



Luis Schmidt

# “Most counts as “total when blocking websites in Mexico

With authors’ works of arts often being made freely available online, laws have had to be updated to maintain necessary protection. Luis Schmidt, OLIVARES, investigates a selection of cases that stood in front of the Supreme Court in Mexico about website blocking that have thus impacted the future of copyright law in the country.

**T**he web connects virtual space, where information flows and spreads around to reach all the people. Neutrality is the principle steering the web, which states that the flow of information cannot be affected, limited, or suspended; but, as a last source, in order to protect human rights, before pondering opposing interests.

The web can be viewed as an online community, living apart from the off-line, as it follows a rule of its own. While the off-line community has evolved from a systematized legal framework, the on-line community has developed from the notion of neutrality.

The online community rejects the laws of the offline world, in particular copyright law - or IP in general. Presumably, copyright law does not fulfill the neutrality standard as it makes a distinction between general information that is of free access and information that is reserved. Copyright is viewed as a legal restriction

to the flow of information. However, the subject matter of copyright is “works-of-authorship”, which is not ordinary free-use-data but artistic creativity made by authors or artists. Copyright grants over works exclusive property rights. Actually, it has been regarded a human right, considering that arts and literature are inherent to human nature.

Works are not created online; they just circulate there. The online community imports works from the off-line community and spreads them all over the virtual world. Technology has played against authors: the web makes it simple for people to gain access to works, the same as they can connect with ordinary

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## Résumé

### Luis Schmidt

Luis Schmidt possesses more than 30 years of intellectual property experience in all areas of IP, and has an unparalleled knowledge of digital media and related copyright law in Mexico, representing the world’s leading companies.

Luis Schmidt’s work in drafting a bill related to digital rights is changing the entire ecosystem of digital rights management in Mexico, for both rights holders and day to day internet users. It can be argued he is the most important IP lawyer in Mexico working in the field of media and entertainment as he is directly influencing the future of Mexico’s copyright law.



information. So, why protect works-of-authorship if the web makes it simple getting them? Especially considering that if they are easy to obtain it is easy as well to use them without asking. The online community “opposes” copyrights, but does it have a fair reason to do it? There would be no need to “ponder” interests or address neutrality if society demanded arts and culture only after honoring the property rights of authors.

Neutrality is not a concept that is new or unique to the web. By definition, aborigine or indigenous communities are self-regulated and neutral societies. Their rules certainly embrace expressions of crafts, folklore, or culture. Strictly speaking, indigenous people do not need to ponder interests or even enforce rights, as they have an organic respect for nature, people and arts. Concerning folklore, artisans and people align in one direction to preserve arts. All is part of tradition. Neutrality is equal to alignment and it works ideally in societies that have a sense of empathy and collective respect for arts and culture.

Modern societies are often disrespectful of culture and of the collective or individual rights of people. A good example is the online community with regard to copyright rights. People tend to behave the same in the world online as they do in the world offline. Therefore, if there is a chance to, they will neglect the rights of authors. They will even “oppose”, by invoking as a pretext freedom of expression or access to information. However, the truth is that neutrality can be utopia, since authors are forced to enforce their copyrights in an adverse environment where the web becomes a land of outlaws.

Authors have “moved” to the world “online” the rules of the world “offline”, in particular enforcement rules. Not surprisingly, the online community dislikes offline rules, but does not contribute

to solve the copyright problem. Ultimately, the indifference or blindness of society has undermined the sense of neutrality in connection with the web.

### **Pondering Interests in Copyright Law**

The online community finds copyright and access to information as opposing interests. However, is that real? Does society really oppose the right of those who create the art that they consume?

Copyright law does not even cross paths with access to information, since the former targets the sender of the information, while the latter targets the receiver. The neutrality rule admits that as a last resort - and under special situations - the flow of information can be intervened. Copyright law is actually one of those special kinds of situations.

It is contradictory saying that because of copyright law the public is prevented to access information, when society gave copyright law to authors as a vehicle to protect their rights. By virtue of copyright law, the diffuser of works needs authorization to give people access to works. The public does not need authorization to see, listen, or read them. People just need to get the works from an authorized source: that is society’s contribution to a balanced system. On the other hand, copyright law is subject to limitations. Among others, the law sets restrictions as to whom can be an author and what can be a work of art; the principles of originality and dichotomy of idea-expression; or the regime of moral and economic rights and exceptions. Accordingly, copyright law provides an inherent rule of balance and proportion, which compensates society’s sacrifice to use works freely.

Generally, judges ponder under “proportionality” human rights’ interests. Any analysis of proportion requires that the action is:

- a) The most adequate to achieve a pursued objective; and
- b) The least restrictive of human rights. Unless being specifically abusive, enforcing copyrights is an adequate action that does not restrict the rights of audiences. Whether copyright is called a human right or not, enforcing it requires that judges take actions against infringers, as well as injunctive or other preventive measures against those providing the means of infringement. Blocking websites is among the measures available for judges to enforce rights and to prevent and discourage infringement.

### Neutrality and Pondering of Interests in Mexico

Mexican courts have resolved two cases addressing making available rights in connection with the blocking of websites. The first case is BA'K, related to the site [www.ba-k.com](http://www.ba-k.com). Plaintiffs, that included authors and recording labels, asked that the Mexican Institute of Industrial Property (IMPI) ordered all Mexican ISPs block the website. An ISP called Alestra filed an "Amparo" action against the order, arguing that their constitutional rights were affected. Alestra challenged the order and courts made IMPI adjust the scope and approach of the same. As a result, a final and definitive order confirmed the blocking of the BA'K website.

In a more recent case, Sony, Universal and Warner Brothers, as well as music composers represented by their collective society, sued [www.mymusiic.com](http://www.mymusiic.com) before IMPI, for copyright infringement. IMPI imposed again an order to block the site. As in BA'K, Alestra filed an "Amparo" against the order and challenged the preliminary measures system in itself.

The district court granted Amparo for violations to the rights of access of information and freedom of expression. The court found that "virtual space" would be disrupted if "rules" are imposed to protect "content" or "materials" - referring to works or sound recordings - leading to an "a priori" censorship and disproportionate restriction of fundamental rights and neutrality of the web. Affecting that system requires an analysis of proportionality. The district court stated that the human right of access to information stands over copyrights, considering that is merely economic the nature of the latter. Measures go only against infringers and IMPI cannot block websites. In any event, the court sustained that, as such, the system of provisional measures is constitutional.

The recording labels appealed and obtained that the Supreme Court attract the case. They argued against the blocking of the website based on the UK *NewzBin2* and *First Row* cases. Thus, they relied on *The Pirate Bay* to argue against freedom of expression as well as *Ashby Donald* and *Telekabel Wien*.

In advance to providing a decision, the Supreme Court published a draft resolution addressing the issue of blocking the website. The draft stated that blocking is prohibited and removal of works or recordings has to be concrete. Access to users cannot be stopped when there are "expressions" in a site, no matter if it also displays illegal copies, as it would attempt against the free circulation of "contents", "information", and "ideas" across the web.

The Supreme Court made substantial changes to the draft as published, to finally resolve that blocking is possible indeed in exceptional cases, if the "totality" in a website is non-authorized copies of works or recordings. The Court considered that copyright is a human right that IMPI needs to ponder vis-a-vis other human rights. In the end, the court remanded the case so that that IMPI



reviewed the blocking issue, based on proportionality standards.

Last week, justice Pérez Dayan, who was in charge to draft the sentence of the Supreme Court, admitted in a public event that the word "total" utilized in the text couldn't be viewed literally, but rather as an equivalent of "majority". He said that blocking is possible in Mexico, if after pondering, IMPI presumes that the "great majority" of the copies in a given website have not been authorized. Ultimately, the sentence addressed IMPI, to perform a different analysis, but having a great deal of discretionary powers for resolving.

### Conclusions

In many respects, the Supreme Court of Justice made important mistakes, as they published a draft that "prohibits" blocking and later gave a final resolution that "permits" it. The sentence was not well written, in particular since it is confusing to employ the word "total", when it was meant to say "majority". Arguably, "proportionality" gives judges leeway for balancing adverse positions, while "totality" is an absolute numeral concept. The idea of "totality" contradicts "proportion". The positive side of the sentence is that Mexican courts have adopted a rule applicable in future infringement cases occurring online.

In principle, blocking shall be available against copyright pirates holding websites where every copy is illegal. However, blocking sites should be extended when a majority - equated to total - of copies are illegal. IMPI shall have authority to impose blocking orders, if it ponders rights effectively. Being a last source to protect a human right like copyright, the blocking system shall guarantee neutrality of the web and accordingly, shall meet the requirements of the online community, used to neglect copyright protection. Needless to say that the notion of "proportionality" still needs to progress and develop, same as the meaning of "freedom of expression" and "access to information", in connection with copyright law. The purpose is that the community "online", with own or adopted rules, protects every human right, not only those that they like better.