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EDITOR'S NOTE

On January 5, 2007, the International Trademark Association presented the Third Learned Professors Trademark Symposium in Washington, D.C., at The National Press Club. This program was designed to provide an academic perspective on trademark issues for professors and students of trademark law, jurists hearing and deciding important cases dealing with trademark disputes, and practitioners specializing in trademark law. This year, Professors Margreth Barrett, Glynn S. Lunney, and Pablo Ruiz-Tagle presented their papers exploring the legal challenges created by the explosive expansion of advertising and other commercial activity conducted over the Internet. The Trademark Reporter is proud to publish these three articles as presented at the Learned Professors Trademark Symposium.
TRADEMARKS, THE INTERNET AND DOMAIN NAMES IN LATIN AMERICA

By Pablo Ruiz-Tagle

This article explores the evolution of case law that relates to the Internet, domain names and trademark rights in various Latin American countries. Selected rulings from arbitration, constitutional, criminal and civil courts and tribunals will be examined, as well as the application of international conventions. It will focus on the issue of whether domain names are merely electronic addresses or property rights and/or contractual rights. Discussion will include the use of marks both to criticize public figures or entities (in “gripe” sites) and to divert traffic to competitor sites. Last, an update on the remedies available to victims of domain name speculation (statutory versus judicial approaches to resolving cybersquatting disputes), including contributory liability claims against Internet service providers (ISP) are also addressed.

I. COMMERCIAL USE OF THE INTERNET AND DOMAIN NAME FILING

Although the Internet was first limited to issues relating to education, personal communication and culture, today it is used for the most diverse of purposes. Evidenced by the increase in domain name registrations in Latin America, commercial use of the Internet, in particular, has increased substantially. This includes e-commerce, all kinds of business web pages, and the use of domain names for trading services, products and information concerning commercial activities.

The chart below shows the Latin American countries that have the greatest increase in domain name registrations. These figures correspond to the total number of domain names registered per year in Mexico, Chile, Peru and Brazil.

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The era of gross cybersquatting, which has had a great impact on Latin America, as with the rest of the world, is over. This change reflects both the adoption of important bodies of substantive law, and the joint efforts of public and private institutions, at national and international levels, to combat the problem. These developments have influenced the evolution of the Internet.2

In Latin America, there are a great number of national authorities that have the power to control and regulate domain names. For example, the Ministry of Foreign Affairs in Argentina, the Ministry of Telecommunications in Colombia and Peru, and the Ministry of Economy in Chile and Brazil.

Domain name disputes in some of these countries are regulated by a private organization under the mandate of the Internet Corporation of Assigned Names and Numbers (ICANN), which, at the domestic level, is referred to as NIC (i.e., NIC Argentina, NIC Chile, NIC Brazil, NIC Mexico, NIC Peru). Some of these private entities are linked to universities, such as the Monterrey Technological Institute in Mexico, the University of Chile, and the University of Los Andes in Colombia.

In Latin America, the role of the municipal courts and the state with respect to conflicts arising from the Internet has increased as well. In some countries, such as Chile, private mediation and other alternative dispute resolution methods have been established.3 The organization of private arbitration procedures for deciding these cases has also increased.4

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4. See supra note 2.
addition, the courts and governmental agencies have become more active in resolving disputes. The protection against discrimination, and of privacy and property rights, freedom of speech and freedom of contract are the legal grounds that have been used to justify this increase in governmental intervention. Even criminal courts have intervened to combat terrorism, drug trafficking and pedophilia networks. Furthermore, civil courts have rendered important decisions that address the issue of who is liable for damages caused by illegal Internet activity. In some instances, government intervention extends to the extraterritorial application of local regulations and the involvement of international courts to decide the issues of enforcement and application of rights related to domain names.

Although trademark lawyers once had serious problems in applying the international trademark classification system to the Internet in addition to understanding the concept of domain names, their knowledge of the relationship existing between the Internet and intellectual property law and practice has substantially increased during the past few years. It is now recognized that the law regulating word marks is directly related to domain name protection. In most Latin American countries, the Internet in general, and domain names in particular, are now considered to be related to some of the products falling in International Classes 9 and 16, as well as to services falling in International Classes 38 and 42. This explains why the recommendation of intellectual property practitioners has been to register a company’s trade name and the trademarks that distinguish its leading products and/or services as domain names.

5. See, e.g., a ruling on emails enacted by Dirección del Trabajo of Santiago, Chile, http://www.dt.gob.cl.


9. See Andres Echeverria, Uso de Marcas y Nombres de Dominio, Derechos Intelectuales, Editorial Astrea, Buenos Aires, 2001, at 124-25. The author also proposes the opposite, that is to register domain names that refer to computer services mainly as trademarks in International Classes 38 and 42. We have also seen the filing of domain names as trademarks in other classes, such as International Classes 9 and 16.
II. DOMAIN NAMES GOVERNED BY PROPERTY LAW OR CONTRACT LAW?

From a technical standpoint, domain names initially were viewed as electronic addresses that identified a place or site on the Internet. However, in Chile, as early as March 24, 2000, in a decision concerning the availability, registration and use of the domain name peoplemeter.cl, a private arbitrator stated:

The fact that both parties are commercial companies in pursuit of profits for their shareholders constitutes an element that cannot be overlooked when resolving the controversy, since the commercial use that is increasingly being made of domain names is evident.

Today domain names are not only considered electronic addresses, but also a means of identifying a particular source of the goods, services or information offered on the Internet. Consequently, it is advised that the person having the legitimate right to use the domain name, including its use in commerce, obtain legal protection.

However, the legal nature of domain names is still unsettled. The controversy involves whether domain names should be governed by property law or contract law. The concept of domain names as property rights means that: (1) they are exclusive rights, *erga omnes*, and enforceable against anyone infringing them, (2) they should be subject to the constitutional mandate that all regulations in this area be made through laws enacted by Congress, (3) the Constitution protects equal access to domain names, (4) there is a need to establish statutory coordination with other intellectual property rights, and (5) they should be subject to the rules of expropriation.

If domain names are regulated by contract law, on the other hand, this means that: (1) they are mainly subject to private relationships between the registration authority and the person who files the domain name, with no *erga omnes* rights, and only involving these parties, (2) domain name regulation can be privately enacted and amended without congressional approval, (3) there is no general right to equal access to domain names, as this is a private matter, (4) there is no need to coordinate these rights with other intellectual property rights, and (5) they are not subject to rules of expropriation.


The private registration of domain names in most of Latin America remains under the delegated authority of ICANN. The issue of whether domain names are governed by property law or contract law is yet unresolved. However, government intervention has increased with respect to the Internet, particularly in the area of domain name litigation. There is also currently strong pressure to adopt a contract law approach to domain names. Pursuing this tack would preclude the application of property regulations in the area, which would mean more domestic or national control. Less domestic control, in contrast, would curb the costs of domain name protection and maintain private control of the same as much as possible. This approach follows the path of software protection, which, for similar reasons, found a more sensible means of protection under copyright law than under patent law. It should be borne in mind that some of the most prominent intellectual property attorneys have argued that the greatest virtue of the Internet is the total absence of any regulation. Today, there remain diverse opinions on this issue.

III. SOURCES OF DOMAIN NAME LAW

The balance between a statutory and a case-law approach in applying trademark rights to the Internet requires an identification of the sources of law available in each Latin American country.

**Argentina:** (1) Argentinean Constitution; (2) civil and procedural law; (3) trademark and copyright legislation; (4) court decisions; (5) International conventions; (6) NIC Argentina regulations and policies; (7) ICANN administration policies.

**Brazil:** (1) Brazilian Constitution; (2) civil and procedural law; (3) trademark and copyright legislation; (4) court decisions; (5) International conventions; (6) ICANN administration policies as adopted by NIC Brazil; (7) court decisions.

**Colombia:** (1) NIC Colombia regulations and policies; (2) ICANN UDRP (Uniform dispute resolution policy); (3) WIPO regulations and policies.

**Chile:** (1) Chilean Constitution; (2) general principles of civil and criminal law; (3) trademark and copyright legislation; (4) International conventions; (5) ICANN policies and regulations as adopted by NIC Chile regulations and policies; (6) WIPO regulations and policies; (7) court decisions (12 cases between 1998 and 2006); (8) decisions issued by local arbitration panels; (9) foreign statutory provisions and/or decisions.

**Mexico:** (1) Federal Constitution; (2) general principles of civil law; (3) trademark and copyright legislation; (4) International conventions; (5) ICANN administration policies as adopted by NIC Mexico; (6) Mexican dispute resolution policies; (7) WIPO
regulations and policies; (8) court decisions; (9) decisions issued by expert panels.

**Peru:** (1) Peruvian Constitution; (2) general principles of civil law; (3) court decisions; (4) trademark and copyright legislation; (5) ICANN administration policies as adopted by NIC Peru; (6) NIC Peru General Assignment Rules.

This preliminary listing of the sources of law for the selected Latin American countries indicates that there is frequently a balanced combination of statutory instruments and case-law bodies. Of course, this balance may change in the future.

**IV. USE OF INTERNATIONAL CONVENTIONS IN DOMAIN NAME LITIGATION**

In domain name litigation, some cases have been decided by the extraterritorial application of local trademark laws and regulations, as well as by international agreements.

International regulations were applied to a case in Chile involving the owner of the famous trademark LACOSTE and the almost identical domain name lacost.cl. The alleged infringer did not appear during the proceedings. Consequently, the arbitrator ruled in favor of the LACOSTE owner, citing general procedural rules and considering European Community Regulation No. 874/2004 (dated April 28, 2004) concerning the .eu top level domain, which, under Article 22.10, provides that if a party does not appear before the arbitrator, it must accept the claims made by the other party. The domain name was therefore assigned to the legitimate owner of LACOSTE.12

Article 6 of the Paris Convention has been used in Argentina and Chile for the protection of well-known trademarks in domain name litigation. Article 8 should also be considered inasmuch as it protects commercial names, either as registered or unregistered trademarks. Moreover, Article 10bis of the Paris Convention contains rules banning acts of unfair competition that are likely to create confusion with respect to the establishment, products, services and/or the industrial or commercial activity of a competitor. False and misleading commercial statements are also banned under this provision.13

Argentina has focused on Article 3 of the Agreement of Trade Related Aspects of Intellectual Property Rights (TRIPS) of Article 3, which gives broader protection to well-known and famous trademarks. Article 16 of TRIPS also provides for broad protection

12. The full text of the decision on lacost.cl was issued on May 17, 2005, http://www.nic.cl.
13. See supra note 9, pp. 105-06.
of trademarks against any deceptive use made by a third party and may be used to oppose the registration of domain names that are identical or confusingly similar to existing trademarks, or those that are identical or similar products or services. Finally, Article 41 of TRIPS mandates that each member state of the Agreement provide an efficient means of enforcing the protection of trademark rights.\(^\text{14}\)

The use of the North American Free Trade Agreement (NAFTA) provisions in Mexico and Chile should also be explored. For example, the U.S.-Chile Bilateral Free Trade Agreement contains several provisions that mandate each signatory of this treaty have an independent system for filing domain names and resolving disputes. It also mandates that treaty participants adopt rules that address the liability of Internet service providers.

### V. THE ROLE OF THE COURTS

In Argentina, the registration of domain names is made with an authority that is not empowered to resolve conflicts. There are no specific provisions for the out-of-court resolution or mediation procedures for theses cases, and courts decide these issues by applying domestic trademark law, and the Paris Convention and/or TRIPS provisions. Argentina has enacted regulations concerning domain names, but these are mostly related to registration requirements and the general prohibition against registering domain names that contain words, letters or distinctive signs that are exclusively used by public authorities.

Brazil has adopted regulations for the filing and maintenance of domain names. The decisions concerning disputes and conflicts are in the hands of the judicial courts.

Chile is the first country to establish substantive and procedural regulations as well as an independent arbitration system to govern the registration and dispute resolution of domain names. The regulations refer directly to the principles of “first come, first served,” good faith, and avoiding infringement of third-party rights. The regulations also prohibit registration of a domain name that is identical or deceptively similar to a third-party trademark or name, or of domain names that are not legitimate. Domain name disputes are resolved first by a system of mediation and, second, by professional arbitrators if case mediation fails. These procedures may be reviewed by the courts. However, the great majority of conflicts that are solved by mediation or arbitration are not appealed.

14. See \textit{supra} note 9, pp. 106-10.
In Colombia, a mediation and arbitration system has been set up for solving domain name disputes. The substantive provisions of the Colombian dispute resolution system reflect those of ICANN’s Uniform Dispute Resolution Policy. Colombia delegates to ICANN the jurisdiction over these cases.

Finally, Mexico has enacted a policy for the resolution of domain name conflicts at the domestic level that is similar to other systems in Latin America. In addition, Mexico has delegated the resolution of such conflicts to an external and independent body, which, at present, is a panel of experts of the WIPO Center for Mediation and Arbitration.

VI. “GRIPE” SITES

In most Latin American countries, there are cases that concern the registration of words and trademarks as domain names and their use in “gripe” sites, that is, sites that criticize public figures or legal entities. For example, in Argentina, the domain name marcelotinelli.com, the name of a famous showman, was registered by a third party who was angry with the way the showman had behaved on television. The TV showman sued and the courts ordered an injunction, ordering the domain name administrator INTERNIC to reassign the domain name to the TV celebrity. The judicial order had an impact beyond its local jurisdiction—namely, it had an extraterritorial effect in the USA.15

Another case, this time in Chile, involved a group of former employees of a gas utility company, who registered the domain name exoneradospoliticosdegasco.cl (“people fired for political reasons from gasco”). Evident from the language of the site, the group attempted to exercise its rights to free speech by criticizing a public utility company that was carrying out unlawful labor practices. The arbitrator ruled that this name negatively affected the rights of the company and its famous trademark and trade name GASCO. He thus ordered the direct reassignment of the domain name to the public utility company. The decision was based on the reasoning that the political nature of this kind of speech was improperly used as a forum to raise a labor issue and to negotiate an economic benefit from the public utility company.16

A similar Chilean case referred to the domain name megamintio.cl. A Chilean local TV network, Red Televisiva Megavisión, called “Mega” for short, had aired a program against the commercial practices of a car dealer. In retaliation, the car

dealer registered a domain name that used “Mega” jointly with the word “lied,” that is, megamintio.cl. The TV network filed a petition with the arbitration panel against the registration of this domain name alleging bad faith on the part of the car dealer. The network used as evidence an email the dealer had sent to the TV network in which it asked for an amount of money as compensation for the transfer of the domain name and expressed its bad faith intent to dilute the commercial value of the word “mega.” The TV network argued that it was the exclusive owner of several trademarks containing “Mega.” The arbitrator held that the principle of “first come, first served” should not be applied to this case because the applicant had registered the domain name in bad faith, and intended to damage the TV network. The arbitrator thus ordered the reassignment of the domain name to Red Televisiva Megavisión S.A.\(^\text{17}\) 

Last, in Chile, a famous newspaper company requested the cancellation of the registration of the domain name elmercuriomiente.cl. The domain name, which in Spanish means “El Mercurio lies,” was used to criticize the Chilean newspaper El Mercurio. In the cancellation action, the newspaper alleged that the existence of this domain was damaging to its prestige and reputation. In its defense, the domain name registrant argued that the domain name was used to debate university student issues, and in particular, that it was filed to remember the student sitting of 1967, a day when several student groups had placed a big poster on the front of a university building claiming “El Mercurio Lies.” The registrant argued that no bad faith existed and no commercial use was planned for the domain name. The arbitrator accepted the newspaper’s arguments, grounding his decision on the principles of good faith and trademark protection. Therefore, the arbitrator ruled that the domain name’s registrant had no legitimate interest in the domain name and reassigned it to the newspaper company.\(^\text{18}\) 

In all of the cases discussed in this section, such as marcello tinelli.com; exoneradosdegasco.cl; megamintio.cl and elmercuriomiente.cl, the rights of trademarks, trade names and personal images have prevailed over the right to register the same domain names as an exercise of free speech. Private arbitrators have not only prevented the use of the infringing domain names, but have also reassigned the same to the criticized public figures or legal entities. Looking forward, perhaps some consideration should be given to the issue of free speech in similar cases involving criticism of public figures on the Internet.

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VII. THE USE OF DOMAIN NAMES
TO DIVERT TRAFFIC FROM COMPETITOR SITES

Another type of case concerns marks that have been used to divert traffic to competitor sites, thereby producing initial interest confusion.

In Argentina, one of the leading cases in this area involves the domain name freddo.com.ar, in which a renowned ice cream chain Freddo decided to place a website on the Internet to offer its products and considered the domain freddo.com.ar most adequate. Unfortunately, the name had already been registered by another company, so the ice cream maker commenced litigation and obtained an injunction against the registrant’s use of the domain name, as well as the temporary transfer of the same to the ice cream maker until the final decision was rendered. In the end, the ice cream chain was unable to justify the registration of the domain name and was therefore permanently enjoined from using “Freddo” on the Internet.19

A similar case was disputed in Brazil involving the domain name geocities.com.br. A petition was filed by Geocities, Inc. against Vserver Brasil Tecnología de Sistemas Ltda., an Internet service provider using the word “geocities” to attract consumers to its own website. At first, the Brazilian court ordered an injunction against the use of the domain name, considering GEOCITIES to be a notorious and well-known trademark owned by a company different from the entity that registered the domain name. Moreover, the registrant was not able to show any legitimate rights to the domain name at issue. The court considered the risk of confusion with and dilution of the well-known trademark and ordered the reassignment of the domain name to the petitioner as the exclusive owner of the trademark GEOCITIES.20

A case decided in Chile involved a notorious trademark that was registered as the domain name hugoboss.cl by the local representative of a perfume distribution company. The local company, in its defense, justified the registration of the domain name by its need to inform the public of the qualities of the products it distributed. The owner of the HUGO BOSS trademark filed arbitration proceedings against this registration. The arbitrator, considering the likelihood of confusion created among


Chilean consumers, ruled to reassign the domain name to the famous foreign perfume company.\textsuperscript{21}

In another case in Chile, the public transit corporation, which provides subway services on an exclusive basis, filed a petition against a third party’s registration of meetro.cl, arguing that it was confusingly similar to its trademark METRO. The domain name’s registrant alleged that its use was linked to an international subway project but did not provide any further information on the nature of same. The arbitrator ordered the reassignment of the domain name to the public transportation company, basing its decision on the fame and notoriety of the METRO trademark, and the likelihood of confusion created among public consumers.\textsuperscript{22}

In Colombia, a similar case involved the name of the national airline company AVIANCA that was filed as the domain name avianca.com. The owner of the trademark and commercial name AVIANCA did not submit timely renewal of its domain name, so the name was immediately registered by a person residing in Florida. The new owner assigned it to another entity that created a link with a travel agency’s website, www.despegar.com. The National Arbitrarium Forum that had jurisdiction over this case held that the new owner of avianca.com had no rights in the name and that the registration was made in bad faith. Moreover, evidence of consumer traffic diversion was present in this case. The domain name was therefore reassigned to its original owner.\textsuperscript{23}

Mexico has two leading cases on this issue. The first concerned the domain name samsungmobile.com.mx, where Samsung Electronics Co. Ltd. filed a petition before the WIPO Arbitration and Mediation Center against an unauthorized dealer that was offering Samsung products via the Internet on the corresponding website, thereby diverting traffic of Samsung consumers to the exclusive benefit of the dealer. Finding a likelihood of consumer confusion, the arbitration panel ordered the reassignment of the domain name to Samsung.\textsuperscript{24}

The second case was also decided by a WIPO panel and concerned the domain name novotelcancun.com. The petitioner was the legitimate owner of the trademark NOVOTEL for hotel services. The domain name at issue was used to house a competitor’s web page, causing a high risk of consumer confusion.

\textsuperscript{21} Decision rendered on hugoboss.cl by a private arbitrator, March 1, 2005, http://www.nic.cl.

\textsuperscript{22} The full text of the decision rendered on “meetro.cl,” March 16, 2006, available at http://www.nic.cl.


Moreover, there was evidence of bad faith on the part of the registrant, as well as negative impact on the Novotel’s trademark rights. Here, too, the panel ordered the direct reassignment of the domain name in favor of the petitioner.25

In Peru, a WIPO panel recently rejected a petition filed by a cosmetics company against a finance and real estate agent for the transfer of the domain names esika.com and esika.net. The cosmetics company alleged that these domain names were identical to its trademark ESIKA. The panel, however, found that the domain names were registered and used prior to the cosmetic company’s trademark registrations. It also stated that the cosmetics industry greatly differed from finance and real estate services, so no confusion could exist in this case. This was the first time in Latin America that a WIPO panel gave priority to a domain name that conflicted with a trademark.26

VIII. THEORIES OF LIABILITY APPLICABLE TO INTERNET SERVICE PROVIDERS (ISPS)

In Latin America, liability depends on the type of Internet service provided. In Argentina, from a scholar’s perspective,27 three groups of ISPs are considered:

(a) Information providers: Liability is determined under an objective standard and this type of ISP shares the same liability with the authors of the infringing content as well as links directly connected to them. Information providers should know what they are including as part of their services. They share responsibility in case their content infringes the law, because they can choose the information they provide as well as the links they make.

(b) Hosting service providers: Liability is established under a subjective standard and depends on whether there is negligence on behalf of hosting service providers and if the same could affect content by creating damages that are measurable. Hosting service providers should control website contents as much as possible to avoid infringing the rights of third parties. If infringement does occur, the

hosting services provider should prevent the spread of damaging information.

(c) **Access service providers**: There is no liability because they only carry out the technical function of providing access to information already available on the Internet.

In Argentina, for example, there is no information on whether this classification of ISPs has become statutory law or has been applied by the courts.

In Chile, a leading case involved a constitutional claim against an ISP. ENTEL, the largest Chilean Internet provider, had advertised in a special section of its website, sexual services using the names of a woman who appeared linked to prostitution as part of an ugly joke. The ISP defended itself by arguing that the service it provided was automatic and free of charge, and that it was administered by a third party for which it had no responsibility. The ISP also explained that, after receiving notification from the petitioner, it immediately stopped the service. The court first established that Chilean law was, in fact, applicable to this case because the hardware and server that were used were located in Chile. Second, it recognized that while the statute regulating telecommunications did not directly apply to this case, general constitutional principles, as well as rules of civil and criminal responsibility, did. The court also distinguished the website provider from the content provider for the purpose of assigning liability. It found that the ISP in this case had no control over the content, but that it could still be considered liable if it had been put on notice and continued providing the offending service. However, the third party that administered the website would be responsible for the content and for any damages caused by such services if no measures had been taken to stop them. The court established that the claim should be dismissed because the advertisement had been removed from the website.

In Peru, the telecommunications statute and its implementing regulations also consider the different types of ISPs and provide for the standards of responsibility for each:

(a) **Network service providers** are not responsible for the content transmitted via the Internet, unless they have been previously notified of the unlawful use of such services;

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28. Court of Appeals of Concepción, Chile, December 6, 1999.
(b) *Access providers* are not responsible for the content of websites, unless they have specific control over the web pages;

(c) *Content providers* are responsible for the content of their websites.

These rules are similar to the scholars’ classification in Argentina. No information exists on whether they have been tested before the courts.

**IX. CONCLUSION**

In Latin America, the Internet is currently viewed as an integral part of commerce, which means that it is governed by commercial law. The statistics concerning domain name registration and litigation show a substantial increase in both the quantity of domain names registered and the number of disputes taking place in Latin America. Domain names are an important part of the commercial expansion of the Internet and, yet, they still lack a precise definition in terms of their legal status. They have been considered to be ruled by both property law and contract law principles.

The resolution of domain name disputes involving “gripe” sites has followed the principles of both trademark law and the duty to act in good faith. However, in these particular types of cases, the question remains as to whether free speech should be given more protection when determining the rights of conflicting users, as opposed to consistently ordering the reassignment of domain names to the trademark owners.

In Latin America, both multi-jurisdictional systems and *ad hoc* domain name dispute resolution procedures are available. A few cases exist where the extraterritorial use of trademark law has been made, such as the conflict related to the domain name marcelotinelli.com.ar. Moreover, international conventions have been used to solve several domain name disputes involving trademark rights, such as the case related to the domain name lacost.cl.

At present, the conflicts between trademark and domain name use are mostly solved at a domestic level as a private law matter. In most cases, trademark rights prevail over domain name filings, and strong consideration is given to previous use of words or characters in assigning rights on Internet. The sources of law and the adjudicators are different for each Latin American country, but all of them seem to use similar principles to decide their cases. These principles can be traced to the most fundamental rules of intellectual property law and its institutions. The law applicable to information providers as well as hosting services for the Internet is still unclear, although it should follow general principles of civil and criminal liability. Overall, these
areas of law are ever changing, but seem to follow a general trend towards globalization.