Transpacific Partnership Agreement (TPPA)

Intellectual Property Chapter Concerns

INTERNET SERVICE PROVIDERS LIABILITY

NGO Derechos Digitales – Chile

The known proposal[1]

Article 16.3 of the leaked US proposal for an Intellectual Property chapter, expresses Parties' duty to establish remedies to prevent infringement, and both civil and criminal remedies to deter further infringements, within that Article's framework. That includes:

(a) legal incentives for private cooperation between service providers and copyright holders,

(b) limitation of scope of remedies against intermediaries that serve as mere conduits in copyright infringements. This includes: (i) limitation confined to certain technical functions; (ii) limitation available only where service provider does not interfere with content or transmission; (iii) different qualification for limitations according to each technical function as described in clauses (iv) to (vii); (viii) limitations for remedies taken against service providers; (ix) obligation to establish procedures for notification for notice and takedown, and counter-notifications in case of erroneous removal, plus monetary remedies for knowing misrepresentation in notice or counter-notice that causes injury; (x) liability exemption for service providers that remove or disable access in good faith provided that it takes "reasonable steps" to notify the removal or restore in case of timely counter-notice; (xi) administrative or judicial procedure to identify the alleged infringer; (xii) definition of service providers for whom rules apply.

The context

- Internet service providers' liability has been in discussion for a couple decades. However, in the US it is consistently maintained by courts that a mere service provider is not responsible for the contents that transit through their services, as they have no editorial control (see *Cubby, Inc. v. Compuserve*).
- The Digital Millennium Copyright Act, contained safe harbor provisions to limit ISP liability on the grounds of copyright infringement, stating that the access, transit, hosting or caching data providers, cannot be held liable unless they received a notice and takedown request from a copyright holder. This model has been transposed into other jurisdictions through free trade agreements, with some changes. This includes the Chilean regulation for ISPs established in 2010, in full compliance with FTA requirements.

The concerns

- The Parties' obligations as set forth in Article 16.3.a) are excessively vague: a legal incentive for private action that affects others, perhaps negatively, may encourage such behavior. For instance, **legal incentives for self-regulation might lead to privately created systems of easy and presumably illegal takedown of content**, or establishing abusive rules towards consumers.
- The Parties' obligations as set forth in Article 16.3.a) may lead to ISPs assuming functions that are beyond the services contracted by consumers. For instance, **it might lead to surveillance of contents or deep packet inspection, in order to fulfill the**

[1] As available on August 3rd 2012 at: http://keionline.org/node/1516.

intended "cooperation" with copyright holders. While this is not required by TPP, it is not forbidden, and "cooperation" is encouraged without considering users' rights.

- New obligations for ISPs regarding control of content, go straight against *mere conduit* rules and the current trend of net neutrality laws (in places like Chile and the Netherlands), that allow for increasingly better connectivity, service transparency and non-interference on private communications by users.
- Parties' obligations, as set forth in Article 16.3.b), establish a DMCA-like process to remove or disable access to allegedly infringing content. **While a *safe harbor* system is already in place in several jurisdictions, it is important not to impose a mandatory private notice system**. When only a private notice is needed to takedown content and exempting a service provider of liability, there are **no incentives to dismiss a request**.[2] Private censorship, system abuses and a potential overload of requests may occur if no proper review is available without a counter notice.
- Parties' obligations as set forth in Article 16.3.b) endanger human rights without providing balanced copyright rules, in mandatory fashion, disregarding complex policy issues that are each country's to decide. For instance, **Chile** and **Canada** have arrived, after long debate, to different takedown solutions: a judicial takedown system in Chile[3], and the *notice and notice* Canadian system. In Chile, this came very recently and after more than three years of debate in Congress in full compliance of USA-Chile FTA requirements. To engage in new congressional discussion for issues so recently enacted into law, is at best unlikely to succeed.[4]
- Parties' obligations as set forth in Article 16.3.b) should not be, at all, obligations. **Not only are they complex policy matters, but they are also unnecessary**. Ever since Chile's reform implementing judicial notification, there have been no known cases of misuse as there have been under DMCA in the U.S.. Ever since the same reform in Chile, cooperation between service providers and rights-holders *has* successfully operated, but with a clearer framework where judicial review enters only when it is necessary.
- Parties' obligations, as set forth in Article 16.3.a) **will end up giving new duties to service providers, making it more expensive to connect to digital networks, thus isolating large parts of the population** and diminishing possibilities for quick, lawful access to countless goods, whether digital or not, available in the global market. This is cause for concern in small countries with large amounts of poor people. To raise the price of access to the internet is to take away the means to a number of licit activities, causing harm to trade and innovation, and discouraging legal services from following the path of Netflix in searching for new venues.
- For the final week of July 2011, Google reported 156,314 requests for URL removal from its search service. For the final week of March 2013, Google reported 4,491,708 requests, representing an exponential growth, and **rendering a proper review process almost impossible.** The system shows signs of wear, and might soon lead to reforms in the U.S.
- As a consequence, private-only notice and takedown systems may:
    - **Encourage meritless claims** that abuse the system, stifling innovation, competition, freedom of expression, and endangering free speech.

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[2] See http://www.chillingeffects.org

[3] Upon a judicial request, the court has to give a brief merit clearance of the request. Also, ISPs have to forward the notice to the actual content publishers.

[4] The Chilean implementation bill wisely left out TPM provisions to quickly ISP liability rules. Even so, it took public demonstrations and intervention from the government in order to secure a political agreement to avoid failure of the bill. In Canada, it took more than ten years of debate over copyright law before Bill C-11 received royal assent in 2012

- Encourage judicial intervention relying on faulty private notices, by giving incentives to judicial outcomes in order to obtain easy compensation money.

Proposed solutions

1. Avoid incentives to judicial systems overload, by supporting notice and notice systems where only meaningful claims are brought to courts.
2. Promote expeditious judicial remedies across the board, instead of risky private takedowns.
3. Avoid heavy burdens for local and international internet service providers, by preventing private notice systems from hastily taking down legitimate content.
4. Support free trade, by engaging in meaningful measures to ensure content providers have proper channels for international availability of copyright goods, thus discouraging unlawful distribution.[5]

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