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 Report

ALAI Study Days Oaxaca 2004

Liability of internet intermediaries. Spanish National Report

<http://www.uoc.edu/dt/eng/peguera0904.pdf>

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Abstract

This is a reproduction of the report from the Spanish Literary and Artistic Copyright Defence Association (ALADDA) on the state of affairs of legislation and jurisprudence in Spain in terms of the liability of internet intermediaries for intellectual property infractions produced for the *Association Littéraire et Artistique Internationale* (ALAI) Study Days held in Oaxaca (Mexico) from June 7 to 9 2004. The report has been produced by professor Miquel Peguera in accordance with the ALAI questionnaire.

Keywords

liability, intellectual property, copyright, internet, intermediaries

A. Implementation of specific national or international norms

1. Specific legislation

[The following two questions are addressed to members of the UE and candidate states.]

1.1 Has your country transposed the EU E-Commerce Directive? If not, at what stage of transposition is your country?

Yes. The E-Commerce Directive was transposed into Spanish law by the Law 34/2002, of July 11th 2002, on the Informa-

tion Society Services and Electronic Commerce (LSSICE: *Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico*), which was published in the Official Journal (*Boletín Oficial del Estado*) Number 166, of July 12th 2002, at pages 25388 to 25403. The official text in Spanish can be consulted at the official site.^[www1]

1.2 If yes, please attach a copy of the relevant provisions concerning the liability of internet service providers. If no, but there is a draft of the law, please attach its relevant dispositions.

The relevant provisions concerning the liability of internet service providers are articles 13 to 17 of the LSSICE. We are attaching here a non-official translation of those articles.

*I want to thank professors Ramon Casas, Raquel Xalabarder and Mark Jeffery for their helpful comments.

www1: www.boe.es/boe/dias/2002-07-12/pdfs/A25388-25403.pdf



Chapter II. Obligations and liability regime of the Information Society Service Providers.

Section 2. Liability Regime

Article 13: Liability of information society service providers

1. Information society service providers are subject to general laws on civil and criminal liabilities and on administrative sanctions, without prejudice to what is established in this Statute.
2. To determine the liability of information society service providers for the exercise of intermediate activities, the following articles will apply.

Article 14: Liability of networks operators and access providers

1. Telecommunications networks operators and providers of access to a telecommunications network who provide an intermediate service that consists of the transmission in a telecommunications network of data provided by the recipient of the service, or of the provision of access to the network, shall not be liable for the information transmitted, unless they themselves have originated the transmission, modified the data, or selected either the data or the addressees¹ of those data.
The strictly technical manipulation of the files containing the data that takes place during its transmission shall not be considered as a modification.
2. The acts of transmission and provision of access referred to in paragraph 1 include the automatic, provisional² and transient storage of the data in so far as this serves only to permit its transmission in the telecommunications network, and provided that the duration of the storage does not exceed the time reasonably necessary for that.

Article 15: Liability of service providers who make temporary copy of the data requested by users

Providers of an intermediate service who transmit in a telecommunications network data provided by a recipient of the service and store those data in its systems in an automatic, provisional³ and temporary way for the sole purpose of making more efficient those data's onward transmission to other recipients who request them, shall not be liable neither for the content of those data nor for their temporary reproduction, provided that:

- (a) They do not modify the information,
- (b) They permit the access to the information only to those who comply with the conditions imposed for that end by the recipient whose information is requested,
- (c) They comply with the rules regarding the updating of the information generally accepted and used by industry,
- (d) They do not interfere with the lawful use of technology generally accepted and used by industry to obtain data on the use of the information; and

(e) They remove or disable access to the information they have stored upon obtaining actual knowledge that:

1. The information has been removed from the place in the network where it was located initially,
2. That access to it has been disabled, or
3. That a competent court or administrative body has ordered to have that information removed or disabled the access to it.

Article 16: Liability of providers of data hosting or storing services

1. Providers of an intermediate service that consists of the hosting of data provided by the recipient of this service shall not be liable for the information stored at the request of the recipient, provided that:
 - (a) They do not have actual knowledge that the activity or the information stored is unlawful, or that it causes actionable damage in respect of the goods or the rights of a third party, or
 - (b) If they do have such knowledge, they act diligently to remove the data or to disable the access to them.
It will be understood that the service provider has the actual knowledge referred to in paragraph (a) when a competent body has declared that the data are unlawful, or has ordered its removal or the disablement of the access to them, or the existence of the damage has been declared, and the provider knew of this resolution, without prejudice to the procedures of detection and removal of content that providers may apply by virtue of voluntary agreements, and without prejudice to other means of actual knowledge that might be established.
2. The exemption of liability established in paragraph 1 shall not apply when the recipient of the service is acting under the direction, the authority or the control of his provider.

Article 17: Liability of service providers that provide links to information or that provide search tools

1. Information society service providers who provide links to other contents, or who include in their own contents directories or search tools of contents, shall not be liable for the information to which they direct the recipients of their services, provided that:
 - (a) They do not have actual knowledge that the activity or the information to which they direct or recommend is unlawful, or that it causes actionable damage in respect of the goods or the rights of a third party, or
 - (b) If they do have such knowledge, that they act diligently to remove or to disable the link.
It will be understood that the service provider has the actual knowledge referred to in paragraph (a) when a competent body has declared that the data are unlawful, or has ordered its removal or the dis-

1. We have translated the Spanish word «*destinatarios*» as *addressees* because it shows more clearly the original meaning. Although the English version of the E-Commerce Directive uses different terms to refer to the person who supplies the provider with the information to in order to have it transmitted («information provided by a *recipient* of the service»), and to refer to the person to which the information is sent («the receiver of the information»), the French and Spanish versions of the E-Commerce Directive use a unique term for both, which is «*destinataire*» in French, or «*destinatario*» in Spanish. The Spanish LSSICE follows the same terminology, which can sometimes be misleading. We prefer therefore to use the term *recipient of the service* when referring to the supplier of the information, and the term *addressee* when referring to the person to which the information has been sent.
2. The Spanish version of E-Commerce Directive uses the word *provisional* instead of *intermediate*, which is the one used in the English version. The LSSICE follows the Spanish version of the Directive and thus uses also the word *provisional*.
3. See footnote 2.



ablement of the access to them, or the existence of the damage has been declared, and the provider knew of this resolution, without prejudice to the procedures of detection and removal of content that providers may apply by virtue of voluntary agreements, and without prejudice to other means of actual knowledge that might be established.

2. The exemption of liability established in paragraph 1 shall not apply when the recipient of the service is acting under the direction, the authority or the control of the provider who facilitate locating those contents.

[The following questions are addressed to all countries that have enacted specific legislation concerning the liability of internet intermediaries.]

1.3 Did your legislature encounter particular difficulties in the course of enacting a text on the liability of online services?

The Spanish legislature encountered some difficulties in the course of enacting the «Information Society Services and Electronic Commerce Law» (LSSICE) especially from the internet Community –which raised a strong campaign against the enactment of the Law. Several reasons may be found behind such an opposition: to some, any regulation of the internet activity is regarded as an unbearable attack to civil liberties; others criticized the scope of application of the Law, which seemed to apply not only to economic activities on-line, but also to personal/private websites, thus going further than the Directive. In general, what they criticized was the interventionism of such a law and the wide discretion of the Administration to restrict the provision of services on the Information Society. In particular, the obligation of ISP to retain all traffic data was strongly criticized. As far as liability norms, criticisms focused on the excessive liability of ISP, which might have a negative effect to freedom of expression and internet development. These criticisms had a strong effect on subsequent drafting.

1.4 Was the liability of persons or entities other than access providers (including «caching») and host service providers addressed either in the legislative history or in the enacted text? For example, was the liability of any of the following actors taken into account? Creators of hyperlinks. Creators/managers of directories by categories. Hosts of banner ads and similar attention-getting listings. Search engines. Cyber-café. Others (who?)

Yes.

1.5 If so, which ones, and why (not)?

Article 17 LSSICE addresses the liability of search engines and links: «information society service providers who provide links to other

contents, or who include in their own contents directories or search tools of contents», although the E-Commerce Directive did not address it.

The liability of hosts of banner ads and similar attention-getting listings and the liability of cyber-café has been neither addressed in the LSSICE, as finally enacted, nor along its legislative history.

Nonetheless, the Ministry of the Interior drafted a proposal –unrelated to the LSSICE– in order to regulate cyber-café in a way similar to gambling premises. The following is a link to the draft, which in the end was not adopted.^[www2]

1.6 What is the liability of access providers? Does this represent a diminution or an increase in liability compared to general principles of copyright or tort law?

Access providers, as well as telecommunications networks operators, are exempted from liability for the information transmitted. This exemption is established in article 14 LSSICE largely in identical terms to those in article 12 of the E-Commerce Directive.

For the exemption to be applicable, the activity carried out must be limited to a mere transmission of data provided by a recipient of the service, or to a provision of access to the network.

Furthermore, it is necessary that the access provider or the network operator:

- Does not originate the transmission,
- Does not modify the data, and
- Does not select the data nor the addressees of those data.

According to the LSSICE the legal notion of «modify» does not include the strictly technical manipulation of the files containing the data that takes place during its transmission. This remark does not appear in article 12 of the E-Commerce Directive, although it does appear in its recital 43.

Just like in the E-Commerce Directive, the LSSICE states that the acts of transmission and provision of access include the automatic, provisional and transient storage of the data in so far as this serves only to permit its transmission in the telecommunications network, and provided that the duration of the storage does not exceed the time reasonably necessary for that.

An exemption for *caching* has also been established. Instead of the term «caching», the LSSICE refers to «temporary copying». The definition and the requirements in order to benefit from the exemption are substantially the same than in the E-Commerce Directive. Like in the E-Commerce Directive, caching is presented as an activity carried out when providing a service of transmission of data. Article 15 LSSICE refers to «providers of an intermediate service who transmit in a telecommunications network data provided by a recipient of the service and store those data in its systems in an automatic, provisional and temporary way for the



sole purpose of making more efficient those data's onward transmission to other recipients who request them».⁴

Providers will benefit from the exemption for caching on condition that:

- a) They do not modify the information,
- b) They permit the access to the information only to those who comply with the conditions imposed for that end by the recipient whose information is requested,⁵
- c) They comply with the rules regarding the updating of the information generally accepted and used by industry,
- d) They do not interfere with the lawful use of technology generally accepted and used by industry to obtain data on the use of the information; and
- e) They remove or disable access to the information they have stored upon obtaining actual knowledge that:
 1. The information has been removed from the place in the network where it was located initially,
 2. That access to it has been disabled, or
 3. That a competent court or administrative body has ordered to have that information removed or disabled the access to it.

The provider that complies with these requirements shall not be liable «for the content of those data nor for their temporary reproduction». In this point, the LSSICE is somehow more explicit than the Directive, which simply states that providers shall not be liable *for the storage* (Art.13.1 E-Commerce Directive).

The second part of the question is whether the new rules imply a diminution or an increase in liability compared to general principles of copyright or tort law.

The LSSICE, like the Directive, does not set new criteria to assign liability, but only exemptions from liability. The criteria to assign liability remain those of the general liability regime. Not complying with the requirements to benefit from a liability exemption does not necessarily result in assigning liability to the ISP, for the requirements established in the general regime on liability must be met in order to become liable.

As a result, the new rules do not amount to an increase in the level of liability of access providers, of those who transmit data, and of those who make cache copies within the context of providing a service of transmission of data.

Nonetheless, some scholars hold an *a contrario* interpretation in the sense of assigning liability to the ISPs that do not qualify to benefit from the exemption. With this interpretation the new rules could be seen as an increase of liability. In our opinion, such an interpretation is wrong.

1.7 What characteristics make one an «access provider»? Is compliance with additional conditions necessary to qualify for a limitation on liability?

There is no specific definition of *access provider*, nor can such a definition be found in the Directive. The only characteristic that makes one an access provider is the fact that one provides an information society service consisting in the provision of access to a telecommunications network –as well as, if we use the term *access provider* in the broad sense used in this questionnaire, the fact of providing an information society service consisting in the mere transmission of data in a telecommunications network or in caching.

The possibility of benefiting from any of the exemptions established in the LSSICE is based only on the activity conducted by the provider. Therefore the exemptions from liability for providing access, for transmitting and for caching are applicable to any information society service provider who carries out those activities.

It is true, however, that Art.14 LSSICE uses the term *telecommunications networks operators* (which is not used in the Directive) together with *access providers*. It is our understanding that this reference does not limit the subjective scope of the exemption, which is fully applicable to any information society service provider that provides a service of mere conduit of data.

No further requirements are needed to benefit from the exemptions from liability, beyond complying with the specific conditions set in articles 14 and 15 LSSICE (which set the exemptions) as examined under the former question.

1.8 What is the liability of host service providers? Does this represent a diminution or an increase in liability compared to general principles of copyright or tort law?

Host service providers of data supplied by the recipient of this service are exempted from liability for the information stored on the condition that:

- a) They do not have actual knowledge that the activity or the information stored is unlawful, or that it causes actionable damage in respect of the goods or the rights of a third party, or
- b) If they do have such knowledge, they act diligently to remove the data or to disable the access to them.

Here the LSSICE differs from the Directive because it does not make the distinction between the lack of actual knowledge of illegal activity or information and the lack of awareness of facts or circumstances from which the illegal activity or information is apparent. As we know, as regards claims for damages, the Directive states that in order for the host provider to be exempted from

4. In a way, the wording here is clearer than in the Directive since the LSSICE refers to the data's onward transmission to other recipients who request *those data*, while in article 13 of the Directive the meaning of the «request» from other recipients of the service is confusing –at least in the Spanish version of the Directive: it is not clear whether it means that those recipients simply request the reception of the data or whether they also request the caching of the data (which would make no sense).

5. Again, the text here is a bit clearer than the one in the Directive (Art.13.b), although the meaning is exactly the same. Notice the use of the term *recipient*, which may be here somehow misleading.



liability, lack of actual knowledge is not enough, it is also required that the provider is not aware of those facts or circumstances. The LSSICE, instead, grants the exemption on the basis of lack of actual knowledge, regardless of the kind of liability claimed, and thus also for claims for damages.

Like in the E-Commerce Directive, this exemption of liability shall not apply when the recipient of the service is acting under the direction, the authority or the control of his provider.

While the E-Commerce Directive says nothing about the nature or the characteristics of «actual knowledge», the LSSICE states that «[i]t will be understood that the service provider has the actual knowledge referred to in paragraph (a) when a competent body has declared that the data are unlawful, or has ordered its removal or the disablement of the access to them, or the existence of the damage has been declared, and the provider knew of this resolution, without prejudice to the procedures of detection and removal of content that providers may apply by virtue of voluntary agreements, and without prejudice to other means of actual knowledge that might be established».

In our opinion, this provision does not imply a limitation of the means through which the provider can gain *actual knowledge*. It is only a list of situations in which actual knowledge is considered to exist, but actual knowledge may also arise in other situations. Nonetheless, some scholars and commentators tend to consider the provision as a formal definition of «actual knowledge»; so if none of the situations foreseen in the provision are met, they conclude that the provider had no actual knowledge (no matter of whether in fact he really knew that the information was illegal). There is at least one judicial resolution that follows the latter interpretation. We will refer to it later on.

As to whether the new rule implies a diminution or an increase in liability compared to general principles of copyright or tort law, we have to say again that the new provision is just an exemption from liability and not a new source of liability. Therefore it should be seen as a diminution in liability, because the main purpose of an exemption is not to hold liable someone that otherwise would be so.

Actually, in the absence of this exemption a provider might be found liable –at least in theory– applying the general rules of tort law, mainly the article 1,902 of the Spanish Civil Code, for his contribution to causing damage. It is not easy, however, to evaluate whether under the new rules liability of providers will in fact diminish, because –to our knowledge– there are no cases previous to the enactment of the LSSICE holding a service provider liable for an activity which is now covered by a «safe harbor».

What is clear, in any case, is that to the extent that the new rules establish a safe harbor that didn't exist before, they afford a higher level of legal certainty to providers.

1.9 What characteristics make one a «host service provider»? Is compliance with additional conditions necessary to qualify for a limitation on liability?

What makes a host service provider is just the fact of providing a host service, defined as an intermediate information society serv-

ice that consists of the hosting of data provided by the recipient of this service. There is no need to comply with any additional requirements, others than the ones already explained, to qualify for a limitation on liability.

1.10 What is the statutory liability of the persons identified in question 1.4?

The LSSICE has established (Art.17) a specific exemption of liability for providers of hyperlinks, providers of directories and providers of search tools. This provision is subject to substantially identical conditions than the ones established for host service providers, although the services are very different in nature.

Providers shall not be liable for the information to which they direct the recipients of their services, provided that:

- a) they do not have actual knowledge that the activity or the information to which they direct or recommend is unlawful, or that it causes actionable damage in respect of the goods or the rights of a third party, or
- b) If they do have such knowledge, they act diligently to remove or to disable the link.

Again, there is a specific provision in this article which deals with the actual knowledge: «[i]t will be understood that the service provider has the actual knowledge referred to in paragraph (a) when a competent body has declared that the data are unlawful, or has ordered its removal or the disablement of the access to them, or the existence of the damage has been declared, and the provider knew of this resolution, without prejudice to the procedures of detection and removal of content that providers may apply by virtue of voluntary agreements, and without prejudice to other means of actual knowledge that might be established».

Finally, like in the exemption for host services, it is stated that the exemption from liability shall not apply when the recipient of the service is acting under the direction, the authority or the control of the provider who facilitates locating those contents.

1.11 How are these persons defined in the law?

There is no particular definition of the persons, but just a definition of the activity. Persons running this activity will benefit from the exemption established in the Statute.

Therefore, everyone providing an information society service of any kind who either provides links to other contents, or directories, or search tools is exempted from the liability that could arise from the unlawfulness of the information linked, or listed in the directories, or located through the search tools provided by the service provider.

2. Caselaw

2.1 In your country, have there already been cases decided under the laws addressed in the questions under n.1?

To our knowledge there are two cases insofar dealing with the liability addressed in the LSSICE. None of them are final decisions. Both of them deal with liability for links.



2.2 If so, please supply citations, together with a summary of each decision. (If these decisions have been the subject of published commentary, please supply citations to the commentary.)

The first one is the «*Auto de 7 de marzo de 2003, del Juzgado de Instrucción número 9 de Barcelona*», which has not been officially published.

The criminal case was brought against the owner of the website^[www3] for a crime of breach of secrecy. The complaint was filed by a group of paying-TV. The site^[www3] consisted of a compilation of links to web pages which contained information on how to crack the codified TV broadcasts, amongst other topics.

Although the website seemed to show enough evidence so as not to conclude that its owner ignored the nature of the linked contents, the judge considered that «actual knowledge» was not proved, stating that: «even though the service provider knew the unlawfulness of the linked pages, the LSSICE defines what is to be understood as «actual knowledge» in its Art.17(1): «[i]t will be understood that the service provider has the actual knowledge referred to in paragraph (a) when a competent body has declared that the data are unlawful, or has ordered its removal or the disablement of the access to them, or the existence of the damage has been declared, and the provider knew of this resolution, without prejudice to the procedures of detection and removal of content that providers may apply by virtue of voluntary agreements, and without prejudice to other means of actual knowledge that might be established»». Since the claimant did not prove that any such resolution existed, nor that the defendant knew about it, the judge declared that «the crime was not proved to exist» (she should have said that it had not been proved that the accused had failed to comply with the requirements to benefit from the liability exemption). The resolution issued is technically an «*Auto de sobreseimiento provisional*», which finishes the prosecution but just provisionally (it can be continued if new evidence is brought to court). The resolution is now under appeal.

The second resolution is the «*Auto de 1 de Agosto de 2003, del Juzgado de Instrucción número 3 de Madrid*». This is a preliminary injunction in a criminal case, which closes for 6 months the website.^[www4]

The judge states that enough evidence has been found to rationally support that a crime against intellectual property has been committed, and that:

«This injunction is ordered after balancing all rights in conflict: on the one hand, the right of defendants to keep their webpage open, and on the other the property right of claimants, always bearing in mind that the web page has been visited by more than a million persons and that it contains links to obtain approximately 21.000 files, which according to the information presented by the police..., are products protected by the intellectual property law.»

«This causes a serious prejudice to the owners of the protected rights, ...according to the number of available works and users with access to them, it should be concluded that the webpage's goal is to facilitate, allow and even assist on what is commonly known as "file downloading"»

«The injunction is also advised taking into account the term of instruction of this case, given the problems concerning the evidence of an expert and the need to produce new evidence before resolving ...this procedure.»

The injunction –which has been appealed– ordered to close down the website with the following text: «This webpage has been closed down by a preliminary injunction in a criminal case». Although the injunction was ordered for a term of six months and it was executed on August 1st 2003, the webpage remains closed and shows the same message (last visited, March 29, 2004).

The injunction contains no reference to Art.17 LSSICE. It seems that the website itself did not host any contents to download, but offered links through which users could download the infringing contents by means of specific P2P software «Edonkey». In order to get an idea of how the website used to be, visit the screen captures available at the official site.^[www5]

2.3 In the absence of a specific law, or in the event of the law's incomplete coverage, have the courts in your country applied general principles of copyright or tort law to resolve questions of the liability of internet intermediaries? (For example, has the liability of search engines, or of cybercafés, or of other persons listed in question 1.4, been the object of judicial analysis in the absence of specific texts?)

Not to our knowledge.

2.4. If so, please supply citations, together with a summary of each decision. (If these decisions have been the subject of published commentary, please supply citation to the commentary.)

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B. Distribution of digital means whose purpose is to enable copying over networks

3.1. Are there specific laws in your country that address the problem of the making available to the public of the means to make digital copies over networks, such as distribution of «peer to peer» software and files?

File sharing has not been expressly addressed by the legislator.

www3: www.ajoderse.com

www4: www.edonkeymania.com

www5: http://web.archive.org/web/*www.edonkeymania.com



As to users of file-sharing software, some scholars think that «file-sharing» is not prevented by copyright law. But we think this opinion is wrong. Perhaps copying (*i.e.* downloading) could be covered under the private copying exception set in Art.31.2 of Copyright Law (*Texto Refundido de la Ley de Propiedad Intelectual: TRLPI*) –as long as we do not take into account the requirement of non-collective use. Nevertheless, end users do not only copy. They also offer files to an open group of persons that exceed the family or domestic circle and, therefore, they carry out a communication to the public in the sense of Art.20 TRLPI.

As to those who make available the public the means to make digital copies over networks, there are not specific provisions either. However, as we saw, Art.17 LSSICE addresses liability for links, directories and search tools; thus, it may be applied to scenarios concerning file sharing, such as in the *edonkeymania.com* case, where a website listed a compilation of links to sites containing files that could be downloaded with P2P programs. In addition, according to Art.102 TRLPI those who, without the owner's authorization «(c) bring into circulation or stock for commercial purposes any instrument whose sole purpose is the unauthorized removal or disablement of any technical device used to protect a computer program» are infringing copyright. It should be noted, however, that this is a specific provision for computer programs and, moreover, it includes a «sole purpose» requirement that frequently will not allow the application of the rule.

It is worth to say that, besides specific laws (TRLPI, LSSICE), those who provide the means for others to commit an infringement, could be liable under the general rules of tort law (Art.1902 Civil Code), always depending on the specific circumstances of the case.

Last, although not directly related to file-sharing, it is important to notice that criminal liability has been strengthened as far as the circumvention of technological measures. Last November 2003 the Spanish Penal Code was modified: among other provisions, Art.270 which deals with the infringement of intellectual property was modified. Before the amendment, it only envisioned as a crime the circumvention of technological measures to protect computer programs. According to new text, the circumvention of any kind of works is a crime, as well as the making, importation, circulation and even the mere possession of any technical devices intended for such circumvention. A transcript of the new Art.270 Penal Code follows.

3.2. If so, please attach the relevant provisions.

Article 102 (c) TRLPI, states:⁶

«For the purposes of this Title and without prejudice to the provisions of Article 100, those persons shall be considered infringers of copyright who, without authorization from the owner thereof, perform the acts provided for in Article 99, and who in particular:

(a) bring into circulation one or more copies of a computer program when they know or can assume that they are unlawful;

- (b) stock for commercial purposes one or more copies of a computer program when they know or can assume that they are unlawful;*
- (c) bring into circulation or stock for commercial purposes any instrument whose sole purpose is the unauthorized removal or disablement of any technical device used to protect a computer program»*

The new text of Art.270 Penal Code, which may be in force on the first of October of 2004, states:⁷

1. *Punishment consisting of imprisonment from between six months and two years and a fine of between six and twenty-four months, will be imposed on anyone who, with intent to profit and to the detriment of a third party, reproduces, plagiarizes, distributes or publicly communicates, either wholly or in part, a literary, artistic or scientific work or its transformation, interpretation or artistic execution thereof fixed in any medium or communicated by any means, without the authorization of the holders of the corresponding intellectual property rights or their licensees.*
2. *Punishment consisting of imprisonment from between six months and two years and a fine of between six and twenty-four months, will be imposed on anyone who intentionally exports or stores copies of works, productions or executions referred to in the former paragraph without the authorization specified above. The same punishment will be imposed on those who intentionally import these products without such authorization, regardless of the lawful or unlawful source in their country of origin; however, importation of such products from a European Union country will not be punished when they have been acquired directly from the rightsowner in such country, or with his consent.*
3. *The same punishment will be imposed on anyone who manufactures, imports, circulates or possesses any device specifically designed to facilitate the unauthorized suppression or neutralization of any technical device used to protect computer programs or any other works, performances or executions in the same terms provided for in paragraph 1 of this article.*

3.3 Have the courts applied these texts, or have they applied general principles of copyright or tort law to resolve the liability of these suppliers?

Not to our knowledge.

3.4 If so, please supply citations, together with a summary of each decision. (If these decisions have been the subject of published commentary, please supply citation to the commentary.)

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3.5 In the absence of a specific law, what is the basis of liability (if any)?

The basis of liability would be the general provision that governs tort law, which is the aforementioned article 1902 of Spanish Civil

6. Translation OMPI (CLEA/Copyright Laws Electronic Access).

7. This is not an official translation.



Code. This general provision imposes an obligation to repair on those who with fault or negligence, by means of action or omission, caused damages to others.

On the other hand, depending on the circumstances of the case, one should not forget the possibility of assigning criminal liability as «cooperator» to whoever facilitates a crime against intellectual property. To our knowledge, though, there are no cases insofar dealing with criminal liability of service providers for crimes related to intellectual property.

3.6 Have the courts considered the acts of the end users, either as a prerequisite to the liability of the supplier of the digital means of copying, or in order to hold the end users directly liable?

No cases exist on the liability of those who supply digital means of copying, nor on the liability of end users.

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