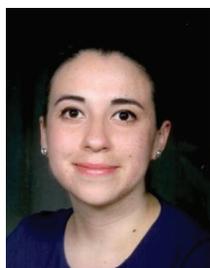




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Problems with Mexican Copyright Law: Camcording

Luis C. Schmidt and Fernanda Díaz from OLIVARES and Ana Maria Magaña from MPAA, explore some of the problems with Mexican Copyright Law by looking into camcording and outline some of the changes needed to help solve the problems.

Legislating or enforcing without understanding issues or rights leads any legal system to become unfair.

It can be affirmed that Mexican legislators and enforcers lack full knowledge of the issues that

copyright law raises, which has resulted in an inadequate or insufficient level of protection or enforcement for films. Camcording is a perfect example of that.

The legislative side of the problem

Generally, copyright infringement – or copyright piracy – signifies that infringers use copyrighted works for massive or extensive copying or dissemination. The foregoing works equally in the physical and digital environments. Some infringers, though, sell the copies or charge money for disseminating the works; selling or seeking gain for selling or disseminating is a legal offense greater than copying or disseminating alone. However, the copying and dissemination of copies are, by themselves, wrongs that affect authors or right holders. Legislators and enforcers have had trouble viewing this and rather have taken a limitative approach.

Mexican legislators have, so far, failed to resolve the camcording issue. For many years, right holders have proposed amendments to the Copyright Law: The Senate previously discussed at least two bills that were unsuccessful, under the excuse that the copyright infringer presupposes gain or that punishing camcording is a threat for minors. The fact is that the Mexican copyright enforcement system is ill-conceived. In camcording, a person – sometimes more than one – attending the exhibition or projection of a film in a movie theatre – or any screen where a film is shown to a public – makes a copy by recording the same with a camera or a device i.e. a smart phone. The copier can keep the copy in the memory of the camera or device, can make a live broadcast, or can edit the copied film to elaborate a master copy and then utilize

Résumés

Luis C. Schmidt

Luis Schmidt possesses more than 30 years of intellectual property experience in all areas of IP and has an unparalleled knowledge of digital media and related copyright law in Mexico, representing the world's leading companies. It can be argued he is the most important IP lawyer in Mexico working in the field of media and entertainment as he is directly influencing the future of Mexico's copyright law.

Ana María Magaña Rodríguez

Ana María Magaña Rodríguez is a lawyer in Intellectual Property, specialized in the area of Copyright. She currently serves as the Managing Director for the Motion Picture Association Mexico, representing the intellectual property interests of the six leading Hollywood studios (Disney, Sony / Columbia, Paramount, Twentieth Century Fox, Universal and Warner Bros.). She acts as President of the Committee on Intellectual Property in the American Chamber of Mexico and serves as a Member of the Board of Directors of the Coalition for Legal Access to Culture.

Fernanda Díaz

Fernanda's experience is concentrated on the Anti-Counterfeit/ Piracy department, by administrative, criminal and civil procedures in Mexico. Her experience includes the protection on non-traditional media, by filing domain name actions at the Arbitration and Media Center of the World Intellectual Property Organization (WIPO), as well as implementing digital environment actions against counterfeits. The anti-counterfeit/piracy practice has been developed from the various clients that are handled in Olivares, thus Fernanda, along with the team, developed a practice that generates programs tailored made for each client.

to obtain physical copies for distribution or share the film on social networks. Moreover, the camcorder can send the film from the movie theatre or any other site, like a website or IPTV channel or app, that will make it available to online users, who can stream or download it from a place and at a time individually chosen by them.

Camcording as a crime

Camcording is a copyright infringement in the sense that it attempts against exclusive patrimonial rights of reproduction, transmission, and making available, that local and international provisions state. It is a criminal offense in itself considering the level of threat it means for the copyright holder but, at the same time, is a wrongdoing that is different from general infringement. Making one single copy with the recording device represents that the copier can potentially multiply the same extensively, both in the physical or digital environments, affecting the normal exploitation of the film, with a significant loss to the rights holder.

Camcording requires to be prosecuted as an offense, regardless if the copier pursues gain or not. Profit or gain is not really an issue related to camcording. It cannot be recognized as incidental film reproduction that a camcorder records from the theatre's screen, but rather as a first step taken to spread out a film. The criminal intent of the copier is never apparent or perceptible and is difficult to demonstrate, since it simply rests behind her or his mind.

Camcording has brought a great challenge to copyright laws and systems of countries like the Mexico, which require that infringement is been made massively and for gain. The question arises whether the law as written can deal with the problem and resolve it.

Mexican copyright law is divided into moral and patrimonial rights; "Patrimonial" is a principle that has been long misunderstood and misconceived. The legislator of 1996 wrongly equated the concepts of "patrimonial" and "commercial". Clearly, they are not the same and cannot be compared.

"Patrimonial" is far broader than "commercial" as it includes every asset that the author possesses in connection with a work, like the chance of commercializing it. However, the Federal Criminal Code stipulates that copyright infringement actions require proof of massiveness – in commercial scale or speculation - or of gain, which enhances the idea of commerce and not of patrimony. The fact that criminal actions provide gain as a requirement cannot be viewed but as a limitation in order to enforce camcording. The legislator of 1996 established that patrimonial rights of authors would be affected if they get infringed – i.e. the right of reproduction -, but also if infringement is made massively and for the purpose of gain.

So, in Mexico, "affecting" the copyrights do not only suppose "reproducing" a work, but also that the reproduction must be made "massively" and for "gain". In copyright law, rights are affected simply and solely when infringers or offenders, without consent, copy, transmit, or make works available to the public. The massive and gain factors are indicators of aggravation that elevate the sanctions but are not a factor of infringement as such.

Copyright infringement resembles robbery in as much as it is a crime that people steal; but stealing is not under the condition that robbers sell what they steal. In the end, Mexican laws do not protect the patrimony of authors over their works to the same extent as they protect the patrimony of people over their property.

Many countries' laws and legal systems do not find camcording to be an issue so strong or unique that would require a special legislation. Certainly, camcording fits within the description of general infringement and, accordingly, there is no need to amend laws or systems. That is the case of countries like:

- a) Australia
Differentiating among summary, strict and indictable offenses, the latter not implying gain, which includes films viewed in public;
- b) Brazil
Dividing between public offenses, against infringement made for gain and private offenses, against infringement not made for gain;
- c) Canada
Providing a particular camcording crime, that does not imply gain and that increases sanctions depending if a recording is made for sale, rental or commercialization;
- d) Germany
Providing criminal sanctions against persons who copy, distribute or make public communication, and that sanctions increase when infringement is made at commercial level;
- d) Italy
Considering the existence of offenses that do not require intent of gain and that they are sanctioned by virtue of fines;
- e) USA
Not requiring intent of gain, but only "willful intent", in attempt to the laws of the USA; and
- f) UK
Stating as crimes different wrongs that are subject to major sanctions depending on the level of wrong.

The enforcement side of the problem

Apart from the legislative concerns, it has also worried copyright owners that enforcers perceive camcording so narrowly. In principle, they believe it should not be prosecuted as a crime and it is the courts or administrative authorities instead that should be in charge of the enforcement. However, neither judges nor administrative authorities have the competence and capacity to stop or prevent people from recording the films. Ultimately, camcording has affected copyrights so badly, that it is just by virtue of criminal actions that rights can be enforced and rescued.

As mentioned previously, camcording implies that one person or perhaps a group of persons, record a film from the screen directly, and do it for the time or part of the time it takes to perform it. Criminal authorities are best suited to act when measures need to be taken quickly and effectively to arrest the copiers at the site, take them before the judge, file necessary complaints, and inspect the cameras or devices for seizing or erasing the copied film.

Changes needed for the law and the practice

Camcording is the cornerstone of an enforcement culture in the copyright arena. It is not a problem exclusive to Mexico and is rather a global issue that all countries are expected to address for a common solution. What makes Mexico key is that in its territory, stats and dimensions of incidents have increased. Mexico is the fourth most important market for the movie industry worldwide and needs an enforcement system consistent with the problem. The copyright



enforcement system of Mexico needs amendment, but a reform is particularly urgent for camcording. In keeping with this, the right holders and the film industry have pursued intensively changes to the Federal Penal Code, for penalizing camcording in a special provision.

In the long run, the legislator will need to design criminal law provisions of a broader scope that fit into every infringing behavior. The objective would be avoiding the need of amendments every time a new challenge develops, like new technologies or conduct turn up. It is true that infringement is subject to evolution as technology is, but it is also true that well written laws help to keep a legal system strong. Concretely in Mexico, criminal provisions need to remove the gain factor or to be more specific, the part of the provisions requiring “purpose of commercial speculation”. And the gain factor needs to be considered an aggravation element.

Regarding international treaties, neither TPP11 nor NAFTA will solve the camcording situation in Mexico. Although both pursue a noble objective, in the end they do not handle the underlying issues properly. No great solution is expected as a result. In any event, the treaties will create awareness of the problem and the need for solving it, globally and regionally. In the best-case scenario, the language in those treaties will recognize that the parties must do everything needed to solve the problem, such as sanctioning and preventing from the legislative and the enforcement sides. In any event, the treaty provisions should be observed from that angle and by that perspective.

Having adequate legal provisions is essential, but also that the authority that applies them has knowledge and good judgement to fight against the crime efficiently. Enforcers have ignored criminal law principles, when raising issues like minors’ liability. Actually, they have weakened their position to take actions and arrest people, considering that copiers can be children who record the films innocently. However, that is just an excuse for not acting, since the Criminal Code provides the legal means and tools to address such cases. As a matter of fact, the Criminal Code considers several provisions for minors’ rights to be protected during any criminal investigation. In the end, the questions of enforcers and legislators,

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in connection with minors and other issues find a response in the Criminal Law and thus should not be impediment for enforcing or legislating on camcording.

Mexico implemented a new criminal justice system, by which the rules were modified and the roll of the authorities diminished or increased, depending on the type of investigation or action conducted. Accordingly, for implementing actions against alleged infringers doing camcording, copyright owners need to collaborate with the Attorney General’s Office in the fight against crime. Because of the massive harm that camcording represents to the right holders and to the society, the criminal authorities should be interested in prosecuting camcording along with the right holders.

Now, as mentioned above, a line of action has to be established to fight camcording. The first is an act *in fraganti*, and the second is the implementation of investigations of alleged infringers, so to proceed against them with a criminal complaint.

One of the most important actions that need implantation in this stage of the crisis that Mexico is facing regarding camcording will be discussing with the Attorney’s General Office about the implementation of the law and the relevance of fighting this crime.