KLEROS AND COPYRIGHT DISPUTES IN DIGITAL ENVIRONMENTS

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Abstract

Intellectual property, like all areas of law, has been greatly affected by the technological advances of recent times. The Internet, information and communication technologies and other disruptive technologies have transformed the essential concepts on which copyright and related rights are based and created a new way to protect those rights: e. g. notice and takedown. Which brings 3 major challenges and opportunities for copyright in digital environments.

The first requires understanding the environment in which new types of works and creations arise. The second is due to the exponential increase in conflicts or disputes that arise in cyberspace. The third raises the need to provide an adequate and efficient dispute resolution mechanism to most of these disputes that arise in the notice and takedown process.

In this sense, Kleros can be an ideal choice to know the cases related to the massive notice and takedown mechanism of copyright and related rights that occur on almost all platforms, sites and applications; and thus complement this procedure by providing it with certainty and security in favor of authors and creators of digital works.

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1. Introduction

There is no doubt that technological advances have transformed the world and its citizens. Tools such as the Internet, the World Wide Web, Search Engines, Social Networks, Mobile Apps, and the Internet of Things, among others, have allowed humans to generate links and interactions that were never imagined 30 years ago.

1.1 The User-Generator

Such is the power of these tools that, by early 2020 - without considering the pandemic - more than 4.5 billion people were expected to make use of the Internet, and by the end of that year social media will surpass the 3.8 trillion mark of users and that about 60% of the world's total population will be connected.[1]

As a result of the use and democratization of platforms, people have gone from being mere consumers, viewers and/or recipients of information to being active actors of the network by producing, generating, sharing and distributing content—whether it is their own or from other people—both in texts, images, videos and sounds, as well as in flavors and textures (thanks to 3D printers) and holograms.

The level of content created or generated by users is such that 294 billion emails are sent, 500 million tweets are uploaded to Twitter, 350 million photos and 100 hours of video are generated on Facebook, and 95 million videos and photos are shared on Instagram in only one minute; all of this is equivalent to 44 zettabytes[2] of stored data[3] in the digital universe.

The amount of information generated on a massive daily basis alongside the new digital links that arise on the network have led to a reconfiguration in interpersonal relationships, not only social, but also economic and legal. The Internet has a network design that seems oriented to circumvent central authority, rather than enable it. In fact, much of what happens on the Internet works on a principle of blind faith in the goodwill of other parties (Lastowka, 2014, p.72), rather than faith and trust in legal systems.

1.2 Impact on Law

In law, it is important to note that not only the profession itself has been affected, but mainly the regulatory bodies that regulate people's behaviors; nowadays, the vast majority of laws, both local and international, are unable to offer an effective, accurate and efficient solution to the new challenges of the digital society.

Even intellectual property[4] as a subject of study of the law that protects intangible creations and assets has been far surpassed by current circumstances, mainly institutes relating to copyright and related rights.

Initially designed to protect publishers' right to copy and reproduce books, copyright has been expanding its spectrum and framework of protection over economically relevant

[1] Source: https://datareportal.com/reports/digital-2020-global-digital-overview.
[2] Zettabyte: Unit of measurement of information equal to 1,000,000,000,000,000,000,000 bytes.
[3] Source: https://www.visualcapitalist.com/how-much-data-is-generated-each-day/.
[4] This includes copyright and related rights such as patent law and trademarks.

works.[5] From the Statute of Queen Anne in 1710 to this day, regulatory bodies have been recognizing copyright, as well as other rights derived from it, in other types of works and creations.

Examples of this include the legal protection of cinematographic and photographic creations. When film and photography appeared in the twentieth century and had an economic impact on an industrial scale, these activities were placed under the legal umbrella of intellectual property, being the technician operating a machine now considered an author or artist, and his work a commodity, and turning the result of photographing or filming something into a new form of ownership (Ramos, 2018, p.91) protected by copyright rules.

In fact, thanks to copyright and related rights, the creativity, works and creations of artists have been prosecuted in a constant cyclical process of updating and monitoring, and authors and others enjoy legal recognition and protection. While the work of anticipating the impact and changes generated by the creative industries is something beyond legal imagination, up until 1990, the law had managed to keep pace with constant updating regarding creativity.

However, it is worth mentioning that this human creativity together with the innovation mentioned above was due to linear, sporadic, and quantifiable patterns. Based on this creative pattern, it was easier for the law to determine and individualize copyrights works, their owners, and their respective economic and moral rights.

2. From Linear Creativity to Exponential Creativity

This linear and measurable process underwent a significant alteration with the emergence of information and communication technologies and the Internet because the abundant production—exponential, incessant and countless—of digital works caused a gap between the digital world, the real world and law itself.

2.1 The Massification of Content. First Step.

In less than thirty years, artists, creators and property rights holders went from thousands to billions, because any person that owned a device (computer, mobile, or tablet) and had Internet access could be considered a potential author or artist, and a potential infringer at the same time.

[5] Even so, not all works, or creations are necessarily monetized or generate the same economic impact.

With the increase of works in digital format, intellectual property suffered a considerable lag. Many of the existing rules applicable to authors and their creations are not entirely applicable to content created by users by the minute on digital platforms, or to new legal-economic relationships arising from interactions on the network.

While it is true that law has played a key role in the configuration of intellectual property - by allowing works of artistic or cultural content to become economic assets susceptible to trade under the same conditions as any other good- (Ramos, op cit., p.80-81), it is also true that the protection afforded to copyright works and creations differs from other kinds of goods.

The rights arising from the creations of human beings are unique. On the one hand, moral rights give the author the power to claim the paternity of his work, oppose all kinds of deformation or modification to the same, keep it unreleased or anonymous, and retract from it and withdraw the same from the legally established channels of disclosure, while economic rights allow the use of one's own or third-party creations through their use, disclosure, and economic exploitation.

However, with the liberalization of content, the mass dissemination of works and easy access to all kinds of resources—whether they are identifiable or anonymous—through the Internet, these rights and the concept of copyright work itself have lost correlation with the digital world. Even the support on which works are reflected, the use and reproduction of them, the control and access mechanisms to creations, the idea of authorship and the procedural tools for copyright infringement are topics that end up not fitting into the digital world.

2.2 The Transformation of Copyright Institutions

Nowadays, the concept of copyright work includes not only literary, artistic and scientific creations but also original contents of any nature (photos, videos, images, texts, messages, books, programs, news, audios, music, presentations) that have been published on websites, blogs, social networks and other platforms. Thus, a photo uploaded to Instagram or stored on Google Photos is as protectible and as attributable as a movie or painting. Similarly, opinions or texts posted on a blog or tweet can enjoy the same protection as a book or academic essay.

Lawrence Lessig was already announcing this when he said that from a technological perspective, digital technologies, unlike analogue ones, allow perfect copies of an original work to be obtained, thus increasing the benefit of copying. In addition, the Internet allows content to be distributed freely (and anonymously) over the network, increasing copy availability.

This suggests, at a regulatory level, that consumers that have internalized the idea that they can do whatever they want with their content, use these new digital tools to make

their content widely available over the Internet, all of which determines the inefficiency of the law to stop this massive sharing of content (Lessig, 2009, p.281).

With regard to the exercise of the right of withdrawal relished by the authors, we find that the works on electronic format are not only intangible but also permanent and indelible; so it is almost impossible to remove or delete a creation fixed on the network or that has been shared and exchanged hundreds of times and is stored on different devices.

The same applies to the subject of the right of reproduction of digital works, through which reproduction and copying is unlimited. Remember that everything remains on the network, and nothing is deleted despite any elimination, deindexing, or blocking mechanisms.

Regarding those mechanisms, copyright holders have an agile, simple, and effective mechanism that allows them to protect their rights in the first instance.

Notice and takedown are recurring figures in copyright infringement and online platforms that will be described below, not to mention the owners of the economic rights of works that increasingly require and depend on national and international associations and performance rights organizations in order to enjoy the rewards derived from the exploitation of the works or to be able to protect them from unauthorized use.

With regard to the authors of the digital world, new types of authors emerge, namely: spontaneous co-creationists that, without agreeing and being part of a community, contribute, build or collaborate in the creation of a work; or indeterminate authors, who identify themselves through a digital identity or avatar that makes it difficult to individualize them in the real world; or non-human authors, who are able to perform or create works as if they were human, as is the case of artificial intelligence.

And finally, the appearance of new categories of copyright protection and recognition, such as Copyleft Licenses, Creative Commons, and open source software; all of which guarantee some moral rights from the authors, and in turn generate an opening of the same works for public use.

3. New Regulation. Brief Reference.

In the face of adverse and complex situations arising from the digital world and in order to control massive copyright violations over the Internet, intellectual property legal systems have sought to adapt and rebuild in a way that is compatible and consistent with this new reality.

3.1 Local and Regional Rules

At the local level, the United States of America serves as an example, as they incorporated the Digital Millennium Copyright Act (DMCA), which, among others, includes a number of specific limitations and exemptions for things such as government research and reverse engineering in specific situations, as well as the safe harbor principle for online service providers, including intermediation service providers, against liability for copyright infringement.

This mechanism available to the owner or agents so they can request that content hosted on the Internet that infringes their moral or heritage rights is quickly removed or blocked, notifying the alleged infringer of that circumstance, who in turn has the right to counter-notification.

Similarly, recent amendments to Mexico's Federal Copyright Law regulate, among others, effective technological protection measures and rights management information; defining these as any technology, device or component that, within the normal course of operation, protects the copyright, performer's right or producer's right from the phonogram, or control access to a work, performance or phonogram.

It also incorporates the safe harbor principle, in the sense that internet service providers will not be held liable for damages or for infringements caused to holders of copyright, related rights and other holders, that occur on their online networks or systems if they do not control, initiate or direct the infringing conduct.

3.2 International Rules

At the regional level, the European Union created Directive 2019/790 on copyright and related rights in the digital single market, which provides for measures to adapt

exceptions and limitations to the digital and cross-border environment, such as the extraction of texts and data; measures to improve licensing practices and expand access to content, such as the exploitation of non-traded works; and, responsibility in the use of press publications and content protected by online content exchange service providers, as well as the establishment of a contract adjustment mechanism to enable authors and performers to be remunerated.

For its part, the World Intellectual Property Organization has gradually created technology-compatible copyright standards, namely: (a) WIPO Performances and Phonograms Treaty, which provides legal protection against the action of circumventing effective technological measures that are used by performers or producers of phonograms in relation to the exercise of their rights; (b) WIPO Copyright Treaty, which protects computer programs and databases, and attributes rights to rent, reproduction

and distribution of works fixed on any media; and, c) Treaty on Audiovisual Performances, which as its name suggests protects and confers rights on performers of works.

In sum, these examples perfectly illustrate the tendency to create and protect copyright and related rights in digital environments, because this branch of law becomes more relevant not only at cultural but also economic level.

4. Just a Click away from the Conflict

Another consequence of the digitization of societies and the constant implementation of technologies has been the exponential increase of differences, disputes and conflicts between consumer-consumer, consumer-company, company-company, company-platforms, platforms-platforms, and consumer-platform, among others.

4.1 Born to Fight...

We must start from the idea that legal conflicts between people and their resolution by a third-party date back to time immemorial. It is something that has accompanied us through all ages, civilizations, and territories. Having a different opinion, opposing and safeguarding personal interests are acts of the human being, which entail an intention or point of discord or controversy against other human beings. It is in our genetic code to generate disputes and … resolve them.

In fact, disputes - legally relevant - arise for 2 main reasons:

a) due to the very nature of the human being and his life in society, since their union in communities and organizations and the development of interpersonal relationships tend to provoke disagreements related to the lack of generosity and the will of individuals, or to the finite amount of usable natural resources; and,

b) due to the nature of the laws themselves, which tend to be confusing and unclear -created for judges, lawyers and law scholars, and not for users and consumers - and the changing, unpredictable and diverse interpretation of these and their application to specific cases (Susskind, 2019, p.23-25).

Empirically, it has been found that the more the population increases and more laws are issued to regulate the legal relationships between them, the more disputes arise - although only a small percentage are subject to the knowledge of judges and courts or other alternative methods of conflict resolution[6].

[6] According to the Organization for Economic Cooperation and Development (OECD) an estimated of 4 billion people around the world live outside the protection of the law, mostly because they are poor or marginalized within their societies. Source: https://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf

In addition, the legal problems that arise are far from homogeneous, as they tend to deploy unique and varied features. Some evoke dogmatic issues and others are exclusively pragmatic. Many others concern the main issues of a legal relationship, and others concern accessories or secondary aspects. While some touch on aspects covered by legal norms, others rest in loopholes. There are others that derive from isolated, accidental, and spontaneous relationships, while others are derived from continued relationships (Cossio, 2014, p.9).

Of course, there are multiple elements that determine the birth of a dispute and so many others that affect its resolution or non-resolution, such as knowledge of the laws and justice systems, the nature or character of the dispute and the interests at stake, the asymmetry of information, the very character and personality of each person, the Internet and other technologies.

4.2 The Rise of a New Kind of Disputes. Second Step.

Why is it claimed that the Internet, information and communication technologies, and other disruptive technologies have an impact on the disputes? Because the internet is a territory that is partially regulated and not entirely understood by people, and mainly because it maximizes the points mentioned by Richard Susskind, which are:

a) In one hand, they destroy the barriers of socialization and communication, generating a huge number of digital legal relationships between individuals and companies from all over the world;

b) On the other, as I noted in previous paragraphs, they go beyond law and regulatory systems; therefore, legal interpretations of laws multiply causing more confusion, uncertainty and discomfort in users in their desire to regulate new legal relationships with rules created for analogue relationships.

This leads to the rise of new categories of conflicts that, far from being connected with the conflicts of the analog world, require new legal rules and new forms of resolution.

In fact, it gradually begins to form a general awareness that more disputes of a kind that we could never have had or imagined in the predigital environment are generated in the cyberspace environment. A new kind of conflicts related to piracy, identity theft, intellectual property, e-commerce, privacy, working relationships, are generated on and over the Internet and other technologies. (Katsh and Rabinovich, 2017, p.04).

It is through the use and implementation of the Internet that rights, obligations, responsibilities, and sanctions can be generated for users, companies, and platforms. Just by simply not fully following the terms and conditions of a website accessed, or with the product ordered and paid for through Amazon or eBay being delayed in delivery, or a user mistakenly sharing your credit information with a third party, that a dispute will arise.

Regarding copyright and related rights, conflicts arising in cyberspace have characteristics that depend on the digital ecosystems in which the subjects develop. As I already noted, the Internet has changed the conception, practice, and protection of this kind of rights. Similarly, it has not only increased the conflict over them, but also the nature and form of these disputes.

In this context, there will be other factors to consider, such as reasonable and fair use of copyright works and creations, the support in which they are located and the place where they are stored, the categories of licenses of use, the purpose of the user, and the subjects involved.

Examples include conflicts that arise on YouTube by videos uploaded by users containing music by recognized artists; on Instagram by the use and exchange of photographs taken or created by third parties; or in Search Engines by websites that allow users to watch movies at no cost. Although similar, they require a particular and individualized analysis to evaluate some of the above factors.

5. Dispute Resolution

People are increasingly aware that these kinds of copyright disputes or problems arising in cyberspace require concrete and comprehensive mechanisms of the environment to resolve them.

While there are multiple methods or ways to resolve Internet conflicts in general and on copyright in particular – public or private justice systems - nowadays, they are insufficient and, in some cases, too slow and costly for the needs of cyberspace.

5.1 New Problems, Old Solutions. Third Step.

Within the traditional ways of resolving disputes, the courts of each country and some dispute resolution mechanisms -arbitration and mediation- should be mentioned, which are responsible for knowing, processing and resolving the matters through certain procedures, prescribed rules and physical rooms.

In the courts of each country - which are attached to formalisms and solemnities - copyright disputes in digital environments are subjected to and resolved by non-specialized courts. Similarly, local arbitrations have largely failed as an alternative way to resolve intellectual property disputes - including copyright - as they have been fed by the sins and flaws of ordinary public justice.

While at an international level, intellectual property dispute resolution is largely better focused by the Arbitration and Mediation Center of World Intellectual Property Organization (WIPO), copyright disputes only include 13% of the total cases submitted to the Centre[7].

This made us rethink the fundamentals of justice systems and the procedures or mechanisms traditionally used for their solution, as Ethan Katsh and Orna Rabinovich rightly point out, since courts are rarely the place where citizens go with complaints. Alternative dispute resolution methods (ADRs) are also becoming anachronistic for many types of contemporary disputes. Our rapidly changing, technology-dependent world, has largely neglected the need to develop a new conflict prevention or resolution infrastructure (Katsh and Rabinovich, op.cit, p.05).

5.2 Ad Hoc Dispute Resolution

As our global society becomes increasingly connected, we face challenges that demand creativity and innovation. These challenges inevitably create conflicts as we try to interact effectively in society and govern ourselves. We need systems that empower people to manage conflicts in a way that allows them to address challenges (Blomgren, Martinez and Smith, 2020, eBook) and resolve them effectively and efficiently.

Currently, there are certain online systems or mechanisms for resolving certain disputes or conflicts arising on the Internet, but there is a disadvantage to it, and it is that these are typical of the platform where the user interacts and generates legal links. These include:

a) The eBay Dispute Resolution Center. Created by this e-commerce platform to address complaints and disputes globally regarding products sold or auctioned on that platform. The most common disputes spin around purchased items that are never received by the recipient, or purchased items that do not match the description of the original ad posted by the seller; however, there are also sometimes cases concerning the payment of purchased products or in connection with infringement of intellectual property rights. In order to do this, the Center tries to contact both the buyer and the seller so as to look for a satisfactory solution for both; if this is not the case, the Center defines who is right within a maximum period of 21 days.

   The Dispute Resolution Center has pioneered consumer law protection and its attention through its online resolution. It currently serves -with automated mechanisms - up to 60 million complaints or disputes each year on its platform.

b) Amazon's Neutral Patent Evaluation Process. The most recent process created by this online trading platform to protect the rights of the patent owner who considers them to be affected by third parties within that platform. In order to participate in such a process, both the holder and the alleged infringer must

[7] Source: https://www.wipo.int/amc/en/center/caseload.html

expressly consent to participate in this proceeding and make a deposit of US$ 4,000.00 each. It emphasizes that the solver is not the platform itself, but accredited lawyers and patent law specialists.

Although these novel dispute resolution mechanisms are effective for the protection of user rights in cyberspace, they do not cover all copyright disputes that arise on the Internet on a daily basis as they only know disputes arising from legal relationships within those platforms and for matters strictly determined by them.

Therefore, a global mechanism needs to be implemented to enable users to submit their copyright disputes in the digital world; and thus, obtain an adequate resolution on them.

6. The Use of Kleros in Copyright Disputes on the Internet

Kleros is an ideal mechanism for resolving disputes over copyright and related rights in digital contexts because it is not another tool for dispute resolution, but a tool that uses the Internet, information and communication technologies and blockchain to respond to problems that arise from legal relationships on the Internet. Certainly, Kleros has redesigned the concept of traditional justice, and oriented it towards a truly more accessible and democratic one, resolving cases quickly, reliably, and economically.

The truth is that every dispute over copyright and related rights deserves particular consideration, so it is impossible to sort them out into a single group or label, making it more practical to incorporate Kleros into the standardized mechanism used on almost all online platforms.

In fact, there is a commonly used, uniform and repetitive tool that allows Kleros to apply cases on the alleged copyright infringement on the internet. This is the figure of notice and takedown used by copyright holders on the internet.

Why?

Because it is a globally standardized, properly regulated and highly effective system- as seen above -.

To provide an idea of the relevance of this figure in cyberspace, according to Google's Transparency Report, this search engine has received more than 4 billion requests for removal of copyright infringing URLs[8] as of today.

[8] Source: https://transparencyreport.google.com/copyright/overview?hl=en

Similarly, China's interactive content platform Tik-Tok made known through its transparency report for the months of July-December 2019 that it processed 1338 requests for the removal of copyright content[9]; or Twitter, during the same period, received the amount of 48,223 applications for copyright infringement.[10]

For that reason, Kleros is the ideal complement to the figure of notice and takedown to provide support in certain cases where, in order to provide support or the removal of the content discussed, or when the declaration of exceptions as to their use and distribution on the platforms, is also a topic of discussion.

6.1 Takedown of Content for Alleged Copyright Infringement

Basically, notice and takedown is the way in which the safe harbor principle materializes in favor of internet service providers, and it consists of the removal notice issued by the copyright holder or its agent, a notice and report to an online service platform - in the vast majority of cases: Google, YouTube, Spotify, Instagram, Facebook, Tik-Tok, Twitter, among others- regarding an infringement of rights by another user - an individual or organization - so that such material or content generated or shared is "deleted", "removed" or "blocked".

It offers copyright holders or their agents a relatively inexpensive, fast, effective and direct process for the enforcement of their moral or economic rights derived from copyright on the internet, and allows them to reduce the potential harm caused by infringement of their rights without resorting to cumbersome and costly legal procedures. In addition, the use of such resources allows to immediately "delete" or "block" the infringing content or works published by third parties.

The notice and takedown procedure involve several subjects that need to be briefly mentioned and described:

a) The copyright owner, meaning the person holding the moral or economic rights, may or may not be the author or creator of the work or content.

b) The complaining party is responsible for promoting the notice and takedown procedure and sending the notice of withdrawal of content to the service provider, and may refer to the rightsholder itself or to a person authorized by the rightsholder to act on its behalf and representation.

c) The service provider, meaning the companies that store content hosted by another, that host content posted by another or search engines, and that, by virtue of receiving notice and takedown communications are required to block infringing content.

[9] Source: https://www.tiktok.com/safety/resources/transparency-report?lang=en
[10] Source: https://transparency.twitter.com/en/reports/copyright-notices.html#2019-jul-dec

d) Agents, these are persons – mostly lawyers - or entities acting on behalf of and representing service providers, who facilitate contact between the complaining party and the provider to expedite the removal of infringing content. And

e) The infringing user, who may be one or more individuals that, post, share, or upload third-party created content.

The way to send the copyright infringement notice is through the so-called notification, which is presented in writing - electronically - to the agent designated by the service provider or to the provider itself (via a form).

It must comply with certain formal requirements that vary and depend on applicable law, but it generally contains: The identification of the complaining party, the individualization of the copyrighted work alleged to have been infringed, the identification of material that is alleged to be the subject of infringing activity and which must be removed or which access must be disabled, sufficient information to enable

the service provider to locate the material, sufficient information to enable the service provider to contact the complaining party. The United States further requires a statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

If the notification encounters the above requirements, the service provider must quickly remove or disable access to allegedly infringing material to notify the alleged infringer of the rights without delay.

6.2 Kleros in Takedown Process

While the notice and takedown process is quite simple and expeditious, so is there, in many cases, some uncertainty as to the validity or provenance of withdrawal of content notices, which may result in a court's intervention for the declaration of ownership of rights or the basis of the infringement.

In this sense, Kleros may intervene in the following cases:

A. Counter Notification to a Takedown under DMCA.

The unjustified removal of non-infringement materials may alter the delicate balance struck by copyright law between the interests of copyright holders in the performance of their rights, and the interest of users trying to learn from works and rely on copyrighted materials. Therefore, in the face of possible abuse of such a mechanism, the DMCA provides the mechanism of counter-notification, which allows the user to challenge the complaining party's request for removal content (Bar-Ziv and Elkin Koren, 2017, p. 10-11).

In that sense, counter-notification is the mechanism through which the alleged infringer informs the service provider or its agent that the reported material does not infringe the copyright of the complainant or the owner, or that there is a mistake as to the identification of the content reported as an infringer.

The counter-notification must comply with the requirements set out in Section 512 of the DMCA, providing identification and contact details, identification of the material that has been removed or to which access has been disabled and the location where the material appeared before access to the material was removed or disabled, a statement under penalty of perjury that the subscriber believes in good faith that the material was removed or disabled as a result of an error or misidentification, and an express statement where the subscriber consents to submit to the jurisdiction of the Court in which the address is located, or if the subscriber's address is outside the United States, to any court in which the service provider may be located.

However, if the platforms allow it, and if the parties so agree, a stipulation may be introduced that in the event of a dispute, they are expressly subject to the jurisdiction of the court of Kleros rather than submit to the jurisdiction of a United States court.

Upon receipt of the counter-notification, the service provider is required to restore the material to its location on its network, and immediately notify the complaining party of the other user's objection, who may choose to promote proceedings before Kleros' courts on the merits of the notice of withdrawal of copyright infringing content.

Why include Kleros instead of a U.S. court?

Because the parties have free disposition of these rights and the freedom to determine the form and mode of dispute resolution; all of which not only helps the expedited notice and takedown system but also prevents the overload of courts of the common order.

Therefore, a Kleros court must rule on the origin or not of the claim and make the following statements: (a) in the event that the removal of the content is not declared, the court shall order the permanence of such content and the possibility of ordering the complainant to pay for any damage caused to the service provider due to improper disposal or blocking of the material or in favor of the user reported as infringing; or, b) if the court declared the removal of the content, the court must order the service provider to withdraw or remove the content, and the possibility - in case of recidivism - to disable the account of the infringing user.

B. Takedown under Directive (EU) 2019/790.

The notice and takedown process in the European Union is not entirely defined by Directive 2019/790; however, it follows the same pattern and form as the process under the DMCA.

The truth is, because of these regulatory gaps in that directive, this process has greater flexibility in submitting complaints and disputes over the withdrawal or blocking of content for alleged copyright infringement; it merely points out that service providers must have an agile and effective complaint mechanism that is available to users of their services in the event of a dispute over the disabling of access to works or other services charged by them or about their withdrawal, that is, with the figure of notice and takedown.

Article 17 states:

> Member States shall provide that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them. Where rightsholders request to
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> have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.

In that case, Kleros' intervention is appropriate at any stage of the following notice and takedown procedure:

a) Prior to the takedown request. It is noted that where rightsholders request that access to copyright works or other specific services of their own be disabled or that such works or services be withdrawn, they must duly justify the reasons for their application.
   In that sense, the justification can be based on a decision of some court. In this case, the rightsholder or his representative must initiate a process of declaring copyright infringement regarding unauthorized content against the alleged infringer, which may be submitted to a specialized court in Kleros.
   In short, if both the complainant and the infringer accept it, the dispute could be resolved *ex ante* by this online dispute resolution mechanism without the need to go to an European court; avoiding a claim without sufficient support and its possible legal consequences for the unjustified removal of the content.

b) When the infringer receives notice of withdrawal of content posted, uploaded, hosted, or shared, by the service provider. Instead of filing a counter-notification, he may sue the complainant for the improperness of the removal of the content, and thus obtain a decision allowing the restoration of the blocked or removed content.

c) At the counter-notification stage. This process will be like the DMCA-based counter-notification, so Kleros' intervention may also be required and called for, in order to declare the copyright infringement and the removal of infringing content.

C. Takedown under Mexico´s Federal Copyright Law

While the amendments to this law, which contain the notice and takedown, have been the subject of strong criticism and certain legal action, they are in force for the time being and, if maintained, will reconfigure the legal relations of the internet in Mexico

Article 114 octies determines the safe harbor principle, the regulation of notice and takedown and the procedure to be followed by copyright holders before service providers. That article also determines:

> Online Service Providers shall not be held liable for violations, as well as for data, information, materials and content that are stored or transmitted or communicated through their systems or networks controlled or operated by them or on their behalf, and in cases that direct or link users to an online site, where they: a) Expeditiously and effectively remove or disable access to materials or content arranged, enabled or transmitted without the consent of the copyright or related right holder, and which are hosted on its systems or networks, once they have some knowledge of the existence of an alleged infringement in any of the following cases: 1. When receiving a notification from the owner of the copyright or related rights or from any person authorized to act on behalf of the owner, or 2. When receiving a decision issued by the competent authority ordering the withdrawal, removal or disabling of the infringing material or content. (...) The Online Service Provider who receives a counter-notification in accordance with the provisions of the preceding paragraph shall report the counter-notification to the person who filed the original notification, and enable the content subject to the counter-notification, unless the person who filed the original notification initiates a judicial or administrative proceeding, criminal complaint or an alternate dispute settlement mechanism no later than 15 working days from the date where the Online Service Provider has informed the person who filed the original notification about the counter-notification.[11]

As it can be seen, both at the stage of notification and in the counter-notification stage, Kleros may be encouraged to arbitrate in order to settle a dispute concerning the blocking or removal of content for copyright or related rights infringement.

Before or during the notification, the copyright holder or the person responsible for making the claim by their own can contact the user or alleged infringer so that both voluntarily submit to dispute resolution proceedings of Kleros Courts in order to determine the copyright infringement. During the counter-notification by the service provider, the complaining party shall urge the proceedings before Kleros within 15 days, in order to declare the takedown of the allegedly infringing content.

In the same way as in the process under Directive 2019/790, the intervention of Kleros will serve to expedite the removal of the content or confirmation of the restoration of such content on the platform where it was stored, fixed, or hosted.

[11] Own translation.

C. Doubt about Copyright Ownership in Takedown Globally

The notice and takedown mechanism is not one without controversy and misuse. From the outset, many organizations and individuals were alerted about the perversion of it, because it encourages some right holders or other interested subjects to report all kinds of content in a frivolous and unfounded manner. In 2007, a study found that 30% of notices and takedowns were legally dubious at best (Lemley, 2007, p.18).

Safe harbors can help the service provider and copyright claimant, but harm parties that were absent greatly. The frequency of error and its bias represent a structural problem, as they make it too easy for inappropriate copyright claims to result in the removal of content, even if the notice is factually questionable or flawed.

It also encourages copyright holders to use copyright claims as a means of expedited withdrawal, even in cases of good faith use, fair use, or public domain. Rapid withdrawal creates a perverse incentive for copyright claimants to file dubious claims. This mechanism is cheaper for the complainant and more expensive for the alleged infringer (Seltzer, 2010, p. 176-178).

In order to reduce a problem that has been growing over time and which causes some imbalance in the notice and takedown procedure (globally), it is necessary for service providers, in the face of doubts as to the provenance of this mechanism, to introduce, guide and incorporate in their forms or terms and conditions a stipulation indicating that, in case of doubt as to the origin of the measure, proceedings before Kleros courts for copyright infringement claim and the determination of the removal or blocking of content shall be determined in advance.

In this way, there will be certainty on the internet platforms that the content reported has been declared infringing or that such content does not infringe any rights under certain circumstances.

Conclusion

As a result of the massification of online content, the exponential increase in copyright disputes, and the lack of suitable means of dispute resolution, copyright and related rights are in a crossroad.

It is necessary to have an online dispute resolution method that not only understands the digital environment where these legal relationships arise and recognizes the new legal forms of copyright, but primarily provides an adequate response to resolve disputes related to these issues.

For these reasons, Kleros emerges as an efficient and effective solution to the needs posed, as it is a disruptive dispute resolution mechanism capable of adapting to

technological advances, understanding legal relationships in cyberspace and recognizing changes in copyright, and providing resolutions to copyright disputes arising in the digital context.

Certainly, from Kleros' interaction with notice and takedown, an opportunity may arise to safeguard the rights and interests of copyright and related rights holders in order to guarantee the safe harbor principle in favor of online platforms and to safeguard the fair, legitimate use of certain content by non-rights users.

And it is true that Kleros could know all kinds of resolution of copyright disputes on the Internet, it is also true that is much easier to integrate this into the standardized mechanism on the Internet, being regulated by almost all major economies of the world, easily accessible and used, and very effective for the removal or blocking of published and shared content that infringes the copyright of third parties.

From that account, it is entirely possible that the subjects involved, depending on the circumstances of notice and takedown, may urge and resort to Kleros' courts to resolve disputes related to copyright or related rights infringement.

It will be possible for the parties to resolve their disputes through Kleros, when notice and takedown are promoted under the DMCA, Directive EU 2019/790, the Federal Copyright Act of Mexico and where service providers require it so in the event of doubt or uncertainty as to the source of the withdrawal of the reported content.

The truth is that, for its effectiveness, it will be necessary for the parties involved in the notice and takedown, to enter into agreements before, during or after the dispute arises in order to submit to a dispute resolution process or, where appropriate, that the stipulation to submit to the Kleros Courts be incorporated into the terms and conditions or in the complaint forms of the service provider, which are binding on their users.

All of this helps the effectiveness of the notice and takedown measure, and in turn leads to objective, digital, expeditious, efficient, and effective justice, accessible to all cyberspace, including copyright holders, their agents, service platforms and users.

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