AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW
PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY

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Honorable Roy Barreras Montealegre
President of the Senate

Honorable Simón Gaviria Muñoz
President of the House of Representatives

Honorable Sergio Díaz-Granados Guida
Minister of Commerce

Dear Presidents Barreras and Gaviria and Minister Díaz-Granados:

We write as a group of international intellectual property academics and experts to applaud the open and participatory process that is underway to implement the provisions of the U.S.-Colombia Free Trade Agreement through amendments to Colombian copyright law. In particular, we note that this process represents a rare opportunity to pair needed reforms in the rights of owners with those necessary to safeguard the critical needs and interests of users. We urge you to take full advantage of this opportunity. Specifically, we urge you to consider the adoption of a provision on limitations and exceptions to copyright that would provide the element of flexibility found in the U.S. "fair use" doctrine. Such a provision would enable the law to accommodate new uses and technologies that evolve over time.

As many of us noted in a previous letter in regard to Bill No. 201 of 2012 (see http://infojustice.org/archives/9414), the original proposal to amend Colombia's copyright law implemented proprietors' rights that restrict the activities of information consumers more than is necessary or appropriate, more than the FTA requires, and more than do the provisions U.S. copyright law itself. We understand that this remains in the current reform proposal. Specifically, the proposal implements proprietors' rights modeled

on U.S. law and referenced in the FTA , while it overlooks the limitations on those rights that help make U.S. law innovation-friendly -- but are not addressed in the FTA.

In its copyright reform, Colombia can protect users and help assure economic progress by following the example of other leading centers of technology innovation. Countries like Singapore, Korea, the Philippines, Israel, and the U.S. itself – likely soon to be joined by China and Brazil - all recognize the value of a flexible approach to limiting the reach of copyright. By a "flexible approach," we refer to any generally applicable copyright exception that incorporates a balancing test that can be applied to new technological and other uses not specifically provided for in legislation. Research recently completed in Singapore, and underway in other countries, suggests a strong correlation between such flexibility and local economic development, especially in key technology domains. This sort of flexibility can be implemented in various ways, but (for example) in the U.S., the flexibility provided by "fair use" has been critical in permitting the healthy evolution of new Internet-based businesses – from Google to Facebook – that now are globally ubiquitous; likewise, it has assured the flourishing of educational institutions to prepare the next generation of innovators. In addition, flexible copyright limitations have allowed an explosion of creativity as users have become producers through remixing and "mashing up" existing works of others in new and transformative ways that add new social value without depriving right holders of their entitlements.

In sum, flexible copyright imitations and exceptions, implemented in a variety of different ways, can present a social, cultural and economic "win-win" situation. The U.S.-Colombia FTA implementation does not bar the adoption of flexible exceptions. Instead, that document allows the U.S. to retain its "fair use" doctrine, and Colombia to choose its own path. The choice is a significant one, and we urge you to consider it carefully.

An international group of experts worked over the last year to create a model limitation and exception that would contain the element of flexibility we propose and would be readily adaptable in civil law systems. The model crafted by that group – one that Colombia could adopt – provides:

> In addition to uses specifically authorized by law, any use that promotes general economic, social and cultural objectives is not infringing if its character and extent is appropriate to its purposes and does not unduly prejudice the legitimate interests of the copyright owner, taking account of the legitimate interests of creators, users, third parties and the public.

This model would be compliant with every "3-step" test in international law, including the one in the U.S.-Colombia FTA. For further clarity, the model outlines an additional (optional) section spelling out the terms of the balance referred to in the main clause. Although the clause would function without that additional section, its adoption might provide additional clarity. The full model is available at http://infojustice.org/flexible-use.

The model just described may or may not be entirely appropriate for Colombia's legal

system. One way or another, however, you should consider giving members of Colombian society who make productive new uses of copyrighted material a legal platform from which to argue that that their uses are lawful when they emerge – rather than leaving this question to be determined years or decades later.

As already noted, there may be other ways to meet this purpose. In the UK, for example, there is a current proposal to add the words "such as" before the categories of "criticism and review," which previously recognized as the sole legitimate purposes for quotation of the work of another.[1] A similar move was included in the 2012 Malaysian legislation that would open a previously closed list of permitted fair dealings with the work of another. (Copyright Amendment Act 2012, Sec. 13(2)(a))

Another mechanism for opening up a closed list system to allow flexibility for unforeseen uses is to graft the international three step test directly into national law as a catch all provision. The Wittem Project proposed a similar provision in its model code for the EU (http://www.copyrightcode.eu/index.php?websiteid=3):

> Any other use that is comparable to the uses enumerated [ ] is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.

These and other models you may consider are provided on a resource page created by the Global Expert Network on Copyright Limitation and Exceptions at http://infojustice.org/flexible-use

In addition to urging serious consideration of a flexible approach to limitations and exceptions, we also note that there are several other areas where the reform proposal appears to fail to take advantage of the opportunity to link expansions of proprietor rights with appropriate limitations and exceptions. For example:

- The bill defines "profit" as "gain or advantage that is obtained from something." This definition is extraordinarily broad – far beyond any employed in U.S. law, for example. Its adverse consequences are especially clear where the "for profit" concept is used to restrict the scope of some limitations and exceptions (such as private copying) or to make criminal sanctions applicable. Nearly any use of a copyrighted material gives some benefit to the user – otherwise the use would not take place. The term "profit" is normally and appropriately used to signify financial gain from commercial trade. We would encourage the Bill to limit this

[1] UK Intellectual Property Office, Technical review of draft legislation on copyright exceptions. Draft quotation exception. Available at http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm

term to such a definition.[2]

- In defining the author's exclusive rights, the Bill repeats the language of the FTA, extending copyright to "[a]ny form of reproduction of the work, permanent or temporary, by any means of procedure including temporary electronic storage." We urge you to consider an appropriate qualification to this right, such as the U.S. law principle that a copy which exists only for "a transitory duration" does not implicate the reproduction right. This principle has been applied to buffer copies, for example. The Cartoon Network v. CSC Holdings, 536 F.3d 121, 127-30 (2d Cir. 2008) (cert. denied June 2009). A failure to do so would pose an entirely unnecessary risk to the functioning of electronic communications systems, as well as the Internet itself.

- Article 11 of the Colombia Bill prevents the "broadcasting through the Internet by land, cable or satellite of television signals" without permission from the owner of the copyright for the signal or its contents "regardless of" any limitations and exceptions to the exclusive rights in Colombia's legislation. The apparent intent of Article 16.7(9) of the U.S.-Colombia FTA, however, was far more limited: to bar wholesale, systematic statutory licensing of television signal retransmission on the Internet. The language of the FTA need not – and should not – be transposed into a blanket prohibition on the application of limitations and exceptions to all Internet uses of television content, as the current draft suggests. In fact, no new legislative language is required to implement this provision of the FTA in Colombian law, which already includes a general prohibition on broadcasting and retransmission of copyrighted content by whatever means. The FTA provision would become relevant if – and only if – a compulsory license limited to Internet "broadcasting" were proposed in the future. The U.S. currently has no such compulsory license (though it does have licenses that works in conjunction with "retransmission" rights to facilitate the operation of cable, satellite, and IP-based pay TV services). But, by the same token, in U.S. law, no exclusive right is categorically immune from general limitations and exceptions, including "fair use." As written, the bill would appear to ban, for example, an Internet use of excerpts from a terrestrial broadcast for educational use or for criticism and review. Such a result may raise serious constitutional concerns.

- Article 12 extends proprietors' rights beyond what is required in the FTA, and significantly beyond existing U.S. law, in imposing liability for circumventing technological protection measures to control access as well as "unauthorized

[2] E.g. Oxford Dictionaries defines profit as "a financial gain, especially the difference between the amount earned and the amount spent in buying, operating, or producing something."

uses" of works. U.S. law and the FTA apply sanctions for circumvention only on those who hack "access" controls, not "use" controls. The parallel section in the U.S. (Sec. 1201 0f the Copyright Act) states that "No person shall circumvent a technological measure that effectively controls *access* to a work protected under this title." The absence of any reference to measures that control "use" of protected works is significant. In the U.S., for example, a consumer who purchases an electronic text is free to make a copy for his or her own personal use – even if the vendor has incorporated controls that aim to frustrate such personal reproduction. Under the proposed legislation, Colombian consumers would be legally barred from doing likewise.

- Article 13 goes significantly beyond the FTA and U.S law in its approach to the process by which new exceptions to the anti-circumvention provisions, designed to preserve the legitimate rights and interests of creators and innovators, will be identified. In the U.S., for example, Sec. 1201(a)(1)(c) provides for a non-political process, conducted by neutral expert agencies. In the Colombian Bill, by contrast, only the legislature has the final power to act. In practice, this means that the real likelihood that meaningful new exceptions will be identified is significantly reduced. In the U.S., by contrast, the administrative approach has produced a series of such additional exceptions, benefitting educators, technology innovators, documentary filmmakers and individual creators, among others.
- The Bill's provisions for criminal penalties, in Article 18, are perhaps the most dramatic example of how this legislation exceeds international and U.S. norms, to the detriment of Colombian citizens. The FTA requires only that "willful" criminal infringers be punished in a fashion that will generate a deterrent effect. The Bill, by contrast, would impose criminal sanctions on a wider range of infringers, including those who were unaware that they were breaking the law. Furthermore, no threshold level is established for the imposition of the most severe criminal penalties on non-commercial infringers; in the U.S., by contrast, an ordinary infringer must make at least 10 copies with a value of at least $2,500 within a 180-day period. Moreover, the Bill's penalty provisions themselves appear extreme. Minimum prison sentences of four years, for even relatively minor violations, are unheard of in most countries. In the United States, for example, a five-year sentence is the maximum permitted for a first offender.
- The Bill appears to apply criminal penalties to any copying of a product for the purpose of "distributing" it. Even an individual duplicating a CD for a friend could be swept into the net of this draconian criminal law.

For further information and inquiries, you may contact the organizers of this letter – Peter Jaszi (pjaszi@wcl.american.edu) and Sean Flynn (sflynn@wcl.american.edu).

Respectfully,

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