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DIGITAL MEDIA OFFER A RANGE OF WAYS FOR PEOPLE TO INFRINGE COPYRIGHT. MEXICAN LAW IS ADAPTING TO THIS SITUATION, BUT THE QUESTION IS WHO TO PROSECUTE FOR INFRINGEMENT.

A number of alternatives exist for distributing copyrighted content through the internet and other digital networks. The internet has traditionally been used for uploading on to web servers. These are connected to networks. Their content can be searched through world wide web browsers and downloaded from these servers on to the memories of personal computers or other devices. Legal questions have arisen because the content disseminated through the networks can include copyrightable works of authorship. Digital networks can function as an infringement too.

DIGITAL DISSEMINATION OF COPYRIGHT MATERIAL

The distribution networks and systems through which people disseminate material are numerous. They may take the form of auction or related sites such as eBay, which can be a source of copyright piracy, especially when counterfeit goods are distributed. Email has become a popular vehicle for the distribution of works through computer programs such as Peer2Mail or Pando, which allow people to compress heavy files for uploading and downloading, using Simple Mail Transfer Protocol (SMTP), Post Office Protocol 3 (POP3) or similar protocols. A downside of email is its limited reach capacity. It is not typically a system in which information can easily be searched. It is a push communication medium. File Transfer Protocol (FTP) sites, in turn, need an FTP server to be set up. The server connects computers in distant places to internet or other networks, such as Local Area Network (LAN) or Wide Area Network (WAN), so that users can share information. Such information can include copyrighted works. Internet Relay Chats (IRCs), as well as newsgroups, allow file sharing within limited circles such as release or encoding groups. Peer-to-peer (P2P) networks have enabled internet users to copy and distribute pirated copies of works. The courts of many countries have been active making decisions on cases

brought by copyright owners against those who facilitated the proliferation of file sharing networks which allowed the exchange of pirated works. Portal sites and P2P portal sites are perhaps the main hubs for most of the world's copyright piracy. They are the meeting point of infringers and verification utility for P2P users. The number of files that transit through portal sites is enormous. Visitors have access to nearly anything circulating on the internet. This includes illegal copies of software and all sorts of works. Notably, P2P portal sites interconnect with other portal or show links or torrents. They hold forum sections and are managed by subscriptions. Lastly, websites, provide another means of dissemination, which may involve piracy. They are often used for e-commerce or trading of products.

Hardware technology is also capable of assisting users to connect with digital networks by using computers as well as portable devices. Use of digital networking has intensified with the advent of digital television, which enables the transmission of audiovisual content to computers or portable devices by wireless means, such as cellular telephones. The same is true for portable digital radio or TV receivers, or devices that connect equipment to digital networks by means of broadband WiFi technologies. Analogue recorded content can be digitized by virtue of TiVo or MagicGate mechanisms or formats for dissemination over the internet or similar networks.

A number of other entities have a key role in online distribution of copyrighted content. They can be liable, to a greater or lesser extent, when the distributed content is a work whose author or copyright title holder has not authorized it to be transformed into a digital code or to be communicated to the public by virtue of a digital network. Such groups include wireless telecom providers, such as telephone companies or TV cable operators, who supply the physical infrastructure that allows users to connect to the internet and have access to or disseminate content. Access or service providers (ISPs) also have a role: they use the network's infrastructure to create connection services which in turn enable users to enter and navigate the networks. They also rent space in their servers to host email mailboxes or websites. And they upload and disseminate information throughout the network, according to their clients' instructions. Operators of sites, including auction, FTP, IRC, portal or P2P portal or websites, also render services. They might be directly responsible for reproducing works, disseminating them to the users or in general, or giving the users access to these works. Nowadays, internet and digital networks users are a heterogeneous

group of corporations and individuals. They demand information of all kinds.

MEXICAN COPYRIGHT LAW ADAPTS

Mexican Copyright Law has partially adapted to this situation. It is tentatively prepared to answer questions about the use of works in digital frameworks. In keeping with this, in 2002 the government joined the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT). However, the Copyright Law of 1997 had already inserted certain WIPO digital agenda standards, as they had been debated in a conference in Geneva, in December 1996. Accordingly, under the Copyright Law, infringement and other illicit acts perpetrated online would occur if parties who participate in the online distribution process infringe economic copyright rights by uploading, downloading or disseminating works of authorship. The question is who, within the distribution chain, including the users, is liable for copyright infringement.

Site operators might be found guilty of copyright infringement if it can be demonstrated that they directly uploaded or disseminated works without proper authorization, or of having reproduced or publicly performed (by granting access) or transmitted the same. The 1997 Copyright Law, supported in the WCT agreed statement to article 1.4, has redefined the fixation and reproduction concepts to meet digital environment standards. For example, fixations shall be valid and protected as long they can be “perceived, reproduced or communicated”, whether publicly or privately. Under the law, the public or private nature of the communication made as a result of the work’s fixation is irrelevant for the work to be regarded as “fixed”. The issue to be discussed would be whether the fixation that occurred enabled the human eye to perceive the work, directly or with assistance, or allowed its reproduction (understood as the multiplication of the fixed work in copies, including its upload or download) or communication. The fixation of the work in transitional computer memories should meet the legal definition. A work of authorship that has been fixed onto RAM shall be protected if the work has been copied or communicated by any third party, despite the fact it remains visible for short time.

Likewise, the Copyright Law has made some clarifications regarding public performance rights. The definition of “public communication” is broad enough

to encompass any means by which a work is made available to a generality of persons. The law has divided it into two types of right. It states that public communication rights shall be those dealing with the public performance, public exhibition, public display or making available of the works. Public transmission is the broadcasting of works to distant locations. Surprisingly, the distinction between public communication and transmission seems not to be applicable in connection with performers' neighbouring rights.

Lastly, the Copyright Law has introduced an availability right, inspired by article 8 of WCT. Members of the public "may access these works from a place and time individually chosen by them". In keeping with this, the Law regards as an economic right "the public access by means of telecommunication", and considers it to be one aspect of the broader notion of public communication. The term "telecommunication" is intended to be broad in scope. It covers every form of communication at distance, including interactive references in digital networks. The availability rights is less clear in connection with neighbouring rights. Curiously enough, the WPPT itself is silent in that regard as well. In principle, it would be difficult for performers, artists and phonogram producers to claim the making available rights as an exclusive right. It might just be possible for them to claim it as a remunerative right, in terms of a bill that Congress passed in 2003.

SERVICE PROVIDERS, MANUFACTURERS AND DISTRIBUTORS

It would not be as easy to prove infringement against ISPs; site operators who supply software that users can install for file sharing; and hardware or device makers who own the infrastructure or provide users with the equipment that they need to connect. This is because they do not upload, download or disseminate copyrighted works, at least in a direct fashion. In agreed statements, the WCT and WPPT have recognized the need for member states to impose restrictions on the copyright rules in digital environments. They have invoked a three-step test which empowers governments to adopt exceptions or limitations on three occasions: in special cases; when there is no conflict with the normal exploitation of a work; and when the limitations prejudice legitimate copyrights. The Copyright Law has never been adjusted to provide safe harbours for the use of works in digital networks. A safe harbour would include the storage, caching or routing of files. Perhaps there is no need for this if the law

outlines rules on contributory infringement or vicarious liability. Accordingly, Mexican ISPs are not obliged to control, police or otherwise limit the information flowing or trafficking in digital networks, knowingly or innocently. The making available provision would probably not be applicable. Only direct infringers are responsible for these types of offence.

For similar reasons, it is unlikely that manufactures and distributors could be charged for selling computers, cellular phones or WiFi devices capable of connecting users to television receivers or internet radio or television equipment, using broadband wireless systems. The producers and vendors do not make the network connections. Nor do they reproduce or publicly perform the works. Sony-Betamax has established a universal fair use principle that protects hardware makers against rights holders who claim that end users enabled unauthorized use of copyrighted content. As a matter of fact, in Mexico the Sony-Betamax doctrine would not apply because of the lack of a contributory infringement or vicarious liability regime in the Copyright Law.

END USERS AND COPYRIGHT

Under the Copyright Law, users might be found guilty for reproducing or transmitting works through digital networks. The fact is that they are the parties who download the information. Likewise, end users can take strong initiatives in the information's dissemination. They may sometimes even participate in uploading and digitization activities. It is relevant to note that the WWW is a pull communication medium. It requires the user to search and find the information and then attract it to his computer. The user seeks assistance from search engines and also from ISPs and other entities, but a share of the responsibility of pulling is his. The question is whether the Copyright Law provides for legal action against the end user of works available in digital networks. Initially the answer is "no", because of the gain factor. However, it is important that not every action under the law requires that gain be proven. Accordingly, if users of unauthorized copies of works can be physically located, it may be possible for rights owners to bring legal action against them and seek reimbursement.