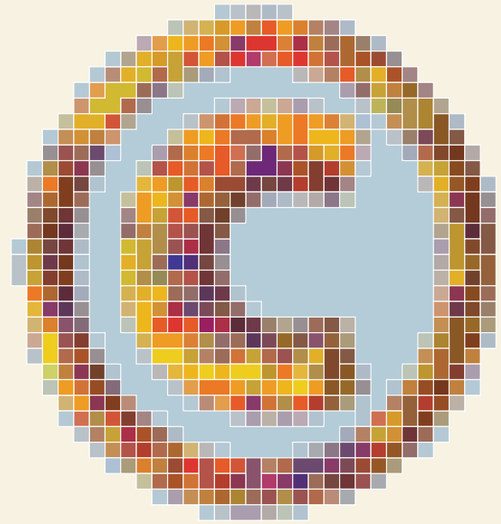

CURRENT REFORMS TO COPYRIGHT SYSTEMS

Myhts and realities of the legislative adaptation to the digital setting

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Copyright responds to the imperative need to regulate relations deriving from the enjoyment of spiritual works, facilitating a harmonious interaction between the endless human interest in leaving an imprint through literary and artistic manifestations and the deepest desire of society to draw sustenance from cultural creations developed by its members. It is thus quite natural to adapt copyright systems as necessary, so that they can be in line with artistic production and dissemination models that are impacted by technology.

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This dissemination has always had a global vocation, and the world order for trade in cultural goods has traditionally been supported by strenuous State efforts at harmonizing copyright laws. The so-called World Intellectual Property Organization (WIPO) Copyright and Performances and Phonograms Treaties, known as Internet Treaties, were signed in 1996, when 91 States proclaimed the use of basic digital copyright principles.

There are new theories, however, indicating that copyright can no longer adapt to contemporary intellectual production dissemination paradigms after the advent of indicators showing a radical change in artistic production, marketing and consumption as an undeniable reality for some cultural industries, and as a close, inevitable future for others.

The exponential growth of electronic commerce, the massive establishment of Wiki communities, the successful programmes of the ministries of culture, education, and information technologies jointly undertaken by various countries of Latin America and the Caribbean, the proclamation of the Digital Agenda for Europe and, in general, the new economic, political and social realities have brought about a proliferation of legislative copyright programmes. Current transition processes have led to the negotiation of multilateral treaties, the incorporation of new copyright obligations into free trade agreements (FTAs), and legislative initiatives throughout the region.

Legislative adjustments are now being introduced into FTAs signed between the United States of America and Chile, Colombia, Costa Rica, and Honduras. Other countries are entering into agreements that will call for legislative reforms, the negotiation of multilateral treaties, and the updating of the Panamanian system with the enactment of Law No. 64 of 2012. All these extremely important initiatives are in line with the interest of certain countries in standardizing their copyright systems in the region and with the hope of adapting the standard to the changing paradigm that is resulting from technological breakthroughs in information and communications.

One cannot lose sight of the fact, however, that developments in the bodies of law of some countries are clear proof of the applicability of general copyright principles over the Internet and their malleability to adjudicate differences deriving from the use of works under protection either in the analogue or digital format. It is thus fitting to review some sensitive issues under discussion, which have made it necessary to reform copyright laws.

Copyright and the new knowledge generation and dissemination modalities

Copyright precludes any type of control over ideas, thus securing the free flow of knowledge. In this context, self-financed projects like Wikipedia are legally feasible and do not require that the information or views of users have necessarily been provided or expressed by them. Cyber surfers may describe the latest work of a Nobel laureate in medicine, mathematics or physics using their own words on the "free encyclopaedia." And they will not break their copyrights, just as Dan Brown could write The Da Vinci Code without paying any royalties to the writers of The Holy Grail.

The authors' monopoly is thus limited to the peculiar way of expressing ideas, either artistic or literary, authorizing or prohibiting any potential use of their works. Copyright provides, therefore, the basis for creators to decide the type of business model they will use over the Internet, including licences like Creative Commons or Copyleft, making sure that their works remain unpublished or undergo Wiki processes.

Exploitation of digital rights

Authors or their representatives have the legal authority to accept or ban any use of their works, even when the relevant local legislation does not expressly mention the rights that make reference to paperless works, including storage as an act of reproduction and availability. In keeping with generally accepted principles, there are as many patrimonial rights as feasible utilization modalities there are. Copyright will not become obsolete although it had been enacted at a time when it was impossible to anticipate the existence of a network like the Internet, where copyright works are circulating.

Liability systems for Internet Service Providers (ISPs)

One of the obligations deriving from free trade agreements that has sparked heated debate has to do with the limitation of liability for Internet Service Providers (ISPs) when they break copyright laws on their webs. While efforts have been made to homogenize copyright legislation, specifically ISP liability systems on the basis of the Digital Millennium Copyright Act (DMCA) - an American law -, such a system is not alien to the Latin American legislation because they are all founded on the same principles. It can well be said that even the countries where no specific legislation has been developed are in a position to establish the liability of portal managers and ISPs when they break copyright laws or facilitate copyright violations by users to make profits. This is based on general rules over copyright and on actions founded in tort.

Web portal managers will be held liable and, therefore, sanctioned if they provide users with systems to share copyright works without previous authorization from right holders, if they are aware of such violations and do nothing to prevent them, or if they seek to make profits, either directly or indirectly, including advertising-generated earnings.

One of the most outstanding examples is the case of some Peer-to-Peer (P2P) or indexer exchange network pages, where managers do not directly break any law as they do not host unauthorized reproductions on their servers, but do provide the tools required for such acts as they facilitate free access by interested users to those who display the works without previous authorization. These actions would be extremely difficult to implement without the assistance of exchange systems. As such portals play the role of indispensable aides to commit crimes and make profits out of their collaboration, they are forced to compensate creators for the damage caused.

Based on this postulate, a court in Argentina, where the copyright legislation dates from 1933 and has hardly been amended, has found Taringa! managers guilty after they facilitated acts of public communication without authorization from the right holders. This did not require the enactment of a new law and provides for new creation and dissemination processes respecting the authors' will.

The main reason why efforts are being made to establish a liability system for ISPs is to set clear rules so that business agents can determine whether or not the activities implemented under a specific business model are in line with the law, thereby providing innovators with legal security. As already mentioned, ISP liability will be identified in accordance with the actions founded in tort. Under these circumstances, it will be difficult to find a web portal manager guilty when he/she implements a system to help right holders to be notified if system users are sharing a work without their consent and to ask to have access blocked. It is thus demonstrated that the service provided does not seek to facilitate violations. What is required today is not a law or decalogue of good practices on economic activities over the Internet, but rather a wide dissemination of general principles and standards in force.

Digital copyright limitation and exception system

As previously indicated, the 1996 "Internet Treaties" sought to put the copyright system in line with the new needs of cultural industries eager to explore the new business models over the web. With this task in mind, the WIPO Copyright Treaty (Article 10) and the WIPO Performances and Phonograms Treaty (Article 16) incorporated the following concerted declaration: "It is understood that the provisions under Article 10 allow the Contracting Parties to duly implement and expand the limitations and exceptions in connection with the digital format in their national legislation, as deemed appropriate under the Berne Convention. It will also be understood that these provisions allow the Contracting Parties to establish new exceptions and limitations deemed appropriate to the digital web."

A State cannot therefore decide to develop rules on limitations and exceptions applicable to the digital format or

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keep those that may be understood to operate in the digital and analogue format because of the way they were drafted.

Negotiations are currently underway at WIPO to consolidate an international instrument relative to limitations and exceptions on individuals who find it difficult to accede to printed texts.

Conclusiones

As is the case in any transition process, there have been speculations and violations. This constitutes no obstacle, however, to develop a sound archetype for the consumption of cultural goods. The notion of law inapplicability over the Internet has gradually been left behind and theromantic myths related to piracy have been removed. The use of Peer-to-Peer exchange networks has decreased as users have understood that unauthorized availability involves rights violation, and this has led to a proportional increase in legal contents consumption. The industry is also devising measures to be in line with new forms of access to cultural goods, respecting consumer rights, as evidenced in freemium models. On the other hand, libraries are signing agreements with platforms and aggregators to lend digital books and reading devices, and books of public domain are being digitized. Full prices are gradually being fixed in accordance with specific market research, and contracts will cover all aspects that are indispensable to smooth digital operations.

It is difficult to predict, without fearing speculation, what creation and dissemination modalities will prevail on the market and whether or not it will be necessary to reformulate the copyright system in the future. For the time being, copyright is playing its original role and will continue to do so without any need for structural reforms. The ideal mechanism to deal with a change in paradigm may well be to promote a culture of respect for copyright, strengthen cultural industries and Wiki communities, empower creators and consumers, and provide copyright organizations and web surfers with incentives. C&D