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SOCIO

MANAGING INTELLECTUAL PROPERTY, NOVEMBER 2010

The theory of indirect liability in copyright law rests on the idea that anybody who encourages or assists others to perpetrate an infringement, shall be liable to sanctions of an administrative, civil or criminal kind. Depending on the legal system involved, indirect liability is usually triggered by general principles set down in civil or common law. Initially, discussions took place over whether suppliers of devices that ordinary people can employ for copying or disseminating copyrighted works or for transforming them, could be found liable for infringing copyrights. Photocopying machines, juke boxes and video recorders have all been the subject matter of disputes between manufacturers or distributors on the one hand and the holder of rights, on the other. Copyright owners have invoked indirect liability as an argument to support their position. Courts have been reluctant to prevent recordings or other media from being distributed in the market. Instead, they have searched for balanced solutions, ensuring that works are disseminated in all areas of the media, while allowing authors rights to authorise or prohibit or rights to receive compensation.

INTERMEDIARY INFRINGEMENT

Digital networks have posed new challenges to copyright law, particularly with regards to secondary infringement issues. The term intermediary has been largely accepted to include internet and online service providers and more specifically, providers of access hosting or search engine services or providers of linking or other information location technology or tools. All of the mentioned intermediaries have taken part in litigations, brought in different jurisdictions, based on indirect liability grounds. The sources of discussion addressing indirect liability have varied depending on the prevailing system. For example, the US has followed common law theories of contributory infringement and vicarious

liability as well as the concept of inducement: *Napster*, *Grokster* and other judicial decisions. Commonwealth countries like Australia or the UK have relied on a statutory figure called authorisation. Civil law countries like France and Belgium have conceived indirect infringement on the grounds of civil liability or related obligation rules, while the Netherlands has applied duty of care and Germany, injunctive relief.

Peer-to-peer and other forms of interactive communication, via digital networks, have raised particularly interesting questions in connection with indirect liability. The making available right reflected in the World Intellectual Property Organisation (WIPO) treaties, was employed to ensure copyright protection in the uncertain conditions posed by digital networks – although the scope of the protection is broader, since it is applicable in connection with analogue systems as well. Scholars have discussed how the making available right fits within the classification of economic rights. A general consensus is that making available is a right of interactive nature. The target is anybody who makes available works, performances or sound recordings, so that members of the public have access to the same from anywhere and anytime and make copies for exchange or other purposes. As agreed by the WIPO diplomatic conference of 1996, the making available right is intended to differ from categories like communication to the public, transmission or distribution rights. A question has been whether the scope of the right is limited to direct infringement or whether it extends to indirect infringement. In *Cooper v Universal Music Australia Pty Ltd*, the Federal Court of Australia relied on the authorization rule of the copyright statute, to find infringement against the defendant for having allowed others, with knowledge, to place in its website hyperlinks connected to infringing works.

Countries have followed different routes in order to impose on intermediaries some sort of obligation when they provide third parties with the means to perpetrate infringement. France enacted HADOPI and then HADOPI 2. HADOPI 2 has been called the three-strikes-system: it empowers an administrative body with the capacity to ascertain infringement and then to ask a judge to impose that the Internet Service Provider (ISP) suspend the connection of internet users who infringe somebody else's copyrights. HADOPI shall be allowed to throw the third ball if after two warnings the client has not normalised an infringing activity. The bill has been criticized strongly by commentators, politicians and consumer groups for restricting the rights of the ISPs. The three-strike-rule has also been regarded a failure, notwithstanding the fact that HADOPI cannot

render an order to suspend.
In addition to the liability of intermediaries, digital technologies have posed additional challenges to copyright law in the shape of hypertext links, search engines, orphan works and digitalisation of works originally made in analogue media. Hyperlink has been considered an infringing activity when used to take users to sites where they can copy infringing works. Otherwise, it has been valid to create links to websites and it has also been valid to use thumbnails and other supportive references. Search engines have posed a similar problem. Courts around the globe have considered to what extent it is legal to provide users of the internet with assistance to find sites of interest. Orphan works, while not a problem exclusive to digital media, have major proportions on the internet. A number of countries have passed legislation inserting specific exceptions or limitations in connection with orphan works. Lastly, digitalisation of works has implied issues as to whether users, such as libraries or online service providers, need permission from copyright holders or if they can invoke exceptions. Countries have started to implement legislation allowing exceptions or limitations.
WIPO treaties set some rules concerning exceptions and limitations. In essence the treaties enhance the three-step-test analysis of the Berne Convention. In agreed statements it has been provided that member states can decide whether to adapt exceptions and limitations to the digital environment or create new ones that are more adequate. Countries have applied the WIPO treaty provisions differently. Regarding the three-step-test, most jurisdictions have viewed it as a supplemental rule, applicable when no specific exception or limitation exists or when courts need to find a balanced solution. Likewise, some countries have not found distinctions between digital and analogue uses of works, in order to impose exceptions or limitations. They have remained technology-neutral. Some other countries have admitted a technology neutral approach, but still have required an explicit extension in certain fields that are specific to digital rights when referred to private copying or orphan works.

MEXICAN LIABILITY

Under the Copyright Law of Mexico, intermediates in charge of connecting internet sites operated by infringers of copyrights or neighbouring rights, are not clearly liable of infringement. Indirect infringement by providing the means

to site operators – both by connecting sites to a number of users and also providing software that users can employ for file sharing or other purposes – to perpetrate infringement of rights in a direct fashion is not an offence. Further, the law does not provide an exception or limitation system, for the simple reason that such system cannot exist in the absence of rights or actions to enforce the same.

Direct infringement has been explored, with success, in connection with works disseminated over the internet, based on the economic right of access that derives from WIPO treaties. The access rights have been tested in a number of cases related to the film and music industries. *MPAA v SigloX.com* has been a landmark criminal case in the field. There is no doubt that, under the Copyright Law, site operators, including service providers who render online services – some in addition to connecting activities - are subject to criminal, administrative or civil damages sanctions. Their services imply direct infringement of copyright or neighbouring rights, by: i) uploading or in general copying works or subject-matter protected by neighbouring rights, without the consent of the rights holders; ii) giving users access to non-authorised copies of works or subject-matter of neighbouring rights; or iii) making transmissions thereof or other forms of communication to the public by utilizing the internet as the medium.

Secondary liability of intermediaries has been debated at a government level. However, they have not yet convinced Congress that ISPs can be liable for secondary copyright infringement. The reaction has been twofold: i) associations have supported the idea that HADOPI 2 should be the model to follow; and ii) collective societies have announced litigations against ISPs. The ground they have relied on is the theory of subjective liability in civil law. However, being civil in nature, it has been questionable whether it can apply to infringement matters deriving from the Copyright Law or the penal code. Likewise, the civil theory is narrow in scope, to the extent that it would not easily accommodate non-common situations dealing with special rights. Lastly, assistance or inducement or even authorisation, are additional factors that can complicate the application of civil liability doctrines.

On April 27 2010, Congress started discussions for a bill to amend the Copyright Law and protect copyrighted works based on the HADOPI model. The draft bill provides a definition of internet service providers covering access and hosting services as well as other service operations. In essence, right holders can ask the Mexican Institute of Industrial Property (IMPI) to notify _ two times _ an ISP, which in turn informs the user of an alleged infringement. A third strike would

be made by requesting injunctive relief (the bill calls it “preliminary measures”, although it is unclear what court action would follow). ISPs who do not make the warnings are subject to administrative sanctions. The bill requires that ISPs take different measures, including technological measures, to detect users who repeat infringement. This seems a very high burden for the ISPs to bear. The bill further stipulates that ISPs shall be entitled to limitations to liability, provided that they fulfil obligations such as: adopting contract termination policies; not interfering with the measures that holders implement to protect works; not starting content transmissions themselves; and not providing their services while knowing that users infringe. However, the bill appears to be copying the Chilean law – this latter is Digital Millennium Copyright Act (DMCA) compatible _ as it does not indicate the limitations and just refers to access services and excludes host, search engine and caching.

The Google libraries settlement has attracted interest around the globe. It can certainly be regarded as a challenging test to the copyright fair use system. Google allows its customers to search books from an index that includes a display of text snippets. For that purpose, Google scans the literary works in the books, makes online indexing and elaborates the snippets of the texts. Google invoked case law allowing free use of works under the argument that the use of the work has been transformed and for that reason, the copy serves a different function to that of the original work. Google would not be successful before the Mexican courts if they invoked the exemption or limitation rules of the Copyright Law, since Mexican rules are much more restrictive and inflexible than those of the US fair use system.

Under the Copyright Law, exceptions and limitations are restricted to what is listed in the law. The three-step-test does not work as a source of principal or subsidiary law, but just as a general reference. The copyright law does not recognise special exceptions or limitations regarding electronic or digital reproduction, making available or transmission using digital networks or works or subject matter protected by neighbouring rights. Existing exception or limitation norms apply to digital rights when compatible with the nature of the work or right. In 2009 Congress discussed a bill dealing with certain exceptions to economic rights, such as the right to make transitional copies of works obtained from the internet in the random access memories of computers, a right to copy video or sound recordings in the memory of computers, including the digitalisation of analogue recordings and a right of private copying of photographic and literary works. By rejecting the bill, Congress found that it did

not improve the existing system.
The Copyright Law does not contemplate exception or limitation provisions applicable to orphan works and those referenced to library/search facilities are narrow.
Orphan works would definitively require the admission of a new specific exception, perhaps a limitation indeed. In keeping with this, the limitation provision would require that the user of the work follows a clearance process using every resource available at hand, including search or registries, records and catalogue at hand, including search or registries, records and catalogue (for example music publisher catalogues). If nothing is found, the user may start using the work, giving public notice that it is an orphan work. If the rights holder shows up at a later time, it would no longer be in a position to stop the use of the work, but would be entitled to remuneration or compensation (although there is no entitlement to profits resulting from the exploitation of the work).