

Federal Copyright Law | Unconstitutionality Action 217/2020 and its accumulated 249/2020

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TLDR

After four years since the Federal Copyright Law was amended to implement the copyright obligations assumed in the TMEC, the Court ratified the constitutionality of the notice & take down system, and, with it, the validity of the protections limiting the liability of intermediaries, supported by the so-called "Safe Harbor" doctrine and the "Good Samaritan Clause".

What happened in the Supreme Court?

In sessions of May 28, 30 and June 3, 2024, the Plenary of the Supreme Court of Justice of the Nation ("SCJN" or the "Court") resolved the Unconstitutionality Action 217/2020 and its accumulated 249/2020. Among other issues, the Plenary analyzed the constitutionality of the notice & take down system provided for in Article 114 Octies, section II, paragraph b) of the Federal Copyright Law ("LFDA" as per its acronym in Spanish), endorsing its validity and constitutionality.

What is notice & take down?

The content circulating on the Internet may be illegal or affect the intellectual property rights of third parties. This is particularly relevant for digital platforms such as social networks, search engines, marketplaces, forums, and, in general, all websites that allow the flow of traffic of content published by their users.

The Free Trade Agreement between the United States, Canada and Mexico (USMCA), in its Chapter 20, requires providing a system in which any person who considers that any online content infringes its copyrights, may give notice and require the intermediary operating the platform to remove or disable the allegedly infringing content. The platform, if certain minimum requirements are met, will proceed to do so, notifying the person responsible for the publication so that, if he considers that it was a mistake, he can respond (by means of a "counter-notice"), stating the reasons for which he considers that the decision to disable his content is incorrect. If this happens, the platform must inform the person who reported the allegedly infringing

content, and if the latter does not initiate legal action within 15 days, the platform must restore such content. This system was implemented in the amendment to the LFDA on July 1st, 2020.

These systems are very similar to those existing in the United States, the European Union and other nations.

What is Intermediary Liability and the Good Samaritan Clause?

The USMCA provided that the intermediary (e.g. a platform) cannot be liable for infringing content posted by its users, unless it unjustifiably refuses to remove such content after being notified of an order from a competent authority, or fails to implement the notice & take down system. These limits on the liability of online service providers are internationally known as the “safe harbor” doctrine.

Likewise, this treaty and amendment both established that an intermediary would not be liable for taking actions aimed at unilaterally and in good faith disabling or suspending content that infringes any legal provision or contractual terms, as long as the author of the content is duly informed. This is known as the “Good Samaritan Clause”. The regulation clarifies that it is forbidden to force the intermediary to be on the lookout for infringing or illegal content proactively.

Why was it considered potentially unconstitutional?

The reform to the LFDA was challenged as unconstitutional by the National Human Rights Commission and the Senate minority, mainly for infringing the right to freedom of expression, access to information, free and legitimate use of intellectual property, and due process.

What did the Court ruled?

The Ministers debated in Plenary, and voted 6-5 in favor of the validity of the notice & take down system, thus endorsing its constitutionality. Regarding the unconstitutionality of the “Good Samaritan Clause”, this was also dismissed and its validity was recognized.

What does this decision mean for my business?

The ruling provides legal certainty about your intellectual property rights protection and the content that circulates online. If you hold copyright (such as texts, images, audios and videos) that are improperly circulating on digital platforms, such as social networks, marketplaces and search engines, you can use those platform’s mechanisms to request such allegedly infringing content to be removed through the notice & take down system, provided you disclose some necessary information. The ruling also means that the platform will have options available (such as the “Good Samaritan Clause”) to proactively protect your rights, and will help to make the Internet a safer and more reliable tool (i.e. free of illicit content).



On the other hand, for digital platforms where users can create and share content, the ruling is beneficial (as it limits their liability) for implementing this system. It is important to mention that moderating user content, as well as complying with these requests, will not generate liability for infringements caused by such content. If there is infringing content on the platform, then the intermediary will not be liable for violations of such content, as long as there is no unjustified failure to comply with orders from authorities or extrajudicial requests from users with this system.

If you would like more information on how to interpret and implement this, Galicia's Technology, Intellectual Property and Administrative Litigation teams can help you. Send us an email to TMTIA@galicia.com.mx.

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