The unresolved debate in Colombia about copyright protection on the Internet. The case of 'Lleras Law'

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SUMMARY

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On Monday April 4, 2011, the former Minister of Interior and Justice, German Vargas Lleras, arrived to the Senate Secretariat accompanied by a group of artists and a with draft law under his arm. "Those who continue using piracy, take back, because from here forward the theme of imprisonment and penalties will be applied rigorously," said Vargas Lleras.

Most of the draft law (16 out 19 articles) envisaged the creation of an extra-judicial mechanism to remove from the Internet those contents -videos, music, text- uploaded or transmitted by users and that allegedly infringe copyright.

The threat of imprisonment for pirates as referred by Vargas Lleras was in one of the final articles of the proposal. Rather than creating a new offense, what it really did was to repeat -if anything, more specifically- the existing definition under the Colombian Penal Code.

By introducing the proposal surrounded by artists, Vargas Lleras was not only attempting to shield of legitimacy the reform -which was part of the obligations undertaken in the Free Trade Agreement (FTA)- but also gave it a really different approach. Before getting into the thorny debate about the balance of fundamental rights on the Internet, the government wanted to keep the debate in terms of the survival of our musicians, actors and producers.

Regulation such as the one embodied in 'Lleras Law' aim to establishing a legal link between Internet Service Providers (ISPs) and copyright holders, so that the latter can control the use of its copyrighted material. 'Legal incentive' means creating a norm that hold ISPs accountable for copyright infringement committed by users, unless they undertake certain actions.

The 'collaboration' proposed in 'Lleras Law', adopted from U.S. legislation, was that ISPs should disable or remove user's infringing content upon notification from the alleged owner of that material. Only then the ISPs would be in what is known as a 'safe harbor', i.e., safe from civil and criminal liabilities. Once the content was removed or blocked, the affected user would receive a take-down notice and could initiate a claim (known as counter-notice).

The most relevant feature of the take-down system in 'Lleras Law' is that it is an extra-judicial mechanism. This means it does not require the judge's intervention during the take-down procedure. Moreover, the process is being waged primarily between the copyright owner and the ISP. This is not the only available model: several countries have adopted administrative (involving an administrative authority), judicial or mixed mechanisms.

This mechanism has been criticized in various parts of the world. ISPs do not have the evidence, nor the authority to assess legitimate uses of copyrighted content. Also, they do have a strong incentive to comply with take-down requests. On the other hand, copyright holders are not an impartial party to analyze the gray areas. Even assuming that the tool is used in good faith, the mechanism is designed in such a way that the parties do not assume any cost for wrong or disproportionate requests of content removal.

The core of 'Lleras Law' did not change during the legislative process in Congress. In a race against the clock, Bill 241 was approved in first debate on June 14, 2011 - five days after the publication of the report -by seven votes to three. Senators Roy Barreras Juan Manuel Corzo, Eduardo Enríquez Maya, Manuel Enríquez Rosero, Juan Manuel Galán, Juan Carlos Vélez and Karime Mota, voted in favor of the bill; Senators Luis Carlos Avellaneda, Jorge Eduardo Londoño and Luis Fernando Velasco, voted against.

The atmosphere changed dramatically for the second debate, and in November 16, in just a couple of minutes, 'Lleras Law' was shelved. This outcome left a very important precedent

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for the future. In the final report, drafted by Senator Luis Carlos Avellaneda, was exposed in great detail why a removal mechanism of content without prior judicial review would be unconstitutional in Colombia.

Since the beginning of the discussion, the proposal's critics had raised this argument without any influence on the body of the regulation. Thus, it seems unclear that this had been the reason to bury the proposal, although the argument was used promptly. Rather, the free speech stand joined the consequences once 'Lleras Law' lost political momentum.

Rejection of Internet-users in social networks and in Congress, largely under the umbrella of 'Redpatodos', turned 'Lleras Law' a very unpopular cause. In addition, there was a lack of coordination between the National Copyright Directorate (under the Ministry of the Interior) and the Ministry of ICT, driven in part by conflicting views of both portfolios, and repositioning of some of the speakers.

But beyond that, what happened must be put into perspective. The rationale underlying 'Lleras Law' was not removed. Those who supported the initiative left on the table the twisted view, or at least questionable idea, that with the fall of the proposal piracy had triumphed in Colombia.

Proposal promoters invoked Congress' help to hold back a damage that was never credited. Even assuming that there was damage, the relevance and adequacy of the proposed solution to stop it was reprehensible in light of other fundamental rights. The discussion undertaken in 2011 should have focused on this, and it should begin there when Congress revisits the initiative.

The assumptions underpinning the debate on copyright enforcement in the Internet should be examined for the case of Colombia, namely, piracy and its relation to the use of Internet, the quantification of damages, permitted uses of copyrighted material and the boom of free culture in the country. Starting this debate, by no means, is an apology for piracy or ignoring the FTA with the United States.

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