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## **Partner**

Mexico's draft copyright bill could be the first to effectively combine the interests of stakeholders in the digital copyright debate.

In an attempt to protect their rights online, copyright owners have traditionally targeted Internet Service Providers (ISPs) who provide access to digital networks, render hosting or search engine services or connect through hyper-linking. They also have brought actions against website operators – chiefly so-called rogue websites– who use works by uploading or disseminating, as well as end users of internet services who copy works by downloading them. Lastly, they have taken actions against file sharing services and the users of file sharing networks. These methods have resulted in backlash and opposition from internet freedom and consumer advocacy groups, both in Mexico and around the world.

## **Digital copyright in Mexico**

Since at least 2009, Mexico has discussed options for protecting works in digital networks and providing limitations on copying content online. An initial attempt to remedy the law was made on April 27 2010, when Congress considered a bill to amend the Copyright Law based on a hybrid model combining the US and French approaches (the Digital Millennium Copyright Act, or DMCA, and HADOPI). However, the bill was rejected after strong lobbying by ISPs, who opposed it for the following reasons: 1) if ISPs refused to collaborate with the Mexican Industrial Property Institute (IMPI) to submit notices to alleged infringers as proposed by the copyright owners, they would have been subject to administrative sanctions; 2) the bill imposed on ISPs an obligation to take all measures necessary, including technological measures, to detect users who repeat infringement; and 3) ISPs would have been entitled to limitations to liability, provided that they fulfill obligations such as adopting contract termination orders (without a prior court order), not interfering with the measures implemented to protect works, not transmitting the works themselves, and not rendering services to the users while knowing that they

infringe rights.

The Anti-Counterfeiting Trade Agreement (ACTA) was the country's next attempt to improve copyright enforcement on the internet. ACTA represented a further step to protect copyrights in digital networks from an international perspective. The purpose of ACTA has been to elevate enforcement standards of IP rights globally, above those set in existing international treaties such as TRIPS or NAFTA and by enhancing international cooperation. In addition to actions against counterfeiting and piracy in general, ACTA provides enforcement solutions in the digital environment. It suggests that contracting parties establish a mechanism so that competent authorities impose on ISPs the burden to disclose to copyright owners' information, allowing the identification of a subscriber whose account was allegedly used for infringement. ACTA received strong opposition by international user groups and supporters of internet freedom. It has been perhaps the broad language utilized by negotiators that has triggered opposition, since nothing in the agreement should affect civil rights.

Mexico was an original negotiator of the agreement. However, the Senate advised the government not to sign ACTA under threat that it would not be ratified, amid protests from various groups. The groups claimed that ACTA would endorse the interests of the entertainment industry and would not only signify the internationalization of the US DMCA, but of ACTA and the Protect Online Piracy Act (PIPA) as well. That bill, and its counterpart, the Stop Online Piracy Act (SOPA), proposed that: 1) the attorney general could seek a court order against an allegedly infringing foreign website visible in the US; 2) copyright owners could seek court orders against US directed websites to deny them access to US payment processors and ad networks; 3) it targeted websites that inform users how to get around censorship mechanisms; 4) it provided the so-called vigilante provision, granting immunity to ISPs if they block websites voluntarily, and 5), the attorney general could block domain name services and de-list websites from search engines. After avid discussion and criticism from many different sectors, the US Congress declined to pass SOPA and PIPA.

Despite the Mexican Senate's warning, the government signed ACTA on July 11 this year and the Senate is now evaluating whether to ratify or refuse. On June 24, the Permanent Commission of Congress protested ACTA's execution.

## A new approach

This year, a group has been searching for agreement on a new position in order to move the debate forward. The group is comprised by representatives of copyright owners, collecting societies, major broadcasting and telecom companies, ISPs and members of academia specializing in copyright and internet law. They all share sensibility and consciousness about the need to amend the Copyright Law, since it presently falls short of what is required to enforce copyrights in digital networks. But they also know that no reform will succeed unless it is consistent with the interests of ISPs and internet users. Accordingly, the group has been drafting a consultation paper that includes all the relevant requirements for a formal bill when drafted under the initiative and leadership of a Senator. The paper has been completed and its terms have been presented to members of Congress. It is expected that a bill shall be drafted and officially submitted to the Senate shortly. In writing the paper the group reviewed as background all of the approaches of other jurisdictions to the subject. It also considered the deficiencies of Mexican Copyright Law and the rejection of the 2010 bill mentioned above, as well as ACTA. In keeping with this, the paper highlights the following proposed changes:

- Implementing a system of gradual response or so-called preventive notice. What is different from other HADOPI 2 models is that: 1) IMPI would be the agency in charge of managing the system; 2) IMPI would send out one notification per request of the copyright owner or ex-officio; 3) the copyright owner would be required to provide an IP address or any other information that identifies the account of the alleged infringer; and 4) if the copyright owner or IMPI do not have in possession the IP address of an alleged infringer, IMPI would ask the ISP who connects or hosts the files containing the infringed work to reveal it.
- Implementing an administrative proceeding before IMPI in the case of infringement of copyright in public telecommunication networks, including digital networks. The group felt it necessary to adopt an *ad hoc* proceeding, since existing proceedings are restrictive with regard to the protection of such rights and since infringement in digital networks is different from other media.

The proceeding would be independent from preventive notice.

- Presuming that the holder of an account used for connecting or hosting the files containing the infringed work would be liable for infringement.
- Implementing preliminary measures consisting of the restriction of the account used by the alleged infringer to connect with an ISP or for hosting the files containing the infringed work. These measures would be in addition to other preliminary injunction or other measures.
- Improving the remedies resulting from administrative, civil and criminal proceedings. It needs to be clearer that copyright owners are entitled to injunctive and administrative relief against infringers who pursue a purpose of gain, but also those who infringe for whatever other reason. Accordingly, damages shall only apply to infringers who make profits and criminal remedies against those who are repeated infringers. Cancellation of an account is a remedy that would be added as a discretionary power of the competent authority, in addition to the aforementioned remedies.
- Indicating that nothing regarding actions or measures to enforce copyrights in digital networks shall be

used to prejudice the fundamental rights of internet users.

This paper differs significantly from any precedent. It has been carefully analyzed in order to meet the particular requirements of the Mexican Constitution and laws, including the Copyright Law in force. It follows HADOPI 2, without being so strict in terms of blacklisting users. It distances itself from PIPA or SOPA, but still confers IMPI with adequate powers to enforce copyrights in digital networks. The proposed remedies and sanctions and the manner in which they have been organized and structured, by following specific proceedings, combine gradual response, preliminary measures and administrative actions. The input by ISPs is significantly important, and the bill does not impose any high burden on them as did the 2010 bill.

Presuming that the holders of accounts can be declared infringers is one of the highlights in the paper. In order to assume the chance was carefully studied by

the group from the constitutional or other angles. The paper can be alleged for not being so strong as DMCA or HADOPI 2. However, the agreed proposal looks as the best alternative after the turmoil of SOPA, PIPA and ACTA for Mexico join the list of countries that are taking leading efforts to achieve a balanced solution to tackle complex issues.

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