

**COLOMBIA – A PLACE WHERE YOU COULD BE SENTENCED TO TWO YEARS IN
JAIL FOR PLAGIARISM: A CRIME THAT DOES NOT EXIST!**

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Colombian copyright law does not expressly incorporate plagiarism as a crime. Nonetheless, Colombian courts have proclaimed plagiarism to be an act worthy of incarceration. Colombian copyright law protects moral rights of the author as human rights. In this regard, moral rights enjoy special protection that economic rights, for instance, do not have. Somewhat counter-intuitively, protecting moral rights as human rights, without set boundaries, may unbalance the copyright system and even violate other human rights, which is the case in Colombia. First, this Article describes the special protection of moral rights as a guaranteed human right under Colombian law. Second, it explains the Sentencia de Casación No. 31403 from 2010, a case law sentencing a professor to jail term for plagiarism. Finally, this Article analyses the said case law and concludes that the protection of moral rights as human rights in the terms established by the Colombian Supreme Court may unbalance the copyright system and violate other human rights.

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I. THE CONSTITUTIONAL PROTECTION OF COPYRIGHT

Have you ever contemplated being jailed for committing plagiarism? You would be, if you infringe rights of paternity in Colombia.

Article 61 of the Colombian Constitution mandates the protection of intellectual property (“IP”).¹ This concept of IP includes both industrial property and copyright.² Nonetheless, under this Article,³ Congress must decide the type of protection to grant according to international standards and constitutional mandate.⁴ The Colombian copyright framework consists of both regional and domestic law. At the regional level, Decision 351 of 1993⁵ from the Andean Community establishes substantive provisions and enforcement mechanisms for copyright protection.

The Andean Community is a forum for economic integration between four Latin American countries: Colombia, Bolivia, Ecuador and Peru.⁶ In order to achieve this economic integration, Andean countries decided to harmonise legislations over some matters which included IP. Therefore, the Andean Commission is the organisation in charge of enacting laws, called Decisions, over IP matters.⁷ Such Decisions have a direct effect on the territories of Andean countries, meaning that Andean Decisions do not need to pass through a domestic implementation process.⁸ At the domestic level, copyright law

¹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art.61.

² Corte Constitucional de Colombia [C.C.] [Constitutional Court], Jan. 24, 2001, M.P: J. Gaviria, Sentencia C-053/01 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2001/C-053-01.htm>.

³ Corte Constitucional de Colombia [C.C.] [Constitutional Court], Feb. 3, 1993, M.S: A.Martinez, Sentencia C-040/1994 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/1994/C-040-94.htm>.

⁴ Corte Constitucional de Colombia [C.C.] [Constitutional Court], Nov. 4, 2010, M.P: L. Vargas, Sentencia C-871 de 2010 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2010/C-871-10.htm>. [hereinafter M.P: L. Vargas, Sentencia C-871/10].

⁵ Andean Community, Decisión 351, Common Provisions on Copyright and Neighbouring Rights, Dic.17, 1993 available at <http://derechodeautor.gov.co/decision-andina>.

⁶ Marcela P. Puerta, *Conflicto de Leyes al Interior del Régimen Común de Derechos de Autor y Derechos Conexos de la Comunidad Andina de Naciones* [Conflict of Laws within the Common Regime of Copyright and Related Rights of the Andean Community of Nations], 17 LA PROPIEDAD INMATERIAL, 205, 206 (2013) (Colom.), available at <http://revistas.uexternado.edu.co/index.php/propin/article/view/3586>.

⁷ Alberto J. Cerda Silva, *Copyright Convergence in the Andean Community of Nations*, 20 TEX. INTELL. PROP. L.J. 429, 430 (2012), available at <http://www.tiplj.org/wp-content/uploads/Volumes/v20/v20p429.pdf>; see also Acuerdo de Integración Subregional Andino [Cartagena Agreement], art. 55, May 26, 1969, 8 I.L.M. 910, available at <http://www19.iadb.org/int/intradebid/DocsPdf/Acuerdos/CANDINA%20%20Acuerdo%20de%20Cartagena%20Decision%20563.pdf>.

⁸ See *Intelectual, Interpretacion Prejudicial*, 90-IP-08, (Tribunal de Justicia de la Comunidad Andina 2008) available at http://www.tribunalandino.org.ec/sitetjca1/index.php?option=com_filecabinet&view=files&id=1&Itemid=92.

is regulated mainly by Law 23 of 1982.⁹ The relationship between both bodies of law is hierarchal. In other words, where the laws disagree, Decision 351 would prevail.¹⁰

Colombian copyright law follows the dualistic theory, therefore, the law grants a set of economic and moral rights to the author as the original right holder.¹¹ These rights go beyond the minimum standards established in the main copyright treaties to which Colombia is a signatory –¹² namely the Berne Convention,¹³ Agreement on Trade-Related Aspects of Intellectual Property (“TRIPS Agreement”)¹⁴ and the WIPO Copyright Treaty (“WCT”).¹⁵ In this way, the law grants economic rights over all known and unknown uses¹⁶ – it not only grants the right of reproduction,¹⁷ distribution,¹⁸ public communication,¹⁹ and transformation,²⁰ but also protects every present and future use of the work. Economic rights are subject only to an exhaustive list of limitations and exceptions that are usually interpreted narrowly.²¹ These exceptions are: quotation;²² illustration for education;²³ reproduction for the illustration of teaching;²⁴ exception for libraries;²⁵ use in the course of judicial proceedings or by the legislative or administrative bodies of the State;²⁶ use of articles on topical subjects, commentaries on economic, political or religious subjects published in newspapers or magazines through the press;²⁷ works seen or heard in the course of reporting current events;²⁸ reproduction of a photograph, illustration and commentary on a current event;²⁹ exception for the use of

⁹ L. 23/1982, Jan. 28, 1982, DIARIO OFICIAL [D.O.] (Colom.) *modified* by L. 44/1993, Feb. 5, 1993, D.O. and *complemented* by L.1403/2010, July 19, 2010, D.O. (Colom.).

¹⁰ See MARCELA PALACIO PUERTA, DERECHOS DE AUTOR, TECNOLOGÍA Y EDUCACIÓN PARA EL SIGLO XXI 151 (2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827825.

¹¹ L. 23/1982, *supra note* 9, art. 9 *supra note* 9.

¹² See PALACIO PUERTA, *supra note* 10, at 152.

¹³ See WIPO Treaties and Contracting Parties, http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=932C (last visited Oct. 22, 2014 6:33 PM).

¹⁴ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, 1869 UNTS 3 (entered into force 1st January 1995) 1867 U.N.T.S. 154.

¹⁵ See WIPO, Other IP Treaties, WIPO http://www.wipo.int/treaties/en/text.jsp?file_id=295166. (n.d.)

¹⁶ See Interpretacion Prejudicial, 24-IP-98, (Tribunal de Justicia de la Comunidad Andina 1998) *available at* intranet.comunidadandina.org/Documentos/Procesos/24-IP-98.doc.

¹⁷ L. 23/1982, *supra note* 9, art. 12(a); *see also* Decision No. 351 Establishing the Common Provisions on Copyright and Neighbouring Rights art. 13(a).

¹⁸ *Id.*

¹⁹ L. 23/1982, *supra note* 9, art. 13(b), 12 (c); *see also* Decision No. 351, *supra note* 17, art. 13(b).

²⁰ L. 23/1982, *supra note* 9, art. 13(e), 12(b); *see also* Decision No. 351, *supra note* 17, art. 13(e).

²¹ *See* 24-IP-98, *supra note* 17, at 9.

²² L. 23/1982, *supra note* 9, art. 22(a), 31; *see also* Decision No. 351, *supra note* 17, art. 22(a).

²³ L. 23/1982, *supra note* 9, art. 32.

²⁴ Decision No. 351, *supra note* 17, art. 22(b).

²⁵ L. 23/1982, *supra note* 9, art. 22(c), 38; *see also* Decision No. 351, *supra note* 17, art. 22(c).

²⁶ L. 23/1982, *supra note* 9, art. 22(d), 42; *see also* Decision No. 351, *supra note* 17, art. 22(d).

²⁷ Decision No. 351, *supra note* 17, art. 22(e).

²⁸ Decision No. 351, *supra note* 17, art. 22(f).

²⁹ L. 23/1982, *supra note* 9, art. 33.

news;³⁰ speeches delivered or read on public;³¹ lectures or talks given at establishments of higher, secondary or primary education;³² images located permanently in a place open to the public;³³ ephemeral recordings;³⁴ performance or execution of a work in the course of the activities of an educational institution;³⁵ transmission or retransmission of a work;³⁶ and private copy.³⁷

On the other hand, moral rights are inalienable and imprescriptible.³⁸ Moral rights granted by the law are paternity right,³⁹ integrity right,⁴⁰ modification right,⁴¹ retraction right,⁴² and the right to conserve the work unpublished and unattributed.⁴³ These rights are only subject to exceptions and limitations in two cases:⁴⁴ first, in architectural design, where the author of such work cannot prevent the owner of the property from making alterations to it;⁴⁵ and second, in works created by public employees or officials, where “moral rights shall be exercised by authors in so far as such exercise is not incompatible with the rights and obligations of the public bodies concerned.”⁴⁶

Under Colombian copyright law, there is an important difference between the legal treatment of moral rights and economic rights. Moral rights are protected as human rights,⁴⁷ while economic rights are considered to have constitutional protection but are not categorised as human rights.⁴⁸ The reason behind protecting moral rights as human rights, as the Constitutional Court has stated, is that a person’s ability to create and to express ideas is fundamental to humanity. Moreover, the Court has stated that removing someone’s authorship over a creation, equals disavowing men as rational creatures.⁴⁹

³⁰ L. 23 / 1982, *supra* note 9, art. 34.

³¹ L. 23 /1982, *supra* note 9, art. 22(g), 35; *see also* Decision No. 351, *supra* note 17.

³² L. 23/1982, *supra* note 9, art. 40.

³³ L. 23/1982, *supra* note 9, art. 22(h); *see also* Decision No. 351, *supra* note 17.

³⁴ Decision No. 351, *supra* note 17, art. 22(i).

³⁵ L. 23/1982, *supra* note 9, art. 149, 164; *see also* Decision No. 351, *supra* note 17, art. 22(j).

³⁶ Decision No. 351, *supra* note 17, art. 22(k).

³⁷ L. 23/1982, *supra* note 9, art. 37.

³⁸ L. 23/1982, *supra* note 9, art. 30; *see also* Decision No. 351, *supra* note 17, art. 11; Corte Constitucional de Colombia [C.C.] [Constitutional Court], Nov. 13, 2002, M.P: R. Escobar, Sentencia C-975/ 2002 (Colom.) *available at* <http://www.corteconstitucional.gov.co/RELATORIA/2002/C-975-02.htm>.

³⁹ L. 23/1982, *supra* note 9, art. 11(b), 30(a); *see also* Decision No. 351, *supra* note 17, art.11(b).

⁴⁰ L. 23/1982, *supra* note 9, art. 11(c), 30(b); *see also* Decision No. 351, *supra* note 17, art.11(c).

⁴¹ L. 23/1982, *supra* note 9, art. 30(d).

⁴² L. 23/1982, *supra* note 9, art. 30(e).

⁴³ L. 23/1982, *supra* note 9, art. 11(a), 30(c); *see also* Decision No. 351, *supra* note 17, art. 11(a).

⁴⁴ *See* M.P: L. Vargas, Sentencia C-871/ 10, *supra* note 5.

⁴⁵ L. 23/1982, *supra* note 9, art. 43.

⁴⁶ L. 23/1982, *supra* note 9, art. 91.

⁴⁷ *See* Corte Constitucional de Colombia [C.C.] [Constitutional Court], Apr. 28, 1998, M.P: V. Naranjo, Sentencia C-155/ 98 (Colom.), *available at* <http://www.corteconstitucional.gov.co/relatoria/1998/C-155-98.htm>.

⁴⁸ *See id.*

⁴⁹ *See id.*

This categorisation of moral rights as human rights grants them special protection under the Colombian legal system that economic rights do not have. Under the Colombian legal framework, there is a concept called “Constitutional Block” [bloque de constitucionalidad].⁵⁰ The Constitutional Block is a construct composed of norms and principles that without expressly being in the Constitution are deemed to be part of it, and, consequently, are considered constitutional mandates that guide the interpretation of the legal system. Under this construct, human rights treaty provisions and international humanitarian law are considered to be part of the Constitutional text. Domestic legislation therefore, cannot conflict with their provisions.⁵¹

Since moral rights are human rights, the Constitutional Court has held that Decision 351 makes moral rights a part of the Constitutional Block. Under the same school of thought, provisions of the Berne Convention pertaining to moral rights could also be made part of the Constitutional Block, and are, therefore, human rights.⁵² The TRIPS Agreement, which is economic in nature and silent about moral rights, is not a part of the Constitutional Block.⁵³

This incorporation of moral right protection into the Constitutional Block has disastrous practical effects, especially in criminal law, as is discussed below.

II. The Case: Sentencia de Casación No. 31403 (28 de mayo de 2010)

Sentencia de Casación No. 31403 from 2010,⁵⁴ is an important decision regarding protection of moral rights under criminal law. In this case, the Supreme Court interpreted criminal law to give a broad scope of protection to moral rights provisions in order to enforce paternity rights.

The petitioner Rosa María Londoño pressed criminal charges against Luz María Giraldo, alleging moral rights infringement for plagiarism. The case began in 1996, when Rosa was a university student and wrote a dissertation in order to obtain her professional degree in literature. Her dissertation was successfully approved. In 1997, however, Rosa

⁵⁰ C.P., *supra* note 1, art. 93.

⁵¹ Corte Constitucional de Colombia [C.C.] [Constitutional Court], Feb. 4, 2003, M.P: M. Monroy, *Sentencia C-067/ 03* (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2003/c-067-03.htm>. [hereinafter *M.P: M. Monroy, Sentencia C-067/03*].

⁵² Corte Constitucional de Colombia [C.C.] [Constitutional Court], Oct. 12, 2004, M.P: H. Sierra, *Sentencia C-582/ 04* (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2004/C-988-04.htm>.

⁵³ Corte Constitucional de Colombia [C.C.] [Constitutional Court], Aug. 11, 1999, M.P: A. Martinez, *Sentencia C-582/ 99* (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/1999/c-582-99.htm>.

⁵⁴ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Penal, May 28, 2010, M.P: S. Espinosa, *Proceso de Casación 31403* (Colom.), available at <http://derechodeautor.gov.co/corte-suprema-de-justicia>.

found out that an article published in the Mexican journal “La Casa Grande” authored by Luz María, who was a professor at her university, had reproduced some extracts from her dissertation. The professor did not quote nor cite Rosa’s work.

In 2004, the Attorney General’s office accused the professor of violating Article 51(3) of Law 44 of 1993.⁵⁵ Law 44 of 1993, which was in force immediately prior to the current law, established a punishment of imprisonment for two to five years and a fine of five to twenty times the legal minimum monthly wage to “any person who in any way or by any means reproduces, disposes of, condenses, mutilates or otherwise transforms a literary, scientific or artistic work without the express prior authorisation of the owners thereof.”⁵⁶ In 2004, the trial court held that the professor had violated the moral rights provision, not under Article 51(3), but under Article 51(1) of Law 44 of 1993. This Article prescribed the same punishment but to “any person who publishes an unpublished literary or artistic work, or part thereof, by any means, without the express prior authorisation of the owner of rights.”⁵⁷

The problem over selecting which provision was infringed arose from the fact that criminal law did not punish paternity right infringement. Regardless of the fact that the professor had been accused of plagiarism, which constituted an infringement of paternity rights, she was punished under Article 51(1), which protects the right of the author to conserve the work, unpublished.⁵⁸ Consequently, the professor was sentenced to twenty-four months of imprisonment and a fine of five times the legal minimum monthly wage was imposed. In 2008, the Court of Appeals confirmed the trial’s court decision.

The defendant appealed [recurso de casación] to the Supreme Court, which has the role of “Cour de Cassation” as in the French system. This was an extraordinary resort because the Supreme Court proceeds only under certain circumstances established by the law.⁵⁹ The Supreme Court decided to hear the case based on a possible violation of fundamental rights of the defendant on the account of differences between the charges used in the accusations and the charges used to convict the professor. According to the defendant, this situation had made it difficult to present a proper defence because Article 51(3) and Article 51(1) incorporated different crimes. The defence arguments initially presented when the defendant was accused of violating Article 51(3) did not apply against the accusation of violating Article 51(1) which the Court used to sentence the defendant.

⁵⁵ L. 44/1993, Feb. 5, 1993, DIARIO OFICIAL [D.O.] (Colom.).

⁵⁶ *Id.*, art. 51(3).

⁵⁶ *Id.*, art. 51(3).

⁵⁷ *Id.*, art. 51(3).

⁵⁸ Moral right established in L. 23/1982, *supra note* 9, art. 30(c); *see also* Decision No. 351, *supra note* 17, art. 11(a).

⁵⁹ L. 906/2004, DIARIO OFICIAL [art. 181, Sept. 1, 2004, D.O.] (Colom.), art. 181.

The Supreme Court determined the scope of application of criminal law to moral rights. The Court described and explained each of the prohibited acts against moral rights under the current legislation, which is similar to Law 44 of 1993. In 2000, the Criminal Code compiled and updated criminal law subject matter. Therefore, Article 51 of Law 44 of 1993 became Article 270 of Law 599 of 2000 with very few changes. The Court concluded that the current criminal legislation did not expressly protect against violations of the paternity right even though it was one of the most commonly violated moral rights. The criminal law provision was aimed at punishing acts that infringed moral rights other than plagiarism – such as publishing an unpublished work without authorisation;⁶⁰ entering in the National Register of Copyright a work in the name of a person other than the author or an altered work⁶¹ and mutilating and transforming a copyrighted work without authorisation.⁶² The Court concluded that the paternity right was not expressly included in the text of the law.

However, the Court gave a constitutional interpretation to the criminal legislation for moral rights protection. The Court concluded that because moral rights were human rights protected by several international treaties, the Colombian Constitution⁶³ and case law, their protection should be interpreted according to the “pro homine” principle. This principle is used for interpretation in human rights cases which require a broader interpretation of the law and it is directed at protecting internationally recognised rights.⁶⁴ Additionally, the Supreme Court stated that under Colombian law, human rights treaties, such as those containing moral rights provisions, are understood to be incorporated directly within the text of the Constitution due to the legal concept of the Constitutional Block.⁶⁵

Therefore, as per this understanding of the law, the Supreme Court established that Article 270 of the Criminal Code,⁶⁶ which covers moral rights protection, should be interpreted in a broader sense to protect human rights, including paternity rights of the author. Article 270 must be interpreted by judges to include and prohibit:

- 1) “Acts that through other forms of disclosure may require public disclosure of unpublished work, without the express prior authorisation of the owner rights; and,

⁶⁰ L. 599/2000, July 24, 2000, DIARIO OFICIAL [D.O.] (Colom.), art. 270(1).

⁶¹ *Id.*, art. 270(2).

⁶² *Id.*, art. 270(3).

⁶³ C.P., *supra note 1*, art. 61.

⁶⁴ Corte Constitucional de Colombia [C.C.] [Constitutional Court], May 10, 2010, M.P: J. Araújo & C. Vargas, Sentencia C-366/ 06 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2006/C-355-06.htm>.

⁶⁵ C.P, *supra note 1*, art.93; see also M.P: M. Monroy, Sentencia C-067/ 03, *supra note 51*.

⁶⁶ L. 599/2000, *supra note 60*.

2) Acts that lead to the violation of the right of paternity, in case of the following eventualities:

a) When without prior express authorisation of the right holder, a person discloses fully or partially, under a name other than its right holder, an unpublished literary, artistic, scientific work, film, audio-visual or phonogram, or computer program.

b) When without prior express authorisation of the right holder, a person publishes in whole or in part, under another's name, an already disclosed, literary, artistic, scientific work, film, audiovisual or phonogram, computer program or software character.”⁶⁷

Based on this reasoning, the Supreme Court affirmed the trial court's decision, stating that despite the difficulties in deciding which Article of the law to apply, both the trial court and the Court of Appeals established that the prohibited act was that of the defendant taking extracts of someone else's text and presenting it as her own. This was an infringement of paternity rights, which the law prohibited under a *pro homine* interpretation.

III. Comments on Sentencia de Casación No. 31403 (28 de mayo de 2010)

This case raises the question of whether protection of moral rights as human rights under Colombian copyright law creates unwanted consequences. The case serves as an example of how such excessive protection may unbalance Colombian copyright law and violate other human rights under the garb of moral rights protection.

Colombia, a civil law country, has designated the role of law-creation to Congress.⁶⁸ The role of applying the law is given to the judiciary. This is especially true in IP, wherein the Constitutional Court has established that under Article 61 of the Constitution (IP clause) the legislative branch is in charge of designing IP protection.⁶⁹

Nonetheless, over time, this strong distinction of roles between judges and legislators has started to blur. One of the reasons for this blurring is the constitutionalisation of Colombian law. This movement, which started under the 1991 Constitution, refers to the direct application of constitutional mandates and principles to controversies between

⁶⁷ Unofficial translation made by the author.

⁶⁸ C.P., *supra* note 1, art. 150.

⁶⁹ See M.P.: L. Vargas, Sentencia C-871/ 10, *supra* note 4.

individuals.⁷⁰ Moreover, it prescribes that Constitutional mandates should guide the interpretation and application of the law.⁷¹

One way to achieve this constitutionalisation is through judicial power, where judges make a “constitutional interpretation of the law.”⁷² Such an interpretation can lead the judge either to reject one understanding of the law for going against the constitution or to condition or complement the law to reflect such fundamental principles.⁷³ In this case, the judge becomes a law-creator.

The case discussed above is an example of the effects of the constitutionalisation movement in copyright law. The Supreme Court became the creator of law with the purpose of protecting moral rights as human rights.⁷⁴ Although the purpose of the constitutionalisation movement was to protect human rights, when applied to moral rights protection, it has several unwanted consequences. The constitutionalisation of moral rights has enhanced the overprotective nature of Colombian copyright protection.

A copyright regime where infringement is punished under criminal law, even when the law does not expressly penalize such an activity, is an unbalanced copyright system. In this situation, users do not know how the State would react to potential copyright infringement, especially regarding moral rights protection, which grants significant power to the creators of copyrightable works. For example, criminal law is silent about the consequences of breaching the right to maintain the work unattributed, which is one of the moral rights established under the copyright law.⁷⁵ If a person breaches this right and the creator decides to approach the criminal authorities, would the user be punished under criminal law due to the application of the pro homine principle or would the case be dismissed due to the lack of express crime under the law?

Moreover, another concern regarding balancing copyright protection is that even other constitutional principles do not seem to have the ability to set boundaries to copyright

⁷⁰ Fabricio Mantilla, *La “Constitucionalización” del Derecho Privado* [The “Constitutionalisation” of Private Law], ½ REVISTA OFICIAL DEL PODER JUDICIAL, 245, 248 (2007) (Colom.) available at [https://www.pj.gob.pe/wps/wcm/connect/44bdcf8043eb7b8ea76ee74684c6236a/15.+Doctrina+Internacional+Fabricio+Mantilla+Espinoza+\(Colombia\).pdf?MOD=AJPERES&CACHEID=44bdcf8043eb7b8ea76ee74684c6236](https://www.pj.gob.pe/wps/wcm/connect/44bdcf8043eb7b8ea76ee74684c6236a/15.+Doctrina+Internacional+Fabricio+Mantilla+Espinoza+(Colombia).pdf?MOD=AJPERES&CACHEID=44bdcf8043eb7b8ea76ee74684c6236).

⁷¹ Corte Constitucional de Colombia [C.C.] [Constitutional Court], Mar. 30, 1993, M.P: A. Caballero, Sentencia C- 127 de 1993 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/1993/C-127-93.htm>.

⁷² Mantilla, *supra* note 70, at 249.

⁷³ *Id.*

⁷⁴ For additional information regarding constitutionalisation of copyright law under Colombian law See Karen Cabrera & Marcela Palacio, *Los de Derechos de Autor: Objeto de Constitucionalización y Sujeto Constitucionalizante* [The Copyright: Object of Constitutionalisation and Constitutionalizing Subject], 13 (1) REVISTA JURÍDICAS, 116, 131 (2017) available at [http://vip.ucaldas.edu.co/juridicas/downloads/Juridicas13\(1\)_8.pdf](http://vip.ucaldas.edu.co/juridicas/downloads/Juridicas13(1)_8.pdf).

⁷⁵ L. 23/1982, *supra* note 9, art. 30(c).

protection. Under the Colombian legal system, criminal law protection is built on a set of principles. Two of these principles are the principle of “legality” [legalidad] and the principle of “law reserve” [reserve de la ley]. Both principles are constitutional mandates.⁷⁶ The legality principle states that the law is the only avenue to criminalise acts and people can be punished only under a pre-existing law. This principle is meant to control the punitive power of the state and curb arbitrariness.⁷⁷ Analogizing to the criminal law does not work because of the legality principle, as people who do not infringe the law should not be punished.⁷⁸ On the other hand, the law reserve principle establishes that Congress is the only entity authorised to enact laws in the field of criminal law, because it is the entity that represents people’s will.⁷⁹

In this case, although the Supreme Court did not engage in a doctrinal discussion about balancing moral rights and criminal law principles, the Court’s decision reflects the prevalence of moral rights protection as human rights over criminal law principles. As mentioned above, the Supreme Court acted as a law-creator by establishing a criminal sanction against a paternity rights infringement, going against the legality principle and the law reserve principle.⁸⁰ This type of behaviour by the Supreme Court can also go against human rights of the users. The legality principle has been recognised by numerous human rights treaties: American Declaration of the Rights and Duties of Man in Articles V and XXV,⁸¹ International Covenant on Civil and Political Rights in Articles 6, 9 and 14,⁸² European Convention for Human Rights in Articles 5, 6 and 7⁸³ among others. This means that in addition to the express constitutional protection of the legality principle under Colombian Law, this principle also falls under the Constitutional Block.⁸⁴ Nonetheless, under the Supreme Court’s decision, moral right protection is significant

⁷⁶ See both principles are established in C.P., *supra* note 1, art. 29.

⁷⁷ FERNANDO VELÁSQUEZ, *DERECHO PENAL PARTE GENERAL*, 131 (2009).

⁷⁸ Corte Constitucional de Colombia [C.C.] [Constitutional Court], June 06, 2000, M.P: F. Morón, Sentencia C- 739 de 2000 (Colom.), available at <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=6970>.

⁷⁹ *Id.*

⁸⁰ Nonetheless, this is not the first case where the Supreme Court has not protected the legality principle. See Fernando Velásquez, *La Flexibilidad del Principio de Legalidad y los Crímenes que Agravan a la Humanidad* [The Flexibility of the Principle of Legality and the Crimes that aggravate Humanity], 7 CUADERNOS DE DERECHO PENAL 91, 104 (2012), available at http://revistas.usergioarboleda.edu.co/index.php/cuadernos_de_derecho_penal/article/view/399/0.

⁸¹ American Declaration of The Rights and Duties of the Man, May 2, 1948, OAS Doc. OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), /I.4, available at <http://www.oas.org/en/iachr/mandate/Basics/declaration.asp>.

⁸² International Covenant on Civil and Political Rights, Dec. 16, 1966, Treaty Doc.95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

⁸³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.echr.coe.int/pages/home.aspx?p=basictexts>.

⁸⁴ Alejandro Ramelli, *Aspectos Controversiales del Bloque de Constitucionalidad en Colombia* [Controversial Aspects of the constitutionality Block in Colombia], *ÁMBITO JURÍDICO* (n.d.) (n.p), available at http://www.ambitojuridico.com.br/site/index.php?n_link=revista_artigos_leitura&artigo_id=10614.

enough to justify limiting other human rights. This situation evidences the overprotection of copyright law under the Colombian legal framework.

Avoiding the application of criminal law principles to moral rights protection is especially worrying, given that criminal law is the avenue preferred by copyright industries to enforce copyright protection.⁸⁵ Criminal protection also has been used as a lobbying tool for free trade agreements.⁸⁶ Furthermore, copyright protection is already strongly protected under criminal law and should not be subject to expansion. Moral rights infringement is punished with 32 to 90 months of imprisonment and a fine of 26.6 to 300 times the minimum wage.⁸⁷ Economic rights infringement is punished with 4 to 8 years of imprisonment and a fine of 26.66 to 10,000 times the minimum wage.⁸⁸ Additionally, the criminal law applicable to moral right infringements does not require a commercial scale or intent to profit.⁸⁹ Perhaps the reason for the absence of those requirements is a lack of economic understanding of moral rights. Incidentally, protection of economic rights in criminal law is as broad as moral rights protection. This punishment is considerably high compared to other crimes; for example, sexual harassment is sanctioned with 12 to 36 months of imprisonment without a fine.⁹⁰

This case evidences that copyright law should strike a balance not only between protection and access, but also between copyright protection and the protection of other rights such as criminal law principles. Even a human rights oriented approach to copyright protection, which endeavours to protect humanity in its most intimate condition, when applied without fixed boundaries, may have unwanted consequences and unbalance the copyright system.

Copyright law, especially moral rights, deserves protection due to its inherent connection with the author. Nonetheless, the enforcement measures taken by the State should be proportionate to the infringement. More importantly, such punishments must not violate important human rights as happened in this case. Achieving the abovementioned balance can result in the enactment of more proportionate punishments against copyright infringement.

⁸⁵ See ALVARO DIAZ, *TLC Y PROPIEDAD INTELECTUAL: DESAFIOS DE POLITICA PUBLICA-EN 9 PAISES DE AMERICA LATINA Y EL CARIBE*, 35 (2006); See also Ernesto Rengifo, *Un Nuevo Reto del Derecho en la Edad de la Información [A New Challenge of Law in the Information Age]*, 12 *LA PROPIEDAD INMATERIAL* 105, 116 (2008), available at <http://revistas.uexternado.edu.co/index.php?journal=propin&page=article&op=view&path%5B%5D=626>.

⁸⁶ See Rengifo, *supra* note 85, at 116 (stating that law 1032 of 2006 that the punishment for the circumvention of the technological protection measures was promoted as a lobby strategy for the USCO).

⁸⁷ See CODIGO PENAL (C. PEN.) art. 270.

⁸⁸ See *id.*, art. 270 amended by L. 1036/2006, July 25, 2006, D.O. (Colom.).

⁸⁹ *Id.*

⁹⁰ See *id.*, art. 210-A.

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Finally, it is important for Colombian society and for the Colombian Government to understand that criminal law is not the only alternative to protect authors' moral rights. There can also be non-monetary measures that can repair the damage, such as publishing the name of the real author of the work in a communication media of great diffusion to ensure that due credit is given. In this scenario, not only would moral rights be protected and enforcement measures remain available, but a balance between authors' rights and proportionate punishments would also be maintained.