



THESIS PROJECC

“Liability of Internet Service Providers for Copyright Infringement”

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## **ABSTRACT**

Growing and expanding so-called Information Society, the most valuable asset is the intellectual, either in its technological aspect, commercial or authorial. The Information Society has led to controversial issues: one on intellectual property specifically relating to copyright in the network, dealt with different perspectives, different laws and dissimilar trends. Precisely in this research will address the liability of Internet Service Providers (ISP) for unauthorized downloads against copyright. For this study will address the various laws and treaties that have governed the issue, the protection mechanisms and the positions embraced by each country in order to protect the copyright. As you will see there is a single outlet to the problem of unauthorized downloads, will depend on the system hosted by each country, but what if it is conclusive that there is still that all countries in the world to adopt a system of protection for individual good is most valuable as intellectual property.

## INTRODUCTION

The development of technologies has allowed the improvement of communications and the knowledge of mankind, however, it has become a double edged weapon for the authors and their work, in any kind, who are in danger when releasing their work, due to the fact that some users illegally download their content without making any compensation and copyright payments.

This downloading process without any control eliminates rights that belong to the creators of the works, and for this reason we wonder: Does the responsibility for the violation of the copyright belong to the Internet Service Provider (ISP) or to the user who uses it?

The phenomenon of Internet is imposing itself as the universal support for the development of advanced and interactive services, having as a main characteristic its capacity to place in order every kind of applications and services and make them available for the citizens in a simple and homogeneous way, reducing in a significant way the costs for providers and users.

Nowadays, inside this technological development, one of the most controversial aspects is represented by the necessity of juridical protection, and digital safety for the Works that are exploited on Internet.

In order to understand the complexity of this investigation, the thesis has been divided in chapters, this way, in the first chapter we will discuss the Illicit acts in Digital Networks which are known as the acts directed against the confidentiality, the integrity and the availability of IT systems, networks and IT data, as well as the abuse on those systems, networks and data, and their main characteristics and actors, among other aspects will be developed.

The second chapter is about the problem of the punishments for these Illicit acts and the compensation of damages related to the copyright, besides this chapter gives us an introduction to the topics of Copyright and the Intellectual Property, their essential characteristics such as: the subjects, the rights and the protection

mechanisms, discussion of moral rights, and the criteria of the World Organization for the Intellectual Property.

In the third chapter, the role played by the ISPs in the digital networks will be discussed and also their involvement in these infractions, and we will define what is understood by Internet Service Provider (ISP), its function as an intermediary; the so called “Internet Treaty” and its main contributions; the Digital Millennium Copyright Act (DMCA) and the Board of Directors of Electronic Commerce and the limitations of responsibilities of the different kinds of ISPs.

The fourth chapter is about the solutions found in the comparative law in relation with the contention of the illicit acts and the role played by the Internet services providers (ISPs), the criteria of the United States of America (DMCA), the criteria of the European Community, the hadopi law, the United Kingdom law, the German law, and the solution found by Chile. Therefore, the mission of this investigation is to be the base for future generations of professionals and students so they are able to deepen more on the knowledge of this topic.

## **Chapter I**

### **Illicit acts in the Digital Networks**

In order to start this chapter related to the illicit acts in Digital Networks, it is strictly necessary to know what a digital network is.

It is possible to say that a digital network is a system of communications in which the information that is transported is codified in digital format.

Another definition could be the interconnection of terminal equipments and systems of communication that exchange information in digital format, understanding that in order for this exchange of information to happen in an effective and successful way, the devices and the nodes of interconnection of the systems must fulfill a series of technical rules called protocols of communication, better known as OSI (OPEN SYSTEM INTERCONNECTION) and TCP/IP (TRANSMISSION CONTROL PROTOCOL / INTERNET PROTOCOL)<sup>1</sup>.

After a brief introduction given about digital networks, the IT Crimes, its concept, its actors and its main characteristics will be developed.

- The IT Crimes: There are many concepts that experts have tried to give regarding this term. Many countries have tried to include IT Crimes inside traditional and typical figures such as, robberies or thefts, frauds, falsifications, prejudices, swindles, sabotages, etc. But due to the increasing use of the IT techniques this has caused the beginning of new crimes, generating of course the need of juridical regulation.

In the international area, many experts have made big efforts for trying to obtain a universal definition, " it is not an easy task to give a concept on IT crimes, considering the fact that its own name relates to a very special situation, because if we talk about crimes in the sense of typical actions, meaning as typified or contemplated in juridical penal texts, it is required that the expression (IT Crimes)

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<sup>1</sup> Isea, Jose. Digital Networks: Present and Future.

Be recorded in the penal codes, and such action in its country as well as in many others it has not been an object of legal classification"<sup>2</sup>.

The crimes with computers refer to "Any criminal behavior in which the computer has been involved as material or as an object of the criminal action or as mere symbol "<sup>3</sup>.

Others define the IT crime as " The accomplishment of an action that, putting together the characteristics that delimit the concept of crime, has been carried out using an IT or telematic element against the rights and freedoms of the citizens "<sup>4</sup>.

Other sources consider that there are many perspectives that different authors have contributed to the above concept, and that the majority thinks that a conceptualization is not necessary since these IT crimes are exactly the same crimes, simply committed by other means<sup>5</sup>.

As a conclusion, giving a specific definition of an IT crime represents a difficult task after so many attempts of a definition, however, the " Agreement of cyber delinquency of the European Council " provides a definition to us: " The acts against the confidentiality, the integrity and the availability of the IT systems, networks and IT information, as well as the abuse of the mentioned systems, networks and information ".

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<sup>2</sup> Julio Teyez Valdes.

<sup>3</sup> Carlos Sarzana. Criminologist y Technology.

<sup>4</sup> Carlos Sarzana. Criminologist y Technology

<sup>5</sup> [www.delitosinformaticos.com](http://www.delitosinformaticos.com)

In Venezuela, a new Special Law for the IT Crimes has been passed, stating a series of violations that are committed through the use of IT systems, which remained unpunished or were regulated using the penal code or other special laws, among these crimes we have:

- Undue Access.
- Sabotage or damage.
- Possession of equipments or provision of sabotage services.
- IT Espionage.
- Undue Obtaining of goods or services.
- Fraudulent Managing and / or appropriation of smart cards or analog instruments, possession of equipments for falsifications.
- Violation of the data privacy or personal information, disclosure or exhibition of pornographic material from adults, children or adolescents.
- Appropriation of intellectual property.
- Deceitful Offers.

As we can observe, these crimes have certain characteristics in common, such as<sup>6</sup>:

- These are crimes that are difficult to proof. There are not human Fingerprints or evidence in the acts, the transfer from the author of the Crime to the material evidence that allows his or her later identification Does not happen.

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<sup>6</sup>Eugenio Urdaneta. Juridical IT (2002)



- There can be a noticeable length of time between the IT execution of the crime and its concrete materialization. The author of the acts can incorporate today into the computer a set of fraudulent instructions so weeks or some months later the perpetration of the desired economic or moral damage will happen.
- These are acts that can be carried out in a simple and quick way, in occasions; these crimes can be committed in just seconds, by using just one IT equipment and by not being physically present in the place of the acts.
- The IT crimes tend to proliferate and evolve, which makes the identification and investigation of the crimes more complicated.

According to what was described before, we could say that many of these crimes remain unpunished because it is not easy to find the author of the crime, who commits the perfect crime due to the complexity that involves the follow-up investigation to determine the person who committed the crime.

The same way is typified in common crimes, IT crimes also have an active subject and a passive subject, as follows:

**Active Subject:** These are people who undoubtedly have great knowledge and develop a great ability for the violation of the different protection barriers that the IT systems have. Throughout the years, it is acknowledged that these people are not only people who work in strategic places where confidential or sensible information is handled, but also a great capacity among Young people has been developed from their homes and they are capable of penetrating security systems that are considered impenetrable. These individuals are known by the term HACKERS worldwide.

**Passive subject:** or victim, they can be individuals, credit institutions, governments, etc, that use automated information systems generally connected to others on line and are directly targeted by the behavior of action or omission that the active subject develops.

Now, having a general and basic notion of what an IT crime is, its characteristics, criminal instruments and its subjects, an emphasis will be made on crimes related to the intellectual property.

**Crimes Related to the Intellectual Property:** The rights derived from the intellectual property must be respected with an absolute character, if not, this could result in violations originated in crimes with the Intellectual Property.

In Spain, the Organic Law 10/95, of date November 23 of the Penal Code, defines in its article 270 the basic type of the crimes related to the intellectual property, which is constituted by the behavior of an individual who is willing to obtain profits and to affect third parties and reproduces, plagiarizes, distributes or communicates publicly in everything or partly a literary, artistic or scientific work, or its transformation, interpretation or artistic execution concentrated on any type of support or communication through any way without authorization of the holders of the corresponding rights of the intellectual property, imposing prison time to the individuals who violate those rights.

In the above-mentioned norm several competing elements are identified with the purpose of materializing the presumed facts.

- A behavior is needed (plagiarism, reproduction, etc.)
- Lack of authorization from the owner of the material.
- Existence of a desire to obtain any profit affecting third parties.

The ordinance is punctual on establishing the actions, the crime and the corresponding penalty, so that normative coordination exists between the dispositions of the Law of Intellectual Property (special norm) and the Penal Code (general norm). "In civil matters it is preferable to leave out of consideration this casuistry ...." When it affirms "whoever defames the authors does not make any exploitation actions, since they do not usurp their right of authorship .."<sup>7</sup>.

Nevertheless, in spite of these annotations the criterion of the harmonization is kept among the norms of the Spanish legislation producing conflicts in the application of the laws on a smaller scale.

This does not happen in the Venezuelan legislation, where it is emphasized even more, taking into consideration the conceptual basis of our current Penal Code (1914), supported in the principles of each classic Italian School from the XIX Century and adopted from de Zanardelli Code during the Kingdom of Humberto I.

In accordance with the diversity of the juridical systems regulated by the Intellectual Rights, their conceptualization has been a really arduous task, responding to the theory of the juridical nature , which is accepted by the author of the definition, so, among the most acceptable, we can observe the ones stated by the defenders of the new theory of the " Juridical Space", which understands Intellectual Rights as:

" Juridical space in which besides these rights' regulatory dispositions, there are others (that grant or not subjective rights) and that discipline the economic activity of exploitation in which such rights affect and in the level of that economic activity in which that incidence is produced (in the economic competition) ".

Another definition that supports the one mentioned above following the same theory says:

" Juridical area that contemplates protection systems for immaterial assets, on an intellectual level and a creative content, as well as its related activities.

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<sup>7</sup>Ángel Carrasco. Guide of Intellectual Property.

The objective for protecting the Intellectual Property, is every intellectual development that comes from the understanding, intelligence, senses or from the spirit that the society considers important to develop, and for instance, it seeks for their defense, however it will exclude those that being intellectual development, are considered opposed to its own benefit.

The Intellectual Right will be seen dispersed in many juridical norms which would pretend the defense of those intellectual development.

The copyright protects the way an idea is expressed.

Due to this, it is affirmed that “ the law does not protect the ideas”, for that reason, for the juridical protection of the “idea”, it is necessary that it is connected to a characteristic itself, in the area where it can be protected, in other words, the “idea” is a component of the protected intellectual creation, however it is not the protected intellectual creation.

The importance of the Intellectual Rights is currently unquestionable, and under the influence of the intellectual assets in the economy, the law, the medicine, the communications, the engineering, and more, all the human society’s branches have been transformed.

The economic paradigms have been modified, before they were considered as production factors: the land, the profits, and work, pointed by Adam Smith. The economist Shumpeter in 1911, added a fourth element to the production factors, considering it a highly important one: The Intellectual Idea (invention) applied to the industry and business.

## **Chapter II**

**The problem of the punishments for these illicit acts and the compensation for damages related to the copyright.**

In order to understand the problem about punishments for Illicit acts, we have to start from knowing what the Copyright and the Intellectual Property are, since the last one is the type and the first one is the legal rule.

The Intellectual property is considered the kind in which one of its components is the Copyright. "To talk about Intellectual Property is to talk about culture"<sup>8</sup>, because it includes everything that the men do related to original production, in other words, it is not just limited to the copyright, it also includes any expression created in the human mind that could have some commercial value, and receive, this way, the protection that comes from a property right. On one hand, these rights will allow creators to choose who can or cannot have access to their property and use it, or on the other hand, they will allow them to keep it safe from the illegal or not authorized use of it

As originally described, the copyright is included in the Intellectual Property, neighboring rights, connected or related with the copyright and the *sui generis* right; including the rights that come from Industrial Property as it happens in some legislations,(brands, patents, industrial drawings, commercial denominations) according to what is established by the World Intellectual Property Organization (WIPO) in its article 2 of the Stockholm Agreement, on July 14, 1967 and the Marrakech Agreement on April 15, 1994, which refers to the agreement on the aspects of Intellectual property rights related to the trade.

The regulation made to the intellectual property by the Spanish legislation in its article 2, indicates that: the intellectual property is integrated by personal and patrimonial rights, which attribute to the author the full disposition and the exclusive right to the exploitation of the work with the limitations established in the law. Including in this law not only the copyright in the strict sense, but also the connected rights.

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<sup>8</sup> According to Bercovitz Rodrigo (Spain).

The majority of human beings are capable of creating, the intellectual creation, in many occasions it is even accidental, every creator is considered an AUTHOR, no matter the kind of the creation, artistic, literary, technological, among others. This AUTHOR, in order to protect the intellectual creation and to obtain the faculty of opposing to any modification of his or her creation without his or her permission as well as protecting the use or exploitation by third parties without authorization, has a group of norms called COPYRIGHT.

The doctrine has structured concepts that in general preserve similar elements, entering terminological conflicts with the intellectual property. "The Copyright in the Anglo-Saxon terminology, consists of the juridical protection of original creations of the human ingenuity and the moral and patrimonial aspects in the scientific, literary or artistic field"<sup>9</sup>.

The copyright is an intellectual property in strict sense<sup>10</sup>, with this we realize that the terminological relation between both terms begins

According to the information explained before, we can infer that when a person creates a work such as: literary, artistic, among others, this person happens to be the indisputable owner of the work and is free to decide how the work should be used, clarifying that the term creator is an unquestionable synonymous of author, and that this implies that the author is a holder of the rights.

**The Berna's Agreement for the convention of the literary and artistic works**, is a multinational treaty on the protection of the copyright, and it is the one that regulates it internationally. The above mentioned agreement was approved in Berne, Switzerland in 1886, logically, it has been revised in multiple opportunities.

In Venezuela we have the Law on the copyright (1993) and its respective Regulation (1997). The Law in its article I stipulates " the dispositions of this law protect the authors' rights on all the works of ingenuity and creative level, being a kind, form of expression, merit or destiny .... But it does not consider the copyright

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<sup>9</sup>Perez Luño. IT and Law's Manual.

<sup>10</sup>Bercovitz Rodrigo. Introduction to Intellectual Property.

in a strict way, even when it possesses the extent of the works according to the mentioned Berna's Agreement for the protection of the literary and artistic works.

This can be found in the Spanish Law where the text on the intellectual property does not have a concrete definition of the copyright.

From the previous information we infer that the copyright is a right of international scope given through juridical protection policies to the creator of original works. Due to the extent of already known and mentioned kinds, it allows us to enunciate the books or other written works, drawings, photos, musical compositions, recordings, movies, computer programs, among others.

The essential characteristics of the copyright change depending on each legislation with purpose of adapting such elements to the presumed facts that the laws establish. This way, three essential characteristics are mentioned: the subjects, the rights and the protection mechanisms<sup>11</sup>.

- a) THE SUBJECTS: as for the subjects there should be a distinction between those that correspond to the copyright and those that correspond to other intellectual property rights, known as connected or neighboring rights; as well as the *sui generis* right's subjects. The copyright subjects refer directly to the work's author considering the fact that it is his or her creation; being defined then as the natural person who creates an artistic, literary or scientific work.

When we study the copyright it always brings the so called connected rights, therefore, we ask the following question: Which are the connected rights to the copyright that appear in texts so often? In the last 50 years these connected rights to the copyright have grown at a very fast pace, these connected rights have been developing around the works protected by the copyright and these offer similar rights though usually more limited and of a very much minor duration, they are given to the subjects of other intellectual property rights, such as:

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<sup>11</sup>Vexaida Primera. Copyright on Internet.



- The artist's interpreters or performers such as actors and musicians with  
Regard to their interpretations or executions.
- The producers of sound recordings (the recordings in cassettes and  
Compact disks) with regard to their recordings.
- Broadcasting Entities, referred to legally registered companies under whose  
Organizational and economic responsibility emissions or transmissions are  
Spread.
- The creators of photographs.
- The creators of the databases (sui generis right), natural people or legally  
Registered companies.
- The broadcasting entities with regard to their radio and television programs.

b) As for The AUTHOR AND HIS OR HER RIGHTS there are two theories related to the content of the copyright which I consider are important to mention:

-The Theory of the Double Law: this theory tries to explain the juridical nature of the Author's copyright as a Personal - patrimonial Law. The biggest defender of this theory is Piola Caselli who affirms that this theory is a mixed nature right, in order to protect interests inherent in the creator, and exclusively patrimonial or economic interests.

-The monist theory: Mainly defended by Ulmer, who considers that in spite of existing two Law sources: Personal and Economic, are not only more than derivations of a unique figure, which is the representation of the juridical power over the author's work.

Now, it is necessary to mention the identification of the patrimonial and moral rights which are attributed to the author of the work's ownership.

Moral Rights: the moral rights would be those rights inherent in the author. " The set of personal prerogatives relating to the guardianship of the relation, inherent in the creation, which is born between the author's personality and his work. It's essential purpose is to guarantee the author's and the society's intellectual interests "<sup>12</sup>.

Another definition is the one offered by the Supreme Court of Spanish Justice, which says: " the author's moral right -*oponible erga omnes* is destined to protect those effects that are linked the most with the creative personality, containing inalienable and imprescriptible capacities.

According to Delia Lipszyc, she divides the moral rights in two categories by reason of the capacity to exercise them<sup>13</sup>:

- The Positive Moral Rights: They can only be exercised by the author of the work since they are based on their personal decisions.
- The Negative Moral Rights: Also called defensive by the reason of not including any decision about the work that could affect it, and are integrated to the work's paternity and integrity.

Patrimonial Rights: these refer to the rights related to the exploitation of the work or protected benefit, among these rights we have the exclusive rights that are those that previously award their creator or author the juridical power to authorize or prohibit certain exploitation forms about their work or protected presentation, and when the author authorizes them in mutual agreement it is with the possibility of obtaining a direct economic benefit for the granted authorization. On the other hand, there are rights of *simple remuneration or obligatory licenses* which are

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<sup>12</sup> According to Fernando Serrano.

<sup>13</sup> Delia Lipszyc. In her work: Copyright and Connected Rights.

those recognized by the law to certain holders demanding the person who exploits their work or protected benefit a payment and a certain amount could have been established legally. Finally there are compensatory rights which derive from the need to balance the intellectual property rights, which are not received because of the reproductions of the works or protected benefits. An example of this is the right for a private copy.

We realize that every legislation regulates in a different way these rights but they are all focused in the protection scope of the definitions mentioned before, only changing according to the regulation gathered by every individual.

- c) As for the Protection Mechanisms, the international organizations and States have implemented protection mechanisms to the rights derived from the authorship inside the intellectual property, existing the possibility of interposing civil and administrative actions and even penal ones, when one of the attributed rights is violated. This way, every State foresees the presumed facts in the cases of infractions not just to the patrimonial rights but also to the moral rights, regarding the copyright, the connected rights and the *sui generis* right since they are considered essential for the human creativity, because they offer creators incentives under the form of equitable recognitions and economic rewards.

As for the location inside the traditional scheme of the law's classification , the copyright, " It is a new part of the Civil law .... As equivalent to the private right ....; its object is the work outside the author in its relations with this one and respect of third parties .... "14.

The work as a result of Intellectuality:

Only the human being's ingenuity is the good that protects the Copyright.

In this respect, the work is understood as " a product of the effort of the men ....., something that does not exist in nature in advance"

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<sup>14</sup> Hector Della Costa (Argentina)

For a sector of the doctrine, the work represents a cultural good, capable of commercialization, even when in its beginnings the consideration was focused on attributing the work only popular recognition effects, reputation or a special form of immortality <sup>15</sup>.

An individual is in presence of the work when it exists juridically, in other words, when it has been established definitively in any support or continent (related to new technological appearances). This way, The Berna's Convention determines it clearly; when the article 2 demands that the work must be "established in writing or any other way".

Legislations relate the work to the creative ingenuity; such work must then have, as essential characteristics the originality; in addition, some internal rules regulate the consideration that the work must have a determined form of expression with the purpose of being able to be protected by the copyright.

In this respect, The United States of America 1976's COPYRIGHT Law, states: " in no case, the protection of an original work's Copyright is extended to any idea, process, procedure, system, operation method, concept, principle or discovery, regardless the way in which it has been described, explained, illustrated or established in such work " according to Ivor Mogollon Rojas.

This general criterion is adopted in the Spanish intellectual property Law in its articles 10, 11 and 12, where the object of the copyright's protection is identified in detail but not limitatively; "this enumeration is related to diverse criteria, predominantly pragmatic, trying to solve doubts or to emphasize specially important categories "<sup>16</sup>.

From my point of view, I believe that it is a good idea to establish a guide list, not limitative of the object of the protection, with the purpose of illustrating the addressee of the norm; opposite to this the Venezuelan Law is imprecise in the

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<sup>15</sup> Hector Della Costa (Argentina)

<sup>16</sup> Rodrigo Bercovitz. Introduction to Intellectual Property.

regulation of the presumed facts, incorporating in its content a higher reach to the norm.

The meeting point of the majority of the legislations and in international protection texts related to the work is the exigency of originality which must not be confused with quality, production effort, destination or purpose, since the guardianship is always the same one from the existence of the original creation. This leads to consider that the exteriorization of the creation is necessary, even when it can be tangible (a book, a sculpture) or intangible (musical improvisation).

It is curious that this criterion about originality is not mentioned or defined often in the international norms about Copyright; it does not appear neither in Berna's Convention nor in the Universal Convention of Geneva which is unexplainable given its importance.

For such reason, some parameters have been established to determine the originality in the work described by Ernesto Rengifo García such as: the intellectual effort, particular work or skill; turning out to be different the originality's scope in relation with the work which is protected.

The World Intellectual Property Organization (WIPO) defines originality when it indicates that " When it comes to referring to a work, the originality means that this is a unique author's creation, and not totally copied in another work or in an essential part.

Given the communications' technological advance, at first any invention or work could be safeguarded from exploitation not authorized by its creator, nevertheless nowadays it is common to obtain the content of not only from books, articles, publications, videos or sound, but also those that are a product of a more physical materialization like a sculpture, and that are "distributed" using ISP, where the content is available.

This way and understanding what the copyright is as a part of the intellectual property and knowing that we cannot conceptualize a specific form of punishment and economic compensation, since the entities in charge of punishing these illicit acts and their way of compensation and sanctions (suspension of services, fines, among others) comes according to the side that every country adopts, we have to study which is the role that ISPs play; being fundamental for finding the location of the offender, and to prevent the unauthorized diffusion of any kind of works.

## **Chapter III**

**The role played by the ISPs in the digital networks and their involvement in these infractions.**

Continuing with the development of the topic let us define what an Internet service provider is, better known as ISP; according to AISGE (artistas, interpretes, sociedad de gestion española in Spanish) (artists, interpreters, Spanish management company) the concept of service providers refers to any natural or juridical person who provides services on line, in other words, in the information industry.

The content suppliers are those that supply the information to the Internet users. " There is a classification in the suppliers' generality which must be known to determine in which one the norm's nonobservance took place and to determine responsibilities, clarifying the author that the delimitation between one and the other is almost imperceptible. This way he considers: among the suppliers or services' providers, there are access' providers, who are those who only provide access to Internet; the content suppliers, who only provide contents on line; the web spaces' providers, are those that rent spaces in order for the individuals to put up their own web sites and there are also those who offer the three services simultaneously"<sup>17</sup>.

It is also necessary that we know the concept of the information company, it is a figure included in the usual vocabulary on intellectual property and new technologies, this name is born in the European Community, with a high importance and Internet development, regulated through a number of Boards, ratified by internal law in the different countries of the community.

Concretely in Spain, the advances in this topic and the importance of the guarantees for the network's regulation, based on the respect for the freedoms and in the promotion of the users' confidence, crystallizing the Law of Information Company and Electronic Trade Services (Ley de los Servicios de la Sociedad de la Informacion y Comercio Electronico (LSSICE) in Spanish), filling this way a legal emptiness in this topic.

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<sup>17</sup> According to Ignacio Garrote. The noncontractual On line Services' Providers' Civil Responsibility related to infraction of the Copyright and connected Rights..



Therefore, due to the fact that the ISPs occupy a position of indispensable intermediaries, they somehow contribute to the perpetration of infractions on Internet and from attributions of responsibility; they might be declared accomplices because of the infractions that their clients and users commit. This inclination of designating the ISPs as responsible for the infractions committed by their Internet services' users can be explained in first place because any civil, penal or administrative violation that takes place on the Internet materializes through its services such as: access, storage, search engines and routers, for that reason, Internet might not exist without the ISPs. Secondly, the ISPs are easy to locate and they normally have a much higher efficiency to repair the damage created than the infractor or law- breaker.

This debate, with regard to establishing the ISPs' responsibility, begins in the year 1995 in The United States, in the National Information Infrastructure (NII), in which it was determined that it was " premature " to exclude or to diminish the ISPs' responsibilities for the intellectual property infractions committed by their users.

According to the World Intellectual Property Organization (WIPO), in order to preserve and to extend the protection of the intellectual rights, the organizations have to participate actively in the international debates related to updated protection norms, mainly related to those spread on the Internet, achieving " The Internet Treaty", adopted by the WIPO's Diplomatic Conference about " Certain Relative Matters concerning the Copyright and connected Rights "<sup>18</sup> celebrated in Geneva, in December 1996; in which the basic Internet rights' norms and other networks, were included, adopting for this result, the WIPO's Treaty on the Copyright and the WIPO's treaty on Interpretation or Execution and Phonograms.

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<sup>18</sup> WIPO's Treaty on the Copyright and WIPO's Treaty on Interpretation, execution and Phonogram. .  
[www.wipo.int](http://www.wipo.int)

The main contributions of the Internet Treaty mentioned above are summarized in:

- a) It ratifies the obligation to abide by the Berna's Agreement.
- b) It introduces the notions of "digital environment " and " storage of a work in electronic backups" all related to the Internet.
- c) It establishes the following rights to its holders: **distribution**, **rent** of three types of works, the computer programs, the films and the works incorporated in photograms, and **public communication**.
- d) It develops the works' interactive communication, Internet's essential characteristic.
- e) It does not modify the applicability's scope of the limitations and exceptions allowed by the Berna's Agreement.
- f) It forces the contracting parties to establish the juridical resources against the action of eluding technological policies.

Eventually, an incorporated commitment was reached, for the first time in the Digital Millennium copyright Act, from now on known as DMCA on October 28, 1998<sup>19</sup>, and two years later in the Board of electronic commerce from now on known as BEC. In Spain it was implemented by the law 34/2002 of Information Company Services and electronic commerce (LSSICE in Spanish). The BEC today was implemented by Austria, Belgium, Denmark, Finland, Greece, France, Ireland, and United Kingdom among others.

It is important to point out that the DMCA belongs to American System and the BEC belongs to the European System, whose difference is the called vertical approximation opposite to the horizontal one.

The DMCA only exempts the ISP of responsibilities for the intellectual property's infractions whereas the BEC exempts it for infractions of any kind. The BEC's horizontal approximation is explained because the normative divergence and jurisprudences, when it comes to talking about the ISP's responsibility, might "

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<sup>19</sup> The DMC, [www.copyright.gov](http://www.copyright.gov)

obstruct the correct functioning of the internal market obstructing the development of cross-border services and producing distortions of the competition ".

In The United States other sectorial laws come to support the ISP's partial responsibility created by the DMCA. In this respect the *Telecommunications Decency Act*<sup>20</sup> is mentioned, whose clause of the "good Samaritan" allows the exemption of responsibility of some ISPs for their users' actions on the Internet.

Some of the responsibilities established initially were defamation, false affirmations, among others, committed by Internet users. Currently, these responsibilities have been expanded to all kinds of civil infractions, except in areas expressly excluded, the intellectual property and federal jurisdiction matters, specially those regulated by federal laws against the obscenity and the child pornography. Anyhow, the BEC's horizontal approximation continues to be broader than the American one; an example of it would be that an ISP could remain exempt from responsibility for infraction of a brand in the European Union but not in The United States. For example, Mindspring, an ISP (Hosting) that used to store a web page that was announcing imitation watches, was declared responsible for such violation, since the DMCA was applicable to punish the ISP for the infraction of the brand (Gucci Vs. Hall). In Europe, the ISP mentioned before would have easily remained exempt from such responsibility with the simple compliance of the " Safe Harbor " information storage's conditions (Hosting).

Another important point when comparing these systems is that while the DMCA only covers **the exemption of the responsibility for "damages"** in other words, the economic compensation, the BEC exempts people from any kind of responsibility. This would explain some of the BEC's specifications compared to the DMCA, with different or contradictory interpretations nationally, which does not benefit the desired harmonization.

Both systems (DMCA and BEC) rest on scenes known as Safe-Harbors in which concrete conditions are met; the ISP will not be responsible for the infraction

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<sup>20</sup> Telecommunications Decency Act 1996 [www.fcc.gov](http://www.fcc.gov)

committed by its user. This way, the simple observance of some of these conditions prevent the ISP from benefiting from the exemption but it does not necessarily assign responsibility to it for the infraction. **The Safe-Harbors' regimen only serves as the first filter:** each ISP's obligation will be established according to the general rules of responsibility, through the secondary liability's doctrine in The United States, where there are two doctrines to establish the existence of "secondary liability" (Due to a foreign fact) for intellectual property's infractions: *Vicarious liability* and *contributory infringement*. It is accepted that there is Vicarious liability for an intellectual property's infraction committed by a third party when two requirements are met: the capacity (and right) to supervise the violating capacity and the existence of an economic interest in it. This way, the decision of whether this responsibility exists will be based on the supervision level that the ISP has (not necessarily practices) over the violating activity and the economic benefit that is directly or indirectly obtained from it <sup>21</sup>.

When referring to *Contributory infringement*, it appears later as an adaptation of the *Vicarious liability's* doctrine which, with the knowledge of a third party's criminal activity, can be declared responsible as offender "contributor", this way it is considered that a *Contributory infringement* exists when the infraction is known and committed by third parties. What remains clear is that in both systems, it is necessary that a "fundamental" infraction exists by the third party (user).

Nevertheless, in none of both exception regimes of responsibility affect or prevent the courts' or administrative authorities' adoption of **orders that demand the elimination or avoid the commission of an infraction**, including the suppression of illegal information or the dismantling of the access to it. Even more, if an ISP disobeys one of these orders, it will not be able to benefit from the corresponding exemption of the responsibility.

The Electronic Commerce directive (ECD) establishes three safe-harbors: One of mere transmission, caching and storage of information (hosting), where the ISP's

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<sup>21</sup> ILP Internet, Law and Politics Magazine 2006.

responsibility can be exempt when it meets the specific conditions established for each of them.

### **Limitation of Internet Service Provider's Responsibility. (ISP)**

Having previously explained the limitations of vertical and horizontal responsibility according to both systems (DMCA and BEC) and also the exception of the good Samaritan, which establishes, according to the TLC Chile - United States, that the service provider that voluntarily or after a bona – fide requirement, removes, disables or blocks the access to material based on an apparent or supposed violation, will be exempt from responsibility, and must notify the content supplier without any delay.

The following develops every type of ISP (Mere Transmission, Caching, Hosting) and the respective behaviors that they must respect for not getting involved or being accomplices of the crimes committed by their users. These behaviors are called ISP's " Safe-Harbors".

#### **Directive 2000/31/CE:**

Concerning the Mere Transmission ISPs according to the Article 12 BEC: Directive 2000/31/CE<sup>22</sup>

1. The Member States will guarantee that in the case of a social service, the information that consists of transmitting in a network of communications, information provided by user of the service or of facilitating access to a network of communications, the service provider cannot be considered responsible for the data transmitted, on the condition that the service provider:
  - Has not originated the transmission.
  - Does not select the transmission's recipient.
  - Neither selects nor modifies the transmitted data.

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<sup>22</sup> Directiva 2000/31/CE [http://www.legitec.com/legislacion\\_pdf/Directiva2000\\_31\\_CE.PDF](http://www.legitec.com/legislacion_pdf/Directiva2000_31_CE.PDF)

2. These transmission and access' concession activities mentioned before include the automatic, provisional and transitory storage of the transmitted information as long as the mentioned storage serves exclusively to execute the transmission in the communications network, and that its duration does not exceed the time reasonably necessary for the mentioned transmission.

Studying more thoroughly this type of ISPs, once these receive a preliminar or judicial decision, these must supply useful information to identify the offender, and they also must block the access to the referred content.

The Caching ISPs according to the Art.13 BEC: Directive 2000/31/CE<sup>23</sup>

1. The Member States will guarantee that, when a social service of information consisting in transmitting through a network of communications the data given by the service's recipient, is provided the service's provider will not be considered responsible for the provisional, temporary and automatic storage (caching) of this information, performed with the only purpose of making the ulterior transmission of the information more effective to other service recipients request by them, providing that:
  - The service provider does not modify the information.
  - The service provider meets the conditions of access to the information.
  - The service provider meets the norms relative to the information's updating, specified in a widely recognized way and used by the sector.
  - That the provider does not interfere in the lawful use of technology widely recognized and used by the sector, in order to obtain information on the use of the information.
  - That the service provider acts quickly to remove the information that he or she has stored, or to make the access to it impossible having effective knowledge of the fact that the information has been removed from the

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<sup>23</sup> Directiva 2000/31/CE [http://www.legitec.com/legislacion\\_pdf/Directiva2000\\_31\\_CE.PDF](http://www.legitec.com/legislacion_pdf/Directiva2000_31_CE.PDF)

network's site where it was initially, that the access to the information has been disabled or that a court or administrative authority has ordered to remove it or avoid its access.

The Information Storage or Hosting ISPs according to the Article. 14 BEC: Directive 2000/31/CE<sup>24</sup>

1. The Member States will guarantee that when a service is provided related to information about storing data by the service recipient, the service provider cannot be considered responsible for the stored data requested by the recipient, providing that:
  - The service provider does not have effective knowledge of whether the activity or the information is illicit, and regarding an action for damages, does not have knowledge of facts or circumstances that reveal the activity's or information's illicit pattern.
  - That the service provider after realizing the previously mentioned aspect acts quickly to remove the data or make the access to them impossible.
2. The point 1 will not be applied when the service recipient acts under the service provider's authority or control.

We have to consider that the mentioned articles 12, 13 and 14 BEC, will not affect the possibility that a court or an administrative authority according to the Member States' juridical systems, demand the services provider to put an end to an infraction or prohibit it, and to the possibility that the Member States establish procedures to control the removal of data or avoid the access to them.

This way it is possible to summarize that an ISP can benefit from **the exemptions of mere transmission and from caching**, when its participation is only technical, automatic and passive, so that way it has neither knowledge nor control over the transmitted or stored information, supposing that the ISPs do not modify the

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<sup>24</sup> Directiva 2000/31/CE [http://www.legitec.com/legislacion\\_pdf/Directiva2000\\_31\\_CE.PDF](http://www.legitec.com/legislacion_pdf/Directiva2000_31_CE.PDF)

transmitted information and that they do not interfere with the established mechanisms; as for the caching that they act fast to remove the data or to prevent the access when there is the knowledge that they have been removed or the access has been disabled in origin, or that a court or administrative authority has arranged his removal or access.

For the **storage or hosting exemption**, a double level of unawareness is established by the ISP, about the unlawfulness of the stored information: "**effective knowledge**" and "**knowledge of facts or circumstances for which the activity or the information reveals its illicit pattern**". The DMC also gathers this double level of knowledge, as **actual knowledge and awareness** being known the latter as the **red-flag-test**: which states that the unlawfulness must be "apparent" and that the simple existence of "suspicious" circumstances of an illicit act is not enough to make the ISP responsible. Reinforcing hereby the principle that refers to fact that the ISP does not have obligation to neither supervise nor control its users' pages and actions, not even when situations of suspicion exist.<sup>25</sup>

Both the knowledge and the unawareness demanded for the exemption of responsibility for damages is the same under both systems: absence of "effective knowledge" and of **awareness**. Therefore, to continue benefiting from the exemption for storage (hosting), having effective knowledge or **awareness** of the existence of an illicit act, the ISP must act quickly to eliminate or to prevent the access to the information or illicit activity.

The Browsing ISPs.

In spite of the information already explained, there are very unspecific determinations that are important to mention, for example the Article 14 BEC that establishes a difference between "responsibility" in general and the one established for an action due to "damages". The lack of this article's juridical force leaves a wide margin to the Member States to interpret for which kind of responsibility the absence of knowledge is demanded. This way in Spain, not only,

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<sup>25</sup> [www.copyright.gov](http://www.copyright.gov) Vid,sec 512



the absence of effective knowledge is required to exempt the ISP of any responsibility, civil or criminal (art.16 LSSICE) but in addition it is required that the illegality has been established by the " competent authority " and that the ISP has been properly.

This aspect will gain more importance in the measure that the jurisprudence decides on these definitions, especially if It is taken into consideration that the BEC does not define when the "effective knowledge" exists, and when the "Awareness" exists, besides the fact that it does not indicate who has the responsibility to prove such definitions

Unlike this situation with the BEC in the DMCA, the **onus probandi** falls on the ISP who will have to demonstrate that it did not have knowledge of the infraction, which can lead to a curious scene, in other words, that it is more difficult to exempt the ISP of responsibility for the infraction of the Intellectual Property (under the DMCA, that under the general rules of the *contributory infringement*, in which the **onus probandi** would fall on the holder of the infringed rights).

The Browsing ISPs.

The BEC in its articles does not refer anything for these ISPs:

No safe-harbor for search engines and link, no notice and take down process; and no disposition on the possibility of ordering the ISP to communicate to the holder of the infringed rights the information related to the supposed offender (who is known in the DMCA as subpoena injunctions).

The BEC instead of a specific regulation chose to entrust the Member States and the Commission in order to promote " the production of behavior codes at a Community level, through associations or commercial, professional or consumer organizations ".

The first report on the application of the BEC " denies that there is the need to take some action in none of two topics (process of detection and removal), and even it manages to affirm that the actions taken up to the moment by the Member States put in danger the pacific functioning of the internal home market "<sup>26</sup>. Nevertheless, in its article 21.2 it indicates that when examining the need to adapt the Directive, the need to present proposals related to the hyperlinks' suppliers and services of location instruments' responsibility will be analyzed. However, It is a proposal for the future that refers the importance of the topic though it s not found in the current BEC's articles.

The LSSICE in its article 12 introduces a fourth exemption for search engines and hyper-links taking as reference the DMCA, these exemptions are for those that facilitate a link to other contents or include in their contents directories or search instruments and that will not be responsible for the information addressed to their service recipients, providing that:

- Do not have effective knowledge of whether the activity or information that they send is illicit or of that it violates a third party's goods or rights susceptible of compensation.
- And if existing, they act fast to suppress or disable the corresponding link. In this case the same considerations are applied with regard to the effective knowledge.

"These links could give problems of responsibility due to a foreign fact and create conditions for the formulation of compensatory aspirations in reason of not agreed links, specially against important service providers since they are (and not the authors of the harmful act) the ones who represent a major attraction for the economic aspirations of the Intellectual Property rights' holder whose violation would have happened due to a not authorized link"<sup>27</sup>.

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<sup>26</sup> [www.europa.eu.int](http://www.europa.eu.int)

<sup>27</sup> According to Plaza Penades, Javier in his work Intellectual Property and Society.

Let's observe as this disposition states different assumptions: 1) that the links would be responsible for foreign facts; 2) they would lay the foundations for the indemnity of the damage due to a not authorized or agreed link making emphasis on the service provider's capacity of economic response, which would leave in advantage those service providers of lower capacity of economic response.

## **Chapter IV**

**Solutions found in the comparative law in relation with the contention of the illicit acts and the role played by the Internet services providers (ISPs).**

After learning how the ISPs play a fundamental role in the attainment or not of the crimes related to the violation of the copyright, analyzing now the different positions adopted in those countries that have legislated about this aspect. Hereby:

**In The United States of America** with its new juridical creation in 1998, *Digital Millennium Copyright Act (DMCA)*, appear normative solutions to exempt from responsibility the ISPs for the infractions of any kind committed by their users:

- The DMCA only exempts the ISPs of responsibility for the infractions of intellectual property. Nevertheless in The United States, other laws complete the partial exemption of ISPs' responsibility that the DMCA does, for being this a law of modification of the Copyright Act, it is necessary to mention the Telecommunications Decency Act of 1996 which encloses the clause of the Good Samaritan.
- The DMCA only covers the exemption of the responsibility for " damages " in other words, the economic compensation.
- The DMCA has its bases in the scenarios known as safe-harbors, in which if some concrete conditions are fulfilled, the ISPs will not be responsible for the infractions that the users commit, and nevertheless the responsibility of every ISP will be established according to the general norms of responsibility through the doctrine of secondary liability.

The ISP will be able to benefit from exemptions of mere transmission and caching when its participation is merely technical, automatic and of passive nature so that the ISP has neither knowledge nor control on the transmitted or stored information. This presupposes no modification of the transmitted information and no interference with the established mechanisms in origin by the ISPs; and that they act quickly to remove the data or to avoid the access when they have the knowledge that the data has been removed or its access has been disabled in origin in the case of caching, or that a court or administrative authority has ordered arranged its removal or access. In general the most important regulations to benefit from the limitations of the responsibility established in the norm would be: 1) to

have adopted and implemented reasonably, as well as informed to the subscribers, a policy about the termination of the contract when it is a matter of repeat violation and 2) not to interfere and comply with the standard technical measures that are used by the holders of copyright to identify or to protect their works, when they have been agreed on both part or are available to any person and do not imply costs or substantial complications for the service providers. "SAFE HARBORS ". In the United States this Safe Harbors establish four situations in which the activities of the service providers on line remain exempt from the obligation to repair the damages caused as consequence of the infractions to the copyright. These situations are: the mere transmission of contents; the temporary storage in caching; the storage of data or hosting of sites or web pages by third parties and the use of tools to locate information (search engines) where the users can access contents in infraction. In relation with each of these activities, the respective dispositions establish the conditions that the on line service providers must comply with, in order to be able to avoid the obligation to repair the caused damages as a consequence of the infraction to the Copyright committed by the users.<sup>28</sup>

"The central aim was in finding a suitable balance of interests that would protect the copyright in Internet without slowing down its right .... There are four aspects to point out in the *Digital Millennium Copyright Act (DMCA)* such as: the definition of service provider on line, what concrete activities are covered by the law, the conditions to enjoy the exemption of responsibility and the procedures for the notification and removal of pirate material."<sup>29</sup>

**In the European Community** the intellectual property is represented by the geographical place where the initial norms have been elaborated allowing the development of future laws, agreements, treaties relating to the need to protect the intellectual production, as the world's cultural heritage. According to the teacher Rodrigo Bercovitz " the European community has followed a unification policy of

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<sup>28</sup> Delia Lipszyc.2005. " "RESPONSABILIDAD DE LOS PROVEEDORES DE SERVICIOS EN LÍNEA POR LAS INFRACCIONES DEL DERECHO DE AUTOR Y DERECHOS CONEXOS EN EL ENTORNO DIGITAL: ANÁLISIS DE LA JURISPRUDENCIA INTERNACIONAL"

<sup>29</sup> Garrote Ignacio, La Responsabilidad Civil Extracontractual de los Prestadores de Servicios en Línea por Infracciones de los Derechos de Autor y conexos.

the intellectual property in the Member Countries, with the purpose of overcoming the obstacles of the legislative diversity on the matter about the unit of the internal home market. This unification policy is applied with the objective of strengthening the protection of the rights derived from the intellectual property ”<sup>30</sup>.

With this, another objective is to avoid the normative contradictions when we face the imminent disparity of presumptions to be regulated in the different States.

These regulations are made by the Directives, passed by the European Parliament and by the Council, produced in diverse areas of the intellectual property; then every Member State transposes to its internal right the Directive with the intention of harmonizing through the adjustment of its norms, the positive regulation on the matter.

According to the demands of a specific regulation of the copyright in the network, the Directive dictates the Directive 2000/31 CE of the European Parliament and of the Council on June 8, 2.000, which regulates the aspects related to the electronic commerce. But in the Articles 12 to 15 it states the responsibility of the intermediary Service Providers (previously developed), which affects directly the diffusion of the intellectual property through IT networks (Internet); according to which the principle that informs the Directive is in attributing responsibility to them for the materials that transmit or upload in their web sites, except that they prove that the conditions established in the Directive’s text for exemptions have been materialized . ; being completed by the Directive of 2001/29 CE of the European Parliament and of the Council on May 22, 2001 about the harmonization of certain aspects of copyright and related rights to the copyright in the company of the information .

This directive materializes the intentions stated in the agreements of the international organizations for the protection of the intellectual production as cultural manifestation and as a demand for the effective application of the

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<sup>30</sup> Rodrigo Bercovitz. Introducción a la Propiedad Intelectual.

regulation of one of the freedoms of trading such as the Property Right (and in this one, the intellectual property).

In consequence, it establishes a harmonized juridical atmosphere and a greater level of juridical security for the intellectual property's protection which brings an increase of the investment activity, in all the sectors: creation of works, exploitation of technologies, infrastructure in the network, increase in the competitiveness; all this inside the challenge of the new technologies.

In the Directive 13 there is the need of coherent application of technological measures, between the Member States of the Community to protect not only the works but also the presentations of the services on line.<sup>31</sup> The most important article, as well as the most debated one of this directive is the number 6, this article prohibits the action of skipping the anti-copies protection systems, as well as the distribution of tools and technologies for it. The main reason of the resistance against this directive is the fact that there is no reference to the Intellectual property's limitations currently existing, as the right to have private copies. Also, the protection is not limited explicitly to the intellectual property. This way, the industry of the leisure can dictate now the use beyond the scope of any system of regulation of the intellectual property. In the practice, this has generated protected CDs that cannot be listened in the car's stereo system or in the computer, as well as DVDs regionally codified that do not work in stereo systems of other countries. In addition, though the introduction of the directive mentions specifically that the protection should not stop the investigation in cryptography, it is not mentioned in the law in strict sense. Many important details are not specified in the directive, and, as result, the Member States have a significant freedom in certain aspects of its implementation.

In Spain, the Law 34/2002, of July 11, of services of information and of electronic Trade, which was transposed by the Directive 2000/31/CE to the above mentioned classification, it establishes in its article 16, the concurrence of the same two

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<sup>31</sup> Fernández, Horacio. Internet: Su Problemática Jurídica.



requirements - effective knowledge of the illegality and inobservance of the removal duty - to attribute civil responsibility to a data-uploading service provider :

1. The service providers of consistent intermediation in sheltering information provided by this service's recipient will not be responsible for the information stored by the recipient's request, providing that:

- a) Do not have effective knowledge of whether the activity or the stored information is illicit or that it affects a third party's goods or rights capable of indemnification, or
- b) If they have it, act with diligence to remove the data or to make the access impossible to it.

" It will be understood that the service provider has the effective knowledge referred in the paragraph a) when a competent entity has declared the data's illegality, ordered its removal or disabled the access to it, or that the existence of a violation has been declared, and the provider knew the corresponding resolution, without affecting the procedures of detection and removal of contents that the providers apply thanks to voluntary agreements and other means of effective knowledge that could be established"<sup>32</sup>.

The effective knowledge of the illegality of the stored content by an ISP constitutes, undoubtedly, the main element that results in the ISP's civil responsibility. Nevertheless, it is not about an element that could be established automatically by a judge and the minor jurisprudence has not been uniform in its identification.

The article 16.1.2 of the Law 34/2002 establishes some guidelines of concretion but it does not restrict the possibility of new means to determine the existence of effective knowledge:

- a) Knowledge of a judicial or administrative resolution that declares the existence of a violation or the contents' illegality.
- b) Knowledge from the procedures of the contents' detection and removal adopted voluntarily by an ISP.
- c) Other means of effective knowledge that could be established.

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<sup>32</sup> Rubí P. Antoni, Derecho al honor online y responsabilidad civil de los ISPs. Oct. 2010

Jurisprudence of the Supreme Court (SPAIN)

**2.1. STS, 1<sup>a</sup>, of 9.12.2009 (RJ 2010, 131; MP: Jose Ramon Ferrándiz Gabriel).  
SGAE and Teddy Bautista c. Internauts' Association.**

" At the beginning of 2000, one group of internauts created a web page to criticize the ways used by the General Society of Authors and Editors (GSAE) in defense of the rights of their partners. The critique remained, however, exposed by the insult: the authors of the contents were called themselves "Really infuriated with the GSAE", the name of domain that they registered to spread them was [www.putasgae.com](http://www.putasgae.com) and in such link there were expressions included calling the GSAE " a band of unemployed persons ", "thieves", " opportunist leeches ", " authors of would-be fascist roundups ", " hitmen ", " mafia gangs " or " male prostitutes ", among others.

The GSAE filed then a lawsuit for the cancellation of the mentioned name of domain at the WIPO' s Center of Arbitration and Mediation, which was estimated by Decision on December 18, 2002 (Case Number D2002-0953). The Center agreed on the existence of a risk of confusion between the name of domain and the brands owned by the GSAE, as well as a malicious use by the defendants. Particularly, the Center concluded that the offense to the honor of the GSAE was more than clear: " the use of the word "prostitute" in front of the word "sgae" is done with a clear sense of insult and aggressive towards the Plaintiff and towards the activity developed by them. There cannot be justification in the use of such a pejorative term, that sounds badly, insulting and abject as previously mentioned, and even less when such a use is done in a context in which clearly one tries to insult the activity developed by the Plaintiff or by the members, since it is possible to verify just by visiting the corresponding web page, [...] the Defendant cannot protect his or her behavior in the exercise of the fundamental rights of freedom of speech and in the right to receive information ".

After the elimination of the domain [www.putasgae.com](http://www.putasgae.com), the Internauts' Association uploaded, under the sub-domain <http://antisgae.internautas.org>, a mirror of the website in its own web site and announced publicly its action. It indicated Textually: " From now on the Internauts' Association offers organizational and legal coverage

and diffusion among its partners and fans in its web site to this platform ". The GSAE and the president of its Council of direction, Eduardo (Teddy) BAUTISTA GARCÍA, sued the Internauts' Association for interference in the right to the honor and requested the cessation of the insults and a compensation of 18.000 Euros for each of the actors.

The JPI number 42 of Madrid in decision on June 15, 2005 entered the lawsuit. Interposed an appeal by the defendants, the AP of Madrid, Section 19<sup>a</sup> confirmed in decisión on February 6, 2006 (AC 2006, 188) decided by the courtroom

The Internauts' Association appealed the court's decision arguing the infraction of the articles 18 and 20 of the Constitution and the article 16 of the Law 34/2002. For the appellant, the concept of " effective knowledge " had to be understood restrictively and reach only those presumptions in which an ISP had known a resolution that was declaring the contents' illegality, arranging their removal, disabling the access to them or solving the existence of a damage.

Such interpretation for the Court, "reduces unjustifiably the possibilities of obtaining the " effective knowledge " of the stored contents' illegality and extends correlatively the area of the exemption " (FD 4<sup>o</sup>).

The Supreme Court states that a set of circumstances can serve to accredit the existence of effective knowledge (*res ipsa loquitur*) and, this way, it avoids to enter the discussion of whether the Decision of The WIPO's Center of Arbitration and Mediation might constitute a resolution of a " competent institution ", in accordance with the article 16.1 of the Law 34/2002. The Court makes its the words of the Provincial Hearing, in which the effective knowledge can be obtained " from suitable facts or circumstances to make possible, though mediately or for logical inferences within the reach for anyone, an effective apprehension of the corresponding reality " (FD 4<sup>o</sup>).

In this respect, for the Court, the effective knowledge was evident: " such title [putasgae], for its insulting characteristic, was a suitable mean - *ex re ipsa* - to reveal, together with the competing circumstances - especially the reality of a conflict between such contents' provider and the management entity of intellectual

property rights identified as the plaintiff, known by the appellant-, the insulting tenor of the data uploaded " (FD 4 0)."

Investigating the situation of Spain, we find that this country is ahead of the European countries when talking about piracy , and that already The United States is considered the " paradise of the piracy ", which has caused a constant movement of the affected industries demanding from the National Government the implementation of laws that protect them from that situation, a law similar to the French ((Law hadopi) (three notifications and disconnection), for that reason it is hoped that at any time the negotiation will be re-stimulated and that the current regulation will be modified.

## **FRANCE**

The law 2000/19, of July 1, 2000, in the chapter VI, indicates that " the natural or moral people whose activity is to offer an access to the on line communication services different from the private mail, are forced to inform on one hand to their subscribers the existence of technical means that allow the restriction to the access of those services or the possibility of selecting them, as well as also proposing them at least one of them ".<sup>33</sup>

The predominant jurisprudence, in different Member States of the European Union seems to favor the ISPs' exclusion of responsibility, while there has not been proof of notification of the transmission to them, in their means, of illicit contents.

In the French case the cases of the ISPs' civil responsibility have been decided using the articles 1382 and 1383 of the Civil Code. In Lacoste, the Court of the Great Instance of the population of Nanterre " ... made a decision against an ISP assigning a non-contractual responsibility to him for omission of quasi-publishing duties, indicating that though the ISP did not have an obligation of " inspecting deeply and meticulously the content of the sites ... (there had to be) reasonable

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<sup>33</sup> Ob. cit.

measures that a careful professional would put into practice to exclude from his or her server the sites where the illicit act is apparent ”.<sup>34</sup>

In another case, *Perathoner v. Pomier*, " the court came to the conclusion that in order to be exempted from any responsibility for the commission of the infractions to their subscribers' copyright, the ISP should: 1. Inform the subscribers about the risks of violation of copyright in the Network and 2. Remove quickly the access to the web sites once the ISP is informed that these were infringing the copyright.<sup>35</sup>

Finally in *Cons. P. et Société Rever c/ Monsieur G. et Altern B.* the Court of the Great Instance of Paris decided that " the sued ISP could not have ignored that the subscriber's name of the domain and the Internet address were reproductions of a famous commercial brand "Calimero" and, therefore, it should have refused to give the subscriber access. By providing access to the subscriber it meant allowing him or her to commit a violation to the copyright."<sup>36</sup>

**The Law Hadopi** was born in France and is the one that authorizes a public entity, High Authority of Protection of Laws on Internet (in French Hadopi), to identify the users who download information, to fine them or eliminate their connection to Internet. This law works basically the following way: the government creates a commission or agency (Hadopi) made up of nine members who send three warnings to the user of an ISP so such user respects the legal obligations related to the copyright when the user downloads protected files without paying, before the suspension of the access to Internet during periods that can go from two months up to one year. During the suspension the subscriber will have to continue paying the rate of connection to the ISP.<sup>37</sup>

This was the law's first proposal, nevertheless the Constitutional Council considered the need to censure it due to the law's most controversial part, where it was put in the hands of a high authority or commission and without a judge's

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<sup>34</sup> de la Maza G, Iñigo. Responsabilidad de los proveedores de los servicios de Internet por infracciones de los derechos de autor en [www.fundacionfueyo.com](http://www.fundacionfueyo.com)

<sup>35</sup> Ob. cit.

<sup>36</sup> Ob. cit.

<sup>37</sup> [www.bitelia.com](http://www.bitelia.com)

approval, the legal authority to suspend the Internet service of the supposed offenders, the current version of this law contemplates fines between 1.500 and 3.750 Euros, in the new version of the same a new amendment was added which states that any suspicious or chased person could be listened by the High authority with the presence of an attorney.

As for the law's procedure, the Hadopi will be the one in charge of sending to an e-mail to the infractor warning him or her about his or her behavior and then a registered letter in case of repeated violation, but it will not be able to suspend the access to Internet because the Constitutional French Council has passed that only a judge has legal authority for it.

In case the internaut happens to be a counterfeiter he/she would be exposed to fines between 300.000 Euros and two years of jail, nevertheless the judge has the legal authority to declare a complementary punishment and suspend for a year maximum the access to Internet.

Another amendment establishes a fine if the subscriber allows a third party to use his/her access to Internet to make not authorized downloads. The holder might have to pay up to 1.500 Euros and eventually be deprived of his/her access to the Network during a maximum period of one month. To avoid this situation, the holder of the credit will be able to install a system in his/her computer so that the entry to certain pages requires an access code, mechanism that the own operators might offer. In case the access is eliminated, the provider will have 15 days to execute the judicial order and a few days before the reestablishment of the service the provider will also have to warn the High Authority to eliminate the tests of the dossier of the accused internaut and to avoid the creation of a black list of registered internauts. In order words, the notification of the compliance stays in the telecoms' hands.

In case the infractor to whom the access has been eliminated goes to another Internet operator to contract the service again, he/she will face a fine of 3.750 Euros. Another innovation introduced is the request for the providers to inform their

subscribers about the risks they have if they make not allowed downloads of protected contents.<sup>38</sup>

**Law of the United Kingdom:** For this country the ISP's responsibility would be determined by the one that is capable of supporting the costs that mean the damages, which in this case is the intermediary, since this is a good distributor of costs due to the relation with the system's operators. Also the Anglo-Saxon legislation is based on the position of the ISP to avoid the damage and for this the companies must be stimulated, we think by the regulatory entity, so they invest in technology for a more effective control and that way avoid the damages, otherwise they would be guilty for negligence.

According to the United Kingdom's legislation the owners of the rights will be able to ask for a judicial order to access the repeat offenders' names and addresses.

Also a project of Labor law from the government was discussed to protect the intellectual property, which includes the possibility of disconnecting the pirates from the network and that the courts could close violating sites. The ISPs will be forced to warn the offenders about their crime. This law had its detractors and an amendment was proposed which changed the governmental proposal about closing pirate web pages by the authorities for another formula that would force them to obtain a judicial order first.

Nowadays in Great Britain the Minister in charge of the intellectual property, Pascal Lamy, works on the creation of the Right's Agency to regulate the infractions in the topic. Currently, There are no sanctions.<sup>39</sup>

**German Law:** In Germany the law of July 22, 1997 is considered to be the pioneer in the Internet regulation and is known as the German Law of Multimedia. In the first section of the mentioned law the ISP is responsible for the contents of public use and what this law does is to refer to the general norms of responsibility, which are those contained in the Civil Code. In the second section of the above-

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<sup>38</sup> <http://postgrado.sapi.gob.ve>

<sup>39</sup> Machicado, Javier. ISP, Derechos de Autor y Acceso a la Información.

mentioned law the ISP will only be responsible for the content of a third party, only if when available to the public it has had knowledge of the content and could have blocked that information, in other words, his/her fault will be directly proportional to the passive attitude that the ISP could assume and that continues allowing the access to that information. In the third section the ISPs are exempt from responsibility when these are simple access providers. The fourth section forces the ISPs to block the illicit contents, according to the laws that regulate the subject, now, this will be effective if the ISP had knowledge of the illicit content and if the blockade is possible and awaited. It refers to the exonerations of the ISPs' responsibility, for violations of copyright called "Safe Harbors" providing that the conditions mentioned before are fulfilled. In relation to the ISP services it establishes the following ones: " a) the content providers are fully responsible for the contents; b)The Hosting providers will be responsible only if they have knowledge of the contents according to the technological possibilities available that allow them to have a control and c) the access providers lack responsibility."<sup>40</sup> This profile and trend is followed then in 1998 by the *Digital Millennium Copyright Act (DMCA)*.

Germany voted for a law against the illegal download on Internet in 2008. According to the German Federation of the Musical Industry the implantation of the law has made decrease in 50 % the cases of violation to the copyright. Every internaut caught in flagrancy committing a crime is in risk of facing time in prison or a lawsuit proportional to his/her income. The law forces the ISP to deliver the suspects' information of illegal downloads to the authorities in order to take them to justice.<sup>41</sup>

In Brussels on March 04, 2010 the German government announced that they will not accept any international treaty to attack the piracy that includes the possibility of blocking the access of the Internet users. The position of Berlin increases the growing pressure on Brussels, Washington and the rest of the capitals have

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<sup>40</sup> Rolero, Graciela. Internet Service Providers in [www.robertexto.com](http://www.robertexto.com)

<sup>41</sup> Machicado, Javier. ISP, Copyright and Access to the Information.



negotiated for three years the ACTA (Anti-Counterfeiting Trade Agreement), in order to clarify both the approach of the future agreement and the compatibility of the measures established in the national legislations about the right to the information, to the freedom of speech and to the privacy.

In Germany, the jurisprudence is in favor of the ISP, the simple functioning of the search engine does not assign responsibility to the ISP since it does not have the obligation to verify if the sold keyword infringes or not a brand, unless the holder of the brand informs about the existence of a violation, this warning can be through an advertisement such as *keyword selling*. And the ISP refuses to disable it <sup>42</sup>.

**In Chile:** The protection of the intellectual property in Chile has its constitutional foundation in the Art.19 Ord. 25, of the political constitution of the Republic of Chile, which states: " the constitution assures all the citizens the freedom of creating and spreading the arts, as well as the copyright on the intellectual and artistic creations of any kind, for the length of time that indicates which will not be shorter than the author's life. The copyright understands the property of the works and other rights as the paternity, edition and the integrity of the work."

This rule is developed in the Law 17336 about Intellectual Property, assuring the author the right on his/her works. Classifying two types of patrimonial rights:

- The right of public execution that includes the copyright and the connected rights.
- The phenomechanic or reproduction rights.

These rights have the same reach and conceptualization that in other legislations. Also, the law develops the moral rights attributed to the author.

We must remember that during the rounds of negotiation of the Treaty of Free Trade Chile and The United States, the ISPs' responsibility was explained in the chapter 17 of the agreement mentioned above, and it was undoubtedly one of the most difficult points in the discussion, due to the fact that Chile would assume the commitment in this topic and it would force it to make a series of reforms in its legal

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<sup>42</sup> Vid. *Nemetschek versus Google Deutschland*.

internal regime, since the United States established as a priority topic the intellectual property due to the extreme importance that this topic has been obtaining worldwide, especially for its regulation or for the lack of it. In this chapter effective measures were established to protect the interests of the cultural and technological industry.

In the chapter 17 of the Treaty of Free Trade of Chile and The United States, the topic of the copyright was discussed with the purpose of clarifying the conflict that existed between the urgent and necessary obligation to protect the authors' works opposite to the right of every person to have access to the culture and to the education. In other words, how to balance these two rights without causing damage to any of them.

Today the topic of the intellectual property has been connected necessarily with the topic of new forms of technology and ends in the legal responsibility that is originated in these topics; this way some norms have been established that relate to the Internet use and to the service providers and their legal responsibility for the content of their pages or for the downloads without authorization. For this the Treaty of Free Trade sanctions "the infraction of technological measures that protect the illegal access to protected material by the copyright"<sup>43</sup>

These negotiations in the commented Treaty of Free Trade included the creators of the literary and artistic works (inside these we find the software), regarding the right that these have to allow or prevent the diverse forms of using the works. Spreading the protection to the interpreters, performers and record and film producers.

This agreement allows Chile to comply with its international commitments especially those that were assumed through the World Trade Organization (WTO), specifically the established ones by the ADPIC. And this way this assures the Chilean artists an effective exercise of their rights.

With these modifications it will be possible for Chile to reach a protection level of the copyright similar to the United States, then the door would be opened for the

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<sup>43</sup> [www.es.scribel.com](http://www.es.scribel.com)

foreign investments and the construction of a center of artistic and cultural production.

This regime will allow the Chilean artists to claim in the United States the utilization of their not authorized works.

In the chapter 17, in its Article. 17. 23., it refers to the limitation of the responsibilities of the Internet service providers, a very debated topic, since an agreement does not exist in the national legislations of the different countries about the ISPs legal responsibility. With regard to this topic, Renato Jijena Leiva thinks " that it is a mistake and imports a measure of censorship the sanction imposed a priori to the connectivity Service providers or telematic access to Internet, since it is assumed that the Internet service provider could control directly the total of the contents of information that circulate minute after minute in their servers. Renato Jijena indicates in this matter the fact that those who decide freely what web site to visit or not are the clients."<sup>44</sup>

For the lecturer mentioned before, the topic of attributing the responsibility to the ISP is transcendental, for providing the downloading of information illegally and for that reason it is important to delimit that is understood for " facilitating the distribution " since it is likely that if improvements are introduced in the service or its coverage is extended, this could be interpreted from a judicial point of view as facilitation attempts. This way, there is not a clear and defined way in the Chilean Law and the Jurisprudence " the degree of responsibility and the duties of diligence that can be demanded to the Internet service providers, this is established in the court's final decision in the case Entel, which as we know it was one of the many opinions about the topic."<sup>45</sup>

In the same order of ideas, Waldo Roberto Sobrino expresses that a double analysis must be made:

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<sup>44</sup> [www.es.scribel.com](http://www.es.scribel.com)

<sup>45</sup> [www.es.scribel.com](http://www.es.scribel.com)

The first one towards the Internet service provider's responsibility for including the information, since we understand that the information of the web site is public thanks to the executives of the page's acknowledgment. This forms what this author calls the objective responsibility that relates to the own or direct contents since " the page's executives are the authors of the published information, or such information was elaborated by their company's personnel",<sup>46</sup> as well as to the contents of indirect or third parties, though the web site's executives are not the authors, they had to analyze and study the content.

The second one of is about the Responsibility for the content of the information, in this case it will be considered to be a subjective Responsibility, this author says that nowadays we all are like a species of universal media and that the same jurisprudential interpretation about freedom of press must be applied to the corporations, multimedia and to the citizens.

Waldo Roberto Sobrino expresses that " the freedom of speech is a fundamental right guaranteed by many different laws, such as the case of the German Fundamental Republic's Constitution in its article 5.1. And equally that the San Jose Pact of Costa Rica, in its article 13, determines that every person has the right to the freedom of thought and speech, and this right understands the freedom of searching, of receiving, of spreading information and ideas of any nature, without consideration of borders, orally, written or printed or artistic or through any other way of choice "<sup>47</sup>.

Now, the Treaty of Free trade with The United States establishes in its article 17.11. 23 regarding the Limitation of the Internet service providers' Responsibility the following:

"Every part will establish in this article":

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<sup>46</sup> [www.es.scribel.com](http://www.es.scribel.com)

<sup>47</sup> [www.es.scribel.com](http://www.es.scribel.com)

a) **Legal incentives** in order for the service providers to cooperate with the copyright holders to dissuade of the not authorized storage and transmission of materials protected by the copyright.

b) **Limitations** in its legislation related to the reach of the available resources against the service providers for infractions to the copyright that the providers do not control, initiate or direct and that happen through systems or networks controlled or operated by them or in their representation <sup>48</sup>

1.- With regard to the limitations, they are applied to the following ISP's functions:

a) Transmission, routing or supply of connections for the material without modifying its content.

b) Temporary storage, also known as caching carried out through an automatic process.

c) Storage requested by a user of material that is stored in a controlled system or network or operated by or for the provider, including e-mails and their attached files stored in the provider's server, and web pages stored in the providers' servers; and

d) Storage by request of a user of material who lodges at a system or network controlled or produced for or for the supplier, included e-mails and his attached files stored in the servant of the supplier, and web pages lodged at the servant of the supplier, and web pages lodged at the servant of the supplier; and.

2.- As for the applicability of the responsibility's limitations the Treaty of Free Trade establishes that they will proceed providing that the ISP:

a) Adopts and implements in a reasonable way a policy that stipulates that in appropriate circumstances, the repeat violators' accounts will be eliminated; a part will be able to establish in its internal legislation that " implements in a reasonable way " implying among other things, that the above mentioned policy is constantly available to its system or network's users.

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<sup>48</sup> [www.es.scribel.com](http://www.es.scribel.com)

b) Adapts and does not interfere with standard technical measures that legally protect and identify material protected by the copyright.

c) Providing that do not impose significant costs to the ISPs or significant costs to their systems or networks. This will not depend on the fact that the service provider has controls on his/her service, or that firmly looks for facts that indicate criminal activity.

3.- In relation to the applicability of the limitations related to the Caching, the Treaty of Free Trade establishes that the ISP will have to:

a) Comply with the conditions of users' access and rules related to the update of the stored material imposed by the material's provider.

b) It will also have to comply with the requirement of not modifying the content in the transmission to other users.

c) It will have to remove or disable quickly the access to the stored material that has been removed or to the material whose access has been disabled in its original site, when it receives an effective notification of a supposed infraction, according to the subparagraph f of the article.17.11.23 of the Treaty of Free Trade .

4.- With regard to the applicability in the limitations to functions of material storage and "link" according to the Treaty of Free Trade, the ISPs will have to comply with these requirements:

a) The Internet Service Providing company does not receive economic benefit directly, attributable to the illegal activity, in circumstances in which it has the right and the capacity to control the mentioned activity.

b) The Internet Service providing company will have to remove or disable quickly the access to the material that is stored in its system or network at the moment of obtaining effective knowledge of the infraction or when finding out about facts or circumstances from which the infraction was becoming evident, even through

effective notifications of supposed infraction according to the subparagraph f of the article 17.11.23 of the Treaty of Free Trade in Chile/The United States.

c) The Internet Service providing company will have to designate a representative to receive the mentioned notifications.

5.- For the process of notification and naming of functions, the Treaty of Free Trade orders that every part will establish proper procedures through an open and transparent session established in its internal legislation, for effective notifications of supposed infractions and against effective notifications on the part of those people whose material was removed or disabled by mistake or erroneous identification.

The notifications will have to be handed in on a written document, signed physically or electronically by a person who represents the holder of the material's copyright. This document must contain sufficient information in order for the Internet service provider to be capable of identifying and locating the material that the claimant invokes with good faith that he/she is infringing.

The communication in the document must contain contact information with the claimant in order to avoid the false notifications that could only make the ISPs incur on unnecessary expenses, for such possibility the notification of infractions is subject to penal sanctions for the one that hands in a notification without being the authorized representative of the material's copyright's holder.

In addition, the Treaty of Free Trade establishes the called Counter notifications, these must contain the same information with regard to a notification, the against notification in addition must contain a declaration of submission to the jurisdiction of the party's courts.

Besides the penal sanctions that will punish those who provide fake information using the notifications, the Treaty of Free Trade separately establishes that every part will establish pecuniary indemnifications against any person who makes a notification or against a notification with the knowledge of false information, that

causes damages to any interested part as assuming that the service provider has based his/her actions on this information.

#### 6.- Limitation of Responsibility for the Internet service provider.

“If the service provider removes or disables, in good faith, the access to material based on an apparent or supposed infraction he/she will be exempt from responsibility before any claim, providing that, in the case certain material is stored in his/her system or network, the service provider adopts with no delay, the necessary actions to notify the material provider that such action has been taken, and if the provider presents an effective counter notification and it is submitted to the jurisdiction in a process for infraction, the service provider will have to restore the service and the material on line, unless the first person who made the notification seeks to obtain a judicial reparation within a reasonable period of time.”<sup>49</sup>

In 2007 the National Congress of Chile received a project of reform to this law, where they were considering to establish more effective procedures for the presumption of the crime; to rationalize the prison penalties versus the infractions, to establish a system of limitation of the Internet service providers' responsibility, to incorporate a wide catalogue of exceptions and limitations that would benefit the libraries, educational establishments and the general public, and finally to establish a system of resolution of conflicts in the establishment of rates by the entities of copyright's collective management.

This project of the law's reform caused a lot of polemic in different organisms and entities both public and private, becoming a great national discussion, and finally on January 13, 2010 it was approved by the National Congress of Chile in plenary session, becoming effective on May 4 of the same year under the number 20435.

One of the most emblematic cases in the above mentioned country was Orlando Fuentes's case vs. ENTEL.

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<sup>49</sup> [www.es.scribel.com](http://www.es.scribel.com)



On August 6, 1999 the plaintiff Orlando Fuentes interposed a legal protection measure against the company ENTEL S.A. due to the fact that in the section of products and services of his WEB there was a banner with sexual offers in which his 17-year-old daughter appeared as the sender. Due to obscene and perverted calls, the family was forced to suspend the telephone service.

ENTEL S.A defends itself claiming that it did not have any responsibility about the mentioned messages because they were sent from a personal computer that belonged to a user, and that the section of its WEB's classified ads was administered by an external company so it was an absolute responsibility of the users since each one could publish or check the ads in simple form.

Nevertheless, regarding the topic of the ISPs' responsibility, the final court's sentence established that:

"....In the publication and spreading of a web site of advertisement or message with an illicit or harmful content the responsibility is also for the access and hosting of the respective web page's provider, when having the knowledge of the illicit activity that is committed by his/her subscribers and does not eliminate the information or makes the access impossible to them and even if he/she has promoted that access. "

Somehow, it can be conclude that the responsibility of the ISP is not related to the topic of the exceptions and limitations of the copyright, on the contrary it can be conclude that the regime of exceptions and limitations is related to the open and free uses and with the legal licenses, topic that with the only exception of the case of the caching systems is not linked to ISP's responsibilities.

Specific Cases of the ISP's Responsibility.

One of the cases of the ISPs' responsibility and the hosting service providers, is when a victimized person lets them know that in some sites, an antijudicial or slanderous fact is taking place.

In the case the Information providers certain obligations will be given to the responsibility, only when the author of the information is also responsible.

In this case the author is responsible, because in spite of being correctly warned of such circumstance it does not do anything to prevent the mentioned content from injuring the rights and interests of third parties.

"This was present in the so called case Yahoo, the decision is submitted to judicial decision. The District attorney of USA Bernard Fos requests a judge to name independent experts to investigate the veracity of the facts invoked by Yahoo, this is, the inability to block the access to the pages with Nazi elements by the French citizens. The Yahoo's attorney, Christopher Pecnard said to the Court " with today's technology it is impossible to find a solution without destroying the quality of the offered service ". Defending attorneys of users' rights answered that if Yahoo cannot block, the company will have to avoid that these pages are still active "<sup>50</sup>.

After promulgating the Law of Intellectual Property (Law Number 20.435 which modifies the law 17.336) Chile became the first country in Latin America that regulated the responsibility of the ISPs, thus, it also complied with one of the commitments assumed through the Free Trade Treaty with the United States. The new law reinforces likewise, the instruments and the sanctions that can be applied to begin judicial actions against the piracy of the copyright. They clarify and extend the exceptions to the copyright, as the possibility of mentioning others authors' works and of introducing new ones that facilitate the access to the works, specially for the handicapped people. In the new law a more global mechanism is established to fix rates charged by the entities of collective management.

“According to the modified Law of Intellectual Property, the Internet service providers are exempt from responsibility if they eliminate the illegal contents as soon as they have knowledge of it. Nevertheless, to come to this conclusion it is necessary to determine from a juridical point of view when it

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<sup>50</sup> [www.es.scribel.com](http://www.es.scribel.com)

is considered that the ISPs know the existence of the illegal contents. With the new law, it is considered that the ISPs know about the existence of the contents that they transmit or host as soon as they receive a judicial notification in that matter. Many authors and holders of rights are not sure that it is enough to protect their interests and they would have preferred a system of extrajudicial notifications between the holders of rights and the ISPs, similar to the one applied in the United States, because it would be faster than the judicial ones.”<sup>51</sup>

During the last years the Ibero-American region has showed a very important growth in connections to Internet provided by the ISPs. This involves the strengthening of the society of the information understood as one in which the activities of the creation, distribution and manipulation of the information and the creative contents form a substantial part of the cultural and economic activities of the individuals. From the perspective of the globalized economy the society of the information offers the network the power of becoming an efficient diffuser of creations and knowledge that are materialized in economic development and social transformation.

In Latin America an evident relation exists between the signing of the WIPO's Agreements and the signing of Agreements of Free Trade with The United States, country that sent the Digital Millennium Copyright Act (DMCA), as a legislative instrument destined to implement the obligations that arose for the signing of WIPO's agreements by this country. The countries that have this agreement with The United States are Colombia, Costa Rica, Chile, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Peru.

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<sup>51</sup> [www.wipo.int](http://www.wipo.int) WIPO Magazine June 2010

## **TREATY OF FREE TRADE BETWEEN DOMINICAN REPUBLIC, CENTRAL AMERICA AND THE UNITED STATES. (CAFTA)**

It is about the creation of a free zone of trade between signatory countries of the above mentioned treaty. This one has brought as consequence the benefit for 80 % of Central American products that gives the Initiative of the Caribbean Basin (ICC), investing approximately 30.000 million dollars.

This Treaty consists of 22 chapters divided in Articles. The negotiation, signature and ratification of the treaty were made depending on every State, according to their characteristics and political context, begins in 2003 for all the countries except for the Dominican Republic, but it was in 2004 when the text was accepted by the different countries and in 2006 it was applied in effect.

The foundation of the Treaty of Free Trade consists on the dispositions relating to the commercial treatment, approaching important topics as the rates of tariff, customs movements, origin of the products and internal rules for the traffic of goods. In addition in CAFTA legislate the aspects related to hygienic production and protection to the environment, with regard to the Laws of Intellectual Property and public and private investment, besides the labor legislation in all the States of the zone CAFTA. We have to mention in addition that it specifies the mechanisms to solve controversies and the establishment of norms in mutual agreement.

This agreement creates the possibility of extending the capacity of export of the companies of the signatory countries and of producing this way the economic activation with the opening of new companies bringing as a benefit the employment of a higher quantity of workforce and for instance of new job openings, increasing this way the productivity of the companies.

The commercial agreement becomes a wide corridor to improve the trade which is what the nations need for their development. But it brings a great challenge of making efforts to produce with the highest standards of quality, to increase the competitiveness and to provide major added quality to the products that are exported to the nations. This agreement turns into a bridge for the Central

American regions strengthening the integration and allowing to accelerate the economic progress and the reinforcement of the democracy. Nevertheless the results have not been so overwhelming and progressive as hoped. The balance is different in every country so much because in each one the time of existence changes as for the concrete results, example of it is Dominican Republic whose relation was balanced until 2004 then in 2005 an increase of the imports is obvious since certainly the DR-CAFTA increases the possibilities of importing more North American products, in 2008 and 2009 this trend goes down.

The indicators of commercial opening, show a Dominican Republic more dependent on the variations of the international trade, since in negotiations of goods (exports and imports) it has an index of 64 % in 2008 and there is a well-known decrease of the exports while the imports increase. The United States buys 95 % of the products of the Dominican Republic, needing a strategy to do business with Central America. In 2007 with the entry in force of the interregional agreements the region increased more than 80 % of the exports, this was kept until 2008 when it changed. The flow of investment of the Dominican Republic comes from different regions and does not come precisely from the countries of the DR-CAFTA.

The expectation at the moment of the negotiations with Central America was that the Dominican economy, had a similar development to those of these countries that would allow it to compete profitably and to be prepared for future negotiations with countries of bigger economies. Nevertheless, the problem seems to take root not in the Treaty of Free Trade but in the lack of preparation of the Dominican Republic to benefit from the advantages of the Treaty of Free Trade. The consequence is for the lack of a culture of export on the part of the Dominican businessmen who are not capable of taking advantage of the Treaty of Free Trade, opposite to other countries of Central America that export products through the Mercosur. The United States continues being Dominican Republic's great

commercial partner and this brings the disadvantage that every time it becomes more consumers and less sellers.<sup>52</sup>

To finish the Dominican Republic has not been benefited with the DR-CAFTA, due to the fact that this one should have produced a more wide accessibility in many products and a reduction of prices and this has not happened.

In Central America they are similar with the Treaty of Free Trade of Chile since both refer to the political, social, economic rules necessary to establish an agreement of free trade. In these the relating points are: cooperation between nations, development and expansion of the world trade, expansion of the markets of goods and services, rights and obligations of the World Trade Organization, competitiveness of the global markets, promotion of innovations, increase of the employment, to safeguard the public welfare and finally to work in an area of free Trade of the Americas.

**THE RD-CAFTA:** It considers the areas of facilitation of regional trade, opportunities for the economic and social development, transparency and efforts to eliminate the bribes and corruption in the International Trade and in the investment. Also, the differences of size and the level of development between the economies of the parts are recognized, remembering the interest of the Central America countries for advancing towards an economic global integration.

Initial Dispositions :

- 1) Establishment of the free zone of trade.
- 2) Relation with other treaties.
- 3) Scope of Obligations.

This chapter describes the aims in its Article 12 the aims are the relation with other agreements in the Article.13 and the scope of the obligations that relate to the agreements in the Art.14, besides national treatment, treatment of more benefited nation and transparency.

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<sup>52</sup> Economic Magazine and business 05/09/2010

Art. 12 The objectives are seven: Expansion and diversification of the trade, barrier elimination to facilitate the trade of goods and services, promotion of the loyal competition, increase of the opportunities of investment, Protection of the rights of Intellectual Property, establishment and effective use of the mechanisms to solve controversies and work for a major bilateral, regional and multilateral cooperation to improve the respective agreement. Also the existing obligations are reaffirmed according to the Agreement by the World Trade Organization and other multilateral agreements art. 13 and they promise to do the necessary things to assure that the governments of the States, except for some dispositions, make the agreements effective.

General definitions: in this chapter II there a set of terms used frequently in the text of the agreements are defined. Also the relating aspect on national treatment is discussed, rate of tariff elimination, special regimens, measures not concerning customs, other measures, Agriculture, Textiles and dresses and institutional disposition.

In the Art. 15-5 everything related to the Obligations of the Copyright and connected Laws is discussed. The 15-6 and 7 specific obligations to the copyright and connected laws; the 15-8 Protection of satellite signals; and 15-11 Observance of the Intellectual Property Laws.

As a conclusion, it is possible to say that since 2002, there has been a long way full of controversy, for the implementation of the Treaty of Free Trade, agreed with the President Bush, one year was needed for the official negotiations in January of 2.003 by the five Central American countries.

The official numbers of The United States conclude that in general the Central American countries showed a rise in their exports in the first half of the decade when the Initiative of the basin of the Caribbean was ruling, with the exception of Costa Rica and El Salvador that did it between 2006 and 2010 with the CAFTA. The exports of Central America to The United States increased in 31 %. And Honduras reported earnings of 609,9 millions in the balance of 2.010.

However, we still have to wait to see better results in the economies of many of these countries since the competition of the integration involves many quality conditions and excellence that cannot be reached by all the participants.



## CONCLUSION

Since its creation, the Internet has become a very useful tool for the development of different activities; nevertheless, it has also caused serious problems especially in everything related to the intellectual property, probably due to the technology's own characteristics such as: the fact that it is easy for users to copy with excellent quality results; the transmission of contents; their modification and the Internet's users' access.

At the beginning of this investigation four specific aims were established to give response to the issue.

The first one of them refers to: "Knowing the service's functioning that is offered by the Internet Service Providers (ISP) ". In the development of the investigation we realize that these mentioned Internet Service Providers or ISPs are just the middle point or the linking point between the company of the information and the users, and that its main reason for existing is not more than providing its users the connection to Internet, in different forms ways, through modem cable, dial up, wifi, among others.

Though it is true that the mentioned function is the main function or the reason why these Internet Service Providers or ISPs are known throughout the world, additional to this great function that the ISPs perform they also offer or provide services to us related with: e-mails, Hosting, we also have the Caching ISPs, and the Browsing services, as well as the Web domains register services.

The second specific objective refers to: " Establishing the types of illicit acts in the digital networks ", with regard to this objective we think that it is extremely difficult to conceptualize or to classify the IT crimes inside the typical figures such as: fraud, sabotage, theft, among others, and there are many characteristics that experts have given to this term coming to a conclusion a bit illogical but satisfactory at the same time. The experts say that a conceptualization of the crimes is not

necessary since they are the same already existing crimes with the only difference that they are committed by other means in this case with a computer, as for the types of IT crimes we can name: the undue access, the sabotage, undue obtaining of goods and services, possession of equipments for falsifications, violation to the privacy, among others and the one that interests the most to our serious investigation would be the intellectual property's appropriation.

With regard to the third specific established objective: "To know the Copyright as an aspect of the Intellectual Property". The intellectual property (I. P), refers to the creations of the mind, such as the symbols, literary works, inventions, among others and that this Intellectual Property is the kind and inside it we can find two species such as the Industrial Property and the Copyright focusing on the Copyright, understanding that it is the one that protects the "way" of expressing an idea, but not the idea as it is, since in order for the copyright to protect the idea, it would have to have some essential characteristics, in other words, the idea is a part of the creation but it is not the creation protected by the copyright.

Our fourth specific objective was " To know the compensations to the owner of the copyright in case of the illicit acts " as already said in the development of the thesis, it would be our audacity to name just one type of compensation, there is a diversity of forms and sanctions executed or put into practice by every country due to the path the country takes, however, among the sanctions we can name, the suspension of the Internet service, fines and even prison time in many cases.

The compensations for the owner of the right made by the Internet Service Providers (ISPs) are given when the ISPs violate the parameters established worldwide so these (SAFE HARBORS) are not accomplices. And they happen to be responsible for the contents that their clients have "obtained" (depending on the kind of ISP). After violating these behaviors or ignoring the given notifications to "get rid of " the content that causes the infraction, the ISPs become an active and acting part in the crime and the payment of compensation is born for the author.

Now, in order to give response to the general objective discussed in the investigation, and knowing that there is a diversity of patterns when talking about sanctions, and that every country fights every day against this type of violations every time more common, which will be the most effective method to attack this phenomenon?.

In this point, diverse positions and legislations have been adopting themselves to each country's juridical legal classification and of the reach achieved in the International agreements.

There is no doubt that the Internet Service Providers (ISPs) fulfill a fundamental role to obtain information in the Web, since without them, the users would not have access to the content of a work that is uploaded in the highway of the information.

After studying the responsibility derived from the infraction of the intellectual property's rights, this originates when a violation of someone of the exclusive author's rights takes place, the faculty to prevent that third parties who are not authorized commit acts that constitute an exploitation of the undue and illicit work.

For this reason the author of this investigation's opinion is that if the Internet Service Provider (ISP) respects the behaviors that he/she must respect and keeps himself/herself inside his/her SAFE HARBOR, it is necessary to say that it is unfair to punish them, due to the fact that if even the infraction is in his/her service the ISP does not have knowledge of the infraction, I think that the responsibility should be attributed to the user. On the other hand, let's keep in mind that the Internet Service Provider (ISP) is the only one capable of locating from which of his/her clients the infraction comes and this way inform the corresponding authorities which happens to be a "problem" since we know that the majority of the ISPs disagree on accusing their clients even though they know they can be the offenders, nevertheless, out of the studied systems the one that seems more practical and ideal to me for the current situation in which we are is the Law Hadopi since as we studied previously this one authorizes a public entity to identify the infractors to give them in this case three warnings, informing them that they are

violating the copyright of a third party, if the situation continues the entity is authorized to sanction them with fines and even the elimination of the Internet service for periods that can get to one year in which the client will have to continue paying the service even though it is suspended by the mentioned law. Additional to this, this law also creates a precedent and takes a national file of people with the suspended Internet service due to the committed infractions.

In my opinion, this law is the most "realistic", because it does not affect seriously the Internet Service Provider (ISP) for anything that is not in his/her knowledge which would be unfair and at the same time it punishes the inobservant user not drastically thanks to the system that this has of three notifications before the sanction, hereby the Internet Service Provider (ISPs) users do not have excuse to get away from the sanctions that are applied to them, and the Internet Service Provider (ISP) continues earning the revenue that this client was providing without being affected by the measure in any aspect. .

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