestic law possible. The directives are provisions that only acquire normative or binding value when a Member State of the Union implements or transposes them into its domestic law, usually through the promulgation of legislation that incorporates the content of the directive.¹¹⁸

116. Case C-415/11, Mohamed Aziz v. Catalunyacaixa, 2013 O. J. (C141) 5.

117. Since the judgment of the Constitutional Court (*Tribunal Constitucional*) 165/1994, May 26, 1994.

118. Art. 288 of the Treaty on the Functioning of the European Union (the consolidated version, consequent to the Treaty of Lisbon of December 13, 2007) leaves to the Member States the choice of the means of incorporating the

One of the subjects of private law that the European legislature has attempted to harmonize or provide a uniform regulation within the European Common Market is intellectual property, which raises several conflicts between holders of protected rights (particularly, authors or creators) and the users who are, substantially, those who exploit protected works by making them available to the public, but also private users. There are, indeed, certain private uses of protected works, such as private copying, which, because of their volume, also cause significant damage or loss of benefit to the authors.

The European legislature has changed its approach to dealing with these kinds of conflicts, as reflected by the first set of directives adopted in the 1990s.¹¹⁹ At first, the European Union opted to reinforce the rights of users against the creators, and even went so far as to impose on the authors specific uses of their works, such as the transmission by cable, in a system of agreements very close to that of the common law system of mandatory licensing.¹²⁰ However, since the beginning of the last decade, a change of legislative policy is taking place because the authorities of the EU have realized that the European market of cultural production can achieve competitiveness only by strengthening the rights of the creator against those of a distributor or exploiter.

directive into their own domestic law. The Spanish legislature opted to incorporate the main directives on matters of private law (e.g., relating to consumer contracts) through provisions with the rank of law and not through mere administrative provisions.

119. Concerning EU policy in the area of intellectual property law at that time and the directives reflecting it, see Juana Marco Molina, J., *El derecho de autor frente a la sociedad de la información*, 2 REVISTA JUR. DE CAT. 367 (1997).

120. See art. 9, Directive 93/83/EC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993 O.J. (L248) 20-21.

That change of legislative policy in the area of intellectual property, in part due to the “Bangemann Report,”¹²¹ resulted in directive 2001/29/EC, May 22, 2001, on the harmonization of certain aspects of copyright and related rights in the information society. Despite the conflicts arising from its application, its firm and definite position to strengthen the rights of the creator against the users of the works facilitates the task of the courts. Some recent judgments of the European Court of Justice (ECJ), as well as some Spanish judicial decisions, reflect this position.

A. The Question of Fair Compensation for Private Copying; ECJ Judgment of June 16, 2011: Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH

The aforementioned judgment resolves the dispute raised by a Dutch copyright management organization for a collective of authors (Stichting de Thuiskopie) brought against a German company (Opus Supplies) which sold, via the internet, blank media that targeted consumers in the Netherlands. Opus Supplies did not pay the private copying levy in either Holland or Germany, as provided for in article 5.2(b), directive 2001/29. The judgment ordered Opus Supplies to pay Stichting de Thuiskopie for the loss of earnings due to the Dutch authors, for reason of non-payment of that levy.

The recognition of the right to receive fair compensation needs to be justified because the copying or reproduction of protected works by a person for private (and non-profit) use is “free use” or does not require authorization from the right-holder of the work.¹²²

121. It was a study conducted by a group of experts led by Martin Bangemann, who was EU Commissioner for Industrial Affairs, Information and Telecommunications Technologies during the 1990s. This report was submitted to the European Council on May 26, 1994.

122. Art. 5.2(b) Directive 2001/29/EC (2001 O.J. (L167) 16) authorizes Member States to exempt from the authorization of the author the “reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial.” Making use of that authority recognized by European Union law to the Member States, Art. 31.2, Spanish Intellectual Property Law (R.D.-L. 1/1996 of April 12) excludes the

This is because, from the inception of intellectual property protection, it has been considered that the protection of the author's rights should stop at the doorstep of those who use the work.¹²³ Nevertheless, because modern audio, visual, and above all, digital reproduction media enable these kinds of copies to be easily made, private copying has acquired over time an uncontrolled and massive nature which, as the judgment recognizes, causes serious economic damage to the authors.

In response to this situation, European legislation recognizes that the right of the author (and also of some other holders of intellectual property, such as interpreters) to fair compensation is based on the estimated damage caused. From the viewpoint of both creditor and debtor, the author's economic right to the work has certain special characteristics:

1. From the creditor's point of view, despite the right to which the author is entitled, he cannot claim it or receive it individually; rather, he may only act through one of the copyright management organizations (or "collecting societies"),¹²⁴ such as that appearing in the above-mentioned judgment. After the fair compensation is paid, the organization distributes it among its members according to its own rules. This is because those revenues are not considered the fee paid or compensation for the individually authorized use of the work, but rather as global compensation for free use or unauthorized use ("fair use") and, accordingly, for the loss of earnings due to the collective authors who are members of the organization.

2. But, from the point of view of the person bound to perform an obligation (the debtor), there are greater particularities

reproductions of works made for private use which are already available to the public from the need to obtain the authorization of the author; B.O.E. n. 97, Apr. 22, 1996.

123. Josef Kohler explains this limitation in these terms (JOSEF KOHLER, *URHEBERRECHT AN SCHRIFTWERKEN UND VERLAGSRECHT* 181 (1981).

124. In Spanish, "*entidades de gestión*."

regarding these rights. As recognized in the judgment, given the practical difficulty to identify the plurality of anonymous private users (who make copies for personal or private use) of protected works, the laws have selected—within the long chain of intermediaries between the creator and the final user of the work—certain persons who directly or indirectly facilitate access to the work. In this case, both the Dutch legislature and, until very recently,¹²⁵ the Spanish legislature determined that manufacturers and importers of equipment, media and devices which enable digital, visual or audio reproduction of protected works are liable to pay fair compensation.

Considering that Opus Supplies possessed such equipment and media (in addition to making them available to private persons¹²⁶ or providing them a reproduction service), the ECJ declared it liable to pay fair compensation for private copying to the Dutch authors associated with Stichting de ThuisKopie, despite the fact that Opus Supplies is not established in Netherlands.

B. Delimitation of the Concept of “Communication to the Public” of the Work; ECJ Judgment of 21 October 2010: Padawan S.L. v. Sociedad General de Autores y Editores de España

This second judgment, also raised in a lawsuit brought by a copyright management organization (in this case, the *Sociedad General de Autores y Editores de España*, or SGAE) addressed the

125. Until now, art. 25 of the Spanish Intellectual Property Law imposed a copyright levy for private copying on the manufacturers of the reproduction equipment above-mentioned in the text. However, the 10th Additional Disposition, R.D.-L. 20/2011 of Dec. 30, on urgent budget, tax, and financial deficit correction measures, abolished this system and provides that the beneficiaries of fair compensation would be compensated from the Spanish national budget; B.O.E. n. 315, Dec. 31, 2011.

126. Without needing such copies to actually be made, since, as pointed out by another ECJ judgment (that of October 21, 2010, in case C-467/08, *Padawan S.L. v. SGAE*), “the fact that that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy, provided that the equipment or devices have been made available to natural persons as private users.”

question of fair compensation for private copying and was resolved in the same manner as in the precedent judgment.

Another issue (widely discussed both before and after the Directive 2001/29/EC) that was addressed collaterally by this decision¹²⁷ is related to whether the “on-demand”¹²⁸ or “peer-to-peer” (“p2p”) communication (i.e., one that only takes place upon individual request by each private user, and accordingly makes the work available at the place and time requested by the individual user) should be considered as public or private communication or use of the work. The typical intermediary in this form of access to works protected by intellectual property law is either a audiovisual media company (e.g., cable television channel), or a hospitality establishment, such as a hotel or restaurant, that, in connection with the main service or accommodation provided to its customers, facilitates as an additional service potential access to protected musical or audiovisual works for their enjoyment.

However, a difficulty arose regarding this form of dissemination of the work with regard to the concept of “public communication” (which includes all the forms of intangible dissemination, e.g., those who make the work accessible to the public without prior distribution of copies of the same) during the preparation of Directive 2001/29/EC. The difficulty was in maintaining the public nature of the communication with respect to interactive or “on-demand” communication: first, because this

127. Indeed, such a debate took place prior to Directive 2001/29/EC and was resolved, for instance, in France. There, it resulted in a judgment contrary to the approach adopted later by the directive and the above-mentioned jurisprudence of the ECJ. In two lawsuits brought by S.A.C.E.M. (*Société des auteurs, compositeurs et éditeurs de musique*, a copyright management organization in France) against two hotel companies (Hôtel Lutetia and Hôtel Le printemps), the *Cour de Cassation* held that the defendant hotel companies had not committed an act of public communication subject to copyright, for having made available to the public works protected by intellectual property law in a private place, such as the hotel rooms. Cass., 1re Civ., Nov. 23, 1971, no. 70-12523.

128. Art. 1.2, Directive 98/48/EC of July 20, 1998, amending Directive 98/34/EC, which establishes the rules relating to the information society services, defines the notion of interactive communication or “à la carte” in similar terms; 1998 O.J. (L217) 21.

form of dissemination involves an individualized access to the work, which makes it difficult for the law to include it within the acts of exploitation contained in the exclusive power of the author;¹²⁹ and second, because such access may occur in places, such as a hotel room, that are supposedly private.

Nevertheless, article 3 of Directive 2001/29/EC opted to include individualized or “on-demand” communication within the broader notion of “public communication”, thereby of allowing for the purpose of collective enjoyment, and not just private enjoyment, of the work. This makes the activity another one of the operating activities that should be authorized by the author, and one for which he should receive remuneration.

Hence, the 2010 judgment mentioned above correctly applied the directive when, according to a 2006 judgment of the ECJ, it stated that “the right of communication to the public covers making the works available to the public in such a way that they may access them from a place and at a time individually chosen by them.”¹³⁰

Several reasons justify this decision:

First, we should take into account that a room in a hotel is not strictly private, since a number of people who are not related by personal ties may separately access it in a consecutive manner. Therefore, even though it is not a public place, it is a place accessible to the public.¹³¹

129. Indeed, only activities of collective use of the work, or making the work available to the public constitute acts of exploitation covered by intellectual property law. See JUANA MARCO MOLINA, *LA PROPIEDAD INTELECTUAL EN LA LEGISLACIÓN ESPAÑOLA* 215 (Marcial Pons 1995).

130. The ECJ judgment of October 21, 2010 explicitly adopted the approach established in legal basis no. 58 of the ECJ judgment of July 13, 2006 in case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles, S.A.* The dispute originated from a claim for compensation for the exploitation of rights brought by SGAE, a copyright management organization, against a hotel company that offered to its customers additional cable television and music services, which allowed them the enjoyment of works protected by intellectual property law.

131. So it is also considered in the ECJ judgment of 2006, *supra* note 130, in their legal basis nos. 48, 49, 53 and 54.

Second, it is not inherent to the activity of public communication that the disseminated work is received or enjoyed simultaneously by a plurality of persons to whom access is facilitated. Such simultaneity is exclusive to the traditional forms of communication such as stage productions. However, with technological advances allowing the work to be recorded or captured and be disseminated at a different time or place, the simultaneity of reception is no longer a necessary characteristic of the activities of communication. Consequently, the legal definition of this form of exploitation does not require simultaneous reception.¹³² As recognized by the above-mentioned jurisprudence, what is crucial is the potentiality, not the effectiveness, of the communication or making of the work available to the public.¹³³

Those who perform such collecting activities through intermediate devices (i.e., cable, speakers or similar devices, as well as individual receivers that are made available to third parties) are not mere receivers of the work, but are instead making an autonomous act of communication to the public, which requires new authorization from the author, since, through their intervention, they expanded the originally-intended scope of the communication previously authorized.¹³⁴

132. It is referred to in Spanish Intellectual Property Law (R.D.-L. 1/1996, *supra* note 122), in which Art. 20.1 provides:

Communication to the public means any act whereby a number of persons can have access to the work without prior distribution of copies to each of those persons.

Communication shall not be considered public when it takes place in a strictly domestic environment that is not integrated or connected to a distribution network of any kind.

133. So declares the ECJ judgment of 2006, *supra* note 130, in which legal basis no. 43 states: “[I]t is not decisive . . . that customers who have not switched on the television have not actually had access to the works.”

134. Indeed, the ECJ judgment of 2006, *supra* note 130, considers it so (see its legal basis numbers 41 and 42):

. . . [I]f reception is for a larger audience . . . a new section of the receiving public hears or sees the work and the communication of the program . . . no longer constitutes simple reception of the program itself but is an independent act through which the broadcast work is communicated to a new public. . . . [S]uch public reception falls within the scope of the author's exclusive authorization right;” and, “The

Finally, it should be taken into account that this new act of communication of protected works provides its agents with a profit or benefit at the expense of the author. Indeed, despite the fact that such activities frequently do not involve direct income, since, as in the case of hospitality establishments, they do not receive from the public an initial compensation (such as an entry fee), the public communication of the work constitutes an indirect source of income. This is because such activities either allow the communicator to apply a surcharge to the price of the main service performed (e.g., a surcharge for the hotel room equipped with devices permitting such individualized or “on-demand” communication) or, at least, because it provides the communicator with a patrimonial benefit derived from the potential increase in the number of his customers due to the fact that this form of communication is facilitated.¹³⁵

Thus, given that the very existence of intellectual property rights is justified by the objective of giving a share to the author from all of the earnings that his work or creation is able to produce, it seems necessary that this type of use might also be remunerated, in the same way that the acts of direct and simultaneous communication to the public are remunerated. This is, ultimately,

clientele of a hotel forms such a new public [since the] transmission of the broadcast work to that clientele using television sets is not just a technical means to ensure or improve reception of the original broadcast. . . . On the contrary, the hotel is the organization which intervenes . . . to give access to the protected work to its customers.

135. As recognized in the ECJ judgment of 2006, *supra* note 130, in its legal basis no. 44:

. . . [T]he action by the hotel by which it gives access to the broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit. It cannot be disputed that the provision of that service has an influence on the hotel’s standing and, therefore, on the price of rooms. Therefore, even taking the view, as does the Commission of the European Communities, that the pursuit of profit is not a necessary condition for the existence of a communication to the public, it is in any event established that the communication is of a profit-making nature

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what the judgments of the ECJ herein commented intend to recognize to the creators.