

Uthoff, Gomez Vega & Uthoff

Assessing fairness in Mexico

Although internet usage is still developing in Mexico, the Web is frequently used to commit copyright infringement. For brand owners the issue of fair use is central

According to research recently published by Maria de las Heras on www.elpais.com, around 30 million people in Mexico use the Internet, with each person spending an average of three and a half hours a week connected to the Web. Considering that Mexico has a population of approximately 106 million, this means that about 28% of Mexicans use the Internet.

As part of her research, de las Heras found that only 14% of participants use the Internet to purchase goods and services, and that eight out of 10 participants use the Internet to search for copyrighted content, mainly videos and songs.

Quoting data obtained from the Motion Picture Association Mexico, Alejandro Gonzalez, reporter for the newspaper *Reforma*, stated that in 2009 7.5 million pieces of online material were unlawfully downloaded in Mexico.

In light of the above information, it can be concluded that in Mexico, a significant amount of illegal downloading is being carried out by a small number of internet users.

The Internet and new technologies make copyrighted materials easily accessible. They speed up methods for using, reviewing and playing works, thus contributing to the spread of culture and education; however, they also facilitate the copying, reproduction and distribution of copyrighted works.

With content so easily obtainable through the Internet, ordinary people with no knowledge about copyright protection may be led to believe that they can freely reproduce and distribute such content without needing to obtain authorisation to do so, and without realising that there is an obligation to compensate copyright owners economically when use of their works moves out of the private sector and into the commercial sector, albeit informally.

Thus, it is necessary to ascertain when

the use of downloaded materials crosses the border of legality from a Mexican law perspective.

In Mexico, as a general rule, the author or copyright holder of a work has the exclusive right to use and commercially exploit the so-called 'economic copyrights' over the work, giving it the right and ability to use, reproduce, distribute, market and communicate literary or artistic works to obtain profit.

Exceptions to this general rule are contained in Title VI of the Federal Copyright Law and include 'fair use' or 'fair dealing' situations. In this context, Article 148 of the law establishes that published literary and artistic works can be used without obtaining authorisation from the economic copyright holder and with no payment obligation, provided that:

- the user quotes the source from which the work was obtained;
- the user does not modify or alter the work; and
- the normal exploitation of the work by the legitimate copyright holder is not affected.

The same article establishes the following as permissible 'fair use' acts:

- quotations, provided that they do not constitute a substantial or simulated reproduction of the works from which they are extracted;
- the reproduction of texts, photographs, illustrations and comments relating to current affairs, published or communicated in written or electronic media, unless the copyright holder has expressly forbidden this;
- the reproduction of portions of works for research or critical purposes;
- the reproduction of one copy by an individual (not a company or legal

entity) of a literary or artistic work for personal and private use and with no intention to obtain a profit. Companies may not take advantage of this right unless they are educational or research institutions or their activities are not aimed at commercial activities;

- the making of backup copies in archives or libraries of out-of-print works;
- the reproduction of works to be used in judicial or administrative proceedings; and
- the reproduction, communication or distribution through drawings, paintings, photographs or audiovisual materials of works that are visible from public places.

Upon analysis of the general fair use principles, it could be argued that in some instances, the downloading of online content is a permitted action that would not constitute copyright infringement.

When downloading content that is strictly for private use with no intention by the downloader to obtain profit through the use, reproduction, distribution, marketing or communication of the downloaded material, there will be no grounds to initiate a copyright infringement action. Companies and legal entities will be entitled to take advantage of this exception only when they have no commercial objective and their main activities are within the research or educational fields.

Conversely, if the downloader intends to profit from the downloaded works, this action will constitute a direct copyright infringement that can be prosecuted under administrative or criminal federal law. When the downloader intends to profit from the downloaded content, the fair use exceptions foreseen by the law no longer apply.

However, problems arise when the downloading, although not aimed at

making profit, affects the copyright holder's own commercial exploitation of the work. The downloading of content through peer-to-peer file sharing systems could be placed in this category.

According to information obtained from Amprofon (the largest Mexican recording industry association), every year 4.4 million internet users in Mexico download 1.767 billion songs using peer-to-peer file sharing structures.

As mentioned, the author or holder of the economic copyright over a work is the only person entitled to make the work accessible to the public and to initiate its commercial distribution in the Mexican market. Thus, when a user places a copyrighted work into a peer-to-peer system to enable file sharing, the user is undertaking an action that it does not have the right or legal ability to carry out. Thus, the content placed in the system becomes illegal, since the copyright holder has not authorised its distribution.

For the downloader, the downloading may be aimed either at profiting from the commercial distribution of the works or at private and personal use of the content. There is no doubt that in the former case, the user of the peer-to-peer system is guilty of copyright infringement. In the latter case, the question arises as to whether, if the downloader is making only personal use of the work, this conduct constitutes copyright infringement. Some may argue that isolated content downloading for strictly personal use would not constitute copyright infringement. However, when the downloading of content is reiterative, although there may be no aim to obtain revenue, this action may negatively affect the normal commercial exploitation of the work. In this case the author or copyright holder should have had the right to obtain economic compensation for a work that, instead of being purchased through authorised means, was distributed through a channel whose use the author or copyright holder had not agreed to when the work was initially placed on the Mexican market.

Conclusion

The following conclusions may be drawn:

- The illegal downloading of online content is a modern form of copyright infringement.
- Although internet usage is still developing in Mexico, the Web is still used to commit copyright infringement.
- In some cases infringements occur due to a lack of knowledge in ordinary people about the existence of copyright



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protection over works that are available online and a lack of perception about the harm that online piracy and piracy in general can cause to the creative industries.

- In order to determine whether the downloading of online content infringes copyright, if the ultimate purpose of the downloading is to obtain a profit, there is no doubt that the conduct will infringe the owner's copyright.
- The fair use doctrine is recognised in the Federal Copyright Law. Therefore, the downloading of content on an isolated basis and strictly for personal and private use should be considered a permissible action in Mexico. Nevertheless, if the illegal content is repeatedly downloaded by the same individual (eg, through peer-to-peer file sharing systems), this may be construed as copyright infringement, since it affects the normal commercial exploitation of the work. **WTR**