Colombia

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1. To what extent does national law differentiate in terms of the effects of copyright law?

a) According to the various work categories

The copyright system in Colombia is essentially based on the provisions of Law 23 of 1982, which is our internal regulation, and on Andean Decision 351 of 1993, applicable to the member countries of the Andean Community, which are currently Bolivia, Ecuador, Peru, and Colombia.

According to these regulations, in Colombia, works subject to protection under copyright law can be classified as follows:

1.1. According to the nature of the work: *literary, scientific, and art works,* regardless of their mode or form of expression and regardless of their destination. Article 2 of Law 23 of 1982 mentions the following examples: books, brochures, and other writings; lectures, speeches, sermons; dramatic or dramatico-musical works; choreographic works or pantomime; music compositions with or without lyrics; cinematographic works, videograms; drawings, paintings, architectural works, sculptures, engravings, lithographs; photographic works or works expressed by similar processes; works of applied art; illustrations, maps, plans, sketches, and three-dimensional works relating to geography, topography, architecture, or science. In addition, Article 4 of Andean Decision 351 of 1993 includes computer programs, anthologies or compilations of assorted works, and databases, which, as a result of the selection or organization of their contents, constitute personal creations, in the list of items subject to copyright protection.

This list of works is not restrictive, and, for this reason, a more general criterion is used to define the subject matter of copyright, as stipulated by the internal regulation, according to which copyright covers and protects any scientific, literary, or artistic production that may be reproduced or defined by any form of printing or duplication, by phonography, radio-telephony, or any other known or as yet unknown medium.

This criterion is reiterated by Article 1 of Andean Decision 351 of 1993, according to which this decision protects "intellectual works in the literary, artistic, or scientific field, whatever their nature or form of expression and regardless of their literary or artistic merit or purpose".

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The Andean Decision also specifies the concept of some works, such as:

- *Audiovisual work:* Any creation expressed by a series of linked images, with or without the incorporation of sound, which is intended mainly for showing by means of projection apparatus or any other means of communicating images and sounds, regardless of the characteristics of the physical medium in which said work is embodied. This concept leads to the conclusion that a cinematographic work as defined in Law 23 of 1982[1] must be understood as an audiovisual work, subject to the same specific regulations established for this type of creations.
- *Work of applied art:* An artistic creation with utilitarian functions or incorporated into a useful article, whether a work of handicraft or one produced on an industrial scale.
- *Three-dimensional work or work of fine art:* An artistic creation intended to appeal to the aesthetic sense of the person perceiving it, such as a painting, drawing, engraving, or lithograph.
- *Computer program or software:* Article 3 of Andean Decision 351 of 1993 defines a computer program as the expression in words, codes, plans, or any other form of a set of instructions which, upon being incorporated into an automatic reading device, is capable of instructing a computer – an electronic or similar device capable of processing information – to execute a particular task or produce a particular result. Computer programs also include technical documentation and users' manuals. Article 23 of Decision 351 of 1993 provides that software is protected under the same terms as literary works.
- *Databases:* Databases are protected by copyright insofar as the selection or arrangement of their contents constitutes an intellectual creation.

1.2 According to the form of creation of the work and the plurality of its authors or participants, works are classified as follows:

- *Individual work:* A work created by an individual. Under the Colombian copyright regulatory system, only individuals may be considered authors of a work. Legal entities may be derived owners of the pecuniary rights to an intellectual creation, but they may not be its authors.
- *Collective work:* A work produced by a group of authors (individuals) through the initiative and under the guidance of an individual or legal entity that coordinates, discloses, and publishes it under that entity's name.
- *Collaborative work:* A work created by two or more individuals whose contributions cannot be separated.
- *Derived work:* A work resulting from adaptation, translation, or transformation of an originating work (originally created), provided it represents an autonomous creation.

[1] Law 23 of 1982: "Article 8, Section S. Cinematographic work: video tape or videogram; fixing on physical media of sound synchronized with images, or images, or images without sound".

– *Work created on commission:* A work created by one or more authors by virtue of a service contract, according to a plan established by a different individual or legal entity and at the latter's own risk.

1.3 In addition, Article 8 of Law 23 of 1982 defines the following types of works:
– *Anonymous work:* A work in which the name of the author is not mentioned because he or she so desires or because it is unknown.
– *Pseudonymous work:* A work in which the author uses a fictitious name that does not identify him or her.
– *Unpublished work:* A work that has not been published.
– *Posthumous work:* A work that is published only after the death of the author.

According to the foregoing, it can be concluded that the subject matter of copyright is the **work**, understood as an original intellectual creation of an artistic, scientific, or literary nature that can be disclosed or reproduced by any means. In this sense, Colombian legislation rules out copyright protection for ideas contained in literary and artistic works, the ideological or technical content of scientific works, or their industrial or commercial exploitation; in essence, what it protects is the way in which the ideas of the author are described, explained, or incorporated into a work.[2]

b) According to factual aspects, e.g. different markets, competitive conditions

Under Colombia's regulatory system, the creation of a work protected by copyright grants the author, regardless of the type of creation, a single set of moral and economic prerogatives over his or her creation. Any differences that can be found between these rights do not lie in the type of work, but, as will seen in the next section, in the way in which the individuals who participate in their creation or marketing exercise those rights.

The plurality of authors or owners of the rights to a work results in a community asset among the different owners, granting each one equal rights to the creation. Considering the duality of moral and pecuniary rights arising from the creation of the work and their characteristics, in Colombia it is possible to find the coexistence of moral and pecuniary rights in the name of different persons, be it because the rights have been assigned by one party to another, or because the law presumes said assignment.

The existence of both moral and pecuniary rights generates the possibility that the owner of the pecuniary rights may claim such rights, without the option for the owner of the moral rights, which will always be the author or authors, to oppose said claim.

One instance of this differential treatment can be found in cinematographic works, which, in turn, are classified as a collaborative work. The different authors participating in this work are and will always be the owners of their contribution, but

[2] Article 6 of Law 23 of 1982 and Article 7 of Andean Decision 351 of 1993.

not of the audiovisual work. According to Articles 98 and 99 of Law 23 of 1983, barring an agreement to the contrary, pecuniary rights in the cinematographic work belong to the producer of the work and the moral rights are recognized to the director. Thus, in this case, despite the coexistence of two rights in the cinematographic work, the producer has the right to exercise the pecuniary rights to said work as he or she deems appropriate, and without interference in this right from the director or owner of the moral rights.

For works created on commission (Article 20 of Law 23 of 1982), defined as works created by one or more authors by virtue of a service contract and according to a plan set out by a third party at its own risk in exchange for payment of a fee, the law presumes an assignment of the rights, except for a stipulation to the contrary, in favor of the person commissioning the work. In this case, the pecuniary rights accrue to the person commissioning the work and the moral rights remain the author's property, meaning that the owner of the pecuniary rights is entitled to market the work and the author may not oppose this marketing.

The same applies to works created by public employees (Article 91 of Law 23 of 1982) and collective works (Article 92 of Law 23 of 1982), which are events in which the pecuniary rights to the works are owned by the corresponding public entity in the first case and, in the second, by the editor or individual or legal entity at whose risk they are carried out.

c) According to other criteria

Colombia's copyright system stipulates several basic principles or criteria that are required for the protection of a work. Some of these criteria are the following:

1. Originality of the work (see answer to Question 2a)).
2. Fixation of the work on a physical medium: In Colombia, entitlement to protection of a work requires its incorporation or fixation on a physical medium. In accordance with legal doctrine on the topic, any intellectual creation implies the concurrence of two elements: the *corpus mysticum*, understood as the purely ideal entity, and the *corpus mechanicum*, understood as the physical entity. These two concurring elements make up the intellectual creation. In order to be able to refer to a creation protected by copyright, said creation must be set, fixed, or incorporated in any known or as yet unknown physical form.

This fixation principle is set forth in Article 2 of the internal law, according to which copyrights apply to scientific, literary, or artistic works "regardless of their mode or form of expression ... and, in general, any production of the scientific, literary, or artistic domain that can be reproduced or defined by any known or as yet unknown means". Note that the legislature, anticipating technological developments, does not include a restrictive listing of forms of expression.

It is important to indicate that the Colombian copyright laws also protect oral works, such as lectures, speeches, sermons, and other similar works, leading us to the conclusion that words per se are considered as a means of fixation of ideas. Protection for this type of works is thus recognized, without requiring their incorporation into a physical medium.

According to decision C-533/93 of the Constitutional Court:

> For a creation of the spirit to be considered as a legal object, that is, using Ihering's terminology, a legally protected interest, it must materialize and become perceptible in some way since, if this were not the case, its existence would be impossible. And non-existence is not applicable in the legal world, which is based on reality, that is, on that which is capable of existing outside of the realm of thought. So-called intra-mental reality, or the absolutely ideal being, cannot be perceived by others and thus, being indeterminate, it cannot be legally protected.

3. Protection of forms of expression and not of ideas: The great limitation to the protection granted by copyright is the fact that what is protected is the manner in which the work is expressed, instead of the ideas or the information contained in the creation. Ideas are part of the public domain and nobody can claim ownership of them (Article 6 of Law 23 and Article 7 of Andean Decision 351).
4. Immediate protection: According to Article 9 of Law 23, the originating title through which the author acquires protection for his or her work is the intellectual creation, and therefore, neither registration of the work before the competent entity, nor the fulfillment of formalities is required to entitle the author to make use of his or her prerogatives in this regard. Article 52 of Decision 351 also stipulates this principle in the same terms, which, of course, agree with the provisions of the Berne Convention on this matter.

Registration of a work before the competent administrative entity, which in Colombia is the National Copyright Office serves the purpose of publicizing the rights of the owners and any acts and agreements transferring or changing said domain under the law, and of providing intellectual ownership titles, as well as any related acts and documents, with a guarantee of authenticity and security. (Article 4, Law 44 of 1993). In sum, registration of a work protected by copyright does not grant any rights, but is solely declarative in nature and its purpose is enforceability against third parties and use as evidence.

2. Which of the following legal instruments are used by national copyright law in order to achieve a "balance" of interests and to what extent are they used?

Any regulations with regard to copyright aim at the achievement of a balance between private and public interests on the basis of equity, fair competition, and access to the enjoyment of the creations of the human intellect; for this reason, the legislation contains limitations as to the scope and exercise of protected rights. Thus, for instance, the period of protection is limited in time; the copyright grants a number of exclusive rights that materialize in the power of control held by the owner of a work to prevent it from being copied, reproduced, or performed in public for commercial purposes; but, at the same time, it allows certain acts that do not require a license or authorization: the copyright protects the way in which the work is expressed, but not the ideas or information contained in the creation. The purpose of this differentiation is the establishment of a balance between the rights of the creators and the public interest.

In Colombia, these mechanisms operate as follows:

a) Specific preconditions or thresholds allowing a work's protection only above a particular degree of creativity

According to Colombia's legislation, a work will only be protected by copyright if it is original. Article 3 of Andean Decision 351 expressly indicates that the work must be an ***original*** artistic, scientific, or literary intellectual creation.

Originality of the work thus becomes an essential requirement for copyright protection and it is assumed that the work is not a complete or simulated copy or reproduction of another work; i.e., that it is the product of human effort. The fact that a work is inspired by a preexisting one does not preclude it from being original, provided that it includes new elements that evidence some particular effort, work, or skill to differentiate it from the previous work.

As stated by the National Copyright Office:

> originality must not be confused with the novelty of the work; originality is the personal seal imparted on the work by the author, and which makes it unique.… Copyright protection applies to the work as an expression of the author's spirit and **the ideas that are the source of the creation are not protected.** Ideas circulate freely in the society from where the author takes them and adds his/her individual elements, converting them into works.[3]

b) Period of protection

With regard to the period of copyright protection, Article 18 of Andean Decision 351 of 1993 establishes a minimum protection period equal to the author's lifetime plus 50 years from the date of his or her death. When the owner of the rights in the work is a legal entity, said period of protection is counted from the date of completion, disclosure, or publication of the work.

The indicated term is the minimum period of protection, given that the community regulation stipulates that, if the periods of protection established by the internal laws of each member state of the Andean Community are longer than those indicated in the community regulation, the former shall prevail and take precedence (Article 59 of Andean Decision 351).

Such is the case with the Colombian legislation, which, as provided in Article 21 *et seq*. of Law 23 of 1982, grants protection to the owner of an intellectual work, provided he or she is an individual, for the lifetime of the author plus 80 years. This regulation is in agreement with the provision of Article 18 of the community regulatory system and its application takes precedence because it provides for the longer term.

In the event that the owner of the work is a legal entity, the community regulation (50 years) would apply, since the internal legislation establishing a protection period of 30 years is unfavorable and contradicts Decision 351 (Article 27). In addition, given the fact that protection periods prior to the effective date of Andean Decision 351 were shorter, the Decision established that any terms that were still current under

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[3] Opinion of the National Copyright Office. The object of copyright protection. Filing Number: 2-2010-15577 of 11 May 2010.

internal legislations would be automatically extended to the expiration of the 50-year term established by the community regulation.

If the copyright has been assigned by an act between living persons, the pecuniary rights to the work accrue to the buyers during the life of the author plus 25 years after his or her death, and to the successors in title for the time remaining to complete 80 years, unless otherwise agreed. (Article 23, Law 23 of 1982).

c) Specific user rights, free of charge, granted by the law in favor of third parties

2.1 Limitations and exceptions to copyrights

Regarding the applicable regulations of copyright limitations and exceptions in Colombia, it should be clarified that, although the regulation of Andean Decision 351 contains a list of limitations and exceptions that are applicable under the law, the limitations set out in Law 23 of 1982 must also be taken into consideration, given that the community regulation itself allows for their application.

The application and establishment of exceptions and limitations pursuant to Andean Decision 351 must be confined to those cases in which normal exploitation of the work is not jeopardized or where no unjustified damages are caused to the owner or owners of the rights (Article 21). It should be noted that this provision expressly incorporates the three-step test into Colombian legislation, as will be discussed in a subsequent section.

Although the regulations on this matter will be defined in the answer to Question 6 of this study, we indicate below the exceptions and limitations set forth in Colombia's legislation, beginning with those established in Andean Decision 351 of 1993:

- Right to quote
- Reproduction for teaching purposes in accordance with fair practices and not for profit
- Reproduction for libraries or archives
- Reproduction for judicial or administrative proceedings
- Reproduction or public communication of articles related to current events, insofar as they are not reserved
- Reproduction and disclosure of current events for information purposes
- Reproduction or public communication of oral works with the purpose of reporting current events
- Reproduction or public communication of works of art permanently located on sites that are open to the public
- Ephemeral recordings[4] by broadcasting agencies
- Conducting a performance of works for teaching purposes

[4] An ephemeral recording is "the sound or audiovisual fixation of a performance or broadcast made for a finite period by a broadcasting organization by means of its own facilities and used for the transmission of its own broadcasts" (Article 3, Andean Decision 351 of 1993).

– Transmission or retransmission of a work, provided that it takes place at the same time as the original broadcast

In addition, Colombian law includes the following:

– Publication of a picture for public interest purposes
– Copies for personal use[5] and not for profit
– Notes and compilation of lessons or lectures by teachers
– Reproduction of legal regulations
– Use of the works in the private home and not for profit

Articles 24 to 27 of the Andean Decision also set forth limitations and exceptions with regard to computer programs. In this respect, see Question 6b).

2.2 Public domain

The legal effect of expiration of the protection term of an intellectual work is the expiration of the exclusive right held by the owner of the work. Upon expiration of the right of disposal over the work of the author or his or her successors in title, the creation becomes part of the public domain.

In copyright terms, the concept of public domain has a special connotation that differentiates it from the same concept as it appears in administrative and civil law. In the field of intellectual property, the work becomes part of the public domain when no one exercises exclusive exploitation rights over it and it can therefore be used or exploited by any person without payment of a remuneration to the owner.

d) Specific user rights granted by the law in favor of third parties subject to the payment of a remuneration to the right holder(s)

Colombian law does not establish any limitation or exception to copyrights subject to a payment or remuneration on account of the user. If the use of a work does not fall under one of the limitations or exceptions mentioned in the answer to Question 2c), the use of a work must be previously and expressly authorized by its owner, under penalty of incurring an infringement of the copyright.

e) Obligations to conclude a contract established by law to grant a third party specific user rights in return for payment of a fee (mandatory license)

In Colombia, the scope of mandatory licenses is limited to the following uses:

Limitations on the Right of Translation

Law 23 of 1982 provides that the translation of a work into Spanish and its publication in Colombia are lawful, even without the authorization of the author or owner, when made under a license granted by the competent authority, which is the National Copyright Office.

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[5] According to Article 3 of Decision 351, personal use means the reproduction or other use of the work of another person, in a single copy, exclusively for an individual's own purposes, in cases such as research and personal entertainment.

The granting of an obligatory license applies when a Colombian individual or legal entity applies for this prerogative to the competent national authority, at least seven years after the first date of publication of a work, in order to translate and publish it in Colombia, provided that, during said period, the owner of the right to translation has not published or authorized a Spanish translation of the work. Licenses for translations may also be granted to a national broadcasting agency.

Limitation on the right of reproduction:

On the other hand, the license may consist of the authorization to reproduce and publish a specified edition of a work in printed form or any similar reproduction method. According to Law 23 of 1982, the license does not apply

> prior to expiration of one of the following terms, calculated from the date of the first publication of the work for which said license is requested: a) Three years for works related to exact and natural sciences, including mathematics and technology; b) Seven years for works of the imagination, such as novels, poetry, dramatic, or musical works and for art books; c) Five years for all other works.

It should be kept in mind that, according to Article 70 of Law 23 of 1982, licenses may also be granted for individual reproduction of any legal audiovisual fixation constituting or incorporating protected works, with the understanding that the audiovisual fixation under consideration was conceived and published exclusively for use in schools and universities. The license also applies when it is intended for translation into Spanish of the entire text accompanying the aforementioned fixation.

f) Rules on misuse

Neither Colombian nor Andean Community copyright legislation specifically regulates the abuse of a right by the author or owner of the work. Abuse in the exercise of a right will be regulated according to the general rules of law. To supplement this, please refer to the answer to Question 12d).

3. Does national law regulate the user rights pursuant to Question 2c) to e) abstractly (for instance using general clauses); concretely (for instance in the form of an enumeration); by means of a combination of the two?

Abstractly: None of the rights or aspects indicated in Question 2c) to e) are regulated abstractly in Colombian legislation.

Concretely: Colombian legislation concretely and specifically establishes the limitations and exceptions to copyrights and the conditions and scope of obligatory licenses.

By means of a combination of the two: None of the rights or aspects indicated in Question 2c) to e) is regulated by a combination of the two in Colombian legislation.

The limitations and exceptions to copyright compensated by a fee are not regulated in Colombian legislation.

4. What is the role played by the "three-step test" in national law in connection with the user rights pursuant to Question 3, in particular

Has the three-step test been explicitly implemented in national law (legislation)?

The three-step test has been incorporated into our legislation through two regulatory bodies. On the one hand, Andean Decision 351 stipulates that copyright exceptions and limitations established by internal laws must be confined to cases that do not jeopardize the normal exploitation of the work, or that do not cause unjustified damage to the legitimate interests of the owner or owners of the rights (Article 21).

On the other hand, the three-step test was incorporated into national law through the adoption by Colombia of the WIPO Copyright Treaty of 1996, through Law 565 of 2000, according to which it is in order to establish exceptions and limitations to copyright in certain special situations that do not hamper the normal exploitation of the work or cause unjustified damage to the interests of the author.

Has it played a specific role in the determination of the legal standards (limitations or exceptions)?

Despite the incorporation of the three-step test into Colombia's legislation, no additional limitations and exceptions beyond those stipulated in the aforementioned regulations have been established since the entry into force of Andean Decision 351. To date, no legislation has been put forward for handling the new forms of exploitation of works in the digital age.

Is it directly applied by judicial practice?

In Colombia, some cases of infringement of rights, mainly of a criminal nature, have been resolved through application of the three-step test. One of these is the cassation decision of 30 April 2008, whereby the Criminal Chamber decided a case in which an individual in the southern section of Bogotá made duplicates on optical disks (CDs) of phonograms that had originally been recorded on acetate disks, without prior authorization of the authors, for a price of 5,000 pesos for each copied acetate disk.[6] That is, he carried out a change of format with the help of computers and five unlicensed computer programs. Of course, change of format is a form of reproduction that is not permitted. In the first instance, the individual was found guilty of the conduct of reproduction of phonograms without the express prior authorization of the owner (Article 51, Law 44 of 1993, currently Section 1 of Article 271 of the Criminal Code).

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[6] Cassation 29188, Reporting Judge: Jose Bustos Martinez.

The court set aside or revoked the judgment because it considered that said conduct fell under the limitations and exceptions to copyrights. The court extended the exception regarding private copies to phonograms and acquitted the defendant.[7] This is a case of laxness in interpretation, given that it ended up altering the sense of copyright law in the matter of exceptions and, moreover, added a new regulatory ingredient, the intent of profit, to the classification of the offense, which was not part of the previous legal definition. Indeed, the court determined that, in the process of classifying a conduct, the legally protected interest is the pecuniary right of the author and therefore, "any person attempting to affect it must operate for profit and with the intention to cause damage to said wealth for his/her own benefit or that of third parties."

In another case, the court, deciding on the application of criminal law against individuals selling counterfeited books at traffic lights, stated that said conduct lacks the physical element of unlawfulness or, in other words, that it does not damage or jeopardize the pecuniary copyright of the owner of the literary work.[8]

Is the "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" well known and if so what role does it play (legislation, judicial practice, academic discussion, etc.)?

The "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" is not known in Colombia and, to our knowledge, has not been the subject of academic discussions.

5. If categories of works are distinguished according to Question 1, to what extent do the legal instruments in Question 2a) to f) differentiate according to these categories?

a) With respect to conditions of originality (2a): For a work, regardless of its type, to be eligible for copyright protection, it must fulfill the requirement of originality described under Question 2a).
b) Under Colombia's copyright provisions, all types of works have the same protection period (2b). Any differences that may be found in this respect relate to the moment at which the protection period starts.

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[7] According to Article 21 of Decision 351 of 1993: "The limitations and exceptions to copyright established through the domestic legislation of the Member Countries shall be confined to those cases that do not adversely affect the normal exploitation of the works or unjustifiably prejudice the legitimate interests of the owner or owners of the rights". And with regard to private copies, our internal legislation, that is, Article 37 of Law 23 of 1982, states: "Reproduction by any means of a literary or scientific work, ordered or obtained by the interested party in a single copy for his/her private use and not for profit, is legal". Note that neither artistic works nor phonograms are included in the exception.

[8] Supreme Court of Justice, Chamber of Criminal Cassation, Judgment of 13 May 2009, Reporting Judge: Julio Enrique Socha Salamanca.

The general rule is that the protection period begins on the date of the author's death. However, in the following cases, this term begins on a different date:

- For works made up of several volumes that were not published simultaneously, as well as those published in the form of booklets or by installments, the term of protection is counted, for each volume, booklet or installment, from the corresponding date of publication (Article 22, Law 23 of 1982).
- The term of protection for compilations, dictionaries, encyclopedias, and other collective works is 80 years from the date of publication and is recognized in favor of the compilation's directors (Article 24, Law 23 of 1982).
- Anonymous works are protected for a period of 80 years from their date of publication in the name of the editor; should the author reveal his or her identity, the term of protection is assigned to the latter (Article 25, Law 23 of 1982).
- Cinematographic works are protected for 80 years from the date of completion, which is understood as the date of their first communication to the public. If the owner of a work is a legal entity, the period of protection is 50 years, in accordance with the minimum limit established in Andean Decision 351 (Article 26, Law 23 of 1982). For further information, see the answer to Question 2b).

c) With regard to the limitations and exceptions to copyright (2c) it is pertinent to note that the grounds established, both in the internal and in the community law, relate to different types of works, but the difference lies in the type of exception referred to. To review the object of every exception provided in the law, see the answer to Question 6b).

   With respect to the public domain, all works become part of the public domain upon expiration of their protection period and may be used by third parties without authorization.

d) Colombian Law does not regulate any limitation or exception to copyright compensated by a fee (2d). Any use of works under copyright protection, with the exception of those included in the list of exceptions and limitations, must have the express prior authorization of the owner.

e) In principle, obligatory licenses (2e) are only applicable to foreign works that may be translated or reproduced, but in general, literary, artistic, and scientific works protected by copyright could be subject to said licenses.

f) The legal rules and instruments (2f) established for the defense of copyright may be exercised regardless of the work in question.

6. Please cite and/or describe as completely as possible

a) The legal instruments and/or the relevant judicial practice concerning Question 2a)

As stated in the answer to Question 2a), originality is the criterion established in Colombia's national legislation for the purpose of granting copyright protection to an intellectual creation. As provided for by Article 2 of Law 23 of 1982 and

Article 4 of Andean Decision 351, copyright protection accrues to the works, understood as "any *original* artistic, scientific, or literary intellectual creation that may be reproduced or disclosed by any means".

In this regard, the Constitutional Court, in Decision C-975 of 2002, stated: "It should be noted that the object of constitutional protection through a copyright is precisely the work, which, in the terms of Article 2 of Law 23 of 1982, constitutes 'all the creations of the spirit in the scientific, literary, or artistic field, regardless of their purpose.'" In addition, in Decision C-276 of 1996, it established that: "the object being protected by means of a copyright is the work; that is: the personal expression of an intelligent being that develops an idea and makes it perceptible, is sufficiently original or individual, and is susceptible to disclosure and reproduction."

The Andean Court of Justice, for its part, indicated that originality as "an existential requirement of the 'work' subject to copyright protection is not only a matter of doctrine, but of substantive law. Thus, Decision 351 recognizes protection for authors of 'works of ingenuity' (Article 1) and, to such end, defines the author as the physical person who achieves the "intellectual creation, and the work as any creation of artistic, scientific or literary character (Article 3)".[9]

Finally, this authority handed down the following in prejudicial opinion 20-IP-2007: "The protected work must be original, with inherent characteristics that make it unique; what is protected is the author's individuality, originality, and style to present his/her ideas".[10]

b) The provisions covered by Question 2c) to e)

With respect to the exceptions and limitations to copyright, 2c)

In addition to the statements under Question 2c), the exceptions and limitations established in the Andean Decision are the following:

a) Right to quote: Article 22 of the supranational regulation provides that it is lawful to "quote published works in another work, provided that the source and the name of the author are given, and on condition that the quotations be made in accordance with fair practices and to the extent justified by the purpose".

   The regulation indicates that the right to quote must be used in accordance with fair practices, that is, "use that does not interfere with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author".[11]

b) Reproduction for teaching purposes in accordance with fair practice and not for profit: Article 22.b makes it lawful to:

   > [r]eproduce by reprographic means for teaching or for the holding of examinations in educational establishments, to the extent justified by the purpose, articles lawfully published in newspapers or magazines, or brief extracts from lawfully published works, on condition that such use is made in accordance with fair practice, that it does

[9] Andean Court of Justice Prejudicial Opinion 10-IP-1999.

[10] For further information, consult: Andean Court of Justice 150-IP-2006.

[11] Article 3 of Andean Decision 351 of 1993.

not entail sale or any other transaction for payment and that no profit-making purposes are directly or indirectly pursued thereby.

c) Reproduction for libraries or archives: Article 22.c provides that users may:

[r]eproduce a work in single copies on behalf of a library or for archives whose activities are not conducted for any direct or indirect profit purposes, provided that the original forms part of the permanent stocks of the said library or archives and the reproduction is made for the following purposes: 1) To preserve the original and replace it in the event of loss, destruction, or irreparable damage; or 2) to replace, in the permanent stocks of another library or archives, an original that has been lost, destroyed, or irreparably damaged.

d) Reproduction for judicial or administrative proceedings: It is lawful to "[r]eproduce a work for the purposes of judicial or administrative proceedings, to the extent justified by the purpose" (Article 22.d).

e) Reproduction or public communication of articles related to current events, insofar as they are not reserved (Article 22.e). It is lawful to:

[r]eproduce and distribute through the press, or transmit by broadcasting or public cable distribution, articles on topical subjects and commentaries on economic, political, or religious subjects published in newspapers or magazines, or broadcast works of the same nature, insofar as reproduction, broadcasting, or distribution to the public have not been expressly reserved.

f) Reproduction and disclosure of current events for information purposes: It is permitted to "[r]eproduce and make accessible to the public, in connection with the reporting of current events by means of photography, cinematography, broadcasting, or cable distribution to the public, works seen or heard in the course of such events, to the extent justified by the informational purpose" (Article 22.f).

g) Reproduction or public communication of oral works with the purpose of reporting current events (Article 22.g): It is allowed to

[r]eproduce in the press or by broadcasting or transmission to the public political speeches and also dissertations, addresses, sermons, speeches delivered in the course of judicial proceedings or other works of similar character presented in public, for the purpose of reporting current events, to the extent justified by the purpose and subject to the right of the authors to publish collections of such works.

h) Reproduction or public communication of works of art permanently located on sites that are open to the public. It is permitted to "[u]ndertake the reproduction, transmission by broadcasting or cable distribution to the public of the image of an architectural work, work of fine art, photographic work, or work of applied art located permanently in a place open to the public" (Article 22.h).

i) Ephemeral recordings by broadcasting organizations (Article 22.i):

In the case of broadcasting organizations, [these may] make ephemeral recordings using their own facilities and for use in their own broadcasts of a work in respect of which they have the right of broadcasting. The broadcasting organization shall be obliged to destroy the recording within the time or under the circumstances provided for in national legislation.

j) See the definition of ephemeral recording in footnote 8, *supra*.

k) Conducting a performance of works for teaching purposes (Article 22.j): It is lawful to

> [c]onduct the performance of a work in the course of the activities of an educational institution, by the staff and students of the said institution, provided that no charge is made for admission and no direct or indirect profit-making purpose is pursued, and that the audience consists solely of the staff and students of the institution or relations or guardians of pupils and other persons directly associated with the activities of the institution.

l) Transmission or retransmission of a work, provided that it occurs at the same time as the original broadcast. It is lawful to, "[i]n the case of a broadcasting organization, make a transmission or retransmission of a work originally broadcast by it, provided that the public transmission or retransmission occurs at the same time as the original broadcast and the work is broadcast or transmitted publicly without any alteration" (Article 22.k).

The limitations and exceptions provided in Law 23 of 1982 with the purpose of completing the community provisions are the following:

m) Publication of a picture for public interest purposes. "Publication of a picture shall be lawful when it relates to scientific, educational, or scientific purposes in general, or to facts or events of the public interest or that have occurred in public" (Article 36).

n) Private copies. "Reproduction by any means of a literary or scientific work, ordered or obtained by the interested party in a single copy for his/her private use and not for profit, is legal". (Article 37).

o) Notes and compilation of lessons or lectures by teachers. "Lectures or lessons given in higher, secondary or elementary education establishments, may be freely noted and collected by the students to whom they are addressed, but their publication or integral reproduction without authorization of the lecturer is prohibited" (Article 40).

p) Reproduction of legal regulations: "It is lawful to reproduce the Constitution, laws, decrees, ordinances, agreements, regulations, and any other administrative acts and judicial decisions, under the obligation of strict adherence to the official publication, provided it is not prohibited" (Article 41).

q) Use of the works in the private home and not for profit. "It is lawful to use scientific, literary, and artistic works in the private home and not for profit" (Article 44).

It should also be noted that Article 32 of Decree 460 of 1995 provides that "the Colombian National Library may reproduce the copies delivered to it, with the sole purpose of ensuring adequate conservation of the deposited works or productions through the use of existing technologies".

In addition, Articles 24 to 27 of the Andean Decision set forth the limitations and exceptions in relation to computer programs as follows:

r) "The owner of a lawfully circulating copy of a computer program may make a copy or adaptation of said program insofar as:
   a) it is essential for the use of the program; or
   b it is made for archiving purposes, that is, for the sole purpose of replacing the lawfully acquired copy where damage or loss has rendered that copy unusable."

s) "Reproduction of a computer program, including for personal use, shall require authorization by the owner of the rights, with the exception of a backup copy."

t) "The introduction of a computer program in the memory of the computer concerned for the purposes of exclusive personal use shall not constitute unlawful reproduction of said program. It is consequently not lawful, without the consent of the owner of the rights, for two or more persons to make use of the program by means of the installation of networks, workstations, or other comparable facilities."

u) "The adaptation of a program created by the user for his sole use shall not constitute transformation within the meaning of this Decision."

The interpretation of these exceptions is restrictive in nature, meaning that they only apply when there is a prior legal provision in that sense, since they are justified for the purpose of benefiting the public interest regarding access to information, education, and culture.

Finally, it should be noted that the internal regulations also allow the use of works that are part of the public domain without requiring payment of remuneration to its author or owner. In this respect, Article 187 of Law 23 of 1982 stipulates the following: "The following items are part of the public domain: 1. Works whose protection period has expired; 2. Folk and traditional works by unknown authors; 3. Works for which the authors have waived their rights; 4. Foreign works that are not protected in Colombia."

Regarding user rights compensated by a fee (2d)

There are no regulatory provisions with regard to limitations and exceptions compensated by a fee.

Regarding obligatory licenses (2e)

Article 32 of the Andean Decision empowers member countries to regulate obligatory licenses, which may not exceed the terms of the Berne Convention and the Universal Convention on Copyrights. Law 23 of 1982 stipulated the regulatory system governing obligatory licenses in two sections, as follows:

Section 1. Limitations on the Right of Translation

Article 45. The translation of a work into Spanish and the publication of that translation on the territory of Colombia, by virtue of a license granted by the competent authority, shall be lawful even without the authorization of the author, in accordance with the provisions contained in the following Articles.

Article 46. Any natural person or legal entity of the country, on expiration of seven years from the date of first publication of a work, may apply to the competent authority for a license to make a translation of the work into Spanish and to publish the translation in printed or analogous forms of reproduction, in so far as its translation into Spanish has not been published by the owner of the right of translation or with his authorization during that period.

Article 47. Before granting a license under the preceding Article, the competent authority shall determine that:

a) no translation of the work into Spanish has been published in printed or analogous forms of reproduction, by or with the authorization of the owner of the right of translation, or that all previous editions in that language are out of print;
b) the applicant for the license has established that he either has requested, and has been denied, authorization from the owner of the right of translation or, after due diligence on his part, he was unable to find such owner;
c) at the same time as addressing the request referred to in (b) above to the owner, the applicant for the license has informed any national or international information center designated for this purpose by the government of the country in which the publisher of the work to be translated is believed to have his domicile;
d) if he could not find the owner of the right of translation, the applicant has sent, by registered airmail, a copy of his application to the publisher whose name appears on the work and another such copy to any national or international information center, or, in the absence of such a center, to the UNESCO International Copyright Information Centre.

Article 48. No license shall be granted unless the owner of the right of translation, where known or located, has been given an opportunity to be heard.

Article 49. No license shall be granted until the expiration of a further period of six months following the date on which the seven-year period referred to in Article 46 ended. Such further period shall be computed from the date on which the applicant complies with the requirements mentioned in Article 47 in (b) and (c) or, where the identity or the address of the owner of the right of translation is unknown, from the date on which the applicant also complies with the requirement mentioned in (d) of the same Article.

Article 50. For works composed mainly of illustrations, a license shall be granted only if the conditions of Articles 58 *et seq.* are fulfilled.

Article 51. No license shall be granted when the author has withdrawn all copies of the work from circulation.

Article 52. Any license under the foregoing Articles:

a) shall be only for the purpose of teaching, scholarship, or research of the work to which the license relates;
b) shall only allow publication in a printed or analogous form of reproduction and only on the national territory;
c) shall not extend to the export of copies published under the license;
d) shall be non-exclusive;
e) shall not be transferable.

Article 53. The license referred to in the foregoing Articles shall provide for just compensation in favor of the owner of the right of translation that is consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the country and owners of translation rights in the latters' countries.

Article 54. The competent authority shall order the cancellation of the license if the translation is not correct and if the following particulars are not included in all copies published:

a) the original title and name of the author of the work;
b) a notice in Spanish stating that the copy is available for sale or distribution only within the national territory;
c) if the original work was published with a copyright notice, a reprint of that notice.

Article 55. The license shall terminate if a translation of the work in Spanish, with the same content as the translation published under the license, is published in printed or analogous forms of reproduction by the owner of the right of translation, or by another entity or person with his authorization, and where copies of that translation are offered within the country at a price reasonably related to that charged for comparable works. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

Article 56. A license under the foregoing Articles may also be granted to a domestic broadcasting organization, provided that all the following conditions are met:

a) the translation is made from a copy made and acquired legally;
b) the translation is only for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession;
c) the translation is used exclusively for the purposes specified in (b) above, through broadcasts that are lawfully made and that are intended for recipients in the country, including broadcasts made through the medium of sound or visual recordings that have been made lawfully and for the sole purpose of such broadcasts;
d) sound or visual recordings of the translation may not be used by broadcasting organizations other than those having their headquarters in the country;
e) all uses made of the translation are without any commercial purpose.

Article 57. A license may also be granted to a domestic broadcasting organization, under all of the conditions provided in the foregoing Article, to translate any text incorporated in an audiovisual fixation that was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Section 2. Limitations on the Right of Reproduction

Article 58. Any natural person or legal entity may, after the expiration of the periods specified in this Article, apply to the competent authority for a license to reproduce

and publish a particular edition of the work in printed or analogous forms of reproduction.

No license shall be granted until the expiration of one of the following periods, commencing on the date of first publication of the work for which the license is requested:

a) three years for works of technology and of the natural and physical sciences, including mathematics;
b) seven years for works of fiction, poetry, drama, and music, and for art books;
c) five years for all other works.

Article 59. Before granting a license, the competent authority shall determine that:

a) no distribution, by or with the authorization of the owner of the right of reproduction, of copies in printed or analogous forms of reproduction of that particular edition has taken place in the country, to the general public or in connection with systematic instructional activities, at a price reasonably related to that normally charged in the country for comparable works, or that, under the same conditions, such copies have not been on sale in the country for a continuous period of at least six months;
b) the applicant for the license has established that he either has requested, and has been denied, authorization from the owner of the right of reproduction, or that, after due diligence on his part, he was unable to find such owner;
c) at the same time as addressing the request referred to in (b) above to the owner, the applicant for the license has informed any national or international information center designated for the purpose by the government of the country in which the publisher of the work to be reproduced is believed to have his domicile;
d) if he could not find the owner of the right of reproduction, the applicant has sent, by registered airmail, a copy of his application to the publisher whose name appears on the work and another such copy to any information center referred to in (c) of this Article, or, in the absence of such a center, to the UNESCO International Copyright Information Centre.

Article 60. No license shall be granted unless the owner of the right of reproduction, where known or located, has been given an opportunity to be heard.

Article 61. Where the three-year period referred to in (a) of the second paragraph of Article 58 applies, no license shall be granted until the expiration of six months computed from the date on which the applicant complies with the requirements mentioned in (a), (b), and (c) of Article 59 or, where the identity or the address of the owner of the right of reproduction is unknown, from the date on which the applicant also complies with the requirement mentioned in (d) of Article 59.

Article 62. Where the seven-year or five-year periods referred to in (b) and (c) of Article 58 apply and where the identity or the address of the owner of the right of reproduction is unknown, no license shall be granted until the expiration of three months computed from the date on which the copies referred to in (d) of Article 59 have been mailed.

Article 63. If, during the period of six or three months referred to in Articles 61 and 62, a distribution or placing on sale as described in (a) of Article 59 has taken place, no license shall be granted.

Article 64. No license shall be granted when the author has withdrawn from circulation all copies of the edition which is the subject of the application.

Article 65. Where the edition which is the subject of an application for license under the foregoing Articles is a translation, the license shall only be granted if the translation is in Spanish and was published by or with the authorization of the owner of the right of translation.

Article 66. Any license under Articles 58 *et seq.*:

a) shall be only for use in connection with systematic instructional activities;
b) shall, subject to the provisions of Article 70, only allow publication in a printed or analogous form of reproduction at a price reasonably related to that normally charged in the country for a comparable work;
c) shall only allow publication on the territory of the country and shall not extend to the export of copies made under the license;
d) shall be non-exclusive;
e) shall not be transferable.

Article 67. The license shall provide for just compensation in favor of the owner of the right of reproduction that is consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the country and owners of reproduction rights in the country of the owner of the right of reproduction.

Article 68. As a condition of maintaining the validity of the license, the reproduction of that particular edition must be accurate and all published copies must include the following:

a) the title and name of the author of the work;
b) a notice in Spanish stating that the copy is available for distribution only in the country;
c) if the edition which is reproduced bears a copyright notice, a reprint of that notice.

Article 69. The license shall terminate if copies of an edition of the work in printed or analogous forms of reproduction are placed on sale in the country, by or with the authorization of the owner of the right of reproduction, to the general public or in connection with systematic instructional activities, at a price reasonably related to that normally charged in the country for comparable works, if such edition is in the same language and is substantially the same in content as the edition which was published under the license. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

Article 70. Under the conditions provided in Articles 58 *et seq.*, a license may also be granted:

a) to reproduce in audiovisual form a lawfully made audiovisual fixation, including any protected works incorporated in it, provided that said fixation was pre-

pared and published for the sole purpose of being used in connection with systematic instructional activities;

b) to translate any text incorporated in said fixation into Spanish.

Article 71. The Articles of this Chapter shall apply to works whose country of origin is any one of the countries bound by the Universal Copyright Convention as revised in 1971.

c) Where appropriate, the relevant judicial practice concerning Question 2c) to e)

Judicial practice in connection with these aspects is the following:

– *With regard to the exceptions and limitations to copyrights (2c)* it is pertinent to note the ruling handed down by the Colombian Constitutional Court through Decision C-282 of 1997, with respect to free and not-for-profit use of works in the private home, and the violation of copyright that can result when hotels are considered equivalent to private homes. At that time, the Court indicated:

> Therefore, from the constitutional viewpoint, in addition to a violation of intellectual property rights, it is evident that there exists a flagrant breach of the principle of equality, given that public performance of artistic works in other types of establishments, in contrast to hotels, does in fact generate the possibility for the authors to claim their intellectual property rights, in accordance with Law 23 of 1982. This means that, under said assumption, the regulation establishes an exception, which in reality results in an unjustified benefit for hotels, in detriment of the copyright.
>
> On the other hand, it is evident that, by expressly and legally equating hotel rooms to private homes, but doing so for the specific and exclusive purpose of assigning them a given copyright regulation, sight was lost of the main purpose of the concept of the private home, which is the granting of legal protection in consideration of the human being and his/her dignity, as can be deduced from the constitutional mandates on this topic, and not as an element to be used to exonerate for-profit organizations from the fulfillment of the obligations inherent to their activities. Such actions distort the purpose of the home as an element that is part of the privacy of the guest – which becomes secondary – and emphasizes the effect by virtue of which the legal concept of "public performance" of artistic works is rendered invalid, to the detriment of the rights recognized by the system in favor of the authors.

– *With respect to user rights compensated by a fee (2d),* there is no judicial or administrative practice in Colombia.

– There is no judicial or administrative practice in Colombia with regard to *mandatory licenses (2e)*. To date, such licenses have not been granted in our country, owing to the strength of the Colombian publishing industry.

d) The rules on abuse according to Question 2f)

Colombian copyright legislation does not specifically regulate the abuse of the right by the author or owner of the work.

7. Have certain legal instruments according to Question 2a) to f) only been introduced in the course of time; been repealed in the course of time; and if so why?

As already mentioned, the legal instruments that regulate copyright in Colombia are stipulated in Copyright Law 23 of 1982, amended and supplemented by Law 44 of 1993 and the provisions of Andean Decision 351 of 1993. With the entry into effect of Andean Decision 351 in 1993, the internal law was not repealed, but supplemented with the Andean regulations. Any provisions contrary to the community regulations were suspended, that is, in the event that Colombia should cease to be a member of the Andean Community of Nations, Law 23 of 1982 would once more become fully effective.

With regard to international treaties adopted by Colombia after 1993, we find the WIPO treaties on Copyright and Performance of Phonograms, which regulate matters regarding the digital environment, and were approved through Laws 565 of 2 February 2000 and 545 of 23 December 1999, respectively.

8. Are there rules that restrict the scope of the user rights according to Question 2c) to e), in particular

By laying down specific preconditions for the applicability of individual user rights; by laying down abstract preconditions for the applicability of individual user rights

As already stated, Andean Decision 351 expressly provides for and stipulates the three-step test as a guiding criterion to achieve a balance between the public interest of access to knowledge and the private interest of the copyright.

The establishment of exceptions and limitations is aimed at allowing the use of the works without the requirement of express prior authorization of the author or owner of the work. In order for said exceptions and limitations to operate, no further requirements or prerequisites are necessary, beyond those stipulated in the regulation establishing the scope of each limitation, as described in the answer to Question 6b).

The specific purpose of establishing said limitations and exceptions is the furtherance of knowledge, information, and culture.

9. Are there rules to protect the existence of the user rights according to Question 2c) to e), in particular

What kinds of binding rules are there to prohibit the undermining of statutory user rights?

The possibility for a user, by virtue of the copyright law, to resort to ordinary justice in order to claim recognition of an exception or limitation of the copyright, has not been legally structured in our country. This may be due to the fact that, under this law, it cannot be concluded with certainty that said limitations and exceptions are in

fact a right of the user and that, therefore, their protection may be claimed in court. In Colombia, exceptions and limitations are used as a tool for the defense in cases of legal action against copyright infringement, but not as a right that may be claimed by the user.

How is the relationship between technical protection measures/DRM (digital rights management) and statutory user rights regulated?

In connection with technical protection measures, it is important to note that their circumvention or manipulation is typified in Article 272 of the Penal Code:

> Article 272. Violation of the Protection Mechanisms for Copyrights and Neighboring Rights, and other fraudulent acts: A prison sentence of four (4) to eight (8) years, as well as a fine of twenty-six point sixty-six (26.66) to one thousand (1,000) current minimum legal monthly salaries shall be imposed on any person who:
>
> 1. Circumvents or evades the technical measures adopted to restrict unauthorized use
> 2. Deletes or alters essential information for electronic management of rights, or imports, distributes, or discloses copies with the deleted or altered information
> 3. Manufactures, imports, sells, leases, or distributes to the public in any form a device or system to enable decoding of an encoded satellite program signal carrier without authorization of the legitimate distributor of said signal; or in any form evades, renders useless, or suppresses any device or system intended to enable the owners of the right to control the use of their works or phonograms, or to prevent or restrict their unauthorized use
> 4. Presents statements or information directly or indirectly intended for payment, collection, calculation, or distribution of monetary copyrights or neighboring rights, altering or falsifying the information required for such purpose by any means or process.

Likewise, the WIPO Copyright and Performances and Phonograms Treaties are directly applicable to this issue. Article 11 of the first Treaty states:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

This rule is restated in Article 18 of the WIPO Performances and Phonograms Treaty, but, in this case, with respect to technological measures used by performers and producers of phonograms for the protection of their rights.

In Colombia, there is no statutory limitation or exception relating to technical protection measures or DRM. Unfortunately, we do not have a judicial practice regarding this matter. This problem has not been exposed in Colombia.

Is there a decision (explicit or implicit) on the extent to which exclusivity rules to the benefit of the right holder …

The only rule that can be found in this regard is the provision of Article 11 of the WIPO Copyright Treaty of 1996, through which the member countries endeavor to guarantee copyright protection in the light of new technologies. In addition, there

are the regulations of the Criminal Code, which ensure the protection of these technological measures.

or access possibilities in favor of third parties, should enjoy priority in the event of doubt?

There is no precedent in Colombia in this respect. The fact is that this situation would mean the existence of a conflict between the intellectual property right owner and the right of access to information. In this respect, the Constitutional Court has indicated that, in the case of conflict between rights, the one closest to the human being involved will prevail; but it has made no specific statement on this particular aspect.

10. Questions concerning user rights subject to remuneration or mandatory licence

a) How is the amount of the fee determined for cases covered by Questions 2d) and 2e), namely: basically and in the event of conflict?

For cases covered by Question 2d) – ***User rights compensated by a fee***

Colombian copyright law does not include any regulation in this regard. If the use of a work does not fall under one of the limitations or exceptions mentioned in the answer to Question 2c), the use of a work must be previously and expressly authorized by its owner.

For cases covered by Question 2e) – Mandatory Licenses

The Colombian legislation refers to obligatory licenses exclusively with respect to foreign works, in matters related to translation and duplication. Even though it is true that these types of licenses are granted by the competent authority (in our case the National Copyright Office) without the prior consent of the owner of the work, this does not mean that the licenses are free of charge and, in the same manner, the licensee must pay the owner of the rights an equitable remuneration for the use of the work, as provided in Articles 52 and 67 of Law 23 of 1982, which, in short, indicate that the fee to be paid is to be calculated by the National Copyright Office according to the scale of rights that are normally paid for freely negotiated licenses for the intended exploitation or use thereof.

In the event of conflict

Regarding **limitations and exceptions to copyright compensated by a fee**, Colombian law does not have any regulation.

In connection with **obligatory licenses**, it is important to note that, according to Articles 45 and 53 of Law 23 of 1982, the valuable consideration for these types of licenses is established in the license granted by the competent administrative entity and it is therefore likely that the entity would issue an administrative act granting the license and establishing the remuneration it deems appropriate. In the event that the user is not satisfied with the administrative decision, he or she may dispute the validity of the administrative act, making use of the legal remedies provided by civil law,

such as the motion for reversal or appeal. If, after having exhausted available legal remedies (called administrative recourse in Colombia), the user is not satisfied with the decision, he or she may attempt, as a last resort, to disprove the legality of the administrative act before the Council of State, which is the highest authority on administrative law in Colombia.

It must be kept in mind that the foregoing procedure is structured according to the application of existing legal mechanisms and rules under Colombian administrative law, but cannot be sustained on any administrative practice, given that, as stated before, to date no obligatory licenses have been requested or granted in Colombia. Moreover, in Colombia we do not have any specific regulations on this matter.

b) Are there particular procedural rules for cases covered by Question 2d), e) and f) e.g. concerning the distribution of the burden of proof; provisional measures; other aspects?

For cases covered by Question 2d) – to limitations and exceptions to copyright compensated by a fee: Colombian copyright law does not include any regulation in this regard.

For cases covered by Question 2e) – Mandatory Licenses: The rules of procedure are set out in the answers to Questions 2e) and 10a).

For cases covered by Question 2f) – Misuse: Colombian copyright law does not include any regulation in this regard.

The distribution of the burden of proof: According to the Colombian Code of Civil Procedure, the general rule with regard to the burden of proof is that: "It is incumbent on the parties to prove the assumption of fact of the regulations that provide the legal effect they pursue. Commonly known facts or undefined denials do not require proof."[12] In accordance with the foregoing, those required to prove their right in copyright issues are the original or derived owners of the work.

In order to strengthen their proof regarding authorship and ownership of a work, the authors and owners of the rights may register the work at the National Copyright Office. This registration does not constitute a right, but does enable the presumption that the contents of said registration certificate are authentic, which becomes a useful element from the viewpoint of submission of evidence.

Provisional measures: Article 56 of Andean Decision 351 of 1993 empowers the competent authorities to enact the following precautionary measures: "a) Immediate cessation of the unlawful activities; b) The attachment, sequestration, confiscation, or preventive seizure, as appropriate, of copies produced in violation of any of the rights recognized by this Decision; c) The attachment, seizure, confiscation, or sequestration of the apparatus or materials used for the commission of the unlawful act." The foregoing measures do not apply to a copy acquired by the user in good faith exclusively for his or her personal use.

[12] Article 177, Code of Civil Procedure.

Articles 244[13] and 245[14] of Law 23 of 1982 set forth the concepts of precautionary attachment and suspension of the performance or exhibition of a work, when it has been carried out without due authorization. Law 44 of 1993 empowers police authorities to take measures aimed at the cessation of unlawful activities.[15]

In addition, the measures provided in the Code of Civil Procedure, in relation with the regulations stated herein, must also be considered.

c) How is the fee paid to the right holders by the party entitled to use for cases covered by Question 2d) and e)?

Colombian copyright law does not include any regulation in this regard.

d) Does national law contain rules that regulate the distribution of fees for cases covered by Question 2d) and e) between the various categories of right holders? If so, which? If not, how are such distributions determined?

Colombian copyright law does not include any regulation in this regard. Unfortunately, there is no judicial or administrative practice in Colombia.

Between the various categories of right holders

Several owners may coexist in a work protected by copyright, but the Colombian law does not establish rules about the distribution of fees between them regarding mandatory licenses.

11. Does national law contain general rules based on a differentiation between different categories of right holders?

The law has conceived five different contractual types in relation with copyrights: publishing agreements, agency agreements, agreements for inclusion in phonograms, public performance of music works, and agreements for cinematographic fixation. Each of these contract types is governed by very clear rules with regard to ownership of both the pecuniary and the moral rights to the work.

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[13] Law 23 of 1982: "Article 244.- The author, editor, artist, producer of phonograms, broadcasting organization, their successors in title and the person holding their legal or conventional representation, may ask the judge for the precautionary attachment of: 1. Any work, production, issues, and copies; 2. The proceeds from the sale and lease of said works, productions, issues, or copies, and 3. The proceeds from the sale and lease of theater, cinematographic, musical, or similar events".

[14] Article 245: "The persons indicated in the subsection of the foregoing article may ask the judge to issue a restraining or suspension order for the performance or exhibition of a theater, musical, cinematographic, or similar work, intended to be performed or exhibited in public without due authorization by the owner or owners of the copyright".

[15] Law 44 of 1993: "Article 54.- The police authorities shall stop unlawful activities by means of: 1. Suspension of the unlawful activity. 2. Seizure of the unlawful copies, molds, plates, matrixes, negatives, supports, tapes, covers, diskettes, telecommunication equipment, machinery, and any other elements intended for the production or reproduction of illegal copies or marketing of same. 3. Immediate closure of the establishment, if the premises are open to the public and the suspension or cancellation of the permit of operation".

Ownership of the work may be original or derived. The original owner of the work is its author; the derived owner of the work is any person who acquires the copyright through an assignment or transfer or rights, be it among living persons, through the law, or as a result of death.

In particular

a) Binding rules on contractual relationships between different categories of right holders (copyright contract)

i. **Contract of cinematographic fixation**
In terms of Article 95 of Law 23 of 1982, the authors of a cinematographic work are the director, the author of the cinematographic screenplay, the author of the music, and the cartoonist or cartoonists if the work is an animated film. The Constitutional Court, in Decision C-276/96, decided that "the remaining participants who are actors or performers do have ownership, but over neighboring rights, and they are fully entitled to freely and autonomously dispose of them".

The foregoing notwithstanding, Article 98 of Law 23 provides that pecuniary rights to the cinematographic work are recognized, unless otherwise agreed, in favor of the producer, and the moral rights assigned to the director of the work (Article 99, Law 23 of 1982).

ii. **Publishing agreement**
In this type of agreement, the author of a literary, artistic, or scientific work undertakes to deliver it to an editor, who agrees to publish it through graphic printing means, as provided in Article 105 of Law 23 of 1982. Ownership of the publishing rights in the work (graphic printing, disclosure, and distribution) are the editor's responsibility, but the moral rights remain the ownership of the author of the work, who, by virtue of said rights, is fully empowered to control the accuracy of the edited work and to make any corrections, additions, or improvements he or she deems appropriate prior to the printing of the work.

iii. **Agency agreement**

In this type of agreement, the author of a dramatico-musical or choreographic work, or a work of any musical genre, authorizes an impresario to organize the performance of that work in public in exchange for remuneration. In these contracts, ownership of the work remains in the name of the author.

iv. **Agreement for the Production of Phonograms**
In this type of contract, the author of a musical work authorizes and pays a remuneration to an individual or legal entity to record or fix a work on a phonograph record, soundtrack, or film, etc., as provided in Article 151 of Law 23 of 1982. The owner of the pecuniary rights to the phonogram is the phonogram producer, and the author of the musical work keeps the moral rights.

It is important to note that the authorization to fix on a phonogram does NOT include public performances; in this respect, the civil chamber of the High Court of the Judicial District of Medellin handed down its sentence of 12 December 1987 in the following terms:

This regulation (Article 151) intends to remedy the scourge of unlawful use, illegal reproduction and unjust enrichment that negatively affects the owners of the rights to the phonogram, since it is not considered fair that the creative capacity of the author embodied in his/her work as an expression of his/her most intimate feelings, as well as the work of the artist, be used with impunity by those who trade with the results of such arduous and painstaking work.

On the other hand, Colombian law defines certain events in which the title to the pecuniary rights in a work is determined by the circumstances under which the work is created. Articles 20, 91, and 92 of Law 23 of 1982 regulate three specific cases in which the author, that is, the physical person who creates the work, is not the holder of the pecuniary rights pertaining to it.

Article 20, recently amended by Law 1450 of 2011,determines that the pecuniary rights to a work created by virtue of a service agreement or employment contract, are transferred or assigned to the employer or to the individual or entity who commissions the work.. The regulation contemplates a presumption of assignment of these rights, unless there is an agreement to the contrary. Article 20 states the following:

The works created to a natural or legal person by virtue of a service agreement or employment contract of service, the author is the original owner of the pecuniary and moral rights, but is presumed, unless otherwise agreed, the pecuniary rights have been transferred to the contractor or employer, as appropriate, to the extent necessary for the exercise of their usual activities at the time of the creation of the work. To operate this assumption requires that the contract is in writing. (…)

For its part, Article 91 provides that the pecuniary rights to a work created by public employees or officials pertain to the respective public entity. More specifically, it provides the following:

The copyright in works created by public employees or officials in the exercise of the constitutional and legal obligations incumbent on them shall be the property of the public body concerned. This provision shall not apply to lectures or talks given by professors. Moral rights shall be exercised by authors in so far as such exercise is not incompatible with the rights and obligations of the public bodies concerned.

Finally, we find Article 92, according to which the rights to collective works where it is impossible to identify the individual contribution of each one of the authors, will belong to the editor or person on whose account and risk the work was made. Article 92 states the following:

The owner of the copyright in collective works created under an employment contract or a contract for services in which it is impossible to distinguish the individual contribution of each of the natural persons who contributed to it shall be the publisher or the legal entity or natural person for whose account and at whose risk the contributions are made.

b) Differences with respect to the scope of statutory user rights

The different categories of right holders have no bearing on the use permitted to users of a work, regardless of whether said use is permitted through an express authorization or by virtue of the limitations and exceptions to copyrights.

12. Which of the following legal instruments or mechanisms are used in national law outside copyright in order to achieve a "balance of interests"?

a) Fundamental rights

Article 61 of Colombia's Political Constitution states that: "The State shall protect intellectual property for the relevant period using the means established by law." In this respect, the Constitutional Court, in Decision C-975/02 of 13 November 2002, set aside the literal definition of the concept of intellectual property and stated that:

> the concept of intellectual property refers to a wide spectrum of rights of different nature: while some originate in the act of intellectual creation and are recognized to stimulate and reward it, others, regardless of the existence of an intellectual creation, are granted with the purpose of regulating competition among producers.

From the perspective of fundamental rights, protection of intellectual property with regard to copyright was judicially established through Decision C-053 of 2001,[16] which indicates that, even though intellectual property is set forth as a social, economic, and cultural right, one of its components must be considered as a fundamental right; said component is the moral scope of the copyright.

In this respect, the Court specifies:

> with regard to the creative ability of the human being, the possibility to express ideas or feelings in a particular manner, his capability of invention, his ingenuity, and, in general, all forms of manifestation of the spirit, are prerogatives that characterize the rational condition inherent to human nature, and to the dimension resulting from it .... [T]he moral rights of the author must be protected as rights derived from the human condition itself.[17]
>
> They must therefore be considered as fundamental rights.
>
> In the aforementioned ruling, the Constitutional Court establishes the legal nature of the different relationships resulting from a copyright, and it concludes: "Moral copyrights are fundamental rights. Monetary copyrights, although not fundamental rights, are protected under the Constitution".[18]
>
> On the other hand and in order to guarantee the protection of the users, Articles 13 and 44 of our Political Constitution set forth the right of equality and access to education, which are classified as fundamental rights; under certain conditions, this could eventually lead to actions for protection of a constitutional right ("tutela"), a constitutional mechanism seeking immediate protection of fundamental rights.

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[16] Constitutional Court – Full Court. 24 January 2001, File D – 3099.
[17] *Ibid.* Page 8.
[18] *Ibid*. Page 9.

Moreover, Articles 70 and 71 of our Political Constitution recognize the rights of all Colombians to have access to the country's cultural and artistic values, in the following terms:

Article 70. The State has the obligation to promote and foster equal access of all Colombians to culture, by means of permanent education and scientific, technical, artistic, and professional instruction at all stages in the process of creating a national identity. Culture in its diverse manifestations is the basis of nationality. The State recognizes the equality and dignity of all those who live together in the country. The State shall promote research, science, development, and dissemination of the cultural values of the Nation.

Article 71. Freedom in the search for knowledge and artistic expression is recognized. Economic and social development plans shall include furtherance of the sciences and of culture in general. The State shall create incentives for individuals and institutions that develop and foster science and technology and other cultural manifestations and will offer special incentives to individuals and institutions pursuing these activities.

b) Competition law

Making improper use of a work protected by copyright could undoubtedly constitute an act of unfair competition, be it because it can be classified under any one of the unfair-competition grounds stipulated under Colombian law, or under general grounds, which disapprove of any acts contrary to good faith and sound commercial practices. For additional information, see the answer to section f) of this Question, below.

c) Contract law

One of the most relevant postulates with respect to contract law is the principle of autonomy of the will, which constitutes the fundamental pillar in the copyright negotiation process and, of course, protection of the author and his or her work. By virtue of this principle and the observance of the agreements, the owners of rights have the prerogative to decide, or at least to negotiate, the type of contract they want to enter into, the expected valuable consideration, and the scope of the authorized use, among other things, be it at the individual level or through collective management companies. The agreement, of course, is a tool that may be useful to the user of the work, providing him or her with the opportunity to negotiate favorable conditions.

d) General rules on misuse

As stated in the answer to Question 6, the law of copyrights does not establish any regulation on the abuse of the right by the owner of the work. Nevertheless, our legislation prohibits the abuse of rights per se, regardless of the right involved, and therefore the general rule also applies to copyright.

The constitutional grounds for prosecuting the abuse of a right are found in Article 95 of the Political Constitution, which states that "The following shall be duties of individuals and citizens: I. Respecting the rights of others and not abusing their own rights". In addition to this, according to Colombia's Commercial Code, "any

person who abuses his or her rights will be required to indemnify the damages caused" (Article 830).

In the event that the use made by the owner of a work protected by copyright can be described as an abuse of the exclusive right that owner holds, said use may be penalized under Colombian legislation, which may eventually lead to the compensation of the damages caused to the user.

There is no relevant judicial or administrative practice in Colombia in this regard, and it is not usual for civil actions to be filed seeking the recognition of abuse in the exercise of a copyright by its owner.

e) Consumer protection law

Copyright users may undoubtedly be classified as consumers in the market, and therefore, in order to achieve a balance of interests, would be covered by consumer-protection regulations and, more specifically, any applicable provisions of the General Consumer Protection Act, Decree 3466 of 1992.

f) Media law

One of the legal mechanisms established in Colombia to attain a balance between private and public interests in relation to the media law is Law 680 of 2001, according to which "subscription-based television operators must guarantee to their subscribers free reception of Colombian national, regional, or local open-television channels through VHF, UHF, or by satellite, only in the area of coverage". (Article 11). The main purpose of this regulation is to expand coverage of the national open-television signal in order to ensure access for the entire population to any information of national interest broadcast therein, which, of course, is clearly in the public interest.

In legal practice, this regulation was used as an argument by the defense in a lawsuit on unfair competition filed by the company DirecTV Latin America LLC against several subscription-based operators who broadcast events over which DirecTV held exclusive rights, but were also broadcast on Colombian open television, by television channels that had acquired the license from DirecTV. In this case, it was decided that there had been no case of unfair competition, given that the subscription-based television operators broadcast the sport events by virtue of a legal mandate (Article 11, Law 680 of 2001), according to which the public interest in access to the public television signal takes precedence over private interests. Likewise, it was stated that there had been no carrying out of unfair trade practices, which is required in order to establish an act of unfair competition in Colombia. The judgment states the following:

> in the absence of unfair trade practices in the act attributed to the opposing party, verification of the objective scope set forth by Law 256 of 1996 (Article 2) cannot be established, because for the harmed competitor to be able to file a claim against the agent of the action resulting from unfair competition, it is necessary to start from an essential premise, which is the engagement in unfair trade practices.

> For this reason, the protection claimed by the plaintiff cannot be granted under an unfair competition proceeding. 2.3.2. On the other hand, it had already been anticipated that, even if the foregoing statement were disregarded, in any event the claim of the plaintiff would have to be dismissed because Cablecentro S.A. and Cablevisión E.U., when they engaged in the conduct denounced as unfair competition, limited themselves to strict compliance with the provisions of Article 11 of Law 680 of 2001 .... [T]heir actions were determined by binding legal regulations.[19]
>
> Compliance with a legal mandate by the subscription-based operators, obviously, rules out any infraction thereof.
>
> On the other hand, Law 1341 of 2009, which defines the principles and concepts applicable to society in the information age and the organization of information and communication technologies, ICT, stipulates that "information and communication technologies must serve the general interest, and it is the obligation of the State to promote efficient and equal-opportunity access to said technology for the entire population of the national territory" (Article 2). In principle, this provision would recognize the precedence of the legal mandate granting these rights over the private interests of the sector; a clear example of the balance of interests advocated by the Colombian state.

g) Other

Besides the ones already described, Colombia does not have any further mechanisms to achieve the balance between public and private interests.

Abbreviations

CD	Optical Disc
DRM	Digital Rights Management
ICT	Information and Communication Technology
LLC	Limited Liability Company
UHF	Ultra High Frequency
VHF	Very High Frequency

[19] Judgment No. 5 of 6 April 2010. Superintendency of Industry and Commerce File 03067843. Plaintiff: DirecTV Latin America LLC – Defendant: Cablecentro S.A., Cablevisión EU.