ARES project
CONSOLIDER-INGENIO 2010 CSD2007-00004
Workpackage 5 - Task 2 (WP5.T2)
Yearly Legal Report on New Regulations P2P Networks and Ubiquitous Networks

José Javier González de Alaiza Cardona
Universitat de les Illes Balears

November 8, 2010

SUMMARY

1. Abstract

In the recent years, copyright holders have tried to stop infringement of their rights by suing p2p networks' users and those who facilitate the utilization of p2p networks, such hyperlink providers. However, the immense majority of criminal and civil actions have been dismissed by the courts. A modification of the current legislation is pending, but if the bill passes with the currently proposed text, the lack of protection of the copyright holders will remain unresolved.

2. Background

File sharing allows users to download films and songs from other users' hard drives. This activity seems to infringe the exclusive rights of the copyright holders to reproduce and to communicate to the public.

The main characters of p2p are: software producers, users and those who facilitate utilization of p2p networks (for example, hyperlink providers).

3. Cases

Software producers have not been sued so far, as the file sharing itself is not considered a copyright infringement since p2p networks can be used to share non protected files.

In Spain the first suits of the copyright holders were against p2p users in the criminal courts. However, the courts did not rule against the users because of the lack of an economic benefit in user's actions (decision of the Criminal Court no. 3 of Santander, 14th July 2006, confirmed by the decision of the Court of Appeals of Cantabria, 18th February 2008).

The possibility to sue the users in front of the civil jurisdiction has been barred as a matter of fact after the decision of the Court of Justice of the European Union, 29th January 2008 ("promusicae" case), declaring the absence of an obligation of the internet service provider to identify the IP users under the Spanish legislation (decision of the Court of Appeals of Barcelona, 15th December 2009).

Afterwards, the copyright holders decided to sue the websites which provide hyperlinks to the files shared in the p2p networks. The courts denied the existence of any

infringement because hyper-linking does not constitute a public communication (writ of the Trial Court no. 4 of Madrid, 20th December 2006, "sharemula" case; writ of the Court of Appeals of Madrid, 11th May 2010, "CVCDGO" case). Nevertheless, two of the courts do have declared the infringement (decision of the Criminal Court no. 1 of Logroño, 25th November 2008, "infopsp" case, and decision of the Criminal Court no. 2 of Vigo, 26th January 2010, "simonfilms.tv" case), but with the consent of the defendant in both cases.

More recently, the copyright holders have brought civil actions against the websites which provide with hyperlinks to the files shared in the p2p networks. The only claim that has been decided so far has been denied because of the same reasons given by the criminal courts (decision of the Commercial Court no. 7 of Barcelona, 9th March 2010) [1]. Other decisions had already denied the adoption of precautionary measures (writ of the Commercial Court no. 3 of Barcelona, 6th May 2009, "ajugero.com" case; writ of the Commercial Court no. 6 of Barcelona, 11th May 2009, "indice-web" case; and writ of the Commercial Court of Huelva, 13th November 2009, "etmusica/elitemula" case).

4. Legislation.

4.1 Intellectual Property Act

The main reason why copyright holders' claims against hyperlink providers have failed is that exclusive rights –to reproduce, to distribute, to communicate to the public and to transform– granted in the Intellectual Property Act [2] protect copyright holders against direct infringement, but not against indirect infringement.

Copyright holders may apply for precautionary measures or even for permanent injunctions to interrupt services provided by intermediaries, such as the hyperlink providers, to third parties which use them to infringe intellectual property rights. These measures will be granted, respectively, under articles 138.3 and 141.6, and 139.1 h) of the Intellectual Property Act [3]. However, copyright holders cannot sue the intermediaries for damages under the Intellectual Property Act because there is no direct infringement.

4.2 Criminal Code

Copyright holders cannot bring a criminal action against users because file sharing is considered a non profit activity [4] and taking an economic advantage is a requisite of copyright offenses. The article 270.1 of the Criminal Code [5] states that "Shall be punished with imprisonment from six months to two years and a fine of 12 to 24 months who, for profit to the detriment of third parties, reproduces, plagiarizes, distributes or publicly communicates, in whole or in part, a literary work , artistic or scientific work or its transformation, artistic performance fixed in any medium or communicated by any means, without the consent of copyright holders or their licensees".

4.3 Civil Code

Some authors have suggested that copyright holders should use tort law (article 1902 of the Civil Code) to sue hyperlink providers. The disadvantage of non-using the Intellectual Property Act is that it will be considerably more difficult to prove the damage and being the hyperlink the proximate cause of the damage.

4.4 Information Society Services Act

The article 17 of the Information Society Act [6] provides an exoneration motive to hyperlink providers. This article reads "Information society service providers that facilitate links to other content or include in their own directories or search tools are not liable for the referred information to their users provided that:

a. They do not have actual knowledge that the activity or information to which they refer or recommend is unlawful or harms property or rights of any party.

b. They act promptly to remove or disable the link.

It is understood that the service provider has actual knowledge referred in paragraph a) when a competent body has declared the illegality of the data, ordered their withdrawal, refused access to them, or else declared the existence of injury, and the provider knew the relevant decision, without prejudice to the procedures for detection and removal of contents that providers that apply under voluntary agreements and other means of effective knowledge that may be established".

If the liability of the hyperlink provider depends on a previous declaration of a competent body, the possibility to claim for damages against them would be completely barred. Nevertheless, the decision of the Supreme Court, 9th December 2009, making an extensive interpretation of article 16 of the Information Society Act, has considered that "actual knowledge" can be achieved by other means.

4.5 Maintainable Economy Bill

In March 2010 the legislative process to pass the Maintainable Economy Bill [7] has begun, which among other things should allow the control of the websites which provide with hyperlinks to the files shared in the p2p networks or facilitate the streaming of films. The Maintainable Economy Bill tries to facilitate the task of identification of infringing providers and removal of infringing hyperlinks.

The proposed new article 8.2 of the Information Society Services Act says that "The competent bodies for the adoption of measures referred to in the preceding paragraph [to interrupt a service or to remove data], in order to identify the information society service responsible person that is performing the alleged infringement, may require information society service providers the disclosure of information enabling identification so that it can be brought in the procedure. Providers are required to provide the data necessary to carry out identification".

And the proposed new article 158 of the Intellectual Property 1/1996 Act says that "The section [second section of the Intellectual Property Commission] may take measures to interrupt the provision of an information society service or to remove intellectual property infringing content by a provider for-profit, direct or indirect, or by any party who intends to cause material injury. The implementation of such acts, as may affect rights and freedoms guaranteed in Article 20 of the Constitution, require prior judicial authorization". The process to obtain the judicial authorization is described in the proposed new article 122 bis 3 of the Administrative Jurisdiction Act [8]: "In the non-extendable period of four-days, following the notification of the Commission's decision and highlighting the record, the Court shall convene the legal representative of the Administration, the Public Prosecutor and the affected holders of rights and freedoms or

their representative to a hearing in which, in a contradictory manner, hear all people and settled by writ, which may permit or deny execution of the measure".

The bill has been criticized for various reasons:
- putting the free speech at risk since the decision to remove hyperlinks will be taken by an administrative body, with just a summary control of a court, when this removal can already be done by a judge under the provisions of articles 138.3, 139.1 h) and 141.6 of the Intellectual Property Act.
- immunity for the users since the bill is only referred to the internet service providers.
- unresolved issue, since courts so far has considered the mere hyper-linking of a copyright protected file as a non infringing activity, it is not clear that the strict compliance with the letter of new article 158 of the Intellectual Property Act will allow identification of hyperlink providers or removal of such hyperlinks.

5. Bibliography.

[1] Peguera Poch, M. Enlaces, descargas y puesta a disposición en redes P2P (comentario a la setencia del Juzgado Mercantil núm. 7 de Barcelona, de 9 de marzo de 2010, sobre el sitio web elrincondejesus). Diario La Ley, num. 7462, Sección Doctrina, 7 Sep. 2010.

[2] Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia.

[3] Modified by the Ley 23/2006, de 7 de julio, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por el Real Decreto Legislativo 1/1996, de 12 de abril.

[4] Circular 1/2006, de 5 de mayo, de la Fiscalía General del Estado

[5] Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.

[6] Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico

[7] Proyecto de Ley de Economía Sostenible, Boletín Oficial de las Cortes Generales, IX Legislatura, Serie A, 9 de abril de 2010, núm. 60-1 <http://www.congreso.es/public_oficiales/L9/CONG/BOCG/A/A_060-01.PDF>

[8] Ley 29/1998, de 13 de abril, reguladora de la Jurisdicción contencioso administrativa