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Technological Protection measure

safe harbors and making available rights on Mexican Copyright Law

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TECHNOLOGICAL **PROTECTION** MEASURES

SAFE HARBORS AND MAKING AVAILABLE RIGHTS ON MEXICAN COPYRIGHT LAW

Technological advancements have reshaped our understanding of digital copyright rights and its relation with human rights. There has been always a need to ponder different interests in relation with the human right of access to information, the neutrality of the web interconnecting virtual space, freedom of speech and the protection granted to authors, producers and performers. Based on the web's neutrality paradigm, online activities have usually followed different rules to those set forth in connection with offline activities.

Mexico signed the United States-Mexico-Canada Agreement ("USMCA"). Every party undertook several obligations related to copyright, among others, technological protection measures, safe harbors, rights management information, criminal and civil enforcement.

As such, on July 1st, 2020, new amendments to the Mexican Copyright Law and to the Mexican Criminal Code were approved. Essentially, the amendments focused on the following:

1. Incorporation of the right of making available for copyright and related rights. The addition of this concept in article 16 section three (by wire or wireless means, including making the works available, in such a way that members of the public can access these works from the place and at the time that each of them chooses) is to be considered a win as it not only derives from the USMCA, but also from WIPO's WCT treaty.
2. Incorporation of effective technological protection measures and rights management information. In compliance with articles 20.66 and 20.67, the amendment now establishes a legal definition for TPMs and RMIs
3. Liability exemption regime for Internet Service Providers and implementation of a "Notice and Take Down" system (safe harbors").

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MAKING AVAILABLE RIGHTS

Although not precisely new in the Mexican legislation, a making available right was inserted in the Copyright Law, as part of the public communication bundle. The change was made principally for the purpose of redaction. It was made clearer in connection with the provisions of the USMCA and World Intellectual Property Organization Performances and Phonograms Treaty ("WPPT").

Making available rights alongside with reproduction and transmission rights, comprise the required rights to protect copyrighted works in the digital era. This is because internet communications are not simultaneous as in broadcasts, but successive, in a way that public access to works occur before the user requests such access from the provider. In the current era, making available rights have helped devise solutions to prevent unauthorized reproductions and public communication of works.

With the changes implemented in the latest amendments, it is now clearer that artists, performers and other neighboring rights holders, like sound recordings producers have the right to authorize and prohibit public communication and making available. The purpose of that reform is aligning the law with the language provided in WPPT. Thus, the old opposition right of the Rome Convention, which remained in the Copyright Law since the sixties, was changed for the newer concept provided by WPPT. So, the amendment provides the producers of phonograms with a right of communication to the public for their works, including the making available to the public.

The amendments also recognize the economic right of authors of computer programs to authorize or prohibit any form of distribution, decompilation, reverse engineering processes and public communication of the program.

The modifications will help to regulate and expressly state the protection granted to authors in connection with technological and digital rights. They will achieve that aim by providing the necessary rules so that copyright continues protecting authors, performers and producers, without affecting the end user or consumer.

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TECHNOLOGICAL PROTECTION MEASURES (“TPM”) AND RIGHTS MANAGEMENT INFORMATION (“RMI”)

Copyright Law was amended in accordance with the provisions of the USMCA, for the regulation of technological protection measures.

TPMs are understood as: “any technology, device or component that, in the normal course of its operation, protects the copyright, right of the performer or right of the producer of the phonogram, or that controls access to a work, a performance or a phonogram”. Provisions were provided as sanctions to criminally prosecute whomever eludes or circumvents TPMs set to protect copyrighted works.

It was not long before multiple organizations, activists and social media users, expressed their concern by claiming that the limitations established are not completely clear, and leave room for uncertainty. For example, they believe that the circumvention of TPMs for the purpose of reverse engineering or repairing will be subject to civil claim and criminal prosecution, these activists and organizations have expressed their discomfort against this so-called “digital locks”, by arguing the unconstitutionality of the reform, as the amendments –according to them– violate human rights, and the “digital” rights of repairing and modifying hardware and software depending on the user’s needs.

They allege that the sanctions should not be enforced with respect to the elution of TPMs, and whomever uses them or offer the services and that accordingly, the production, reproduction, manufacture, distribution, importation, marketing, rental, storage, transport and making available of devices or systems, which are intended to circumvent them. In their opinion, the implementation of this amendment was due to a lack of an in-depth study by the Congress.

The organizations protesting this unconstitutionality seem to ignore –probably intentionally– that the repair and maintenance of hardware is not copyrightable subject-matter, TPMs only protect illegal access to the word protected by the hardware and not the hardware per se. TPMs will protect the software utilized for protecting works, prohibiting the unlawful reproduction, distribution and access to these works with a monetary intention, not the repair and maintenance of physical devices.

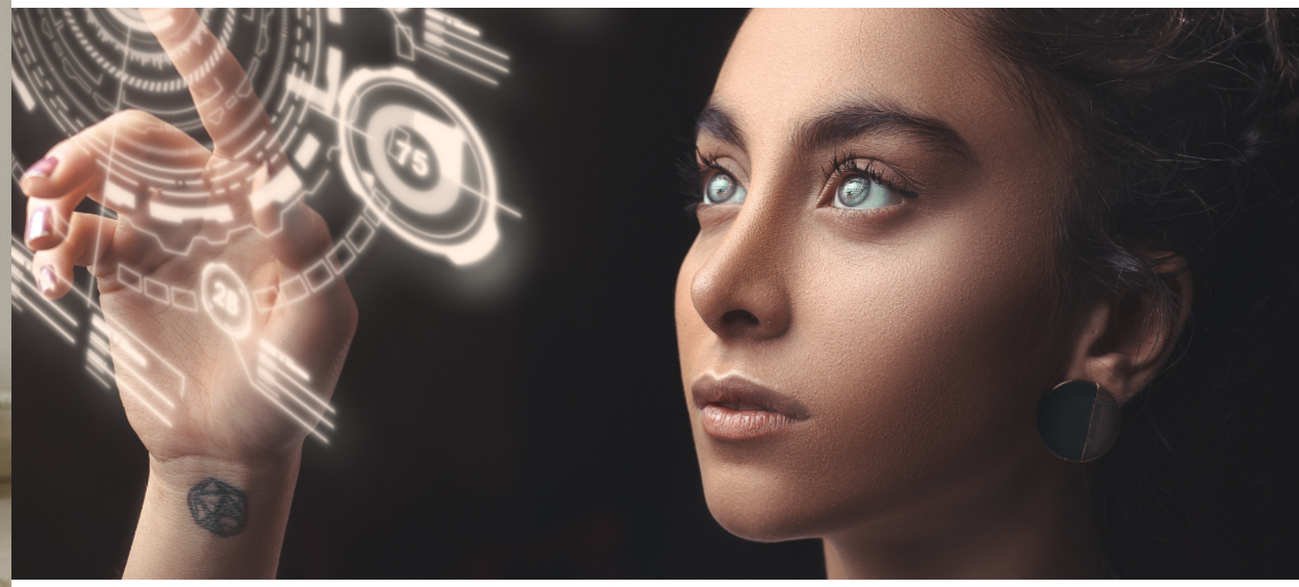
In another note, both international treaties and the newly-amended Mexican Copyright Law, foresees several limitations on the evasion of TPMs, which are substantially guided by the limits and exceptions established on copyright and neighboring rights. Thus, reverse engineering in good faith may be carried out with the aim of achieving interoperability of systems, to access works with the purpose of making them accessible to people with disabilities or the circumvention of measures for research and teaching, among others.

However, the reform did not exclude liability for those individuals engaged in the production of devices which are not intended to carry an illicit conduct, pursuant to article 20.66.2 of the USMCA. This would have avoided unneeded criticism from the opponents. Besides article 114 Quater section VI is broader than the corresponding exception in article 20.66.4 of the USMCA. Similarly, section VII of the same article exception is broader than the exception for security research permitted under 20.66.4(b) by not limiting it to an “appropriately qualified researcher”, excepting that the researcher “has made a good faith effort to obtain authorization for those activities” and exception is not limited to the use only “to the extent necessary” for the research. But the most worrisome is stated in the new section IX since unilaterally, favors INDAUTOR. It allows for the implementation of additional exceptions and is much broader than USMCA article 20.66.4(h).

The amendments included, as well, the RMIs, which is information that identifies the performer, producer of the phonogram or sound recording and works, information about the terms and conditions of the use of said performance, sound recordings or works. RMI is also called metadata –as in descriptive information about a resource-. It is used for discovery and identification. It includes elements such as title, abstract, author, and keywords.

Several measures are implemented to anyone who deletes, removes or otherwise modifies the RMI.

All things considered, and in line with the making available rights mentioned above, TPMs provisions were needed in the modern, digital world in order to provide better protection to authors, performers and producers.



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SAFE HARBORS

Internet content is distributed, hosted and located by online intermediaries, usually known as Internet Service Providers (“ISP”). As stated earlier, works merely circulate within the internet, utilizing said IPSs for this purpose. they are –usually– not creators of their own works. The liability of the providers has been widely discussed since the early days of the internet.

Therefore, in a long overdue amendment, Mexico regulated the liability of ISPs, defining them as “a person (legal or natural) who transmits, routes or provides connections for on-line digital communications, without modification of content, between points specified by a user, of material selected by the user, or who performs intermediate and temporal storage of such material made automatically in the course of transmitting, routing or providing connections for on-line digital communications”.

The amendment provides that, ISPs will not be liable as long as they “promptly and readily” eliminate any copyrighted works that infringe upon copyright, regardless of whether they acquire knowledge of the infringement through a notice or by their own means. They do not initiate the chain of transmission of the works, performances or productions or select them, and do not receive financial compensation for the transmission, making available or reproduction of the works. Regrettably, the amendment removed the “neutrally and passively” function defining Online Service Providers which was originally advocated for.

Safe Harbor measures have been provided, so that ISPs are not directly liable, when they comply with appropriate compliance measures. Thus, the measures implemented are free from liability to pay damages and not from complying with the precautionary measures. Another aspect to be polished is the fact that legal remedies and safe harbors provided by article 20.88 only limit liability for monetary relief and not all ISP liability. USMCA only provides safe harbors to ISPs for monetary relief and not injunctive relief or administrative sanctions imposed on infringers. This distinction was not cleared by the wording of the amendment.

A “notice and takedown” system was implemented for compliance purposes. In Mexico, the system has generated controversy among the same organizations and activists that oppose the implementation of TPMs. They argue that the system will foment “privatized censorship”, as anyone will be able to claim infringement. Therefore, ISPs will have to immediately remove the works and net neutrality and freedom of speech and access to information will suffer as a result. Regrettably, Article 114 octies falls short of the requirements of USMCA Art. 20.88.3(a) because it only requires ISPs to remove infringing content upon receiving notice of infringement from the rights holder. There is no requirement for ISPs to remove infringing content upon actual knowledge of copyright infringement or when they become aware of facts or circumstances from which infringement is apparent.

There is limited evidence of this alleged “privatized censorship”. Research seems to support the proposition that in the interest of avoiding litigation or risk, ISPs and hosts are sometimes inclined to remove or block access to notified works, without investigating it in detail. However, there is also a counter-claim system established that should –in general–, prevent “privatized censorship”.

The Mexican Constitution guarantees the freedom of speech through any means. However, this freedom does not imply the use of content protected by copyright without the authorization of right holder. There is no opposition between copyright protection and freedom of expression. To be clearer: one of the fundamental pillars of copyright is precisely freedom of expression and creativity. Anyone can express their opinions freely. What you cannot do is misuse what was created by another person without their authorization.

In fact, artists and creators have always been the staunchest defenders of freedom of expression, because it is what allows them to create without censorship. Just as copyright protection is what allows them to continue creating.

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Likewise, these organizations, fail to ponder that the access to information is not limited in any form or manner. They would provide that the authorization to access the works must be granted by title holders. Here -and in the safe harbor provisions discussed earlier-, it has been misunderstood the meaning of “net neutrality”. The online community usually confuses concepts when related to copyright.

In first place, they confuse the access to information to the access to works protected by copyright. In second place, they confuse the term “neutrality”. Neutrality is the principle that ISPs must treat equally all internet communications, which with these amendments continue to be true. However, they will now have the obligation to “take down” content that infringes copyright rights.

Finally, they misunderstand that not anyone will be able to notify ISPs and eliminate works. It will not be based on arbitrary decisions or merely on the fact that someone does not agree or it does not help further their agenda. Only title holders of works protected by copyright, performances or neighboring rights, will be able to carry out the notice. Thereby, they would diminish the risk of “privatized censorship”.

Likewise, “notice and take down” system provides clarity so that ISPs do not have responsibilities for copyright violations if they implement a series of measures prescribed in the law itself in a very clear manner.

On the other hand, for those who request the content be removed as well as who uploaded it, a simple notice and counter-notification procedure is established, where it is precisely who requests that the content be downloaded who must demonstrate the ownership of the right.

Thus, the reform offers the possibility of resolving the conflict between the parties, protects the user, the ISP and the right holder improves his legal certainty.

It is worth mentioning that the reform does not oblige to carry out legal procedures;

Copyright does not cross paths with access to information and net neutrality, 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.

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CONCLUSIONS

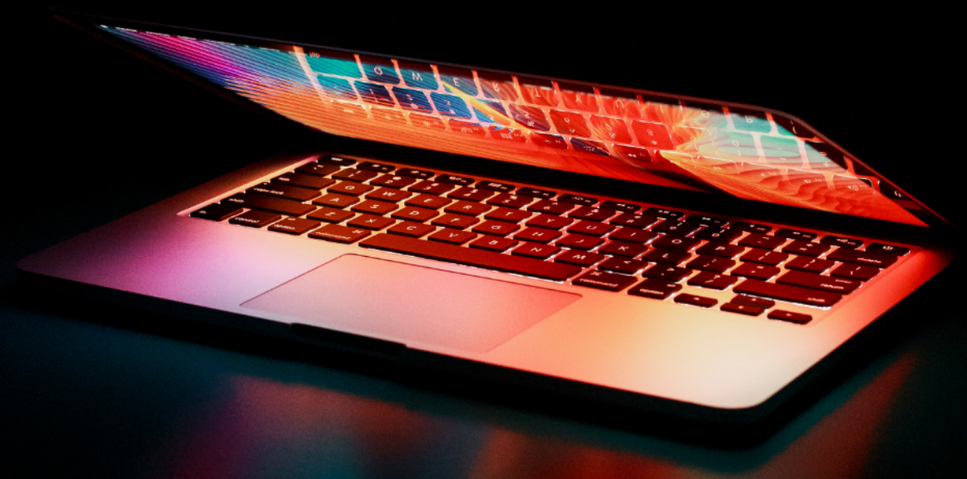
In general, the amendments made we necessary to modernize Mexican copyright to the digital area, and were all in line with the current global tendency of copyright protection.

Making available rights were previously provided for in Mexican legislation. However, there was ambiguity in the term, and it was important to amend it in order to be in harmony with the rest of the copyright related digital reform. The amendments are a step forward in the right direction for authors and holders of neighboring rights, to protect their rights, and continue to incentivize artistic creation.

In relation with TPMs, the amendments were needed in order to regulate the growing problem of piracy and illegal distribution of works with the use of technology. As specialized problems in dealing with copyright piracy, so should legal systems evolve to deal with these types of infringements and crimes.

Notice and takedown is required to protect and enforce copyrights. Experience has proved internationally, that private proceedings can work as solutions to fight against illegality. The Internet is a giant communication medium and infringement of rights on the internet tends to be of massive proportions. Courts would be overwhelmed if they did enforcement alone. The best outcome or achievement 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.

This system 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. However, it is not a measure in which “one size fits all”. The amendments to the Mexican Copyright Law will need to go through the scrutiny of Courts, and the interpretation of the law will have to gradually be realized on case-by-case basis.



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