

# Looking north is looking back: the negative impact of the DMCA. The notice-and-takedown procedure and Technological Protection Measures

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## SUMMARY



**The Free Trade Agreement (FTA) between Colombia and the United States includes, among others, two commitments to extend copyright protection in the digital environment: creating a mechanism to remove allegedly infringing material from the Internet and prohibiting by law to circumvent technological measures that protect such material.**

And even though these commitments shelter equally to both the United States and Colombia, only the latter should do something to fulfill them, since both points are in force in a U.S. law and were included in the FTA in very similar terms. Such law is the Digital Millennium Copyright Act (DMCA), promoted by Bill Clinton's administration and issued in 1998.

Based on the DMCA provisions, the Colombian government has recently boosted bills on each point. Thus, in 2011, the government filed an initiative that included the creation of a content removal mechanism. It was the original "Lleras Law," which ended up being shelved months later. Afterward, in April 2012, President Juan Manuel Santos asked Congress to fast-track processing a law that included matters in regard to the circumvention of technological measures. However, the Court declared it unconstitutional on procedural

grounds; hence, the government filed again a similar text in Congress last May.

The DMCA is unsuccessful model, as long as it is understood by successful a balanced copyright model. In the United States are countless voices constantly pointing out the harmful effect of this law. Even a group of academics, entrepreneurs, NGOs and members of technology companies launched a formal campaign to call for reforming it. Thus, the DMCA's problems are not an exclusive subject for hackers and activists.

On the other hand, this law was issued in a dissimilar present and, above all, in a social and political context very different from ours. If Bill Clinton's government assumptions of the project on National Information Infrastructure -that supported the DMCA- were wrong 20 years ago, today are simply unsustainable. And more important than that, the Internet use and incorporation is not the same in the United States than in Colombia. The inclusion of a law like the DMCA in our country must be consistent with our goals for development, education and access to information and communication technologies.

The key problem of the notice-and-takedown system is that it is a mechanism disproportionately unbalanced against the citizen. For the sole purpose of

safeguarding content owners' interests, the system ignores the own scope of copyright and, even worse, infringes users' due process and freedom of expression.

Technological Protection Measures (TPM), meanwhile, are criticized for one reason: they bestow the owner of works a control that goes beyond the control rationality and justification of copyright. The circumvention of protection measures not only serves illicit purposes, it is also essential to achieve collectively desirable objectives. However, the TPM hinder the use of works for other and innovative purposes -which in any way threatens the exploitation of the original work-. Furthermore, TPM sacrifice the access possibility for less well-off persons or from various segments of society to contents through secondary markets or non-profit institutions.

Assuming that the FTA is not a straitjacket but an agreement with a number of obligations to be incorporated into our legislation, the negative effects of both the notice-and-takedown procedure and the TPM should be taken into account when designing similar laws in Colombia. This involves observing, at least, the following points:

- Introducing legal incentives to deter content owners to submit reckless notice-and-takedown requests. The DMCA's

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accessing and using contents in exercise of fair use grounds and exceptions and limitations to copyright.

- Legally allowing the circumvention of TPM to dispose of legally acquired products in non-profit settings.
- Prohibiting the introduction of TPM whose primary purpose is to prevent the interoperability and compatibility of services, devices and programs.

design favors that the holders request removal of any material; therefore, it is common that legitimate contents end up censored on the Internet.

- Incorporating into the Colombian law a fair use clause. A balanced copyright system should give the same guarantee to both the work authors and owners and those who access and use these contents for lawfully and socially desirable purposes.
- Incorporating the obligation of assessing fair use and other existing exceptions and limitations. Content owners should be required to assess in advance whether fair use grounds and other legal exceptions that may be applicable support a given content on which they wish to submit a takedown request.
- Introducing a special judicial or administrative mechanism for processing notice-and-takedown requests. The DMCA's experience shows that a private notice mechanism undermines due process and freedom of expression, and it is prone for arbitrariness of the parties.
- Placing the burden of proof on the claimant. The takedown request should impose copyright holder the burden of demonstrating to the court or special administrative authority the user infringement.
- Legally allowing the circumvention of TPM for

If the Colombian regulation will be based on the DMCA, it cannot just adapt it in its literality, but also in the context of its surrounding discussions, interpretation and proposals. In other words, the U.S. DMCA is not just the text but also the experience of its application and additional regulation. To that extent, the recommendations presented in this document are a relevant reference, and taking them into account for the law that shall implement the FTA commitments on this regard, would balance the protection of content owners and the citizens' right to benefit from such creations. This balance does not disregard copyright boundaries, but it is an aim of copyright in itself.



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