

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Joint PIJIP/TLS Research Paper Series

7-2013

Intellectual Property Reform in Colombia: Future Colombian Copyright Legislation Must Not Place Overly Restrictive Burdens on Internet Service Providers that Unnecessarily Restrict Access to Information and Freedom of Expression of the People of Colombia

Glushko-Samuelsan Intellectual Property Clinic
Washington College of Law, American University, ipclinic@wcl.american.edu

Andrés Izquierdo
Universidad Javeriana, info@andresizquierdo.com

Fundación Karisma, Bogotá, Colombia
carobotero@gmail.com

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/research>



Part of the [Intellectual Property Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Glushko-Samuelsan Intellectual Property Clinic, in collaboration with Andrés Izquierdo and Fundación Karisma. 2013. Intellectual Property Reform in Colombia: Future Colombian Copyright Legislation Must Not Place Overly Restrictive Burdens on Internet Service Providers that Unnecessarily Restrict Access to Information and Freedom of Expression of the People of Colombia. PIJIP Research Paper no. 2013-03.

This Article is brought to you for free and open access by the Program on Information Justice and Intellectual Property and Technology, Law, & Security Program at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Joint PIJIP/TLS Research Paper Series by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact DCRepository@wcl.american.edu.

INTELLECTUAL PROPERTY REFORM IN
COLOMBIA: FUTURE COLOMBIAN
COPYRIGHT LEGISLATION MUST NOT PLACE
OVERLY RESTRICTIVE BURDENS ON
INTERNET SERVICE PROVIDERS THAT
UNNECESSARILY RESTRICT ACCESS TO
INFORMATION AND FREEDOM OF EXPRESSION
OF THE PEOPLE OF COLOMBIA

The Glushko-Samuelson Intellectual Property Clinic *

In Collaboration with:

*Andrés Izquierdo, Labcom, Instituto Pensar,
Universidad Javeriana, Bogotá, Colombia.
Fundación Karisma, Bogotá, Colombia*

*The Glushko-Samuelson Intellectual Property Clinic is part of the American University Washington College of Law. Student attorneys Kate Collins, Seth Dennis, Brian Dudley, Chad Guo, Sarah Leggin, Bijan Madhani, Sarah Beth Smith, and Tamara Winegust contributed to this project under the supervision of Professors Peter Jaszi and Nabila Isa-Odidi.

TABLE OF CONTENTS

- I. Introduction 3
- II. Colombia’s Global Ascension Depends on its Continued Commitment to Protecting Fundamental Freedoms..... 5
- III. Overly Restrictive ISP Laws Threaten the Rights of Due Process, Expression, Information, and Privacy 6
 - A. The Colombian Constitution and International Covenants Recognize the Right to Due Process 7
 - B. The Colombian Constitution and International Instruments Require Rigorous Protection of Free Expression..... 7
 - C. The Colombian Constitution and International Trends Exalt the Freedom of Access to Information..... 8
 - D. Right to Privacy Is Enshrined by the Colombian Constitution and International Human Rights Organizations..... 10
 - E. Laws like Ley Lleras 1.0 Infringe the Right to Due Process 10
 - F. Enactment of Ley Lleras 1.0 Would Have Chilled Expression and Subverted Access to Information 11
 - G. Re-Enactment of Ley Lleras 1.0 Will Endanger the Right to Privacy 13
- IV. The Language of the FTA allows Colombia to Implement Creative Laws that Respect the Scope of the Agreement and Uphold Colombians’ Constitutional Rights 14
 - A. Other Countries’ Implementation of Substantially Similar FTA Language Shows a Law Like Ley Lleras 1.0 Is Not the Only Way to Fulfill the FTA Obligations 14
 - B. Constitutional Courts of Other Countries Have Held that Overly Restrictive ISP Laws Violate Individuals’ Rights to Expression, Communication, and Due Process..... 16
 - C. Argentina Has Proposed Content-Neutral ISP Legislation that Endorses a Judicial Process Prior to Content Removal 17
 - D. Colombia Should Learn from the U.S.’s Successes and Mistakes in Its Laws Limiting ISP Liability..... 17
- V. Recommendations for Future Legislation Should Honor the Content of the FTA and Respect Citizens’ Rights 19
 - A. Future ISP Laws Must Not Violate Citizens’ Rights 19
- VI. Conclusion 20

I. INTRODUCTION

In April 2011, Bill 201—known as “Ley Lleras 1.0”—was introduced by the Colombian legislature to implement certain provisions in the US-Colombia Free Trade Agreement (FTA). The law placed strong burdens on Internet Service Providers (ISPs) to police the Internet and would have allowed ISPs to collect information about users, including which websites they frequent, what content they access or post, and with whom they communicate. It also permitted ISPs to deactivate subscribers’ Internet access without a court order verifying that the subscriber had posted or accessed copyright-infringing material.

Fortunately, Ley Lleras 1.0 was archived in November 2011 after civil society groups harshly criticized it as shattering the notion of privacy and standing as a barrier to the free access of information. However, this attempt to pass an overly restrictive ISP law reveals how the Colombian legislature has not fully considered the impact such laws could have on the fundamental rights to expression, information, privacy, and due process. Public discussion and debate are necessary so that future ISP liability laws will not violate these precious rights for all Colombians.

Ley Lleras 1.0 developed out of Colombia’s attempts to foster more positive relationships with other democratic nations worldwide. To further strengthen ties between Colombia and the United States, these two countries entered into an FTA in 2006. This FTA emphasized market access for agricultural products and removed barriers between Colombia and its largest trading partner, which made selling goods more profitable and assisted the Colombia’s continued development.

The FTA included flexible language that gave Colombia wide discretion to create laws implementing the FTA in ways that best serve Colombians’ needs. However, when the Colombian legislature attempted to pass two controversial and restrictive laws, it failed to take advantage of the flexibility afforded by the FTA in a way that maximized the benefits for *all* Colombians.

The FTA requires Colombia to provide creators of original works control over their works, consistent with international intellectual property regimes. To ensure protection, Article 16.11.29 of the FTA empowers Colombia to implement laws relating to the liability of ISPs who host content that violates the rights of these creators. Those FTA provisions merely require that the Colombian legislature create a regime that incentivizes ISPs to cooperate with copyright owners by limiting the ISPs’ potential liability under prescribed circumstances. These requirements

include implementing a policy providing instructions to take down infringing content and to terminate the Internet accounts of repeat offenders. Importantly, the FTA prohibits conditioning eligibility for these ISP “safe harbors” by requiring that the ISPs monitor users or affirmatively seek facts that show its users could be infringing copyright.

One particular “safe harbor” allows ISPs to remove content in good faith that violates authors’ rights based on “claimed or apparent infringement.” This is known as a “notice and takedown” regime, which is currently used by the U.S.

The FTA does not set out a time limit or manner in which the allegedly infringing material need be removed in order for the ISP to claim the safe harbor. Rather, the FTA only requires that: (a) copyright owners provide ISPs with effective written notice, identifying the materials that owners claim infringe their copyrights before any process to remove the material starts; and that (b) users who have had their content removed be allowed to provide ISPs with “counter-notification,” claiming that the removal was a mistake or was due to misidentification. Additionally, a side letter to the agreement dated November 22, 2006, clarifies that the copyright owner claiming infringement need only have a “good faith belief” that the material is infringing. Similarly, once the content is removed, the side letter allows the person whose content has been removed to notify the ISP that he has a “good faith belief” his material was removed in error. Neither the text of the FTA nor the side letter requires that the ISP automatically remove any material from their servers upon receipt of an infringement claim from a copyright owner.

The FTA does require that Colombia establish an administrative or judicial procedure that allows the copyright owner to “expeditiously” obtain information from the ISP identifying the infringer under Article 16.11.29(b)(xi). However, this procedure does not affect the ISP’s ability to claim “safe harbor.”

Because Colombia wishes to comply with the FTA, it is highly likely the legislature will soon introduce another bill to implement the ISP provisions. To avoid a similar roadblock and to ensure the FTA is implemented in a way that maximizes the benefits for all Colombians, the Colombian Legislature must create laws that honor the text of the FTA and respect the rights of all Colombians.

II. COLOMBIA'S GLOBAL ASCENSION DEPENDS ON ITS CONTINUED COMMITMENT TO PROTECTING FUNDAMENTAL FREEDOMS

Like other modern nations, Colombia has capitalized on new technological innovations and increasingly open communication to connect its diverse population. Improved Internet access has helped bridge the gap between Colombia's wealthy and impoverished, enabling many Colombians to rise out of poverty through increased access to education and information. The Internet has become as important as radio and television in bringing new ideas and information to Colombians. The power and potential of the Internet impact all facets of life including communication, education, business, and culture.

Colombia has enshrined the freedom of expression, a right to privacy, and due process in the Constitution as fundamental rights. It recognizes freedom of expression as the cornerstone of any democracy and as a human right that is essential to the growth and development of education, innovation, and communication. They recognize the right to privacy bolsters this freedom of expression by ensuring that individuals can access and develop resources without fear of government monitoring and censorship. They recognize due process as a foundational requirement of a democracy to ensure that the state respects every person's legal rights.

Due process, freedom of expression, access to information, and privacy are fundamental values to Colombians and to the international community. Due process is recognized internationally and in the Americas as fundamental to every person's right to liberty and security.¹ Freedom of expression is universally recognized as necessary for the free and peaceful functioning of democratic societies.² The right to access information is a crucial to citizens' participation in society, especially for the most vulnerable social and economic groups in Colombia. Without it, citizens cannot participate meaningfully in political discussions or processes, or

¹ International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 175.

² Inter-Am. Comm'n H.R., OEA/Ser.L/V.88 Doc. 9 rev. at 1 (1995). ("Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart. A society that is to be free both today and in the future must engage openly in rigorous public debate about itself."). *See also* Annual Report of the Inter-American Commission on Human Rights 2011, Chapter IV, pg. 9-11; Article 13 of the American Convention on Human Rights, Article IV of the American Declaration of the Rights and Duties of Man, and Article 4 of the Inter-American Democratic Charter have been (interpreting as being much more generous to free expression than other comparable treaties from other regions. Restrictions to the free circulation of information, opinions, and ideas are reduced to an absolute minimum within the Inter-American system).

commentary on government actions. Restraints on citizen access to information remove an essential means of controlling corruption and prevent citizens from generally exercising their other human rights.³ The right to privacy is inexorably tied to freedom of expression and access to information rights: privacy ensures that citizens can choose to be autonomous and independent and permits them to form and express opinions about political and personal issues without fear of reprisal. Respect for the right to privacy is therefore necessary to promote a free and democratic society.⁴

Intellectual property laws can implicate all four fundamental rights. For example, copyright law seeks to both encourage creation of new content and regulate the use of that content. Overly restrictive protections risk disincentivizing creativity as well as compromising access to and use of information. Furthermore, overzealous enforcement measures can compromise citizens' rights to privacy. As such, any laws regulating and enforcing intellectual property rights, such as copyright, must balance the need to protect expression with the need to respect the fundamental rights to due process, expression, information, and privacy of all Colombians.

III. OVERLY RESTRICTIVE ISP LAWS THREATEN THE RIGHTS OF DUE PROCESS, EXPRESSION, INFORMATION, AND PRIVACY

Ley Lleras 1.0 implicitly encouraged ISPs to collect information on users as a way to protect themselves from copyright liability; it placed no limitation on their ability to monitor users' activity in order to protect themselves, even though the FTA explicitly states that limitations on liability should not be based on active monitoring of users. By encouraging such censorship, laws like Ley Lleras 1.0 may unfairly initiate enforcement, chill expression, invade privacy, and stifle innovation and sharing of information. As such, laws like Ley Lleras 1.0 violate citizens' fundamental rights to due process, expression, privacy, and access to information.

³ Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.134 Doc. 5 rev. at ¶ 147 (2009). *See also* Annual Report of the Inter-American Commission on Human Rights 2011, Chapter IV, pg. 16-18.

⁴ Colombian Constitution in Judgment C-640/10 of August 2010.

A. *The Colombian Constitution and International Covenants Recognize the Right to Due Process*

Article 29 of the Colombian Constitution states, “Due process will apply to all legal and administrative measures. No one may be judged except in accordance with the relevant previously written laws before a competent judge or tribunal following all appropriate formalities in each trial.” Due process requires fairness in administrative and judicial proceedings and adherence to established principles and rules of law. The Colombian Constitutional Court further described the right to due process as allowing those who are party to an administrative or judicial proceeding to participate actively in such proceeding by making their own arguments and providing relevant evidence.⁵ ()

International covenants also require Colombia to provide fair trials for all defendants.⁶ Such rights include the right to cross-examine witnesses,⁷ to promptly be notified of all charges,⁸ and to be presumed innocent until proven guilty.⁹

B. *The Colombian Constitution and International Instruments Require Rigorous Protection of Free Expression*

The value of privacy and access to information are meaningless if citizens cannot freely express ideas. As such, the Colombian Constitution explicitly protects and encourages the freedom of expression. Moreover, at least ten other articles of the Constitution can be read to support this right.

The Colombian Constitutional Court has vigilantly defended the freedom of expression in many decisions, upholding and enforcing this right of the people. The Court has stressed the importance of protecting this right as a “core principle[] of democracy.” The freedom of expression’s fundamental role in the development of Colombia as a democracy means it is “preferable to face the consequences resulting from exercising the right to hold opinions without interference, rather than imposing a general restriction on it.”¹⁰ This right is so important that freedom of expression

⁵ Sentencia T-549-07

⁶ International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. at 176 [hereinafter ICCPR]. American Convention on Human Rights, art. 8, Nov. 22, 1969 [hereinafter ACHR].

⁷ ICCPR, art. 14(3)(e), Dec. 19, 1966. ACHR art. 8(2)(f), Nov. 22, 1969.

⁸ ICCPR, art. 14(3)(a).

⁹ ICCPR, art. 14(2). ACHR, art. 8(2).

¹⁰ Manuel Jose Cepeda Espinosa, T-391 of 2007 (Colombian Constitutional Court, May 22, 2007) (translation provided by the Court).

“prevails over other interests.” Courts therefore hold laws restricting the freedom of expression to strict scrutiny: they must presume that “any kind of measure controlling the content of opinions or expressions is a form of unconstitutional censorship.”¹¹

At the international level, the Universal Declaration of Human Rights (UDHR) recognizes a right to freedom of opinion and expression for all.¹² Regionally, Article 13 of the American Convention on Human Rights similarly prohibits indirect suppression of freedom of expression.¹³ The open-ended nature of the Convention¹⁴ suggests that any laws potentially restricting freedom of expression must be treated with caution. Particularly, the Convention only permits restrictions of free expression after certain conditions have been met. First, the restrictions must serve compelling objectives and be present in clear and precise laws: they prohibit legislation that grants too much discretion to the government. Second, the restrictions to free expression must be necessary, appropriate, and strictly proportionate to the state’s objectives: they must therefore be the least restrictive and most proportionate means of achieving the objective.

C. The Colombian Constitution and International Trends Exalt the Freedom of Access to Information

An informed public is necessary for a stable and free society. The Colombian Constitutional Court has repeatedly ruled that access to information is absolutely necessary to achieve the goals outlined in the Colombian Constitution. Particularly, the Court has recognized that “[t]oday much of the economic activity and the exercise of power [are] based on the intangible resource of information.”¹⁵ Access to information is thus an “indispensable prerequisite” to the exercise of human rights and a free society. Furthermore, Article 74 of the Constitution enshrines the right of access to public documents, which the Court held as central to the core right of petition.¹⁶

¹¹ *Id.*

¹² The Universal Declaration of Human Rights, art. 19, Dec. 10, 1948.

¹³ ACHR, art. 13.3, Nov. 22, 1969 (“The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”) *See also* Rios v. Venezuela, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 194 (Jan. 28, 2009).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Luciano Riapira Ardila, T-473 (Colombian Constitutional Court, July 14, 1992).

On the world stage, many international bodies and most developed countries have recognized the important role that access to information plays in democratic development and protection of other rights. For example, Article 19 of the UDHR recognizes the right “to seek, receive, and impart information and ideas through any media.”¹⁷ In 2011, the United Nations (UN) explicitly recognized the right to access information through the Internet as protected by Article 19 of the UDHR.¹⁸ Moreover, the United States passed its “Freedom of Information Act” in 1966, and Canada implemented similar acts in most provinces by the early 1980s. Most Council of Europe member states have similarly enacted a right to freedom of information either in legislation or in their constitutions.¹⁹

In addition to protection, international instruments and initiatives are helping promote and implement fair and free access to information. Target 8f of the UN’s Millennium Development Goals entreats states to “make available the benefits of new technologies, especially information and communications.” The “Connect the World” project, launched in 2005 by the International Telecommunication Union, as well as the UN Development Programme’s “One Laptop Per Child” project, seeks to advance this goal by helping disadvantaged children access computers and the internet through distribution of affordable laptops.²⁰

Individual countries have also adopted similar initiatives to connect their citizens. In Latin America, Brazil’s government launched a “computers for all” program in 2009 and established over 100,000 Internet access centers—called “Local Area Network Houses”—with fast broadband Internet connections in areas where many residents do not own personal computers.²¹

On the international and local level, countries have not only recognized the fundamental role access to information plays in the development of their nation, but have also actively worked to promote such access.

¹⁷ The Universal Declaration of Human Rights, art. 19, Dec. 10, 1948.

¹⁸ See Frank La Rue, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” Human Rights Council, A/HRC/17/27, 16 May 2011, at 6–9.

¹⁹ Access Info Europe. “Access Information: A Fundamental Right, A Universal Standard.” White Paper. (2006) Available at: <http://www.access-info.org>

²⁰ A/HRC/17/27 at 17–18.

²¹ A/HRC/17/27 at 18.

D. Right to Privacy Is Enshrined by the Colombian Constitution and International Human Rights Organizations

Respect for individual privacy is the *sine qua non* of autonomy and independence. Colombia's Constitution recognizes every person's right to privacy.²² The Constitutional Court reaffirmed this absolute and inalienable right conferred on individuals from both the state and others in Judgment C-640/10 of August 2010. The Court defined privacy as an "absolute right" to be left alone, and as a necessity, allowing citizens to be autonomous and independent. Furthermore, such right to privacy permits people to "think in solitude" and form their own opinions about political and personal issues.

Other international bodies similarly recognize the fundamental nature of privacy in relation to the pursuit and realization of other human rights. The Organization of American States (OAS) recognizes a right to privacy, honor, and dignity. Additionally, the UDHR recognizes a right to privacy, honor, and reputation. Evidenced by the Colombian Constitutional Court's ruling, as well as international human rights documents, a strong right to privacy is absolutely necessary to promote a democratic and freethinking society, as well as to respect human dignity as codified in Article 1 of the Colombian Constitution.

Colombian civil society has also recognized the importance of the right to privacy, particularly on the Internet. The value of privacy for Colombians began as an important concern for safety and for economic reasons. With the rise of the Internet, civil society groups have noted a myriad of problems that are created by a void of online privacy. They have recognized the ability of businesses and other companies to gather confidential information from unknowing users, as well as of the government to censor information and to monitor user activity. Colombian civil society groups, such as RedPaTodos and Karisma, have all warned about the infringement of citizens' right to privacy posed by overly restrictive copyright and ISP laws.

E. Laws like Ley Lleras 1.0 Infringe the Right to Due Process

Ley Lleras 1.0 would have required ISPs to immediately take down allegedly infringing content, without a court order, to avoid liability. This removal of content, which would have been required by law, eradicates the user's right to due process by letting a private entity take down content that

²² Constitución Política de Colombia [C.P.] art. 3.

may not actually be infringing. Article 29 of the Colombian Constitution says, “No one may be judged except in accordance with the relevant previously written laws before a competent judge or tribunal” Allowing ISPs to take down information before getting a court order would allow them to determine the strength and validity of the copyright infringement claim and prevent others from accessing the content, all without any proceeding before a judge or tribunal. As a result, a private entity would take away content without a legal proceeding, and the burden would then shift to the user to initiate his or her own proceeding in court to restore the content.

Furthermore, Ley Lleras 1.0 required ISPs to deactivate repeat offenders’ Internet access, which could then be later adjudicated by the user in court to reinstate the service. However, the taking away of Internet access by the ISP without any judicial intervention is a blatant violation of due process, and this is not remedied by the mere subsequent ability of the user to go to court after the fact. Without the issue being adjudicated before an independent third party, the user’s due process rights are violated when the law allows such private entities to take Internet access away from users. Thus, an administrative or judicial proceeding should be required in order to disable a repeat offender’s access to the Internet, and the FTA does not prohibit such a requirement.

The previously proposed law therefore would have deprived citizens of their ability to view content without actually having to go through any legal or administrative proceeding, which deprives the user of their right to due process. This procedure is fundamentally unfair as it allows private actors with their own subjective interests in the matter to judge whether a copyright infringement claim is sufficient to warrant the takedown of the content or the disabling of a person’s Internet access. Therefore, Colombia’s future ISP law should not permit ISPs to make determinations that would be unfounded in court and directly affect the legal rights of users. Content takedowns and labeling people as “repeat offenders” without a court or administrative order deprives the user of the ability to challenge the claim before content is taken down or Internet access is disabled.

F. Enactment of Ley Lleras 1.0 Would Have Chilled Expression and Subverted Access to Information

In order to exercise the right to access to information, accessible information is required. Ley Lleras 1.0 would have obstructed access to information in two ways: first, by requiring ISPs to remove content from their servers without due process or knowledge that the content is illegal;

and second, by requiring ISPs to disable Internet access of “known offenders.”

Ley Lleras 1.0 required private actors to remove information and expressions from the Internet without substantial proof the information was *in fact* illegal. The proposed “notice and takedown” regime (explained above) in Ley Lleras 1.0 would have allowed anyone to simply fill out a form accusing certain content of infringing copyright laws and give it to the ISP hosting the content. Upon receipt of this notice, Ley Lleras 1.0 required the ISP to remove or “takedown” the content. This meant removal of information and expression without further proof, and without judicial review.

The law compelled ISPs to follow this process, or else risk facing copyright liability themselves. Imposing such strict obligation on ISPs creates an atmosphere of fear that will lead ISPs to remove content after even the shallowest claims of copyright infringement in an effort to avoid any chance of liability. Not only does this process encourage potentially baseless removal of expressive materials, but it also ignores any possible defenses the user may have.

Although Ley Lleras 1.0 provided a process for users to have their material restored, the law imposed a substantial burden on users who wanted to assert these rights: it prohibited ISPs from restoring the content unless the user could make a compelling legal argument in defense of the material, or a court ordered the ISP to replace the content. The legal nature of the argument and high cost of accessing courts effectively prevents substantial numbers of Colombians unable to afford to access these services from ensuring their freedom of expression is protected. Furthermore, even if they could access these services, reinstatement can take time, and the harm on the user may have already occurred.

As written, Ley Lleras 1.0 imposes a low threshold to stop or block expression, and it imposes an incredibly high threshold to assert or protect expression. This renders the legislation subject to abuse. Importantly, the law provided no penalties for such abuses. Without penalties, a business could maliciously use the notice and takedown regime to gain advances over competitors. For example, faced with competition, a company could make an unfounded claim against a competitor as a way to temporarily remove valuable content from the competitor’s website, knowing that by the time it is reinstated, the company will have an advantage over its competitor. Likewise, a political organization could abuse the notice and takedown regime to harass opponents and stifle speech on either side of a debate. The “notice and takedown” regime in Ley Lleras 1.0 thus presents a

substantial burden on access to information because it can be used to actively block users from gaining access to important ideas.

Ley Lleras 1.0 further aggravated this potential abuse by requiring ISPs to create procedures to disable Internet access for “repeat offenders.” Specifically, because the law deemed individuals to be “repeat offenders” if their content had been removed under the “notice and takedown” regime on several occasions, abusers of the “notice and takedown” regime could target a specific user to the point where the user’s Internet access is cut off. For example, the “repeat offender” provision could be used to harass individuals whose political views or opinions differ from the person who filed the complaint because the law would require their Internet be cut-off after a certain number of complaints have been made. The “repeat offenders” requirement thus inflates the danger posed by the “notice and takedown” regime because it requires ISPs to revoke Internet access for an individual who may in fact post no *actually* infringing material.

Furthermore, because the “repeat offender” provision in Ley Lleras 1.0 could be used to block an individual’s Internet access without substantial cause, the law creates a chilling effect on expression. Specifically, because the law requires the ISP to block Internet access for users whose content is allegedly infringing, users whose materials have been subject to a takedown action would thereafter be much less likely to risk posting any content, whether or not a court would find it actually infringing.

The Inter-American Commission on Human Rights has noted gains in Colombia’s protection of freedom of expression.²³ Imposing a law like Ley Lleras, which would severely chill speech, plainly contradicts Colombia’s strong commitment to freedom of expression and access to information. To assist Colombia’s international rise, and protect the constitutional rights of all Colombians, any new law must address these concerns.

G. Re-Enactment of Ley Lleras 1.0 Will Endanger the Right to Privacy

The originally proposed version of Ley Lleras 1.0 would have placed no limits on ISPs who monitor and collect personal data online. While the legislature subsequently took steps during the first debate of that bill to protect privacy rights, such rights must be ensured in all future legislation. ISPs must not be encouraged to monitor user activity as a way to pre-empt notice from copyright owners that the ISPs were hosting infringing content. This encouragement is a clear challenge to the right to privacy.

²³ See Inter-Am. Comm’n H.R., OEA/Ser.L/V/II., doc. 69 rev. ¶ 25-31 (2011).

Moreover, Ley Lleras 1.0 went beyond the requirements of the FTA. The law would have placed the burden on ISPs to remove allegedly infringing content from their servers with little more than an accusation from the claimed copyright holder, or else face copyright liability themselves. This burden would not only lead to ISPs removing expressive content and other information from their servers without substantial evidence that it was infringing, but also could promote active monitoring of user activities and removal without any basis, simply to avoid *any* chance the ISP could be subject to liability.

By failing to prohibit such monitoring, Ley Lleras 1.0 facilitated the type of invasion of privacy that the Constitution explicitly prohibits. The law also exceeded the requirements of the FTA at the expense of individual rights. Any similar law should therefore encourage government oversight, and it must remove provisions that chill expression, hinder users' expected privacy, and inhibit access to information.

IV. THE LANGUAGE OF THE FTA ALLOWS COLOMBIA TO IMPLEMENT CREATIVE LAWS THAT RESPECT THE SCOPE OF THE AGREEMENT AND UPHOLD COLOMBIANS' CONSTITUTIONAL RIGHTS

The language of the FTA enables the Colombian legislature to implement laws that both respect the FTA and uphold the constitutional rights of Colombians generally. First, the FTA forbids Colombia from conditioning the safe harbor on the ISP's monitoring user activity, and, accordingly, any new law should prohibit ISPs from engaging in such behavior. Such a law will respect Colombians' constitutional right to privacy.

Second, because the FTA does not proscribe a specific process for the "notice and takedown" regime, the Colombian legislature is free to implement laws that empower users to challenge claims of infringement without substantial financial burden. Furthermore, because the risk to freedom of expression is heightened by the "repeat offender" laws, any new law should impose strict requirements to ensure infringement claims are legally genuine and without defense. It should also impose steep penalties on owners who attempt to abuse the "notice and takedown" regime. This will remove the chilling effect on freedom of expression by placing a high burden on those who wish to limit it.

A. *Other Countries' Implementation of Substantially Similar FTA Language Shows a Law Like Ley Lleras 1.0 Is Not the Only Way to Fulfill the FTA Obligations*

Other countries, such as Chile and Australia, have entered into FTAs with the United States that contain substantially the same language as the Colombia-U.S. FTA. In implementing the terms of these FTAs as related to ISPs, these two countries have created regimes that balance the need to remove infringing content with the need to protect its citizens' fundamental rights.

Chile is a party to a 2004 U.S. Free Trade Agreement that is largely identical to the Colombia-U.S. FTA in terms of the ISP provisions. However, Chile took a different approach than Colombia and the U.S. In 2010, Chile amended its existing copyright laws in an effort to implement an FTA with the U.S.²⁴ In order to meet the ISP requirements, Chile enacted a "Notice and Takedown" scheme that does not require ISPs to remove or block accused material absent a court order.²⁵ Further, ISPs are not required to police their content, and the law only applies when a rights holder notifies the ISP of potentially infringing content. Article 85 Ñ of the Chilean statute states:

[S]ervice providers . . . shall not be considered liable [if the provider]: a) has no actual knowledge of the unlawful nature of the data; . . . d) expeditiously removes or disables access to the stored material in accordance with the following paragraph.

The Service provider shall be deemed to have actual knowledge when *a competent court of justice . . . has ordered that the data be removed* or access to it be disabled and the service provider served, does not comply expeditiously with such order.

The effect of this law is that an ISP is only required to act in response to a court order. This system protects Internet users while also meeting the FTA's requirements by taking down the infringing content. Therefore, this law strikes an appropriate balance between protecting users' rights to due process, expression, access to information, and privacy, and the interests of rights holders.

Australia also signed an FTA with the U.S. in 2004. Similarly, Australia chose to structure the law to require that the rights holder obtain a court order for an ISP to take down infringing content and to avoid liability.

²⁴ Law No. 20.435, Ley N° 20.435, 2010, Repertorio de Legislación y Jurisprudencia Chilenas [Rep. Leg. Jurisp.] (Chile)..

²⁵ *Chile's Notice-and-Takedown System for Copyright Protection: An Alternative Approach*, Center for Democracy and Technology (Aug. 2012), <https://www.cdt.org/files/pdfs/Chile-notice-takedown.pdf>.

The law states that the ISP must expeditiously remove or disable access to copyrighted material residing on its system upon receipt of a notice in the prescribed form that the material has been found to be infringing (1) by a court; (2) becomes aware material is infringing, or; (3) becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing. Therefore, similarly to Chile, Australia fulfills its obligations under its U.S.-FTA and to its rights holders, while fulfilling its duties to protect its citizens' rights to due process, expression, privacy, and access to information.

B. Constitutional Courts of Other Countries Have Held that Overly Restrictive ISP Laws Violate Individuals' Rights to Expression, Communication, and Due Process

Alternatively, other countries have taken overly restrictive approaches to ISP liability, which have been challenged for infringing fundamental rights. For example, France chose to insulate its ISPs from liability for copyright infringement through a different method. Under the HADOPI law, enacted in 2009, an ISP must monitor a subscriber upon receipt of a notice from a rights holder that the subscriber is accessing or posting allegedly infringing content. An email is sent to the subscriber notifying him of the claim, and if the subscriber commits a repeat offense within six months, the ISP must send them a certified letter explaining the claim. Finally, if the subscriber continues to post or access allegedly infringing content within the following year, the ISP must suspend the user's Internet access and the user must continue to pay for the access. That user is then blacklisted, and other ISPs cannot offer them Internet service. Only after their Internet access has been suspended can a subscriber go through an appeal process to reinstate his service.

The HADOPI law came under attack, and key portions of the law were found to be unconstitutional by the French Constitutional Council (Decision n° 2009-580 of June 10, 2009). In particular, the court held that suspending a person's access to the Internet without a judicial proceeding, and where an appeal can only occur after Internet access has been suspended, violated the person's right to expression, communication, and due process. Thus, laws that suspend Internet access for repeat offenders must take into account the user's rights to expression, access to information, and due process; such laws must require judicial intervention so that the subscriber has the fundamental ability to contest the claims before an impartial adjudicator can impose a harsh punishment as disabling a person's Internet access entirely.

C. Argentina Has Proposed Content-Neutral ISP Legislation that Endorses a Judicial Process Prior to Content Removal

Argentina introduced a bill on March 27, 2013, to address the legal liability of ISPs.²⁶ The bill places a low bar on entry to the safe harbor, and it absolves ISPs of all liability for third-party content hosted on or passing through their servers, unless the ISP had actual knowledge that the content violated laws or rights of others. Article 6 provides that every person has a right to seek judicial remedy (i.e. court order) to remove, block, stop, and/or disable access to content on an ISP; however, to have standing before the court, the content must have injured that person's right or interest that is recognized in the Constitution or other laws, including treaties.

The judicial evaluation provisions contain three important elements. First, while the judge may order provisional measures without hearing the other party, by requiring judicial evaluation of the injured party's claim before removing content, the bill ensures that a knowledgeable, experienced, and neutral decision maker come to a proper legal decision. It does not leave such actions to individual ISPs who lack the training and resources to interpret and apply laws, including copyright. However, the judge's evaluation based on one party's testimony alone would likely violate due process rights in Colombia; a judge should hear both parties before he or she evaluates the injured party's claims and determines whether the content should be removed.

Second, the bill allows a judge to require the injured party to bring evidence that they have indeed been injured. This protects against baseless claims that abuse the content takedown regime, as it actually requires the injured party substantiate their claim. Last, the bill requires the judge to not only consider the law, but also balance the injured party's claims against the rights of ISPs and users. This requirement specifically avoids infringing user's constitutional rights and the unnecessary blocking of Internet service.

D. Colombia Should Learn from the U.S.'s Successes and Mistakes in Its Laws Limiting ISP Liability

The United States also has a notice and takedown regime, as required by the FTA. This law was enacted in 1998 as a part of the Digital Millennium Copyright Act (DMCA). Under the DMCA § 512(c), ISPs are not liable for

²⁶ Providers of Internet Service, Bill, 1508-D-2013, Parliamentary Procedure 019, Senate and House of Representatives, Argentina (Mar. 27, 2013), *available at* <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1508-D-2013>.

infringing content if they take down allegedly infringing content, as the FTA states. In particular, the content owner must send a notice to the ISP, who then would take down the content and notify the alleged infringer of the takedown. Then, the infringer can send a counter-notice to the ISP arguing that it was taken down unlawfully. The content owner is then notified and has ten to fourteen business days to file suit in court; if they do not, then the ISP must put the content back on the Internet. The DMCA also provides for Internet access of repeat offenders to be disabled, like in the FTA.

The DMCA further provides many particular safe harbors for certain situations or groups. In addition to many other safe harbors, Section 512(a) eliminates liability for transitory network communications. This means that when ISPs are passively transmitting material that a user has requested (and they are not storing it), they are not liable for any potential copyright infringement of that material. Section 512(d) of the DMCA further exempts ISPs from liability when they link users to websites who may have infringing content on them, such as if the ISP is a web search engine. Additionally, the DMCA exempts non-profit educational institutions from liability for copyright infringement by faculty and staff who may post material online. Similar safe harbors must be included in future Colombian legislation to create a more balanced approach between the content owners and Internet users.

While the U.S. has created many safe harbors in its ISP law, it has faced strong criticism. Companies have abused the notice and takedown procedure to order the take down of negative reviews of their products, even though there was no copyright infringement under U.S. fair use exceptions to copyright law. (See <http://www.theverge.com/2013/3/20/4128428/gopro-fights-accusation-of-suppressing-review-with-dmca-notice>). This abuse is precisely the reason a neutral third party—namely, a judge—should determine whether a content owner actually has a valid infringement claim before content is taken down. U.S. law suffers from this lack of neutral evaluation of infringement claims, and Colombia should not make the same mistake. The FTA does not prohibit Colombia's ISP law from requiring a court order or neutral third party to evaluate claims with information from both the content owner and the alleged infringer. Thus, Colombia should take advantage of the many safe harbors the U.S. has in its own law, as well as the flexibility built into the FTA, to create an even better law for its people than the U.S.

V. RECOMMENDATIONS FOR FUTURE LEGISLATION SHOULD HONOR THE
CONTENT OF THE FTA AND RESPECT CITIZENS' RIGHTS

A. *Future ISP Laws Must Not Violate Citizens' Rights*

If a bill similar to Ley Lleras 1.0 is proposed next year, the law must be heavily debated and amended before being adopted to ensure ISPs cannot violate citizens' rights.

First, the law should require a court order before an ISP removes any content. A court, not a private company, should decide what content to strip from the public. ISPs should not be making these decisions because they are not impartial decision makers; they too have a stake in taking down content. They will err on the side of taking down too much potentially infringing content, regardless of whether it actually does infringe, in order to shield themselves from liability. Therefore, changing the law to require a court order prevents ISPs from having to monitor user activity, which protects users' rights of privacy. Allowing a court, not a private entity, to determine what content is infringing also protects due process rights of users and prevents ISPs from unnecessarily taking down legal content, which protects freedom of expression and access to information.

Second, Ley Lleras currently provides an ISP-based appeals process to restore the removed content, as well as the ability for an affected user to contest the removal in court. However, most individuals neither know about these remedies nor have the ability to actually take advantage of them without spending a great deal of time and money. The law should require that these remedies be easily accessible and understandable for all Colombians. The law should also impose penalties on content owners who make weak claims of copyright infringement in order to maliciously target certain individuals or organizations.

Finally, the additional conditions placed upon ISPs through Ley Lleras should be removed from the law so that ISPs are not encouraged to monitor or collect data on user activity. In fact, the law should discourage or prohibit ISPs from monitoring or collecting such information. The law also needs to specify that ISPs be transparent in their take-down procedure and appeals process. Each of these proposed provisions and amendments to Ley Lleras will help protect the fundamental rights of Colombian citizens and promote the continued development and ascension of Colombia.

VI. CONCLUSION

As Colombia settles into its new position of influence in the Americas, it must fulfill its international obligations while continuing to safeguard its citizens' fundamental and constitutional rights. The initial push to implement the ISP provisions of the Colombia-United States Free Trade Agreement through Ley Lleras 1.0 has failed. However, this failure now presents the Colombian Congress with a unique opportunity to implement a strong and creative ISP law that fulfills its international obligations and respects the fundamental and constitutional rights of its citizens. A survey of approaches utilized by other countries who have implemented substantially similar FTAs demonstrates that these two goals are not mutually exclusive. The recommendations in this paper are thus advantageous for three reasons. First, they are squarely within the scope of the FTA's language, allowing Colombia to fulfill its international obligations. Second, such changes dispel the fear among ISPs that unless they automatically remove allegedly infringing content upon *any* notification from a copyright owner, they will be subject to copyright liability. Finally, and most importantly, these changes respect and protect Colombians' constitutional rights to due process, privacy, freedom of expression, and information.