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# Intellectual Property Reform in Colombia: The Colombian Legislature Must Consider Local and International Conventions and Pass Balanced Copyright Legislation that Preserves the Fundamental Rights of All Colombians

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INTELLECTUAL PROPERTY REFORM IN  
COLOMBIA: THE COLOMBIAN LEGISLATURE  
MUST CONSIDER LOCAL AND  
INTERNATIONAL CONVENTIONS AND PASS  
BALANCED COPYRIGHT LEGISLATION THAT  
PRESERVES THE FUNDAMENTAL RIGHTS OF  
ALL COLOMBIANS

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## I. INTRODUCTION

In January 2013, the Colombian Constitutional Court struck down on procedural grounds the controversial copyright law known as Ley Lleras 2.0, which presented Colombia with a tremendous new opportunity to draft balanced copyright legislation that meets the needs of its citizens.

Ley Lleras 2.0 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 a Free Trade Agreement (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 Colombia-U.S. 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 required Colombia to provide creators of copyrighted works with control over their works in a way that was consistent with international intellectual property regimes; however, the agreement did not provide exceptions for incidental copies, educational use, satire, or commentary. Because the Colombian legislature's initial attempt to implement the FTA only maintained the base requirements set out in the agreement, it did not take advantage of the flexibility available in implementing the agreement that would have better promoted the economic and constitutional rights of the Colombian people.

In the face of harsh resistance, the Colombian legislature attempted to pass sweeping legislation regarding Internet usage and copyright protections, which would have adversely affected all Colombians. The highly restrictive Internet Service Provider (ISP) bill of 2011, known as Ley Lleras, would have greatly increased potential ISP liability and forced service providers to police Colombian's Internet use.<sup>2</sup> When that bill failed to pass, the Legislature rushed through Ley Lleras 2.0 in April of 2012, which drastically altered existing copyright laws. Ley Lleras 2.0 imposed harsh penalties for violations, even unintentional ones, and the law failed to include any significant limitations or exceptions. Despite objections from Colombian civil society, the Legislature used questionable procedures to rush the passing of Ley Lleras 2.0 in an unheard of 18 days. This hurried and insulated tactic ultimately led to the law's downfall in the Constitutional Court.

Colombian Civil Society, members of the Colombian legislature, legal scholars, and international treaties and conventions all call for a more balanced application of the provisions in the FTA. Now, in the aftermath of the Colombian Court's decision, the Colombian legislature must draft new legislation that respects and protects the freedom of expression and privacy rights of all Colombians - not just the economic rights of a minority.

## II. COLOMBIAN LAWMAKERS MUST INVOLVE COLOMBIAN CIVIL SOCIETY IN DRAFTING NEW COPYRIGHT LEGISLATION

Ley Lleras 2.0 was loudly rejected by several areas of Colombian

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<sup>2</sup> See Andrea Sánchez, *Colombia's Bill to deter copyright infringement on the Internet must undergo public scrutiny*, REDPATODOS (Apr. 6, 2011, 4:03 PM),

society and even some members of the Colombian legislature because the Colombian legislature ignored the input of members of Colombian society when drafting the law. Colombians felt violated because the law severely restricted their freedom of expression, hindered their access to information, and infringed upon their right to privacy. As the Colombian government moves forward in drafting new legislation, it *must* take notice of the criticism and suggestions of members of Colombian society.

The ultimate downfall of Ley Lleras 2.0 resulted from the complete lack of meaningful debate and public comment. When initially presented to the public, the Colombian legislature promoted Ley Lleras 2.0 as merely implementing the copyright law required by the FTA. Yet in reality, the law went much further than what was necessary. Ley Lleras 2.0 is significantly stricter than U.S. copyright law, which must also comply with the FTA, but Ley Lleras 2.0 offers fewer limitations and exceptions than U.S. copyright law. The hurried passage of Ley Lleras 2.0 combined with the legislature's ignoring of Colombian society input resulted in a product that lacks exceptions necessary to guarantee Colombian's basic human rights, such as access to information.

Members of the Colombian government and various interest groups criticized the swift passage of the copyright law as a ploy to appease the United States in advance of a visit by President Barack Obama.<sup>3</sup> Senator Carlos Alberto Baena, a member of the political movement MIRA, voiced his concern that copyright legislation must be flexible enough to allow states to meet the education and communication demands of modern society.<sup>4</sup> Senator Jorge Robledo voiced his concerns by challenging the law in the Colombian Constitutional Court in May 2012.<sup>5</sup> Robledo argued that the strict protections of copyrighted materials would hinder the ability of Colombian students to effectively use the Internet for educational purposes. Further, the law would disproportionately increase the rights of corporate copyright owners and media outlets at the expense of the impoverished people, which would diminish access to information among Colombia's large impoverished community.<sup>6</sup> Though the Constitutional Court did not

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<http://karisma.org.co/?p=667>.

<sup>3</sup> See Sofia Castillo, *Opposing Views on the Constitutionality of Colombian Ley Lleras 2.0*, IPBRIEF.NET (Sep. 26, 2012, 11:26PM), <http://www.ipbrief.net/2012/09/26/opposing-views-on-the-constitutionality-of-colombian-ley-lleras-2-0/>.

<sup>4</sup> <http://movimientomira.com/noticias/sala-de-prensa/boletines-institucionales/1324-mira-voto-en-contra-de-articulos-13-y-10-de-qley-lleras-2q>

<sup>5</sup> See Castillo *supra* note 3.

<sup>6</sup> Jorge Enrique Robledo, Public Action of Unconstitutionality Against Law 1520 of 2012, Complaint to the Constitutional Court, at \*19. The complaint also claimed violation of Articles 142, 153, and 157, which deal with the manner in which the legislature debates and passes a law. *Id.* at \*14. There are many who argue the copyright law was rushed

ultimately decide on the merits of the law—striking down the law on the grounds that it passed through the wrong committees in both the Colombian House of Representatives and the Senate—Robledo’s legitimate concerns must be addressed in future legislation.

Many groups protested against Ley Lleras 2.0 because the interests threatened by the law reach far beyond just internet users. Library and reader groups and advocates for the blind and deaf have all joined the advocacy effort. RedPaTodos, a collaborative community of lawyers, artists, designers and programmers in Colombia, created an online forum to discuss copyright issues in their country.<sup>7</sup> RedPaTodos strives to work with the Colombian legislature to create *balanced* copyright laws that allow for the fair use of copyright material. In light of the recent Constitutional Court decision, Colombian civil society’s reaction to the poorly implemented and draconian Ley Lleras 2.0 sends a clear message that the Legislature cannot so easily interfere with Colombian’s fundamental rights to freedom of expression and access to information.

### III. FUTURE COPYRIGHT REFORM MUST PROTECT FREEDOM OF EXPRESSION

The Colombian government’s first attempt at implementing the FTA resulted in a law that conflicted with the strong protection of the freedom of expression provided for by the Colombian Constitution, the American Convention, and international treaties. Accordingly, as the Colombian legislature revisits the legislation, it must amend or replace the previous legislation to allow for rights-protecting limitations and exceptions.

#### A. *The Colombian Constitution Demands Strong Protection of Free Expression*

Freedom of expression is a fundamental Colombian right. Article 20 of the Colombian Constitution of 1991 guarantees that every individual has the “freedom to express and diffuse his/her thoughts and opinions,”<sup>8</sup> and the remainder of the Constitution includes no less than ten additional articles protecting various forms of freedom of expression. The right to express one’s opinions is not just protected, but rather, it is encouraged by the

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through the legislature and not afforded necessary debate and review.

<sup>7</sup> See What do we want, REDPATODOS (last visited Nov. 26, 2012), <http://redpatodos.co/blog/que-queremos/>.

<sup>8</sup> Text of Article 20 in spanish: “Se garantiza a toda persona la libertad de expresar y difundir su pensamiento y opiniones, la de informar y recibir información veraz e imparcial, y la de fundar medios masivos de comunicación.” Artículo 20, Constitución Política de la República de Colombia de 1991.

Constitution. Further, the Colombian Constitutional Court is a strong defender of the freedom of expression, upholding and enforcing this right of the people, and stressing the importance of strong protection for this right in many decisions.

According to the Court, the freedom of expression is a “core principle[] of democracy.” Its 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.”<sup>9</sup> As a result, Colombian laws that restrict the freedom of expression are held to strict scrutiny, which means that the court must presume “any kind of measure controlling the content of opinions or expressions is a form of unconstitutional censorship.” This presumption “prevails over other interests.”<sup>10</sup>

*B. The Legislature Must Not Ignore Inter-American and International Conventions*

The Inter-American Commission on Human Rights has noted gains in Colombia’s protection of freedom of expression;<sup>11</sup> however, constant vigilance is still required. Human rights advocates must be particularly attentive to efforts to regulate digital communication, because these regulations can suppress the freedom of expression.<sup>12</sup> Article 13 of the American Convention on Human Rights prohibits indirect suppression of freedom of expression, and the open-ended nature of the Convention<sup>13</sup> suggests that restrictive copyright laws, such as Ley Lleras 2.0, must be treated with caution.

The American Convention only permits restrictions to free expression after certain conditions have been met. First, the restrictions must serve compelling objectives and be present in clear and precise laws, blocking legislation that grants too much discretion to the government. Second, the restrictions to free expression must be necessary, appropriate, and strictly

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<sup>9</sup> Manuel Jose Cepeda Espinosa, T-391 of 2007 (Colombian Constitutional Court, May 22, 2007) (translation provided by the Court), <http://english.corteconstitucional.gov.co/sentences/T-391-2007.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> See Inter-American Commission on Human Rights, Annual Report (Chapter 4), at 9-11 (2011).

<sup>12</sup> THE AMERICAN CONVENTION ON HUMAN RIGHTS, art. XIII, § 3 (“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.”).

<sup>13</sup> *Rios v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R.

proportionate to the state's objectives.

Ley Lleras 2.0 violated these conditions of the American Convention. First, the law was overly broad because it lacked fundamental and widely accepted limitations and exceptions,<sup>14</sup> granting the government too much discretion. All international treaties protecting authors' rights balance such rights against the public need to use those works. The goal is to provide protection for authors with a safety valve for users. Ley Lleras 2.0 failed to provide such safety valves.

Further, Ley Lleras 2.0 disproportionately protected the legitimate interests of copyright owners. The American Convention requires that a law restricting human rights be the least restrictive and most proportionate means of achieving an objective. Despite recognizing the irreplaceable value of education and a free press in several articles of the Colombian Constitution, the legislature turned a blind eye to these core principles by omitting necessary limitations and exceptions. In order to create a less restrictive and more proportionate law, the Colombian legislature must now heed the Inter-American Commission's call and must incorporate limitations and exceptions into a new copyright law that protects freedom of expression.

### *C. Excessive Penalties Further Compound the Silencing of Expression*

Fear of reprisal serves as a powerful deterrent to free expression. Existing and previously proposed copyright legislation imposes overly harsh criminal sanctions of potential copyright misuse, yet provides overly vague guidance as to appropriate activity. Under Ley Lleras 2.0, this confusion was compounded by the fact that even an accidental mistake could lead to debilitating fines or prison time. While the FTA and international treaties only require countries to punish "willful" copying, the previously proposed law could have punished any person who copies *anything* without prior permission from the author.<sup>15</sup> Such penalties go far beyond what was envisioned in the FTA and what is necessary under international treaties, and these harsh sanctions even surpass those enforced

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(ser. C) No. 194 (Jan. 28, 2009).

<sup>14</sup> WIPO, study on Limitations and Exceptions on copyright and Related Rights in the Digital Environment, April 5, 2003 (9th Sess), SCCR/9/7 at 3 citing *Actes de la Conférence internationale pour la protection des droits d'auteur réunie à Berne du 8 au 19 septembre 1884*, pp. 67 (closing speech to the 1884 Conference) (Negotiators of the first international treaty on copyright in 1884 recognized that "limits to absolute protection are rightly set by the public interest.").

<sup>15</sup> Colombian Copyright Law, new articles 16–18.



by the United States in compliance with the FTA.<sup>16</sup> Furthermore, unlike international conventions, Ley Lleras 2.0 would have targeted both commercial and personal unauthorized use, a deviation that must not be repeated.<sup>17</sup> While it remains to be seen if the Colombian government will choose to impose the harsh penalties, the mere threat of such criminal sanction has convinced many Colombians not to engage in potentially prohibited activity.

If the Colombian legislature chooses to maintain these harsh sanctions in future legislation, its effect on the people of Colombia will be startling. The possibility of being arrested and potentially being sent to jail or forced to pay a ruinous fine will be enough for any member of Colombian society to be wary about engaging in expressive conduct that might fall under the wrath of the copyright law. Ley Lleras 2.0 created the statutory threat that the Colombian government could arrest, try, and jail anyone for any violation, including a student for a single act of copying done for a school project. Such a result contradicts international treaty requirements, far exceeds any requirements imposed on Colombia by the FTA, and blatantly chills free speech.

This chilling effect becomes exacerbated by provisions in Ley Lleras 2.0 that would have punished even unintentional copyright infringement. No person wants to defend himself against criminal charges in court. Attorneys or rights holders seeking to make easy money act as trolls, threatening criminal charges unless a user pays a fee. Rather than facing the potential of financial ruin or years in prison, a cautious minded Colombian may pay such unnecessary fees or, even worse, choose not to engage in expressive activity at all. Ultimately, a student may create a less involved project, weakening her educational experience; a journalist may choose to stay quiet, muzzling the press; and an independent blogger, questioning the actions of his government, may decide not to become involved with his society.

While some in the legislature suggest that such harsh deterrence is necessary to protect the rights of defenseless copyright holders from money hungry pirates, the overly broad and vague nature of previously proposed legislation casts an impermissibly wide net, threatening to punish even accidental or socially justified uses by students, professors, professional and amateur journalists, or even a user who accidentally downloads the wrong material. These people are not pirates. These people are the citizens who advance and strengthen Colombian society, and their activities should never

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<sup>16</sup> See TRIPS Art 61; FTA Arts. 16.7(4)(a), (5)(a), 16.8(1)(b), 16.11(26).

<sup>17</sup> *Id.*

face revilement by their Government. The broad and vague nature of Ley Lleras 2.0, combined with the already existing harsh criminal penalties, amounted to an impermissible restriction on freedom of expression, a mistake the legislature must not repeat. New copyright legislation must include protections for freedom of expression and more reasonable criminal sanctions that deter criminal activity without creating unnecessary fear for the average, innocent user.

#### IV. COPYRIGHT LAW MUST BALANCE AUTHOR'S RIGHTS WITH THE FUNDAMENTAL RIGHT OF ACCESS TO INFORMATION

Over the past few decades, Colombia made great strides in building a strong middle class. Education plays a substantial role in providing people with the skills needed to enter the workplace and climb into the middle class. The Colombian constitution mandates that all children receive an education, and the government is responsible for providing for a public education. However, great disparities remain between the education available to the wealthy and to the poor, and between the urban and the rural. Superior opportunities have long been recognized as a powerful barrier to upward economic mobility, and the previously proposed copyright law would have suppressed poor Colombian children and reinforced the barriers against upward mobility for future generations of Colombians.

##### *A. The Colombian Constitution Exalts the Freedom of Access to Information*

Access to information is absolutely necessary to achieve the goals outlined in the Colombian Constitution and expressed by the Constitutional Court. The drafters of the Colombian Constitution and the members of the Constitutional Court understand that an informed public is necessary for a stable and free society. Article 74 of the Colombian Constitution grants the right of access to public documents. The Constitutional Court interpreted Article 74 as a core right of petition.<sup>18</sup> Further, the Court noted, “[t]oday much of the economic activity and the exercise of power is based on the intangible resource of information.”<sup>19</sup> The Court concluded that access to information is an “indispensable prerequisite” to the exercise of human rights and a free society. By not allowing for exceptions for education, press, and persons with disabilities the copyright law jeopardized the ability

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<sup>18</sup> Luciano Riapira Ardila, T-473 (Colombian Constitutional Court, July 14, 1992).

of individuals to access information.

*B. International Trends Advance the Free Access of Information*

Article 19 of the Universal Declaration of Human Rights (UDHR) recognizes the right “to seek, receive, and impart information and ideas.”<sup>20</sup> Most developed countries recognize a right to access information. 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 their constitutions or in separate legislation.<sup>21</sup> In 2011, the United Nations explicitly recognized the right to access information through the Internet as protected by article 19 of the UDHR.<sup>22</sup>

Several international instruments and initiatives are working to promote fair and free access to information. Target 8f of the UN’s Millennium Development Goals implores 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, seek to forward this goal by helping disadvantaged children access computers and the internet through distribution of affordable laptops.<sup>23</sup>

The UN World Intellectual Property Organization, or WIPO, has also recognized the need for individual countries to facilitate access to printed information by citizens with visual impairment. This Summer, various government delegations will meet in Marrakesh, Morocco, at the Diplomatic Conference to conclude a Treaty to facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities. The express goal is to create a treaty, binding member states to include limitations and exceptions for persons with disabilities in future copyright legislation. The visually and hearing impaired want nothing more than equal access, and existing copyright laws in Colombia, and around the world, restrict their access to usable material. These barriers effectively deny them access to information and block them from engaging in their

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<sup>19</sup> *Id.*

<sup>20</sup> The Universal Declaration of Human Rights, art. XVIII.

<sup>21</sup> See [http://www.access-info.org/documents/Access\\_Docs/Advancing/EU/1049-2001.pdf](http://www.access-info.org/documents/Access_Docs/Advancing/EU/1049-2001.pdf)

<sup>22</sup> 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.

<sup>23</sup> *Id.* at 17–18.

own culture. This treaty would take a step towards lowering those barriers and increasing access to information and participation in culture.

Other countries have taken their own 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 the population predominantly does not own personal computers.<sup>24</sup>

### *C. Previous Copyright Legislation Has Ignored Advances in Modern Information Technology*

Over the past decades, the world has adopted new means of accessing information. In the past, the primary way to read a book or watch a movie required one to obtain a hard copy of the material. Now, many people access information over the Internet, and this has changed the way many countries view infringement as it relates to electronic media. Online streaming of movies or music requires a personal computer to automatically create many transient copies of short pieces of online material. These short copies are stored on a computer's hard drive for mere seconds, yet, under the previously rejected copyright act, these short-lived copies would constitute infringement. That legislation blatantly ignored modern advances in technology. Future legislation must take into account the current specifics of technology and clearly state that transient temporary storage of electronic information does not constitute infringement.

As with several other sections, the previous copyright law contained a provision related to temporary electronic storage that was nearly identical to the language of the FTA. Article 12 stated that the rights holder has the "exclusive right to authorize or prohibit . . . any form of reproduction of the work, *permanent or temporary*, by any means of procedure *including temporary electronic storage*." (Emphasis added). This tracked Article 16.5(2) of the FTA nearly word-for-word. However, straight copying of this provision alone neglects the fact that the U.S., the other signing party to the FTA, has additional provisions in its copyright act, which allow for "transient" storage of electronic material.

The distinction comes in the way that the parties define "fixation," a necessary step in electronic storage. Again, the Colombian law (Article 2) mimicked the FTA (Article 16.6(8)(c)) and defined "fixation" as the embodiment or incorporation of signs or sounds in a form "from which they

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<sup>24</sup> *Id.* at 18.

can be perceived, reproduced, or communicated through a device.” However, the U.S. copyright act provides a more narrowed definition of fixation that allows for transient electronic storage, adapted to modern technological requirements. Section 101 provides that a work is fixed only when it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration.*” (Emphasis added). This additional limitation is crucial for allowing for internet users to safely and freely stream content from the internet. If the U.S. is a party to the FTA, then the Colombian government should presume that the terms of the FTA would allow future copyright legislation to contain similar language related to transient electronic storage.

Technology is advancing at an astounding rate. The Colombian legislature initially passed copyright reform legislation that would have neglected the last 15 years of innovation. Copyright law is inextricably linked to modern technology, from online books to streaming video and audio content. The Colombian legislature has an incredible opportunity to create broad and forward thinking copyright legislation that fully considers modern technology and remains flexible enough to allow for future innovations. At a minimum, the next copyright act must include language that allows for transient temporary electronic storage.

#### *D. Future Copyright Legislation Must Facilitate Access to Information and Promote Social and Economic Development*

Allowing greater access to information will help grow the middle class and reduce societal stratification in Colombia. Restrictive copyright laws, such as Ley Lleras 2.0, create barriers to people trying to climb out of poverty, further expanding the gap between the poor and the wealthy. A strong, educated, and well-informed middle class is fundamental to a free society and a strong economy. Therefore, the Colombian legislature must draft copyright legislation that promotes access to information for all of Colombia’s citizens, not just for those who can afford access.

Ley Lleras 2.0 provided several opportunities for wealthy individuals to access information that would otherwise not be available for the poor. For example, it is more likely the wealthy members of Colombian society would be more able to shoulder the advanced legal representation necessary to counter an infringement action, representation likely less available to those who cannot afford it. This could result in a disproportionate number of impoverished people being jailed while more affluent defendants walk free.

Further, the harsh restrictions on the use of copyrighted materials would force users to enter into license agreements with content owners, agreements that would likely be too expensive for many Colombians and available only to the country's elite. This could have dire consequences for the Colombian education system. Private schools that serve wealthy families could pay for access to copyrighted materials, providing wealthy students with access to the most current materials and information, while schools serving less wealthy students would be unable to afford licensing fees and are thus forced to either forgo access to this information or engage in infringing activity. If the school forgoes access, the wealthy student then stands to potentially receive a better and more complete education, giving the wealthy student an advantage over the poor student. Such a system prevents upward mobility and solidifies the barrier between the rich and the poor. Alternatively, if the school decides to take a risk and engage in unlawful access by infringing on the material, it opens itself up to criminal sanctions under the current and previously proposed copyright laws. The school essentially chooses to "pirate" the material. Colombia as a country would not benefit from a copyright regime that leads to the country's education system being built on piracy. There must be means for educational and research institutions to gain lawful access to vital information.

The education disparity created by the controversial copyright legislation directly conflicts with Colombia's goal to reduce its high poverty level. Under the previously proposed legislation, a wealthy individual is far less affected by restricted access than an impoverished individual. A wealthy person will have the money to consult an expert attorney either ahead of potentially infringing activity or in the event that he is pulled into court. A poor individual would have access to legal representation from law students; however, they would lack the ability to obtain representation from seasoned experts in the field, and may need to forgo risky activity all together in an effort to avoid being forced into court.

While some genuine infringement will be stopped, far more innocent and beneficial activity will be avoided by those who can't afford advice simply out of fear of reprisal. This disparity widens the gap and increases the likelihood the rich stay rich and the poor stay poor.

#### V. COLOMBIA MUST ENACT NEW COPYRIGHT LEGISLATION THAT ALLOWS FOR LIMITATIONS AND EXCEPTIONS

Limitations and exceptions comprise a necessary safety valve in copyright legislation. These key provisions balance the rights of content

owners with the needs of the users. Their importance is evidenced by the breadth of developed countries that include various limitations and exceptions in their copyright laws. In South America, Brazil, like Colombia, places great weight on authors' rights. However, Brazil balances these rights with those of the users by including in their copyright law exceptions for journalism, the visually impaired, quotation, education, and parody.<sup>25</sup> Currently, the Brazilian legislature is reforming the copyright act, and among the potential additions is the inclusion of a flexible standard similar to fair use.

France similarly provides for exceptions for journalism, the disabled, education, parody, archives, libraries, and some personal use. Further, French law allows for some additional flexibility by providing an open exception for uses that are comparable to those that are listed, so long as 1) the requirements of the corresponding limitation are also met, 2) the challenged use does not interfere with the normal exploitation of the work, and 3) the use does not unreasonably prejudice the legitimate interests of the author or owner of the work.<sup>26</sup>

Australia also provides a list of several exceptions, which includes those for journalism, research or study, criticism or review, and parody.<sup>27</sup> In 2006, the legislature created a flexible exception, based on the three-step test of the Berne Convention, for libraries, archives, educational institutions, and persons with disabilities. Under this amendment, it is not infringement if 1) the use does not fall under another exception; 2) the use is by a library, archive, educational institution, or a person with disabilities; 3) the use is for non-commercial purposes; 4) the use does not conflict with the normal exploitation of the work; 5) the use does not unreasonably prejudice the legitimate interests of the copyright owner; and 6) the use qualifies as a special case.<sup>28</sup>

Israel provides for a copyright law that has a hybrid of enumerated limitations and exceptions and fair use. Section 19(a) of the 2007 Copyright Law allows for the "fair use" of works for private study, education, journalism, and quotation. Section 19(b) then provides for greater flexibility by allowing use only after considering "1) the purpose and character of the use; 2) the character of the work used; 3) the scope of the use, quantitatively and qualitatively, in relation to the work as a whole;

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<sup>25</sup> Brazil's Copyright Act, art. 46.

<sup>26</sup> Art. L122-5.

<sup>27</sup> Copyright Act § 200AB (1968).

<sup>28</sup> *Id.*; see Laura Simes, A User's Guide to the Flexible Dealings Provision for Libraries, Educational Institutions and Cultural Institutions, Australian Libraries Copyright Committee (2008).

[and] 4) the impact of the use on the value of the work and its potential market.” The law grants the Minister of Justice the authority to set regulations defining what will be considered a fair use.

Finally, the United States, a party to the FTA that Colombia is trying to implement, includes codified exceptions for libraries, archives, education, and for the visually and hearing impaired. Additionally, the U.S. has codified and enforced a flexible standard of Fair Use, which allows an exception for parody. All these limitations and exceptions to the U.S. copyright laws were in place at the time the FTA was signed, and therefore Colombia should presume that the U.S. intended and understood that the FTA would allow for these limitations and exceptions. Accordingly, Colombia must take advantage of this opportunity and avail its citizens of these rights that have been recognized and granted by developed countries around the world.

*A. The Colombian Legislature Should Consider and Expand upon Current Legislation that Calls for Limitations and Exceptions*

Currently, RedPaTodos supports and advocates the passage of legislation that would allow for temporary electronic storage of copyrighted material and exceptions for people with disabilities, libraries, parody, and for education and research purposes. The legislature was presented with a bill on July 20, 2012, that would have inserted several of these exceptions and limitations into the recently struck down Ley Lleras 2.0 copyright law,<sup>29</sup> yet the legislation has neither been adopted nor dismissed. RedPaTodos considers this bill to be too narrow. Its members continue to encourage the legislature to adopt more broad and balanced copyright legislation that incorporates limitations and exceptions, such as for parody, and allows for temporary or transient copies, which are fundamentally necessary under modern internet technology.

While this proposed legislation can be seen as a step in the right direction, RedPaTodos is not alone in calling for additional limitations and exceptions. Various library and readers groups have expressed concern that any future amendments should protect both public and nonprofit libraries in addition to the Colombians who use their services.<sup>30</sup>

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<sup>29</sup> See Bill 001, 2012 Camera.

<sup>30</sup> See, e.g., *Excepciones y limitaciones al derecho de autor en América Latina: entorno digital, activismo y participación ciudadana*, Infotecarios (Nov. 26, 2012, 9:00AM), <http://www.infotecarios.com/mauriciofinogarzon/excepciones-y-limitaciones-al-derecho-de-autor-en-america-latina-entorno-digital-> (pointing to Margarita Lisowska, of Universidad del Rosario, who has called on future legislation to take into account the important role of the open access movement).



The blind and deaf communities of Colombia also call for exceptions that allow for the more efficient translation of materials, free from overly repressive conditions. Some members of these communities have called for a commercial trade reciprocity agreement for the blind and deaf.<sup>31</sup> RedPaTodos has echoed the desires of the blind community, calling for fewer restrictions on how translations are made and by whom. Previous legislation required that translations be created by a “trusted third party,” which RedPaTodos and the blind community criticize as discriminatory and an imposition of greater costs and less efficiency. Such barriers decrease the blind community’s, and other like groups’, access to information and suppresses the right of expression, fundamental rights in Colombia. RedPaTodos calls for open debate and discussion as to how to best proceed in this matter.

Individual members of the group RedPaTodos have also expressed concern that the proposed limitations and exceptions legislation is again proceeding without input from civil society.<sup>32</sup> In a letter sent in August 2012 to the Colombian House of Representatives, the group addressed several specific concerns. The group noted that the current law, Ley Lleras 2.0, failed by not providing a limitation to the definition of a reproduction to something “sufficiently permanent or stable . . . for a period of more than transitory duration.” The group accurately points out that the current law, absent such a limitation, is not practical in our digital world where Internet use frequently requires the temporary storage of data.

RedPaTodos further argues that the current proposed exceptions and limitations legislation does not adequately provide the necessary limitations on the definition of a reproduction, but rather attempts to tie the matter to whether the temporary use is related to profit. Instead, RedPaTodos recommends that an exception be created allowing temporary, transient, or incidental reproduction of information that is essential and integral to the technological process associated with Internet use.

## VI. CONCLUSION

As Colombia settles into its new position of influence in the Americas, it must choose to stand for expression and access to information. Recognizing that the shortsighted actions of the government will bind the people of Colombia if legislators are allowed to progress unopposed, the

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<sup>31</sup> *Id.*

<sup>32</sup> *Comentarios jurídicos al proyecto de ley 001 de 2012*, RedPaTodos (Aug. 22, 2012), <http://redpatodos.co/blog/comentarios-juridicos-al-proyecto-de-ley-001-de-2012/>.

Constitutional Court of Colombia struck down Ley Lleras 2.0. Likewise, civil society in Colombia has pushed against such overly repressive legislation, with many of the most vocal groups being those already concerned with copyright. The recent actions of the legislature bundle teachers and Internet users with pirates—an unfair association, which will stifle society. This issue must be seen as more than a copyright issue; it is a human rights issue that affects rights guaranteed by the Colombian Constitution and the Inter-American System and which are necessary for a democracy to function properly. As it reexamines and revisits its mistakes with Ley Lleras 2.0, the Colombian legislature must keep these considerations in mind for the good of all of its citizens.