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IN SUMMARY

-INTERNATIONAL EFFORTS TO COMBAT ILLEGAL FILE-SHARING INCLUDE THE REVISION OF THE BERNE CONVENTION BY THE WIPO. IT HAS ALSO RELEASED A COPYRIGHT TREATY AND PERFORMANCES AND PHONOGRAMS TREATY. BOTH TREATIES ADDRESS A DIGITAL AGENDA, AND SHOULD STRENGTHEN THE TECHNICAL PROTECTION MEASURES AVAILABLE TO COPYRIGHT OWNERS.

-THE DIGITAL AGENDA HAS ALSO BEEN DISCUSSED AT A NATIONAL LEVEL. THIS FEATURE COMPARES MOVES IN BOTH THE US AND MEXICO.

For the past two decades, the world has dealt with complex legal questions posed by digital technologies, in particular those that enable the dissemination of copyrighted content throughout digital networks. In keeping with this, the World Intellectual Property Organization (WIPO) has revised the Berne Convention and has released the WIPO Copyright Treaty¹ and the WIPO Performances and Phonograms Treaty². Both treaties address a so-called "digital agenda", that redefines the notion of "public communication" by inserting a "making available" right³ and that incorporates provisions that impede the deactivation of technical protection measures that copyright holders employ to prevent unauthorized use of their copyrighted works, and that protect electronic rights management information⁴.

NATIONAL MOVES

In addition to the efforts in the international front, the digital agenda has been discussed at a national level. The US Congress has enacted the Digital Millennium Copyright Act⁵ which amends the Copyright Act of 1976 in connection with digital environment issues.

The DMCA provides anti-circumvention provisions that are generally broader than those in WCT and WPPT. Accordingly, the DMCA prohibits the making, using or selling of devices that encrypt or scramble technical or "access" controls, like the Serial Copy Management System⁶. The limitations regime limits to seven factors⁷. By contrast, WCT and WPPT aim at preventing violation of technological measures and at the same time, focus on circumvention acts in general and not just the elaboration or trafficking of devices that circumvent⁸. WCT and WPPT also establish standards to impede that persons knowingly remove or alter electronic rights management information, or distribute copies of works in which the information has been altered or removed.

Mexican Congress has worked on anti-circumvention protection as well, based on the standards of WCT/WPPT, and with a degree of US influence that goes back perhaps, to the times of NAFTA negotiations. Around the same time that Mexican Congress adopted the Copyright Law⁹, the US government was undergoing the analysis the "National Information Infrastructure" and had published the 1995 NII White Paper which gave rise to the DMCA. Interaction between the US and Mexican governments is evident during the legislative discussions of the Mexican Copyright Law and the rules on anti-circumvention evidences that fact. In keeping with this, the Federal Penal Code imposes criminal sanctions against manufacturers of devices or systems that deactivate the protective electronic controls of computer software¹⁰. On the other hand, the Mexican Copyright Law regards an administrative infringement the distribution — by import, sale, rental or otherwise making available of devices that deactivate electronic controls of computer software¹¹. The two provisions resemble the DMCA for being restricted to manufacture or distribution activities of access controls. However, limitations go further since the provisions target software and not other subject matter, like films or sound recordings. Likewise, the Copyright Law does not stipulate anything regarding the digital rights management standard of WCT and WPPT.

BALANCE SOUGHT

Pursuant to liability of intermediaries, Title II of the DMCA has laid down provisions seeking balance between copyright industries and on-line service providers. Prior to the DMCA, right holders had relied successfully on traditional copyright rights to take either direct infringement actions against on-line intermediaries that knowingly or unknowingly reproduce copyrighted works¹². They had used as well indirect "inducement" theories such as contributory infringement¹³ or vicarious liability¹⁴. The DMCA created liability limitations that include activities of mere conduit, caching, hosting and search engine. It also secured online intermediaries to benefit from the limitations, by implementing policy rules that foster respect to IP rights and do not interfere with protective technologies used by copyright holders¹⁵. The Copyright Law of Mexico does not safe harbour site operators and service providers for any of their online intermediary communication and reproduction activities. Likewise, the law dictates that exceptions to patrimonial rights shall be viewed literally and narrowly, to the extent that it could be questioned if the Berne and WCT/WPPT three-step rule is materially applicable.

Accordingly, site operators and service providers cannot take any defensive position against infringement claims by copyright holders, based on mere conduit, caching, hosting or search engine arguments. By contrast, they seem not to be required to adopt policy rules to prevent their subscribers to respect IP rights.

NOTES

DEVELOPING TECHNOLOGY

The US peer-to-peer legal experience relates to the evolution of technologies that enable web users to download files from the computers of others. In a first P2P "generation" Napster and other network services utilized software capable of compiling the titles of music files found in the memory of a computer and of

placing them in a home or "central" server together with the directories of other connected computers. Users who had installed the software could browse into the list of titles in the central server and search for a music file copied in any computer that has listed the title and has been logged on at that time and obtain by transfer a copy of saidfile. The second generation that includes KaZaa and Grokster, had in common that the directories were moved from the central servers to installations made regionally on user computers. A third generation, lead by Limewire, has been grounded on an open source software entitled Gnutella that eliminates directories and allows the sharing of music or other content files in a more simple fashion. The current trends recognize that content can be encoded for transmission without anybody having a perception thereof¹⁶.

Among other P2P operators, Napster and Grokster have faced reverse court decisions in litigations against plaintiffs that include certain companies of the Recording Industries Association of America (RIAA), like A&M Records, Inc.¹⁷ and Metro-Goldwin-Mayer Studios, Inc.¹⁸. The common ground in both decisions is that defendants engaged into contributory or vicarious copyright infringement.

In Napster the US District Court examined the 1984 Sony Betamax decision¹⁹ to find out that differently from Sony²⁰, plaintiff was likely to succeed on the merits of a copyright infringement action under the theories of contributory infringement and vicarious liability. The reason was that it had been involved in the process of facilitating users of the website a software entitled MusicShare, created to give the website's users access to exchange and download copyrighted works. Likewise, defendant gave support in connection with the compilation and indexing of files; and in general, with the fostering of interactions among users that exchange the music files²¹. Supported un case law, the Ninth Circuit added that Napster "knowingly encourages and assists the infringement of plaintiff's copyrights"²².

In Grokster, the US Supreme Court argued that contributory infringement can be invoked against anybody making a product or service available to the public at large allowing that copyrighted works are used profusely, and thus impossible for the copyright holder to take actions against the direct infringers. Under the theory of "inducement" the court required demonstration of "affirmative steps" to "encourage direct infringement"²³. The ultimate question was whether defendants Grokster and Streamcast were involved with the infringing activity

by placing their software and operating a website that allowed users to exchange files, despite the fact that their software did not require the use of a central server as it was the case in Napster. The answer was that the defendants had indeed infringed, since they "clearly voiced the objective that recipients use it (the information) to download copyrighted works, and each took active steps to encourage infringement"[24](#).

FURTHER DISTRIBUTION

In more recent times RIAA has argued before the US courts that P2P is a form of making works available to the public, which is ultimately a copyright infringement behaviour. *Atlantic Recording Corp. v. Howell*[25](#) is an example of the foregoing. The District Court sustained that "making copyrighted works available for download via peer-to-peer network contemplates 'further distribution', and thus constitutes a violation to the copyright owner's exclusive 'distribution', right number 17 U.S.C. Section 106 (3)"[26](#).

Services of third-generation operators like Limewire, Morpheus or Veoh are widely used in Mexico in addition to local webcasting or downloading services. Last year the General Attorney's Office declared the switching off of SigloX.com , an illegal on-line television website holding a large catalogue of Hollywood films offered to subscribers for rent.[27](#) The MPAA brought charges of copyright infringement for the reproduction and public performance of copyrighted films. The arguments were not much different from those that RIAA explored in the Howell case. The difference is that under the Mexican Copyright Law, the making available rule applicable in internet connects with the right of public performance and not with the right of distribution[28](#). The Mexican legislator of 1997 just adopted the standard of WCT[29](#). Accordingly, the argument was that SigloX.com infringed the MPAA studios' right of public performance by making the films available to the public and then actually transmitting the same online per request or demand. The case is still pending resolution.

Mexican laws do not recognize the theories of contributory infringement or vicarious liability as such. Criminal laws provide rules that can only be proximate to contributory infringement. For example, the Federal Penal Code gives the circumstances under which anybody can participate in crimes. However, they are restricted to situations when participants knowingly take positive steps to assist who has ultimately perpetrated the crime[30](#). Likewise, the Penal Code

recognizes specific secondary liability when third parties supply the "raw materials" or "consumables" for reproducing works³¹. In P2P service providers do not supply to the public anything like that, making it hard that they can be regarded secondary infringers. Under the Penal Code, third parties unrelated to copyright holders would not be held secondarily liable for inducing others to commit infringement.

However, copyright holders might not need to invoke indirect or secondary liability indeed, since under the Copyright Law plaintiffs can support their copyright infringement claims on direct infringement of rights, namely public performance and making available rights. In the end, the intermediary and not only the public at large can be directly liable of copyright infringement.