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Transitional Justice, Truth, and Copyright: The Case of Colombia

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TRANSITIONAL JUSTICE, TRUTH, AND COPYRIGHT: THE CASE OF COLUMBIA

*Marcela Palacio Puerta**

ABSTRACT

The impact of copyright on various aspects of human life is becoming increasingly evident. This paper explores, for the first time in the literature, the relationship between copyright and the search for peace, with a focus on the transitional justice process in Colombia. Through a documentary research methodology, the study highlights the challenges posed by copyright laws that lack certainty in the application of exceptions and limitations to the digital world. Such challenges can increase difficulty in a process that is inherently complex and holds great significance. Moreover, these laws also affect access to information, which is crucial in a context where transitioning to peace is imperative. Thus, there is a pressing need to devise a system of exceptions and limitations that can adapt to social and technological changes.

Keywords: Copyright, archives, truth, transitional justice, limitations and exceptions, technology, Colombia.

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ABSTRACT	1
INTRODUCTION.....	2
I. INTERRELATION OF COPYRIGHT WITH NEW AREAS OF SOCIAL LIFE.....	3
II. TRANSITIONAL JUSTICE PROCESS: THE NOVELTY OF THE COLOMBIAN PROCESS.....	4
III. RELATIONSHIP BETWEEN COPYRIGHT AND THE TRANSITIONAL JUSTICE PROCESS IN COLOMBIA.....	7
A. <i>The use of art as a tool to communicate, visibility, and singing of pain.....</i>	7
B. <i>The participation of different public and private actors in the construction of the truth as a participatory, democratic, diverse, and pluralistic process.....</i>	8
C. <i>Information dissemination tools.....</i>	10
IV. THE REACTION OF COLOMBIAN COPYRIGHT LAW TO THE TRANSITIONAL JUSTICE PROCESS.....	11
D. <i>Weighting of Rights.....</i>	16
V. LESSONS FROM THE TRANSITIONAL JUSTICE PROCESS AND ITS RELATION TO COPYRIGHT LAW	18
CONCLUSION	19

INTRODUCTION

Copyright has a growing relationship and impact on more and more aspects of human life because as interconnection and technological development increase, copyright reacts and begins to shape situations in relation to what can and cannot be done. This is the case of Colombian society and its quest to end the internal armed conflict. During the Colombian transitional justice process, the use of technology, especially the internet, has been fundamental to achieve the dissemination and appropriation of the truth, but this has also made it the first transitional justice process that must begin to openly consider aspects of copyright.

This paper, for the first time in the literature, discusses the relationship between copyright and transitional justice processes with a focus on the Colombian peace process. As will be described in this paper, the relationship between the search for peace and copyright refers to a large number of interrelated issues such as access to information, archives, right to truth, technology, and peace, demonstrating that copyright permeates areas of life that were previously unthinkable, and providing evidence on the need to create a copyright system, and especially exceptions and limitations, which can adapt more quickly to social needs and technological changes.

A transitional justice process is a complex process, which actually includes a diversity of processes and mechanisms, requiring different strategies, tools, and time.¹ This paper focuses mainly on two specific

¹ According to United Nations transitional justice comprises "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past violations and abuses to ensure accountability, serve justice, and achieve reconciliation" ([S/2004/616](#)). *About Transitional justice and human Rights*, United Nations

situations in the Colombian transitional justice process: a) the creation and operation of the Virtual Human Rights Archive based on Article 145 of Law 1448 of 2011; b) the mandate of the Commission for the Clarification of the Truth and especially its final legacy. Therefore, when this paper refers to the Colombian transitional justice process, it is referring specifically to these situations.

The methodology used to develop this research was mainly a documentary review, exploring the collections, terms and conditions, and documents that make up mainly the Virtual Archive of Human Rights and the Digital Platform of the Commission for the Clarification of the Truth (CCT), as well as doctrine and legislation available on issues of copyright, right to truth, archives, and transitional justice. Written questionnaires were also sent to the Historical Memory Center and the Commission for the Clarification of the Truth to answer questions about the internal handling of sources provided by third parties. Subsequently, by means of systematic analysis, relationships were drawn between the different topics.

This article begins by exploring 1) Interrelation of copyright with new areas of social life; 2) Transitional justice processes: The novelty of the Colombian process; 3) The relationship of the author's process and the transitional justice process in Colombia; 4) The reaction of Colombian copyright law to the transitional justice process; 5) Lessons of the Transitional Justice Process and its relationship with Copyright, concluding that copyright permeates more and more situations of human life, and sometimes, as in the case of transitional justice, the fact of not having a system of exceptions and limitations that provides certainty about its application to the digital world or that adapts quickly to technological and social changes, creates difficulties to a process that for all its meaning carries a great implicit complexity. Similarly, it affects access to information in a scenario where it is necessary to make the transition to peace, which shows the need to think of a system of exceptions and limitations that allows adapting to social and technological changes.

I. INTERRELATION OF COPYRIGHT WITH NEW AREAS OF SOCIAL LIFE

Copyright and technology have had a long history together. As technology increasingly permeates life in society, it is followed by copyright analyzing and reacting to the new scenarios that technology brings.

Office of the High Commissioner for Human Rights, <https://www.ohchr.org/en/transitional-justice/about-transitional-justice-and-human-rights> (last accessed, April 16, 2023).

Education, research,² access to information,³ and industries such as music,⁴ among others, are evidence of this connection, as each advance that technology allows creates the need to explore the reaction of copyright to this new reality.

Thus, with the advance of technology and its use in so many areas, copyright is beginning to impact more and more aspects of life in society that were previously unthinkable, such as the search for peace. This is the case of Colombian society and its quest to end the internal armed conflict. Within the Colombian transitional justice process, the Internet has been used for its ability to disseminate information. However, this also brings up copyright-related issues. The relationship between the search for peace and copyright refers to a large number of interrelated issues, such as access to information, archives, right to truth, technology, and peace, to show that copyright permeates areas of life that were previously unthinkable and perhaps demonstrating the need to create a system that adapts more quickly to new realities and needs.

II. TRANSITIONAL JUSTICE PROCESS: THE NOVELTY OF THE COLOMBIAN PROCESS

In the history of humanity, there have been several transitional justice processes. In the Latin American region alone, countries such as Brazil, Argentina, and Chile have experienced this type of process after living through dictatorships. On the other hand, Guatemala, El Salvador, Peru, and Colombia have experienced transitional justice processes due to internal armed conflicts.⁵ These transitional justice processes are very important for a society living in conflict since, through these processes, a society seeks to make the transition from a state of war to a state of peace. There are many tools or mechanisms that are used to allow such transition, for example, an alternative punishment for those responsible, measures aimed at preventing the repetition of new violations, and various types of reparations, among others.⁶

The search for the truth is a central aspect of transitional justice processes; sharing information about a conflict with society so that victims can know

² Carroll, M., *Copyright and the Progress of Science: Why Text and Data Mining is Lawful*, 53 U.C. Davis L. Rev. 893 (2019).

³ Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums*, (U of Melbourne Legal Studies, Research Paper No. 434, 2019).

⁴ Palacio Puerta, M., *Colombian artists and digital music platforms: some difficulties*, 33 Revista de Derecho Privado 111 (December 2017).

⁵ *Transitional Justice Manual for Latin America*, ICTJ, <https://www.ictj.org/es/publication/justicia-transicional-manual-para-america-latina> (last accessed April 16, 2023).

⁶ *About Transitional justice and human Rights*, supra note 1.

what happened allows justice to be obtained.⁷ What happened, why did it happen, who are the actors, who are the victims? These are questions of vital importance in the process of transition to peace, as they serve two objectives: a) to enable the realization of the victims' and their families' right to truth, which involves knowing the facts related to the serious violations committed, and; b) to allow the materialization of the historical memory.⁸ These objectives are crucial in achieving the right to reparation, reconciliation of society, and prevention of future occurrences.

In this way, human rights archives become vital tools for the materialization of the aforementioned rights since it is through the archives that information on the conflict can be safeguarded and accessed by the victims, and the memory of society can be preserved.⁹

Although the discussion regarding archives and copyright is common,¹⁰ the specific intersection of these topics with transitional justice processes has not yet been widely addressed or at least documented. In these processes, archives are created from various documents (including many that are protected works) that come from different sources, sometimes even from unknown authors, with the goal of providing access to the truth for the purpose of achieving reconciliation. This requires a fundamental component of communication, dissemination, and access to information. Conversely, previous peace processes have not, at least, documented copyright discussions within the transitional justice process itself, and the doctrine has not approached the issue either.¹¹

However, in the Colombian transitional justice process, the need to address the connections of this process with copyright is becoming evident.¹²

⁷ Ortega Ruiz, L.G., & García Miranda, J.P., *Truth in transitional justice*, 50 IUSTA 39-63, 43 (2019).

⁸ *Id.* at 44

⁹ Marta Lucia Giraldo-Lopera, *Archives, human rights and memory. A review of the international academic literature*, *Inter-American Journal of Library Science* 40, no. 2, (2017) 125-144.

¹⁰ The discussion on libraries and archives is an item on the agenda of the Standing Committee on Copyright and Related Rights in connection with discussions of exceptions and limitations. See: Standing Committee on Copyright and Related Rights, *Report on the regional seminars and international conference on limitations and exceptions*, SCCR/40/2, September 15, 2020, https://www.wipo.int/edocs/mdocs/copyright/es/sccr_40/sccr_40_2.pdf.

¹¹ Based on a state of the art conducted during the research for this article it was not possible to find related information.

¹² See how the Digital Platform created by the Truth Commission addresses copyright-related provisions in its terms and conditions: Truth Commission, *Terms and Conditions for Access and Use of the Contents of the Final Report Digital Platform*, <https://www.comisiondelaverdad.co/sites/default/files/descargables/2022-06/Te%CC%81rminos%20y%20condiciones%20para%20el%20acceso%20y%20uso%20de%20los%20contenidos%20de%20la%20Plataforma%20digital%20del%20Informe%20Final%20-%20VERSION%20FINAL%20%28junio%202022%29.docx.pdf> (last accessed, March 29, 2023).

For example, the final report of the Truth Commission begins with a copyright-related statement. The report opens in the following manner:

The Final Report *Hay futuro si hay verdad* is a work of public domain, which constitutes a measure of reparation of the right to individual and collective truth of the victims of the armed conflict in Colombia, and therefore should be subject to maximum disclosure. In this sense, any natural or legal person, public or private, is authorized to reproduce, communicate and distribute the Declaration and the volumes of the Final Report, as long as partial or total use is made of them in a contextualized manner, and the Truth Commission is acknowledged as the corporate author and those who appear in the corresponding credits of each volume and document in their different roles and activities. The Final Report may be downloaded from the entity's website: www.comisiondelaverdad.co

(original version in Spanish)

This quote evidences that copyright discussions took place during the elaboration of the report.

Similarly, the Colombian transitional justice process, utilizing the advances of recent years, has made technology a central tool in the process, a situation that did not occur in past processes. For instance, the Commission for the Clarification of the Truth concluded its mandate in August 2022 by delivering not only a written document, which is common in other truth commissions but also an online digital platform incorporating multimedia products and digital content. The purpose was to reach the entire community, particularly the most remote areas,¹³ providing the ability to download content in areas with limited internet access.¹⁴ Additionally, the digital platform aims to engage young people through videos, podcasts, photos, sound installations, and illustrations, among others.¹⁵ Finally, the digital platform includes the "Archive of Clarification," enabling all Colombians to gain knowledge about the events that took place during 60 years of war.¹⁶

Similarly, within the transitional justice process that began in 2005, the Victims Law, Law 1448 of 2011, was issued, in which the Historical Memory Center was the entity responsible for the creation of the Virtual Archive of Human Rights. This archive is aimed at the organization, systematization, and preservation of documentary collections related to human rights, historical memory, and armed conflict in order to allow access, appropriation,

¹³ *Id.* at 2.

¹⁴ Truth Commission, *CAP06: The Legacy*, (online video), YouTube, 2022, Minute 10:27 ss, https://www.youtube.com/watch?v=IT_ys9BSVVU (Last accessed March 29, 2023).

¹⁵ *Id.* at minute 9:13 ss.

¹⁶ Truth Commission, *Clarification Archive*, <https://archivo.comisiondelaverdad.co/que-es-el-archivo> (Last accessed March 29, 2023).

and social use.¹⁷ As its name indicates, the Virtual Human Rights Archive is accessible to the public through the Internet, precisely to take advantage of the opportunities for dissemination and access that it provides.

Therefore, the transitional justice process in Colombia presents new elements that differentiate it from the processes of the past: 1) Open manifestations related to copyright were made; 2) The internet was used to disseminate information about the conflict. These differences open the way to new discussions, such as the role of copyright in transitional justice processes, especially when the processes become much more democratic and highly diffused, as will be seen below.

III. RELATIONSHIP BETWEEN COPYRIGHT AND THE TRANSITIONAL JUSTICE PROCESS IN COLOMBIA

The importance of discussing copyright issues within the Colombian transitional justice process can be seen in different activities or parts of the process. First, in the use of art as a tool to communicate, make visible, and sing the pain.¹⁸ Second, in the participation of different public and private actors in the construction of the truth as a participatory, democratic, diverse, and plural process. Third, in the information and dissemination tools used that involve digital media such as virtual archives. As will be described below, these actions generate the interaction or reaction of copyright.

A. The use of art as a tool to communicate, visibility, and singing of pain

The Commission for the Clarification of the Truth used art within the transitional justice process for two purposes: as a tool to communicate the final report and as a tool for the communities that were victims of violence to find an instrument of expression of what happened.¹⁹

Regarding the first point, art is used to publicize the final report, seeking to touch the most sensitive aspects of society through plays, and photographic exhibitions,²⁰ among other works protected by copyright. From a copyright perspective, these are likely works commissioned²¹ by the CCT for this purpose and, therefore, owned by or licensed to the CCT for use.

¹⁷ Response to private questionnaire sent to the Centro de Memoria Histórica in development of the investigation: Centro de Memoria Histórica, Response to your official communication 202205266001789-2 CNMH, June 3, 2022.

¹⁸ Truth Commission, *CAP05: The Strategies*, (Online Video), YouTube, minute 12:57 ff <https://www.youtube.com/watch?v=LTAjS-2fg54> (Last accessed March 29, 2023).

¹⁹ *Id.* at minute. 12:57 ss.

²⁰ *Id.*

²¹ After reviewing some of the contracts signed by the Truth Commission for the production of videos or photographs in order to communicate the final report, it was revealed that these productions are commissioned Works. For example, contracts such as CO-AJ-320-2022 for the realization of the audiovisual work “Edson Velandia en Nombrar lo innombrable: Conversaciones sobre el arte y verdad”; CO-AJ-247-201 for the realization of the audiovisual work “AlcolirykoZ Nombrar lo innombrable: Conversaciones sobre el arte y verdad”; 349-2021 for the realization of visual work “Hacer visible lo invisible”.

Art was also used as a tool for communities that were victims of violence to find a way to express what had happened and to promote dialogue in the community. Similarly, art was used as a way of investigating resistance within the community, to make visible those practices that allowed a community to live within the conflict, and to generate bonds.²² For these purposes, meetings were held where the victims carried out various artistic manifestations such as community murals, paintings, and sculptures, among others.

From the perspective of copyright, it is possible to show that many times, the works made by the victim communities fall within the concept of protected works as they are paintings, drawings, sculptures, and handicrafts, among others. In relation to the author or copyright holder, it is evident that in some cases, the author was the community or collectives,²³ where it is not possible to individualize each of the authors, or they were unknown authors who continue to be the owners of the rights.²⁴ Similarly, some of these works may have the quality of unpublished works, i.e., those that have not been made known to the public.²⁵ Subsequently, some of the works or photographic reproductions of the works were incorporated into the virtual platform of the CCT as part of the Archive of Clarification. All this scenario generates the reaction of the copyright, which enters to demand the fulfillment of the corresponding legal authorizations, as will be explained below.

B. The participation of different public and private actors in the construction of the truth as a participatory, democratic, diverse, and pluralistic process

Allowing the participation of a plurality of actors within the transitional justice process is fundamental to promote a change in the perception and understanding of the victims and to finally achieving the appropriation of the process by society.²⁶ During the Colombian experience, participatory plurality has been present in the preparation of the final report by the CCT as well as in the construction of the Virtual Human Rights Archive. This plurality has been reflected, among other things, in the contributions of

²² Truth Commission, supra note 19 at minute 15:00 ss.

²³ After reviewing the collection of the Archive of Clarification, it is possible to see works such as murals that were made by a community or by collectives.

²⁴ Although it was not possible to find information on the possible signing of licenses or assignments in favor of Truth Commission, upon reviewing the metadata of the works included in the digital platform, it can be evidenced that such metadata does not recognize Truth Commission as the owner of the copyrights over the works.

²⁵ In the Archive of Clarification of the Truth Commission, one can observe works consisting of drawings on cardboard made by child victims of the conflict during the development of a workshop. It is very possible that it is an unpublished work within the definition established in Decision 351 of 1993 art. 3(G).

²⁶ *About Transitional justice and human Rights*, supra note 1.

documents authored by third parties or entities or through donations of personal archives from third parties or legal entities.

This means, and from a more copyright-oriented point of view, that both the digital platform of the final report and the Virtual Archive of Human Rights contain two types of documents: a) documents that have been created internally either by the Truth Commission or in the case of the Virtual Archive of Human Rights by the Historical Memory Center²⁷ and therefore, owned by the respective entity, b) external sources referring to documents coming from third parties who have voluntarily delivered them in different supports VHS, beta, cassettes, cd, DVD, paper and other formats such as photographs, audiovisuals, audios and written documents such as written press, reports, minutes, research projects, among others,²⁸ and therefore, at least initially, owned by a third party.

For example, the Truth Commission invited civil society, think tanks, universities, entities, and ethnic peoples to tell their own versions of the conflict and share their research as part of the process of preparing the final report.²⁹ As a result, the CCT received documents in a wide variety of formats such as photographs, audio files, audiovisual material, press articles, publications and reports, cases related to the Truth Commission, web pages, YouTube videos, microsites, blogs, among others.³⁰ Likewise, the Truth Commission, in co-authorship with other entities such as universities, created useful resources within the truth finding process.³¹

For its part, the Virtual Archive of Human Rights has been integrated with collections from the archives of civil society, public entities, and international organizations that have generously and extensively provided documents.³²

Of these documents mentioned above, although not all are relevant to copyright, a large number of sources can be categorized as protected works, such as photographs, audiovisuals, and various types of written documents, such as press articles, reports, and research projects.³³ This makes it necessary to take into account not only issues of privacy and victim protection when publishing them through the web but also copyright issues. Likewise, although some documents were specifically produced by the third-party collaborator for the Truth Commission, and the corresponding use authorizations may have been granted, not all the copyright over the documents provided by third parties were owned by the third party. This

²⁷ Centro de Memoria Histórica, *supra* note 18.

²⁸ *Id.*

²⁹ Truth Commission, *CAP03: The Clarification*, (Online Video), YouTube, minute 18:20 ss <https://www.youtube.com/watch?v=LTAjS-2fg54> (Last accessed March 29, 2023)

³⁰ Response to private questionnaire made to the Truth Commission in the course of the investigation: Truth Commission, *Respuesta a derecho de petición*. Radicado 2022-001797 of May 25, 2022, June 2022.

³¹ Truth Commission, *supra* note 13 at 4.

³² Centro de Memoria Histórica, *supra* note 18.

³³ *Id.* This category of protected work can also be evidenced when reviewing the collections of the different archives.

situation can be more easily evidenced in the case of the Virtual Archive of Human Rights, as it is integrated with third-party files, meaning that whoever delivers them is not necessarily the author or copyright holder. All these issues are relevant within copyright regulations and make it necessary to review issues of authorization for the use of the material, either through the law in the form of exceptions or limitations or through licenses, as explained below.

C. Information dissemination tools

Taking into account the need for the dissemination of information that must exist in a transitional justice process to achieve the appropriation of the process by society and make the transition to peace, the dissemination tools play a major and necessary role. However, this point is the one that generates the greatest reaction on the part of the author's right when having to massively make known to the public works owned by third parties, either by reproducing them or communicating them publicly.

In the case of the Colombian transitional justice process, the Internet was chosen as a means of dissemination to publicize the Truth Commission's final report and its digital platform³⁴ and the Virtual Archive of Human Rights.³⁵ This choice was made for several reasons, but mainly because of the Internet's capacity to reach the most remote regions, which were also the hardest hit by the violence. It also provides the possibility of downloading content for access in those parts of Colombia where there is no Internet connection.³⁶

For example, the Truth Commission, as mentioned above, leaves as part of its legacy a digital platform whose content is divided into three sections: 1) it contains the text of the final report; 2) content that reflects the experience of the CCT; 3) the Archive of Clarification with the materials used by the CCT during its investigation.³⁷ In addition to documents authored or co-authored by the Truth Commission, the platform also showcases the art created by some of the victims during meetings and documents authored by third parties. This means that from a copyright perspective, the platform contains both works whose copyright is owned by the Commission and works whose copyright is owned by third parties.³⁸

Similarly, the Virtual Archive of Human Rights comprises documents whose copyright is owned by both itself and third parties. However, certain

³⁴ To access the final report and the Truth Commission's digital platform see: <https://comisiondelaverdad.co/>.

³⁵ To access the Virtual Human Rights Archive see: https://www.archivodelosddhh.gov.co/saia_release1/ws_client_oim_a2/menu_usuario.php

³⁶ Truth Commission, *supra* note 15 at Minute 9:13 ss.

³⁷ Truth Commission, *supra* note 13 at 2-4.

³⁸ Truth Commission, *supra* note 13 at 4.

restrictions on access to the documents have been put in place, mainly to protect the rights and privacy of the victims involved.³⁹

Again, from a copyright perspective, the use of the Internet to disseminate content that includes works protected under Colombian law entails the exercise of the right of reproduction and public communication, which are exclusive rights of the author or owner.⁴⁰ Therefore, it is necessary to examine authorizations for the use of the material, either through exceptions or limitations provided by law or through licenses, as will be explained below.

IV. THE REACTION OF COLOMBIAN COPYRIGHT LAW TO THE TRANSITIONAL JUSTICE PROCESS

Having shown that within the Colombian transitional justice process, there are components that generate attention or the application of Colombian copyright, we will now analyze how copyright is applied in this scenario and how it is facilitated or complicated.

At first glance, applying copyright to a transitional justice process in Colombia may not seem complex. For instance, the Truth Commission, as copyright holder of the final report, has granted a broad license for the use of its report, deserving of maximum disclosure, which greatly facilitates mass dissemination.⁴¹ However, as previously mentioned, matters become more complicated when wide dissemination, particularly via the internet, involves third-party creations, some of which have unknown authors or are unpublished works.

Therefore, it is necessary to examine how Colombian copyright law applies to two scenarios: 1) what actions the archive that received the information can take to achieve mass dissemination of the collection through the internet, and 2) what the user who accesses the content can do to promote or allow its wider dissemination. It is important to remember that in this transitional justice scenario, dissemination and appropriation of information are fundamental issues. This is because they aim to raise awareness in

³⁹ Centro de Memoria Histórica, *supra* note 18. This category of protected work can also be evidenced when reviewing the collections of the different archives.

⁴⁰ Decision 351 of 1993, Common Provisions on Copyright and Related Rights, Article 13.

⁴¹ The Final Report “Hay futuro si hay verdad” is a work of public domain, which constitutes a measure of reparation of the right to individual and collective truth of the victims of the armed conflict in Colombia, and therefore should be subject to maximum disclosure. In this sense, any natural or legal person, public or private, is authorized to reproduce, communicate and distribute the Declaration and the volumes of the Final Report, as long as partial or total use is made of them in a contextualized manner, and the Truth Commission is acknowledged as the corporate author and those who appear in the corresponding credits of each volume and document in their different roles and activities. The Final Report may be downloaded from the entity's website: www.comisióndelaverdad.co (report there is future if there is truth).

Colombian society and prevent the repetition of conflict-related events, making them indispensable issues.⁴²

Initially, it is important to determine the permissions granted by copyright law for human rights archives established in a virtual manner with high public interest. Discussions regarding copyright exceptions for archives or research are not new. Archives have a long history of seeking an exception or limitation that allows them to preserve documents, reproduce them for research purposes, and use orphan works and tools aimed at limiting their liability, but at the same time, allow them to fulfill the public interest involved in their function.⁴³

Currently, the exceptions and limitations related to archives under Colombian regulations are primarily established for the analog world. Article 22(c) of Andean Decision 351 of 1993 established an exception and limitation in favor of libraries or archives. This exception allows libraries or archives to reproduce a work in a single copy for two specific purposes: (1) to preserve the original and replace it in case of loss or destruction, and (2) to replace the permanent holdings of another library in case of loss or destruction. However, any other type of reproduction for a different purpose is not covered by the exception.⁴⁴ Therefore, although digital means could be used to reproduce the work for preservation,⁴⁵ these digital copies cannot be distributed or communicated to the public since these rights are not covered by the exception in favor of libraries or archives. Similarly, the exception does not cover reproduction for other purposes, such as digitization for the purpose of creating a digital archive.

In 2018, Law 1915⁴⁶ attempted to accommodate technology in libraries, archives, and documentation centers by creating a new exception for them. However, this exception, established in Article 16 (c), fell short of the possibilities offered by technology. It only allows the making available of copies of lawfully acquired works in terminals installed within the facilities of libraries, archives, or documentation centers. While this exception may

⁴²Truth Commission, *supra* note 13 at 2.

⁴³ Dryden, Jean. "Exceptions to copyright: an archivist's perspective." WIPO Magazine, (August 2017) available at: https://www.wipo.int/wipo_magazine/es/2017/04/article_0003.html (last accessed, March 29, 2023).

⁴⁴ Dirección Nacional de Derechos de Autor, Concepto, Radicado 1-2017-29917 Available at : https://registroenlinea.gov.co/Intrane1/Desarrollo/CONCEPTOSWEB/arch_conceptos/1-2017-29917.pdf (last accessed, March 29, 2023).

⁴⁵ Rodríguez Moreno, s. *La era digital y las excepciones y limitaciones al derecho de autor*, Bogotá, Universidad Externado de Colombia, 2004 p. 269-270, 272. Additionally, Ley 594 de 2000, which establishes the General Law of Archives and other provisions, establishes in Article 47 paragraph the possibility of copying documents in new media.

⁴⁶ Ley 1915 de 2018 by which Law 23 is amended and other provisions on copyright and related rights are established. Diario Oficial No. 50.742. Retrieved from: <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=87419>

address issues of limited availability of highly consulted works, it does not permit the creation of digital libraries or archives accessible beyond the physical facilities of these entities.

This situation highlights that copyright law, unprepared to respond to a virtual reality, presents a complex scenario for the dissemination initiatives that have taken place within the Colombian transitional justice process. Both the Archive of Clarification, created by the Truth Commission, and the Virtual Archive of Human Rights, created by the Center for Historical Memory, must seek authorization for the use of materials related to the conflict to include them in the digital archive when they are works owned by third parties or made in collaboration with other entities. Since they cannot avail themselves of exceptions and limitations, they bear the burden of obtaining these authorizations. As previously mentioned, putting protected works on the internet entails exercising the right of making them available, as a modality of the right of public communication and reproduction, under copyright law.⁴⁷

This situation would be different if these archives were analog. The archive would have the right to give users access to the documents, except in the case of unpublished works, and provide a copy when required.⁴⁸ However, an analog archive falls short of the desired levels of dissemination required in a transitional justice process, especially at the regional level.

For example, the Truth Commission requested the signature of an authorization that states: "the contributor of information authorizes the Truth Commission to use, for the purposes of its mandate and its products, acknowledging at all times its authorship" when receiving a contribution from a third party.⁴⁹ Although this authorization may initially authorize the creation of the digital file when the contributor is the copyright holder, it also presents the problem that it assumes that the third party who is delivering the material to the Commission is the copyright holder of the work. This shifts a heavy burden to the third party who wants to contribute to the peace-building process.

Recognizing the difficulty mentioned above, i.e., the possibility of having documents within the public and virtual archives whose authorization has not been received, either because they come from a third party who is not the right holder or because the author is unknown, the Truth Commission chose to create its own system of notice and takedown. This was done even though, in Colombia, the law does not provide for a regime of limitation of liability of internet service providers. Therefore, strictly speaking, it would not function as a mechanism to limit the liability of the Truth Commission or of

⁴⁷ Decision 351 of 1993, Common Provisions on Copyright and Related Rights, Article 13.

⁴⁸ Ley 594 de 2000, which establishes the General Law of Archives and other provisions, establishes in Article 27 the authorization to access the documents and grant a copy to the user.

⁴⁹ Truth Commission, *supra* note 31. Original text in Spanish

the entity to whom the license is granted.⁵⁰ However, this situation shows that the entity has had to compensate for the shortcomings and difficulties generated by a copyright law that is not very flexible and is not suitable for the digital world.

Similarly, although Law 1915 established a regulation on orphan works⁵¹ that would eventually allow the use of works of unknown authors, it has not been sufficiently regulated by the Colombian government and therefore has no current application. Once again, the Truth Commission had to resort to principles of law, such as good faith, to try to limit any type of liability. This subject will be discussed later on.

In contrast, the Historical Memory Center and its Virtual Human Rights Archive took a different position than the Truth Commission. The Directorate of Human Rights Archives (DHRA) affirms that it is not necessary to sign a copyright license insofar as the archive is responsible for collecting documents that have been gathered in the course of the life of a public or private entity or a person.⁵² This position is true to the extent that no documents are received that fall into the category of protected works. However, as the threshold for protection under Colombian law is low, many types of documents may fall within the definition.⁵³

Now, although the legal system requires that licenses be explicit,⁵⁴ it is possible to think that copyright holders who voluntarily donated documents to the archive may not later claim their use. Despite DHRA's position, it is very likely that the archive's collection contains protected works whose

⁵⁰ Truth Commission, *supra* note 13 at 7.

⁵¹ Ley 1915 de 2018 by which Law 23 is amended and other provisions on copyright and related rights are established. Diario Oficial No. 50.742 articles 18 et seq. Retrieved from: <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=87419>

⁵² Centro de Memoria Histórica, *supra* note 18. This category of protected work can also be evidenced when reviewing the collections of the different archives.... The DADH understands collection as: Set of activities, tasks and strategies aimed at the recovery, organization, systematization and preservation of documentary collections (originals or reliable copies) related to human rights, historical memory and armed conflict, from natural or legal persons of public and private law, preserving their integrity, in order to allow their access, appropriation and social use. This is carried out by the CNMH in compliance with the provisions of Article 145 of Law 1448 of 2011, in the sense of integrating and making available to the public and private sectors the information on human rights, historical memory and the armed conflict, preserving its integrity, in order to allow access, appropriation and social use.

The DADH will make available to interested parties an archive of victimizing events that also contains a collection of testimonies corresponding to the victims and their families. It is also a procedure that is part of the component for the creation of human rights, historical memory and armed conflict archives of the DADH, whose purpose is to contribute to the comprehensive recovery of the victims and, as a documentary source to contribute to the reconstruction of the national and regional identity disrupted by the conflict".

⁵³ Decision 351 of 1993, Common Provisions on Copyright and Related Rights, article 4.

⁵⁴ See Decision 351 of 1993, Common Provisions on Copyright and Related Rights, article 31; Ley 23 de 1982, on Copyright, art. 78.

copyright is owned by third parties,⁵⁵ on which there is no authorization to use. In addition, the archive's terms and conditions are silent on copyright issues, unlike the solutions proposed by the Truth Commission. Therefore, as there is no archival exception allowing access to the material in the digital world, the Human Rights Archive's existence and purpose of disseminating and promoting the truth operate from a legal uncertainty in regards to copyright.

Now regarding the second aspect, what can users do with the contents of the archives? Here again, the exceptions and limitations do not seem to establish a useful scenario to allow the community at large to assume the role of teaching, researching, and disseminating the truth report or the human rights archives. While it is true that in terms of research, Article 37 of Law 23 of 1982 establishes the exception of private copying, which allows any interested party to reproduce a literary or scientific work by any means without profit, enabling people to download the documents from the respective virtual archives for their research,⁵⁶ it does not allow sharing or communicating them. On the other hand, the private use exception, established in Article 44 of Law 23 of 1982, allows the non-profit use of scientific, literary, and artistic works in a private domicile, further limiting the possibility of sharing to a very small number of persons located within the private domicile.

Similarly, and with respect to research, Colombian law does not explicitly address the authorization required to carry out research activities using a computational process, such as data mining.⁵⁷ Therefore, running an algorithm within the collection of human rights archives to extract knowledge from the data is not covered by exceptions and limitations. Consequently, this type of activity may infringe upon the exclusive rights of the copyright holder, leading to difficulties in obtaining the necessary authorizations.

On the other hand, the exceptions for teaching, which would eventually allow the function of teaching and disseminating the truth, are limited to formal or non-formal educational institutions but always in an academic context. Therefore, they do not allow wide communication or dissemination outside the academic environment nor the creation of distance learning courses.⁵⁸ Hence, the possibility of disseminating truth archives under the exceptions and limitations is limited to the academic world.

⁵⁵ This can be evidenced by reviewing the collections and the documents contained in each of the collections.

⁵⁶ However, there are scholars who state that the private copying exception does not apply to the digital world since it would not comply with the three-step rule.

⁵⁷ Decision Andina 351 de 1993, Ley 23 de 1982 and, Ley 1915 de 2018 are silent about limitations and exceptions in favor of data mining.

⁵⁸ Monroy, J. C., "Estudio sobre las limitaciones o excepciones al derecho de autor y los derechos conexos en beneficio de las actividades educativas y de investigación en América Latina y el Caribe", Comité Permanente de Derecho de Autor y Derechos conexos, 2009, p. 65.

All of the above limits the possibilities of wide dissemination that the documents of the Archive of the Clarification of the Truth and the Archive of Human Rights should have, such as displaying the documents in a public space, translating them into indigenous languages, disseminating them through NGO initiatives, and uploading them to other websites, among others. It is still too early to determine the real impact of copyright on the use of users since the Truth report and the Digital Platform were only delivered in June 2022,⁵⁹ and the stage of dissemination and appropriation by the community is just beginning. The needs will start to become evident soon.

In this scenario, entities had to look for other tools to allow the use and dissemination of truth-telling archives. Creative Commons played a fundamental role here. The Truth Commission used Creative Commons licenses to authorize users for content sharing. The Attribution-NonCommercial-ShareAlike 4.0 license was used for contents whose copyright was owned by the Truth Commission, allowing the general public to disseminate the sources.⁶⁰ However, as not all the copyright for the content is owned by the Truth Commission, not all content is subject to the same Creative Commons license. Thus, users must review the metadata of each source and analyze the scope of authorization for each one.⁶¹

On the other hand, the Human Rights Archive of the Historical Memory Center does not use this type of licence, leaving the use of contents to the application of copyright, which, given the uncertainties, only allows private use.

Therefore, the above scenario shows that although the Internet provides the best possibilities in terms of dissemination, for a topic that is vital to be known by the community as it is a transitional justice process, it also generates uncertainty about the copyright landscape due to the lack of certainty about the availability of exceptions and limitations in the digital environment. So far, no cases of copyright claims have been filed against the Truth Commission or the DHRA. However, this does not preclude the possibility of future claims.

A. *Weighting of Rights*

Taking into account the uncertainty and ambiguity generated by not having adequate exceptions and limitations for this type of initiative and the importance of the right to truth in transitional justice, it would be possible, in the event of any claim for infringement of copyright, to resort to the rest of the Colombian legal system in search of a weighing of rights.

⁵⁹ *La Comisión de la Verdad presenta a Colombia y al mundo su Informe Final*, Comisión de la Verdad, (junio 26 de 2022), <https://web.comisiondelaverdad.co/actualidad/noticias/la-comision-verdad-presenta-a-colombia-y-al-mundo-su-informe-final> (last accessed April 16, 2023).

⁶⁰ Truth Commission, *supra* note 13 at 5.

⁶¹ *Id.*

With the rise of the Constitutionalist movement, the principles and fundamental rights enshrined in the Colombian Constitution have gained greater importance in the legal system. Since the principles and rights are abstract, there are scenarios in which two interests protected by the legal system⁶² may collide and clash, such as the right to the truth and the right to authorship.

As a solution to cases of tension between principles or rights, judges may resort to weighing. The weighing of rights is a procedure that seeks to determine the practical balance between the needs of holders of conflicting rights in a specific case.⁶³ The results of these balancing tests are integrated into jurisprudential lines to maintain consistency in related cases.⁶⁴

Although weighing the right of access to the truth, established in international human rights treaties, against the right to intellectual property, which is fundamental in its moral dimension and has constitutional protection in its patrimonial dimension, is beyond the scope of this paper, it is important to mention that the Truth Commission has already had to resort to this type of argument to justify the use of sources within the transitional justice process. This is due in part to the uncertainty generated by the authorial regulations.

For example, the Truth Commission relies on the inalienable principle of truth,⁶⁵ as articulated in Article 1 of the Joinet Principles on the *Administration of Justice and Human Rights of Detainees*,⁶⁶ to justify its right to use protected works while recognizing the authorship of the works.⁶⁷ The principle of good faith is also invoked as justification in cases where authorship has not been recognized in the contents, with the author being encouraged to contact the Commission to make the respective rectification or withdrawal of the material.⁶⁸ No previous case law has addressed these kind of issues, so the result is uncertain. All of the above highlights the challenges

⁶² Lopez, D., *Interpretación constitucional*, Bogota, Escuela Rodrigo Lara Bonilla, 2006, <https://escuelajudicial.ramajudicial.gov.co/sites/default/files/biblioteca/m7-16.pdf>

⁶³ Sentence No T-425/95, Constitutional Court of Colombia, Eduardo Cifuentes Muñoz. Retrieved from: <https://www.corteconstitucional.gov.co/relatoria/1995/T-425-95.htm>

⁶⁴ Lopez D., Módulo de interpretación Constitucional, Episodio 12, <https://diegolopezmedina.net/comunidadj/course/view.php?id=4> (last accessed, April 16, 2023).

⁶⁵ Joinet Principle No. 1 on the inalienable right to the truth states: "Every people has the inalienable right to know the truth about past events, as well as about the circumstances and reasons which led, through the massive and systematic violation of human rights, to the perpetration of heinous crimes. The full and effective exercise of the right to the truth is essential to prevent in the future that such acts are not reproduced."

⁶⁶ Final report prepared and revised by M. Joinet pursuant to Sub-Commission resolution 1995/35, The administration of justice and the human rights of detainees: the question of impunity for perpetrators of human rights violations (civil and political). (1996). United Nations. Retrieved from: <https://digitallibrary.un.org/record/236548?ln=en>

⁶⁷ Truth Commission, *supra* note 31.

⁶⁸ Truth Commission, *supra* note 13 at 7.

and responsibilities that the entity has undertaken in fulfilling the right to truth of the Colombian people.

Although relying on the weighting of principles may seem like an available defense to copyright infringement to protect the right of truth, relying on proportionality judgments also generates difficulties, as weighting is a tool that is widely criticized. Sometimes, it becomes a rigid assessment that legal examiners may struggle to comprehend and fails to elicit the intended reflection⁶⁹. Similarly, the outcome of this test depends on a case-specific study. It is important to mention that in the current scenario of transitional justice, very different cases may arise regarding the use of sources, whether by the archives themselves or by the users. Therefore, it is not possible to predict whether they will yield the same result.

V. LESSONS FROM THE TRANSITIONAL JUSTICE PROCESS AND ITS RELATION TO COPYRIGHT LAW

The process of transitional justice in Colombia is evidence that copyright has a relation and impact on an increasing number of aspects of human life. As interconnection and technological development continue to grow, copyright is influencing various activities in social life, determining what is allowed and what is not. Therefore, it is necessary to advocate for a more balanced copyright law that allows for exceptions and limitations to adapt to the advancement of technology and social progress, just as the rights do.

In Colombia, recognizing the special connection between copyright and technological progress, copyrights are written as open clauses that allow adaptation to such changes. Similarly, the rights are unlimited to the extent that they are as numerous as the number of uses that may exist, meaning they can anticipate the future without becoming obsolete. However, the exceptions and limitations are subject to an exhaustive list that does not advance with technological development or social needs. It must be interpreted restrictively and does not admit analogical application.⁷⁰ Therefore, with each technological or social development, the copyright system is increasingly unbalanced.

In the context of transitional justice and the right to truth, the uncertainty surrounding the authorization of certain copyright-related activities has caused difficulties in the process and created uncertainty about the legality of the actions taken by entities and users. It is important to consider that many of the challenges faced during the process could have been minimized if there

⁶⁹ Lopez, *supra* note 65.

⁷⁰ Andean Court of Justice 24-IP-98: c) Limitations or exceptions are of restrictive interpretation: "... They are subject to a *clausus number*. They are specific, unlike the rights, which are recognized with generic character. Therefore, as long as the law does not expressly establish a certain limitation, the exclusive right of the author covers every possible form of use of the work, already existing at the time of the sanction of the norm or arising in the future as a consequence of technological development or new modalities in the commercialization of works and cultural products" (LIPSZYC, Delia, *ob. cit.*, p. 177)".

were an exception and limitation applicable to virtual archives or a residual exception that could function as a general clause, allowing for adaptation to social needs and the ability to weigh specific cases, such as those involving transitional justice processes. The copyright system has always been a balance of interests, as per the various underlying theories⁷¹. Therefore, having a copyright law that allows for the adaptation of rights to technological change but not having exceptions and limitations that can evolve accordingly renders the copyright law obsolete.

Similarly, although fortunately, this was not the case in Colombia, uncertainty in the application of exceptions and limitations to the digital world or an exception with an open approach may discourage initiatives such as the Virtual Archive of Human Rights or the Archive of Clarification. In the present case, due to the great public interest involved in transitioning to peace, institutions decided to use technologies despite being aware of possible difficulties that could arise and sought different alternatives to overcome them and provide more security and certainty to authors, third-party collaborators, and users. This situation implied institutional wear and tear.

Likewise, it is evident that there is a tension in the Colombian legal system between access to information and copyright, which has not yet been resolved and which it would be advisable to analyze in order to find a prompt solution.

CONCLUSION

Copyright has an increasing impact on various aspects of human life, especially as interconnection and technological development progress. As a result, copyright law shapes situations by defining what can and cannot be done. This has been evident in Colombia's transitional justice process, where copyright has created difficulties in achieving wide dissemination of the truth. It is worth noting that this is the first transitional justice process that appears to have addressed copyright issues openly.

The Internet has been utilized as a tool to disseminate information and, therefore, materialize the right to truth in the transitional justice process in Colombia. In compliance with Law 1448 of 2011, the Historical Memory Center created the Digital Archive of Human Rights, and the Commission for the Clarification of the Truth left a legacy in the form of a final report and a digital platform that contains the Archive of the Clarification. The decision to use the Internet as a means of dissemination was based on several factors, primarily its ability to reach remote regions and the option to download content for access in areas without internet connectivity.

⁷¹ Geiger, C, "The future of copyright in Europe: Striking a fair balance between protection and Access to information", Report for the Committee on Culture, Science, and Education-Parliamentary Assembly, Council of Europe (2009) p.2 ss, available at https://www.unistra.fr/uploads/media/Report_Future_of_Copyright.pdf.

However, given that the archives were built in a participatory, democratic, and plural manner and, in turn, contain the artistic productions of the victims who sing of their pain, the documents contained in the archives, from the point of view of copyright, are owned both by the entities and third parties and sometimes even by unknown authors.

Upon review of exceptions and limitations to copyright, archives are not authorized by law to create digital collections that can be open to public consultation. This situation makes the transitional justice process very difficult in relation to the truth. For example, in the case of the Truth Commission, it has had to seek licenses and create its own tools to enable it to establish a defense in the event of a claim, such as its own notice and take down system for downloading content and resorting to general principles of law such as good faith. Similarly, there are few legal authorizations in the form of exceptions and limitations that the community can use and disseminate the sources of the archives. This is also a matter in development since the report was only recently delivered, and the work of dissemination and appropriation is just beginning.

The aforementioned points demonstrate that as the Internet and technologies become more intertwined with various aspects of human life, such as the pursuit of peace, it is necessary for copyright law to adapt so that not only rights apply to the digital world but also its exceptions and limitations. Otherwise, the legislation will become obsolete. In the field of transitional justice, the absence of exceptions and limitations that cater to the new reality has generated and will continue to generate greater difficulties within a process that, due to its significance, carries great complexity. Furthermore, it impacts access to information, which is vital in a scenario where it is necessary to transition to peace.