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Ministerio de Comercio Industria y Turismo
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Ref. Proyecto de Ley "Por la cual se modifica la Ley 23 de 1982 y se adiciona la legislación nacional en materia de derecho de autor y derechos conexos"

Dear Sir, Madam.

We write as a group of international intellectual property academics and experts in response to the request for comments on Colombia's recently released copyright law amendment bill, Proyecto de ley Por la cual se modifica la Ley 23 de 1982 y se adiciona la legislación nacional en materia de derecho de autor y derechos conexos.

We understand that the bill is intended to implement the US-Colombia Free Trade Agreement. Other countries - including Singapore and Korea - have successfully used Free Trade Agreement implementing processes to adopt exceptions specifically modeled on the U.S. "fair use" exception. The general approach associated with the term "fair use" is to include an exception to copyright that is general, open and flexible, as those terms are defined below. The particulars of how such an approach may be implemented can differ from country to country. Both civil and common law systems increasingly embrace such exceptions in their

law. Colombia can and should consider including one in its revision.

General, open and flexible exceptions provide an avenue for courts, enforcement entities and users themselves to conclude that a reasonable use of protected materials in ways not specifically foreseen at the time of the legislation's drafting may be nonetheless legal. In times of rapidly changing technology, the adaptability of such provisions can be instrumental to promoting technological innovation and access to its products -- with associated benefits for cultural production and consumption, learning, research and access to the products of knowledge upon which social and economic development depend.

As academics who study comparative copyright, we write to share information on the potential benefits of adopting a general, open and flexible exception in Colombia, and to dispel the notion that such an exception is appropriate only for common law legal systems.

Implementing General, Open and Flexible Exceptions

In implementing an FTA with the United States, Colombia should feel free to adopt any aspect of currently existing US law without fear of violating the FTA. One key aspect of US law that would benefit Colombia is its inclusion of a *general* exception that is *open* to potentially any purpose, applied in specific cases through a *flexible* balancing the interests. 17 U.S.C. § 107 ("Fair Use"). Indeed, promotion of similar balancing features within copyright law has become a specific objective of US trade policy. See Trans Pacific Partnership Agreement, Art 18.66 (Article 18.66: Balance in Copyright and Related Rights Systems).

Although use of the term "fair use" for general, open and flexible exceptions is particular to US law and those of a handful of other jurisdictions around the world, the key elements of generality, openness and flexibility are common features of copyright exceptions in civil law as well as common law countries.

- Generality: A *general* exception applies a single test to multiple purposes. This a common feature of copyright exceptions. Generality in this sense may be most readily evident in "fair use" and "fair dealing" statutes in countries influenced by United Kingdom legal history. See Jonathan Band, The Fair Use/Fair Dealing Handbook, http://infojustice.org/archives/29136. U.S. law takes the most straight and economical approach by specifying in 17 U.S.C. Sec 107 that any use by anyone that fits certain general criteria is not infringing, and providing a non-exclusive list of examples (comment, reporting, teaching, etc.). But general clauses exist in civil law copyright systems as well. Colombia Decision 351 Common Provisions on Copyright and Neighboring Rights, Cartagena Agreement, Art. 21 (1993) requires that

the application of every exception be confined to situations that satisfy a general test derived from Art 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886, amended September 1979. Although this test restricts , rather than enables, user rights, it need not be so limited in its application. China has recently proposed transforming a similar restriction into a general enabling clause -- authorizing uses for any purpose that "do not adversely affect the normal exploitation of the works or unjustifiably prejudice the legitimate interests of the owner or owners of the rights." See Global Network on Copyright User Rights: Model Flexible Copyright Exception, Appendix II: Examples of Flexible Limitations and Exceptions from Existing and Proposed Laws, http://infojustice.org/flexible-use; see also The Wittem Project, European Copyright Code, Article 5.5 (proposing a general exception for "any other use that is comparable to the uses enumerated" in the Act on similar terms).

- Openness: An *open* exception can be applied to uses for potentially any purpose. In the US, the openness of fair use is accomplished by including the words "such as" before an illustrative list of permitted purposes. Many exceptions in civil as well as common law countries contain this element of openness within categories of permitted uses. Quotation exceptions, for example, can be either closed to specific purposes (e.g. for criticism or review of the work quoted) or open to any purpose subject to a fairness test. Colombia's current law is an example of the latter. It authorizes quotation for any purpose as long as not "constituting a prejudice for the author of the work from which they were taken." Art. 31, L.23/90, enero 28, 1993, Diario Oficial [D.O.] (Colom.). Similarly, Colombia's private copy exception is open to a reproduction of a work for any purpose lacking gainful intent. Art. 37, L.23/90, enero 28, 1993, Diario Oficial [D.O.] (Colom.). Openness, like generality, is thus not peculiar to common law systems.
- Flexibility: A *flexible* exception is one applied through a proportionality test balancing the interests of rights holders with those of users, third parties and society at large. Most copyright laws contain at least some exceptions that turn on similar balancing tests. This element ensures that the exception is fair to the interests of rights holders, including to comply with the so-called "three-step test" in Article 9 of the Berne Convention. Such flexibility can be found in any exception that turns on determination of whether the use is "to the extent justified by the purpose," as does Article 32 of the Colombia Copyright Act (authorizing reproductions for teaching purposes "to the extent justified by the purpose"). And thus flexibility, like generality and openness, is not a feature of law exclusive to common law countries.

The benefits of General, Open and Flexible Exceptions

Although Colombia's law does not lack exceptions that require judges to apply general, open or flexible terms, it does lack an exception that combines these three elements together. The combination of the three elements creates a catch-all general exception applying a standard flexible test to an open list of potential purposes and uses. It thus creates an escape valve for important social and economic interests that do not unduly harm the interests of copyright holders, but that were not specifically imagined at the time of the legislation's drafting.

The US has the longest history of the incorporation of a general, open and flexible exception into its law, and thus provides a useful case study into its potential benefits. Over the years, for example, the U.S. publishing and motion picture industries have taken bold advantage of these features of fair use to enable the production of new works. See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006) (unauthorized use of poster images in book); Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc., 953 F. Supp. 2d 701 (N.D. Miss. 2013) (dismissing action against movie studio for inclusion of quotation from a novel in a Hollywood film).

The features of fair use have also been incredibly important in enabling the production and consumption of new technologies. For example:

- Time shifting (the VCR and DVR). In 1984, the fair use doctrine was deployed to justify a new technology that depended on reproduction of entire television programs for its consumer appeal – the video cassette recorder. At the time, no copyright law in the world contained an exception for the time shifting of content recorded from a television by electronic means. Such activity is not "criticism or review," "parody," "news reporting" or any other purpose that was commonly listed in the exceptions of most laws. Today, widespread consumer use of digital home video recording enabled by TiVo and other set top box manufacturers rely on fair use.
- Reverse engineering. The 1992 decision in Sega Enterprises, Ltd. v. Accolade, Inc., approved of the reliance on fair use rights to enable reverse engineering of software. The possibility of engaging in such practices before legislative clarification was a boon to the US software industry, facilitating a range of practices needed to develop innovative and interoperable products in the digital world.

- Cloud Services. In 2008, the openness of U.S. fair use was interpreted to permit the introduction of remote digital video recording devices, giving rise to the development of myriad cloud storage services. This decision had demonstrable economic impacts – one study found that it "led to additional incremental investment in U.S. cloud computing firms that ranged from $728 million to approximately $1.3 billion over the two-and-a-half years after the decision."

- Internet search. The fair use doctrine was instrumental in enabling the internet search industry to develop -- with its comprehensive reproducing of protected content for the specific purpose of providing useful location information. Kelly v. Arribasoft, 336 F.3d 811 (9th Cir. 2003).

- Text and data mining. One of the latest waves in this long line of innovations lies in the modern practice of research through data and text mining enabled by the internet. Such research requires the copying and indexing of massive amounts of copyrighted works for the "non-consumptive" purpose of research and indexing. But most copyright research exceptions are not broad enough to cover such activity, raising the need for openness in a general exception if such activity is going to be accommodated. In recent years in the U.S. and other countries with open general exceptions (and in the handful of countries with specific authorizations for the purpose), there has been a rise in individual and institutional commitments of talent and money in the development of data mining techniques and the creation of digital databases across which to employ those techniques, in the confidence that when the issue came to court (as it ultimately did in Authors' Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014)), it would be appropriately resolved. In countries that lack open and flexible general exceptions, data mining and text mining research is rare.

The Appropriateness of General, Open and Flexible Exceptions for Civil Law Countries

Often the loudest argument against adopting a general , open and flexible exception in copyright law is that it would not be consistent with the civil law tradition. We dispute this idea. There is nothing in the civil law tradition that would hamper the utility of any civil law country adopting a general, open and flexible exception in its law.

As we noted above, exceptions that include generality, openness and flexibility are not unique to common law systems. Every copyright law we are aware of, including Colombia's, requires judges to apply general, open and flexible norms in some cases.

The collectection of these elements into a single exception is also not unique to common law countries. Civil law countries -- including Taiwan (Copyright Act 2007-07011, Art. 65, 2014), Korea (Copyright Act, Art. 35-3, 2012) and the Philippines (Republic Act 10372, Art. 185.1 and 185.2, 2012) -- have adopted general, open and flexible exceptions. Other civil law countries are currently considering adopting such exceptions in their laws, including in Brazil, Copyright Law Reform Bill, Federal Bill, Art. 46, Bill nº 3133/2012, 2012, and China,Copyright Law Reform Bill 2014, People's Republic of China, Article 43.

General, open and flexible exceptions have also been created, in effect, by civil law courts. In both Brazil and in the EU, courts have interpreted human rights or other principles within copyright law to permit the recognition of new classes of permitted uses of copyright materials through the application of flexible proportionality tests. See C-201/13 Deckmyn v. Vandersteen, 2014 E.C.R. 2132; Superior Tribunal de Justiça, Recurso Especial Nº 1.512.647 - MG (2013/0162883-2), Relator Luis Felipe Salomao, 13.05.2015, Revista Eletrônica de Jurisprudência [R.E.j.], 05.08.2015, (Braz.); Superior Tribunal de Justiça. Recurso Especial n. 964.404/ES. Tribunal Pleno. Relator: Min.Paulo de Tarso Sanseverino, 03.15.2011 (Braz.); see generally P. Bernt Hugenholtz & Martin R.F. Senftleben, *Fair Use in Europe: In Search of Flexibilities*, U. Amsterdam, Jan. 28, 2012, http://ssrn.com/abstract=2013239 (describing EU courts use of free expression rights in copyrigth cases).

Nor is the promotion of general, open and flexible exceptions the province of common law policy advocates. There is an increasing community of civil law academics who promote the adoption of general, open and flexible exceptions in civil law copyright systems. See, e.g., Wittem European Copyright Code, http://www.copyrightcode.eu/ (composed by drafting and advisory committees with members from Germany, Netherlands, Belgium, Norway, Italy, Poland, France and Spain); Tatsuhiro Ueno, *Rethinking the Provisions on Limitations of Rights in the Japanese Copyright Act * – Toward a Japanese-style "Fair Use" Clause*, AIPPI J., 159,201 (2009); Martin Senftleben, *Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law*, U. Amsterdam, Jan. 28, 2013; Florian Potzlberger, *Google and the thumbnail dilema - "Fair Use" in German Copyright Law?*, 9 I/S: J.L. & Pol'y for Info. Soc'y 139, (2013); Hugenholtz, P., *Flexible Copyright. Can EU Author's Right Accommodate Fair Use?* In: Copyright Law in an Age

of Limitations and Exceptions, R. Okediji , Cambridge U. Press, p. 242-258, (2016); Hugenholtz, P., *Fair use in Europe*, Comm. of the ACM, 56, issue 5, (2013) at 26-28; Van der Nol, R., Guibault, L., van Gompel, S.Poort, J. Breemen, J., *Flexible Copyright: The Law and Economics of Introducing and Open Norm in the Netherlands*, SEO Amsterdam Rapport, nr. 2012-60, (2012) of the ACM, 56, issue 5, (2013) at 26-28.

Importantly, stare decisions -- a unique feature of common law adjudication -- is not necessary for the efficient and effective operation of general, open and flexible exceptions. All systems of adjudication -- including in civil law countries -- require the application of general norms in specific cases. This is true, for example, in the application of civil law as well as common law principles such as negligence in tort, malfeasance in contract, originality in copyright, etc. The stability and predictability of the law in civil law countries is aided through the use of of published cases that are open to inspection by lawyers, judges and potential litigants. While no single decision may be said to bind a court, "Civil law courts are expected to take past decisions into account when there is a sufficient level of consistency in case law," and "[o]nce uniform case law develops, courts treat precedents as a source of 'soft' law, taking them into account when reaching a decision." See Fon, Vincy and Parisi, Francesco, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*. INT'L REV. of L. & Eco. (2004), http://ssrn.com/abstract=534504. As in other areas of law, these uses of prior cases in copyright matters give citizens the guidance they need to predict applications of the law in individual cases, despite the lack of a strict stare decisis system.

A general, open, and flexible fair use provision would also accord well with Colombia's tradition of judicial protection of human rights. The recent report of the Special Rapporteur in the field of cultural rights noted the importance of copyright exceptions and limitations to empower new creativity, promote educational opportunity, expand space for noncommercial culture. See Special Rapporteur in the field of cultural rights, *Copyright policy and the right to science and culture*, U.N. General Asembly, Doc. A/HRC/28/57 (Dec. 24, 2014) (by Farida Shaheed). The report also noted the necessity of copyright exceptions and limitations to promote access and cultural works and social inclusion, particularly for the disabled and linguistic minorities. The report affirms that uncompensated exceptions are consistent with the rights of authors, and will be appropriate in many cases, especially in developing countries. The report concludes that "States have a positive obligation to provide for a robust and flexible system of copyright exceptions and limitations to honor their human rights obligations." Moreover, "At the domestic level, judicial or administrative procedures should enable members of the public to request the implementation and expansion of exceptions and limitations to assure their constitutional and human rights."

We thank you for the opportunity to express these comments and invite you to contact the main drafters of this letter, Sean Flynn (sflynn@wcl.american.edu) and Peter Jaszi (pjaszi@wcl.american.edu) if we can be of further assistance.

Sincerely,

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