

ALAI BRUSSELS 2014

Moral rights in the 21st century

The changing role of the moral rights in an era of information overload

QUESTIONNAIRE

COLOMBIA

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1. Please describe the origin, the objectives and the underlying philosophy of the moral rights in your country.

The first regulation issued in Colombia conferring an author the right over the paternity and respect of the work integrity is enshrined under article 49 of Law 86 of 1946. In this same law, the violation of paternity or integrity right is deemed as a crime, although it is worth pointing out that the regulation solely accounted the conduct in connection with unpublished works (Art. 96 (1) Law 86 of 1946.).

It is worth highlighting a preceding provision, such as Law 32 of 1886, wherein the protection of works paternity and integrity principle was conceived, (but not provided for as a copyright), directing that re-prints of public domain works and translation of foreign works in a language different than Spanish shall include publishing the name of a known author.

The underlying philosophy of this legislation is the dual nature of copyrights, which may be seen in the same provision under reference (Article 49 of Law 86 of 1946), since it establishes that the transfer of the full exercise of the right only conveys the entitlement of enjoyment and disposal, but the author remains with the inalienable paternity and integrity rights.

A broader and more robust arrangement will occur later with Article 30 of Law 23 of 1982, which furthermore confers the right of keeping the work unpublished or disclosing it, as well as the right of withdrawal and repentance.

2. What do the moral rights consist of in your country:

- right of disclosure (divulgation)
- right to claim authorship (paternity right)
- right to respect and integrity
- right to repent or to withdraw
- other elements: ...?

Right of disclosure (divulgation):

The National Directorate of Copyrights (institutional body in charge of designing, directing, administering and executing governmental policies regarding copyrights and related rights in Colombia), through the opinion lodged with No.:2-2014-16301 dated: 25/03/2014, called such

right as “publication right” (In Spanish: “*derecho de ineditud*”) and defining it as the “*author’s entitlement to disclose or not its work to the public*”.

On its part, the Chamber of Service and Consultation of the Council of State, through Opinion dated October 28, 1992, File 465 (deciding a controversy arising from the accessibility to unpublished works registered with the National Copyrights Registry, whose database is open to public consultation), providing:

“the author’s wish to keep a work unpublished or anonymous implies the impossibility of advertising such work while such decision is maintained. This, the counterpart of the work that has been submitted to the Registration Office shall be kept pursuant to the author’s will. The databases built by the National Copyright Registration Office may, in principle, be consulted by interested individuals, since they contain public documents which, pursuant to Law 57 of 1985, are of general knowledge, if they are not subject to reserve, provided by the Constitution or the Law. Nevertheless, if the databases relate to works, which due to the will of their authors, shall remain anonymous or unpublished, pursuant to Law 23 of 1982, have a reserved character and due to the same, legally it is not possible to provide any information thereof.”.

Right to claim authorship (paternity right)

The National Directorate of Copyrights, through opinion in File No.:2-2014-16301 dated: 25/03/2014, provided that “*it is the capacity of an author to demand from any third party to be acknowledged always as the creator of the work, stating its name or pen-name in any act of exploitation or utilization of the work*”, in such a manner that it may claim anytime and any place and regarding any utilization of the work that its name is mentioned totally hidden, or to hide it under a pen-name /pseudonym.

Under the same grounds, the author is entitled to the privilege of exercising in a negative manner its paternity moral right under anonymity, event in which the legislation assigns the responsibility to the publisher and to the entrepreneur, as the case may be.

Right to respect integrity

The National Directorate of Copyrights, through opinion in File No.:2-2014-16301 dated: 25/03/2014, established that the same “*is the author’s entitlement to oppose to any distortion or mutilation of the work, that may jeopardize the propriety of the same or the author’s reputation*”.

Right to repent or to withdraw

In this regard, the National Directorate of Copyrights, through opinion in File No.:2-2014-16301 dated: 25/03/2014, established that “*it is the author’s entitlement to withdraw from circulation any work or to suspend its utilization, even it had been previously authorized*”, but it may solely be exercised “*in exchange of a prior indemnity in favor of third parties, for the damages that could have occurred*” due to the withdrawal of the work, clarifying that third parties are understood only such persons having a legitimate interest over the work.

Other elements: the right to modify the work

Item D of Article 30 of Law 23 de 1982 expressly enshrines this right, as follows:

“(Article 30. The author shall have a perpetual, inalienable and un-waivable right over its work, for)

D. modifying it, before or after its publication”

Exercising the content definition, the National Directorate of Copyrights, through opinion in [File No.:2-2014-16301 dated: 25/03/2014](#), has stated that the same *“is the entitlement that allows the author to make changes to its work before or after its publication”*, and can only be exercised *“in exchange of a prior indemnity in favor of third parties, for the damages that could have occurred”* due to the modification of the work, clarifying that third parties are understood only such persons having a legitimate interest over the work.

3. ¿ Can the moral rights be transferred or waived in your country?

No. Due to an express provision in Article 11 of Decision 351 of the Andean Community and Article 30 of Law 23 of 1982, moral rights are un-waivable and inalienable under the Andean Community and Colombian legislation.

These same regulations provide that upon the author’s death, the exercise and defense of these rights correspond to the heirs and/or assignees until expiration of the term of protection of economic rights and thereafter the defense corresponds to the Colombian State. In Colombia such issue is vested upon the Ministry of Culture.

4. Which is the term of protection of the moral rights in your country? Is it identical to the term of protection of the economic rights?

Unlike economic rights, which have different protection terms, depending on the type of work, and depending if the ownership corresponds to a natural or legal person, moral rights are perpetual pursuant to Article 30 of Copyrights Law (law 23 of 1982).

Regarding the duration of economic rights, Article 21^o of cited Colombian copyrights sets forth: *“Copyrights shall correspond to the author’s lifetime, and after its death, those who have acquired the same, legitimately shall enjoy them for a term of eighty years. In the case of duly established collaboration, the eighty-year term shall be accounted for as from the death of the last co-author”*.

With regards to the copyright protection term, when the ownership corresponds to legal persons, the Andean Decision (applicable regulation in Colombia, Ecuador, Peru and Bolivia), in its Article 18 establishes that *“the protection term shall not be less than fifty years, counted as from the drafting, disclosure or publishing of the work, as the case may be”*. It is worthwhile mentioning that the Free Trade Agreement with the United States obliges Colombia to implement a duration term for economic copyrights not less than 70 years, for legal persons. The law implementing such regulation was declared unenforceable by the Colombian Constitutional Court and a new regulation on the matter is pending.

Can the moral rights be exercised after the death of the author and by whom? Are works in the public domain still somehow protected under moral rights?

Yes, since moral rights are perpetual (Subparagraph 2 of Article 30 of Law 23 of 1982 provides that after the author's death, the protection of moral paternity and integrity rights may be exercised by the author's spouse or consanguineous heirs, and in their absence, the exercise shall correspond to any natural or legal person accrediting its character of ownership over the respective work."

Regarding works that have become part of the public domain, subparagraph 3^o establishes such protection possibility, setting forth that "The defense of paternity, integrity and authenticity of the works that have become part of the public domain shall be in charge of the Colombian Institute of Culture, if such works do not have owners or assignees that could defend or protect such moral rights". Currently the entity that replaces the aforementioned extinct institute is the Ministry of Culture.

5. Do other types of rights (such as "personality rights", "civil rights", "publicity rights", "portrait rights" or other, depending on the jurisdiction) complement the protection of the moral rights in copyright?

Yes, there are several existing rights that may complement the protection of moral rights.

The law on unfair competition forbids the exploitation of third party's reputation. Consumer and Trademarks Law can also provide protection to the author's moral interests, especially to paternity (for instance the misappropriation of an author's name may induce consumers into error or cause confusion regarding the origin of a product –a work-, and also at the same time could be a trademark infringement). One of the limitations of unfair competition, trademark and consumer laws in connection with moral rights is that they are solely applicable within the context of a commercial activity.

Personality rights such as the right to one's own likeness, privacy, reputation and good name share similar characteristics to moral rights. These are fundamental rights that cannot be waived, they are inalienable, and their application is not circumscribed to the commercial sphere. These rights may be used to protect the author's moral interests as well as to limit them. It is worth highlighting that the latest decisions of the Constitutional Court on this matter have involved situations of publications of photos in social networks or in advertising platforms such as Facebook.

6. Does the legislation or case law in your country provide sanctions or other mitigating mechanisms for the abusive exercise of the moral rights, in particular by the author and/or his/her heirs?

Applying the general principle of Prohibition of abuse of law, an auxiliary criterion of judicial activity pursuant to Article 230 of the Political Constitution, it is feasible to deem the hypothetical possibility of providing mitigation to an abusive use of moral rights. There is no

existing special regulation contemplating the latter, or any jurisprudence precedents for an event directly related to copyrights.

- 7. How would a conflict between the exercise of a moral right and of any other proprietary right, such as the right to “material” property on the “carrier” of the work, be solved in your country? (e.g. mention of the name of the author on a building, modification of a utilitarian work, demolition of an artistic work, graffiti on a building,...)**

Regarding this type of conflict, Article 43 of Law 23 of 1982 (Copyright Law) includes a special regulation in connection with the conflict between the owner of the property right over a real property good and the author of an architectonic work, the cited regulation reads: *“the author of an architectonic work cannot prevent the owner of introducing modifications thereon, but it shall be entitled to prohibit its name to be associated with the altered work.”*

The Colombian Constitutional Court, through decision of constitutionality C-871 of 2010, pointed out that this Article 43, “enshrines a limitation and an exception, with the application made by the Court of the so called *“three step rule”* to the limitation established under provision challenged it was possible to define it as legal and limited, and it does not jeopardize the normal exploitation carried out by the architect exercising its rights with respect to its work and the prejudice caused is justified by the protection of the interests constitutionally acknowledged”.

- 8. How would a conflict between the exercise of a moral right and the exercise of the right to freedom of expression or other fundamental rights be solved in your country?**

Such a conflict would have to be resolved in a concrete case following the jurisprudential rules developed by the Constitutional Court about weighing rights, under the criteria of proportionality and reasonability, taking into account the fact that due to the interpretation of this same Court moral rights form part of the constitutionality block.

- 9. How do authors exercise their moral rights in practice?**

Civil and criminal actions are brought forward in Colombia so authors may protect infringements to their moral rights. Some cases have been judged by the Supreme Court of Justice in Colombia through the criminal chamber where the authors have been able to stop the continued infringement of such rights. Likewise it is worthwhile mentioning that moral rights cannot be assigned or licensed, since they are deemed as inalienable and un-waivable by the legislation (Art 30 Law 23 of 1982).

Do they consider this a matter of importance?

Yes, they consider this as an important matter and due to several training programs given by the Government as well as by academic institutions, Colombian authors learn permanently about such protection mechanisms and the importance of such right.

How do they want to be acknowledged (which modalities exist for the exercise of the rights of authorship and integrity)?

Article 270 of the Colombian Criminal Code establishes protection modalities regarding the violation of authorship and integrity moral rights. This article reads:

“Article 270. Violation of author’s moral rights. Whoever incurs in any of the following, shall be liable of the penalty of two (2) to five (5) years of prison and a fine of twenty (20) to two hundred (200) minimum monthly legal salaries in force:

1. Publishing, in whole or in part, without prior and express authorization by the holder of the right, of an unpublished work with a literary, artistic, scientific, cinematographic, audiovisual or phonogram, computer program or software.
2. Registering with the copyright registry a name different than the authentic author, or with a modified or suppressed title, or with the text altered, modified or mutilated, or falsely mentioning the publisher’s name or producer of a work with a literary, artistic, scientific, cinematographic, audiovisual or phonogram, computer program or software.
3. By any means or procedure, compiling, mutilating or transforming, without prior or express authorization by the holder of the right, a work with literary, artistic, scientific, cinematographic, audiovisual or phonogram, computer program or software.

Subparagraph. If the name, corporate name, logo or emblem different from that of the legitimate owner of the right is used in the material support, cover or trade dress of a work having a literary, artistic, scientific, phonogram, videogram, computer program or software character, in the cases of exchange, suppression alteration modification or mutilation of the title or text of the work, the penalties aforementioned shall be increased up to one half of the original sanctions”.

Likewise, copyright law in its Articles 30 and 242 to 252 establishes the possibility of initiating civil actions for the enforcement of those rights.. It is also important to add that the Ministry of Culture may exercise the corresponding actions for protecting authorship and integrity moral rights, in the absence of heirs or when the work has not been assigned to a holder of the right.

How do they impose respect of their moral rights when they are faced with derivative works?

Pursuant to Articles 13 and 15 of Law 23 of 1982 the author of a derivative work is the owner of the rights, always provided it has produced it with authorization by the author of the original work, and it shall continue respecting in turn the authorship right with respect to the preceding work.

In connection with works deriving from works in the public domain, Articles 14 and 16 of Law 23 of 1982 confer copyrights to their authors, making it clear that any other may in turn produce other additional derivative works.

Do licenses (in particular via creative commons) commonly provide a prohibition to create derivative works?

One of the modalities of these licenses in the version for Colombia prohibits the production of derivative works allowing a literal copy.

Are there in your country model contracts per sector (such as the literary, audiovisual, musical, graphic arts or artistic sectors) that are made available by professional organizations or by collective management organizations and that contain clauses regarding the moral rights? If so, which ones?

From the perspective of collective management organizations, there are models of license of use contracts including clauses on moral rights. Such partnerships bind usually themselves to respect authorship and integrity moral rights, and in turn they also commit the users, when conferring use authorization over the works under their administration. In the first case, the example is SAYCO that manages the right of reproduction of musical works and in second place it is worthwhile mentioning EGEDA that grants authorization for public disclosure of a cinematographic work.

10. Do collective management organizations play a role in the exercise of the moral rights in your country?

No. There is no existing Colombian legislation that expressly provides to collective management organizations legal capacity to sue regarding moral rights of their affiliates. Furthermore, there are no known cases where collective management organizations have intended to exercise moral rights of their affiliates.

11. In your country, is it provided in legislation, case law and/or scholarly literature how the moral rights apply with regard to particular forms of use, such as:

- "artistic quotation"
- user generated content
- folklore
- orphan works
- cloud computing
- alternative (free) licensing schemes (in particular open source licenses or creative commons)
- international aspects (determination of jurisdiction and applicable law)

In our legislation no regulations exist such that they expressly foresee a particular application of moral rights for these concrete cases, in such a manner that with no express exceptions in the law, the rule of moral rights is fully in force. Thus, these are events with a potential conflict with respect to moral rights, as it may happen particularly regarding creative commons licenses in connection with derivative works, or with content generated by the user, in the absence of a prior authorization by the author to carry out modifications of the original work.

With regards to folklore, Article 187 of Law 23 of 1982 establishes that folklore works with unknown authors belong to the public domain, in such a manner that the resulting consequence is that anybody may perform transformation acts thereon, and in such case, the fact of exercising the right of integrity by the Ministry of Culture would be a matter subject to further discussion.

12. The objective of certain moral rights appears to be changing in the digital context. The right of disclosure, which enables authors to decide when their works can be made public, is invoked at times to protect the confidentiality of certain kinds of content or data or their private dimension. The right to claim authorship (paternity) is changing into a right of attribution which places more emphasis on the identification of one contributor among others (for example, on Wikipedia or in free licenses) than on recognition of authorship. Lastly, the right of integrity may become a right through which to protect a work's authenticity. Indeed, while modifications to works are more and more widely authorized, authenticity is assuming greater importance, notably through the use of technological measures to guarantee it. In your country, are there any indications in legislation, case law and/or scholarly literature that the moral rights "shift" in a digital environment:

- **From a divulgation right to a right to the protection of privacy (private life)?**

Yes, especially privacy. The right to one's own likeness, and the right of privacy have been developed by the Constitutional Court of Colombia and may be used by the author to reinforce its right of disclosure, and it can also result in a limitation for publishing works that may jeopardize rights of third parties. The Constitutional Court has extended the right to privacy to situations in which aspects of private life are not published, but publishing material in social networks such as Facebook affects personal life. In Colombia the right to privacy is increasingly extending to a right of identity that allows the control over what is published and its context. The Court has stated that: "*although images do not reveal private life aspects, their publication and the access provided thereby to a wide range of public in Facebook social network affect personal and social privacy. In such sense, publishing images within the cited context and conditions, including free access by third parties to such published images affects the relationships of the party initiating the action with its family and its social core environment because the images published do not correspond to what the plaintiff represents "as a human being"* (T-634/13).

- **From a right to claim authorship (paternity) to a right to attribution?**

No. It is necessary to clarify that in Colombian and Andean Community legislation the moral right of claiming authorship explicitly uses the expression "paternity"; both legislations grant the right to "claim the paternity". In Copyright law (for instance: United States of America, New Zealand or Australia) the equivalent legal concept is called "right of attribution". In fact, the Spanish versions of creative commons (CC) licenses use the expression "attribution", mainly due to the literal translation of the same word in English. The definition of 'attribution' in such licenses does not substitute, modify or extends the right of paternity existing in Colombian legislation. The definition of 'attribution' in CC licenses basically refers to information relating to rights management information.

- **From an integrity right to a right to respect the authenticity of the work?**

No. The right of authenticity as a quasi moral right (Adolf Dietz, ALAI 1996) and its relation to technological protection measures (TPMs) and rights management information (RMI) has not been discussed in Colombia. Since the year 2000 Colombia established legal protection for TPMs

and RMI. TPMs and RMI have been applied and discussed only in relation to economic rights. In any case, since 1982, copyright legislation established that the Ministry of Culture is responsible for the defense of authenticity of works in the public domain.

- **Up to acknowledging similar interests and rights akin to moral rights for authors and performing artists, for the benefit of publishers, producers and broadcasters?**

No.