

The isp's role in improving intellectual property protection on the digital economy

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Abstract

There is now a protectionist tendency of copyright in the digital economy, driven by the cultural and creative industries, which attacks the interests, freedoms and rights of Internet users. Even though this is in response to an apparent increase in infringements and piracy, it's also the effect of an inability of the industries to adapt to a new reality. Through this paper, we want to analyze the role of the Internet Service Providers (ISP) in this issue, as actors responsible for identifying and subsequently block allegedly infringing contents. Having said the above, this analysis will be done from the American experience, and concluding in the Canadian model as a viable solution that safeguards respect for freedoms affected.

Keywords

Digital Economy, Intellectual Infringements on the Internet, Intellectual Property Protection, Internet Service Providers, ISP, Net Neutrality

Resumen

Existe en la actualidad una tendencia proteccionista de los derechos de autor en la economía digital, que busca favorecer la industria de contenidos atentando los intereses, las libertades y los derechos de los usuarios de Internet. Si bien ello se da como respuesta a un evidente aumento de las infracciones y a la piratería, también es consecuencia de una incapacidad de esta industria en innovar y adaptarse a una nueva realidad. A través de este artículo se busca analizar el rol de los proveedores de servicios de Internet, o ISP, dentro de esta problemática, en su calidad de actores encargados de identificar y bloquear posteriormente los contenidos presuntamente infractores. Se presentará un panorama de lo anterior, a partir de la experiencia norteamericana, y se planteará por último el modelo canadiense como una solución viable y garantista.

Palabras clave

Economía Digital, Infracciones a la Propiedad Intelectual en Internet, ISP, Propiedad Intelectual, Proveedores de Servicios de Internet, Neutralidad en la Red

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Résumé

Il existe à nos jours une tendance de protection des droits d'auteur dans l'économie numérique qui cherche à protéger l'industrie de contenus, défavorisant ainsi les intérêts, les libertés et les droits des usagers d'internet. Bien que ceci est une réponse à l'évidente augmentation des infractions et de la piraterie, elle est aussi une conséquence de l'incapacité de cette industrie à innover et à s'adapter à une nouvelle réalité. Cet article cherche à analyser le rôle des fournisseurs de services d'internet ou ISP, en tant que responsables d'identifier et bloquer postérieurement les contenus présumés infracteurs. On présente d'abord un panorama de tout ceci à partir de l'expérience nord-américaine pour ensuite présenter le modèle canadien comme une solution viable et de garantie.

Mots clés

Economie numérique, infractions à la propriété intellectuelle sur internet, ISP, propriété intellectuelle, fournisseur de services d'internet, neutralité sur le net.

Introductory description of the problem

Results of a study conducted by the Piracy Observatory and Digital Contents Consumption Habits in 2011, estimated the losses caused by digital content infringement to the cultural industry of Spain at approximately five million euros. This accounts for at least four times the value of legal consumption in the sector, which generated a turnover of 1,538.1 million that same year (Achareandi & Maldonado, 2012).

Among the four industries analyzed by the Observatory, piracy has had the greatest impact on the turnover of the film and music industries, with rates of 79.9% and 98.2%, respectively. This is followed by the video game industry with an online piracy rate of 61.7%, and, lastly, the book industry, ever closer to the former with a rate of 49.3% that has been constantly growing over the last semesters (p. 2).

While these figures correspond to Spain, they could nevertheless be applied to any country. The shutdown of the Megaupload file management platform in January 2012 was expected to cause changes in the standards for the online distribution of contents, and there were even those who ventured to predict the shutdown of similar platforms, P2P networks or standardized services such as Youtube or Spotify.

This leads to our first statement: the traditional copyright model is not the answer. Evidence of this is the atomization of platforms such as Bittorrent, PopCorn Time, Zona or Cuevana, which force governments to develop increasingly elaborate strategies for tracking alleged infringers, while traditional business models such as video rental stores, bookshops and record shops have chosen to close indefinitely.

In fact, even though it might seem reasonable to explain these issues as a result of the current economic crisis, the truth is that infringements and piracy of content have increased proportionally to the closure of this type of establishments (Leyshon, 2009, pp. 1309-1310). It should be noted that one of the first proposals against piracy was the implementation of filtering systems as an immediate solution, although it was ruled



out for violating users' guarantees and fundamental rights (EGC, C-070/10).

This tendency towards protectionism has been maintained insofar as control, identification and subsequent content blocking should always respect, according to this Court, a fair balance among intellectual property, freedom of enterprise, data protection and the freedom to receive or impart information.

On the other hand, Internet Service Providers, as intermediaries, should not be oblivious to all this, since, as controllers of the flow of information, they are usually answerable to the Court of practically all the information on the Web (*Vid, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* 545 U.S. 913, 2005; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 2001). This is partly a result from the unveiling of the mentioned issues with Napster, even though at the time there were already illegal file sharing networks such as Usenet, Hotline and IRC.

This is understandable insofar as our information society involves both diverse and unique elements, becoming a theoretical construct that brings together capitalism and constitutional democracy within a framework of moral hedonism (Nadal-Sánchez, 2011). This frame has been built in spite of the problem brought about by new technologies and the fact that at times they seemed to upset the existing balance, at least in states with utilitarian and contractual liberalism policies.

As expected, the relevance of the Internet's impact on knowledge assets lies in the challenge presented by the diagnosis and treatment of new behaviors that do not

follow the traditional model of economic exploitation of copyright. On the other hand, from an economic perspective, the Internet has changed the classic exploitation models designed by the cultural industries by demanding the introduction of new strategies following Drucker's innovation for business durability paradigm (2012).

This reminds us that, even in new scenarios, every model proposed is governed by capitalist economic principles whose purpose, among others, is that revenue resulting from Internet access be regulated by market laws, thus reducing the Worldwide Web to a mere property or, in other words, a commodity based on a purchase and sale relationship.

The role of Internet Service Providers

Thanks to the incentive from society for the interactive transmission of intangible assets, Internet Service Providers or ISPs enter this scenario as active participants playing an essential role in the development of an emerging liability regime. Accordingly, their control over the access to contents, a power that was possibly underestimated at first, constantly increases.

From a purely theoretical point of view, Garrote Fernández-Diez (2003) states that since ISPs discovered this hidden power, there has been no turning back, and we assume that, although they assimilated the monopoly itself and its implications, these media followed traditional patterns. Thanks to these media, private copying and public communication of phonograms and audiovisual works, subject only to a right to remuneration, became possible, leading to the establishment of a true and absolute monopoly of the right to use a work.



Another relevant aspect is the fact that ISPs begin to understand the notion of property as a fundamental right, as something that might be owned, even viewing the Internet as a possible social commodity (Nadal-Sánchez, 2011, p. 101). This leads to the emergence of a neoliberal paradigm that goes beyond the initial idea of market society to the concept of open society.

This is why, before the Communications Decency Act (CDA), which could be considered the first Internet responsibility law, entered into force in 1996, the message of U.S. jurisprudence was clear: Internet Service Providers with no intention of controlling the contents hosted on their servers may not be held liable for any infringements or unlawful acts committed by third parties (P.L. 104-104, 110 Stat. 133).

The contribution of the American experience

The initiative for the creation of a liability regime in line with the problems posed by the Internet became a priority issue following two cases that marked a turning point. Consequently, the Congress of the USA undertook an exhaustive legislative process that resulted in the Digital Millennium Copyright Act (DMCA), considered the first pillar of the construction known as Internet Liability.

Since then, the regulatory and judicial front has been carefully watching the evolution of the American experience, which is considered, beyond any doubt, the legal and judicial model for other hemispheres, or at least the starting point to redefine regulatory schemes.

Such was the case of Commission Directive 2000/31/EC, which describes the liabilities of

ISPs with regard to copyright infringements regardless of the type of content. This involves a horizontal approach redefined in comparison with the DMCA, which, even though it inspired the European Community standard, managed to differentiate the various types of content through the limitations on liability relating to online material.

Discussion in Europe in the late twentieth century on how to best regulate a society that was gradually growing apart from atoms to accommodate bytes, led two giants, the communications sector and the great cultural industry, to place themselves on opposing sides to press local governments to regulate a situation (Link, 2014; Ryan & Cairtona, 2010) involving both high profit margins for the former, and major losses and bankruptcy of companies for the latter.

Against this background, it was once again thanks to the American experience through the DMCA that several governments across the world obtained valuable tools to redefine the rules of the game, thus promoting the recovery of the cultural industry, while fostering the growth of the telecommunications sector, which was additionally excluded from legal action insofar as it was diligent in the withdrawal and preventive blocking of contents.

In any event, these regulations are a response to the problems that are day by day posed by the Internet, and to the new scenarios created by the also new restrictions by governments on users, who have evolved developing new and increasingly complex behaviors (Marshall, 2012; Sidak, 2006).



It is not in vain that the rules of experience have proved that this is a dynamic and ever-changing realm, so that regulations are still unable to produce the desired effects (Stamatoudi, 2010, p. 40). In the meantime, discussion evolves around the process of notice and takedown of contents.

The Canadian model as an example of success: A preliminary conclusion

With increasing frequency, we observe how civil society begins to react against certain governments' "pro-industry" approach to public policies on intellectual property online. Often through ignorance or lack of legislative technique, governments have made mistakes in such task, as was the case in France with the Hadopi Law (Musiani, F, Schafer, V. & Le Crosnier, H. (2013), and in India in its failed attempt at structuring blacklists of infringing webpages (Marsden, 2011).

The truth is that strategies to regulate the issues raised by the fast and easy exchange of digital contents begin to fall short, leading to a pressing need for new alternatives involving other sectors to redefine the negative image of Internet Service Providers. For its part, the current Notice and Takedown system, which seems to be the solution in many countries, already belongs to the past in those where governments have managed to change their outlook, such as Canada.

Through this system, providers mainly issue advertisements automatically, informing webpage administrators of alleged infringements on their servers. In principle, this notification involves no further action, although in the takedown phase providers proceed to a preventive block of the data to be transmitted, which involves the removal

of allegedly infringing content and/or the cancellation of the service.

Thus, by moving away from this scenario, through its legislative initiative C-60, Canada implemented a new model known as Notice and Notice, which, by sending second, third or even fourth notices of the infringement, gives the administration the chance to take measures before proceeding to remove the infringing content (Kleinschmidt, 2010). This instance of good practice leads to the creation of a scenario that, beyond repression, actually benefits the holders of online copyright and related rights.

In the case of the United States, the entry into force of the DMCA entailed the regulation of safe harbors to protect ISPs from liability for copyright infringements committed by their users, provided they respect notice and takedown policies. This is the case with certain videos published by their legal holders that have been banned from platforms such as YouTube, Bebo or MySpace (Marsden, 2008, p. 119), causing general upset, since this mechanism affects certain rights such as freedom of expression or the right to parody.

This is how, by comparing Canadian and American policies, it can be observed that, by dissociating from safe harbors, the first mechanism adopted proposes a positive background from which ISPs are granted a sui generis condition of immunity from liability, thus fostering the improvement of their notification systems, while they benefit from good practice in secure operative spaces.

On the other hand, they shall be responsible for repairing any damages caused by failure



to observe this procedure, provided they are unable to prove the reason why they were not able to do so. The ceiling for damages was recently fixed between 5,000 and 10,000 \$, which is a very reasonable figure (C-11).

Despite the above, reality proves that it is mostly the website owners, in more than 80% of the cases, who decide to voluntarily take down the contents following the first notification (Miller, 2010). In conclusion, this system provides a fair balance among the different interests by creating incentives and allowing administrators, rather than ISPs, to remove contents with autonomy of decision upon evidence of any alleged copyright infringement.

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