In wonderland

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After appearing on a US ‘watch list’, Spain is undertaking major reform to stop online piracy. But it won’t be a smooth ride, says Laura Cantero

The Spanish Government has drawn up a preliminary draft bill, made public on 22 March, to modify the Spanish Copyright Act of 1996 with which it intends to continue on the reform track started with the controversial Sustainable Economy Act no. 2/2011 of 4 March (the popularly so-called ‘Ley Sinde-Wert’), by adopting measures aimed at ensuring a suitable level of protection of copyright in the digital environment in Spain and, more specifically, by extending the administrative procedure for safeguarding legality established with that Act.

Despite the text being still at an early stage, it has already brought first results at least when it comes to the image of Spain abroad, as it has helped Spain to avoid being included in the annual “Special 301” Report, published on 1 May 2013, produced by the Office of the United States Trade Representative (USTR), standing as a genuine “black list” of the countries with the lowest rates of effectiveness in ensuring protection of intellectual property rights and, in short, those most affected by the worrying phenomenon of piracy. The effectiveness of the recent Government’s reform proposal in this sense becomes clear as in February the International Intellectual Property Alliance (IIPA) submitted a report to the USTR where it expressly recommended to classify Spain within the Watch List. The reform proposal for the Copyright Act has momentarily dispelled the threat that was in this regard hovering over Spain.

Despite this relative victory, few have shown conformity with the reform proposal, and the text made public has already given rise to numerous opposing voices among the copyright-based industry, copyright collecting societies and internet users associations.

Concerning the contents of the reform, the proposed amendments to the Copyright Act mainly refer to three issues:
1. Limitations to copyright are amended, particularly illustration in teaching and, in a significant way, private copying, whose concept is restored.
2. The regime of copyright collecting societies is modified with the aim of increasing their transparency and enhancing their effectiveness, while at the same time their financing system is transformed.
3. Measures are taken to reinforce the mechanism for safeguarding the legality against violations of copyright by internet service providers (“ISPs”) assigned to Section no. 2 of the Copyright Commission created within the Spanish Ministry for Culture and which was established by the afore-mentioned Sustainable Economy Act.

The preliminary draft bill undertakes a deep revision of a passive subject against which protection can be sought, in order to orientate the proceedings against large-scale infringers in the digital environment, as well as to provide the possibility to require measures of withdrawal of contents or interruption of services against those who offer links that allow unauthorised download of protected material from p2p networks (in both cases, provided there is profit-making purpose or real or probable property damage).

Thus, regarding this second category of possible passive subjects, when infringing ISPs have no sufficient links to Spain or when effective relief cannot be guaranteed for other reasons, protection can be sought against those who fulfill the following conditions: 1) they participate in infringing rights in a significant manner taking into account their audience ratings in Spain or volume of protected content whose location is facilitated; 2) their main activity is to facilitate in a specific and massive way the location of contents presumably offered without authorisation; 3) they develop active, specific and non-neutral work of maintenance and updating of localisation tools, in particular offering ordered and classified lists of links to protected contents; 4) they do not just develop activities of pure technical intermediation.
It is an extensive definition that allows to react against the offering of links to protected works, an activity to which, until present day, neither substantive law nor case-law have provided a clear and categorical response. It is further deduced that those who just facilitate some links occasionally and ISPs that simply offer internet search tools not oriented specifically to locating protected contents (eg Google) would be excluded.

The event that an ISP does not voluntarily abide by the Commission’s decision ordering withdrawal of contents or interrupting the service, the Commission is expressly given empowerment to require providers of intermediation services, electronic payments or advertising to suspend the services they render for that ISP. This remedy, which was already envisaged concerning intermediaries in article 24.11 of Development regulation on the functioning of the Copyright Commission, is hence extended to payment gateways and advertisers, the text expressly pointing out that blocking the financing of the ISP will be a priority, while blocking services from providers of internet access should be regarded as a last resort measure should others at hand prove to be unsuccessful. As is already established in the Copyright Act and the aforementioned Development regulation, enforcing any measure at the expense of the ISP considered an infringer will require prior court authorisation.

The text establishes fines going from €30,000 to €300,000 for ISPs that repeatedly refuse to voluntarily withdraw contents or to interrupt the service further to the Commission’s resolutions in that regard. Moreover, the lack of Collaboration by providers of intermediation services, electronic payments and advertising, ordered by the Commission upon court authorisation, shall be considered violation of article 11 of Spanish E-Commerce Act (“Duty to cooperate of intermediary service providers”).

Last to be highlighted, the Spanish Civil Procedural Act is subject to modification, and particularly the mechanism for obtaining information and evidence prior to starting legal proceedings are extended. Whoever intends to take action for the infringement of copyright (or intellectual property rights) committed in the digital environment, will be entitled to previously ask the court to practice enquiries to identify the alleged infringer by verifying its IP address, domain name, internet address or any other similar identification data. To that end, the court request for identification could be addressed to ISPs, providers of electronic payment services or advertisers that have had economic relations with the alleged infringer in the last twelve months. This means of identification of the alleged infringer on Internet, so far only admissible in Spain within criminal proceedings, would thus be extended to pursuing infringements in civil courts.

One of the goals from the outset of the preliminary draft bill is enhancing efficiency of the proceedings before the Copyright Commission, especially to enable action against ISPs which base their business model in offering links to copyrighted works. Save for some exception Spanish Courts have not determined the unlawful nature of such behavior, either in the lack of evidence of profit-making purpose (required in criminal proceedings) or on the consideration that providing links to copyrighted material does not involve any of the activities proscribed by the Copyright Act. In the Appeal Judgment in the case “Brinncondejesus.com”, the Court suggested for the first time that the offering of links could be approached by requesting an injunction against the owner of a linking site in its condition as intermediary service provider whose services are used by a third party to infringe copyrights by sharing work files in p2p networks. However, given the practical problems this solution may give rise due to the interaction with the liability regime for ISPs in the E-Commerce Act, channeling the problem through the administrative relief procedure may at least represent a provisional and quick solution, from the perspective of participation in infringement by offering links, until a substantive review of the Copyright Act, and in particular the definition of communication to the public, takes place to clarify the legal description that shall be attributed to such activity.

However, the very fact that the existence of copyright infringement is subject to decision in administrative proceedings, as well as the adoption of the corresponding safeguard measures by the Copyright Commission and its increased attribution of powers, is still a subject for criticism as it was at the time on the occasion of the implementation of the proceedings, despite judicial authorisation being required to enforce the measures that shall be agreed by the Commission. Besides, from a mere procedural standpoint, the fact that an administrative court (Contentious-Administrative Chamber of the National Court) may deal with those violations in appeal stage might collide with competence assigned to civil courts on the matter of actions for copyright infringement.

The copyright-based industry has complained that the preliminary draft bill does not address the problem of offering of contents from major search engines (which has been mainly remarked by the Spanish Newspaper Publishers Association, AEDE), and concerning the prosecution of link offering, that the administrative relief proceedings still requires initiation at the request of a party.

The preliminary draft bill amending the Copyright Act which is currently on the table, among other objectives, aims to face those voices that have highlighted the ineffectiveness of the controversial Second Section of the Copyright Commission in its first year of life by enlarging its scope of action. Leaving aside the controversy over the draft text, it certainly opens the door to action be taken by authorities against the offering of links to download copyrighted works, a conduct for which there is still legal vacuum in Spain. However, since the preliminary draft bill is still in a very early stage, we must wait and see how events unfold, and be particularly attentive to the parliamentary discussion on the text that will eventually reach the Congress in the form of draft bill, to make a more accurate assessment of potential changes in Spanish copyright legislation, but the road ahead is expected not without controversy.

Footnotes
4. “Upon receipt of the writ of the competent Central Administrative Court authorising or refusing to enforce the suspension, it shall be notified (...) to intermediary service providers within the information society whose collaboration is necessary, which shall, where applicable, ensure compliance with the suspension (...)”.
5. Royal Decree 1889/2011, 30 December.
8. Under articles 138 (3rd par.) and 139(1)(h) of the Copyright Act.

Author
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