Luis Schmidt

Notice and take down before NAFTA

Luis Schmidt from OLIVARES explores Mexican copyright laws and trends surrounding the Internet, specifically considering the TPP, the DMCA and the role NAFTA has played in progressing laws in the country.

Reproduction, distribution, communication to the public, transmission, and making available are all considered economic copyrights. On the Internet, the service

provider (ISP), reproduces by request of users works or sound recordings, for purposes like caching -defined as storage of data made automatically, provisionally and timely for quicker transmissions in the web – or hosting – defined as a service rendered to website administrators for holding information-.

Likewise, ISP make available authored works or sound recordings to users, for transmitting them through the network. In keeping with this, website administrators use various services that ISP offer. The foregoing includes searching locations by employing engines, creating hyperlinks or building frames or embedding. According to the Copyright laws of most of the countries, the administrator of a site, as well as the ISP, need authorization from the right holder, for making available to the public works or sound recordings or for reproducing or transmitting them. Otherwise both, the administrator and the ISP, become infringers of copyright or neighboring rights.

DMCA

In 1998, the USA adopted the DMCA as a response to the question of ISP liability. Before then, local courts had declared indirect copyright infringement against some ISP. In essence, section 513 of the Copyright Act provides safe harbors - mere conduit, caching, hosting and search engine - as exceptions to the infringement of reproduction and transmission rights. In the USA there is not as such a right of making available, like in the rest of the world, in particular, the WIPO treaties member countries. Accordingly, there is no fair use rule applicable for making available works or sound recordings. Infringement comes from theories like vicarious liability or contributory infringement. In contrast, infringement of the making available right is direct in other counties, since works are used or exploited by the fact that ISP gives access of them to the public. This in addition to reproducing and transmitting the works.

No infringement exists when safe harbor is applied, so long as the administrator of a website adopts an internal policy to comply with the requirements provided by the DMCA. Safe harbor implies, for example, not knowing about the flow of information and the activity of the users in the network or having an agent who facilitates the communication among the copyright holder, the ISP and an alleged infringer. By request of the copyright holders, ISP need to remove the copies of works that the website administrators ask to reproduce or transmit, without authorization. It is called "Take Down" the technical means of removing from a given website illegal copies of works or sound recordings.

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.

The DMCA provides a notice system that copyright owners can utilize to ask that ISP complete a "take down" of infringing copies of works. It also gives the chance of a counter notice, by which alleged infringers respond that the copies of works have been made available, copied and transmitted legitimately. In keeping with this, the ISP will return back the copies to the site and normalize the transmission thereof. In order to obtain that the copies are removed, the copyright holder shall need to take the matter to a competent court.

Notice and take down is an interesting, pragmatic, and legitimate legal mechanism, as it is a private proceeding that the parties follow in virtue of an agreement, entered by themselves and by the ISP without involving the government or the courts. Substantive disputes go to the judge, after the proceeding is over and the alleged infringer has given a counter notice, which by the way happens very few, in comparison to the thousands of take downs made every day effectively. Ultimately, the system has resulted in a piece of legislation that optimizes copyright protection but, at the same time, reduces or eliminates the need of copyright enforcement without affecting the rights of others. A dispute will turn from private into public, when the proceeding ends and the case goes to court. In principle, government or courts are unnecessary, since the ISP removes by its own will the copies of works. It requires a practice that is agile the high volume of take downs practiced on a daily basis. In the end, the DMCA has become an impeccable self-determined system, that gives speedy and balanced solution to the sensitive issue of online copyright infringement.

EU Directive

Europe adopted a system similar to DMCA, reflected in the Directive 2000/31/CE, of the Information Society. It is peculiar that in Europe there is not a safe harbor for search engine activity. In the year of 2000, it was considered an infringement attributed to an ISP that the website operator reproduces copyrighted works or sound recordings with its support. The Directive recommends, without to compel, expanding to search engines the regime of safe harbors. The European court of justice has emphasized the foregoing, in cases like GS Media v Sanoma Media Netherlands and Others (C-160/15). In this matter it was analyzed whether fixation of hyperlinks can represent an act of communication to the public and if it was made for the purpose of a gain, it is presumed that the provider is conscious that the hyperlink leads to a site where works have been made available to the public, without the authorization of the copyright holder. The European courts have adjusted their practice, with respect to the methodology of the DMCA.

> *"NAFTA represents a new chance for Mexico to fill the empty space of ISP liability, by inserting notice and take down."*

TPP

The counter notice system of TPP is equal to that in the DMCA, with the difference that adopting it is optional for the contracting States and that there are no time restrictions for the copyright holder to file court actions before the ISP returns back the works to the Internet.

"If a system for counter-notices is provided under a Party's law, and if material (sic) has been removed or access has been disabled in accordance with paragraph 3, that Party shall require that the Internet Service Provider restores the material (sic) subject to a counter-notice, unless the person giving the original notice seeks judicial relief within a reasonable period of time."

Safe harbors of TPP is essentially the same system as the DMCA.

There is quite a broad scope of application, but without a doubt pursues that the contracting States gradually adopt a system of notice and take down, with the same characteristics of the DMCA. Even though the text does not specify the conditions of effectiveness to perform, - like the appointment of a designated agent - it provides a standard rule compelling that the ISPs impose conditions of effectiveness. Article 18.82(3) states the following:

"To facilitate effective action to address infringement, each Party shall prescribe in its law conditions for Internet Service Providers to qualify for the limitations described in paragraph 1(b), or, alternatively, shall provide for circumstances under which Internet Service Providers do not qualify for the limitations described in paragraph 1(b).

In footnote 155 of chapter 18 of TPP, a specific model is specified that does not include the designation of agents and under which it would be esteemed that each State fulfills that direction. The proposed model represents an organization of State participation, with the power to certificate entities that authentify and validate the notifications of notice and take down.

The essential difference of the model described in footnote 155 of chapter 18 of TPP, with respect to DMCA, is that in DMCA, the model consists about the designation of the agent, on behalf of the ISP and the annotation of the same in the registry of copyrights, representing a simpler form of authenticating interactions of notice and take down.

"(2) Designated Agent.- The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory".

NAFTA

TPP broadened the scope of notice and take down, considering its condition of "frame" provision, so that the States adopted a system of responsibility of ISP. Alternatives exist to notice and take down, but not as effective. Mexico signed TPP and thereby subscribed the idea of having a rule if its own, based on the original DMCA standard. However, the USA renounced to TPP when the Mexican senate was analyzing the ratification of said treaty. Accordingly, Mexico had to stop the plan of adopting a treaty that was nearly approved.

NAFTA represents a new chance for Mexico to fill the empty space of ISP liability, by inserting notice and take down. As a matter of fact, Mexican law would allow the safe harbor system. A good example is the regulation of data privacy, that requires that the responsible entities adopt policies that liberate them from responsibility - including the designation of someone in charge - and implements private interaction mechanisms by which the responsible entity is

in possession of personal information, cancels the use that was not authorized or rectifies the same by request of the holders.

Notice and take down is good law

Notice and take down is required to protect and enforce copyrights. Experience has proved that private proceedings can work as solutions to fight against illegality. The Internet is a massive communication medium and infringement of rights on the Internet tends to be of massive proportions as well. Courts would be overwhelmed if they did the enforcement alone. The best outcome, then, is that the parties participate in the solution themselves, at least in the beginning. Accordingly, the real controversies or disputes would be reserved for the courts.

It has to be emphasized also that - under certain laws like the Mexican Law - ISP infringe copyrights on an equal degree that the administrators of websites, who request the ISP to make the copies of works available to the public. As a result, ISP are the first and main beneficiaries of the notice and take down system and of the safe harbors system in general. It is surprising to see why they reject that the same is adopted. It would be quite difficult to fight in court all the thousands infringement claims that copyright holders could take to the courts every day.

Notice and take down is an effective and efficient tool addressing the problem of online copyright infringement, without to affect the rights of the users of networks. It resolves nicely the confrontation between copyright and other human rights, since liability is limited to the infringement activity of the ISP and the administrators of websites, without to involve, by any means, the public having access to the works uploaded in websites.

Likewise, by inserting a counter notice mechanism, due process is fulfilled as enjoyed by the administrators of websites and by ISP, since it allows opposition to remove copies that they believe to be legitimate. Respect to the neutrality principle of the web is absolute, also, considering that the flow of information in the Internet will be suspended to protect the human right of property called copyright.

In conclusion, the trend in the world is clear with regard to the manner that Internet piracy is combatted. There is no reason to place Mexico outside the trend, given the complete congruence with the standards of proportionality and protection of human rights that govern this country.