

TOWARD THE EXTENSION OF OBLIGATIONS TO OTHER INTERMEDIARIES IN THE INTERNET

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INTRODUCTION TO THE SUBJECT

In his “Defense of Sextus Roscius Amerinus” Cicero said that “Lucius Cassius, whom the Roman people used to consider a most impartial and able judge, used constantly to ask at trials, ‘to whom it had been any advantage?’ The life of men is so directed that no one attempts to proceed to crime without some hope of advantage”¹.

The question that arises from Cicero’s suggestive statement and that this work seeks to answer is if internet intermediaries (credit card and advertising providers) undertake copyright infringement in the hope of taking advantage.

The Economist magazine in one of the main articles of its July 20, 2013 issue, titled “The Curious Case of the Fall in Crime”², reported that in spite of recession and unemployment crime had greatly diminished in big cities around the world due to technological advances and other factors, among which it underlined one of psychological character: “the main deterrent to crime is the fear of being caught”.

Does this criterion apply in the internet? Is it scary to be caught loading or downloading copyright-protected content in the internet or helping to do it? It would be risky to affirm, as the British magazine does about crime in the analogue world, that crime in the internet concerning copyright has decreased; on the con-

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1. MARCO TULLIO CICERÓN. *Discursos. En Defensa de Sexto Roscio Amerino*, trad. de JESÚS ASPA CEREZA, Madrid, Biblioteca Clásica Gredos, 1995, p. 48.

2. Cfr. *The Economist*, July 20 to 26 2013, p. 9.

trary, we can say that piracy has grown with technology and that illegal loading and downloading in the internet do not produce the fear of being caught. Also, those activities generate huge profits.

It is well known that the copy diminishes the individual value of the creation and discourages the effort of the creator. Because of this, the responsibility of internet service providers (ISP) concerning copyright infringement by their users has been a subject of much discussion for more than a decade³.

This discussion has led to a consensus in the sense that the ISP will not be responsible when their participation in the infringement is limited to transmitting, linking, caching, and disseminating information generated by third parties, as long as other requirements are met, such as adopting and communicating policies intended to prevent infringements⁴.

However, the development of new business models and the expansion of services available online have raised the question of whether it is possible to extend the secondary or indirect liability regime to other intermediaries such as internet advertising services and financial transaction providers.

In order to analyze the liability regimes that could be applied to these intermediaries it is important to take into account the following points, which will be developed in this paper: i) to understand the operation of online advertising and payments and the economic magnitude of these businesses, ii) to understand the liability regime presently applied to the PSI, iii) to study the objections that have been raised against the extension of such regime to online advertising and financial transaction providers, and then, iv) to analyze how through recent legislative initiatives such as the proposed PIPA, SOPA, and OPEN bills in the United States, efforts have been undertaken to overcome the objections and to offer effective and expeditious mechanisms to protect copyright in the internet.

The starting point to undertake the study of this problem is to understand the operation of the payment systems available in the internet, the diffusion of advertising online, and the economic magnitude of these businesses.

3. The Berne Treaty in its article 11 *bis* (1) determines that the authors have the exclusive right to authorize the broadcasting and public communication of their works, for which reason, being the internet a medium for the diffusion of information, the publication of copyright works through this medium also should be subject to the authorization of their creators; however, the web implies the massive distribution and diffusion of all kinds of information, and so the traditional concept of diffusion does not apply to it. This created the need to regulate copyright infringements in the internet, which led to the OMPI Treaties on Copyright (WTC) and the OMPI Treaty on Interpretation or Execution and Phonograms (WPPT). Although none of these treaties expressly regulated the responsibility of the ISP, they did shed light on the matter by pointing out that the responsibility for copyright infringements should not apply to those parties that acting as conduits supply the physical elements to facilitate or to make a communication. Cfr. LÓPEZ ROMERO, TATIANA. "Internet Service Providers' Liability for online copyright infringement: The US Approach". In: *Universitas*, Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas, n.º 112, July-December, 2006, pp. 194-195. OMPY Treaty on Interpretation or Execution and Phonograms (WPPT), Article 8. December, 1996.

4. MARTINET FARANO, BÉATRICE. *Internet Intermediaries' Liability for Copyright and Trademark Infringement: Reconciling the EU and U.S. Approaches*. In: *Transatlantic Technology Law Forum*. Working Papers, Stanford, n.º 14, 2012.

At present, the dissemination of advertising in the internet is one of the most profitable services online. In fact, the report on revenue derived from advertising in the internet carried out by the Interactive Advertising Bureau (*IAB internet advertising revenue report*) points out that this revenue amounted to \$36.6 billion dollars in 2012⁵.

Since the inception of the internet, several mechanisms have been created to disseminate advertising, including marketing emails, and advertising in social networks, through search engines and mobile devices such as cellphones and tablets, digital videos, and several kinds of exhibitions like banners and pop-ups.

The dissemination of advertising online implies the participation and mediation of several actors⁶, such as the advertisers, who have a product or service to be promoted in the internet; the advertising managers, who do the promotion work for the advertisers; and the web editors, webmasters⁷, and administrators of web pages, who forward the advertisement selected by the advertiser to the public.

Several systems that may be related to the effectiveness of advertising have been established for the remuneration of these actors. In the *Cost by click (CBC)* system the amount to be paid by the advertiser will be given by the number of times the web bloggers *click* in the advertisement; in the *Cost by Thousand Impressions (CTI)* system the total value of the advertisement will depend on the number of times it appears in the web page, regardless of whether the bloggers do or do not *click* on it; while in the cases where the advertiser must pay a determined amount for each user who enters the site and places enough information in it to know that he is a potential buyer, we are dealing with the *Cost by Lead* system⁸.

This means that profits obtained from advertising by the web site where the advertisement is exhibited will greatly depend on the number of visitors to it, since the probability that a visitor *clicks* on an advertisement or becomes a potential buyer will increase as the number of visitors is greater⁹.

5. *IAB internet advertising revenue report*, 2012 full year results. April, 2013. Available in: [www.iab.net/media/file/IAB_Internet_Advertising_Revenue_Report_FY_2012_rev.pdf]. Consulted in September, 2013.

6. To make it possible that all actors involved in advertising online work in concert may create great challenges to the advertising agencies. Cfr. FIELD, Dominic *et al. Cutting Complexity, Adding Value: Efficiency and Effectiveness in Digital Advertising*. Boston, The Boston Consulting Group, May, 2013, p. 5 and following.

7. The webmasters are the persons in charge of determining the final content of pages in the internet, be it by creating it (for example, writing the articles in a blog), designing the look and the images that will appear in the same, programming or administering the site to make sure that the server is operating properly. Cfr. SPAINHOUR, STEPHEN and ECKSTEIN, ROBERT. *Webmaster in a nutshell, a desktop quick reference*, O'Reilly & Associates, 3rd Ed., 2003.

8. Cfr. ATHEYA, SUSAN & NEKIPELOV, DENIS. *A Structural Model of Sponsored Search Advertising Auctions*, 2012. Also, cfr. blog titled *Modelos de costos más utilizados en el marketing en Internet*, May, 2011, available in: [www.microsoft.com/business/es-es/content/paginas/article.aspx?cbcid=43]. Consulted in September, 2013.

9. Among the "Tools for Webmasters in Google" it is suggested that in order to have a successful site in the internet the most convenient way is to momentarily forget the system of algorithms used by Google to perform searches and to concentrate instead on the production of quality content with substantial usefulness, including contributions

Since the internet is a worldwide center for the exchange of information, the quality of the content in a web site will determine the number of its visitors. This is why a way of attracting them is to make available to the public material that may be protected by copyright, such as videos, songs, movies, books, etc.¹⁰.

On the other hand, the already mentioned report carried out by the *Interactive Advertising Bureau* shows that there is an increasing variety of advertisers using the internet to promote their products and services¹¹. This has created the need for mechanisms to allow payments online, in order that the supply created by the internet is met by an effective demand through the same means. In this way a new business opportunity was opened for financial transaction providers such as banks and credit bureaus, who had to create tools to enable their users to administer their resources in the cyberspace by making all kinds of transactions, from electronic transfers to payment of utilities, including, naturally, copyright works.

All this testifies to the creation of very profitable business methods by the new providers and intermediaries in the internet. It still is questionable, however, whether the activities they run into within their trade is enough to declare them responsible for copyright infringement and to oblige them to pay compensation to copyright holders or to adopt supervisory or safeguard measures to reduce the infringements.

I. SECONDARY LIABILITY

In order to answer the foregoing question it is necessary, therefore, to understand the liability regimen presently applied to the internet services providers.

The responsibility of the ISP for copyright infringements by their users has been regulated in several countries. This was made in the United States by the issuance of the *Digital Millennium Copyright Act* of 1998 (DMCA), which has served as a model to most of the laws tackling the subject; and in Europe by the Directive 2000/31/CE from the European Parliament and Council regarding certain juridical aspects of services in the information society, especially electronic commerce in the internal market, and also by Spanish Law No. 34 of 2002.

The DMCA, for example, contains a list of circumstances that would limit the corrective measures or compensation mechanisms to be imposed on the ISP in

made by authorities on the topic concerned, impeccable drafting and spelling, etc. See [<https://support.google.com/webmasters/checklist/1095542?rd=1>], consulted on September, 2013.

10. To grasp in more detail how piracy works in the cyberlockers, see the article "*MPAA victory against Hotfile is a victory shared by all content creators hurt by online piracy*", published in [<http://voxindie.org/tag/copyright-infringement/>], consulted on September, 2013. Also, to understand the functioning of other intermediaries the following is recommended: PERSET, KARINE. *The Economic and Social Role of Internet Intermediaries*, Organisation for Economic Cooperation and Development, May, 2010. (DSTI/ICCP(2009)9/FINAL).

11. The study found that minority vendors such as restaurants, and sellers of toys, cosmetic products, and jewelry, etc., make up 20% of the advertisers in the internet, followed by financial services providers, who make up 13%; also included are the automotive and entertainment sectors, all products related to computers, tourism, telecommunications, health, and pharmaceutical.. Cfr. *LAB internet advertising revenue report*, cit., p. 21.

case their users incur in copyright infringements. The DMCA does not establish exceptions to copyright in the internet, but, we must insist, it limits the amount and the compensation mechanisms to which the ISP could be condemned when copyright infringement is proven¹².

The restrictions will be applied as long as the participation of the ISP in the infringement is limited to transmitting, linking, storing, and disseminating information generated by third parties. These circumstances or exceptions are known as “safe harbors”¹³.

Moreover, for the DMCA to be applicable and for a web site to be considered a safe harbor certain requirements must be met. The first one is that the ISP may be qualified as “*Service Provider*” following the definition contained in the DMCA¹⁴. Also, the ISP must adopt and communicate policies intended to avoid infringements; on having knowledge of an infringement through its services, the ISP must take all necessary measures to withdraw the infringing material and could not interfere with the technical mechanisms adopted to identify and protect works in the web¹⁵.

Then, considering that the DMCA did not limit the reach of copyright, the diffusion of protected material in the internet also requires the express authorization of their authors. And this makes it possible that the ISP be condemned for the infringements committed in their networks under the regimen of contributory liability.

This second liability regimen applicable to the ISP establishes, in general terms, the following: “A person is responsible for the infringement (or for any other act not allowed) of an actor or of a third party only when: (1) the behavior of the actor is a punishable conduct, (2) there are circumstances in which it is ‘fair’ to affirm that another person is responsible for the acts of the infringer”¹⁶.

12. Section 512 (a) of Title 17 of the United States Code, introduced by the DMCA, establishes the following: “A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive relief, for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider”.

13. “The term ‘safe harbor’ is a nautical metaphor, indicating a place where a ship will be safe from stormy weather. But as in the case of a ship, being outside a safe harbor does not mean that you are in danger. It just means that your safety is not assured. Each DMCA safe harbor substantially limits the liability for copyright infringement. Each is separate, and if you fall within any one, your liability is limited. And even if you don’t meet the requirements of one of the safe harbors, that is not an indication that you are infringing a copyright. Other defenses, such as fair use, still remain available”: HOLLAR, LEE. *Legal Protection of Digital Information*, BNA Books, November 26, 2002.

14. Section 502 (k) (1) (A) of the United States Code points out: “As used in subsection (a), the term ‘service provider’ means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by user, of material of the user’s choosing, without modification to the content of the material as sent or received”.

15. Before the enacting of the DMCA there was no law regulating the subject in the United States, and the judicial resolution of concrete cases led to the development of different theories intended to determine in which cases the ISP could be liable for acts of third parties. For this purpose the attempt was made of resorting to the doctrine of secondary liability.

16. FOLSOM, THOMAS. *Toward Non-Neutral First Principle of Private Law: Designing Secondary Liability Rules for New Technological Uses*, University of Akron, 2008, p. 50.

Within this context, for a ISP to be condemned for contributing to the commission of copyright infringements through the service he provides it is indispensable that there is a direct infringer, which means that it must be proven that a video, a book, or a video game was placed in the web by a cybernaut and copied by others thanks to a web site without the express authorization of the owner of the video, the book, or the video game. Also, the circumstances in which it is fair to affirm that the ISP is responsible for the direct infringement have been presented in two categories: by having consciously and materially contributed to the commission of the infringement (contributive liability), or because having the faculty of supervision over the infringer he does not exercise it and derives some direct or indirect benefit from the infringing conduct (vicarious liability)¹⁷.

By comparing the assumptions for the application of the DMCA with those of the regimen of secondary liability it can be inferred that if one of the regimens might not apply the other would, since the factual assumptions that must be proven to apply the latter regimen correspond with certain exceptions of “safe harbor”.

In fact, for a ISP whose business model implies to accommodate or reference protected material not to be declared responsible for the conduct of his users he must prove that he ignored the commission of the infringement, while for the contributive liability to be applicable the actual knowledge of the infringement is required in addition to a material contribution to the same¹⁸. On the other hand, the doctrine of vicarious liability implies that a direct benefit from the infringement is obtained and that the possibility to control it or avoid it has existed, assumptions in which it is impossible to apply the exceptions established in the DMCA.

In other words, the “safe harbor” exceptions are only the first step to attribute the responsibility of the ISP. The second step, after concluding that neither of those exceptions takes form, is to evaluate if the ISP is responsible for the acts of a third party according to the general rules of civil responsibility. And depending on the conclusion reached, the ISP could be condemned to pay monetary compensations or only to adopt precautionary measures such as limiting the access to the services supplied by him in the web¹⁹.

17. “Although ‘the lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn’, [...] in general, contributory liability is based on the defendant’s failure to stop its own actions which facilitate third-party infringement, while vicarious liability is based on the defendant’s failure to cause a third party to stop its directly infringing activities”: the Court of Appeals of the Ninth Circuit in the case *Perfect 10 v. Amazon.com*. An in the case *Grokster* it reads: “[o]ne infringes contributory by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it”.

18. Cfr. LÓPEZ ROMERO, TATIANA. *Internet Service Providers’ Liability for online copyright infringement: The US Approach*, cit., p. 212.

19. Section 512 of Title 17 of the United States Code establishes on this: “(j) Scope of relief.- [...] (B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms: (i) An order restraining the service provider from providing access to a

II. RELEVANT CASES

After outlining the regimen of responsibility applicable to the ISP in the United States, it is useful to examine if this regimen can be extended to other intermediaries in the internet, such as the financial transaction providers and the internet advertising services.

Considering the nature of the secondary responsibility and the assumption of application of the “safe harbor” regimen it is possible to infer that both of them can be applied to other intermediaries in the internet such as advertisers and financial transaction providers.

In fact, the secondary responsibility helps to determine in what cases a person may be responsible for the acts of a third party, and in the United States this doctrine has been applied even in a transversal way in cases of copyright infringement. So, the United States Supreme Court pointed out in the case *MGM Studios Inc. v. Grokster*: “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another, [...] these doctrines of secondary liability emerged from common law principles and are well established in the law”²⁰.

In *Perfect 10 v. Amazon.com* it reads: “[c]laims against service providers for direct, contributory, or vicarious copyright infringement, therefore, are generally evaluated just as they would be in the non-online world”²¹.

As indicated, for the “safe harbor” exceptions to take effect it is necessary that the defendant may be qualified as a *Service Provider* following the definition established in the DMCA²². In broad terms, this definition determines that a ISP is whoever offers

subscriber or account holder of the service provider’s system or network who is using the provider’s service to engages in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order. (ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States”.

20. *Metro-Goldwyn-Mayer Studios inc. v. Grokster, Ltd.* (04-480) 545 U.S. 913 (2005) 380 F.3d 1154.

21. United States Court of Appeals for the Ninth Circuit. *Ellison v. Robertson* 357 F.3d 1072 (9th Cir. 2004). Quoted in: United States Court of Appeals for the Ninth Circuit, *Perfect 10, Inc., v. Amazon.com.* (508 F.3d 1146 (9th Cir. 2007) Amended, December 3, 2007, p. 14.

22. Section 502 (a) of Title 17 of the United States Code, introduced by the DMCA: “(A) for the purposes of incise (a), the term ‘service provider’ means an entity that offers the transmission, routing, or provision of connections for digital communications online, between the points specified by the user, of the materials selected by the user, without modifications in the content of the material both sent and received.

“(B) as used in this section, excepting the incise (a), the term ‘service provider’ means a provider of services online or for access to networks, or the operator of the installations of the same, and it includes an entity described in incise (A)”.

Another difficulty to be added to those mentioned above consists of eluding the possibility that the non-authorized use of protected material on the part of the ISP be legitimized by the exception of *fair use*. In the case *Perfect 10 v. Amazon.com*, the Court of Appeals of the Ninth Circuit considered that the use of thumbnail images of Perfect 10 as links to other web sites was a fair use allowed by the law. Concerning this the Court said: “we now weigh these factors together ‘in light of the purposes of copyright’. [...]”

and realizes the processes and jobs needed for the internet to be accessible to the final consumers, regardless of the service involved, that is, whether the ISP is a search engine, a *cyberlocker*, or a social network such as *Facebook*, as long as the ISP, in development of his activity, limits itself to the transmission, linking, caching, and dissemination of content generated by third parties. For being such a broad definition, the DMCA would extend to all ISP presently operating and those that can exist in the future.

However, and based on the cases that will be set out below, it can be said that neither of the two modalities of subsidiary liability (contributive or vicarious) has been easily applicable to protect copyright in the internet, either because the owners of the protected works have not proven that the ISP had knowledge of the commission of the infringement to be able to avoid that its conduct were covered by the stipulations of the DMCA, or because it was not exactly established in what consisted the material contribution of the ISP in the configuration of the infringement so that it could be declared subsidiary liable²³.

The cases *Robert Hendrickson v. eBay Inc. et al.*²⁴ and *Perfect 10, Inc. v. CCBILL LLC*²⁵ illustrate the difficulty faced by copyright owners at the time of proving that they correctly notified the ISP about infringements committed against their rights through the site provided by the same, a requirement contemplated in Section 512 (c) (3) of Title 17 of the United States Code, in order that the ISP is ordered to withdraw the infringing content from the web or is condemned, in case he does not do it.

The web site of *eBay* brought together a great number of cibernauts who bought and sold all kinds of goods and services, including pirate copies of a documentary titled “Manson” owned by the plaintiff ROBERT HENDRICKSON, who took legal action intending that *eBay* were declared responsible for having contributed to the infringements committed by its users.

The Court of the Central District of California considered that, according to the available evidentiary material, there was no doubt that the conduct of *eBay* was covered by the stipulations of the DMCA because the plaintiff did not notify the

In this case, Google has put Perfect 10 thumbnail images (along with millions of other thumbnail images) to a use fundamentally different than the use intended by Perfect 10. In doing so, Google has provided a significant benefit to the public. Weighing this significant transformative use against the unproven use of Google’s thumbnail for cell phone downloads, and considering the other fair use factors, all in light of the purpose of copyright, we conclude that Google’s use of Perfect 10’s thumbnails is a fair use”: *Perfect 10, Inc., v. Amazon.com*. Op. cit.

23. United States District Court for the Central District of California. *Robert Hendrickson v. eBay Inc et al.* September 4, 2001, 165 F.Supp.2d 1082, 60 U.S.P.Q.2d (BNA) 1335 (C.D. Cal. 2001).

24. United States Court of Appeals for the Ninth Circuit. *Perfect 10, Inc., v. CCBILL LLC*, December 4, 2006.

25. For the understanding of the case it is important to clarify that the decision of the Court of the Central District of California dealt with a petition of summary trial submitted by eBay, which to be granted needs that no controversy exists on the factual assumptions required to definitely settle the dispute, so that only the resolution of juridical matters is pending.

defendant in duly form, since he did not include in his communications a statement on the good faith and truthfulness of his affirmations and did not provide enough identification of the infringing material²⁶.

In the case *Perfect 10, Inc. v. CCBILL LLC* it also was concluded in second instance at the Court of Appeals of the Ninth Circuit of the United States that the notifications of infringements sent by *Perfect 10*, owner of the copyright, to two ISP, *CWIE* y *CCBILL* (the first offered web hosting and connection and the second allowed the use of credit cards for subscription payments), did not comply with the legal requirements to consider the ISP sufficiently informed of the infringement so that they be declared responsible.

The Court's reasoning admits that the DMCA establishes limitations to the compensation the ISP must pay in case an infringement is proven²⁷, and points out that for those limitations to be applicable it is necessary that the ISP adopts reasonable measures intended to avoid infringements.

Starting from the text of Section 512 (c) of the United States Code, the Court considered that the reasonableness of those measures implies that the ISP has current knowledge of the infringement, for which it is necessary that the holder of the copyright informs the ISP in duly form, that is, complying with the formal requirements established in the same section.

Applying the same logic, the Court considered that the notifications sent by *Perfect 10* did not create in *CWIE* and *CCBILL* a current knowledge of the infringements because none of the several communications complied with the requirements that they be in writing, be sent to the agent designed by the ISP, provide sufficient identification of the infringing material, and contain a sworn statement on the good faith and truthfulness of the same²⁸.

26. On this the Court says: "The DMCA established certain safe harbors to 'provide protection from liability for: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information location tools. These safe harbors limit liability but "do not affect the question of ultimate liability under the various doctrines of direct, vicarious, and contributory liability": *Perfect 10, Inc. v. CCBILL LLC*. December 4, 2006, p. 7.

27. In the Court's words: "Taken individually, Perfect 10's communications do not substantially comply with the requirements of § 512(c)(3). Each communication contains more than mere technical errors; often one or more of the required elements are entirely absent. (...) In order to substantially comply with § 512(c)(3)'s requirements, a notification must do more than identify infringing files. The DMCA requires a complainant to declare, under penalty of perjury, that he is authorized to represent the copyright holder, and that he has a good-faith belief that the use is infringing. This requirement is not superfluous. Accusations of alleged infringement have drastic consequences: A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed. [...] Since Perfect 10 did not provide effective notice, knowledge of infringement may not be imputed to CCBILL or CWIE based on Perfect 10's communications. Perfect 10's attempted notice does not raise a genuine issue of material fact that CCBILL and CWIE failed to reasonably implement a repeat infringer policy within the meaning of § 512 (i)(1)(A)": *Perfect 10, Inc., v. CCBILL LLC*, cit., p. 13.

28. United States Court of Appeals for the Ninth Circuit, *Perfect 10, Inc. v. Visa International Service et al.* 494 F.3d 788 (9th Cir. 2007).

In the opinion of the Ninth Circuit, the need that the notification to the ISP meets all the requirements is not merely a formal point but a substantial one, because it is on its basis that the provider blocks access to the infringing material or removes it; and if the notification is defective, is blocked, or non-infringing material is removed, the freedom of expression consecrated in the First Amendment of the U.S. Constitution ends up being affected.

On the other hand, in cases like *Perfect 10 Inc. v. Visa International Service Association et al.*, as in *Elsevier Ltd. and John Wiley & Sons Inc. v. Chitika Inc et al.*, the copyright holders unsuccessfully sought that the doctrines of contributive and vicarious liability were applied to those intermediaries.

In the first case, the Court of Appeals for the Ninth Circuit of the United States recognized that the payments service provided by Visa for the legal acquisition of works produced by *Perfect 10* encourages disregard of copyright by allowing the infringer to derive economic benefit from his conduct, but it sustained that the reproduction, alteration, and exhibition of the material of *Perfect 10* in the internet may occur without the Visa services, so that the activity of Visa cannot be considered as a material contribution in the terms of contributive liability²⁹.

Indeed, the question that emerged in this case was whether the payment process constituted an essential step in the copyright infringement or if there was inducement –the other element from which the contributive liability can be inferred– when payments systems were offered for illegal content provided in a web site. The Court of Appeals of the Ninth Circuit sustained that the defendants did not induce consumers to buy pirate products when they used their credit cards.

The Ninth Circuit also pointed out that if subsidiary liability were to be extended in such degree to intermediaries, peripherally involved third parties also would end up being liable: among these, companies that produce computer screens, provide storage services or develop software for image edition, and even utility companies that provide electricity to the internet.

Regarding the vicarious liability, the Court of Appeals sustained that the defendants absolutely did not have the right to stop the infringing activity: “They cannot stop websites from reproducing, altering, or distributing infringing images”³⁰.

Curiously, the Court of Appeals did not analyze, as an element of vicarious liability, the direct financial interest that the online payments systems had in the

29. And the sentence adds that many services provided by a company may help an infringing business to generate profit, but this does not mean that a vicarious liability is necessarily configured. “In addition to the necessity of creating and maintaining a website, numerous hardware manufacturers must produce the computer on which the website physically sits; a software engineer must create the program that copies and alters the stolen images; technical support companies must fix any hardware and software problems; utility companies must provide the electricity that makes all these different related operations run, etc. [...] but that does not mean, and *Grokster* by no means holds, that they are all potentially liable as vicarious infringers”.

30. “Because *Perfect 10* has failed to show that Defendants have the right and ability to control the alleged infringing conduct, it has not plead a viable claim of vicarious liability. Accordingly, we need not reach the issue of indirect financial interest”.

infringing activity because it considered that *Perfect 10* had failed to prove that the defendants had the right and the capacity to control the users' infringing conduct. The economic benefit obtained with the use of online payments systems in pirate sites, therefore, was not considered³¹.

In the same way, also in the case *Perfect 10 v. CCBILL* the Court of Appeals of the Ninth Circuit affirmed that the possibility of obtaining pirate material in the sites where *CCBILL* y *CIEW* offered their services and the works of *Perfect 10* were illegitimately exhibited did not attract web site subscribers and so the subscription payments in those sites could not be considered as "the collection of a direct economic profit derived from the infringement", an indispensable requirement to declare the vicarious liability of the ISP³².

Thus, several questions arise about the effects that would cause an extension of responsibility to the intermediaries in the internet for acts of third parties. For example, whether this could affect the operation of the web or produce an impact in the judicial system by increasing the number of claims against subjects that could potentially be declared responsible.

In the case *Elsevier Ltd. and John Willet & Sons Inc. v. Chitika Inc., and kapil Dev Saggi*, the authors of pharmacology books that were being illegally downloaded thanks to a web page named "*Pharmatext.org, Free Pharma EBooks*", sued the company *Chitika*, advertising manager of that page, with the purpose of having it declared responsible of the downloading³³.

The District Court of Massachusetts denied the pretension by considering that a direct copyright infringement had not taken place since none of the downloads had been made in the United States; in second place, because even if the infringements had occurred, *Chitika* did not consciously contributed to the same since the web sites where the page "*Pharmatext.org, Free Pharma EBooks*" directed the bloggers was automatically opened without human intervention. Finally, the District Court quoted the case *Perfect 10* only to say that to make economically profitable the commission of infringements could not be considered as a material contribution that resulted in the declaration of responsibility against *Chitika*³⁴.

Without prejudice to what has been mentioned and to the inconveniences that exist in determining the responsibility of the ISP, in 2011 the most famous animations producer in the world, *Disney Enterprises Inc.*, achieved that the Southern

31. Cfr. *Perfect 10, Inc., v. CCBILL LLC*, cit., p. 23.

32. Cfr. *Perfect 10, Inc., v. CCBILL LLC*, cit.

33. United States District Court of Massachusetts, *Elsevier LTD., and John Wiley & Sons, Inc. v. Chitika Inc., Kliksor.com, Inc and Kapil Dev Saggi*, December 2, 2011.

34. "... while *Chitika's* advertising payments might make it easier for *Saggi's* infringement to be profitable, *Chitika* did not create, operate, advertise, or promote the infringing websites, and its advertisements were not the 'site' of the infringement. [...] Here, in contrast to *Visa*, *Chitika* did not provide an 'essential' service to *Saggi* that enabled infringement on a 'massive scale'. Plaintiffs make no factual allegations that *Chitika* knew about any infringing activity, nor is there any evidence that *Chitika* was 'intimately and causally involved in a vast number of infringing transactions'".

District Court of Florida, United States, rejected the motion to dismiss an action undertaken by it against *Hotfile Corp et al.* for copyright infringements committed by the latter's subscribers. The Court's main foundation in this case was that the business model of *Hotfile*, as ISP of a web site that allows its users to share material protected by copyright in exchange for an economic retribution, could lead to consider the ISP secondarily responsible for the infringements by encouraging disregard of copyright³⁵.

Afterwards, on December 3, 2013 the Southern District Court of Florida declared *Hotfile Corp et al* civilly liable for copyright infringement³⁶, on the basis of the business model employed by the *cyberlocker* and due to the ability the same had to stimulate and control the users' infringing behavior.

Hotfile had two main income sources: first, the monthly subscriptions its users were willing to pay to make a big number of downloads with greater speed, and even for movies that still were being shown in the movie theaters; and second, the "Hotlink" system, designed to share movies and television series without having to enter the *Hotfile* web site.

In addition, the *cyberlocker* paid its "affiliate" users for sharing movies and videos as long as these were downloaded, at least, by one thousand more users, that is, the "subscribers". Concerning this point, *Hotfile* recognized that one of its objectives was to increase the number of its affiliates and the amount of their payments depending on the number of times the files were downloaded, while it discouraged those users that only employed its servers to store personal files³⁷.

The above mentioned facts led the Southern District Court of Florida to declare as proven the direct responsibility (for own fault) and the indirect one (for a third party fault) in copyright infringement. Concerning the direct responsibility, the Court considered that thanks to the control *Hotfile* exercised over the servers where the infringing copies were found, it had played a leading role, together with its owner, Anton Titov, in the offer of infringing material and its massive distribution, for which reason their participation in the infringement had been personal and direct.

Now then, the foundation to declare the contributive responsibility of *Hotfile* was that, in spite of knowing the infringements, it not only failed to adopt the technological measures aimed at avoiding them, but materially contributed to them by adapting its technological platform to make sure of always having attractive material for its subscribers. In addition to this, the fact that the ISP could control and

35. United States District Court. Southern District of Florida. Miami Division. *Disney Enterprises, Inc. et al., v. Hotfile Corp. et al.* Case No. 1:2011cv20427, July 8, 2011.

36. United States District Court. Southern District of Florida. Miami Division. *Disney Enterprises, Inc. et al., v. Hotfile Corp. et al.* Case No. 1:2011cv20427. December 3, 2013. Among the plaintiffs were, Twentieth Century Fox film Corp., Universal City Studios Productions, Columbia Pictures Industries, Inc., and Warner Bros. Entertainment Inc.

37. In its ruling, the Southern District Court of Florida emphasizes that *Hotfile* admitted: "We are trying to encourage the good promoters by increasing their earnings and to reduce for uploaders that mainly use the free hotfile resources for storage": *ibid.*, p. 11.

monitor its users' behavior and had obtained a direct profit from the infringement was a valid reason for the Court to declare the vicarious responsibility of *Hotfile*³⁸.

As a last point in connection with *Disney v. Hotfile* it is important to highlight that although the issue of the "safe harbor" exceptions was not dealt with, these would have not been easily applicable since, as was pointed out, the defendants did not take measures to avoid the infringements; on the contrary, *Hotfile* had several electronic addresses (URL) for infringing files in the web, so that in case one of these addresses was deactivated at the request of the copyright holders, another address would be instantly activated without the user (affiliate) having to again upload the file to the web³⁹.

At any rate, in the light of the mentioned cases and notwithstanding that the two liability regimens could be applied to all the ISP precisely for the fact of being ISP –and also because the secondary responsibility encompasses all areas of law–, it is felt that their application to other intermediaries has not been equally effective; this is so because it is not easy to demonstrate the assumptions allowing their application, v. gr., the existence of a direct copyright infringement, the knowledge of the infringing conduct by the intermediaries and, above all, the most difficult requirement to satisfy which is proving that the intermediaries have materially contributed to the infringement.

III. REGULATORY PROJECTS

In order to fill that void, two bills were proposed in the United States: the *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act*⁴⁰ (PIPA) and the *Stop Online Piracy Act* (SOPA)⁴¹.

The purpose of these two proposed bills was to reduce copyright infringements online by allowing intermediaries in the internet, that is, both the traditional ISP and the advertisers, payment service providers, search engines, domain name registrars, etc., to take measures against websites dedicated to committing such infringements, especially those located in other countries.

The proposed bills empowered the Attorney General to seek judicial enforcement of the obligation of ISP to restrict access to sites defined as infringers⁴². Moreover, SOPA

38. According to the evidence presented in the process and the business model employed by *Hotfile*, this company could differentiate its users between those who paid for the subscription and those who did not pay, in order to determine the quality and duration of the downloads of each one, set the level of their payments and even temporarily block them. Moreover, in the two years of its existence *Hotfile* was able to become one of the most visited web sites due to the copyright infringements. Cfr. *Disney v. Hotfile*. *Ibid.*, p. 19 and ss.

39. Cfr. *Disney v. Hotfile*. *Ibid.*, p. 12 and ss.

40. United States Congress, Senate. Proposed Bill: *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011*. S. 968 (112th).

41. United States, House of Representatives. Proposed Bill: *Stop Online Piracy Act*. H.R. 3261.

42. CASTRO, DANIEL. *PIPA/SOPA: Responding to critics and finding a path forward*. In: *The information Technology & Innovation Foundation*, December, 2011.

established in its section 103 that providers of online payment services and managers of advertising in the internet should deny their services to offending websites, both those in the United States and those located in other countries.

Criticism of the proposed bills was strong and abundant. It was affirmed that if they were approved the operation of the internet would be affected. Since web pages located out of the United States would be punished, this would imply worldwide application of U.S. law. It also was sustained that the proposed bills would violate the First Amendment of the U.S. Constitution by limiting freedom of expression in the internet. Moreover, it was pointed out that they would allow the State to constantly keep under surveillance the activities of the cybernauts, and also that social networks like *Facebook* and *You Tube* would disappear⁴³.

Most of the criticism of SOPA concerned Sections 102 and 103 of Title I. The first one allowed the Attorney General to obtain a Court's order against pirate sites. Therefore the ISP, search engines, payments processors and ad networks would be forced to take predictable and reasonable technical measures against the infringing sites. Orders were specifically foreseen, for the ISP to block access to the infringing sites; for the search engines to stop providing link services to those sites; for the payment processors to stop payment transactions of U.S. users, and for the ad networks to end the exhibition of advertisements in infringing sites in the name of those sites⁴⁴.

Section 103 seeks to create a system to facilitate the notice that copyright holders must give to payments processors and ad networks on the use of their services by infringing sites. This section was to be applicable to all those sites, local or foreign, that were directed to audiences in the United States⁴⁵.

The social unrest generated by the SOPA and PIPA initiatives prevented their approval in the United States Congress⁴⁶. Nevertheless, and since the need persists of protecting copyright in the internet, a third legislative initiative, called "*Online Protection and Enforcement of Digital Trade Act*" (OPEN) was presented to the U.S. Congress, also containing several dispositions intended to force intermediaries to deny their services to websites that are declared as infringers⁴⁷.

43. SEELIGSON SMITH, LAMAR. *Myths vs. Fact: Stop Online Piracy Act*. United States House of Representatives, Judiciary Committee (TX-21).

44. Cfr. *Stop Online Piracy Act* § 102 (b) Action by the Attorney General.

45. Cfr. *Stop Online Piracy Act* § 103: "Market-Based System to protect U.S. customers and prevent U.S. funding of sites dedicated to theft of U.S. property".

46. BENKLER, YOCHAI; ROBERTS, HAL, FARIS, ROBERT FARIS, SOLOW-NIEDERMAN ALICIA & ETLING, BRUCE. *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate*. The Berkman Center for Internet & Society at Harvard University. July, 2013.

47. United States. House of Representatives. Proposed Bill: *Online Protection and Enforcement of digital Trade Act*. H.R. 9782 (1112th).

At any rate, none of these initiatives would modify the norms on civil responsibility applicable to the intermediaries, that is, the “safe harbor” exceptions and those related to indirect responsibility for the actions of third parties; but they would seek to establish mechanisms so that an authority (judicial in the first case, administrative in the last one) forced the intermediaries to adopt the necessary and reasonable technical measures to prevent financing of offending websites.

In OPEN, the Section titled “*Saving clauses*” determines that nothing in the dispositions of Section 337 A, that would be introduced in the United States Code if the bill is approved, would be interpreted as a limitation or extension of the means of civil or penal compensation available to any person in the United States for copyright infringing activities in the internet, according to any Federal or State law.

And concerning the secondary responsibility, it is also pointed out that the law would not be interpreted as a limitation or extension of the vicarious or contributive liability as foreseen in the respective law. The proposed bill reads:

Interpretation rules related to the vicarious or contributive responsibility.- Nothing in this section shall be construed- (A) To enlarge or diminish vicarious or contributive liability for any cause or action available under title 17, United States Code, or the Lanham Act, including any limitations on liability under section 512 of such title 17...

It is precisely in section 512 where the liability exceptions mentioned *supra* are outlined, which allow to have a web site as safe harbor.

OPEN provides that copyright (and trademark) holders may submit claims to the *U.S. International Trade Commission* (an independent federal agency known in the United States for settling certain conflicts concerning patents), by stating under oath that a web site is involved in a copyright infringement, and identifying the providers of payments services and the advertisers, with the purpose that the Commission orders them to adopt measures to avoid the payments and the display of advertisements in the web sites after having determined the existence of an infringing activity.

OPEN is very similar to SOPA to the extent that it seeks to stop the flow of funds to infringing sites. However –and this is one of their differences–, under OPEN the payment service providers and the ad networks would not assume legal obligations until the Commission issued the respective order; on the contrary, SOPA seeks to impose obligations to the intermediaries on the basis of the statements of copyright holders.

In contrast to the U.S. precedents based on civil liability trials, a Swedish court in the case *Sony Entertainment et al. v. Pirate Bay*, applying penal norms intended to determine liability for complicity acts on the part of the ISP, *Pirate Bay*, and its administrators for infringements occurred in its files exchange network, considered

irrelevant to analyze the degree of knowledge that the defendants might have had about the infringing activities that their content providers and users materialized in their networks and systems, because the defendants must have been conscious of the risks of their operative system⁴⁸. So, the discussion goes on.

IV. NATIONAL LAW

In Colombian law the secondary liability is ruled by general norms of civil liability of the Civil Code and by special rules contained in particular statutes of copyright recognition and protection.

Concerning the first ones, derived from the Napoleonic Code of 1804, there are two that would apply to determine the responsibility of the ISP: “One who has committed a crime or fault, who has caused harm to another, is obliged to compensation” (C.C. 2341), and the rule of responsibility for the actions of others according to which, “Every person is responsible, not only for his own actions to the effect of compensating the harm, but for the actions of those that are in his care. (...) But the responsibility of such persons will end if with the authority and care that their respective quality confers them, they were not able to prevent the action” (C.C. 2347). This means that the legislator’s will, in this case, is to protect the victim by placing the responsibility, not in the infringer himself but in the third party that the law considers liable.

Therefore, to the extent that the ISP may prevent the infringing action for having control on the platform and knowledge that the available content is illegal, he must take the necessary measures to forestall the commission of the conduct and in this way evade the responsibility that could be attributed to him.

The following are typical elements of liability for the actions of others: “1. That a subordinating and dependence link exists between two persons; 2. That this subordinating and dependence link is of private law; 3. That both persons are capable of crime or misdemeanor; 4. That the subordinate or dependent person has committed a crime or illicit action, and 5. That the victim proves the responsibility of the subordinate or dependent person”⁴⁹.

48. Stockholm District Court. *Sony Music Entertainment et al. vs Pirate Bay*. Case No. B 13301-06. April 17, 2009. The Swedish court’s reasoning was based on the assumption that a conviction for complicity requires, in the first place, the existence of a direct copyright infringement; then it must be examined if the complicity acts existed, due to which “not only the person who has committed the action (principal offense), but also other persons who have helped and incited this person in words or acts (complicity act) become responsible of a specific action”, under Chapter 23, section 4, Swedish Criminal Code. Following the Swedish court, to make copyright protected material available in the ISP platform constitutes an infringement by not having the authorization of its holders. Moreover, the operation realized through *Pirate Bay* objectively is an act of complicity in the copyright infringement. The question was to determine if the defendants could be liable for these acts, to which the Swedish court answered in the affirmative.

49. ALESSANDRI RODRÍGUEZ, ARTURO. “*De la responsabilidad extracontractual en el Derecho Civil*”, Santiago de Chile, Editorial Jurídica Chile, 2010, p. 309.

It is evident that the responsibility takes form against a third party and that the mentioned requirements are established for the purpose that the person who controls or cares for the actions of others in virtue of a legal or contractual link assumes the full compensation for the harm caused by other subject of law. The question is whether on the basis of this criterion a presumption *iuris tantum* is derived against the controlling or dominant subject.

About the responsibility for the action of others the Colombian Supreme Court of Justice has pointed out:

... in one of its possible modalities, the contractual indirect liability, also called reflected or legal liability, occurs when someone is ordered by law to respond to third parties for the harmful effects of activities realized by other persons who are under his custody or care or of whom, in dependency situations, that person receives business tender, principle of general character that is formulated with absolute clarity in incise 1 of article 2347 of the Civil Code [...] complemented afterwards with the indication of the assumptions in which, in the opinion of the legislator, this type of liability is better identified, and ending, in the final incise, by declaring in the just mentioned precept that this liability is configured if the persons to whom it is attributed in principle attest in a conclusive manner that notwithstanding the authority and care that their respective subordinating quality confers on them, they could not prevent the action that caused the harm for which compensation is required of them⁵⁰.

So the dominant party, even when acting with sufficient control and due diligence, only would be exonerated of responsibility against third parties if he can prove that the event giving rise to the damage was inevitable.

At any rate, it is good to point out that the liability figure for actions of a third party applied to the ISP could be inferred as long as it is proven that he had or could have control on the infringing actions of third parties. If such control is not proven it is very difficult to apply this modality of extra contractual civil responsibility (*tort law*).

Now then, with respect to the level of protection based on special provisions, Andean Decision 351 of 1993⁵¹ contains a norm on the matter. Article 54 reads: "No authority, or natural or juridical person, may authorize the use of a work, interpretation, phonographic production, or radio broadcasting, or lend support for their use, if the user does not have the express and previous authorization of the copyright holder or his representative. In case of non-observance they will be jointly responsible".

50. Supreme Court of Justice, Room of Civil Cession, decisión of March 15, 1996, M.P.: CARLOS ESTEBAN JARAMILLO SCHLOSS, exp. 4637.

51. Andean Community of Nations. Decision 351 of 1993. Common Regimen on Copyright and related rights. December 17, 1993. Lima, Perú.

In recognizing joint liability, this norm requires that some of its elements be subject to judicial interpretation in order to understand their actual meaning and reach; especially the expression, “or lend support for their use”, from which joint liability could derive not only for the mere providers of access to the internet but also to other, more sophisticated ISP, who although do not materially contribute to the infringement, technically, financially, or commercially encourage it. But here we are in the area of speculation because in the Andean region there has not been a judicial precedent to clarify the situation. Still, and in the light of the legal text, it is clear, for example, that if a cloud computer service provider lends support for a work to be used without the authorization of the copyright holder, he would be jointly liable for the infringement⁵².

Furthermore, since Colombia’s Free Trade Agreement with the United States already entered into force, the country committed itself to adopt legislative measures to regulate ISP limitations with similar provisions to those included in the DMCA. This makes it all the more important that the secondary liability regimen, the safe harbor exceptions and the legislative initiatives being discussed in other countries are understood in Colombia⁵³.

Article 16.11 of the TPA, related to the observance of intellectual property copyright, stipulates that each party should adopt “legal incentives so that service providers cooperate with copyright holders in dissuading the unauthorized storage and transmission of copyright protected materials; and legislative limitations concerning the reach of the available resources against service providers for copy-

52. Concerning misleading advertising, for example, even when the advertiser is directly responsible for the advertisement, the medium through which it is transmitted also could be jointly liable for the damages caused to the consumer. The Colombian Statute for consumer protection, Law 1480 of 2012, Art. 30, says the following on this matter: “The advertiser will be responsible for the damages caused by misleading advertising. The medium will be jointly responsible only if guilt or deceit is proven. In the cases where the advertiser does not comply with the objective conditions announced in the advertising, without prejudice to the administrative sanctions that might take place, he must respond to the consumer for the damage and loss caused”.

53. The Trade Promotion Agreement (TPA) between the Republic of Colombia and the United States of America was subscribed in Washington, D.C. on November 22, 2006. The incorporation of the agreement into Colombian law was done by approval of Law 1143 of 2007, which was endorsed by the Constitutional Court in Sentence C-750 of 2008. Only in October, 2011 the U.S. Congress approved the agreement, which was promulgated in the respective approving law. The TPA finally entered into force by Decree 0993 of May 15, 2012, promulgated by the Colombian government during the VI Summit of the Americas in Cartagena de Indias. The subscription of the TPA with the United States created the need of modifying and adjusting our copyright and related rights legislation according to the obligations consecrated in it. However, Colombia is in arrears of its need to regulate the responsibility of service providers in the internet and other parties involved in the provision of technological services. A new law should establish the procedure and the conditions in virtue of which copyright holders may ask the ISP to withdraw or block content that infringes their copyright. To comply with the acquired commitments, the Government submitted to the Congress the legislative proposal No. 241 of 2011, which was not approved, among other reasons because of the number of its opponents, the scarce socialization of its proposed norms, and the civil society’s lack of knowledge about its actual legal implications.

right infringements they do not control, start, or direct, and that occur through systems or networks controlled or operated by them, or in their representation”.

The Treaty defines the ISP as service providers online, regardless of the type of service they provide or the business model they use for that purpose. It is pointed out that the ISP cannot be convicted to pay monetary compensations to the creators, but only to restrict the entry of infringing users to their web sites, when their activity is limited to transmit, link, or temporarily storage content created by third parties. They also should adopt a mechanism that allows them to receive notifications from copyright holders when these consider that their rights are being infringed, in order that ISP adopt the pertinent measures⁵⁴.

It must be underlined that the regimen that will derive from the Trade Promotion Agreement will not exclude the application of the general regimen of civil responsibility (*tort law*) or of the special norm contained in the Andean Decision. Consequently, a claim for damages which is excluded by the Treaty's regimen (“these limitations will exclude pecuniary compensations”), may be raised with the exercise of a general action of civil responsibility or with the use of the special Andean norm.

FINAL EVALUATION

Going back to electronic payment operators, it is convenient to highlight the following statements from the already mentioned case *Perfect 10 Inc. vs. Visa International Service Association et al*, not made by the dissenting judge but by the majority opinion:

The defendants can refuse to process credit card payments for those images, but while this refusal would reduce the number of those sales, that reduction is the result of indirect economic pressure rather than an affirmative exercise of contractual rights.

We recognize that the financial pressure frequently is very strong, but precisely for this reason we doubt in extending the vicarious liability law to encompass any kind of financial pressure.

It is an article of faith of the free market that, subject to certain limited exceptions, one can refuse to deal with anyone for any reason, and by refusing to deal with the offending websites, these providers could limit infringement⁵⁵.

We can observe, then, that although the payment systems providers would not materially contribute to the infringement, those systems do make it easier and economically more profitable for the infringers. Even if the infringement itself is

54. Chapter 16, “Intellectual Property Rights” of the TPA subscribed between Colombia and the United States, available in: [www.tlc.gov.co/publicaciones.php?id=14853].

55. *Perfect 10 Inc. v. Visa International Service Association et al.*, cit., p. 9.

not the payment, because the violation consists of the reproduction, alteration, and distribution of the images, the transcribed statements show the effective intervention that electronic payment operators could have in the reduction of infringements of protected content. The Ninth Circuit recognized that the suspension of payments with the use of credit cards would reduce sales in the offending sites or where infringing material is marketed. And that is what all this is about.

If the European Union could settle the simmering conflict between the principle of free circulation of goods and the principle of territorial validity of intellectual property rights by making the distinction between the existence and the exercise of those rights; and if U.S. law foresaw the protection of content in the internet without ignoring its importance as a marketplace of business, trade, and information, the challenge is to achieve that the free circulation of ideas, business models, and the freedom of expression do not affect the rights of creators⁵⁶.

The European Court of Justice in the case *L'Oréal v. eBay* pointed out that the safe harbor privilege foreseen in article 14 of the European Directive on Electronic Commerce only applies for neutral activities of the electronic market operator. According to the European Court, this article “should be interpreted in the sense that it applies for an electronic market operator when he does not perform an active role that allows him to acquire knowledge or control of the storage data. This operator performs such role when he provides his consistent assistance, in particular, to optimize the presentation of the sales offers in question or in promoting such offers”⁵⁷.

In view of this it is relevant to ask if in truth the operators of payment systems online or those who provide advertising services in infringing sites of the internet may proclaim themselves as genuinely neutral⁵⁸. This, of course, is the *quid* of the matter.

To protect copyright in the internet and to regulate the responsibility of service providers and intermediaries several factors must be considered, such as making sure that access to information is easy, the creation of new businesses and services is allowed and, of course, the freedom of expression of the cyberspace is possible⁵⁹.

56. “... The DMCA preserves ‘strong incentives’ for ‘qualifying’ service providers to cooperate with copyright holders. [...] The Court does not read section 512 to endorse business practices that would encourage content providers to turn a blind eye to the source of massive copyright infringement while continuing to knowingly profit, indirectly or not, from every single one of these same sources until a court orders the provider to terminate each individual account. [...] The Court does recognize that section 512 (j) allows for court orders terminating user accounts, but it also recognizes that online service providers are meant to have strong incentives to work with copyright holders. [...]. As mentioned earlier, section 512 is meant to encourage some level of copyright enforcement activity by service providers, not to punish it”: *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002).

57. Sentence of the European Court of Justice of July 12, 2011, in case C-324/09.

58. To analyze the sentence of the European Court of Justice, see especially: MATTHIAS LEISTNER, *Structural aspects of secondary (Provider) Liability in Europe*, draft presented in ALAI, Cartagena, September, 2013.

59. On this point, Tatiana López Romero affirms that measures such as the liability limitation among the ISP and their users to eradicate piracy in the internet do not seem to be enough because a considerable number of ISP are relatively small companies that

But it is also necessary that the actors of the private sector cooperate in the reduction of the disregard for copyright, adopting technical measures to prevent infringements. Business models in the internet at the cost of copyright imply the loss of the individual and social value of the creation.

Alternative mechanisms are needed, like fostering of education of the cibernauts respect to copyright⁶⁰ and encouraging self-regulation on the part of the intermediaries; and measures that make the respect for copyright in the internet profitable and that assure to copyright holders the ownership of the revenue derived from the exploitation of their creations. An example of this last case is found in the recent alliance between *YouTube* and Egeda⁶¹.

In short, the fight against piracy in the internet requires that all actors involved recognize the importance of the issue and take steps commensurate to the role they play in it. So, it is for copyright holders to facilitate the identification of infringing sites; for technological companies to provide technical tools needed to block the infringer once he has been identified, or to restrict the financial means that support his functioning; for companies holding trademarks to pay more attention to the sites where their distinctive signs appear and to indicate in what web sites they wish to advertise and in which ones they do not; for the *fans* and cibernauts to recognize their basic role in this controversy, because they are the final recipients both of the copyright protected material and of the advertising available in illegal sites. Their demand in infringing sites constitutes an additional economic incentive for the perpetuation of piracy and so they, as the other parties involved, must take action.

One final thought, as timely as that of CICERO, from JARON LANIER's recent book *Who owns the future?* serves as the postscript of these lines: "When copying is easy, there is almost no intrinsic scarcity and therefore market value collapses". Therefore, to persecute the money that encourages the infringement will help to rescue the intrinsic value of the creation.

take part in a very competitive market in which an additional cost, like having to keep money reserves to bear the costs of a legal action for secondary liability could have very negative effects in their business and cause that the ISP transfer that additional cost to their users, for example, increasing the subscription rates. This, in the end, would make access to the internet more difficult for the general public from the economic standpoint. Cfr. LÓPEZ ROMERO, *Internet Service Providers' Liability for online copyright infringement: The US Approach*, cit., p. 199 and 200.

60. An example of educational measures seeking that the internet users abstain themselves from committing infringements and face the possibility of being punished for their acts is the "6 strikes copyright alert system", by which the ISP, after receiving a notification from a copyright holder indicating that an infringement has been committed, will contact the user to make him aware of the illegality of his act and warning him that if a correction is not made his access to the ISP services could be restricted.

61. Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA) and *YouTube* help Spanish creators to optimize intellectual property in the internet. July, 2013. Available in: [www.egeda.es/EGE_MostrarNoticia.asp?NmNoticia=512]. Consulted in September, 2013. In 2007 *YouTube* launched a program called ContentID with a production cost of approximately 30 million dollars. This software allows to compare musical videos and other materials protected by copyright with a list of licensed works to identify infringements, permitting that copyright holders decide to monetize their rights by asking for their payment, or simply let them to be freely reproduced and make a follow-up of their use.

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