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# COLOMBIA'S POETIC WORLD OF AUTHORS' MORAL RIGHTS: CONSIDERATIONS ON IMPRISONING A PROFESSOR FOR PLAGIARISM

Carlos Castellanos Rubio<sup>†</sup>  
Translated by David Cromwell<sup>‡</sup>

*Abstract:* The following is a translation of Carlos Castellanos Rubio's article in the June 2011 edition of *La Revista de Derecho, Comunicaciones y Nuevas Tecnologías*, a Colombian legal periodical. The article discusses a 2010 Colombian Supreme Court of Justice decision that sentenced Professor Luz Mary Giraldo to two years in prison plus monetary and civil sanctions for plagiarizing a student's thesis, "The Poetic World of Giovanni Quessep." The decision has been controversial in Colombia for a variety of reasons, and many have accused the Court of judicial activism. Much of this criticism stems from the Court convicting Giraldo of violating the student's moral right to publish, or not publish, her "unpublished" work, based on an expansive reading of that statute. These critics have pointed out that the student's work was published, and sitting in her university's library. Others have decried the severity of the sentence, as it is the first criminal moral rights conviction in Colombian history. In this article, Mr. Castellanos explains how the Court based its decision on a broad interpretation of the personhood theory of copyright, without any discussion of the theory itself or its alternatives. He then suggests potential problems with the Court's perspective; namely, that it might grant monopolies on unoriginal expressions and ideas, and thus stifle free expression. As a solution, the article proposes that Colombian judges develop and/or adapt analytical tools for filtering out a work's unprotectable elements from the original, protectable elements, focusing on the idea/expression dichotomy.

## I. INTRODUCTION

The idea/expression dichotomy amounts to a distinction between authorship and copyright, between the scope of what the author sends into the world (i.e., idea as much as expression) and the narrower scope of what is subject to legal protection (i.e., expression alone) . . . . The proposition that only expression is copyrightable, and not ideas, is thus necessarily rooted in the equality of the parties as authors.<sup>1</sup>

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<sup>1</sup> Abraham Drassinower, *A Rights-based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J. L. & JUR. 1, 10-14 (Jan. 2003).

There is no doubt that the Supreme Court of Justice,<sup>2</sup> in affirming Professor Giraldo's two-year prison sentence and fine,<sup>3</sup> espoused a highly protectionist view of authors' moral rights.<sup>4</sup> This view, extensively guided by the personhood philosophy of intellectual property ("IP") rights,<sup>5</sup> highlighted the well-known—yet rarely studied in Colombia—doctrinal and jurisprudential tension woven into the idea/expression dichotomy.

The decision also showed that the Supreme Court of Justice was open to comparative legal analyses. Even if only undertaken in dicta, these analyses represent valid analytical attempts at tackling the complex world of copyright law.<sup>6</sup>

For better or worse—this article does not normatively judge the Court's sentence against Professor Giraldo—one should also acknowledge that, after several years of silence on the subject of authors' rights (an issue that for many, including lawyers and academics, seems more poetic than the "The World of Giovanni Quessep"), the Court not only developed guidelines for deciding whether someone plagiarizes an "unpublished work," but also acted as a quasi-legislator.<sup>7</sup> Illustrating this latter point, the Court demanded that

<sup>2</sup> [Translator's Note] The Supreme Court of Justice (Corte Suprema de Justicia) is the highest Colombian court for criminal appeals. Antonio Ramirez, *An Introduction to Colombian Governmental Institutions and Primary Legal Sources*, GLOBALEX, <http://www.nyulawglobal.org/Globalex/Colombia.htm> (last visited Sept. 16, 2012).

<sup>3</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Pen. mayo 28, 2010, M.P: S. Espinosa Pérez, Casación, (No. 31.403), available at [http://190.24.134.121/webcsj/Documentos/Comunicorte/Decisiones/FALLO%20DERECHOS%20DE%20AUTOR%2031403%20\(28-05-2010\)\[1\].pdf](http://190.24.134.121/webcsj/Documentos/Comunicorte/Decisiones/FALLO%20DERECHOS%20DE%20AUTOR%2031403%20(28-05-2010)[1].pdf) (Colom.) [hereinafter *Giraldo*].

<sup>4</sup> [Translator's Note] A few points on Colombia's copyright regime. Colombian copyright protects authors' economic and moral rights in their work. See DIRECCIÓN DE DERECHO DE AUTOR, MANUAL DE DERECHO DE AUTOR (2010), [http://derechodeautor.gov.co/htm/Publicaciones/Cartilla%20derecho%20de%20autor%20\(Alfredo%20Vega\).pdf](http://derechodeautor.gov.co/htm/Publicaciones/Cartilla%20derecho%20de%20autor%20(Alfredo%20Vega).pdf). Economic rights are authors' rights to exploit their work for profit, including the rights to publish and distribute the work. See Robert P. Merges, Peter S. Menell & Mark A. Lemley, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE, 413, 416-17 (5th ed. 2010). Moral rights are an author's personal interest in the work and, in Colombia, include the right to claim authorship, the right to object to modifications of the work, the right to publish (or not publish) a work, and the right to withdraw a work after publication. See L. 23, enero 28, 1982 (Colom.), translation available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=126025](http://www.wipo.int/wipolex/en/text.jsp?file_id=126025). These rights are perpetual and cannot be relinquished. *Id.*

<sup>5</sup> See discussion *infra* Part.II.

<sup>6</sup> [Translator's Note] Technically, the Colombian term "derecho de autor" translates as author's right, author's rights, or authors' rights. In the United States, the French equivalent "droit d'auteur" may be more familiar. Because "copyright" is a more familiar term to English-speakers, and the Colombian National Copyright Directorate translates the term as "copyright," this article translates "derecho de autor" as "copyright."

<sup>7</sup> It is worth asking whether this action violates the principle of judicial restraint, which holds that "the legislative branch is the only branch with the power to produce criminal standards. This is so because, in addition to being its assigned role within the government's division of powers, legislators are popularly elected, something essential in making law, particularly criminal law, which—as the Constitutional Court has stated—by its nature should be preceded by a process of public debate and education over its conception and implementation; that is to say, by a more democratic process." Corte Constitucional

“in the interest of precipitating the clarification of the law,”<sup>8</sup> the Ministry of Interior and Justice, the Congress, and the National Copyright Directorate (DNDA) should “incorporate, both amply and with specificity, the principal facets of authors’ moral rights protection, in order to avoid ambiguities or misunderstandings that can call into question the profound protection that moral rights—we reiterate—fundamentally deserve.”<sup>9</sup>

Against this backdrop, this article will attempt to explain to the reader, first, the reasons why the decision evidenced a court both guided by a personhood perspective of moral rights and—by establishing additional criminal sanctions for their violation—highly protective of these rights.<sup>10</sup> These philosophies led the Court to apply the *pro homine* principle,<sup>11</sup> in order to ensure that Article 270 of the Criminal Code<sup>12</sup> “adequately”<sup>13</sup>—in accord with Colombia’s international agreements—protected authors’ moral rights. In developing this connection—and after discussing why I think the Court adopted this view—I will comment on the principal problem with this

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[C.C.][Constitutional Court], agosto 4, 1999, M.P. A. Martínez Caballero, Sentencia C-559/99, available at <http://www.corteconstitucional.gov.co/relatoria/1999/c-559-99.htm>.

<sup>8</sup> [Translator’s Note] The Court is referring to the moral rights section, Article 270 of the criminal code. See *infra* note 12.

<sup>9</sup> Giraldo, *supra* note 2, at 83.

<sup>10</sup> I would also like to clarify that this article does not address whether instrumentalist or utilitarian justifications for moral rights—focusing on moral rights as a means, not an end in of themselves, to maximizing social utility—are preferable to a natural rights based view, or vice versa. Nor does the article discuss whether instrumentalist or utilitarian perspectives are the only theoretical means of explaining the public domain. On the contrary, this article acknowledges that—as Professor Drassinower argues—a rights-based view can limit authors’ rights to account for the public domain. See Drassinower, *supra* note 1.

<sup>11</sup> [Translator’s Note] The *pro homine* principle is a “standard for interpreting human rights law, according to which, internationally recognized human rights . . . are to be interpreted as broadly as possible.” Ernesto Rengifo García, *¿Es el plagio una conducta reprimida por el derecho penal?*, 14 REVISTA DE LA PROPIEDAD INMATERIAL 303, 304 (2010) (citing Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, M.Ps: J. Araújo Rentería, C. Vargas Hernández, Sentencia C-355/06, (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm>).

<sup>12</sup> [Translator’s note] Article 270 of the Colombian Criminal Code provides criminal sanctions for moral rights violations. It punishes anyone who:

1. Publishes, completely or partially, without the previous and express permission of the right-holder, an unpublished work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.
2. Enters into the national registry with the name of anyone other than the true author, or with the title altered or removed, or with the text altered, defaced, modified or mutilated, or the editor or producer’s name falsely stated, a work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.
3. By any means or procedure, condenses, mutilates or transforms, without the previous and express permission of the right-holder, a work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.

<sup>13</sup> By placing adequately in quotes I do not mean to suggest that applying the *pro homine* principle to criminal moral rights protection generates a per se defense of instrumental or utilitarian based views of moral rights. See *supra* note 10.

perspective, focusing on the importance of differentiating cases of plagiarism from those that involve the free use of ideas, thoughts, methods, formulas, or concepts.

Second, and intimately linked to this last problem, I will examine the need to study—not transfer or transplant—analytical tools that will rationally and objectively lead to the appropriate differentiation between plagiarism and the free use of ideas. This section requires, on the one hand, a reexamination of the idea/expression dichotomy and, on the other, an explanation of how North American courts have developed analytical tools that help identify the protectable and non-protectable elements that an allegedly plagiarized work can contain and/or integrate into its creative structure.

On this point, I would like to make clear that these references to North American courts (especially the Ninth Circuit) do not represent any capricious desire to vindicate transplanting and implementing these tools into Colombia's legal system, something that has increasingly occurred in moral rights and plagiarism cases. Rather, the references are made with the intention of providing a comparative perspective of the efforts those courts have made to prevent copyright law from granting monopolies on ideas.<sup>14</sup>

Finally, and reiterating that this article does not intend to normatively judge the Court's sentence against Professor Giraldo, I will conclude by recommending that Colombian judges consider developing analytical tools—within a Colombia-specific framework—that will help them rationally and objectively identify, *a priori*, the distinction between ideas and expression, an analysis often involved in plagiarism cases. In the absence of these tools, as I will emphasize, judges run the risk of not only granting monopolies on ideas or expressions that do not deserve protection, but also violating international agreements that preach the necessity of balancing authors' legitimate interests with the users' legitimate interests in freely accessing and using prior works' ideas, concepts, formulas, or methods.

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<sup>14</sup> I find it necessary to recall Benjamin Kaplan's *An Unhurried View of Copyright* (Columbia Univ. Press, 1967), in which Kaplan insists on the need to reevaluate the current state of copyright, in order to save the system from its expansion in scope and protection.

## II. USING THE PERSONHOOD PERSPECTIVE TO INTERPRET THE CONSTITUTIONAL SCOPE OF AUTHORS' MORAL RIGHTS

### A. *An Introduction to the Personhood Theory*

Among the many different philosophies<sup>15</sup> used to analyze the political, economic, and social purposes of IP, one finds the personhood theory, a philosophy used to justify both IP protection in general and copyright specifically.<sup>16</sup>

Hegel's explanations of the relationship between personality and IP rights provide the basis for the theory. To Hegel, "intellectual property need not be justified by analogy to physical property. In fact, the analogy [] may distort the status Hegel ascribes to personality and mental traits in relation to the will."<sup>17</sup> As Justin Hughes explains in his seminal work on the subject,<sup>18</sup> this philosophy is therefore unique in that:

The persona is the one type of potential intellectual property which is generally thought of as *not* being a result of labor. Even if the persona is considered to be a product of labor, people would work on their personas without any property rights being necessary to motivate them. Therefore, the instrumental labor justification is not necessary. In contrast, the persona is the ideal property for the personality justification. No intermediary concepts such as 'expression' or 'manifestation' are needed: the persona is the reaction of society and a personality. Property rights in the persona give the individual the economic value derived most directly from one's personality.<sup>19</sup>

Thus, when applied to authors' rights, this theory holds that one's personhood comprises not just the "persona," but also poems, stories, novels, musical works, sculptures, and paintings. More succinctly, as Justice

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<sup>15</sup> Theories such as legal realism, critical legal studies, law and economics, and law in context have elaborated discussions attempting to give clarity, to propose reforms, and to justify or decry the protection given by IP law.

<sup>16</sup> For fuller discussions of the theory see, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO STATE L.J. 517 (1990); Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

<sup>17</sup> Hughes, *supra* note 16, at 337.

<sup>18</sup> See, e.g., William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 184 (Cambridge Univ. Press, 2001) (referring to Hughes' piece as "perhaps the most fully developed" on the subject).

<sup>19</sup> See Hughes, *supra* note 16, at 340 (emphasis in original).

Holmes stated, such works are viewed as “the personal reaction of an individual upon nature.”<sup>20</sup>

A major problem with this conclusion, however, arises with copies of works; that is, when “[t]he writer physically manifests his will only ‘in a series of abstract symbols’ which can be rendered into ‘things’ by mechanical processes not requiring any talent.”<sup>21</sup> In this scenario, the copier “does not embody his will in an object in the same way the artist does.”<sup>22</sup> To Hegel, this ease of copying can pose a major problem to IP rights, given that “the purpose of a product of mind is that people other than its author should understand it and make it the possession of their ideas, memory, thinking, etc.”<sup>23</sup>

As a solution to this dilemma, Hegel believed “that the alienation of a single copy of a work need not entail the right to produce [copies].”<sup>24</sup> Hegel seemed to view an author’s work as an “ongoing expression of its creator, not as a free, abandonable cultural object.”<sup>25</sup> Hegel also believed the right to make copies of a work was “one of the ‘universal ways and means of expression . . . which belong to [the author].’” Thus, “just as he does not sell himself into slavery, the author keeps the universal aspect of expression as his own.”<sup>26</sup> The personhood perspective, therefore, precludes an author from transmitting all of his rights in the work.

Yet this conclusion raises the question: “What justifies the author in alienating copies of his work while retaining the exclusive right to reproduce further copies of that work?”<sup>27</sup> Just like with real property, an author may alienate his IP rights in two ways. First, through a complete sale: the author alienates all the economic rights he derived from creating—in the case of copyright—the artistic, literary, or scientific work.<sup>28</sup> Second, through selling copies: the author alienates copies of his work, with limitations on how those copies may be used.<sup>29</sup> Unlike real property, however, an author may “alienate the intellectual property while keeping the ‘whole’ of the property and himself.”<sup>30</sup>

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<sup>20</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

<sup>21</sup> *Id.*

<sup>22</sup> Hughes, *supra* note 16, at 338.

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.* at 348.

<sup>26</sup> *Id.* at 338.

<sup>27</sup> *Id.*

<sup>28</sup> Hughes, *supra* note 16, at 346.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 349.

Having established these two means of alienation, the personhood theory may provide a better justification than traditional common law theories<sup>31</sup> for an author's ability to transmit some IP rights while retaining others.<sup>32</sup> As Hughes points out, "[t]he alienation of copies is perhaps the most rational way to gain exposure for one's ideas," because "[e]ven for starving artists[,] recognition of this sort may be far more valuable than economic rewards."<sup>33</sup> The personhood theory therefore allows an author to alienate copies of his work in order to earn respect, honor, admiration, and money from the public, while preventing authors from surrendering all their rights, "most importantly, their right to prevent others from mutilating or misattributing their works."<sup>34</sup> Hughes concludes that this outcome can be accomplished if the author receives "public identification," and the work receives "protection against any changes unintended or unapproved by the creator."<sup>35</sup>

### B. *The Court's Adoption of the Personhood Theory*

Before continuing the analysis, it is worth noting that in the Colombian Judicial System, as opposed to common law, moral rights do not usually generate discussions on the tension between personality and property just discussed. The silence is due to Colombian moral rights being both perpetual and inalienable,<sup>36</sup> thus preventing an author from alienating all of his IP rights.

What seems inconsistent about the Court's decision, therefore, is not due to a conflict between personality and alienation, as in common law. Rather, the issue is that the Court—without even mentioning the theory, let alone the complexities discussed above—adopted Hegel's personhood

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<sup>31</sup> [Translator's Note] Courts in the U.S., for instance, predominantly view copyright law "as a statutory instrument designed to balance incentives necessary for the author's productivity with the public interest in access to and dissemination of her products." Drassinower, *supra* note 1, at 1; *see also supra* note 15.

<sup>32</sup> *See* Hughes, *supra* note 16, at 350.

<sup>33</sup> *Id.*

<sup>34</sup> *Philosophical Perspectives on Intellectual Property*, THE BRIDGE (Oct. 10, 2012), <http://cyber.law.harvard.edu/bridge/Philosophy/ipphil.htm>.

<sup>35</sup> Hughes, *supra* note 16, at 350.

<sup>36</sup> "The moral right is born at the same time as the work, a consequence of creation, not administrative recognition. These rights are non-economic, inalienable and, in principle, perpetual. They are meant to protect the intellectual interests of the author and with respect to these rights, the State takes various actions, guaranteeing the law helps the right-holder disclose his work or keep it private, to assert his right of recognition for the work, to demand respect for the integrity of the work, and to retract the work." Giraldo, *supra* note 3, at 17-18 (citing Corte Constitucional [C.C.] [Constitutional Court], junio 20, 1996, M.P. J.C. Ortiz Gutiérrez, Sentencia C-276/96 (Colom.), *available at* [http://www.derechodeautor.gov.co/htm/legal/jurisprudencia/CD\\_Legal/IndiceConologico/CC.htm](http://www.derechodeautor.gov.co/htm/legal/jurisprudencia/CD_Legal/IndiceConologico/CC.htm)).



justification of moral rights. This silence is especially noteworthy because the theory provided the basis for the Court's decision.

To illustrate this point, one need simply note the Court's statement that moral rights, "given their fundamental nature, find support in various international agreements approved and ratified by the Colombian State,<sup>37</sup> in the Constitution, as well as in legal norms."<sup>38</sup> The Court, citing a previous Constitutional Court<sup>39</sup> decision, then emphatically held:

A failure to recognize a man's right of authorship to the fruits of his creativity, the exclusive manifestation of either his spirit or ingenuity, *is a failure to recognize a man's condition as an individual who thinks and creates, and by his very nature expresses this rationality and creativity.* For this reason, authors' moral rights *should be protected as rights that emanate from the human condition.*<sup>40</sup>

This quotation raises the question: how could the Court, without any discussion of these theories, much less the debates occurring outside of Colombia on the subject, establish that creative works represent a part of the human condition? This query, in turn, leads me to ask whether the Court's position represents an adoption of personhood perspective of authors' moral rights—a question I unequivocally answer in the affirmative.

It is this philosophical underpinning that led to the Court's expansive interpretation of moral rights protection. As a result, the Court did not simply clarify that plagiarism is included within the rights protected by Article 270, but also that Colombia must offer this protection in order to "sufficiently" and "adequately" fulfill its international agreements.<sup>41</sup> Thus, under the umbrella of achieving these goals, the Court revealed the extent of its own personhood perspective of moral rights.

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<sup>37</sup> See *Giraldo*, *supra* note 3, at 13, 20-21 (citing Andean Community Decisions); *id.* at 15 (citing the Berne Convention); *id.* at 18 (citing the 1948 UN Human Rights Charter); *id.* at 22 (citing the Rome Agreement of 1961). [Translator's Note] Colombia is a party to the Andean convention and therefore subject to that court's judicial decisions. See Camilo A. Rodriguez Yong, *Enhancing Legal Certainty in Colombia: The Role of the Andean Community*, 17 MICH. ST. J. INT'L L. 407, 430 (2008).

<sup>38</sup> See *Giraldo*, *supra* note 3, at 20.

<sup>39</sup> The Constitutional Court "reviews the constitutional validity of laws approved by the legislative branch and some decrees issued by the executive branch; and it is also responsible for procedures related to actions created to protect the rights of those accused of criminal offenses, or actions against abuses of public administration officials, including members of the judiciary. The Court thus guards the integrity and supremacy of the constitution; and rules on amendments to its text, and on the enforcement of international treaties." Ramirez, *supra* note 2.

<sup>40</sup> *Id.* at 74 (citing Corte Constitucional [C.C.] [Constitutional Court], abril 28, 1998, M.P.: V. Naranjo Mesa, Sentencia C-155/98, (Colom.), available at <http://www.derechodeautor.gov.co/htm/legal/jurisprudencia/Corte%20Constitucional/C-155-98.doc>) (emphasis in original).

<sup>41</sup> *Giraldo*, *supra* note 3, at 75.

Consequently—in the Court's opinion—all Colombian judges must now reconcile Article 270 with international human rights standards. The Article should therefore be interpreted such that section one not only protects the right to publish (or not publish) unpublished works but also—in a broader, teleological sense—authors' moral rights. The Court clarified that the section also prohibits—in addition to publishing unpublished works—the following acts:<sup>42</sup>

- 1) Those that, through other forms of disclosure, entail the public diffusion of the unpublished work, without the previous and express permission of the right-holder;
- 2) Those that entail the violation of the right of authorship or recognition, in accordance with the following contingencies:
  - (A) When without the previous and express authorization of the right-holder, someone discloses in whole or in part, in the name of someone other than the right-holder, an unpublished work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.
  - (B) When without the previous and express authorization of the right-holder, someone publishes completely or partially, in the name of another, an already disclosed work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.<sup>43</sup>

In these terms, the Court tacitly held—again, in accord with its broad, personhood perspective—that this formulation, as opposed to the actual

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<sup>42</sup> [Translator's note] The original statute punishes anyone who:

1. Publishes, completely or partially, without the previous and express permission of the right-holder, an unpublished work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.
2. Enters into the national registry with the name of anyone other than the true author, or with the title altered or removed, or with the text altered, defaced, modified or mutilated, or the editor or producer's name falsely stated, a work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.
3. By any means or procedure, condenses, mutilates or transforms, without the previous and express permission of the right-holder, a work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.

CÓDIGO PENAL (Criminal Code) (C. PEN) art. 270 (Colom.).

<sup>43</sup> *Id.* at 78-79. For a comparison, see the original statute, *supra* note 42.

statute,<sup>44</sup> would “fully protect” the moral rights of authorship, recognition, publication, and integrity.<sup>45</sup>

Without judging whether the Court’s adoption and extension of the personhood perspective was appropriate or not, it is worth discussing what I believe to be the principal problem this position poses to Colombia: the possible failure in the judicial process of identifying and distinguishing cases of plagiarism from those involving the free use of ideas, thoughts, and concepts. The potential number of criminal sentences for plagiarism—either menial<sup>46</sup> or elaborate<sup>47</sup>—is great if one understands authors’ moral rights to cover all situations in which an individual “thinks, creates [] and expresses [his] rationality and creativity.”<sup>48</sup>

This interpretation is not, amongst other things, entirely the goal of IP. Rather, as Article 7 of the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”) states, IP seeks to “contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”<sup>49</sup>

It is therefore valid to ask to what extent a rigid and extensive interpretation of the personhood perspective—as applied to authors’ moral rights—could affect the free circulation of ideas.

Of note, unlike what the Court stated, it is not so easy—though not impossible—to distinguish between plagiarism and the free use of ideas by simply establishing that the essential element of plagiarism is the “appropriation of original and novel expressions, understood as the result of the activity of the spirit, which evidence individuality and creation, but keeping in mind that in many occasions similarities may be due to chance, of the development of an idea within the same social framework.”<sup>50</sup> That is, it does not seem so easy to differentiate between cases of plagiarism and the free use of ideas when using the Court’s rationale, because the Court’s

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<sup>44</sup> [Translator’s Note] For a translated version of the original statute, see *supra* note 42.

<sup>45</sup> *Giraldo*, *supra* note 3, at 79.

<sup>46</sup> Menial plagiarism occurs when the plagiarizer “simply suppresses the real author’s name at all without touching the content of the work.” *Giraldo*, *supra* note 3, at 80-81.

<sup>47</sup> Elaborate plagiarism occurs when the plagiarizer “extracts important parts of the original work in order to incorporate them into his.” *Giraldo*, *supra* note 3, at 81.

<sup>48</sup> *Giraldo*, *supra* note 3, at 74 (citations omitted).

<sup>49</sup> General Agreement on Tariffs and Trade, Art. VII, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, in THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999) [hereinafter TRIPS].

<sup>50</sup> Vicente E. Gaviria Londoño, *Delitos contra los derechos de autor*, in LECCIONES DE DERECHO PENAL, PARTE ESPECIAL (2003) 557 (citing ALEJANDRO GÓNZALEZ GÓMEZ, EL TIPO DE LOS DELITOS CONTRA LA PROPIEDAD INTELECTUAL 192 (1998)).

interpretive and analytical framework featured a broad personhood perspective of authors' moral rights.

Consequently, Colombian judges following this interpretation could have problems when addressing ambiguous questions, such as “[a]re there intellectual works that do not involve an expression of the activity of the spirit of the author, but show individuality, originality, and novelty in the creative process?” The answer is likely circular, and distracts from the ultimate goal of determining plagiarism in actual cases. Such questions are useful, however, because they lead to a discussion of the paradigms and elements that both characterize and justify the Court’s personhood perspective of authors’ moral rights. For example, this perspective: allows individuals to assert their free will and be recognized by third parties; promotes individuality, understood as the identity a person derives from his work; and relies on the author’s benevolence, something essential for third parties to express their ideas on the author’s original work.

However, these benefits also run contrary to IP’s goal of disseminating technology by suppressing “the revolutionary social and cultural implications of our increasingly powerful copying technology.”<sup>51</sup> The law would thus continue consumption-based social distinctions and serve as “Sumptuary Intellectual Property Law.”<sup>52</sup> On this point, Barton Beebe recently argued that IP in general—and copyright in particular—already serves as a judicial tool for maintaining the social status quo.<sup>53</sup> Beebe points out that many courts, in assessing damages in copyright infringement cases, have adopted anti-dilution rationales, basing damages on the harm of the infringing work’s “availability and prevalence.”<sup>54</sup> This conception of copyright runs contrary to the traditional idea that authors are compensated based on the originality of their work, not its distinctiveness. Such a law would therefore twist the teleology of the IP system, namely, authors’ rights in original, creative works, into trademark rights in distinctive—not original—marks.

This is all to say that there are numerous important interests wrapped into each intellectual creation, and improper plagiarism analysis could lead to sacrificing the free use of ideas for the sake of authors’ moral rights. The

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<sup>51</sup> Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 810 (2010).

<sup>52</sup> “Through Sumptuary intellectual property law, we seek in particular to suppress the revolutionary social and cultural implications of our increasingly powerful copying technology. Sumptuary intellectual property law is thus taking shape as the socially and culturally reactionary antithesis of the more familiar technologically progressive side of intellectual property law.” *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> *Id.* at 861 (citing *Spinmaster, Ltd. v. Overbreak LLC*, 404 F. Supp. 2d 1097, 1111 (N.D. Ill. 2005)).

result could be legally granted monopolies on ideas, with future authors' creative processes subject to these rights holders' benevolence.

Finally, this discussion stresses the importance of recognizing that authors' rights are founded and justified on the understanding that "copyrighting ideas is inconsistent with the doctrine of originality and its normatively necessary corollary, the defense of independent creation."<sup>55</sup>

### III. THE NEED TO DEVELOP AND/OR ADAPT ANALYTICAL TOOLS TO DEFINE THE IDEA/EXPRESSION BOUNDARY

As noted in the previous pages, distinguishing between plagiarism and the free use of ideas is a difficult process, especially with an expansive personhood theory of moral rights. This reality forces us to find and/or restructure analytical tools that allow us to distinguish, *a priori*, between ideas and expressions thereof, and also to decide if a particular case falls within the type of crime Article 270 describes. On one hand, we have the Supreme Court stating that "it is fundamental, in analyzing conduct which could involve the violation of authors' moral rights, *to distinguish the free use of ideas, from the appropriation of the expression of those ideas*, because only the latter will trigger criminal sanctions."<sup>56</sup> On the other hand, it is complicated to develop this distinction given that, in the words of Judge Learned Hand, "[n]obody has ever been able to fix that boundary, and nobody ever can."<sup>57</sup>

As a first methodological step in arriving at a rational and objective approach to this thorny issue, it is interesting to observe, in comparative terms, how North American courts—particularly the Ninth Circuit (ironically, the very court that the Supreme Court of Justice cites in its opinion)—have developed a series of analytical and interpretive tools targeted at defining, filtering, and distinguishing unprotectable ideas from the protectable expressions thereof. This dichotomy, as the Supreme Court of Justice properly expressed, "explains why there are hundreds or even thousands of works that are based on a single idea, yet these works do not infringe the original thinker's rights as, we reiterate, what is protected is the style, language, and the forms used to express human thought."<sup>58</sup> The Ninth Circuit has stated that this determination—separating ideas from expressions thereof—is the Court's true objective in an infringement case.<sup>59</sup>

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<sup>55</sup> Drassinower, *supra* note 1, at 14.

<sup>56</sup> *Giraldo*, *supra* note 3, at 28 (emphasis added).

<sup>57</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>58</sup> *Giraldo*, *supra* note 3, at 27.

<sup>59</sup> *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977).

The two primary analytical tools used by the Ninth Circuit to separate ideas from expressions are the merger doctrine and *scènes à faire*. It is worth mentioning that “[o]bviously, no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed its ‘expression.’”<sup>60</sup> However, these tools are important because, at the very least, they provide a rational means of reconciling two legitimate socioeconomic interests: compensating the author for his effort and originality; and ensuring the social and economic benefit of using that idea.<sup>61</sup>

First, the merger doctrine holds that “[w]hen an idea is inseparable from its own expression, that idea is said to merge with the expression, and such expression, despite any originality, is denied copyright protection.”<sup>62</sup> The doctrine stands for the fact that a third party cannot infringe an author’s rights if the original work’s underlying ideas can only be expressed in a single form; the original work was not protectable in the first place. To hold otherwise, “would confer a monopoly over the idea itself,”<sup>63</sup> which would likely limit expression.

Second, *scènes à faire* is defined as “sequences of events which necessarily follow from a common theme. ‘[S]imilarity of expression . . . which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form will preclude a finding of actionable similarity.’”<sup>64</sup> For example, architectural plans may contain generalized notions of where to locate functional elements such as roads or the best engineering methods to use. To the extent these plans or—to be more precise—these functional elements are “ideas,” they cannot be protected under copyright.<sup>65</sup> Also, in literature, *scènes à faire* would prevent protection of the “overlapping sequences of events” that derive from “the thematic concept that to a lost child, the familiar face of the mother is the most beautiful face, even though the mother is not, in fact, beautiful to most.”<sup>66</sup> Similarly, “a spy novel usually contains items such as luxury cars, numbered Swiss bank accounts, a femme fatale or [ ] spy gadgets hidden in watches, belts, shoes or umbrellas; but the work in which these elements appear would not be plagiarizing an earlier work also containing these

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<sup>60</sup> Peter Pan Fabrics v. Martin Werner, 274 F.2d 487, 489 (2d Cir. 1960).

<sup>61</sup> See Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57 (2d Cir. 2010) (analyzing alleged architectural plagiarism).

<sup>62</sup> Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1463 (5th Cir. 1990).

<sup>63</sup> Fin. Control Assocs., Inc. v. Equity Builder, Inc., 799 F. Supp. 1103, 1118 (D. Kan. 1992).

<sup>64</sup> Reyher v. Children’s Television Workshop, 533 F.2d 87, 92 (2d Cir. 1976) (citations omitted).

<sup>65</sup> Peter F. Gaito Architecture, 602 F.3d at 68.

<sup>66</sup> Reyher, 533 F.2d at 92.

elements.”<sup>67</sup> That is, “[t]he fact that Shakespeare wrote a story about star-crossed lovers cannot mean that he has a proprietary claim on all stories about star-crossed lovers.”<sup>68</sup> Further, as the Ninth Circuit stated, “Degas can’t prohibit other artists from painting ballerinas and Charlene Harris can’t stop Stephanie Meyer from publishing *Twilight* just because Sookie came first.”<sup>69</sup>

In conclusion, *scènes à faire* prevents protecting elements of a work derived from expressions or representations that necessarily flow from one common idea. In the face of this principle, one can see that authors cannot protect common topics within a genre or theme. Nor do these rights protect elements that naturally flow from the subject more than from the author’s creativity, or elements that are dictated merely by functional or external factors.

#### IV. CONCLUSION

Regardless of the complications brought about by the implementation and/or application of these doctrines to actual cases (e.g., determining who has the burden of proving the original work’s ideas or expression thereof; whether the doctrines should be affirmative defenses or elements in the definition of copyright infringement)<sup>70</sup>, it is important to understand that these analytical tools are filtering unoriginal items out from authors’ rights protection.<sup>71</sup> This filtering will, *prima facie*, allow a fair balancing between the work’s protectable elements and its unprotectable free ideas. Therefore, in cases where the original work has numerous unoriginal elements, there would need to be “virtual identity” between the works to find infringement.<sup>72</sup>

The ultimate question then, given the Court’s broad, personhood based interpretation of Article 270, is what would have happened in this case if the courts had used these analytical tools to rationally measure—before judging the alleged conduct—the spectrum of protection available to the allegedly infringed work. More specifically, was the range of expression

<sup>67</sup> S.A.P., Nov. 22, 2007 (Madrid, Spain) available at <http://audiencias.vlex.es/vid/intelectual-proyeccion-peliculas-indemnizacion-37390826>.

<sup>68</sup> Drassinower, *supra* note 1, at 17.

<sup>69</sup> *Mattel, Inc. v. MGA Entertainment Inc.*, 616 F.3d 904, 913 (9th Cir. 2010).

<sup>70</sup> For a full discussion of these points, see Andrew B. Hebl, *A Heavy Burden: Proper Application of Copyright’s Merger and Scenes a Faire Doctrines*, 8 WAKE FOREST INTELL. PROP. L.J. 128 (2007).

<sup>71</sup> See Drassinower, *supra* note 1, at 18-19 (“The Plaintiff’s ideas cannot be copyrighted in the name of the protection of the plaintiff’s authorship because the copyright of ideas in fact denies the possibility of the defendant’s authorship . . . . The defendant’s equal dignity as an author is the concept by way of which a rights-based approach to copyright law insists upon the preservation of and cultivation of the public domain.”).

<sup>72</sup> *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000).

limited such that certain elements merged with the work's underlying idea? Were certain elements necessary to discuss the idea? The answers to these questions could have made "virtual identity" the appropriate standard for infringement in this case.

As this article does not set out to answer these questions, it is enough to say that, given the Court's broad interpretation of moral rights, Colombian judges need to be careful in deciding both plagiarism cases and sentences. Given that under this precedent, there is no *a priori* distinction between the protectable and unprotectable elements of the literary, artistic, or scientific work allegedly plagiarized; a failure to distinguish between these elements could grant monopolies on the allegedly infringed work's functional ideas, methods, or concepts.

This need is particularly important, as the Court itself referenced when using the Constitution to justify applying the *pro homine* principle to Article 270, because a failure to create distinctions creates the risk that Colombia could fail to fulfill its international treaty obligations, such as the aforementioned TRIPS Article 7. That is, authors' rights may cease to "contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."<sup>73</sup> This would be a world in which authors' moral rights are incredibly poetic, but also impractical and out of touch with Colombia's economic and social reality.

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<sup>73</sup> TRIPS, *supra* note 49, at art. 7.