February 8th, 2013

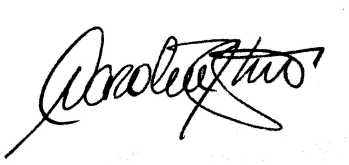
Mr.
Stanford K. McCoy
Assistant U.S. Trade Representative for Intellectual Property and Innovation
Office of the United States Trade Representative

Re: 2013 Special 301 Review
Docket No.: USTR-2012-0022-0001

Dear Mr. McCoy:

The purpose of the memorandum attached hereto is to urge the USTR to remove Colombia from the Watch List of the Special 301 Report. Among several reasons, Karisma Foundation wishes to emphasize the following ones: 1) During the last years Colombia has been implementing reforms on intellectual property rights enforcement –some of them arising from international obligations such as the Free Trade Agreement (FTA) with the United States. 2) In such a context, the use of the Special 301 Report constitutes an external pressure to our national policy discussion.

Sincerely,



Carolina Botero
Karsima Foundation

Memorandum regarding the inclusion of Colombia in the Special 301 Report Watch List. Karisma Foundation.

Within the scope of the World International Property Organization (WIPO), Colombia has ratified several treaties on IPR enforcement. Furthermore, our country has ratified the TRIPS Agreement, is party to the Patent Cooperation Treaty and the Madrid Agreement, and is member of the Andean Community of Nations. Finally, Colombia's FTA with the United States was formally adopted last May by means of Decree 993 of 2012.

This host of international obligations has been included in national laws or is part of bills currently under debate in Congress. For example, Law 890 and Law 1032 established imprisonment penalties of as much as 8 years for infringing online copyright or circumventing technical protection measures.

In the realm of the FTA with the US, Bill 241 –discussed in Congress in 2011– included a takedown mechanism for allegedly infringing online content, largely identical to that of the Digital Millennium Copyright Act. In addition, Law 1520 established –among others– new restrictions to transmit online television signals, and raised the burden on technology circumvention.

Several civil groups and stakeholders voiced their concern for what amounted to be the establishment of TRIPS-plus standards in Colombia's legislation, even beyond the US legislation threshold. For example, Law 1520 disallowed any exception criteria for the use of copyrighted content, disregarding the fair use doctrine included in the US jurisdiction.

Bill 241 was shelved after many congressmen opposed a DMCA-style takedown mechanism without prior judicial review, which contradicted the most elementary guarantees in our Constitution. In the memorandum for second debate, the speakers of Bill 241 drafted the issue in the following terms:

> Restrictions to freedom of expression in the Internet are only acceptable when they comply with international standards, which establish –among others– that such restrictions must be provided by law and pursue a legitimate aim recognized by international law as necessary to reach it (the 'tripartite test')[1].

The speakers referred as well to Article 13 of the Inter-American Convention on

[1] Congress of Colombia, Journal No. 814 of 2011, pg. 16. Informal translation.

Human Rights, which states that freedom of expression *"shall not be subject to prior censorship but shall be subject to subsequent imposition of liability"*.

On the other hand, the Constitutional Court overturned Law 1520 due to a procedural irregularity in Congress. Beyond that, several groups declared their concern for the stringent standards included in this legislation. According to a group of north-American scholars who submitted a letter to the tribunal, *"many of the changes that upgrade protection for copyright go beyond what the FTA requires and are, in fact, more restrictive than U.S. law itself"*[2].

This context does not suggest that Colombia is failing to implement an adequate IPR enforcement framework. On the contrary, we believe that our country is already complying with its multilateral commitments. As a matter of fact, the issues addressed by Law 1520 are already in place in Colombia's legal system (such as the three-step test and the prohibition to transmit online TV signals), although with the necessary exceptions and limitations that were going to be stripped of with the new law.

Regarding the FTA implementation, the current state of affairs also shows that both Congress and civil society are starting to engage in a sovereign public debate to develop a sound policy for the Internet within the boundaries of the agreement. In such situation, the use of Special 301 Report –and the inclusion of Colombia in the Watch List– constitutes an external pressure to the country's internal discussion.

In 2011 a group of civil organizations (including among others the Electronic Frontier Foundation and Public Knowledge, from the US; Digital Rights, from Chile, and Karisma Foundation) stated that the Special 301 Report should not be used *"to pressure countries to adopt intellectual property protection that exceeds the level required by the TRIPS Agreement"* or *"to pressure countries to adopt intellectual property protection that exceeds the level of protection found in U.S. law"*.

In this opportunity we want to reinforce that message, which is even more relevant in Colombia's current situation.

[2] The letter is available at http://infojustice.org/archives/9344.