



# AMERICAN UNIVERSITY

W A S H I N G T O N , D C

Program on Information Justice and Intellectual Property

April 9, 2012

Honorable Presidents of the Senate and House of Representatives:

We write as a group of international intellectual property academics and experts in response to what we perceive as a hurried process to implement the provisions of the U.S.-Colombia Free Trade Agreement through amendments to Colombian law that may not fully take into account the importance of balance in a healthy copyright system.

It is universally accepted by copyright scholars and experts that intellectual property regimes can only serve a society's public interest in fostering creation, innovation, and access to cultural production by establishing a careful balance between the interests of rights holders, on the one hand, and those of the civil society at large, on the other. Laws that offer rewards to proprietors through market exclusivity must be carefully qualified with limitations and exceptions that serve the needs and interests of follow-on creators and innovators, market competitors, and the ultimate consumers of market products – including teachers, students and scholars. Empirical research and economic modeling show that this is particularly important in developing countries with high income inequality, where the rational profit-maximizing behavior of many monopolists will be to price exclusive products to reach only the most prosperous sliver of the market.

Upon review of Bill No. 201 of 2012,<sup>1</sup> we find that many of the changes that upgrade protection for copyright go beyond what the FTA requires and are, in fact, more restrictive than U.S. law itself. Moreover, we note that Colombia's legislators do not appear to be using this opportunity to recalibrate the balance between rights holders and other citizens by introducing flexible limitations and exceptions into national law, along with stronger safeguards for ownership.

Implementing unbalanced legal reform may reduce public access to important information and, by stifling legitimate innovation, put Colombia and its people at a cultural and competitive disadvantage. We note that Colombian civil society has asked the legislature to slow down this process and use the time gained to consider a fuller and more balanced range of reforms, in consultation with a wide range of interested parties and groups.

We are not experts in Colombian law, nor have we fully reviewed the relevant local and regional regimes; but, it is our conclusion that the Bill provides for significantly less balance than do the laws

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<sup>1</sup> An official Spanish text of Bill 201 of 2012 and an unofficial English version are available at <http://tinyurl.com/colomcopyrightbill>. We welcome comments on the English language version.

of many other countries, including the United States, which is also bound by the terms of the FTA. We note, generally, that there exist a number of areas in which the Bill fails to link the enhancement of proprietor rights with a correlative limiting principle, or to make a new right subject to generally applicable limitations and exceptions.

The remainder of this letter is designed to note some specific areas of choice to which a renewed deliberative process might devote attention. In particular, we focus on provisions that implement proprietors' rights beyond the requirements of the FTA, as well as aspects of the Bill that could be altered to implement the more robust limitations and exceptions as permitted by the FTA. For example:

- In defining the author's exclusive rights, the Bill repeats the language of the FTA extending copyright to "[a]ny form of reproduction of the work, permanent or temporary, by any means of procedure including temporary electronic storage."<sup>2</sup> The Bill fails to reflect an important principle developed in U.S. court decisions limiting the right to situations in which "[the copy] is sufficiently permanent or ... stable to permit it to be ... reproduced ... for a period of more than transitory duration."<sup>3</sup> In other words, Colombia might subject to the control of copyright owners a variety of technologically-driven forms of transitory reproduction, such as buffering, that U.S. law authorizes. The failure of the Bill's sponsors to recognize this fact puts Colombia's information and technology industries, as well as its consumers, at an unnecessary comparative disadvantage. At a minimum, Colombian law can and should specify that "storage," within the meaning of the Bill, does not include "temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process," as suggested in a recent proposal for the Trans-Pacific Partnership Agreement by the Computers and Communications Industry Association.<sup>4</sup>
- Article 13 of the Colombia Bill prevents the "broadcasting through the Internet by land, cable or satellite of television signals" without permission from the owner of the copyright for the signal or its contents "regardless of" any limitations and exceptions to the exclusive rights in Colombia's legislation. In U.S. law, by contrast, no exclusive right is categorically immune from the general limitations and exceptions, including "fair use," which the law provides. Thus, for example, an Internet retransmission of portions of a terrestrial broadcast for educational use might be considered a non-infringing use. In Colombia, under the Bill, this does not appear the case. Thus, Colombian students and teachers could be less free to engage in effective educational uses of the Internet than their U.S. counterparts. The FTA

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<sup>2</sup> Colombia Free Trade Agreement, U.S.-Colom. art. 16.5(2), Oct. 21, 2011, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>.

<sup>3</sup> *The Cartoon Network v. CSC Holdings*, 536 F.3d 121, 127-30 (2d Cir. 2008) (cert. denied June 2009).

<sup>4</sup> Press Release from Computer Comm'n Industry & Association, Internet Indus., Proposals for TPP (Feb. 28, 2012). *Available at*: <http://infojustice.org/wp-content/uploads/2012/03/CCIA-positive-proposal.pdf>

does not require this anomalous result, and the U.S. Constitution would almost certainly bar a similar enactment.

- Article 14 extends proprietors' rights beyond what is required in the FTA, and significantly beyond existing U.S. law. It imposes liability for circumventing technologically effective measures imposed to control "access and unauthorized uses of works." U.S. law and the FTA apply sanctions for circumvention only on those who hack "access" restrictions.<sup>5</sup> In the U.S., for example, consumers who purchased e-books with safeguards to prevent downloading (a use of a work rather than access to it) would be free to avoid this technological "lock" if they had lawful access to the work. the means to do so.<sup>6</sup> This was a hard-fought compromise won by U.S. information consumers in 1998, when anti-circumvention legislation was first enacted. It is unclear why this Bill puts Colombian consumers at an entirely unnecessary disadvantage.
- Article 15(g) also goes significantly beyond the FTA and U.S. law in its approach to the process by which new exceptions to the anti-circumvention provisions, designed to preserve the legitimate rights and interests of creators and innovators, will be identified. Anti-circumvention measures are designed to provide new levels of protection of proprietors, but – to the extent possible – are not intended to do so at the expense of law-abiding citizens. Thus, it is important that a process exist by which those whose otherwise lawful activities are impeded by technological protection measures can petition for relief. The FTA states, in general terms, that such a mechanism should be provided for, but the Colombian Bill puts significant – and unnecessary – procedural and substantive barriers in the way of successful implementation of this mechanism. In the U.S., for example, Sec. 1201(a)(1)(c) provides for a non-political process, conducted by neutral expert agencies. In the Colombian Bill, by contrast, only the legislature has the final power to act. Likewise, the U.S. law contemplates the making of new exceptions whenever these agencies find a substantial adverse effect on non-infringing uses; there is no requirement that this be demonstrated by "substantial evidence," as in the Bill. Again, Colombian consumers and innovators would be left less well off than their U.S. counterparts, for no apparent reason.
- The Bill's provisions for criminal penalties, in Article 16, are perhaps the most dramatic example of how this legislation exceeds international and U.S. norms, to the detriment of Colombian citizens. The FTA requires only that "willful" criminal infringers be punished in a fashion that will generate a deterrent effect.<sup>7</sup> The Bill, by contrast, would impose criminal sanctions on a wider range of infringers, including those who were unaware that they were breaking the law. While this *in terrorem* approach may deter infringement by making examples of poorly informed individuals (including young people), as well as the commercial "pirates," this approach is both inherently unfair and out of keeping with the practice of

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<sup>5</sup> 17 USC 1201(a)(1); Colombia-U.S. Free Trade Agreement, Art. 16.7(4).

<sup>6</sup> The same presumably would be true of efforts to avoid "region coding" on commercial DVDs under US law.

<sup>7</sup> Colombia-U.S. Free Trade Agreement, Art. 16.11(26)

other nations, including the United States. Furthermore, no threshold level is established for the imposition of the most severe criminal penalties on non-commercial infringers; in the U.S., by contrast, an ordinary infringer must make at least 10 copies with a value of at least \$2,500 within a 180-day period.<sup>8</sup> Moreover, the Bill's penalty provisions themselves are similarly and gratuitously extreme. Minimum prison sentences of four years, for even relatively minor violations, are unheard of in most countries. In the United States, for example, a five year sentence is the maximum permitted for a first offender. Similarly, fines of 26.66 to 1000 times monthly wages, even for minor offenses, unrelated to actual harms imposed or profits gained, appear to disregard the fundamental principle of proportional punishment. Under this standard, even a non-commercial infringer earning \$12,000 per year could count on being fined more than \$25,000 in a criminal proceeding that could be brought at the government's discretion.

- The Bill appears to apply criminal penalties to any copying of a product for the purpose of “distributing it.” Even an individual duplicating a CD for a friend could be swept into the net of this Draconian criminal law. Although this approach to criminal copyright damages in Colombia was foreseen in Article 2 of Law 1032 (2006), which amended the Colombian Criminal Code (Art. 271 of Law 599 (2000)), the current Bill represents a missed opportunity to restore some level of balance to the system of penalties even as the range of possible criminal offenses expands.
- Similarly, Article 17's assignment of the most severe criminal penalties for unauthorized circumvention to those acts done for “private financial profit” should be less than reassuring to Colombian citizens and consumers, since the Bill's own definition of profit is essentially open-ended.

Choices about issues of this kind should not be taken without careful analysis, wide consultation, and broad consideration of the available options. The balance struck in the existing laws of other countries certainly is not perfect, but it may be instructive. Of course, U.S. law is not necessarily the model that other countries should follow in modernizing copyright laws, but in legislation designed to implement an agreement with the U.S., some of its features may be worthy of consideration. As copyright experts, we also are aware that flexible limitations and exceptions to copyright are an important part of the success story of the U.S. creative sector, copyright industries, and educational system, a fact that U.S. negotiators do not always choose emphasize. We also are aware that U.S. FTAs are notoriously unbalanced documents – they seek to harmonize proprietors' rights and remedies to U.S. levels but do not seek harmonization with U.S. limitations and exceptions. Instead, these are left as optional choices for national legislation. However, national choices about such restrictions on copyright are neither prohibited, nor closely regulated by FTAs.

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<sup>8</sup> 18 USC 2319(c)(1)

Colombia now has an opportunity to secure balance in copyright for years to come. As part of that exercise, it may be appropriate to give some general consideration to the possibility of emulating one aspect of the U.S. law: the flexibility embodied in the doctrine of “fair use.” In the context of unprecedented shifts in the nature of communication and growth in information technologies, a key issue for any copyright reform is how best to implement the flexibility in limitations and exceptions that is needed to respond to change. In the U.S., some limitations and exceptions are expressed in connection with the particular exclusive rights that they modify (as discussed above). Fair use, on the other hand, is a dynamic standard that applies to a wide array of exclusive rights, allowing courts to update the law of limitations and exceptions continuously, by applying general statutory principles. We note that as part of its implementation of the Korea-U.S. FTA, the Republic of Korea recently adopted a fair use-based, open-ended standard for limitations and exceptions in Article 35-3 of its copyright law.

We recognize that the precise contours of fair use itself may or may not be appropriate for Colombia’s legal system. Another way to achieve the goal of flexibility through legislation might be to adopt a principle favoring “transformative use” of copyrighted works; yet another would be through a balancing test that specifically weighs the interest of the proprietor alongside the interest in free expression and technological innovation of users and the greater society.

We do not have sufficient knowledge or experience to know how best to achieve the goal of balance in revising Colombian copyright law. However, there are many possibilities that deserve serious consideration. Our experience leads us to suggest that the issue is one of real and long-lasting importance. We hope you will take the full range of options into account as you create a process of discussion in which all domestic interests are fully engaged.

For further information and inquiries, you may contact the organizers of this letter – Peter Jaszi (pjaszi@wcl.american.edu) or Sean Flynn (sflynn@wcl.american.edu).

Respectfully,

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