Human Rights and Copyright:
Human Rights Challenges to Criminal and Online Copyright Enforcement in Latin America

by

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Abstract

Copyright protection and human rights are in tension through Latin America. Historically, countries in the region have strained public interest in general, and human rights in particular, when implementing international commitments on intellectual property into their domestic law. This creates a risky situation today, when those countries are required to implement new commitments tailored for criminal and online enforcement, such as taking down online infringing content, criminalizing noncommercial infringement, and disconnecting copyright infringing users. This dissertation explores the challenges and advantages of the Latin American legal regime when regulating copyright enforcement through criminal law and in the online environments in compliance with human rights.

The dissertation has been divided in three parts. The first part (Chapters I to III) provides a general background on copyright and human rights in Latin America, analyzes the historical development of copyright law, and extracts some lessons from the process of implementation of international copyright obligations into domestic law. The second part (Chapters IV to VI) analyses the criminal enforcement of copyright by reviewing the current law and its actual application to two basic issues: criminalization and punishment. The third part (Chapters VII to IX) focuses on certain measures of online enforcement, which are: identifying online users, disconnecting internet subscribers, and taking down content. The second and third parts analyze how copyright regulation may infringe some human rights. This analysis does not focus on either freedom of speech or access to

knowledge, which have been the subjects of abundant literature. Instead, the analysis focuses on a set of civil human rights, such as the right to privacy, due process of law, and the presumption of innocence, among others. This section may contribute to filling a gap in the human rights analysis of intellectual property regulation. It also provides support for current advocacy and policymaking, as well as legal background for potential litigation before domestic courts and in the regional human rights system.

This dissertation contributes to a comprehensive view on a matter of public interest, namely the human rights implications of copyright regulation, particularly in relation to its criminal and online enforcement. Rather than closing an argument, human rights open a new perspective for discussion. Although human rights are essential for human and societal development, those rights are limited and, therefore, they allow for certain limitations. Enforcing copyright, which are essentially private rights, may require limiting human rights to a certain extent, but in no case should that enforcement derogate human rights. Highlighting the intersection between copyright law and human rights is a key issue for Latin American countries, especially for those that have assumed international obligations on the matter, and must navigate the complexities of updating their domestic copyright law to digital technologies and the online environment.

Keywords

Copyright - Human Rights - Latin America - Internet - Criminal Enforcement

To Karen, Jack, and Sarah.

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List of Abbreviations

ABPI	Associação Brasileira da Propriedade Intelectual
ACHR	American Convention on Human Rights
ACTA	Anti-Counterfeiting Trade Agreement
ADHR	American Declaration of the Rights and Duties of Man
APEC	Asia-Pacific Economic Cooperation
CEPAL	Comisión Económica para América Latina
CERLALC	Centro Regional para el Fomento del Libro en América Latina y el Caribe
DMCA	Digital Millennium Copyright Act
RMI	digital right management information
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
FTAA	Free Trade Area of the Americas
FTA	Free Trade Agreement
HADOPI	Haute Autorité pour la Diffusion des Œuvres et la Protection des droits sur Internet
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFPI	International Federation of the Phonographic Industry
ISP	Internet service provider
MERCOSUR	Southern Common Market
NAFTA	North American Free Trade Agreement
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
p.m.a.	post mortis auctoris
RIAA	Recording Industry Association of America
TPM	technological protective measure
TPPA	Trans-Pacific Partnership Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
U.S.	United States of America
USTR	United States Trade Representative

WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

List of Usual Legal References

Andean Community

Decision 351	Decisión No. 351 Régimen Común sobre Derecho de Autor y Derechos Conexos [Decision 351 Common Regime on Copyright and Neighboring Rights], adopted by the Commission of the Cartagena Agreement, on Dec. 17, 1993, Official Gazette of the Andean Community No. 145, Dec. 21, 1993.

Argentina

Const. Arg.	Constitución de la Nación Argentina, as amended by Aug. 22, 1994 (Argentina).
Copyright Act Argentina	Ley No. 11.723 Régimen Legal de la Propiedad Intelectual [Legal Regime Intellectual Property Act], Boletín Oficial Sep. 28, 1933, as updated on Dec. 2009 (Argentina).

Brazil

C. F. Braz.	Constituição da República Federativa do Brasil, as consolidated by constitutional amendment No. 66, June 13, 2010 (Brazil).
Copyright Act Braz.	Lei No. 9.610 de 19 de Fevereiro de 1998: Altera, atualiza e consolida a legislação sobre direitos autorais [Act that Changes, Updates and Consolidates the Law on Copyright], Diario Oficial da União Feb. 20, 1998, as updated by Law 12.853, Diario Oficial da União Aug. 15, 2013 (Brazil).
Software Act Braz.	Lei N.° 9.609 de 19 de Fevereiro de 1998: Lei do Software [Software Act], Diario Oficial da União Feb. 20, 1998 (Brazil).

Chile

Const. Chile	Constitución Política de la República de Chile, as amended by Ley No. 20.414, Diario Oficial Jan. 4, 2010 (Chile).
Copyright Act Chile	Ley No. 17.336 sobre Propiedad Intelectual [Intellectual Property Act], Diario Oficial Oct. 2, 1970, as updated by Ley No. 20.435, Diario Oficial May 4, 2010 (Chile).

Colombia

Const. Colom.	Constitución Política de Colombia de 1991 (Colombia).
Copyright Act Colombia	Ley No. 23 de 1982 sobre Derechos de Autor [Copyright Act], Diario Oficial Feb. 19, 1982, as updated by Law 1403, Diario Oficial Jul. 19, 2010 (Colombia).

Costa Rica

Const. Costa Rica	Constitución Política de la República de Costa Rica de 1949, as amended by Law No. 8.365 on July 15, 2003 (Costa Rica).
Copyright Act Costa Rica	Ley No. 6683 sobre el Derecho de Autor y Derechos Conexos [Copyright and Neighboring Rights Act], La Gaceta Oct. 14, 1982, as amended by Law No. 8834, La Gaceta, May 3, 2010 (Costa Rica).
Intellectual Property Enforcement Act Costa Rica	Ley No. 8039 de Procedimientos de Observancia de los Derechos de Propiedad Intelectual [Law on Procedures for Enforcement of Intellectual Property Rights], La Gaceta, Oct. 5, 2000, as amended by Law No. 8834, La Gaceta, May 3, 2010 (Costa Rica).
ISP Regulation Costa Rica	Reglamento sobre la Limitación a la Responsabilidad de los Proveedores de Servicios por Infracciones a Derechos de Autor y Conexos de Acuerdo con el Artículo 15.11.27 del Tratado de Libre Comercio República Dominicana-Centroamérica-Estados Unidos, [Regulation on Limitation of Liability for Service Providers for Copyright and Neighboring Rights Infringements According to Article 15.11.27 of the Free Trade Agreement Dominican Republic-Central America-United States], La Gaceta, Dec. 16, 2011 (Costa Rica).

Mexico

Const. Mex.	Constitución Política de los Estados Unidos Mexicanos de 1917, as amended, Diario Oficial de la Federación, Dec. 27, 2013 (Mexico).
Copyright Act Mexico	Ley Federal del Derecho de Autor [Federal Law on Copyright], Diario Oficial de la Federación Dec. 24, 1996, as consolidated Jul. 2003 (Mexico).

Peru

Const. Peru	Constitución Política del Perú de 1993 (Peru).
Copyright Act Peru	Decreto Legislativo No. 822, Ley sobre el Derecho de Autor [Copyright Act], Diario Oficial El Peruano, Apr. 24, 1996, as updated by Law 29.316, Diario Oficial El Peruano Jan. 14, 2009 (Peru).

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Introduction

Human rights and intellectual property are connected, although practically their narratives have developed on parallel tracks.[1] This disconnection is even more noticeable when referring to online environments, whether because of the myth of the Internet as a space beyond governmental control built mainly by non-state actors, or maybe just because of its highly technical issues. In recent years, the increasing inclusion of intellectual property in international instruments on trade has lacked explicit consideration of human rights which, as a result of not being represented at the table, have been jeopardized. Whatever the reason for this historical disconnection, in recent years, scholars have made evident the intersection of human rights and intellectual property, first with patent, and later with copyright.

Over the last decade, an increasing interest has developed on the relationship between intellectual property and human rights, particularly on how patent laws affect access to health. Because of the international commitments assumed as members of the World Trade Organization, countries have modified their domestic law to provide patent protection to pharmaceutical products.[2] Exclusive rights on drugs and the artificial scarcity

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1 Paul L. C. Torremans, *Copyright as a Human Right*, in COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION - INTELLECTUAL PROPERTY – PRIVACY 1-2 (Paul L. C. Torremans ed., Kluwer Law International, 2004).

2 Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S.

created by intellectual property have collided with public health needs, particularly in those countries that lack manufacturing capacities.[3] Unfortunately, international law has not handled that conflict properly, depriving thousands of people of medicines essential to face the ravages of pandemics. Some changes have been introduced in international law to ameliorate the restrictions that intellectual property places on governments striving to meet public health needs and realizing the right to health for their population.[4] Intellectual property and access to medicine is, today, a field with extensive scholarship.

Copyright law historically has been connected with the public interest.[5] In fact, public interest considerations have been present in copyright regulation for a long time, particularly in the United States, where protection is granted as a trade off for achieving societal progress,[6] but also in other jurisdictions.[7] However, the public interest viewpoint

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299 [*hereinafter* TRIPS Agreement] (providing that *"patents shall be available for any inventions, whether products or processes, in all fields of technology…"*).

3 COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY (London, 2002).

4 *See* Decision of the General Council of 30 August 2003, on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, WTO Document WT/L/540 y Corr.1 (removing limitations on exports under compulsory license to countries that lack manufacturing capacities for medicines); and, Decision of the General Council of 6 December 2005, on Amendment of the TRIPS Agreement, WTO Document WT/L/641 (amending the TRIPS Agreements to allow countries that lack manufacturing capacities to issue compulsory licenses for reasons of public health).

5 ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 16 (Hart Publishing, 2010) (noticing that "copyright has always been about the public interest or about balancing the public interest against the claims of authorship").

6 U.S. Const., art. I, § 8, cl. 8 (empowering the U.S. Congress *"to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"*).

7 *See, e.g.,* GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST (VCH, 1994) (providing a public interest analysis on copyright for a few major jurisdictions: France, Germany, the

has had a narrow perspective, mainly expressed in its treatment of copyright as an isolated body of law. It is not surprising, therefore, to find scholarship that limits public interest considerations to the requirement to achieve protection, copyright exceptions and limitations, and the public domain.[8] But the public interest exceeds an internal analysis focused only on copyright law and demands a broader, more integral consideration of the whole legal system.[9] This thesis concentrates on yet another public interest consideration: human rights.

United Kingdom, and the United States). *See also* GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST (Sweet & Maxwell, 2nd ed., 2002) (updating its previous edition with then-recent developments on international copyright law, mainly the WIPO Internet Treaties and the European Union directives on copyright); ALEXANDER, *supra* note 5 (analyzing the role of public interest rhetoric in nineteenth century Commonwealth); and, GUAN H. TANG, COPYRIGHT AND THE PUBLIC INTEREST IN CHINA (Edward Elgar, 2011).

8 DAVIES, *supra* note 7 (limiting the public interest consideration to internal features of copyright law, such as copyright exclusion, term of protection, and exceptions and limitations); TANG, *supra* note 7, at 49-51 (analyzing public interest as an essentially internal copyright tension between protecting authors and granting access to the public). *Cf.* Ricardo Antequera, *Las Limitaciones y Excepciones al Derecho de Autor y los Derechos Conexos en el Entorno Digital*, WIPO Document OMPI-SGAE/DA/ASU/05/2, 26 de octubre de 2005, para. 8 (limiting public interest as an internal factor already informing copyright law, by suggesting that public interest is represented by copyright exceptions and limitations, and compulsory licenses); and, Plinio Cabral, *Limitações ao Direito Autoral na Lei nº 9.610*, 37 REVISTA DA ABPI 3 (1998) (suggesting that copyright limitations represent the public interest in copyright regulation, and omitting any other public interest consideration into copyright law). *Cf. also* ROBERT SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 32 (Westview Press, 1990) (suggesting a narrower role for public interest on intellectual property, according to which, it only becomes relevant as a mere supervening interest, thus is, when the term of protection has expired). *But see* Mihály Ficsor, *Teaching Copyright and Related Rights,* in TEACHING OF INTELLECTUAL PROPERTY: PRINCIPLES AND METHODS 53-54 (Yo Takagi, Larry Allman, and Mpazi A. Sinjela eds., Cambridge University Press, 2008) (arguing that public interest is in both protection and accessing copyrighted works). *See also,* ALEXANDER, *supra* note 5, at 2-4 (discussing divergences among scholars on the meaning and effects of public interest in copyright issues).

9 *See, e.g.,* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW (Michael Geist ed., Irwin Law, 2005) (embracing a broader scope of public interest considerations in copyright policies and regulation).

Human rights discourse is a relatively novel concept,[10] but its underlying philosophy has already been present in copyright law to some extent. In fact, copyright evolved from a regime of privilege that served royal censorship to become a legal regime that grants exclusive rights to authors and preserves their right to freedom of expression, without fear of governmental censorship and dependency from individual private patronage. Freedom of speech is not a newcomer to copyright discourse, but one of its foundations, because creative work is precisely the way in which authors enjoy free speech. The U.S. Supreme Court encapsulated this idea by stating that copyright is the *"engine of the free expression."*[11]

But in recent years, tensions have risen increasingly between copyright law and freedom of speech. Progressive extension of copyright during the last few decades has accentuated limitations imposed on the public for using copyrighted content. These restrictions affect not only consumers and citizens, but also intermediaries and even some producers of content (i.e., creators).[12] By preventing the use of works precisely at the point

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10 *See* John P. Humphrey, *International Law of Human Rights in the Middle Twentieth Century,* in THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75-105 (Maarten Bos ed., Kluwer1973) (referring to the Second World War as the *"catalyst that produce the revolutionary developments in the international law of human rights"*).

11 *Harper & Row Publishers, Inc. v. Nation Enterprises*, 401 U.S. 539, 558 (1985).

12 *See* SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (New York University Press, 2003); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (Penguin, 2005); LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (Penguin, 2008); ALESSANDRA TRIDENTE, DIREITO AUTORAL: PARADOXOS E CONTRIBUIÇÕES PARA A REVISÃO DA TECNOLOGIA JURÍDICA NO SÉCULO XXI 91-103 (Elsevier, 2009) (analyzing the copyright paradox on cost-benefits for creativity); and, Kevin Perromat, *Consecuencias Imprevistas de las Políticas Culturales. Los Derechos de Autor como Instrumentos*

when humankind has developed technologies that allow an extensive diffusion and reutilization of content, copyright has transformed from a driving force to a gag on the freedom of speech. Abundant literature has analyzed the paradox of new technologies supporting free speech versus the restrictions imposed on it by copyright law.

Copyright protection is also in tension with its own parallel narrative known as the right to access to knowledge. Orthodox scholarship has limited its research and discourse to protecting copyright, but paid much less or no attention to the *"right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,"* as is set forth by the Universal Declaration on Human Rights.[13] As a result, scant literature is available on the matter, but it appears to have increased somewhat of late, especially since the United States adopted the Berne Convention,[14] the leading international instrument on copyright, because the automatic copyright protection granted in that convention makes more palpable the mentioned tension,[15] by protecting works by default,

de Control y Limitación de la Creación Literaria, in LITERATURA POLÍTICA Y POLÍTICA LITERARIA EN ESPAÑA: DEL DESASTRE DEL 98 A FELIPE VI, 43-63 (Guillermo Laín Corona & Mazal Oaknín eds., Peter Lang, 2015) (criticizing the assumption that sees copyright as a motor of free speech and public good, ignoring its censoring effects and increasing corporate interest).

13 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 26 (1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [*hereinafter* UDHR]. *See also,* International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 [*hereinafter* ICESCR].

14 Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Star. 2853 (1988).

15 Berne Convention, art. 5.2 (granting, since the 1908 Berlin Act of the Berne Convention, the enjoyment and the exercise of the rights recognized in the Convention shall not be subject to any formality).

instead of the previous law that protected only works that complied with certain formalities.

But human rights have a broader impact on copyright law and deserve a comprehensive analysis.[16] Freedom of speech and access to knowledge may conflict more evidently with granting exclusive rights on works. However, recent tendencies related to enforcing copyright, especially in online environments,[17] have made a clear argument about the risks of copyright law diminishing other human rights, such as the right to privacy and protection of personal data, the right to due process and the presumption of innocence, and even the foundations of criminal law. An ongoing tendency to maximize copyright law is increasingly sacrificing human rights and, at the same time, jeopardizing the bases of our democratic societies. There is significantly less literature exploring this wider connection between human rights and copyright.

Exploring the impact of copyright law on a broader category of human rights may open several venues, particularly when referring to civil and political human rights. Unlike social and economic rights, the first generation of human rights enjoys better mechanisms of enforcement before domestic and international forums, and its realization into domestic

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16 Laurence R. Helfer, *Towards a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 977 (2007). *But see,* Mark F. Shultz & David B. Walker, *The New International Intellectual Property Agenda*, in THE FEDERALIST SOCIETY, ARE INTELLECTUAL PROPERTY RIGHTS HUMAN RIGHTS? 9 (The Federalist Society, 2007), (minimizing human rights concerns in connection with intellectual property by stating that its is a conflict created by who are sceptic of protecting intellectual property).

17 *See generally* INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES (Xuan Li & Carlos Correa ed., Edward Elgar Publisher, 2009).

law is more affordable.[18] Therefore, analyzing the challenges for a broad spectrum of human rights in connection with copyright not only contributes to building a more comprehensive understanding of the matter, but also may open opportunities for both litigating and policymaking, especially having in mind the ongoing development of domestic copyright laws in several countries.

Copyright must be protected, but the price of that protection cannot be abolishing human rights. Authors have the human right *"to the protection of the moral and material interests resulting from any scientific, literary or artistic production."*[19] This creates another paradoxical situation, in which it is necessary to delimit copyright as a human right itself in order to harmonize it with other human rights.[20] However, it cannot be forgotten that copyright primarily looks to satisfy private interests.[21] The latter does not mean that it does not

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18 In recent years, an increasing number of Latin American scholarship has paid closer attention to the enforcement of social rights. *See generally,* GERARDO PISARELLO, LOS DERECHOS SOCIALES Y SUS GARANTÍAS: ELEMENTOS PARA UNA RECONSTRUCCIÓN (Ed. Trotta, 2007) (criticizing the perspective that underestimates social rights and advancing a comprehensive theoretical understanding of them with full political and legal guarantees); and, VÍCTOR ABRAMIVICH & CHRISTIAN COURTIS, LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES (Ed. Trotta, 2014) (setting foundation for enforcement of social rights).

19 UDHR, art. 26 (2) (providing that *"[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."*). *See also,* ICESCR, art. 15.

20 *See, e.g.,* Audrey R. Chapman, *Approaching Intellectual Property as a Human Right (Obligations Related to Article 15 (1) (c))*, 35 COPYRIGHT BULL. 4 (2001); Peter Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2006-2007); Peter Yu, *Ten Common Questions about Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709 (2006-2007); Paul Torremans, *Copyright (and Other Intellectual Property Rights) as a Human Right*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS (Paul Torremans ed., Kluwer, 2008).

21 TRIPS Agreement, pmbl. (recognizing intellectual property are essentially "private interest").

deserve protection, but it should not override other human rights. Copyright must be protected, but in harmony and compliance with other human rights commitments.

Rising concerns about copyright law from a human rights viewpoint should call the attention of governments, since they are the primary entities obliged to respect those rights. This is what we have witnessed in recent years when citizens opposed frenetic regulatory attempts by governments. That was the case in France, with Sarkozy's bill that would allowed disconnecting from the Internet, without trial, those users who supposedly infringe copyright;[22] in Colombia, with the so-called Ley Lleras, a bill introduced by the local government to implement copyright commitments into domestic law, which eventually failed after strong rejection by its citizens,[23] just like the failure of the Stop Online Piracy Act in the United States,[24] and the strong repudiation of the Anti-

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22 In May 2009, the French Parliament passed a bill submitted by President Sarkozy that would authorize an administrative body to punish supposedly repeat infringing users with their disconnection from the Internet. The French Constitutional Council, however, declared partially unconstitutional the law because sanctioning powers must be granted to courts, in addition to infringe the presumption of innocence, and violate freedom of expression and communication. In the aftermath, the Parliament remedied the unconstitutionality by empowering courts with the authority to disconnect Internet users. *See* FRENCH CONSTITUTIONAL COUNCIL, Decision 2009-580, Jun. 10th, 2009 (final judgment) act furthering the diffusion and protection of creation on the Internet.

23 In April 2011, the Colombian government attempted to modify its copyright act in order to comply with obligations assumed in the free trade agreement signed with the United States, through the so-called "Ley Lleras." The bill required ISPs to identify user, disconnect repeat infringers, and shooting down content at copyright holder's request without warrant. After six months of high social pressure, expert opinions, and public hearings, the bill was dropped off by its supporters in the Congress because of the unexpected rejection by citizens and Internet activists.

24 In October 2011, the Stop Online Piracy Act (SOPA) was introduced in the U.S. Congress to improve law enforcement against online piracy and counterfeit goods by forbidding search engines to link to infringing websites and requiring Internet service providers to block access to those sites. The bill was strongly rejected by scholars, activists, business and civil society

Counterfeiting Trade Agreement by European citizens.[25] Governments must pay close attention to the human rights implications of their intellectual property law in general, and copyright in particular.

Governments' obligations go beyond respecting human rights, however.[26] Governments certainly must tailor their policies to comply fully with human rights commitments, whether when regulating and judging, policing and enforcing the law, or even when contracting with others.[27] But international human rights law requires much more from governments. Governments must encourage non-state actors to comply with human rights standards too, and adopt protective measures not only against public actors

organizations, because of its serious risk for Internet freedoms and innovation. Eventually, the U.S. Congress postponed consideration of the bill until having a *"wider agreement on a solution."*

25 During the month of February 2012, thousands of demonstrations took place across Europe and million of citizens lettered their governments rejecting the Anti-Counterfeiting Trade Agreement (ACTA), a treaty that would require extending the enforcement of intellectual property but jeopardizing citizens' rights, and which consistency with European Union law was arguable. Under political pressure, the EU Commission referred ACTA to the European Court of Justice for its review, but it did not stop the EU Parliament from rejecting the agreement.

26 HUMAN RIGHTS COMMITTEE, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant on Civil and Political Rights, UN Doc. CCPR/C/21/Rev1/Add.13 (May 26, 2004) (analyzing extensively the States' obligations to "*respect*" and "*ensure*" human rights as it set by the Covenant on Civil and Political Rights).

27 *Id.,* para. 7 (stating that State Parties must adopt *"legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations"*).

committing violations, but when private actors do as well.[28] Governments must respect, promote, and protect human rights.[29]

In recent decades, governments' obligation to respect, promote, and protect human rights has become a well-settled standard in Latin America, both regionally and domestically. At the regional level, the Inter-American Human Rights System makes countries responsible not only for the failure of governments to respect their commitments, but also when they fail in protecting and promoting human rights among non-state actors. This criterion was adopted by the Inter-American Human Rights Court in its seminal case Velásquez Rodríguez, in which the Honduran government was condemned for failing to protect human rights violated by paramilitaries.[30] At the domestic level, Latin American constitutionalism, unlike that in Europe and the United States, requires non-state actors to respect fundamental rights by making those rights enforceable and providing specific remedies against infringers.[31] In sum, in Latin America, non-state

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28 *Id.*, para. 8 (stating that State Parties must ensure human rights, not just against their violations by its agents, but also *"against acts committed by private persons or entities"*).

29 *See generally* INTERNATIONAL COMMISSION OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES (ICJ, 2008).

30 *Velásquez Rodríguez* case, Inter-Am. Ct. H.R. (sec. C) No. 4 (July 29, 1988), paras. 180 and 185 (ruling that the State of Honduras was responsible for the involuntary disappearance of a citizen, even if it has been committed by a private person, because failing to take effective action to ensure respect of human rights within its jurisdiction). *See also* Claudio Grossman, *The Velásquez Rodríguez Case: The Development of the Inter-American Human Rights System*, *in* INTERNATIONAL LAW STORIES (Foundation Press, 2007).

31 *See generally* ALLEN R. BREWER-CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS (Cambridge University Press, 2009) (analyzing extensively the constitutionalization of human rights into Latin American constitutionalism and their enforcement through constitutional remedies).

actors must also pay close attention to human rights, but not because of corporate social responsibility or any other kind of good will regarding human rights, but because of actually enforceable legal obligations on the matter.

The Internet is mainly a private environment. In deed, Internet supposes a collective effort from a myriad of private entities, such as telecommunication operators, standard setting organizations, Internet access providers, hosting providers, domain name providers, online platforms, content providers, and other businesses. As was said above, under the Latin American legal regime, the fact Internet is mainly an environment controlled by private entities does not mean that private actors can avoid compliance with human rights. Even if the government cannot control the Internet, it still can regulate those private actors that do control the online environment. In this context, conducting an analysis of the challenges to human rights in the online environment as a result of the increasing regulation of copyright law in Latin America is a relevant task for advocating, litigating, and policymaking. In addition, the Latin American experience may be useful for advancing a global perspective on the regulation of both the Internet and intellectual property in harmony with human rights commitments.

There is tension between copyright protection and human rights in Latin America, especially when regulating the online environment. Historically, Latin American countries have strained public interest in general, and human rights in particular, when implementing international commitments on intellectual property into their domestic law. This creates a risky situation today, when those countries are required to implement new commitments

tailored for criminal and online enforcement, such as taking down online infringing content, criminalizing noncommercial infringement, and disconnecting copyright infringing users. This dissertation explores the challenges and advantages of the Latin American legal regime when regulating copyright enforcement through criminal law and in the online environments in compliance with human rights. The ultimate goal is providing some strategies for public policies, particularly on copyright regulation, in order to achieve an Internet in which human rights are respected, promoted, and protected.

This dissertation has been divided in three parts. The first part (Chapters I to III) provides a general background on copyright and human rights within the region, analyzes the historical development of copyright law in Latin America, and extracts some lessons from the process of implementation of international obligations into domestic law. The second part (Chapters IV to VI) analyses the criminal enforcement of copyright by reviewing the current law and its actual application to two basic issues: criminalization and punishment. The third part (Chapters VII to IX) focuses on certain measures of online enforcement, which are: identifying and disconnecting users, as well as taking down content. The second and third parts analyze how copyright regulation may infringe some human rights. This analysis does not focus on either freedom of speech or access to knowledge, which have been the subjects of abundant literature, instead, it focuses on a set of civil human rights, such as the right to privacy, due process of law, and the presumption of innocence, among others. This section may contribute to filling a gap in the human rights analysis of intellectual property regulation, and also provide support for current advocacy and policymaking, as well as legal background for potential litigation

before domestic courts and in the regional human rights system. The following paragraphs provide a brief summary of each chapter.

For achieving the purpose of this thesis, understanding the Latin American legal system is a necessary preliminary step because of its several peculiarities, three of which stand out here. First, Latin American countries are recipients of the civil law tradition; therefore, several features available in the U.S. legal system are not available in Latin America, such as statutory and punitive damages, class actions, and the *stare decisis* doctrine (i.e., court judgments in Latin America are not legally binding in future cases). Second, Latin American human rights are more complex than in the United States, in part because of the commitment of those countries to the Inter-American Human Rights System, and in other part because of the role that their more modern constitutions play in recognizing, protecting, and enforcing those rights. Third, Latin American countries follow the *droit d'auteur* tradition rather than the copyright tradition; as a result, they lack, for example, the fair use and work-for-hire doctrines, but, instead, have comprehensive moral rights. Fortunately, plentiful scholarship exists on the regional civil law tradition, the Inter American human rights system, and Latin American constitutional laws. More limited are the sources of Latin American copyright law.[32]

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32 *See* WORLD INTELLECTUAL PROPERTY ORGANIZATION, ESTUDIO SOBRE LA ENSEÑANZA DE LA PROPIEDAD INTELECTUAL EN UNIVERSIDADES DE AMÉRICA LATINA A OCTUBRE DE 2002 (prepared by Delia LIPSZYC) (Genève, WIPO, 2002) (identifying barely a 43-page list of Latin American works on intellectual property law, including copyright, patent, trade mark, and other intellectual rights, up to October 2002). *See also* Delia Lipszyc, *Estado Actual de la Enseñanza del Derecho de Autor y los Derechos Conexos en Universidades Públicas y Privadas de los Páises de América Latina*, 2 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 194, 252-269 (2007) (providing an updated and comprehensive list of books on copyright produced in Latin

Providing an extended analysis of Latin American law, particularly having in mind the significant differences between countries in the region, constitutes an impossible enterprise for this dissertation. But Chapter One provides at least a brief overview that will allow readers unfamiliar with Latin American law to grasp it generally in those areas relevant to understanding the challenges and advantages of the Latin American legal regime in regulating copyright in compliance with human rights. This also may illustrate why some features of Latin American law are particularly hard to reconcile with commitments countries have assumed in international instruments and bilateral trade agreements, which provisions seem drafted following the common law pattern and sometimes look disruptive vis-a-vis constitutional and human rights requirements. In addition, Chapter One also introduces the conflicting relationship between copyright and human rights in Latin America to highlight some of their distinctive features.

Chapter Two of this dissertation reviews Latin American copyright law from an historical viewpoint. Up until the 1980s, most Latin American countries were not parties to the international copyright system, but had their own regional regime, based on several treaties that conformed to the Inter American copyright system, which has more flexible rules and fits better their needs. Later, countries entered into the international copyright regime by becoming parties to instruments such as the Berne Convention, the TRIPS

America); and, J.A.L. STERLING, WORLD COPYRIGHT LAW 1439-1552 (Sweet & Maxwell, 2008) (providing only a handful of references to literature on copyright for Latin American countries in English).

Agreements, and the WIPO Internet Treaties. Most of Chapter Two focuses on analyzing the legal development of copyright throughout the region, but some political and economic considerations have been included in order to explain the context in which Latin American countries have moved through the time. Since the 1980s, after years of pervasive dictatorships in the region, Latin America has reestablished the importance of human rights and adopted mechanisms for protecting, promoting, and preserving those rights and their democratic governments. At the same time, the strategy for development in the region has moved from protectionism to an increasing openness of market through liberalization and privatization of economies. Both political and economic considerations are relevant to understand the implications of the relationship between human rights and intellectual property within the region.

The aforementioned international instruments required implementation into domestic law, a process already being afforded by Latin American countries, which is analyzed in Chapter Three. This analysis shows some common features in implementing processes, such as the absence of technical assistance, the pressure of interest groups and foreign governments, and the lack of transparency. As a result, implementing regulations have come into being regardless of the public interest in general, and compliance with human rights commitments in particular. These lessons are useful for anticipating problems in future implementation by providing a prospective pattern in the implementing process of a new set of international instruments on copyright that emphasize criminal and online enforcements, which raise concerns about the consistency of some specific commitments, and their potential implementing laws, with human rights standards.

The second part of this dissertation moves into the criminal enforcement of copyright law. Limiting criminal enforcement has been a basic requirement for modern societies since the eighteenth century and, today, is one of the bases of human rights. In fact, every single international instrument on human rights sets forth some substantive and procedural limitations to punishment. Those limitations have been cumbersome when confronted with extending criminal copyright enforcement in Latin America, whose countries have been immersed in judicial reform of criminal procedures, during the last two decades, although with uneven results. Transitioning from inquisitorial to adversarial systems has been the way to face the challenges of increasing criminal phenomena, to solidify human rights standards within criminal procedures, and to grant legal certainty on property rights for attracting foreign investment. Those competing narratives and interests have been stretched when enforcing copyright, by exceeding largely international trade law requirements and, at the same time, infringing human rights law.

Chapter Four focuses on criminalization, that is, the process of defining a given conduct as criminal. In general, when criminalizing copyright infringement, Latin American countries largely have exceeded the requirements of international copyright law. At the same time, they have been violating fundamental rights granted by international instruments on human rights, as well as their domestic constitutions, which connect with well-set principles of criminal law, such as the principles of legality, presumption of innocence, and *ultima ratio*. Rectifying excessive reliance on criminal enforcement of

copyright becomes urgent, as law provisions drafted for an industrial model of production and distribution of copyrighted material become applicable to users of digital technologies.

After dealing with criminalization, Chapter Five pays close attention to a related phenomenon: the extent of criminal punishment applied to copyright infringers. Such punishments may raise concerns based on their arguable compliance with constitutional and human rights requirements for criminal law, by infringing the principle of legality when sanctioning conduct not established by law; by infringing the principle of proportionality when punishing innocuous behavior; and by infringing the proscription of detainment for debts when penalizing breach of contract rather than a criminal infraction. Recalling the foundations of criminal law and human rights is important when confronting the tendency to extend criminal copyright enforcement, not only when criminalizing but also when punishing beyond an acceptable point.

These two related issues, criminalization and punishment on copyright infringements, may become more vital as new international instruments require countries to provide *ex-officio* powers to custom, judicial, and prosecutorial authorities on enforcing the law. Chapter Six briefly elaborates on this by focusing on the application of truly punitive measures through bodies other than criminal courts, such as administrative authorities, customs officials, and civil courts, a practice that eludes a defendant's fundamental rights. This chapter also refutes a typical accusation against criminal copyright enforcement in Latin America, which suggests that the actual application of law differs from the law on the books. Limited available data suggests, on the contrary, that criminal

copyright punishment actually is applied extensively within the region. It also makes apparent that some forms of punishment are being applied by non-criminal courts, administrative bodies, and even law enforcement officials in disregard of human rights, the most well known of which is the guarantee of due process related to criminal trial.

The third part of this dissertation deals with online enforcement of copyright, an area with still limited regulation, but intensively being committed through trade agreements. Implementing several commitments on the matter may collide with human rights, but for purpose of analysis we have paid close attention to a set of specific measures of copyright enforcement for online environments. These measures have become common in instruments not only on international trade but also on intellectual property, and because of the novelty of Internet regulation they have raised serious concerns about whether their implementation aligns with human rights. There are several commitments in recent international copyright law that conflict with Latin American law, because of differences based on civil law, constitutional, and *droit d'auteur* traditions. This thesis, however, analyses only those measures intended to regulate the online environment in order to protect copyright but that could diminish some human rights. Such measures include: identifying online users, implementing notice and take down procedures for infringing content, and sanctioning users with disconnection from the Internet.

Enforcing copyright in both offline and online environments requires, to some extent, identifying those users that supposedly have infringed the law. While procedures for identifying the actors involved in offline misbehavior have well-set rules in procedural

law, such rules have not been translated for the most into the online environment by Latin American countries. Drafting procedural regulations for identifying users requires considering the respect for the rights of presumed-innocent users, such as the right to inviolability of communications, freedom of speech, and the rights to privacy and personal data protection. Chapter Seven of this dissertation focuses on the latter two rights, not only regarding disclosing personal information for the purpose of identifying users, but also on the rules that govern data retention and data processing. With regard to protecting information privacy, Latin America is in the midst of a transition from a system based on constitutional clauses and fragmentary regulation to a comprehensive protection based on overlapping constitutional and statutory regulations on personal data. This extensive and comprehensive approach to protection raises concerns in the face of procedures for identifying online users because of mere copyright infringement.

Enforcing copyright may require adopting measures against both infringing content and infringing users. Chapter Eight examines the implementation of procedures for preventing massive copyright infringement by expeditious remedies for taking down infringing content from the Internet, which includes a broad range of possibilities from merely blocking access to a given and specific content to shutting down a whole website. Then, Chapter Nine analyzes the challenges for implementing a specific punitive sanction against infringers, the so-called *three strikes* or *graduated response*, which consists of disconnecting repeat copyright infringers from the Internet. Several countries in Latin America have committed to implement such kinds of measures, which may severely affect human rights, including: freedom of speech, by silencing discourses and people; due

process of law, by allowing limitations on liberties without due respect to judicial guarantees; and even the presumption of innocence, by presuming that a given user has infringed the law without being established by a previous judicial finding. In some Latin American countries, disconnecting users also may infringe the fundamental right to access to the Internet. This dissertation reviews notice and take down procedures and the sanction of disconnecting users, how they may infringe human rights, and how governments, especially the judicial and the legislative branches, should handle that risk.

Chapter Ten, the last, includes the main conclusions of the study, synthesizes recommendations, and explores some future research lines on the intersection of copyright and human rights in the Latin American context. This chapter attempts to advance a positive agenda for achieving actual human rights enforcement on copyright issues in Latin America. After providing a review of human rights and copyright law in the region, and the challenges for the former because of the increasing regulation by the latter, it seems necessary to provide a positive agenda, and, thus, the thesis makes some recommendations in order to achieve an adequate level of compliance with human rights commitments in the region when assuming, implementing, and enforcing copyright obligations.

This positive agenda includes suggestions for domestic regulators for drafting statutes and regulations in compliance with human rights. It takes into account recommendations to advocate on exploring strategies to enforce human rights in both domestic and international fora. But recommendations should extend also to governments

for empowering international agendas on both the regional level (such as the Mercosur and the Andean Community) and the global level (such as WIPO and the WTO). Therefore, this thesis provides recommendations to policymakers for regulation, advocates for enforcement, and governments for foreign policy. But this dissertation will not explore good practices, multi-stakeholder models, or social responsibility initiatives, however, because their analysis goes well beyond the scope of this thesis and would require unavailable capacities and resources.

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In regards to the methodology, given the fact that our object of study is mainly international and Latin-American law, this thesis applies comparative law methodologies. For international law, sources have been focused on international agreements, official documents from the relevant international bodies, and leading scholarship about each of them. For domestic law, because Latin American countries follow the civil law tradition, we have identified and analyzed the relevant constitutional and statutory legal framework. Additionally, a preliminary effort for identifying relevant case law was conducted, especially decisions by constitutional and other superior courts. Such sources provided us with a perspective of the Latin American regulation from a formal viewpoint, that is, from their legal documents.

In addition to reviewing legal documents, an extensive examination of legal scholarship on Latin American copyright law was conducted. But the sources have been

quite limited. On one side, scholars have paid little attention to copyright issues in Latin America, and comparative analyses have been restricted to Europe and common law countries.[33] On the other side, the reduced scholarship that has been produced in Latin America on copyright tends to be highly descriptive and self-referential.[34] Additionally, because of the strong ties between Latin American scholars and copyright holders,

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33 For example, while there is abundant literature on copyright history for Europe, the United States, and the Commonwealth, particularly on the internationalization of copyright in the 19th century, it remains unexplored for Latin America. Only recently two authors have opened still-narrow venues on this field: José Bellido and Jhonny Pabón. *See* José Bellido, *Colonial Copyright Extensions: Spain at the Berne Convention (1883-1899)*, 58 J. COPYRIGHT SOC`Y U.S.A. 243 (2011); José Bellido, *Latin American and Spanish Copyright Bilateral Agreements (1880-1904)*, in 12 J. WORLD INTELL. PROP. 1 (2009) (exploring bilateral agreements on copyright between Spain and its former colonies in Latin America); . *See also* Jhonny Pabón, *Aproximación a la Historia del Derecho de Autor: Antecedentes Normativos*, 13 REVISTA DE LA PROPIEDAD INMATERIAL 59 (2009) (approaching a brief history of copyright by analyzing its legislative evolution in a set of Latin American countries); and, JHONNY PABÓN, DE LOS PRIVILEGIOS A LA PROPIEDAD INDUSTRIAL: LA PROTECCIÓN EN COLOMBIA A LAS OBRAS LITERARIAS, ARTÍSTICAS Y CIENTÍFICAS EN EL SIGLO XIX (Universidad Externado de Colombia, 2010).

34 *See supra* note 32. *See* Ricardo Antequera, *La Observancia del Derecho de Autor y los Derechos Conexos en los Países de América Latina*, in DIAGNÓSTICO DEL DERECHO DE AUTOR EN AMÉRICA LATINA 134-141 (CERLALC, 2007) (referring to the limited academic capacities on copyright in the region and the lack of literature other than describing a given country's domestic law); and, Delia LIPSZYC, La Enseñanza Universitaria del Derecho de Autor y los Derechos Conexos en los Países de América Latina, *in* DIAGNÓSTICO DEL DERECHO DE AUTOR EN AMÉRICA LATINA 157-176 (CERLALC, 2007) (providing an extensive description of the precarious development of copyright scholarship, teaching, and literature in Latin America). *See also,* EDWIN R. HARVEY, DERECHO CULTURAL LATINOAMERICANO: CENTRO AMÉRICA, MÉXICO Y CARIBE 11, 41-118 (OEA – Depalma, 1993) (failing in providing cites and notes of literature on copyright for the region); and, Raiza Andrade Francisco Astudillo Gomez, *La Enseñanza Universitaria de la Propiedad Intelectual en Venezuela*, in 2 CONGRESO INTERNACIONAL PROPIEDAD INTELECTUAL, DERECHO DE AUTOR Y PROPIEDAD INDUSTRIAL 764-783 (Universidad de Margarita, 2004) (concluding that teaching on intellectual property is still precarious in Venezuela and Latin America). *Cf.* Fernando Zapata, *Realidad Institucional del Derecho de Autor en América Latina,* in DIAGNÓSTICO DEL DERECHO DE AUTOR EN AMÉRICA LATINA 28-29 (CERLALC, 2007) (complaining about the limited scholarly commitment on copyright within the region, except for that "*discouraging*" its protection). *See generally,* TEACHING OF INTELLECTUAL PROPERTY: PRINCIPLES AND METHODS (Yo Takagi, Larry Allman, and Mpazi A. Sinjela eds., Cambridge University Press, 2008) (exploring the challenges and providing recommendation for teaching and scholarship on intellectual property, although none of them focuses in peculiarities in either developing or Latin American countries).

especially collective societies and corporate advisers, literature tends to value the establishment and demands are conducted to increase copyright protection,[35] but lacks consideration for the public interest and human rights. However, this landscape is progressively changing with the newest generation of copyright scholars, particularly in countries like Brazil, Chile, and Mexico.[36]

In spite of its many countries' differences, Latin America has distinctive features: it is the most open market, the most democratic, and the most unequal region of the developing world.[37] These characteristics create some paradoxes that put the region at stake. And protecting intellectual property in general, and copyright in particular, are part of those contradictions. Rules on intellectual property were adopted as part of an economic model of development that has not delivered desired outcomes. On the contrary, it seems to accentuate obstacles for development and social equality. In recent years, it became apparent that those rules also conflict with an essential component of democratic societies: human rights. This tension increases with adoption of each new set

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35 Pedro Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira de Souza, *Exceptions and Limitations to Copyright in Brazil: A Call for Reform, in* ACCESS TO KNOWLEDGE IN BRAZIL 67-71 (Lea Shaver ed., Bloomsbury, 2010) (describing the role of Brazilian legal scholarship on copyright).

36 Mizukami *et al.*, *supra* note. 35, at 71.

37 Liliana Rojas-Suarez, *Introduction: A New Approach to Growth in Latin America*, GROWING PAINS IN LATIN AMERICA 20 (Liliana Rojas-Suarez ed., Center for Global Development, 2009) (concluding with these characteristics for Latin America, after an extensive review of international statistics on openness, democracy, and social inequality). *See also,* Jorge Carpio, *Derecho Constitucional Latinoamericano y Comparado*, 114 BOLETÍN MEXICANO DE DERECHO COMPARADO 949, 952-962 (2005) (recalling other common features of Latin American countries, such as a common historical background, cultural heritage, language, sense of unity, *mestizaje*, and legal tradition, among others).

of rules on copyright through free trade agreements and their implementation into domestic law by Latin American countries. This dissertation focuses exactly on that problem, by analyzing some human rights challenges for criminal and online enforcement of copyright in Latin America.

Latin America is a large region that covers twenty-one countries that speak various Romance languages. In spite of the majority being former colonies of the Spanish and Portuguese empires, there are significant differences among countries within the region.[38] Because studying and analyzing each jurisdiction would become an extremely time and source consuming task for our purposes, this dissertation has focused on a limited set of countries. Selecting those countries has been to some extent an arbitrary decision and they may not represent the excluded ones, but certainly they are main economies in the region and provide a broad diversity of Latin American law. Those countries are: Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, and Peru.

A snapshot of those countries shows their commonalities and diversity: all of them are parties to the Berne Convention and the TRIPS Agreement; all of them but Brazil are parties to the WIPO Internet Treaties; five of them have signed free trade agreements with the U.S. and four with the European Union; five of them are also parties to a sub regional process of integration, such as the Southern Common Market (Mercosur), the Central

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38 PATRICE FRANKO, THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT 2-4 (Rowman & Littlefield Publishers, 3d. ed., 2007) (suggesting that such differences make of Latin America a real puzzle).

American Integration System, and the Andean Community. Together, according to the World Bank, they represent around 77% of the regional population, and 85% of the regional trade.[39] All of them have democratically elected representative governments, are parties to the Organization of American States and to the American Convention on Human Rights, and recognize jurisdiction of the Inter-American Court of Human Rights.

Once the sample of Latin American countries was selected, the research analyzed their legal systems in depth, by using two additional methodologies: cases of study and expert interviews. Chapter Six also incorporates some statistical analyses based on limited and reliable data available on criminal enforcement. Through those methodologies, the research has ameliorated (but not eliminated) the limitations of a merely formal analysis of legal provisions and possible misunderstanding of domestic legal systems. In addition, these methodologies permitted employing a first-hand approach to the different strategies and initiatives used in Latin American countries in order to confront the human rights challenges posed by increasing copyright regulation.

Cases studies were selected based on their relevance for analyzing the challenges to human rights as a result of copyright enforcement, particularly in how they impact measures in terms of modifications to domestic copyright law, lessons learned from them, and public policy decisions adopted after them. In order to guarantee a full and unbiased understanding of each national legal system and the human rights challenges caused by

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39 WORLD BANK, World Development Indicators (World Bank, 2013).

increasing copyright enforcement, expert interviews were conducted with several specialists in each selected country, including government officials, academics, and representatives of civil society organizations and the private sector, when necessary they are referred in footnotes.

Throughout the drafting of this dissertation, several chapters benefited from comments by law professors and colleague doctoral students. The members of my doctoral committee – integrated by Professors Rebecca Tushnet, Michael Carroll, and Julie Cohen – provided numerous comments to early drafts, which, eventually, have allowed me to improve arguments and provide needed contextual information. My colleagues at the S.J.D. program at Georgetown University Law Center gave me innumerable recommendations for reaching a broader audience and connecting my own findings with their areas of scholarship. Generous commentators offered me feedback in conferences holds at American University, Central European University, Fundação Getulio Vargas, Georgetown University, Indiana University, Seton Hall University, and Universidad de Chile. Anonymous peer-reviewers provided extensive comments on at least two chapters in their publishing process. Mistakes and vagueness are my own responsibility, though.

This thesis does not claim objectivity. Its topic and scope were selected based on the author's background. As a tenured professor at the University of Chile Law School teaching Internet regulation, copyright law, and information privacy law, but also as a public interest advocate, and as adviser of governments and international agencies, I have committed to promoting human rights in digital environments. Because of the peculiarities

of their laws, Latin American countries provide particular challenges and opportunities to human rights when regulating the Internet, particularly through copyright law. Unfortunately, regional scholars have paid little attention to the connection between copyright and human rights, and this thesis attempts to contribute to this analysis by focusing on that connection in criminal enforcement and online environments.

FIRST PART

GENERAL BACKGROUND

Chapter I

Human Rights and Copyright in Latin America

Chapter II

Copyright Tradition in Latin America

Chapter III

Implementing International Copyright by Underestimating Public Interest

Chapter I

Human Rights and Copyright in Latin America

This dissertation focuses on the human rights challenges facing copyright regulation in Latin America, particularly on provisions related to criminal and online enforcement. While tensions between human rights and copyright are not exclusive to this region, there are some peculiarities in these countries' legal systems that, on one hand, accentuate the conflict among those two bodies of laws and, on the other, provide more opportunities for litigating copyright matters based on constitutional and human rights ground. Among the regional peculiarities, three stand out. First, Latin America enjoys a regional human rights system designed to promote and protect certain fundamental rights, and even when it mainly has centered until now on more pressing issues, it is predictable that it will address human rights challenges to copyright in the near future. Second, modern Latin American constitutionalism has incorporated human rights standards into domestic law, made them horizontal (i.e., enforceable against both public and private actors), and provided some mechanisms for actual enforcement. Thus, the region offers more latitude for dealing with human rights challenges to copyright law at both regional and local levels. A third feature of the countries' legal system, however, seems paradoxical: Latin America provides stronger copyright protection than other regions, which makes more noticeable its conflicting relationship to human rights.

This chapter contextualizes some of the aforementioned idiosyncratic features of Latin America's legal system. The first section reviews human rights recognition and enforcement at both regional and domestic levels, with particular emphasis on the intensive interaction between the regional human rights instruments and systems, and domestic constitutional law. The second section provides a general description of current copyright law and makes apparent its comparatively stronger features, since it provides broader substantive rights, narrows exceptions and limitations, and relies heavily on criminal enforcement. Successive chapters of this dissertation deepen the discussion of some of those features as well as on the historical evolution of copyright law in the region. Finally, the third and fourth sections of this chapter explore some normative considerations that are relevant to solving conflicts between copyright and human rights. Rather than advancing a concrete argument, this chapter provides background on both human rights and copyright laws in Latin America, which would allow the reader to have some of the needed context to move forward in successive chapters.

1. HUMAN RIGHTS IN LATIN AMERICA

Human rights protections in Latin America are the result of continued interactions between domestic, regional, and international laws. Since the early days of their independence, these countries' domestic constitutions have recognized certain fundamental rights, which became more important after countries abandoned the idea that constitutional provisions were merely programmatic and progressively embraced

their actual enforceable character. At the same time, after the Second World War, Latin America, as along with the rest of the world, committed to human rights standards, by endorsing leading international instruments on the matter. Between the 1940s and 1960s, countries of the Americas set forth the bases for an Inter-American Human Rights System, which became fully operative by the late 1970s, in a different political setting, since most of the region was now under pervasive dictatorships arising out of the Cold War. Through the 1980s and 1990s, Latin American countries advanced in their political democratization,[1] a process that supposed an intense interaction between new constitutional arrangements and both international and regional human rights frameworks. As a result, during the last three decades, human rights discourse and analysis have become more relevant in the region because of their implications not only in international forums, but also because of their actual repercussions within domestic forums.

1.1. At the International Level

Latin American countries are parties to international instruments on human rights and, therefore, are subject to their mechanisms of enforcement. Among them, it is the Inter-American Human Rights System that exercises the greatest influence throughout

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1 Frances Hagopian & Scott P. Mainwaring, *Introduction* to THE THIRD WAVE OF DEMOCRATIZATION IN LATIN AMERICA: ADVANCES AND SETBACKS 3 (Frances Hagopian & Scott P. Mainwaring eds., Cambridge Univ. Press, 2005) (identifying only two authoritarian governments in 2003: Cuba and Haiti).

the region, perhaps because it is native to the region and offers more effective mechanisms for achieving compliance.

The Inter-American Human Rights System was created in 1948 though the Charter of the Organization of the American States (OAS),[2] which succeeded the Pan American Union. In addition to the Charter, countries adopted the American Declaration of the Rights and Duties of Man,[3] which became the first international instrument on human rights, albeit not binding. As the need for actual enforcement on human rights at international level became recognized worldwide, countries of the Americas adopted the 1969 American Convention on Human Rights,[4] which introduced some enforcement mechanisms on the matter, but entered in force only in 1978.

The Inter-American Human Rights System is based on two key bodies: the Inter-American Commission on Human Rights, a body created by the Charter that promotes

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2 Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force Dec. 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, entered into force Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, entered into force Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, entered into force September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, entered into force Jan. 29, 1996 [hereinafter OAS Charter].

3 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter ADHR].

4 American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) [hereinafter ACHR].

the observance and protection of human rights, as well as advises the OAS;[5] and, the Inter-American Court of Human Rights, created by the American Convention, which has jurisdiction on all matters related to the interpretation or application of the Convention.[6]

The Commission, a Washington, D.C.-based body, hears and oversees petitions against OAS-members for violations to those human rights granted by both American Declaration and Convention. As a result of those petitions, the Commission may issue recommendations to governments and report to the OAS General Secretary. In the case of countries that have ratified the Convention, the Commission can formulate friendly settlements and even bring the case before the Court, if countries have accepted its jurisdiction. Additionally, the Commission can initiate *ex-officio* investigations on human rights and report on them to the OAS General Assembly, the main political body of the organization.

The Court, a regional tribunal based in Costa Rica, has jurisdiction over cases involving violations on human rights brought against countries that have ratified the American Convention and accepted its optional jurisdiction.[7] Cases must be submitted by another country or by the Commission, which makes a decision after it has finished an investigation. Individuals cannot bring cases directly to the Court, but must do so

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5 OAS Charter, art. 106.

6 ACHR, art. 62.

7 *See generally,* JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (Cambridge Univ. Press, 2nd ed., 2013).

through the Commission. The Court decision is binding and, if it rules that a right has been violated, it decrees the measures a government must adopt to rectify the violation, which may include payment of compensating damages to the victims. Additionally, at a country's request, the Court can issue an opinion on the compatibility of its domestic law with international instruments on human rights.

The Inter-American Human Rights System includes several instruments, only some of which are legally binding. Among those with binding effects, the leading piece of law is the mentioned American Convention on Human Rights, also known as the Pact of San José, which sets forth legally binding commitments on its signatories and includes an optional mechanism of enforcement through the Court. Most Latin American countries, including all those analyzed in this dissertation, have acceded or ratified the Convention, as well as recognized the Court's jurisdiction. There are other instruments with binding effects, although they lack a mechanism of enforcement similar to the Convention. This is the case of certain conventions on the prevention and punishment of torture,[8] on the abolishment of the death penalty,[9] on the forcible disappearance of persons,[10] on violence against women,[11] on discrimination against people with

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8 Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992).

9 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S. Treaty Series No. 73 (1990), adopted June 8, 1990, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 80 (1992).

10 Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994), entered into force Mar. 28, 1996.

disabilities,[12] and on economic, social, and cultural rights.[13] Recently, two new conventions have been adopted, although they are not yet in force: one against all forms of discrimination and intolerance,[14] and another dealing with racism.[15] Instruments without binding effects include the aforementioned American Declaration, which still applies to those countries that have not ratified the Convention, as well as certain specific declarations on refugees[16] and on the environment.[17]

The Inter-American Human Rights System has contributed to strengthening human rights through Latin America. Initially, its efforts focused on denouncing gross and mass human rights violations committed by non-democratic regimes within the continent. The system then moved onto dealing with the challenges of transitional justice, as well as with the demand of political redemocratization of the region. In recent

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11 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534 (1994), entered into force Mar. 5, 1995.

12 Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, AG/RES. 1608, 7 June 1999.

13 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," O.A.S. Treaty Series No. 69 (1988), entered into force Nov. 16, 1999, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992) [hereinafter Additional Protocol].

14 Inter-American Convention Against All Forms of Discrimination and Intolerance, adopted in La Antigua, Guatemala, on June 6, 2013.

15 Inter-American Convention Against Racism, Racial Discrimination and related Forms of Intolerance, adopted in La Antigua, Guatemala, on June 6, 2013.

16 Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 Nov. 1984.

17 Human Rights and the Environment, AG/RES. 1926 (XXXIII-O/03), Adopted at the fourth plenary session held on June 10, 2003.

years, a new generation of human rights issues have called the attention of the system, such as public transparency, due process, and the right to privacy.[18] Unlike the European Court of Human Rights,[19] neither the Internet nor intellectual property issues have attracted the attention of the Inter-American Court yet,[20] which has also avoided making any significant decisions on economic, social, and cultural rights, other than preventing unfair discrimination by governmental public policies.[21]

The Inter-American Human Rights System has not escaped criticism, which has focused on its shortcomings rather than on substantive objections. It has been said that the main problems of the system include: its conspicuous lack of universality, because of the reluctance of Canada, the United States and several Caribbean states to accede to it; the absence of enforcement mechanisms for decisions; the increasing scope of matters being handled by the system and, therefore, its delay in solutions; and its deficient

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18 Víctor Abramovich, *From Massive Violations to Structural Patterns: New Approached and Classic Tensions in the Inter-American Human Rights System*, 11 SUR – INTERNATIONAL JOURNAL OF HUMAN RIGHTS 7 (2009) (developing an historical analysis of the Inter-American Human Rights System and its evolution from gross human rights violations to transitional justice and re-democratization, and, more recently, the challenges of overcoming social exclusion and inequity through the region).

19 *See* Ana E. Santos, *Intellectual Property and Human Rights: Northern and Southern Perspectives,* in NEW TECHNOLOGIES AND HUMAN RIGHTS: CHALLENGES TO REGULATION 82-84 (Mario Viola de Azevedo Cunha, Norberto Nuno Gomes de Andrade, Lucas Lixinski, & Lúcio Tomé Féreita eds., Ashgate Publ., 2013) (criticizing the role of the European Court of Human Rights on the matter, for paying more attention to protecting intellectual property through human rights than to balancing competing interests).

20 *See, e.g.,* INSTITUTO NACIONAL DE DERECHOS HUMANOS, INTERNET Y DERECHOS HUMANOS 23-24 (INDH, 2013) (noting the absence of decisions by the IACHR dealing with the Internet and free speech).

21 Abramovich, *supra* note 18, at 18-23 (analyzing the IACHR's case law on civil rights from a social viewpoint that not only restricts infringement by state but also imposes positive duties on it, in order to advance from a formal to a material equality).

financial resources.[22] In recent years, as the system has dealt with human rights violations committed in democratic societies, a new set of criticisms have emerged questioning the Court's legitimacy to challenge decisions by democratically-elected officials. This questioning has led to abundant scholarship dealing with the *margin of appreciation* that countries would have for implementing human rights into their domestic policies,[23] and the test on *conventionality control* that compels national courts and authorities to uphold the Convention and the Court's interpretation of human rights matters in domestic forums.[24] Consequently, over the last decade, there has been an increased jurisprudential dialogue between the Inter-American Human Rights Court and domestic courts.[25]

In spite of such criticism, there is no doubt of the contribution of the Inter-American Human Rights System to strengthening human rights through the region. The

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22 José Miguel Insulza, *Sistema Interamericano de Derechos Humanos: Presente y Futuro*, 2 ANUARIO DE DERECHOS HUMANOS 119, 123-126 (2006). *See also,* Gustavo Gallón *et al.*, *Simposio Una Revisión Crítica del Sistema Interamericano de Derechos Humanos: Pasado, Presente y Futuro*, 3 ANUARIO DE DERECHOS HUMANOS 53 (2007); Claudio Grossman *et al.*, *The Future of the Inter-American System of Human Rights*, 20-2 HUMAN RIGHTS BRIEF 2 (2013) (providing contribution of several experts on shortcomings and mechanisms for overcoming criticism against the regional system); and, PASQUALUCCI, *supra* note 7, at 24-32 (agreeing on aforementioned limitations and adding the necessity of domestic implementation, the failure of OAS' political body to carry out its role on human rights enforcement, and the lack of quality control on judges).

23 *See generally* ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (Oxford Univ. Press, 2012); and, YUTAKA ARAI-TAKAHASHI, THE MARGIN ON APPRECIATION DOCTRINE AND THE PRINCIPLES OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (Intersentia, 2002).

24 Víctor Bazán, *El Control de Convencionalidad: Incógnitas, Desafíos y Perspectivas, in* JUSTICIA CONSTITUCIONAL Y DERECHOS FUNDAMENTALES: EL CONTROL DE CONSTITUCIONALIDAD 17-18, and 23-31 (Víctor Bazán & Claudio Nash eds., Fundación Konrad Adenauer, 2012) (conceptualizing the control of conventionality and reporting on its historical development in the IACHR).

25 Bazán, *supra* note 24, at 46-49.

scope of new adopted instruments, as well as the nature of current theoretical discussions on the extension of the binding effects of the Court's decisions, are unequivocal evidence of the success of the system in building a common baseline in Latin America. In spite of the limited number of cases and significant delays on their processing, that success also can be measured in the relative effectiveness of the system in protecting and defending human rights.[26] In order to conform to human rights standards, countries within the region not only comply with Court's decisions, by amending their domestic law, modifying public policies, and compensating victims, but also have been incorporating human rights and adopting mechanisms for their realization into domestic law. There are a number of examples that corroborate this synergic relation between the role of the Court and domestic policies, including the

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26 *See* YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS (Oxford Univ. Press, 2014) (discussing methodological limitations for measuring effectiveness of international courts, proposing a goal-based model of judicial effectiveness, that author applies to several international courts, but the Inter-American Human Rights Court). *See also,* Fernando Basch *et al.*, *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance With its Decisions*, 12 SUR INTERNATIONAL JOURNAL ON HUMAN RIGHTS 9, 18-27 (2010) (concluding that the effectiveness of the Court's decisions vary through the region according to the nature of the adopted measures, with high levels of compliance with reparative and preventive measures to lower levels in case of measures that requires agreement by different branches of the government, such as law reforms or judicial investigations); PASQUALUCCI, *supra* note 7, at 299-334 (noticing also dissimilar level of compliance between countries and nature of measures adopted by the Court); Viviana Krsticevic, *Reflexiones sobre la Ejecución de las Decisiones del Sistema Interamericano en Protección de Derechos Humanos,* in IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: JURISPRUDENCIA, NORMATIVA Y EXPERIENCIAS NACIONALES 41-68 (Viviana Krsticevic & Liliana Tojo eds., Center for Justice and International Law, 2007) (reviewing cases that raise more difficulties in achieving compliance by countries because of requiring inter-branches compromise, such as freeing unfair convicted ones, prosecuting violators in cases where amnesty or statute of limitations apply, and affecting third parties); and, Kathryn Sikkink, *El Efecto Disuasivo de los Juicios por Violaciones de Derechos Humanos*, 7 ANUARIO DE DERECHOS HUMANOS 41, 58-59 (2011) (noting that transitional countries whose courts handle human rights violations have better human rights practices than those countries do not, and their actions produce even some cross-border dissuasive effects).

adoption of policies on public transparency and accountability, freedom of expression and abolition of censure, criminal justice and due process, among others.

1.2. At the Domestic Level

Since the 1980s, after decades of pervasive dictatorships and authoritarian governments, Latin America progressively has moved into the democratic pathway, a process in which countries have followed the principles of modern constitutionalism with regard to the enactment and enforcement of human rights within the domestic forum.[27] These constitutions show an intensive dialogue with international human rights, particularly with the Inter-American Human Rights System, which creates synergies with both domestic and regional mechanisms of human rights enforcement.

It is possible to identify four ways in which constitutions help prevent and address human right violations in Latin American countries. First, they enact human rights standards within their constitutional framework. Second, they make human rights enforceable not only against state actors, but also against non-state ones. Third, they

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[27] Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV 1587 (2010-2011); and, Rodrigo Uprimny, *Las Transformaciones Constitucionales Recientes en América Latina: Tendencias y Desafíos*, in EL DERECHO EN AMÉRICA LATINA: UN MAPA PARA EL PENSAMIENTO JURÍDICO DEL SIGLO XXI, at 109-137 (César Rodríguez Garavito ed., Siglo XXI Ed., 2011) (Spanish version) (reviewing the main changes in Latin American constitutionalism since the mid-1980s). *See also,* Jorge Carpio, *Derecho Constitucional Latinoamericano y Comparado*, 114 BOLETÍN MEXICANO DE DERECHO COMPARADO 949, 972-985 (2005) (reviewing developments of Latin American constitutionalism during last three decades with a special emphasis on the constitutional enforcement of fundamental rights).

provide specific mechanisms for enforcing those rights, including some constitutional remedies. And, fourth, they facilitate the international enforcement of human rights. This does not mean that the constitutional approach is a panacea, because it has its own limitations, as briefly explained below, but it certainly provides a venue for further addressing human rights issues in connection with copyright.

Latin American constitutions include an extended catalogue of human rights that governments commit to respect, promote, and protect. The objective of constitutionalism has been to limit governmental power with respect to its citizens, by normalizing the state, distributing the power, and recognizing some inalienable rights. In addition to civil and political rights from liberal constitutionalism,[28] since the 1917 Constitution adopted after the Mexican Revolution, Latin American countries have included social and economic rights within their constitutional framework,[29] which, more recently, also have incorporated collective rights and cultural diversity issues.[30]

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28 Allan R. Brewer-Carias, *The Latin American Amparo Proceeding and the Writ of Amparo in the Philippines*, 1 City U.H.K.L. REV 73, 75 (2009) (noting the trend followed the American and French eighteenth-century constitutionalism). *See also,* Pablo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281 (2003), pp. 296-303 (analyzing the influence of the French Declaration of the Rights and Duties of Men and American constitutionalism in nineteenth century Latin America, although pointing out two facts that tailored a different outcome: first, unlike French experience, Latin American Independence was not a popular revolution; and, second, unlike the U.S. process, Rousseau's ideas on social contract exercised greater influence than Locke's libertarian ideology).

29 Carozza, *supra* note 28, at 303-311 (supporting the influence of the 1917 Mexican Constitution on Latin American constitutionalism by incorporating social and economic guarantees and protections into constitutional frameworks).

30 Uprimny, *supra* note 27, at 89-91 (analyzing the recognition of diversity, as well as expansion and protection of individual and collective rights in Latin America).

In most Latin American countries, constitutional rights reflect human rights recognized in international instruments, that is, the latter rights have been incorporated expressly into the constitutional text, becoming part of the domestic law of a given country.[31] In addition to express incorporation, constitutions recognize rights beyond those explicitly stated by international human rights law, although each may do so in different terms. Several constitutions provide that the human rights are not limited to those expressly available in their own text.[32] In other cases, according to domestic

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31 Brewer-Carias, *supra* note 28, at 76 (noticing the incorporation of human rights instrument into Latin American constitutionalism, although discussing its legal status within domestic law); and, NÉSTOR PEDRO SAGÜÉS, MECANISMOS DE INCORPORACIÓN DE LOS TRATADOS INTERNACIONALES SOBRE DERECHOS HUMANOS AL DERECHO INTERNO at 45-52 (CODHEM, 2003) (discussing progressive incorporation of international instruments on human rights into domestic law through the region and its legal status, although recognizing that constitutionalization prevails and, unlike supra-constitutional value, reconciles international value of human rights with national sovereignty). *But see* Carozza, *supra* note 28, at 284-289 (arguing also about the reciprocal and significant influence of Latin American constitutionalism in bringing constitutional rights into international human rights law, in the context of drafting the Universal Declaration). *See also,* LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW at 25 (Oxford Univ. Press, 2nd ed., 2004) (referring to an analogous legal progress in the United Kingdom, where the 1998 Human Rights Act made the European Convention on Human Rights enforceable into domestic forum and, therefore, "arguments based on the Convention have become more frequent and the jurisprudence of the Court more relevant").

32 Brewer-Carias, *supra* note 28, at 75 (noting the trend in Latin American constitutionalism to include "open clauses" of rights). *See, e.g.*, Constitución de la Nación Argentina, as amended by Aug. 22, 1994 [hereinafter Const. Arg.], art. 33; Constitución Política del Estado de Bolivia de 2009, Gaceta Oficial de Bolivia, Feb. 7, 2009 [hereinafter Const. Bol.], art. 13.11; Constituição da República Federativa do Brasil, as consolidated by constitutional amendment No. 66, June 13, 2010 [hereinafter C. F. Braz.], art. 76.2; Constitución Política de la República de Chile, as amended by Ley No. 20.414, Diario Oficial Jan. 4, 2010 [hereinafter Const. Chile], art. 5; Constitución Política de Colombia de 1991 [hereinafter Const. Colom.], art. 93 and 94; Constitución Política de la República de Costa Rica de 1949, as amended by Ley No. 8.365 on July 15, 2003 [hereinafter Const. Costa Rica], art. 74; Constitución de la República de Ecuador de 2008, Registro Oficial, Oct. 20, 2008 [hereinafter Const. Ecuador], art. 10.7; Constitución Política de los Estados Unidos Mexicanos de 1917, as amended, Diario Oficial de la Federación, Dec. 27, 2013 [hereinafter Const. Mex.], art. 1; Constitución Nacional de la República del Paraguay de 1992 [hereinafter Const. Para.], art. 45; Constitución Política del Perú de 1993 [hereinafter Const. Peru], art. 3; Constitución de la República Oriental del Uruguay de 1967, as amended in 2004 [hereinafter Const. Uru.], art.

regimes, all or some international instruments on human rights are self-executing, thus, they do not require implementing law but are directly enforceable as long as they stay in force and have been ratified by the country.[33] Those mechanisms provide a continuous updating of human rights at the constitutional level.

Human rights incorporation into domestic law happens not only by the express and implicit recognition of international instruments in constitutions, but also through judicial interpretations, in both constitutional and non-constitutional courts. Domestic courts progressively have applied not only domestic law but also international instruments on human rights as a source of interpretation of legal provisions and, more recently, also with case law by the Inter-American Court of Human Rights. By doing so, domestic courts attempt to ensure that the domestic regime harmonizes with human rights standards.

Constitutions even may provide broader protection for human rights. In fact, constitutional provisions frequently go beyond merely incorporating human rights standards into domestic law. In some cases, constitutions advance human rights, by anticipating the recognition of certain rights as fundamental in a domestic forum even before they become recognized by international law. In other cases, constitutional

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72; Constitución de la República Bolivariana de Venezuela, Gaceta Oficial, Dec. 30, 1999 [hereinafter Const. Venez.], arts. 19, 22 and 27.

33 Const. Arg., arts. 75 No. 22; Const. Bol., art. 13; C. F. Braz., art. 5 §§ 1-3; Const. Chile, art. 5; Const. Colom., arts. 53 and 93; Const. Costa Rica, art. 48; Const. Ecuador, art. 417; Const. Mex., art. 1; Const. Para., arts. 137 and 141; Const. Peru, arts. 57, 200, and 4 transitory; and, Const. Venez., art. 23.

provisions provide a better concept of those rights than that available in international law. This is the case, for instance, of the rights to privacy and the protection of personal data, which have received only slight recognition in international instruments on human rights, unlike their wider and more explicit grant in constitutional provisions.[34]

In addition to providing broad recognition to human rights, Latin American constitutions make those rights enforceable against both state and non-state actors. In Latin America, the legal tradition to give the constitution such horizontal effects on society dates back to the 1950s,[35] and developed parallel to the German *drittwirkung theory* that allows constitutionalization of private relations.[36] Today, in most Latin American countries, in addition to the state and public officers, non-state actors also are required to respect and promote those rights.[37] In some cases this general obligation is implied by the terms of constitutional provisions, but in most cases this clearly is set forth as an obligation of citizens, people, or the whole society.[38] As a matter of fact, some rights

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34 *See infra* Chap. VII, notes 65-70, 87-90, and accompanying text.

35 Supreme Court of Argentina, Sept. 5, 1958, Kot, Samuel SRL s/Recurso de Corpus (considering that *"Neither the text nor the spirit of the constitution allows state that the protection of the so-called human rights is limited to attacks that came only from the authority"*).

36 Federal Constitutional Court of Germany, *Lüth* case, Jan. 15,1958.

37 César Landa, *La Fuerza Normativa de la Constitución*, *in* JUSTICIA CONSTITUCIONAL Y DERECHOS FUNDAMENTALES: FUERZA NORMATIVA DE LA CONSTITUCIÓN 36-41 (Víctor Bazán & Claudio Nash eds., Fundación Konrad Adenauer, 2011) (arguing that modern constitutionalism overcomes the failure of liberal constitutionalism which grants a mere formal freedom by enforcing the constitution against both state and non-state actors).

38 *See, e.g.*, Const. Bol., art. 410; Const. Colom., art. 95; and Const. Ecuador, art. 83; Const. Peru, arts. 1 and 38; and, Const. Venez., art. 132.

recognized by constitutions make sense only insofar as they are enforceable against private actors, such as workers' rights[39] and consumer protection.[40]

Requiring private actors to respect fundamental rights through constitutional law is consistent with international human rights law. The American Convention on Human Rights, for instance, requires the state to "*ensure*" the free and full exercise of the enumerated rights and freedoms to all persons subject to their jurisdiction.[41] This means that the state must not only restrain itself from infringing human rights, but it also must take measures to guarantee the enjoyment of those rights by everyone, including when they are placed at risk by non-state actors. The Inter-American Court of Human Rights has reaffirmed this criterion since its early jurisprudence, in the cornerstone case *Velásquez Rodríguez*, in which the Court set forth that the state is internationally responsible not only for its own acts but also for violations by third parties *"because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."*[42] As a result, if the state may become responsible for non-state actors, it should adopt mechanisms for guaranteeing that those non-state actors are in compliance with human rights requirements.

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39 Const. Arg., arts. 14 bis and 16; Const. Bol., arts. 46 – 55; C. F. Braz., arts. 7 and 9; Const. Chile, art. 19 No. 16; Const. Colom., arts. 25, 53, 55, and 56; Const. Costa Rica, arts. 56 – 74; Const. Ecuador, arts. 33, 325 – 333; Const. Mex., art. 5; Const. Para., arts. 86 – 99; Const. Peru, arts. 23 – 29; Const. Uru., arts. 53 – 57; and, Const. Venez., arts. 87 – 97 (providing constitutional protection to workers' rights, including the right to go on strike).

40 Const. Arg., art. 42; Const. Bol., art. 75; C. F. Braz., art. 5.31; Const. Costa Rica, art. 46; Const. Ecuador, arts. 52 – 55; Const. Para., arts. 27 and 38; Const. Peru, arts. 65; and, Const. Venez., art. 117.

41 ACHR, art. 1. *See also,* ICCPR, art. 2.

42 Velasquez Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, para. 172 (July 29, 1988).

Some scholars have highlighted the retrospective connection of Latin American constitutionalism, on making human rights enforceable domestically against both state and non-state actors, with the region's historical background, in which democracy and human rights have been placed at risk as much by corporate interests as by governmental abuse.[43] Our dissertation, instead, looks forward from this feature of Latin American constitutionalism. In the context of increasing globalization of the economy, which reduced the power of the nation states but increased that of corporations,[44] Latin American constitutional law offers an opportunity for a more intense dialogue between human rights and intellectual property, because of requiring not only state but also non-state actors to respect human rights. As a result, for instance, some measures of enforcement that are permissible in other legal systems may not be allowed within the region, because the room for private enforcement is narrower in Latin America than other places.[45]

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43 Olivier de Schutter, *Transnational Corporations as Instrument of Human Rights,* in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 422 (Philip Alston & Mary Robinson ed., Oxford Univ. Press, 2005) (referring to developing countries' concerns about how corporate actions affect human rights in foreign countries as early as the 1970s).

44 Rhoda E. Howard-Hassman, *The Second Great Transformation: Human Rights Leapfrogging in the Era of Globalization*, 27 HUM. RTS. Q. (2005) (referring to the effects of globalization on human rights); Dinan Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT`L & COMP. L. REV. 273 (2002) (arguing on the changes of power that globalization and technologies have produced between state and non-state actors).

45 *See* JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE at 155-186 (Yale University Press, 2012) (referring to the construction of an architecture of control for online behavior in which private actors play a significant role, from rights holders and business associations to online service providers and standard-setting bodies).

Latin American countries not only have incorporated human rights within their constitutional framework and made them enforceable against both state and non-state actors, but they also have strengthened the mechanisms for making those rights more effective.[46] During the last decade, significant efforts have been conducted throughout the region to reinforce the independence of the judiciary, as well as to introduce improvements in court procedures, although with uneven outcomes. At the organic level, countries have allocated constitutional review before their Supreme Courts, while others, following Hans Kelsen's Austrian model, have adopted special Constitutional Tribunals, including Chile, Colombia, and Peru. Additionally, following Swedish tradition, almost all countries have an Ombudsman, an independent official that investigates individuals' complaints against maladministration.

Constitutional remedies play a significant and common role on human rights within the region, by providing procedures for their enforcement and, therefore, contributing to the actualization of said rights.[47] Latin American countries have, among

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46 Uprimny, *supra* note 27, at 1593-1594. *See also,* ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM, 1810-2010 at 148-195 (Oxford Univ. Press, 2013) (reviewing recent constitutional developments in Latin America and highlighting that, in addition to recognizes rights, successful constitution provides changes in the institutional structure of power that ensure standing for concretizing those rights).

47 *See* Mauro CAPPELLETTI, JAMES GORDLEY, & EARL JOHNSON, TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 75 (A. Giuffrè, 1975) (stating that *"the higher law of the modern constitution may become the guarantor of positive laws that make the modern right to legal aid fully effective."). See also,* Antonio Enrique Pérez-Luño, *Intimidad y Protección de Datos Personales: del Habeas Corpus al Habeas Data,* in ESTUDIOS SOBRE EL DERECHO A LA INTIMIDAD 40-42 (Editorial Tecnos, 1992) (referring to the proceduralization of fundamental rights as a mechanism for granting their actual effectiveness, in the context of the right to control personal information through the habeas data action).

others, three of these mechanisms: the *habeas corpus*, the *habeas data,* and the *amparo proceeding*.[48] The *habeas corpus* is a constitutional remedy, currently available in all the Latin American constitutions,[49] that prevents illegal deprivation of freedom and allows the release of a person who has been already deprived of it.[50] The *habeas data*, a construction by the 1988 Brazilian Constitution that has been adopted by several Latin American countries,[51] protects the right to privacy by protecting against illegal processing of personal information.[52] The *amparo proceeding,* the remedy with the longest tradition in Latin American constitutionalism,[53] also available in all countries within the region, protects a broad category of fundamental rights by preventing or ending their violation.[54]

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48 Brewer-Carias, *supra* note 28, at 74. There are other constitutional remedies, such as, in Chile, the so-called action of economic amparo, which purpose is to provide protection for the right to entrepreneurship and limits state corporatization. *See* Enrique Navarro Beltrán, *El Recurso de Amparo Económico y su Práctica Jurisprudencial,* 5 ESTUDIOS CONSTITUCIONALES 99 (2007).

49 Const. Arg., art. 43.4; Const. Bol., arts. 125-127; C. F. Braz., art. 5 LXVII; Const. Chile, art. 21; Const. Colom., art. 30; Const. Costa Rica, art. 48; Const. Ecuador, art. 89; Const. Mex., arts. 103 I and 107; Const. Para., art. 133; Const. Peru, art. 200.1; Const. Uru., art. 17; and, Const. Venez., art. 27.

50 *See* Domingo García Belaunde, El *Habeas Corpus Latinoamericano*, 104 BOLETÍN MEXICANO DE DERECHO COMPARADO 375 (2002) (providing a review on historical background and development of the habeas corpus through Latin America).

51 Const. Arg., art. 43.3; Const. Bol., arts. 130-131; C. F. Braz., art. 5 No. 71; Const. Ecuador, art. 92; Const. Para., art. 135; Const. Peru, art. 200.3; and, Const. Venez., art. 28.

52 *See infra* Chap. VII, notes 84-103 and accompanying text (providing a review of the habeas data and the protection of personal information in Latin America).

53 Héctor Fix Zamudio, *Estudio sobre la Jurisdicción Constitucional Mexicana,* in LA JURISDICCIÓN CONSTITUCIONAL DE LA LIBERTAD 144 *et seq*. (Mauro Cappelletti ed., UNAM, 1961) (stating the origin of the action of amparo in the 1857 Mexican Constitution).

54 Const. Arg., art. 43; Const. Bol., art. 128; C. F. Braz., art. 5 LXVIII (naming this remedy as mandado de segurança); Const. Chile, art. 20 (naming this remedy as *action of protection*); Const. Colom., art. 86 (naming this constitutional remedy as *acción de tutela*); Const. Costa Rica, art. 48; Const. Ecuador, art. 88; Const. Mex., arts. 103 I and 107; Const. Para., art. 134; Const. Peru, art. 200.2; Const. Uru., art. 72 (supporting a well-set jurisprudence that

In general, in spite of some local differences, *amparo proceedings* allow the affected person or a representative to appear before a court in order to get an appropriate remedy to prevent or end the violation of the affected person's rights by state and non-state actors.[55] This procedure, whose process is simpler and more prompt than ordinary actions, provides broad maneuverability to courts for adopting the most appropriate remedy. For instance, the remedy can *"consist in compelling the defendant to do or to refrain from doing certain acts in order to maintain the enjoyment of the plaintiff's rights,"* or order the *"reestablishment of the juridical situation to the stage it had before the violation or to the most similar one."*[56] In addition, courts may adopt preliminary measures with effects during the procedure even before making a final decision on the case,[57] in order to preserve the *status quo*, avoid harm, or restore the original situation.[58] In some cases, the procedure allows imposing monetary compensation, while in other cases the judgment may help to achieve that indemnification because of its *res judicata* effects.[59]

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recognizes the amparo proceeding as an implicit right in the constitution); and, Const. Venez., art. 27.

55 Brewer-Carias, *supra* note 28, at 87 (noting that, in general, amparo proceeding apply against both state and non-state actors, with a few exceptions).

56 ALLAN R. BREWER-CARIAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS at 380 *et seq.* (Cambridge Univ. Press, 2009).

57 Brewer-Carias, *supra* note 28, at 77-78 (noticing the existence of amparo proceedings in all Latin American countries, except for Cuba).

58 BREWER-CARIAS, *supra* note 56, at 366-368.

59 BREWER-CARIAS, *supra* note 56, at 386-393.

Having constitutional remedies in general, and *amparo proceedings* in particular, is an international human right obligation for Latin American countries.[60] As a matter of fact, the American Convention on Human Rights states that *"[E]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."*[61] Other international instruments on human rights include a similar guarantee,[62] at Latin America's request.[63] The Inter-American Court of Human Rights has elaborated broadly on how these constitutional remedies realize the aforementioned clause of the American Convention.[64]

Constitutional remedies do not provide a solution for each and every constitutional challenge, since they have certain limitations. For instance, these remedies may not allow for constitutional review of a law duly adopted by the legislature or for appealing court decisions by litigating parties, since in most instances other mechanisms of constitutional control would be available, such as procedures before constitutional

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60 Brewer-Carias, *supra* note 28, at 81.

61 ACHR, art. 25 (1).

62 UDHR, art. 8; and, ICCPR, art. 2 (3).

63 Carozza, *supra* note 28, at 287 (reporting on the adoption of an effective remedy in the drafting of the Universal Declaration at Latin America's request, which later other international instruments on human rights also incorporated).

64 *See* Inter-Am. Ct. H.R., Advisory Opinion OC-8/87 of January 30, 1987, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights); and, Inter-Am. Ct. H.R., Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights).

courts and ordinary petitions within the court system.[65] Constitutional remedies apply, however, against a number of infringements on constitutional rights, such as against regulation by executive bodies and administrative agencies, and decisions by local councils, enforcement authorities, businesses associations, corporate actors, or an individual person.

Constitutional remedies facilitate human rights enforcement throughout the region. Far from fulfilling a merely symbolic role,[66] these remedies have become, in fact, the primary legal remedy of choice among practitioners in Latin America for a variety of reasons.[67] But, beyond their intense usage in fact, constitutional remedies contribute to human rights enforcement in several other ways, such as by precipitating the exhaustion of domestic remedies, by enforcing decisions by the Inter-American Court of Human Rights, and by encouraging local courts to judge with a human rights viewpoint.[68]

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65 BREWER-CARIAS, *supra* note 56, at 305-327 (noting that most Latin American countries have excluded amparo proceedings against laws and judicial decisions).

66 INTERNATIONAL COMMISSION OF JURISTS, 3 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CIVIL REMEDIES 8 (Geneva, ICJ, 2008) (suggesting that constitutional remedies do not play a significant role in human rights enforcement, particularly against non-state actors).

67 *See* COMISIÓN INTERNACIONAL DE JURISTAS, ACCESO A LA JUSTICIA: CASOS DE ABUSOS DE DERECHOS HUMANOS POR PARTE DE EMPRESAS EN COLOMBIA at 6, 55, and 56 (Geneva, 2010) (noting that, in Colombia, as a result of the inefficiency of ordinary remedies and high level of impunity, constitutional remedies have became more used and efficient to protect human rights); INSTITUTO NACIONAL DE DERECHOS HUMANOS, INFORME ANUAL 2010: SITUACIÓN DE LOS DERECHOS HUMANOS EN CHILE at 55-56 (2010) (noticing that in Chile, because of the efficiency of constitutional remedies, there has been a noticeable increase on their use beyond the purpose of enforcing human rights, such as in a variety of cases of mere contractual breach); and, GARGARELLA, *supra* note 46, at 187-190 (analyzing the role of amparo procedures in Costa Rica and Colombia).

68 *See* SIRI GLOPPEN, BRUCE M. WILSON, ROBERTO GARGARELLA, ELIN SKAAR, & MORTEN KINANDER, COURTS AND POWER IN LATIN AMERICA AND AFRICA (Palgrave Macmillan,

Constitutional remedies precipitate the exhaustion of domestic remedies, which is a basic prerequisite for introducing a case before the Inter-American Human Rights System.[69] In fact, constitutional remedies have been designed as "*simple and prompt*" mechanisms of human rights enforcement, by cutting out nonessential bureaucratic red tape and terms, dispensing formalities, and prioritizing decisions. As a result, constitutional remedies reduce the time for exhausting domestic remedies compared with the timing of ordinary actions.[70] In Chile, for instance, although civil proceedings may take years, constitutional procedures rarely exceed a few months. In the *Olmedo-Bustos* case, the plaintiffs, who argued against censorship of the movie "The Last Temptation of Christ," exhausted domestic constitutional remedies in less than seven months,[71] while the plaintiffs in *Claude Reyes*, a landmark case about public transparency, exhausted domestic remedies in barely three weeks.[72]

There is no doubt about the binding effects of decisions by the Inter-American Court of Human Rights, but there is some uncertainty surrounding its mechanisms of

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2010) (providing a comparative analysis of the rise of the judiciary in developing countries, which, on different levels, have gone from toothless bureaucracy to an actual mechanism for government accountability and human rights protection, over the last two decades).

69 ACHR, art. 46 (1).

70 Brewer-Carias, *supra* note 28, at 85-86.

71 *Olmedo-Bustos* et al. Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 73, para. 60 (Feb. 5, 2001) (describing the facts of the case).

72 *Claude-Reyes* et al. Case, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151, paras. 57.23-57.31 (Sept. 19, 2006) (describing the exhaustion of domestic remedies in the case).

compliance in domestic law, as well as the scope of those effects.[73] In fact, some authors have argued compliance remains a political matter that requires adopting clear rules into domestic law.[74] As a result, in recent years, some Latin American countries have been working out mechanisms for enforcing decisions,[75] including some constitutional amendments that have set forth mechanisms of compliance, such as the so-called *acción de cumplimiento* (action for observance), a specific constitutional remedy that assures the enforcement of judgments by international organizations on human rights.[76] This is an extremely recent development of Latin American constitutionalism; therefore, it is still premature to draw any conclusion about its actual efficacy, but at least it shows a concern for satisfying international human rights standards and the usefulness that they look for in constitutional remedies.

Constitutional remedies have propelled domestic courts to judge with a human rights viewpoint. Local scholars refer to the "*constitutionalization*" of every single area of law, because of the relevance that constitutional provisions, particularly those related to

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73 Krsticevic, *supra* note 26, at 31 (noting that mechanism's compliance of the IACHR's decisions by countries remains an issue of domestic law yet).

74 Flávia de Ávila & Paula Maria Nasser Cury, *Os Princípios Jurídicos e a Efetividade das Sentenças da Corte Interamericana de Direitos Humanos no Brasil,* 4 MERITUM – REVISTA DE DIREITO DA FCH/FUMEC 209, 225 (2009) (arguing for a constitutional reform in Brazil to guarantee compliance with decisions by the IACHR).

75 *See* Krsticevic, *supra* note 26, at 68-110 (reviewing mechanisms available in domestic law for achieving compliance with the IACHR's decisions, ranging from constitutional mandate to legal amendments, and relevant case laws).

76 *See* Const. Ecuador, art. 93; and, Const. Venez., art. 31.

fundamental rights, have achieved on legal matters.[77] This phenomenon has been significantly influenced by the Inter-American Court of Human Rights' doctrine, which not only has guided constitutional amendments and legal reforms, but also shaped domestic court decisions on human rights throughout the region, an issue that has attracted some amount of scholarship.[78]

In spite of its significant achievements, human rights enforcement through domestic law still presents some well-known limitations throughout the region, including social inequality,[79] limited civic engagement,[80] a culture of noncompliance,[81] and

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77 *See* Louis Joseph Favoreu, *La Constitucionalizacion del Derecho*, 12 REVISTA DE DERECHO (VALDIVIA) 31 (2001) (arguing the constitutionalization of law took place by the end of the last century as the constitution displaced previous prevailing value of statutes by becoming an actually applicable and enforceable norm); and, Luis Roberto Barroso, *El Neoconstitucionalismo y la Constitucionalización del Derecho en Brasil: El Triunfo Tardío del Derecho Constitucional en Brasil*, 12 REVISTA DE DERECHO DE LA UNIVERSIDAD DE MONTEVIDEO 25 (2007). *See also,* Denis Borges Barbosa & Charlene de Ávila Plaza, *Intellectual Property in Decisions of Constitutional Courts of Latin American Countries,* in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 236-252 (Christophe Geiger ed., Edward Elgar Publishing, 2015) (providing a brief review of some Latin American constitutional courts' decisions on intellectual property and copyright).

78 SERGIO GARCÍA RAMÍREZ, TEMAS DE LA JURISPRUDENCIA INTERAMERICANA SOBRE DERECHOS HUMANOS: VOTOS PARTICULARES at iv (Mexico, 2005).

79 Oscar Vilhena Vieira, *Inequality and the Subversion of the Rule of Law, in* LAW AND SOCIETY IN LATIN AMERICA: A NEW MAP 23-42 (César Rodríguez Garavito ed., Routledge, 2015).

80 Laurence Whitehead, *Latin American Constitutionalism: Historical Development and Distinctive Traits, in* NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES 138-139 (Detlef Nolte & Almut Schilling-Vacaflor eds., Ashgate, 2012) (criticizing the fact that, although for many Latin American citizens their constitutions help to concretize some rights, their rules reflect aspirations rather than entitlements, and have not fully answered demands for accountability, participation, and collective rights).

81 Mauricio García Villegas, *Ineffectiveness of the Law and the Culture of Noncomplaince with Rules in Latin America,* in LAW AND SOCIETY IN LATIN AMERICA: A NEW MAP 63-80, *supra* note 79.

disregarding of rule of law.[82] Leaving aside some structural limitations – such as the independency of the Judiciary, pervasive corruption, expensive litigation, and even geographical restrictions – there are four key limitations on the domestic enforcement of human rights that are somehow related to the legal system: the lack of enforcement of social, economic, and cultural rights; the ambiguity of constitutional principles; the relative effects of court judgments; and, the lack of regional harmonization.

A first limitation of human rights enforcement in Latin America, at both domestic and regional level, has been the fact that social, economic, and cultural rights have little to no mechanisms of enforcement. Neither democracy nor the rule of law have delivered the promises of social justice, and Latin America remains the most unequal region of the world.[83] In recent years, an increasing number of scholars have paid closer attention to the enforcement of social rights, and some litigation has explored the use of judicial actions to allocate public resources in the provision of housing, health, education, and the meeting of other social needs.[84] Some scholars have expressed their caution about

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82 Julieta Lamaitre, *Constitutions or Barbarism? How to Rethink in "Lawless" Spaces*, in LAW AND SOCIETY IN LATIN AMERICA: A NEW MAP 43-62, *supra* note 79.

83 Liliana Rojas-Suarez, *Introduction: A New Approach to Growth in Latin America*, in GROWING PAINS IN LATIN AMERICA 20 (Liliana Rojas-Suarez ed., Center for Global Development, 2009).

84 *See* GERARDO PISARELLO, LOS DERECHOS SOCIALES Y SUS GARANTÍAS: ELEMENTOS PARA UNA RECONSTRUCCIÓN (Ed. Trotta, 2007) (criticizing the perspective that underestimates social rights and advancing a comprehensive theoretical understanding of them with full political and legal guarantees); and, VÍCTOR ABRAMIVICH & CHRISTIAN COURTIS, LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES (Ed. Trotta, 2014) (setting foundations for the enforcement of social rights). *See also,* DERECHOS SOCIALES: JUSTICIA, POLÍTICA Y ECONOMÍA EN AMÉRICA LATINA (Pilar Arcidiácono, Nicolás Espejo Yaksic, & César Rodríguez Garavito eds., Siglo del Hombre Editores, 2010); and, DAVID

the actual role of the judiciary when judging decisions that imply political choices, though.[85]

A second limitation of domestic enforcement of human rights is that it solves conflicts based on constitutional provisions that sometimes lack enough precision. While some provisions set forth rules with a clear mandate that could be easily enforced, most constitutional provisions related to human rights do not set forth rules, but mere principles, the ambiguity of which allows a varying level of compliance and requires harmonization with other principles.[86] But this limitation is to some degree inherent to constitutional designs and also less significant in the case of Latin American countries, whose courts integrate both constitutional law and international human rights law, which is known as the *"block of constitutionality"* when judging cases referring to human rights.[87]

BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS (Oxford Univ. Press, 2008).

85 THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Rachel Sieder, Line Schjolden & Alan Angell eds, Palgrave MacMillan, 2005) (analyzing the increasing influence of the judiciary in Latin American politics). *See also,* César Rodríguez Garavito, *Constitutions in Action: The Impact of Judicial Activism pn Socioeconomic Rights in Latin America*, in LAW AND SOCIETY IN LATIN AMERICA: A NEW MAP 112-140, *supra* note 82.

86 *See* ROBERT ALEXY, TEORÍA DE LOS DERECHOS FUNDAMENTALES at 86-87 (Ernesto Garzón Valdés trans., Centro de Estudios Constitucionales, 1993) (1986) (making the clear distinction between rules and principles); and, MANUEL ATIENZA & JUAN RUIZ MANERO, ILÍCITOS ATÍPICOS (Trotta, 2006) (arguing that atypical illicitness has a place when infringing principles, but not rules).

87 Landa, *supra* note 37, at 23-26 (referring to the effectiveness of the constitutional block, which includes both constitutional and human rights treaties).

A third limitation is the relative effects of judicial decisions, which is a commonality of countries with a civil law legal system.[88] A favorable decision on human rights does not guarantee that successive cases with analogous circumstances will achieve the same outcome, because court decisions lack *stare decisis*, thus, they are not legally binding for courts but only for the actual parties in the case. This is particularly discouraging for individual litigants who have to return to domestic courts over and over because of the same conflicting issues. However, this feature of civil law may be overstated: even lacking *stare decisis*, inferior courts tend to follow *ratio decidendi* by superior courts' decisions;[89] several countries through the region have introduced some amendments into their legal system to achieve certain level of judicial predictability, by making at least some court decisions binding on third parties;[90] and, while this may be a problem in certain cases before ordinary courts, it is not an issue for an enforcement

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88 JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA at 23 and 36 (Stanford Univ. Press, 3d ed., 2007) (referring to the rejection of the *stare decisis* doctrine by civil law countries).

89 MERRYMAN & PÉREZ-PERDOMO, *supra* note 88, at 46.

90 *See* C. F. Braz., art. 103 A, as amended by Constitutional Amendment No. 45, Dec. 30, 2004 (authorizing the Supreme Federal Court to adopt *"súmulas vinculantes,"* i.e., binding interpretations on constitutional matters adopted after having repeated similar decisions, since 2004); Ley de Amparo, D.O.F. Jan. 30, 1936 (Mexico), as amended on June 17, 2009, arts. 192 a 197-B (authorizing the adoption of *"jurisprudencia,"* i.e., binding legal interpretations by superior courts in certain cases, such as adjudicating five previous decisions on similar terms, or resolving conflicting interpretative criteria); and, Civil Procedure Code (Chile), art. 780 (authorizing litigating parties for requesting a plenary session of the Supreme Court in order to resolve a case in which it has adopted conflicting criteria).

action brought before a Constitutional Tribunal or a Supreme Court confronting a constitutional challenge, both of whose decisions could have binding effects.[91]

A fourth limitation of domestic enforcement of human rights is that it creates some lack of regional harmonization. In spite of being parties to the same international instruments on human rights and having similar constitutional provisions on fundamental rights, domestic courts may arrive at different outcomes when judging a given case. However, this limitation may be mitigated because of the significant role the Inter-American Human Rights Court is playing on harmonizing jurisprudence throughout the region. In fact, Latin American courts rely heavily on the Court's judgments when making their own decisions.[92]

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91 Gretchen Helmke & Julio Ríos Figueroa, *Introduction to Courts in Latin America,* in COURTS IN LATIN AMERICA 21-23 (Gretchen Helmke & Julio Ríos Figueroa eds., Cambridge Univ. Press, 2011) (concluding that Latin American constitutional courts have assumed a fundamental political role in the region, by controlling inter-branch conflicts and by enforcing rights, although with uneven outcome by countries); and, Julio Ríos Figueroa, *Institutions for Constitutional Justice in Latin America,* in COURTS IN LATIN AMERICA 26-54 (Gretchen Helmke & Julio Ríos Figueroa eds., Cambridge Univ. Press, 2011) (reporting on the improvement of judicial independence in Latin America from 1945 to 2005, and empowering the lawmaking process through *"quite a diversified portfolio of legal instruments of constitutional control"*).

92 *See* Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEX. L. REV. 1835 (2010-2011) (reporting intensive adoption of the Court's criteria by domestic courts through the region, particularly on amnesties, obligation to investigate human rights violations, the right to an effective remedy, and non-discrimination and the rights of indigenous people); Diego García-Sayán, *Una Viva Interacción: Corte Interamericana y Tribunales Internos*, in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS. UN CUARTO DE SIGLO: 1979-2004, at 323-384 (Corte IDH, 2005); and, Cecilia Medina, *Los 40 Años de la Convención Americana sobre Derechos Humanos a la Luz de Cierta Jurisprudencia de la Corte Interamericana*, 5 ANUARIO DE DERECHOS HUMANOS 15, 31-32 (2009). *But see,* Jorge Contesse Singh, *Constitucionalismo Interamericano: Algunas Notas sobre las Dinámicas de Creación e Internalización de los Derechos Humanos,* in EL DERECHO EN AMÉRICA LATINA: UN MAPA PARA EL PENSAMIENTO JURÍDICO DEL SIGLO XXI, *supra* note 27, at 251-269 (arguing that domestic constitutional mechanisms of enforcement have actually reciprocal influence on

In sum, despite its limitations, Latin America has made significant progress on recognizing and enforcing human rights, on both regional and domestic levels. It is possible to appreciate an intense dialogue between the regional human rights instruments and systems, and domestic constitutional law, which provides for more opportunities for bringing human rights challenges against copyright that may conflict with them. At the same time, as the next section explores, Latin American copyright law has some features that accentuate conflicts with human rights, such as its broad substantive rights, narrow exceptions and limitations, and heavy reliance on criminal enforcement.

2. LATIN AMERICAN COPYRIGHT

Copyright law, in general, grants to creators and their assignees rights to control their creations for a given term. On one hand, economic rights assure a monopoly in the exploitation of works, by publishing, copying, and making it available to the public, among other uses. On the other, countries provide moral rights, a set of faculties that emphasize the connection between authors and their works by allowing certain forms of control on their creations, such as the rights of attribution and integrity of works. While

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regional mechanisms of human rights enforcement). *See also,* DIREITO CONSTITUCIONAL INTERNACIONAL DOS DIREITOS HUMANOS (Alexandre Coutinho Pagliarini & Dimitri Dimoulis eds., Ed. Fórum, 2012) (exploring the internationalization of human rights by domestic constitutions); and, Jorge Contesse, *Intre-American Constitutionalism: The Interaction between Human Rights and Progressive Constitutional Law in Latin America,* in LAW AND SOCIETY IN LATIN AMERICA: A NEW MAP 235-250, *supra* note 82.

economic rights have achieved significant similarities across countries, this is not the case of moral rights, the recognition and scope of which still vary notably worldwide. This is not the place for extensively describing copyright law in Latin America, but this section will at least highlight some peculiar features of current copyright through the region, which, as is explained below, make more noticeable the conflicting relations with human rights.

Latin American copyright law follows the French tradition of *droit d'auteur* rather than the common law tradition of copyright.[93] Because of historical roots with the civil law system, countries implemented into domestic law a copyright regulation based on protecting the person of the actual author,[94] an approach whose origin is found on Hegel's philosophy of rights.[95] This tradition differs from the utilitarian perspective that common law countries adopted in their copyright, a regulation that is the result of a trade off between providing individual incentives for producing works and encouraging social achievements.[96] It is possible to find some traces of such a copyright tradition in

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93 SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY 35 (Oxford Univ. Press, 2008). *See also*, JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI, & MAUREEN A. O´ROURKE, COPYRIGHT IN THE GLOBAL INFORMATION ECONOMY (Aspen Publishers, 2nd ed., 2006) 5-13 (reviewing the different theoretical foundation of copyright and droit the autor).

94 Ricardo Antequera, *El Derecho de Autor en el Ámbito Universitario*, 13 REVISTA PROPIEDAD INTELECTUAL 124, 125 (2010) (stating that in the Latin and Continental copyright system, the subject by definition is the author, i.e., *"the physical person who creates,"* although legal entities could become right holders).

95 *See* VON LEWINSKI, *supra* note 93, at 38.

96 *See* VON LEWINSKI, *supra* note 93, at 37-38.

Latin America, particularly in the early nineteenth century,[97] but as regulation developed the region embraced the *droit d'auteur* approach. Although this distinction between copyright and *droit d'auteur* traditions has ameliorated its importance in recent years, due to increasing global harmonization,[98] it still exercises some influence, particularly on tailoring the theoretical approach on regulation,[99] as well as on two key normative features, which are the narrow recognition of the work-for-hire doctrine in domestic law [100] and the overwhelming relevance of moral rights.[101]

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97 *See infra* Chap. II, notes 20-36 and accompanying text.

98 Raquel Xalabarder, *Presentacion*, 1 REVISTA DE INTERNET, DERECHO Y POLÍTICA 2, 3 (2005). *See also,* PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 21 (Oxford Univ. Press, 3d ed., 2013) (noticing accelerated convergence in European Union members that are part of the copyright tradition); and, Raymundo Urtiaga Escobar, *Derechos de Autor y Copyright: ¿Contraposición o Simbiosis?,* 6 REVISTA MEXICANA DE DERECHO DE AUTOR 11, 15 (2002) (rejecting a systemic difference between copyright and author's rights traditions, by arguing that differences among countries are rather circumstantial than the outcome of belonging to different systems). *But see,* VON LEWINSKI, *supra* note 93, at 33-36 (recognizing mixture of both legal systems, but arguing also that the acceding by the United States to the Berne Convention led that country to push strongly for the recognition of elements of its own domestic copyright into international instruments, which has accentuated competition between both systems).

99 VON LEWINSKI, *supra* note 93, at 39-63 (analyzing underlying differences of both systems and their conceptual effects on regulation, extensively listing the differences between copyright and *droit d'auteur* traditions, and pointing out their status under the current international regime).

100 DELIA LIPSZYC, COPYRIGHT AND NEIGHBOURING RIGHTS 149-150 (UNESCO Publ'g, 1999) (referring the conflicting views on work-for-hire between the *droit d'auteur* and the copyright traditions). *See also,* GOLDSTEIN & HUGENHOLTZ, *supra* note 98, at 254-255 (noticing the different assumptions made by copyright and *droit d'auteur* traditions on work made for hire or under employment); Carmen Arteaga Alvarado, *Obras Creadas al Amparo de un Contrato Laboral o de Prestación de Servicios: Tratamiento Legal de la Titularidad y el Ejercicio del Derecho de Autor en los Países Iberoamericanos*, 11 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 44, 57-66 (2012) (providing a comparative analysis of work for hire in Latin American countries); and, María Carolina Uribe Corzo, *El Derecho de Autor en las Obras Creadas por Encargo y en el Marco de una Relación Laboral*, 10-11 REVISTA LA PROPIEDAD INMATERIAL 45 (2006-2007).

A second commonality of copyright throughout Latin America is that it has enjoyed constitutional and legal protection since its early days.[102] Thus, in addition to an act adopted by the Legislature, countries have incorporated into their constitutions an express recognition of copyright as a fundamental right of authors.[103] Unlike the utilitarian model provided by the U.S. Constitution, however, these Latin American constitutional recognitions reflect the *droit d'auteur* approach, as well as the language of

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101 GOLDSTEIN & HUGENHOLTZ, *supra* note 98, at 358-361 (noticing differences between copyright and *droit d'auteur* traditions on moral rights, although recognizing some reciprocal influence of both systems on the matter); and, Mira T. Sundara Rajan, *Tradition and Change: The Past and Future of Author's Moral Rights,* in INTELLECTUAL PROPERTY IN COMMON LAW AND CIVIL LAW 123-146 (Toshiko Takenaka ed., Edward Elgar, 2013) (recalling the differences between civil and common law traditions on moral rights, and calling the attention to the progressive adoption of them by common law jurisdictions). In fact, several common law countries have embraced comprehensive moral rights protection in compliance with the Berne Convention, leaving the U.S. isolated in its reluctance. *See, e.g.* DAVID I BAINBRIDGE, INTELLECTUAL PROPERTY 97-116 (Pearson, 5th ed., 2002) (analyzing moral rights in British law); BENTLY & SHERMAN, *supra* note 31, at 230-250 (reviewing moral rights under British copyright law); PETER RAMSDEN, A GUIDE TO INTELLECTUAL PROPERTY LAW 49-50 (Juta, 2011) (referring to comprehensive recognition of moral rights under South African domestic law); WILLIAM VAN CAENEGEM, INTELLECTUAL PROPERTY IN AUSTRALIA 40-42 (Kluwer, 2010) (recognizing little protection to moral rights until 2000 copyright amendment that improve protection, although subject to extensive limitations and derogations); and, TAMALI SEN GUPTA, INTELLECTUAL PROPERTY IN INDIA 28-29 (Kluwer, 2011) (describing moral rights recognized by Indian law, according to the "general law of the land in all civilized countries").

102 *See infra* Chap. II, notes 20-38 and accompanying text.

103 Const. Arg., art. 17; C. F. Braz., art. 5 XXV; Const. Chile, art. 19 No. 25; Const. Costa Rica, art. 47; Const. Ecuador, art. 22; Const. Para., art. 110; Const. Peru, art. 2 No. 8; Const. Uru., art. 33; and, Const. Venez., art. 98. *But see* Const. Bol., art. 102 (imposing on government a duty to protect); Const. Colom., arts. 61 and 150 No. 24 (imposing on government the duty of protecting intellectual property and on the Congress the duty of regulating); and, Const. Mex., art. 28 (referring to "privileges" rather than rights for creators and inventors). *Cf.* GOLDSTEIN & HUGENHOLTZ, *supra* note 98, at 23-25 (finding that constitutional recognition of author's rights is still "rare" among European countries.). *But see* Christophe Geiger, *Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles,* in MAX PLANCK INST. INNOVATION & COMPETITION RESEARCH PAPER 14-10, at 6-8 (finding that a half of about 200 national constitutions provide some constitutional protection to intellectual property assets).

international instruments on human rights on the matter. Depending on the country, constitutionalizing copyright not only makes it more relevant for public policies, but also provides specific mechanisms for enforcing rights within countries, such as constitutional remedies, higher quorums for approving legal amendments, and certain constitutional constrains for modifying the law. At the same time, it provides more space for litigation challenging initiatives that strengthen copyright beyond the constitutional framework, a path that has not yet been explored in all its magnitude within the region.

Following international law,[104] Latin American countries provide automatic protection from the moment of creation, which makes unnecessary any additional formality, such as registration or deposit, except for evidentiary purposes.[105] Countries still preserve, however, some institutional arrangement that varies from small registrar offices to more complex institutions that promote and protect copyright at administrative level, like in Colombia and Mexico. That protection, in general, extends beyond the 50 years p.m.a. required by international law; most countries grant 70 years p.m.a., and some even longer terms, such as Colombia with 80 years p.m.a., and Mexico with 100 years p.m.a.

While international copyright law grants a certain number of exclusive economic rights to right holders, in several Latin American countries copyright protection of

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104 Berne Convention for the Protection of Literary and Artistic Works (as revised at Paris, France, Jul. 24, 1971) [*hereinafter* Berne Convention], art. 5 (2).

105 LIPSZYC, *supra* note 100, at 540-541 (noticing the evidentiary purposes of registration).

economic rights is broader, by extending its monopoly to any potential usage of a protected work.[106] This comprehensive protection of economic rights is a common feature of Latin American countries that became parties to the international copyright regime by acceding the Berne Convention in the 1980s and 1990s. Afraid of running short in protection because of the effects of new technologies, particularly digitalization and the Internet, when amending their domestic law, these countries provided complete protection by covering any possible use, even if not expressly listed by copyright act.[107] As a result, in several countries within the region exclusive rights are much broader than usual in international and comparative law.

Limitations on exclusive rights, which allow using a protected work without right holders' authorization, play a narrow role on copyright within Latin America.[108] Discussion of this issue follows later,[109] but meanwhile it is useful to highlight some

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106 *See infra* Chap. III, notes 61-70 and accompanying text. *See also,* ALEJANDRA CASTRO, DERECHO DE AUTOR Y NUEVAS TECNOLOGÍAS 168 (EUNED, 2006) (supporting that economic rights are *numerus apertus*); and, VON LEWINSKI, *supra* note 93, at 54-55 (noticing that comprehensive protection on economic rights is available also in other countries that follow the *droit d'auteur* tradition, unlike any country that adheres to copyright tradition).

107 LIPSZYC, *supra* note 100, at 58, and 179-180 (arguing the economic exclusive rights are not subject to *numerus clausus* in civil law tradition and, therefore, its listing in legal texts satisfies mere informational purposes); and, Hernán Correa Cardozo, *Retos del Entorno Digital al Régimen de Limitaciones y Excepciones*, 1 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 100, 112-119 (2007) (endorsing abundant scholarship that argues digital technologies offers an opportunity for extending exclusive rights, limiting exceptions or transforming them into collective-managed licenses).

108 *See, e.g.,* Maria Ferreira Dias, Carlos Fernández Molina, & Maria Manuel Borges, *As Exceções aos Direitos de Autor em Benefício das Bibliotecas: Análise Comparativa entre a União Europeia e a América Latina*, 16 PERSPECTIVAS EM CIÊNCIA DA INFORMAÇÃO 5 (2011) (reporting on notorious asymmetries and deficiencies of Latin American copyright exceptions for libraries compare with European and American laws).

109 *See infra* Chap. III, notes 46-56 and accompanying text.

factors that may explain the reduced importance of copyright limitation in the region. First, as depositories of the civil law tradition, unlike in the United States, Latin America does not provide for fair use, meaning that judges cannot create new hypotheses of limitations, but merely recognize those already set by law.[110] Second, in several countries, the legislature not only has complied with international law by tailoring limitations to the exigencies of the three-step-test,[111] but also has incorporated that test into domestic law as a mechanism that empowers courts to restrict the scope of actual use of said limitations already set by law.[112] Third, there is a pervasive doctrine that argues copyright limitations must be interpreted restrictively, thus, an interpreter may reduce but cannot

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110 Ricardo Antequera, *El Derecho de Autor en el Ámbito Universitario*, 13 REVISTA PROPIEDAD INTELECTUAL 124, 137-138 (2010) (supporting an unlimited exclusive rights, while narrow and *numerous clauses* exceptions that must be interpreted restrictively). *See also,* VON LEWINSKI, *supra* note 93, at 56-57 (linking the system of limitations and exception of the *droit d'auteur* tradition, as well as flexibilities in copyright tradition, with their underlying philosophical differences). *But see,* Alexandre Libório Dias Pereira, *Fair Use e Direitos de Autor (Entre a Regra e a Exceção)*, 94 REVISTA DA ABPI 3, 8-10 (2008) (recognizing that the *droit d'auteur* tradition lacks a fair use clause, but arguing that the need for a general safeguard in the context of potential collision of copyright with other fundamental rights makes of the abuse of rights a mechanism for preventing unintended outcomes and that the three-step-test should become the courts' criterion for allowing solve those conflicts).

111 Berne Convention, art. 9 (2) (allowing countries to permit the reproduction of copyrighted works "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."); and, TRIPS Agreement, art. 13 (restricting countries to confine limitations or exceptions to exclusive rights to "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder").

112 *See infra* Chap. III, notes 71-78 and accompanying text. *See also,* Correa Cardozo, *supra* note 107, at 117 (reporting a supposed consensus on extending the three-step-test to any potential usage of copyrighted works); and, CASTRO, *supra* note 106, at 264-265 (referring how exceptions already recognized by law are narrowed by the incorporation of the three step test into domestic law and, additionally, the proscription of any for profit usage).

extend their scope.[113] In some countries, this doctrine has express recognition in the text of the law, while in others it is a judicial elaboration,[114] or just mere scholarship that has entangled even those who reject it.[115]

Latin America provides broader recognition not only to economic rights but also to moral rights. The latter rights are recognized in the Berne Convention,[116] but the TRIPS Agreement has prevented its actual internationalization by excluding them from its enforcement mechanism.[117] However, while international law acknowledges the rights to authorship and integrity,[118] Latin American countries have gone further by recognizing additional moral rights. All countries have recognized rights on: authorship, including publishing the work under pseudonymous or anonymously; integrity and modification of

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113 *See, e.g.,* LIPSZYC, *supra* note 100, at 58, 181, and 223 (arguing copyright exceptions are not only *numerus clausus* but also they "must be interpreted and applied in a restrictive way".); Plinio Cabral, *Limitações ao Direito Autoral na Lei nº 9.610*, 37 REVISTA DA ABPI 3, 6 and 7 (1998) (arguing copyright exception and limitations are *numerus clausus* in Brazil); and, Helenara Braga Avancini, *Os Limites e Exceções dos Direitos Autorais na Sociedade da Informação*, 78 REVISTA DA ABPI 40, 41 (2005) (supporting a restrictive interpretation and closed list for copyright exceptions and limitations when reviewing those available within Latin American countries' domestic laws). *See also,* CASTRO, *supra* note 106, at 264.

114 *See infra* Chap. III, note 70.

115 ALLAN ROCHA DE SOUZA, A FUNÇÃO SOCIAL DOS DIREITOS AUTORAIS 278-279 (Ed. Faculdade de Direito de Campos, 2005) (referring to the doctrine that argues *numerus clausus* for copyright exceptions and limitations, and criticizing it because of presumptuous disregarding to constitutional demands). *But see,* CARLOS ROGEL VIDE & EDUARDO SERRANO GÓMEZ, TENSIONES Y CONFLICTOS SOBRE DERECHO DE AUTOR EN EL SIGLO XXI: MATERIALES PARA LA REFORMA DE LA LEY DE PROPIEDAD INTELECTUAL 15-19 (Fundación Coloquio Jurídico Europeo, 2012) (rejecting the use of fundamental rights to justify copyright limitacions not settled down by law, in Spain).

116 Berne Convention, art. 6 bis.

117 TRIPS Agreement, art. 9.

118 1946 Washington Convention, art. XI; and, Berne Convention, art. 6 bis.

the work; and, on the disclosure of the work, among other moral rights.[119] While some of those rights may lack even recognition in foreign countries, Latin American countries not only grant them but also provide for their extensive protection through constitutional, civil, and even criminal actions.[120]

Latin American countries provide strong criminal enforcement against copyright infringement. In general, their laws criminalize a wider range of infringements and impose harder punishments that those required by international law, while also infringing human rights implicated into criminal enforcement. Overcriminalization and overpunishment are not merely laws on the books but actual phenomena, as discussed further in Chapters Four and Five, that may be aggravated by new international obligations on the matter, as well as the increasing tendency to grant *ex-officio* powers to administrative, custom, and prosecutorial authorities for enforcing intellectual property.

Latin American copyright does not explicitly deal with the online environment.[121] Of course, countries have adopted provisions on certain digital works, such as computer

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119 Copyright Act Brazil, art. 24 (adding the right to withdraw the work from the market and the right to access to the work); Copyright Act Chile, art. 14 (adding the right to authorize another person to finish the work); Copyright Act Colombia, art. 20 (granting moral right to withdraw the work from thee market); Copyright Act Costa Rica, art. 14 (recognizing right to withdraw the work from the market and protection on author's honor and reputation related to the work); Copyright Act Mexico, art. 21 (adding the right to withdraw the work from the market and the right to oppose false attribution); and, Copyright Act Peru, arts. 22-28 (granting right to withdraw the work and to access it).

120 *See infra* Chap. IV, notes 173 *et seq.* and accompanying text (deepening on criminal enforcement of moral rights).

121 *See* LA SOCIEDAD DE LA INFORMACIÓN EN AMÉRICA LATINA Y EL CARIBE: DESARROLLO

programs and databases, as well as on technological protective measures and digital rights management.[122] But, as analyzed in successive chapters, most countries lack specific copyright provisions dealing with the Internet and online usage. In fact, regulation is designed for an industrial model of production and distribution of copyrighted material, where copying capabilities traditionally have been limited largely to professional publishers. In some cases, the core of the law dates back to the 1930s, like in Argentina and Uruguay. This anachronism should be overcome in the coming years, especially because several countries within the region must implement into their domestic law obligations assumed through free trade agreements on the matter.

In sum, Latin America countries have adopted copyright laws based on the *droit d'auteur* tradition, by providing automatic protection to authors for their life and an additional term that exceeds that set forth in international law. Both economic and moral rights granted to authors also surpass international law, while copyright exceptions and limitations play a narrow role. In general, the enforcement of copyright within the region

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DE LAS TECNOLOGÍAS Y TECNOLOGÍAS PARA EL DESARROLLO 199-222 (Wilson Peres & Martin Hilbert ed., CEPAL, 2009) (analyzing challenges of new technologies on protecting intellectual property through Latin America). *See also,* Ricardo Antequera, *Las Limitaciones y Excepciones al Derecho de Autor y los Derechos Conexos en el Entorno Digital*, WIPO Document OMPI-SGAE/DA/ASU/05/2, 26 de octubre de 2005; Juan Carlos Monroy Rodríguez, *Study on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities in Latin America and the Caribbean*, WIPO Document SCCR/19/4, Sept. 30, 2009; and, Juan Carlos Monroy Rodríguez, *Necesidad de Nuevas Limitaciones o Excepciones para Facilitar la Digitalización y Puesta a Disposición de Obras Protegidas en el Marco de la Educación Virtual*, 14 REVISTA LA PROPIEDAD INMATERIAL 195 (2010) (noting the lack of exceptions for digital environments in Latin America and the Caribbean, including those needed for the Internet functioning, and arguing for specific exceptions for e-learning).

122 *See, e.g.,* Carlos E. Delpiazzo, *Evolución y Perspectiva del Tratamiento Jurídico del Software en América Latina*, 12 INFORMÁTICA Y DERECHO 915, 922 (1995) (concluding that, in spite of different level of progress, at that time all Latin American countries provided copyright protection to software).

relies heavily on criminal law, while most countries lack specific provisions dealing with online environments.

3. COPYRIGHT AND HUMAN RIGHTS IN CONFLICT

Copyright and human rights are in tension. Prerogatives granted to copyright holders and their enforcement at times conflict with fundamental rights granted to people through both international instruments on human rights and domestic constitutional frameworks. This is another expression of the friction between intellectual property and human rights, more clearly illustrated by the discussion on pharmaceutical patenting and its effects on access to medicines.[123] More broadly, this is part of the challenge posed by the lack of coherence between international law on trade and on human rights, a subject of serious concern for scholars at the outset of the twenty-first century.[124]

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123 *See, generally,* Audrey R. Chapman, *Approaching Intellectual Property as a Human Right (Obligations Related to Article 15 (1) (c))*, 35 COPYRIGHT BULLETIN 4 (2001); Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. J. L. SCI. & TECH. 47 (2003); COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION, INTELLECTUAL PROPERTY, PRIVACY (Paul Torremans ed., Kluwer Law International, 2004); and, INTELLECTUAL PROPERTY AND HUMAN RIGHTS (Paul Torremans ed., Kluwer, 2008). *See also,* Peter Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 UC DAVIS L. REV. 1039 (2006-2007); and, INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX (Willem Grosheide ed., Edward Elgar Publishing, 2010).

124 Carlos Fortín, *Régimen Jurídico del Comercio Internacional y Derechos Humanos: Una Compleja Relación*, 4 ANUARIO DE DERECHOS HUMANOS 231 (2008).

Copyright is a modern era phenomenon. While some of its features can be traced back into early human history, such as the rejection of plagiarism,[125] its actual design is the outcome of anthropocentrism, liberal thinking, and a peculiar economic structure that took place in the eighteenth century.[126] In fact, leaving aside statutes on real monopoly and privileges for printers and publishers, the first copyright law saw the light in 1710, with the adoption of the Statute of Anne, which granted exclusive temporary exploitation of works by authors and their assignees,[127] and later would become the basis for the U.S. Copyright Act.[128] Later on, after its revolution, France adopted a regulation centered on the author's personhood, which provided not only economic rights but also moral rights,[129] and emphasized the connection between the creator and its creation. This approach subsequently would prevail in continental Europe, as well as in Latin America.

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125 Karin Grau-Kuntz, *Direito de Autor: Um Ensaio Histórico,* in REVISTA DA ESCOLA DA MAGISTRATURA REGIONAL FEDERAL: EDIÇÃO ESPECIAL DE PROPRIEDADE INTELECTUAL 66-70 (EMARF, 2011) (arguing that Roman plagiarism provided moral rather than legal protection to authorship because of religious beliefs and recognition).

126 Grau-Kuntz, *supra* note 125, at 105. *See also,* Allan Rocha de Souza, *A Construção Social dos Direitos Autorais*, 93 REVISTA DA ABPI 11 (2008) (arguing copyright is the outcome of certain historical conditions related to functioning of economy and technical development, as well as a certain rhetoric elaboration by right holders).

127 An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.

128 PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE 69-73 (Princeton University Press, 2014) (referring to the influence of British copyright law on American law); and, Oren Bracha, *Early American Printing Priviledges. The Ambivalent Origins of Author's Copyright in America,* in PRIVILEGE AND PROPERTY: ESSAYS ON HISTORY OF COPYRIGHT, at 89-114 (Ronan Deazley, Marin Kretschmer, & Lionel Bently eds., Open Book Publishers, Oxford, 2010) (exploring the connections between British privileges and copyright and its versioning in the American colonies).

129 Peter Drahos, *Intellectual Property and Human Rights*, 3 I.P.Q. 349, 352 (1999) (rejecting a connection between the French Revolution and author's rights as a natural right, by stating that *"Revolution was much more about the liberation of information than the creation of property rights in information"* and reporting that authors' protection appeared sometime after the Revolution).

Differences between both copyright and the *droit d'auteur* were key in law, but today they remain more limited because of compromises arising from progressive internationalization of copyright law.

Copyright empowers authors to enjoy their fundamental rights, particularly free expression. By granting control over their creations, authors may be able to make a living from their work, being freed from both private patronage and government censorship, and, ultimately, exercising free speech.[130] But the monopolistic nature of copyright implies a significant restriction on others for using copyrighted content for expressing themselves in turn. Thus, copyright encapsulates a dilemma: favoring one author's free speech forbids other people's expression.[131] An extensive body of literature has analyzed how copyright protection boosts an author's free speech,[132] as well as how that

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130 *See, e.g.,* Ysolde Gendreau, *Copyright and Freedom of Expression in Canada,* in COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION, INTELLECTUAL PROPERTY, PRIVACY, *supra* note 123, at 22 (stating that *"copyright law already incorporates freedom of expression valves through its own mechanisms."*). *See also,* DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT (Stanford Univ. Press, 2009) (reporting historic evolution of copyright in connection with free speech in the United States and arguing for enforcing an absolute First Amendment that proscribe copyright monopoly on expressions). *But see,* Neil W. Netanel, *Copyright and Democratic Civil Society*, 106 YALE L.J. 283 (1996) (arguing that copyright is a regime that support democratic societies by encouraging creative expression).

131 *See* ALESSANDRA TRIDENTE, DIREITO AUTORAL: PARADOXOS E CONTRIBUIÇÕES PARA A REVISÃO DA TECNOLOGIA JURÍDICA NO SÉCULO XXI at 91-103 (Elsevier, 2009) (analyzing the copyright paradox on cost-benefits for creativity).

132 David Felipe Álvarez Amézquita, *La Libetad de Expresión como Resultado y Garantía Principal del Derecho de Autor*, 1 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 150, 155 (2007) (arguing that copyright is "the foundation of (authors') freedom," although omitting any consideration to other people's freedom); and, Santiago Schuster, *El Autor ¿Un Concepto en Crisis?*, 5 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 12, 26-27 (2009) (highlighting relevance of copyright for author's free speech).

protection affects other people's free speech;[133] this requires policy makers to build a delicate balance.

The free speech dilemma is not the only internal conflict that copyright law must resolve though. Society grants certain rights to authors as a trade off in order to achieve progress and allow other members of the society to enjoy the benefits from that progress. As the Universal Declaration on Human Rights sets it forth, "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,"[134] wording also found in other international instruments on human rights.[135] This is known as the right to access to knowledge, and a number of works of scholarship have analyzed its relation to copyright

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133 *See* Charlotte Waelde, *Copyright, Corporate Power and Human Rights: Reality and Rhetoric,* in 2 NEW DIRECTIONS IN COPYRIGHT 291-310 (Fionna Macmillan ed., Edward Elgar, 2005) (examining intersection of human rights and copyright, but limiting findings to free speech in the U.K. and the challenge for access to information in the EU law). *See also,* Gustavo Arosemena, *Conflicto entre Derechos de Propiedad Intelectual y (Otros) Derechos Humanos: Una Breve Esquematización*, 2 REVISTA JURÍDICA DE PROPIEDAD INTELECTUAL 215, 221 *et seq*. (2009) (analyzing conflict between free speech and intellectual property); and, María Helena Barrera-Agarwal, *Derechos de Autor y Libertad de Expresión*, 90 REVISTA LATINOAMERICANA DE COMUNICACIÓN CHASQUI 32 (2005).

134 UDHR, art. 27 (1).

135 ICESCR, art. 15 (providing that "1. The States Parties to the present Covenant recognize the right of everyone: a. To take part in cultural life; b. To enjoy the benefits of scientific progress and its applications…"). In the Inter-American Human Rights System, *see* 1948 ADHR, art. XII (recognizing that "Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries."); and, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 14 (stating that "1. The States Parties to this Protocol recognize the right of everyone: a. To take part in the cultural and artistic life of the community; b. To enjoy the benefits of scientific and technological progress…").

law,[136] frequently by stressing its connection with the right to education,[137] as well as with the right to development.[138]

In recent years, propelled by intellectual property expansionism, new human rights concerns have arisen because of copyright. Authors have called attention to copyright's noxious effects on, among others, the right to seek information,[139] the right to create,[140]

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136 *See, e.g.,* Guilherme C. Carboni, *Conflitos entre Direito de Autor e Liberdade de Expressão, Direito de Livre Acesso à Informação e à Cultura e Direito ao Desenvolvimento Tecnológico*, 85 REVISTA DA ABPI 38 (2006) (analyzing the conflict of copyright law with free speech, access to knowledge, and the rights to technological development in the context of Brazilian constitutionalism).

137 *See, e.g.,* Sergio Branco, *A Lei Autoral Brasileira como Elemento de Restrição à Eficácia do Direito Humano à Educação*, 6 SUR – REVISTA INTERNACIONAL DE DIREITOS HUMANOS 120 (2007) (analyzing restrictions on concretizing the human right to education set forth by Brazilian copyright law); and, CASTRO, *supra* note 106, at 237-249 (referring the link between copyright and the right to education, the right to access to culture, and freedom of information).

138 *See, generally,* INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS (Tzen Wong & Graham Dutfield eds., Cambridge Univ. Press, 2011) (providing a comprehensive review of several fields of intellectual property from a human development viewpoint). *See also*, TRIPS AND DEVELOPING COUNTRIES: TOWARDS A NEW IP WORLD ORDER? (Gustavo Ghidini, Rudolph J.R. Peritz, & Marco Ricolfi eds., Edward Elgar, 2014); Maria Beatriz Leonardos, *O Conflito entre a Proteção aos Direitos Autorais e os Interesse da Sociedade na Livre Disseminação de Ideais, Cultura e Informação*, 108 REVISTA DA ABPI 39 (2010) (arguing for copyright flexibilities based on fundamental rights granted by Brazilian constitution, such as access to culture, education, free speech, and the social function of property); and, Michael César Silva, Roberto Henrique Porto Nogueira, & Sávio de Aguiar Soares, *Direito de Propriedade Intelectual, Tecnologia e Interoperabilidade: Estudo à Luz das Limitações aos Direitos Patrimoniais de Autor*, 101 REVISTA DA ABPI 48 (2009) (arguing that copyright exceptions are not *numerous clausus,* since they allow for the realization of constitutional rights).

139 Christophe Geiger, *Author's Right, Copyright and the Public's Right to Information: A Complex Relationship (Rethinking Copyright in the Light of Fundamental Rights)*, 5 NEW DIRECTIONS IN COPYRIGHT 24-44 (Fionna Macmillan ed., Edward Elgar, 2007) (exploring the relation between copyright and the people's right to seek information); Karem Orrego Olmedo, *La Propiedad Intelectual del Estado en Chile: Una Limitación al Dominio Público, in* CIUDADANAS 2020: EL GOBIERNO DE LA INFORMACIÓN 155-166 (Patricia Reyes ed., s.e., 2011) (suggesting synergies between access to public information and copyright regulation, particularly through public domain).

the right to free enterprise,[141] and the right to cultural self-determination.[142] Several scholars have challenged the scope of copyright by appealing to the *"social function"* of property, an elaboration of Mexican constitutionalism,[143] recognized as an inherent limitation to exclusionary rights by several Latin American constitutions,[144] which was initially linked to land and capital, but has extended progressively on industrial property, especially patent,[145] and most recently on copyright issues.[146] Going even further, some

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140 François Dessemontet, *Copyright and Human Rights: Essays in Honour of Herman Cohen Jehoram*, in INTELLECTUAL PROPERTY AND INFORMATION LAW 113-120 (Jan J.C. Kabel & Gerard J.H.M. Mom ed., Kluwer, 1998) (outlining conflict between copyright protection and the right to create, superficially related to freedoms of thought, speech, and opinion).

141 TRIDENTE, *supra* note 131, at 75-89 (arguing copyright limitations because of monopolistic rights block the right to free enterprise and distort the functioning of markets).

142 Fiona Macmillan, *Copyright, The World Trade Organization, and Cultural Self-Determination,* 6 NEW DIRECTIONS IN COPYRIGHT LAW 307-334 (Fiona Macmillan ed., Edward Elgar, 2007) (arguing for the right to cultural self-determination and cultural diversity).

143 Carozza, *supra* note 28, at 304 (recalling that article 27 of the 1917 Mexican Constitution *"recognizes the right to hold property privately, but subordinates that right to the public interest"*).

144 Const. Arg., art. 17 (referring to public benefit); Const. Bol., arts. 56, 186, 393, and 397 (providing the social function of individual and collective property); C. F. Braz., art. 5 XXIII (naming social function); Const. Chile, art. 19 No. 25 (2) (naming social function); Const. Colom., art. 58 (naming social function); Const. Costa Rica, art. 45 (referring to social interest); Const. Ecuador, arts. 31, 66 No. 26, 282, and 321 (referring to the social function of property); Const. Mex., art. 27 (talking about public interest and social benefit); Const. Para., art. 109 (recognizing private property, although subject to its economic and social function); Const. Peru, art. 70 (requiring the exercise of property rights "in harmony with common good"); Const. Uru., art. 7 (allowing limitations on property for "reasons of general interest"); and, Const. Venez., art. 115 (recognizing limitations on private property for purposes of "public usefulness or general interest".).

145 Renata Pozzato Carneiro Monteiro, *A Função Social da Propriedade na Constituição da República de 1988 e a Propriedade Industrial*, 69 REVISTA DA ABPI 23 (2004) (analyzing the constitutional social function of intellectual property in light of compulsory licensing); Adriana Alves Dos Santos Cruz, *A Licença Compulsória Como Instrumento da Adequação da Patente à sua Função Social*, 80 REVISTA DA ABPI 45 (2006) (analyzing domestic regime on compulsory licensing as a mechanism for concretizing the social function of property provided by the Constitution); Kelly Lissandra Bruch & Homero Dewes, *A Função Social Como Princípio Limitador do Direito de Propriedade Industrial de Plantas*, 84 REVISTA DA ABPI 19 (2006); and, Daniela Zaitz & Gustavo Fávaro Arruda, *A Função Social da Propriedade Intelectual: Patentes e Know-How*, 96 REVISTA DA ABPI 36 (2008).

authors have suggested rebuilding the copyright balance around constitutional provisions that protect public interests.[147] Thus, copyright has raised significant concerns based on a broad category of human rights granted by both international and constitutional laws.[148]

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146 ALLAN ROCHA DE SOUZA, A FUNÇÃO SOCIAL DOS DIREITOS AUTORAIS 265-309 (Ed. Faculdade de Direito de Campos, 2005) (arguing the social function of copyright in order to overcome the shortage of limitations and exception to fulfill public needs). *See also,* PEDRO PARANAGUÁ & SÉRGIO BRANCO, DIREITOS AUTORAIS 65-72 (Fundação Getulio Vargas, 2009) (arguing that, in addition to close-list of statutory copyright limitations, the constitution may also impose limitations on copyright because of the social function of intellectual property); and, Michael César Silva, Roberto Henrique Porto Nogueira, & Sávio de Aguiar Soares, *Direito de Propriedade Intelectual, Tecnologia e Interoperabilidade: Estudo à Luz das Limitações aos Direitos Patrimoniais de Autor*, 101 REVISTA DA ABPI 48 (2009) (arguing that exceptions are not *numerus clausus* by stating an exception for interoperability on technological works based on constitutional social function of property and the principle of objective good faith in contracts). *See also,* Pedro Mizukami, Ronaldo Lemos, Bruno Magrani & Carlos Affonso Pereira de Souza, *Exceptions and Limitations to Copyright in Brazil: A Call for Reform,* in ACCESS TO KNOWLEDGE IN BRAZIL 72 (Lea Shaver ed., Bloomsbury, 2010) (supporting application of the social function of property to copyright issues and reporting the backing of an increasing body of Brazilian scholarship on the matter); and, Maria Beatriz Leonardos*, O Conflito entre a Proteção aos Direitos Autorais e os Interesse da Sociedade na Livre Disseminação de Ideais, Cultura e Informação*, 108 REVISTA DA ABPI 39 (2010) (arguing for an open clause on copyright exceptions that would allow for harmonizing copyright with the constitutional request for social function of property, and reporting on other scholars making similar argument).

147 Mizukami *et al., supra* note 146, at 71-73 (arguing that constitutional reasoning based on Dworkin and Alexy theories on norms and rules may allow "a more extensive and permissive system of exceptions and limitations"). *Similarly,* Rodrigo Moraes, *A Função Social da Propriedade Intelectual na Era das Novas Tecnologias,* in 1 COLEÇÃO CADERNOS DE POLÍTICAS CULTURAIS: DIREITO AUTORAL 268-269 (Ministério da Cultura, 2006) (rejecting a property viewpoint on copyright and arguing for an interpretation of copyright law with a constitutional key); Michael César Silva, Roberto Henrique Porto Nogueira, & Sávio de Aguiar Soares, *Direito de Propriedade Intelectual, Tecnologia e Interoperabilidade: Estudo à Luz das Limitações aos Direitos Patrimoniais de Autor*, 101 REVISTA DA ABPI 48, 53 (2009) (arguing that copyright exceptions realize constitutional rights and, therefore, those exceptions are not *numerus clausus,* but open to satisfy constitutional requirements).

148 Laurence R. Helfer, *Towards a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 977 (2007) (arguing for a coherent and comprehensive human rights framework on intellectual property law and policy).

Human rights concerns about copyright, however, have been limited. They have focused on the substantive aspect of the regulation, such as exclusions, limitations, exceptions, and other flexibilities. These emphases may be explained because the scholarship has been the result of reacting to the narrow room provided by copyright law for fulfilling the needs of the public interest. As a result, less literature has explored human rights matters related to copyright enforcement, an issue that may attract more scholars in coming years, as increasing international efforts are made in order to guarantee the actual observance of copyright law. This dissertation in particular, as has been mentioned, analyses human rights challenges in connection with criminal and online mechanisms of copyright enforcement.

4. SOME CONSIDERATIONS FOR RESOLVING THE CONFLICT

Identifying a conflict between a given human right and copyright does not imply ruling immediately in favor of the human right. This kind of conflict is hard to resolve sometimes because human rights operate as relatives rather than absolutes and also because copyright itself is, to certain extent, a human right.

Despite being recognized as belonging to all members of humankind, human rights are not absolute, thus, they are not exempt from certain restrictions.[149] As a matter

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[149] Louis Henkin, *Introduction,* in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 21-22 (Louis Henkin ed., Columbia Univ. Press, 1981). *See,*

of fact, all relevant international instruments have recognized specific circumstances that allow imposing some constraints on human rights. It is possible to identify three sets of such restrictions: i) reservations, which are made by states when accepting, signing, approving, or ratifying an international instruments in order to excuse themselves from complying with certain requirements,[150] although the actual efficacy of such reservations is being challenged because their very existence may defeat the purpose of those instruments;[151] ii) derogations, which are certain temporary restrictions allowed in times of emergency,[152] such as some constraints on free speech during war; and iii) limitations, which are more permanent curtailments on certain rights. All of those permissible constraints are regulated by international instruments on human rights, as well as by domestic constitutional law, but this study focuses only on the limitations since they are the ones relevant to the interaction between human rights and copyright.

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generally, Alexandre Charles Kiss, *Permissible Limitations on Rights,* in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290-310 (Louis Henkin ed., Columbia Univ. Press, 1981). *See also Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* 7 HUM. RTS. Q 1 (1985). *But see,* Alan Gewirth, *Are There Any Absolute Rights?,* in THEORIES OF RIGHTS 91-109 (Jeremy Waldron ed., Oxford Univ. Press, 6th ed., 1995) (arguing that the right to not be tortured to death is absolute and suggesting a line of reasoning for extending that character to other rights).

150 Vienna Convention on the Law of Treaties, arts. 2 d), and 19 to 23, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [*hereinafter* Vienna Convention] (setting forth the legal effects of reservation on international law).

151 Vienna Convention, art. 19 (c) (allowing reservations unless it is "incompatible with the object and purpose of the treaty".). *See* Louis Henkin, *Introduction,* in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 23-24 (Louis Henkin ed., Columbia Univ. Press, 1981) (analyzing the effects of reservations incompatible with the object and purpose of the Covenant).

152 Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations,* in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 151, at 78-90 (reviewing permissible derogation and its specific limitation under international instruments on human rights).

Human rights could be subject to limitations for several reasons, including national security, public safety and order, as well as public health and morals.[153] Limitations are also permissible, according to the Universal Declaration on Human Rights, *"for the purpose of securing due recognition and respect for the rights and freedoms of others."*[154] Both the American Declaration and the American Convention have adopted similar language with a general clause on limitations of human rights based on protecting others.[155] The American Convention and the ICCPR have gone further, however, by specifying which particular human rights may be subject to limitations in order to protect the rights and freedoms of others.[156] Whether this specification limits the scope of a general clause on limitations remains open to disagreement, a matter we return to below.[157] At this stage, what is

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153 Kiss, *supra* note 149, at 295-304 (conceptualizing the meaning of that language within the ICCPR).

154 UDHR, art. 29 (2).

155 ADHR, art. XXVIII (providing that "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy."); ACHR, art. 32 (2) (stating that "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society").

156 LATE LILLICH, HURST HANNUN, JAMES ANAYA, & DINAN SHELTON, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 229 (Aspen Publishers, 4th ed., 2006).

157 *See* Inter-Am. Ct. H.R., Advisory Opinion OC-6/86 of May 9, 1986 "Laws" in article 30 of the American Convention on Human Rights, para. 17 (rejecting that article 30 of the America Convention provides a general authorization for setting forth new restrictions other than those allowed by specific provisions on each human right, on the contrary, this article imposes additional conditions to those restrictions, authorized singularly, in order to legitimate them). *But see infra* Chap. VII, notes 143-148 and accompanying text (discussing acceptance of limitations on the right to privacy, although not set forth by international instrument on human rights law expressly). *See also*, Kiss, *supra* note 149, at 291-292 (supporting that limitations are only permitted where a specific clause allows them within the International Covenant, but recognizing implicit limitations).

relevant is that international instruments on human rights allow certain limitations on those rights in order to protect the rights of others, which could be the case of copyright holders.

Although states have some room for defining exceptions to recognized human rights, which allows for contextualizing said exceptions from one country to another, they still must comply with certain rules established by international law on the matter.[158] First, limitations require an enabling law. Second, limitations must have a legitimate purpose. Third, limitations must be proportional. And, fourth, when adopting limitations, countries must establish appropriate safeguards in order to prevent the misuse and abuse of those restrictions vis-a-vis human rights. The following paragraphs briefly review the rules that constrain state adoption of human rights exceptions.

First, limitations on human rights must be set forth by law, that is, according to the American Court of Human Rights, by a general norm tied to the general welfare, passed by democratically elected legislative bodies established by the constitution, according to procedures set forth by it.[159] Legality is a common exigency in all international

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158 *See* Inter-Am. Ct. H.R., Advisory Opinion OC-6/86 of May 9, 1986 "Laws" in article 30 of the American Convention on Human Rights, para. 18 (listing the requirements for setting forth limitations on human rights by domestic law, under the American Convention).

159 *Ibidem*, para. 38 (ruling that *"the word 'laws' in Article 30 of the Convention means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose"*). *But see Symposium: Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, supra note 149, at 18 (suggesting more flexible interpretation of this requirement in the International Covenant on Civil and Political Rights by scholars that excludes measures taken by executive authorities, but allows unwritten laws).

instruments on human rights,[160] which purpose is *"avoiding arbitrary restrictions on rights by requiring that limitation be established by general rules … normally imposed by [the] legislature."*[161] Therefore, unless the law authorizes measures taken by executive authorities, such as police and administration, they are prohibited as an improper way for limiting human rights. By the same token, private agreements cannot limit the fundamental rights of third parties, unless a law recognizes the efficacy of those agreements.

Second, limitations on human rights must have a legitimate purpose. As was discussed previously, international instruments on human rights mandate that limitations are allowed only for certain purposes, such as securing due recognition and respect for the rights of others and reasons of general interest like national security, public safety, and public order in a democratic society. The expression *"in a democratic society"* imposes additional restrictions on the limitation clauses it qualifies, since in order to have a legitimate purpose a limitation cannot impair the democratic functioning of a given society.[162] The specific circumstances that qualify for limiting a certain right may vary

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160 ADHR, art. XXXIII (setting forth the duty to obey the law); UDHR, art. 29 (2) (establishing that limitation must be *"determined by law"*); ICCPR, art. 17 (1) (banishing *"unlawful interference"* with the right to privacy); and, ACHR, art. 30 (prescribing that limitations *"may not be applied except in accordance with laws"*).

161 Kiss, *supra* note 149, at 304-305. LAURENCE BURGORGUE-LARSEN & AMAYA UBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY 554-555 (New York, Oxford Univ. Press, 2011) (exploring the meaning of "law" as a source of human rights restrictions).

162 *See* UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 Sep. 1984, E/CN.4/1985/4, para. 19-21; and, SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIAL AND COMMENTARY 652-656 (Oxford Univ. Press, 3rd ed., 2013) (discussing the meaning of

from one case to another but, in any case, the limitation must be consistent with the functioning of a democratic society. For the purpose of legitimacy, for instance, under no circumstance may a limitation discriminate arbitrarily, since international law proscribes distinctions of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.[163] Successive chapters of this dissertation discuss in depth some of the circumstances that allow for setting for limitations on human rights.

Third, limitations on human rights must be proportional. In spite of lacking an express recognition in international instruments on the matter,[164] human rights jurisprudence requires that limitations must pass a test on proportionality.[165] This test requires that a given measure that limits fundamental rights must be: adequate, that is,

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"necessary in a democratic society" and arguing it incorporate the notion of proportionality into the imposition of limits). *See also,* Kiss, *supra* note 149, at 05-308 (noting that the formula "in a democratic society" qualifies the notions of public order and national security by preventing arbitrary treatment); and, BURGORGUE-LARSEN & UBEDA DE TORRES, *supra* note 161, at 554-555 (interpreting the meaning of "democratic society" in relation with the necessity test and noting that the Inter-American Court of Human Rights initially linked necessity and proportionality, but, ultimately, the proportionality has become a fourth condition for setting forth a restriction).

163 ADHR, arts. I and II; UDHR, arts. 1 and 2; ICCPR, art. 2; and, ACHR, art. 1.

164 PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 161 (Oxford Univ. Press, 2011) (referring to proportionality among the underlying principles set forth by several provisions of the European Convention on Human Rights that "requires there to be a 'pressing social need' for the measure or interference in question and also that it is proportionate to the aim being pursued"). *See also,* Cecilia Medina, *El Derecho Internacional de los Derechos Humanos*, in DERECHOS HUMANOS: SELECCIÓN DE TRATADOS INTERNACIONALES Y RECOMENDACIONES DE ORGANISMOS INTERNACIONALES A CHILE 16 (Humanas, 2006) (supporting the exigency of proportionality in articles 4 of the ICCPR and 27 of the ACHR).

165 *See, generally,* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Cambridge Univ. Press, 2012).

appropriate to achieve its intended objective; necessary, that is, there are no less severe means of achieving the intended objective; and, proportional *sensu stricto*, that is, when balancing competing interests at hand, the benefits of the measure must be greater than its detrimental effects.[166] Despite some criticism that it is ambiguous and subjective,[167] the test of proportionality, which is an elaboration of German law,[168] has led the jurisprudence of all international human rights courts, as well as most constitutional courts, including Latin American ones,[169] becoming common language in human rights speech.[170]

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166 Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131, 135-136 (2003) (explaining the principle of proportionality and its three components: suitability, necessity, and proportionality in the narrow sense).

167 Alexy, *supra* note 166, at 136-140 (challenging Habermas' objections to the proportionality test based on its eroding effects on human rights, disregarding correctness, and being irrational); and, Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT. J. CONST. L. 572, 573-577 (2005) (rejecting objections against balancing test of being irrational and subjective). *See also,* Bernhard Schlink, *Proportionality in Constitutional law: Why Everywhere But Here?*, 22 DUKE J. COMP. & INT'L L. 291, 299-301 (2012) (arguing against lacking objectivity and being ambiguous).

168 Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 97-111 (2008) (reviewing the evolution of the principle of proportionality in German law since late eighteen century administrative law to the second half of twenty century constitutional law). *See also,* Schlink, *supra* note 167, at 294-296.

169 Sweet & Mathews, *supra* note 168, at 111-159 (reporting on the adoption of the test of proportionality by domestic courts and by some international bodies, including the European Court of Justice, the European Court of Human Rights, and the World Trade Organization); BARAK, *supra* note 165, at 175-202 (reporting on historical development of the test of proportionality and its progressive adoption by domestic jurisdictions worldwide); and, MARTÍN RISSO FERRAND, ALGUNAS GARANTÍAS BÁSICAS DE LOS DERECHOS HUMANOS 122-127 (Fundación de Cultura Universitaria, 2008) (reporting reception of the test of proportionality by courts in Southern Cone countries).

170 Schlink, *supra* note 167, at 302 (referring to the test of proportionality as *"part of a deep structure of constitutional grammar that forms the basis of all different constitutional languages and cultures"*); LEGG, *supra* note 23, at 178 (referring to the adoption of the proportionality test by international human rights bodies); Sweet & Mathews, *supra* note 168, at 74 (qualifying the proportionality analysis as *"the defining features of global constitutionalism"*.); and, BARAK, *supra* note 165, at 202-206 (supporting that, although the test of proportionality has broad

Fourth, when adopting limitations on human rights, countries must establish appropriate safeguards in order to prevent their misuse and abuse. Available safeguards could range from adopting substantive standards (e.g., for criminal guilt) to setting forth terms and conditions for applying a certain limitation on human rights (e.g., for defendant's remand), as well as procedural mechanisms that prevent undesirable outcomes. The American Convention on Human Rights, as noted previously, requires countries to implement a specific safeguarding mechanism consisting of the right to judicial protection, according to which, everyone has the right to simple and prompt judicial recourse for protection against acts that violate their fundamental rights.[171] Similarly, this right has evolved in Latin American countries into a broad recognition of constitutional remedies for protecting human rights – such as *amparo proceedings*, *habeas data*, *habeas corpus*, and others – which provide an additional defense in cases of arbitrary or abusive use of limitations on human rights.[172]

In sum, human rights are not absolute and, therefore, susceptible to limitations. Those limitations, however, are subject to requirements set forth by both international human rights and constitutional laws. In order to determine if a given constriction on human rights complies with the law, it is necessary to: identify the specific limitative measure and the affected human right; determine if the measure is permissible as a

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reception by international law, it has been particularly welcomed by international human rights and humanitarian laws).

171 ACHR, art. 25.

172 *See supra* notes 47-72 and accompanying text.

limitation on the affected right; and ensure that the measure is provided by law, for a legitimate purpose, and is proportional in relation to its intended purpose. Additionally, the law must establish appropriate safeguards for preventing unintended results. The coming chapters apply this framework for determining whether and to what extent certain measures of copyright enforcement that limit the rights of others are in compliance with both international human rights and constitutional laws.[173]

Copyright itself is a human right, as previously noted, which makes it harder to make *ipso facto* a ruling in favor of another human right with which it is in conflict. The Universal Declaration on Human Rights recognizes that *"[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."*[174] Similar ambiguous language,[175] which evokes the French tradition on *droit d'auteur* rather than the common law tradition on copyright,[176] is reproduced by binding instruments on human rights, such as the International Covenant on Economic, Social and Cultural Rights,[177] as well as the Additional Protocol to the American

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173 Note that certain countries' constitution may impose additional requirements for adopting exceptions and limitations on fundamental rights. In Chile, for instance, the 1980 Constitution assures that limitations set forth by law cannot affect the essence of fundamental rights, neither impose conditions, fees, or another requisite that prevent their free exercise. *See* Const. Chile, art. 19 No. 26.

174 UDHR, art. 27 (2).

175 MIRA T. SUNDARA RAJAN, COPYRIGHT AND CREATIVE FREEDOM: A STUDY OF POST-SOCIALIST LAW REFORM 216-217 (Routledge, 2006).

176 Dessemontet, *supra* note 140, at 114 (stating that the Declaration and Covenant follow the French viewpoint on literary and artistic property that opposes the Anglo-American mercantilist perspective adopted by the TRIPS Agreement).

177 ICSECR, art. 15 (1) (c).

Convention on Human Rights in the Area of Economic, Social and Cultural Rights.[178] Determining that authors have a human right on the moral and material interest resulting from their creations, however, does not prescribe the exact nature and scope of copyright law,[179] an issue that, having attracted already a number of works of scholarship, here requires only a short synopsis.

One primary issue that raises some doubts is the actual nature of the interests to which international instruments on human rights grant protection. Some scholars have suggested these instruments protect not only authors' creative works, but also inventors and their patent rights,[180] and even commercial trade secrets.[181] This overly broad

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178 Additional Protocol, *supra* note 13, art. 14 (1) (c).

179 *See* Ulrich Uchtenhagen, *El Derecho de Autor como Derecho Humano*, 3 REVISTA DE DERECHO PRIVADO 3 (1998) (using human rights on copyright as a rhetoric mechanisms that close discussion and narrow legal choices).

180 GRAHAM DUTFIELD & UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 213-233 (Edward Elgar, 2008) (arguing that human rights protection covers both copyright and patent, and criticizing the general comments on article 15 (1)(c) of the International Covenant on Economic, Social and Cultural Rights for excluding patenting from human rights protection). *See also* RICARDO J. COLMENTER GUZMÁN, HUMAN RIGHTS IMPLICATIONS IN THE TRIPS ENFORCEMENT PROVISIONS: INTELLECTUAL PROPERTY AND HUMAN RIGHTS TOPICS 113-119 (Paredes Libros Jurídicos, 2002) (arguing that any intellectual property violation is also a human rights violation, under the assumption that all intellectual property rights are human rights also).

181 Ronald A. Cass, *Intellectual Property and Human Rights,* in ARE INTELLECTUAL PROPERTY RIGHTS HUMAN RIGHTS? 31-35 (The Federalist Society, 2007) (arguing that a broad intellectual property is protected expressly in international human rights instruments, by distorting the actual meaning of clause on access as the base for the protection, which would include copyright, patent, and even commercial secrets, such as the formula for Coca-Cola). *See also,* Santos, *supra* note 19, at 79-90 (assuming, although a "fragile liaison", human rights cover a broad category of intellectual property matters, including both copyright and patents.); and, Ramiro Rodríguez, *El Derecho de Autor en Colombia desde una Perspectiva Humanista*, 30 REVISTA PROLEGÓMENOS. DERECHOS Y VALORES 141 (2012) (assuming that human rights provide protection to copyright, as well as to industrial property and plant varieties).

interpretation that covers any intellectual property is, however, groundless. On the contrary, the actual language of those instruments, as well as their historical backgrounds and drafting processes, clearly state that this human right refers only to the moral and material interests of authors in their creations and, therefore, excludes from such protection any other intellectual property assess.[182] The exclusion of other intellectual property is also the authoritative interpretation provided by the United Nations,[183] according to which, *"protection of the moral and material interests of the author … does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements."*[184]

A second consideration is that the moral and material interests protected by international instruments refers only to human beings. It is clear that international human rights law does not provide protection to legal entities, whether corporations or governmental bodies.[185] Moreover, this protection does not extend to all people, but only

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182 *See* Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007) (reviewing historical drafting of the human rights provisions on intellectual property); and, Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709 (2007).

183 UNITED NATIONS – COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, General Comment 17 (2005): The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), UN Document E/C.12/GC/17, Jan. 12, 2006.

184 *Id.*, para. 2.

185 UNITED NATIONS – COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 183, para. 7 and 8 (stating that this human right provides protection to individuals, groups of individuals, or communities, but legal entities). *See also*, Megan M. Carpenter, *Intellectual Property: A Human (Not Corporate) Right,* in THE CHALLENGE OF HUMAN RIGHTS: PAST, PRESENT AND FUTURE 312-330 (David Keane and Yvonne McDermott eds., Edward

the actual authors of creative works and, therefore, it excludes claims based on human rights law by successive assignees of authors' rights. This understanding is corroborated by several provisions of international instruments on human rights that limit copyright's effects to actual human beings and to authors, as well as excluding transferences of these rights.[186] This interpretation also is consistent with the French tradition of *droit d'auteur* received by those instruments,[187] for which authorship is only conceivable as coming from human beings.[188]

A third question on the international protection of the moral and material interests of authors is whether it refers to both moral and economic rights that copyright law grants to creators. One observation on the matter is the semantic differences between the two bodies of law: while copyright refers to "rights," international instruments on human rights use "interest," a slightly different term that suggests a lower legal

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Elgar, 2012). *But see* Cass, *supra* note 181, at 31-35 (suggesting international human rights protection for the formula for Coca-Cola).

186 ADHR, pmbl. (recognizing the *"essential rights of man ... based upon attributes of his human personality"*); UDHR, pmbl. (recognizing *"equal and inalienable rights of all members of the human family"*); ICCPR, pmbl. (recognizing *"equal and inalienable rights of all members of the human family"* and that *"these rights derive from the inherent dignity of the human person"*); and, ACHR, pmbl. (recognizing *"essential rights of man ... are based upon attributes of the human personality"*).

187 SUNDARA RAJAN, *supra* note 175, at 218-219 (noticing the conceptual compatibility of moral rights and human rights on natural law). *See also* VON LEWINSKI, *supra* note 93, at 38 (pointing out that, although not based on natural law, the *droit d'auteur* tradition reflects many features of the natural law theory).

188 LIPSZYC, *supra* note 100, at 50-53 (arguing that the concept of author in the droit d'auteur tradition refers *"exclusively to the physical person who created the work"*); and, Guillermo Zea Fernández, *Obra Futura: Cesión de Derechos Patrimoniales Vicisitudes,* 7 REVISTA PROPIEDAD INMATERIAL 3, 4 (2003) (stating that *"without exception, the human being is the only one who can become an author"*).

entitlement.[189] Similarly, while copyright law usually refers to economic rights, international instruments on human rights use the phrase "material interest," which raises concerns about the actual meaning and scope of that provision in those instruments. Given that ambiguity, it makes sense to discuss whether human rights refer to the economic and moral rights granted to authors by copyright law.

Human rights are by definition inalienable, thus they cannot be taken from or given away by those who are entitled to them. This is a common feature of human rights recognized by international instruments on the matter.[190] On the other hand, economic rights granted by copyright law to authors, in order to achieve economic exploitation of their creations, are subject to negotiation. These rights are transferred and licensed to third parties, as well as assigned to and inherited by others.[191] This mere fact makes apparent that economic rights granted by copyright law to authors are not part of what is protected by international instruments on human rights when referring to the author's "material interest." This understanding is endorsed by the United Nations in the

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189 Ricardo Lackner, *Aproximación a los Aspectos Penales de las Modificaciones a la Ley de Propiedad Literaria y Artística (Ley No. 9.739) Introducidas por la Ley No. 17.616*, 14 REVISTA DE DERECHO PENAL 7, 10 (2004) (noting that the UDHR refers to rights for accessing and mere interest for authors).

190 *See supra* note 186.

191 Arteaga, supra note 100, at 48-53 (providing a description of transferring and licensing of copyright in Latin American countries).

authoritative interpretation provided by its Committee on Economic, Social and Cultural Rights.[192] We return to this point below.

There are significant commonalities, on the contrary, between human rights and moral rights.[193] Both have common ground in natural law theories,[194] and are constructed around the concept of personhood. They are independent from economic rights and, in fact, they can be exercised even after transferring said economic rights.[195] Moral rights, likely human rights, are inalienable.[196] Those similarities make possible to argue that the "moral interest" of an author referred to by international instruments on human rights somehow correspond to the "moral rights" granted to authors by copyright law. But recognizing that correlation does not mean ruling that whatever moral rights granted by domestic copyright law become human rights under international law; instead, only certain moral rights may achieve that status.

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192 UNITED NATIONS – COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 183, para. 1-3. *But see* CASTRO, *supra* note 106, at 214 (suggesting that human rights approach on copyright would cover both economic and moral rights).

193 *See* UNITED NATIONS – COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 183, para. 12-14.

194 *See supra* note 187.

195 Berne Convention, art. 6 bis (recognizing that those rights could be exercised by authors even after transferring economic rights on works).

196 SUNDARA RAJAN, *supra* note 175, at 229 (agreeing on its inalienability by saying that *"moral rights are, by definition, rights of personal authorship: as a rule, they cannot be exercised by corporations, bought by them, transferred or sold to them".*). *See, e.g.,* Copyright Act Braz., arts. 27 and 49; Copyright Act Chile, art. 16; Copyright Act Colom., art. 30; Copyright Act Costa Rica, art. 13; Copyright Act Mexico, arts. 18 and 19; and, Copyright Act Peru, art. 21.

It is possible to argue that the moral rights grated by copyright that achieve the status of human rights are those recognized by international law. At the time of adoption of the American Declaration and the Universal Declaration, leading international instruments on copyright recognized two moral rights: the right to claim authorship of the work and the rights to preserve integrity of the work.[197] Although I agree with those who challenge the theoretical foundations of moral rights other than authorship,[198] following the authoritative interpretation by United Nations Committee on Economic, Social and Cultural Rights, international human rights law would provide recognition to these two moral rights: authorship and integrity.[199] These moral rights are a baseline, but

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197 Berne Convention, art. 6 bis; and, 1946 Washington Convention, art. XI. However, for some scholars the right to divulgation, i.e., the power to control the first publication of the work, is an implicit moral right that authors have to their copyrighted works. *See* VON LEWINSKI, *supra* note 93, at 51 (referring to authorship, integrity, and divulgation as "the three basic rights"); and, GOLDSTEIN & HUGENHOLTZ, *supra* note 98, at 361-367 (adding the right to withdrawal, thus is, to take the work out from circulation because it does not represent the author's views anymore, although recognizing that only an small number of countries recognize it).

198 Alejandro Guzmán Brito, *Los Derechos sobre las Cosas Intelectuales o Producciones del Talento y del Ingenio, in* ESTUDIOS DOGMÁTICOS DE DERECHO CIVIL 53-81 (Alejandro Guzmán Brito ed., Ediciones Universitarias de Valparaíso, 2005) (criticizing the lack of theoretical and conceptual consistency of moral rights, and arguing for a narrow recognition of them – actually limited to authorship or paternity – because the right of divulgation is not other than a consequence of exercising the economic right to publish the work, while the right to integrity lacks foundations on immaterial property as much as on material property, on one side, and, on the other, is no more than a misleading expression of the economic right to adaptation). *See, e.g.,* JACQUELINE ABARZA & JORGE KATZ, LOS DERECHOS DE PROPIEDAD INTELECTUAL EN EL MUNDO DE LA OMC 22-23 (United Nations, 2002) (expressing confusion in distinguishing between the moral rights of integrity and the economic right of adaptation for purpose of enforcement within the TRIPS Agreement). *See also,* Guilherme C. Carboni, *Conflitos entre Direito de Autor e Liberdade de Expressão, Direito de Livre Acesso a Informação e à Cultura e Direito ao Desenvolvimento Tecnológico*, 85 REVISTA DA ABPI 38, 39-41 (2006) (arguing that only authorship has the status of fundamental rights, but noting that the Brazilian constitution misleadingly provides such status to industrial property and author's economic rights).

199 UNITED NATIONS – COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 183, para. 12, 13, and 39 (b).

there is no restriction in recognizing additional moral rights by domestic law. In fact, domestic laws recognize other moral rights, which number, nature, scope, entitlement, exercise, and duration vary significantly from one country to another, evidencing a well-known lack of harmonization not only through Latin America but worldwide.[200] Whatever their status in domestic law, however, none of them reaches the status of human rights before international law.[201]

Human rights discourse may provide some traction to moral rights,[202] particularly in countries that fail to protect them, such as Russia and the United States.[203] Even countries with well-protected moral rights use human rights speech for strengthening

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200 BENTLY & SHERMAN, *supra* note 31, at 155 and 250 (noticing the lack of international harmonization on moral rights, the substantial differences among European countries, and the lack of attempting even their harmonization by the European Union). *See also* GOLDSTEIN & HUGENHOLTZ, *supra* note 98, at 360-361.

201 *See* SUNDARA RAJAN, *supra* note 175, at 217-218 (arguing that as human rights, moral rights should have a broader scope than that provided by international copyright instruments, by extending the right to integrity to any potential modification, expanding the right to attribution to anonymous and pseudonymous authorship, and granting exercise of rights post-mortem).

202 SUNDARA RAJAN, *supra* note 175, at 209, 217, 238-239 (recognizing that human rights model can provide public awareness on moral rights, prevent state exploitation and censorship, provide criteria for implementing and enforcing moral rights, and entitle them to a place in constitutional instruments).

203 *See* SUNDARA RAJAN, *supra* note 175, at 205-233 (arguing for author's moral rights in post-communist Russia based on human rights); ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 133-145 (Stanford Law Books, 2010) (articulating human rights argument in favor of broader recognition for moral rights in the United States); and, Daniela Mattos Sandoval, *Moral Rights in Works of Authorship in the American Legal System,* 50 REVISTA DA ABPI 39 (2001) (recognizing some equivalent protection of moral rights in the U.S. law, although limited, while arguing for more efficient protection by a uniform system through federal law).

that protection, as Colombia did when criminalizing their violation.[204] In Latin America, scholars have raised their voices using that discourse against the increasing application of the work-for-hire doctrine, which disenfranchises authors from the moral rights on their creations.[205]

There is still a loose end, however, in this analysis: the meaning of recursive language on the *"material interest"* of the authors in international instruments on human rights. As noted, this does not refer to economic rights, which, unlike human rights, are alienable. Therefore, it must refer to certain other aspects of the inalienable rights granted by law to authors. When interpreting that language, the United Nations Committee on Economic, Social and Cultural Rights has been cryptic. Instead of specifying the actual scope of said *"material interest,"* the Committee has pointed out to the connection between that interest and other human rights, such as the right to own property, the right of any worker to adequate remuneration, and the right to an adequate

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204 *See infra* Chap. IV, notes 186-192 and accompanying text. As a matter of fact, the Colombia Constitutional Court has a well-developed jurisprudence, according to which, moral rights are fundamental because non-transferable, inalienable and imprescriptible, unlike economic exclusive rights that are alienable, waivable and prescriptible. *See* Corte Constitucional de Colombia, Sentencia C-334/1993, 12.08.1993 (Colom.); Corte Constitucional de Colombia, Sentencia C-155/1998, 28.04.1998 (Colom.); Corte Constitucional de Colombia, Sentencia C- 1118/2005, 01.11.2005 (Colom.); and, Corte Constitucional de Colombia, Sentencia C-339/06, 03.05.2006 (Colom.).

205 Francisco Cumplido, *El Derecho de Autor en el Marco del Constitucionalismo,* in VII CONGRESO INTERNACIONAL SOBRE PROTECCIÓN DE LOS DERECHOS INTELECTUALES: DEL AUTOR, EL ARTISTA Y EL PRODUCTOR 41 (Santiago – Chile, OMPI, 1992), (raising concerns on the lack of protection for moral rights in the work-for-hire). *But see,* Santiago Schuster, *Derechos de Autor en las Relaciones Laborales y su Vínculo con el Tratado de Libre Comercio entre Chile y Estados Unidos,* in ESTUDIO DE DERECHO Y PROPIEDAD INTELECTUAL: HOMENAJE A ARTURO ALESSANDRI BESA 369-384 (Marcos Morales & Rodrigo Velasco ed., Ed. Jurídica de Chile, 2011) (arguing that moral rights prevail on work-for-hire, whose effects are limited to economic exclusive rights).

standard of living.[206] This systematic interpretation is correct that whatever the scope of copyright as human rights, it does not prevent creators from achieving protection through other human rights. It fails, however, to provide a clear meaning to *"material interest"* in the context of the provisions of international human rights law instruments that protect authors.

The expression *"material interest"* of authors also may have an additional meaning. It may refer to the potential economic interest resulting from exercising (or not) the aforementioned moral rights. Indeed, Latin American scholars agree that infringing on moral rights may also raised economic considerations.[207] For instance, authors may or may not oppose certain alterations of the integrity of their works, a decision that may be

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206 UNITED NATIONS – COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 183, para. 15.

207 Carlos Villalba, *Infracciones y Sanciones en Derecho de Autor y Derechos Conexos: La Evaluación del Daño, in* 2 III CONGRESO IBEROAMERICANO SOBRE DERECHO DE AUTOR Y DERECHOS CONEXOS 947-955 (Montevideo, OMPI – IIDA - Gobierno de Uruguay, 1997) (arguing that infraction to moral rights also may require monetary compensation). *See also,* CASTRO, *supra* note 106, at 157-158 (admitting that moral rights may have some economic implications, particularly the right of disclosure); LUIS CARLOS PLATA LÓPEZ, RESPONSABILIDAD CIVIL POR INFRACCIONES AL DERECHOS DE AUTOR 123-129 (Ediciones Uninorte, 2010) (reviewing different hypothesis of compensation for infraction on moral rights under Colombian copyright law); Gabriela Paola Salazar Sempértegui, *Valoración del Daño en las Infracciones al Derecho Moral de Autor* (unpublished Bachelor in Law thesis, Pontificia Universidad Católica del Ecuador, 2013); Pedro Féliz Montes de Oca, *Derecho Moral de Autor: Valoración de los Daños Causados por Su Violación*, 2 ANUARIO DOMINICANO DE PROPIEDAD INTELECTUAL 17 (2015); and, Raúl Solórzano Solórzano, En Torno al Derecho Moral del Autor a la Integridad de Su Obra: Reflexiones a Propósito del Daño Efectuado a los Murales en el Centro de Lima, 74 REVISTA DERECHO PONTIFICIA UNIVERSIDAD CATÓLICA DEL PERÚ 97 (2015). *But see,* MARÍA EUGENIA TRIVIÑO FIGUEROA, DEFENSA DEL DERECHO DE AUTOR EN SU PROPIEDAD ARTÍSTICA Y LITERARIA Y PROCEDIMIENTOS JUDICIALES Y ADMINISTRATIVOS A QUE DÉ LUGAR 18-20, 109 (Ed. Atena – Edic. La Epoca, 1988) (arguing that moral damages wouldn not be compensable, except infringement affects economic rights also, for instance when publishing copies of a book without mentioning its author).

determined by some potential economic compensation by third parties, which would be the material interest referred to by international instruments on human rights. This underlying economic compensation for the exercise of and infringement on moral rights has been recognized also in domestic law by Latin America countries.[208]

In sum, the connection between human rights and intellectual property is *"thin at best."*[209] It does not cover intellectual property other than certain moral rights of authors in their creations, as well as the potential material interest on said rights. But narrowing the actual meaning of human rights discourse on authors' rights does not exclude protecting other facets of copyright, particularly economic rights, even recognizing they are not human rights under international law, but, as the TRIPS Agreement states, mere "private interest."[210]

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Until this point, this dissertation makes apparent that the tensions between human rights and copyright may be greater in Latin America than elsewhere. This would be the

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208 *See, e.g.,* Copyright Act Brazil, art. 24 §3; Copyright Act Costa Rica, art. 14; and, Copyright Act Colombia, art. 30 (recognizing, all of them, potential compensation for infringing and authorizing the exercise of moral right by third parties).

209 Drahos, *supra* note 129, at 358. *See also,* Paul L. C. Torremans, *Copyright As a Human Right,* in TORREMANS (ed.), *supra* note 123, pp. 1-20, pp. 9-10 (arguing that copyright has a *"very weak claim to human rights status"*, based on its historical inclusion in international instruments); and, Santos, *supra* note 19, at 79-90 (refering to the *"fragile liason"* between human rights and copyright, although assuming that that liason also covers other intellectual property rights).

210 TRIPS Agreement pmbl. (*"recognizing that intellectual property rights are private rights"*).

outcome of two parallel processes. On one hand, the increasing scope of copyright law through the region, since both substantive and procedural rules, specially those designed for criminal enforcement, go further than international and comparative laws. On the other, Latin America offers a broader opportunity for raising human rights challenges regarding copyright law, under both international and domestic laws. Following chapters of this dissertation deepen on those processes. For now, this chapter has outlined those features of Latin American law, as well as certain relevant aspects for resolving potential conflicts, that is, the relative character of human rights and the fact that to some limited extent copyright is also a human right. The following chapters further the discussion of the historical evolution of copyright law in the region and, later, on specific human rights challenges facing copyright regulation in Latin America related to criminal and online enforcement.

Chapter II

Copyright Tradition in Latin America[1]

In recent years, Latin American countries have committed to adopt rules about copyright in digital environments, which requires implementation into domestic law. This process of transporting international obligations into domestic law is highly complex because of its potential harmful effects on human rights. For a proper understanding of the human right challenges created by new copyright commitments, it is necessary to examine the process through which those countries have adopted domestic law in the past, become parties to the international copyright system, and implemented previous obligations on the matter. The former issues are explained in this second chapter, the latter one is analyzed in the next chapter.

Scholarship on the history of copyright in Latin America is extremely limited, particularly with regard to its development during the nineteenth century.[2] Although in recent years a new generation of scholars has tried to fill that gap, there is still widespread ignorance on the subject, which has reinforced different misconceptions

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1 An early version of this chapter was published in English as Alberto Cerda, *Copyright Tradition in Latin America: From Independence to Internationalization,* 61 J. COPYRIGHT SOC'Y 577 (2014), and in Spanish as Alberto Cerda, *Evolución Histórica del Derecho de Autor en América Latina*, 22 REVISTA IUS ET PRAXIS 19 (2016).

2 EUGENIA ROLDÁN VERA, THE BRITISH BOOK TRADE AND SPANISH AMERICAN INDEPENDENCE: EDUCATION AND KNOWLEDGE TRANSMISSION IN TRANSCONTINENTAL PERSPECTIVE, at ix (Ashgate Publishing, 2003) (lamenting still-precarious development of history of copyright in nineteenth century Latin America).

around the evolution of copyright in the region. Some scholars have assumed that Latin American copyright lacks any peculiarity and distinctiveness from the European system. This view has been criticized as *"the illusion of a harmonized evolution of the copyright system thought the countries"*,[3] which denies local identity, experiences, and capacities. This misconception goes hand-in-hand with the tendency to see Latin American law as a mere deficient (Q: do you mean derivative?) copy of European or American law.[4] Other authors assume that the region *"does not posses any legal tradition of protecting intellectual property rights"* and, therefore, that copyright has become an issue for the region only recently with the new wave of international agreements on the matter.[5] This narrative usually is connected with one that presupposes Latin American countries did not pay attention to

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3 JHONNY ANTONIO PABÓN CADAVID, DE LOS PRIVILEGIOS A LA PROPIEDAD INTELECTUAL: LA PROTECCIÓN EN COLOMBIA A LAS OBRAS LITERARIAS, ARTÍSTICAS Y CIENTÍFICAS EN EL SIGLO XIX, at 23 (Universidad Externado de Colombia, 2010); and, Jhonny Antonio Pabón Cadavid, *Aproximación a la Historia del Derecho de Autor: Antecedentes Normativos*, 13 REVISTA LA PROPIEDAD INMATERIAL 59, 60 (2009). *See also* JOÃO HENRIQUE DA ROCHA FRAGOSO, DIREITO DE AUTOR E COPYRIGHT: FUNDAMENTOS HISTÓRICOS E SOCIOLÓGICOS, at 195-199 (Quartier Latin, 2012) (presuming an early division between copyright and authors' right traditions, and the uniformity of the latter around the Berne Convention).

4 César Rodríguez G., *Un Nuevo Mapa para el Pensamiento Jurídico Latinoamericano, in* EL DERECHO EN AMÉRICA LATINA: UN MAPA PARA EL PENSAMIENTO JURÍDICO DEL SIGLO XXI, at 12 (César Rodríguez G. ed., Siglo XXI Ed., 2011). *See also,* César Rodríguez Garavito, *Remapping Law and Society in Latin America: Visions and Topics for a New Legal Cartography,* in LAW AND SOCIETY IN LATIN AMERICA: A NEW MAP 1-20 **(**César Rodríguez Garavito ed., Routledge, 2015).

5 EDGARDO BUSCAGLIA AND CLARISA LONG, U.S. FOREIGN POLICY AND INTELLECTUAL PROPERTY RIGHTS IN LATIN AMERICA, at 4 (Hoover Inst. – Stanford Univ., 1997) (affirming that assumption). *See also* Mónica Sánchez, *Piracy in Latin America: Panama Attempts to Curb Illegal Reprinting and Reproduction of Copyrighted Matter*, 2 LOY. INTELL. PROP. & HIGH TECH. L. Q. 30, 34 (1997) (talking about *"an overall lack of protection of intellectual property and copyrights by Latin American governments."*).

the international implications of copyright,[6] and purposely stayed away from international initiatives on the matter until recent years.

This chapter confronts the aforementioned misconceptions by briefly reviewing the evolution of copyright in Latin America. The first section of this chapter reviews the old tradition of Latin American countries protecting copyright, initially by domestic law. But because of the limitations of mere local protection, countries later built a regional copyright system based on several treaties, and this system is analyzed in the second section. This system is named the Inter-American copyright system, because it was not limited to Latin American countries. In fact, the United States, which was one of its strong promoters, was also party to its leading instruments. Through the years, this system demonstrated more flexibility than the competing European copyright system based on the Berne Convention and its successive revisions, making accession to Berne hard for Latin American countries.

But having two parallel systems hinders achieving universal copyright protection for authors; this situation became aggravated by the middle of the twentieth century because of the devastating effects of the Second World War on Europe and the emerging decolonization of Africa and Asia. As a result, countries worked on harmonizing differences between the existing systems. The third section of this chapter describes the process of harmonization – actually, Europeanization – of international

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6 ARCADIO PLAZAS, ESTUDIOS SOBRE DERECHO DE AUTOR: REFORMA LEGAL COLOMBIANA, at 102-103 (Temis, 1984).

copyright law and particularly how Latin American countries became parties to the Berne Convention and subsequent instruments on copyright.

1. INITIAL DOMESTIC COPYRIGHT PROTECTION IN LATIN AMERICA

During the colonial period, Latin American economies were based on the exploitation of natural sources, such as mining and agriculture.[7] Land was assigned to colonizers, while indigenous peoples and slaves provided the workforce in the economy. Production satisfied domestic consumption, but a significant amount was sent to colonial metropolises in Spain and Portugal, which were able to enforce strict trade control on their Latin American territories due to an extensive bureaucratic network. The Spanish Crown's monopoly was concentrated in both purchasing colonial

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7 PATRICE FRANKO, THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT, at 37 (Rowman & Littlefield Publishers, 3d. ed., 2007). *See also* D. A. Brading, *Bourbon Spain and Its American Empire*, in 1 THE CAMBRIDGE HISTORY OF LATIN AMERICA, at 389-439 (Leslie BETHELL ed., Cambridge Univ. Press, 1984) (describing colonial trade between Spain and its colonies); and, Andrée Manzuy-Diniz Silva, *Portugal and Brazil: Imperial Reorganization: 1750-1808*, in 1 THE CAMBRIDGE HISTORY OF LATIN AMERICA, at 486-508 (Leslie BETHELL ed., Cambridge Univ. Press, 1984) (describing Brazilian trading policy during last years of Portuguese Empire). *See also* BENJAMIN KEEN AND KEITH HAYNES, A HISTORY OF LATIN AMERICA (Houghton Mifflin Co., 7th ed., 2004), at 85-90.

Figure 1:
Latin America after Independence

goods and selling given products to overseas settlements.[8] A virtual monopoly was also set forth on cultural matters.[9] Despite having some printing capacities, colonies were subject to even more censorship than in Europe by the Catholic Church and the

8 KEEN and HAYNES, *supra* note 7, at 90-91.

9 *Id.* at 143.

Crown,[10], which limited printing in Latin America to religious texts.[11] Printing was greatly limited and colonies depended on Spanish publishers for meeting cultural needs.[12] Later in the eighteenth century, contraband books brought the Enlightenment's ideas to the new continent, which, eventually, helped to pave the path to independence.

After their independence, but unable to achieve BOLIVAR'S dream of a single country, Spanish Latin America struggled in consolidating new nations, governments, and political regimes.[13] Brazilian transition to independence was noticeably later but peaceful and quick in comparison with Spanish Latin America.[14] Economically, after an

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10 *Id.* at 147.

11 Jacques Lafaye, *Literature and Intellectual Life in Colonial Spanish America*, *in* 2 THE CAMBRIDGE HISTORY OF LATIN AMERICA, *supra* note 7, at 663-704 (reviewing Spanish cultural policy on the Americas during the colony). *But see* Alamiro de Avila Martel*, La Impresión y Circulación de Libros en el Derecho Indiano*, 11 REVISTA CHILENA DE HISTORIA DEL DERECHO 189, 209 (1985) (arguing that legal constraints on printing and distributing books within the Americas were not harder but rather the same as those adopted by the Spanish Crown for Castile).

12 LAFAYE, *supra* note 11*,* at 698 (stating that publishing remained rare in the Americas, being confined to Lima and Mexico City, which favored Spanish printing); and, Leslie Bethell, *A Note on Literature and Intellectual Life in Colonial Brazil*, in 2 THE CAMBRIDGE HISTORY OF LATIN AMERICA, *supra* note 7*,* at 705-707 (stating that in the case of Brazil, in which printing first arrived in 1808, books were published in Portugal).

13 William Glade, *Latin America and the International Economy: 1870-1914*, in 4 THE CAMBRIDGE HISTORY OF LATIN AMERICA, *supra* note 7, at 1-7 (analyzing Latin American political stabilization during the first half of nineteenth century and its effects on region's economy). *See also* LAWRENCE A. CLAYTON AND MICHAEL L. CONNIFF, A HISTORY OF MODERN LATIN AMERICA, at 72-107 (Thomson-Wadsworth, 2nd ed., 2005) (reviewing Spanish Latin America search for political order between 1830-1850); and, VICTOR BULMER-THOMAS, THE ECONOMIC HISTORY OF LATIN AMERICA SINCE INDEPENDENCE, at 19-45 (Cambridge University Press, 2nd ed., 2003).

14 *Compare* Jaime Rodríguez, *The Process of Spanish American Independence*, in A COMPANION TO LATIN AMERICAN HISTORY, at 195-214 (Thomas H. Holloway ed., Blackwell Publishing, 2008) (describing the Spanish America's revolution of as a civil war followed by a war for independence and subsequent political restructuration) *with* Leslie Bethell, *The Independence of Brazil*, *in* 3 THE CAMBRIDGE HISTORY OF LATIN AMERICA, *supra* note 7*,* at 195. *See also* John Charles Chasteen, *Cautionary Tale: A Radical Priest, Nativist Agitation, and the Origin of*

initial postwar stagnation,[15] by the middle of the nineteenth century, Latin American countries had embraced Adam SMITH'S free trade and David RICARDO'S comparative advantages theories,[16] by redoubling the efforts of their economies based on exploiting natural resources.[17] It is no wonder why real estate, rather than capital or knowledge, including intellectual property, was the main concern of lawmakers at the time. For instance, the influential civil codification by Andrés BELLO, which was adopted by

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Brazilian Civil Wars, in RUMORS OF WAR: CIVIL CONFLICT IN NINETEENTH CENTURY LATIN AMERICA, at 16-21 (Rebecca Earle ed., Inst. of Latin American Studies, 2000); and, THOMAS E. SKIDMORE, PETER H. SMITH, AND JAMES N. GREEN, MODERN LATIN AMERICA, at 27-36 (Oxford Univ. Press, 7th ed., 2010).

15 Tulio Halperín Donghi, *Economy and Society in Post-Independence Spanish America,* in 3 THE CAMBRIDGE HISTORY OF LATIN AMERICA, *supra* note 7, at 329-330 (stating the third quarter of the nineteenth century was a transition from stagnation after independence to a period of growing export that took place until the Great Depression). *But see* Aldo Lauria-Santiago, *Land, Labor, Production, and Trade: Nineteenth-Century Economic and Social Patterns,* in A COMPANION TO LATIN AMERICAN HISTORY, *supra* note 14, at 264-284 (advocating for revisionism on Latin American economic historiography on first half of nineteenth century, by rejecting stagnation and arguing the period was dominated by rural production and the absence of national development strategies).

16 SKIDMORE *et al., supra* note 14, at 353-358 (referring to the period between 1880s-1920s as the "liberal era" of Latin America, in which "free trade and *laissez-faire* became the catchwords of the day" through the region).

17 *See* GLADE, *supra* note 13, at 9-19 (describing the exporting sector of Latin American countries between 1870 and the First World War, which was mainly based on agriculture and mining). *See also* Warren Dean*, The Brazilian Economy: 1870-1930*, in 5 THE CAMBRIDGE HISTORY OF LATIN AMERICA, *supra* note 7, at 693-700 (reviewing the period of "apogee of export orientation in Brazilian economic history" based on agriculture production, but essentially on coffee); TERESA A. MEADE, A HISTORY OF MODERN LATIN AMERICA: 1800 TO THE PRESENT, at 103-133 (Wiley-Blackwell, 2010) (analyzing free trade policies through the region in the nineteenth century and arguing that a combination of monoculture and an export-led economy were the guiding engines of economic development from colonialism to a new form of economic control known as neocolonialism); KEEN and HAYNES, *supra* note 7, at 217-220 (referring to British and later American neocolonialism over Latin America through the nineteenth century); SKIDMORE *et al., supra* note 14, at 37-40; and, EDUARDO GALEANO, OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT 58-133 (Monthly Review Press, 1997) (noting the subordination of Latin American economies to foreign needs and finance when countries transitioned from colonial to independent status, but preserved monoculture, *latifundia*, and social struggles).

several countries within the region,[18] did not regulate authors' rights and barely referred to subsequent regulation on literary property.[19] However, even if not a primary concern, copyright protection has a long tradition in Latin American countries, and its roots can be traced to the early days of their independence, when countries provided both constitutional and legal protections.

Latin American countries adopted constitutions once their independence from their colonizers was achieved.[20] Copyright clauses were introduced in these constitutions, despite the limited printing capabilities in the region.[21] In some cases, following the U.S.

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18 *See* IVAN JAKSIC A., ANDRÉS BELLO: LA PASIÓN POR EL ORDEN, at 226-229 (Edit. Universitaria, 3rd. ed., 2011) (reporting the extent of adoption and influence of Bello's Civil Code through Latin America).

19 Civil Code Chile, art. 584 (recognizing authors' property rights in their creations, but referring its regulation to "special laws"). *See also* Andrés Bello, *Derechos de Autores*, *in* 7 ANDRÉS BELLO, OBRAS COMPLETAS, at 467-474 (Ed. Nascimento, 1932) (1848) (advocating for introducing improvements in the 1834 copyright act based on experience of comparative law).

20 *See* Laurence Whitehead, *Latin American Constitutionalism: Historical Development and Distinctive Traits, in* NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES 123-126 (Detlef Nolte and Almut Schilling-Vacaflor eds., Ashgate, 2012) (describing early Latin American constitutionalism as a melt of inspirations from previous sources, including the United States, the First French Republic, and the 1812 Spanish Cortes of Cadiz, as well as an adaptation to general principles and local realities).

21 *See* JOSÉ TORIBIO MEDINA, LA HISTORIA DE LA IMPRENTA EN LOS ANTIGUOS DOMINIOS ESPAÑOLES DE AMÉRICA Y OCEANÍA (Fondo Histórico y Bibliográfico José Toribio Medina, 1958) (providing extensive research about printing during the Spanish colonial era in Latin America, which was limited to satisfy ecclesiastical and governmental needs, except in the case of Mexico). *See also* BOOKS BETWEEN EUROPE AND THE AMERICAS: CONNECTIONS AND COMMUNITIES, 1620-1860 (Leslie Howsam and James Raven ed., Palgrave-Macmillan, 2011) (enlightening the intense trade of books from Europe to the Americas, including novels to Brazilian market, and handbooks on education to Spanish Latin America).

Constitution,[22] Latin American constitutions embraced copyright as a mean for promoting progress and referred its implementation to the legislature, as in the 1824 Constitution of Mexico[23] and the 1819 Constitution of Argentina.[24] Other countries initially adopted similar clauses but later embraced the French philosophy of authors' rights.[25] This was the case in Peru, where the 1828 Constitution followed the United

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22 U.S. Const., art. I, §8, cl. 8. (stating that *"[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"*).

23 Constitución Federal de los Estados Unidos Mexicanos, Oct. 4, 1824, art. 50 (providing that *"[t]he Congress has exclusive power for … promoting enlightenment by assuring for a limited term exclusive rights to authors for their works…"*). *See also* EMILIO O. RABASA, HISTORIA DE LAS CONSTITUCIONES MEXICANAS, at 15 (Inst. de Investigaciones Jurídicas – UNAM, 2000) (explaining the similarities between the U.S. and the Mexican constitutions, by saying that the 1824 Constitution of Mexico was a *"copy and synthesis of the 1787 U.S. Constitution and the 1812 Constitution of Spain");* FERNANDO SERRANO MIGALLÓN, NUEVA LEY FEDERAL DEL DERECHO DE AUTOR, at 38-39 (Edit. Porrúa – UNAM, 1998) (noticing that no explicit mention of copyright exists in the 1836 and 1857 Constitutions, it only appears again in the 1917 Constitution); and, MARIANO JOSÉ NORIEGA, LA PROPIEDAD LITERARIA Y CASO JURÍDICO, at 7-8 (Antigua Imprenta de Murguia, 1907) (observing that, unlike the constitution, the Mexican copyright act followed a more conservative approach, by granting exclusive, absolute, and perpetual rights to authors, with analogous powers to those granted to proprietors in Roman law, that is granting *jus utendi, fruendi et abutendi.*). *See also* TELESFORO A. OCAMPO, DOS PROBLEMAS JURÍDICOS EN MATERIA DE PROPIEDAD LITERARIA, at 13-17 (Imprenta del Gobierno, 1900) (noting that the Mexican copyright act limited exclusive rights to reproduction).

24 Constitución de las Provincias Unidas de Sudamérica, Apr. 22, 1819, art. 44 (stating as a power of the Congress *"assuring to authors and inventors exclusive privilege for a given term"*). *See also* E.S. ZEBALLOS, LA LÉGISLATION SUR LA PROPRIÉTÉ LITTÉRAIRE DANS LA RÉPUBLIQUE ARGENTINE, at 1-2 (Imprimerie F. Van Buggenhoudt, 1911) (noting that constitutional protection for copyright passed from the 1819 Constitution to the 1826 Constitution, and later to the 1853 Constitution).

25 Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990); and, PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE 14-29 (Princeton University Press, 2014) (reviewing the main differences between the French tradition of authors` rights and the Anglo-Saxon tradition of copyright).

States model,[26] but its 1856 Constitution granted to authors exclusive property rights and required legislative action for implementing law.[27] Similarly, an early draft of the 1833 Constitution of Chile followed the U.S. Constitution,[28] but eventually granted property rights to authors according to the continental authors' rights viewpoint,[29] which persists until today.[30] Venezuela has recognized copyright since its 1830 Constitution,[31] also by following the authors' rights approach.[32] In the intense constitutional life of Colombia's

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26 Constitución Política de la República Peruana 1828, Mar. 18, 1828, art. 48 (19) (providing that *"[t]he Congress has the power for granting patents for a given term to authors that introduce any invention or useful improvement into the Republic"*).

27 Constitución de la República Peruana, dada el 13 de octubre de 1856 y promulgada en 19 del mismo mes, art. 27 (mandating legislative intervention by setting forth that *"[t]he law shall assure to authors or introducers of useful inventions exclusive property on them, or compensation for their value if are required to publish them"*).

28 Camilo Mirosevic Verdugo, *Origen y Evolución del Derecho de Autor: Con Especial Referencia al Derecho Chileno*, 28 REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DE VALPARAÍSO 35, 64-65 (2007) (stating that an early draft of the 1833 Constitution of Chile was influenced by the American constitutionalism on copyright through the 1824 Mexican Constitution, but later the continental viewpoint of the authors' rights prevailed).

29 Constitución Política de la República de Chile, D.O. May 25, 1833, art. 152 (granting right to authors by stating that *"any author or inventor shall have the exclusive property on his discovery or production for the time granted by law; and, if it requires publication, inventor shall be properly compensated"*).

30 Camilo Mirosevic Verdugo, *supra* note 28, at 65-77 (noting the continue adherence to the authors' rights approach in the Chilean constitutions of 1833, 1925, and 1980). *See also,* PABLO RUIZ-TAGLE VIAL, PROPIEDAD INTELECTUAL Y CONTRATOS 123-186 (Ed. Jurídica de Chile, 2001) (reviewing constitutional and political frameworks related to intellectual property and technological transferences in Chile); and, SANTIAGO LARRAGUIBEL ZAVALA, DERECHO DE AUTOR Y PROPIEDAD INDUSTRIAL: NUEVAS DISPOSICIONES CONSTITUCIONALES (Ed. Jurídica de Chile, 1979) (reviewing the drafting of constitutional provisions on intellectual property that, ultimately, would become part of the 1980 Constitution).

31 Constitución del Estado de Venezuela de 1830, arts. 161 and 217 (providing that *"[a]ll inventors shall have the property of their discoveries and productions. The law shall grant a temporary privilege or compensate their lost in case of publishing"* and allocating power for providing copyright protection).

32 José Rafael Fariñas Diaz, *La Protección Constitucional de la Propiedad Intelectual en Venezuela*, 12 REVISTA PROPIEDAD INTELECTUAL 10, 14 (2009) (arguing that even when the constitution

post-independence years, it is possible to find early references to intellectual property protection,[33] but only the 1858 Constitution referred expressly to copyright by conferring on the President the power to grant protection.[34] Unlike other Latin American countries, Brazil did not provide constitutional protection to copyright until the end of nineteenth century, but, instead, relied on criminal law.[35] Constitutional protection of copyright is, in fact, a common feature of Latin American law that continues through the present.[36]

Giving constitutional protection to copyright was extremely useful. It allowed courts to overcome loopholes in legislation then in force by providing protection when

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seemed to refer only to inventors, it also protected authors, by using the words "production" and "publication," which normally are related to creative works). *See also* RICARDO ANTEQUERA, CONSIDERACIONES SOBRE EL DERECHO DE AUTOR: ESPECIAL REFERENCIA A LA LEGISLACIÓN VENEZOLANA, at 20 (1977).

33 *See* DANIEL PEÑA AND MARÍA CATALINA CARMONA, INTELLECTUAL PROPERTY LAW IN COLOMBIA, at 23 (Kluwer Law International, 2011); and, E. RENGIFO GARCÍA, PROPIEDAD INTELECTUAL: EL MODERNO DERECHO DE AUTOR, at 25 (Universidad Externado de Colombia, 1996) (dating some early constitutional references back to 1811).

34 Constitución Política para la Confederación Granadina, Bogotá, 29 de mayo de 1858, art. 43 No. 14 (providing that *"The President of the Confederation has the power for: … 14) conferring patent by granting for a given term property on literary production of useful invention applicable to new industrial operations, or to improvements of already in existence, to authors of those productions and inventions"*).

35 PEDRO MIZUKAMI, FUNÇÃO SOCIAL DA PROPRIEDADE INTELECTUAL: COMPARTILHAMENTO DE ARQUIVOS E DIREITOS AUTORAIS NA CF/88, at 286-290 (Pontifícia Universidade Católica, 2007) (dating first Brazilian legislative action on copyright in 1827 and reporting domestic regulation focused on criminal rather than civil enforcement, while constitutional recognition took place just in 1891). *See also* PEDRO PARANAGUA AND SÉRGIO BRANCO, DIREITOS AUTORAIS, at 18-20 (FGV, 2009); and, Pedro Mizukami, Ronaldo Lemos, Bruno Magrani, and Carlos Affonso Pereira de Souza, *Exceptions and Limitations to Copyright in Brazil: A Call for Reform*, in ACCESS TO KNOWLEDGE IN BRAZIL, at 42-48 (Lea Shaver ed., Bloomsbury, 2010) (arguing that current excessive criminal enforcement of copyright in Brazil has historical roots in nineteenth century, when the 1830 criminal code provided protection to copyright).

36 *See* GILENI GÓMEZ MUCI, EL DERECHO DE AUTOR EN EL MARCO DE LOS DERECHOS HUMANOS: SU CONSAGRACIÓN CONSTITUCIONAL EN ESPAÑA Y DEMÁS PAÍSES IBEROAMERICANOS, at 299-366 (Edit. Jurídica Venezolana, 2016) (reviewing current in-force constitutional protection of copyright in Latin American countries).

law was insufficient.[37] For instance, in the case of *Hernández v. Barbieri Hermanos*, despite the absence of any applicable law, the Supreme Court of Justice of Argentina granted economic compensation in favor of the plaintiff, the writer José Hernández, on the theory that unauthorized copies by defendants of his masterpiece *Martin Fierro*, the pinnacle of nineteenth-century Argentinean poetry, infringed his constitutional copyright.[38] In other words, in the absence of law, constitutional clauses provided protection. But, as the early adoption of legislation on the matter proves, constitutional copyright clauses also called for legislative attention in order to specify the scope of that protection.

In addition to constitutional recognition, several Latin American countries adopted systematic copyright legislation.[39] Initially, new countries continued using the law of their colonizers,[40] but progressively domestic law replaced colonial rules.[41] For

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37 *See* HORACIO F. RODRÍGUEZ, PROPIEDAD ARTÍSTICA Y LITERARIA, at 35-36 (Edit. A.M. de Tommasi, 1929) (referring several cases in which copyright protection was granted through constitutional provisions, despite lacking copyright act).

38 Supreme Court of Justice of Argentina, Hernández v. Barbieri Hermanos, Nov. 24, 1885, in Fallos XXIX, 148. *See* CARLOS BAIRES, LA PROPIEDAD LITERARIA Y ARTÍSTICA EN LA REPÚBLICA ARGENTINA, at 19-26, and 55-87 (Imprenta de Juan Alsina,1897) (providing analysis of the constitutional protection of copyright in Argentina, as well as local case law on the matter).

39 PABÓN CADAVID, DE LOS PRIVILEGIOS..., *supra* note 3, at 82-88 (documenting the protection of copyright in Latin America during the first half of the nineteenth century and stating that copyright law was developed only in Colombia, Chile, Mexico, Peru, and Venezuela).

40 SERGIO MARTINEZ BAEZA, EL LIBRO EN CHILE, at 28-35 (Biblioteca Nacional, 1982) (reporting on colonial law applicable to printing and commercialization of books in Latin America under Spanish control). *See* José María Díez Borque, *Derechos de Autor en los Siglos de Oro: Antecedentes y Consecuentes*, *in* LITERATURA, BIBLIOTECAS Y DERECHOS DE AUTOR EN EL SIGLO DE ORO (1600-1700), at 205-240 (José María Díez Borque & Alvaro Bustos Tauler

instance, Mexico applied Spanish regulation until 1846 when it adopted its own copyright regulation,[42] after a boisterous case that tested the inefficacy of colonial rules.[43] Some countries approved domestic laws sooner; this was the case in Chile (1834),[44] Colombia (1834),[45] Venezuela (1839),[46] and Peru (1849).[47] Most Latin American countries, however, approved copyright law later in the nineteenth century. In general,

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eds., Universidad de Navarra – Iberoamericana - Vervuert, 2012) (reporting on the development of Spanish copyright law from 1600 to the present).

41 ÁNGEL R. OQUENDO, LATIN AMERICAN LAW, at 114 (Foundations Press, 2006) (stating that *"the new nations preserved Spanish and Portuguese private law, respectively, until they completed the protracted process of codification"*); and, MATTHEW C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA, at 125-131 (Univ. of Texas Press, 2004) (discussing continuing usage of colonial material by new countries until mid-nineteenth century, when codification changed sources of law). *See also* JAKSIC, *supra* note 18, at 207 *et seq.* (referring to the slow process of substitution of colonial rules by new laws in Chile, after its independence); Ramiro Rodríguez, *El Derecho de Autor en Colombia desde una Perspectiva Humanista*, 30 REVISTA PROLEGÓMENOS: DERECHOS Y VALORES 141, 146 (2012) (referring to the survival of Spanish law in Colombia, even after its independence); and, Ariel Antonio Morán Reyes, *Antecedentes del Derecho de Autor en México: Legislación Peninsular, Indiana y Criolla,* 31 INFORMACIÓN, CULTURA Y SOCIEDAD 85 (2014) (reviewing Mexican copyright law from the colonial era to its early post-independence).

42 MANUEL MATEOS ALARCÓN, ESTUDIOS SOBRE LA PROPIEDAD LITERARIA, DRAMÁTICA Y ARTÍSTICA, at 9-10 (Imprenta de Francisco Díaz de León, 1887) (stating that even after its independence, Mexico continued under the colonial copyright regime until December 3, 1846, when the law on intellectual property was promulgated). *See also* SERRANO MIGALLÓN, *supra* note 23, at 39-41; and, Morán Reyes, *supra* note 41.

43 *See* PABÓN CADAVID, DE LOS PRIVILEGIOS…, *supra* note 3, at 81-82.

44 Ley de Propiedad Literaria y Artística [Law on Intellectual and Artistic Property], Diario El Araucano, 24 de Julio de 1834 (Chile). *See* Alejandro Guzmán Brito, *Los Derechos sobre las Cosas Intelectuales o Producciones del Talento y del Ingenio*, *in* ALEJANDRO GUZMÁN BRITO, ESTUDIOS DOGMÁTICOS DE DERECHO CIVIL, at 58 (Ediciones Universitarias de Valparaíso, 2005).

45 Ley de 10 de mayo de 1834, que asegura por cierto tiempo la propiedad de las producciones literarias y algunas otras [Law that assures a certain temporary protection to property on literary works and some other material] (Colom.). *See* PABÓN CADAVID, DE LOS PRIVILEGIOS…, *supra* note 3, at 91-118 (providing a more detailed analysis on the development of copyright in Colombia through the nineteenth century).

46 Ley 19 de abril de 1939 asegurado la propiedad de las producciones literarias [Law that assures property on literary works] (Venez.).

47 Ley de Propiedad Intelectual [Law on Intellectual Property], 3 de noviembre de 1849 (Peru).

copyright law provided to domestic authors exclusive rights of printing of registered works for a short term after the publication of the work and compliance with certain legal formalities, such as registration and deposit.

Countries that did not have systematic copyright law still provided protection. Brazil, for instance, adopted its first copyright act in 1898, but from 1830 on, criminal law provided some protection.[48] Argentina is probably the most extreme case within this group because, through the nineteenth century, it lacked a systematic regulation and had only fragmentary protection until adopting its 1910 copyright act,[49] which caused some authors to wrongly assert that the country lacked copyright protection.[50] Absence of coherent copyright law, however, limited protection to outrageous circumstances and created some legal uncertainty.[51]

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48 MIZUKAMI, *supra* note 35, at 287-288 (providing a detailed description of Brazilian criminal copyright law during nineteenth century).

49 *See* ZEBALLOS, *supra* note 24, at 1-7 (reviewing the historical background of the 1910 copyright law, which became the first Argentinean law providing a systematic regulation on the matter). *See also* José Bellido, *Montevideo vs Berne: The Rise of an Interpretation in International Copyright (1888-1898)*, 229 REVUE INTERNATIONALE DU DROIT D'AUTEUR 5, 93-98 (2011) (linking the adoption of copyright act by Argentina with shameful comments made by former French Prime Minister Clemenceau about his surprise that country lacked that regulation). For previous regulations, bills, and international instruments applicable in Argentina, *see* ERNESTO QUESADA, LA PROPIEDAD INTELECTUAL EN EL DERECHO COMPARADO, at 132-231 (Librería de J. Menéndez, 1904).

50 CARLOS M. RAMA, HISTORIA DE LAS RELACIONES CULTURALES ENTRE ESPAÑA Y LA AMÉRICA LATINA: SIGLO XIX, at 176 (Fondo de Cultura Económica, 1982) (stating that copyright was not recognized by Argentina, even for its own inhabitants until 1888, when Spanish writer Justo S. López de Gómara was granted it for his play, EL SUBMARINO PERAL).

51 B. SINGER, COPYRIGHT LAWS OF THE WORLD, at 7 (Singer, 1909) (stating the absence of a specific copyright act, but a constitutional protection, and some uncertainty it created on the duration, scope, and beneficiaries of copyright). *See also* BAIRES, *supra* note 38, at 19-53

During the nineteenth century, Latin American countries not only advanced constitutional and legal protections to copyright, they also transitioned from a regime of privileges to a consolidated one of rights deeply tied to natural law.[52] Most scholars within the region did not see any difference between property rights concerning tangible goods and so-called literary property, but temporary limitations were barely accepted because of overriding practical social interests.[53] By the end of the century, however, scholars had adopted more comprehensive concepts for referring to this field of the law, such as intellectual property or authors' rights,[54] concepts that still prevail in Latin American scholarship.

Normative and theoretical developments of copyright in Latin America, however, contrast with the limited capacities of countries during that period for

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(reviewing Argentinean copyright legal framework, which included provisions from the constitution and civil codification, among others).

52 José Victorino Lastarria, *Constitución de Chile Comentada*, *in* 1 JOSÉ VICTORINO LASTARRIA, OBRAS COMPLETAS: ESTUDIOS POLÍTICOS I CONSTITUCIONALES, 455-460 (Impr. Barcelona, 1906) (1856) (arguing about natural law on literary property, its distinction from privileges, and its perpetual duration); Vicente Reyes*, La Propiedad Literaria,* 15 ANALES DE LA UNIVERSIDAD DE CHILE 332 (1857); and, BAIRES, *supra* note 38, at 22 and 25. *See* DÍEZ & BUSTOS, *supra* note 40, at 222-224 (noting that Spanish copyright law also transitioned from a privilege to a rights-based approach during mid-nineteenth century).

53 *Id. See also* JOSÉ MANUEL MESTRE, DE LA PROPIEDAD INTELECTUAL (La Antilla, 1863).

54 MESTRE, *supra* note 53 (referring to a comprehensive intellectual property); CALIXTO OYUELA, ESTUDIOS Y ARTÍCULOS LITERARIOS, at 397-502 (Impr. de Pablo E. Coni é Hijos, 1889) (discussing the theoretical foundations of the authors' rights); and, SAMUEL MARTINS, DIREITO AUTORAL, at 17 *et seq.* (Officinas da Livraria Franceza, 1906), (criticizing the usage of the wording 'literary property' through most of the nineteenth-century in Brazilian bills on copyright and, instead, using authors' rights). Recently, Jhonny Pabón has documented the slow transition from privileges to intellectual property in nineteen-century Colombia. *See* PABÓN CADAVID, DE LOS PRIVILEGIOS…, *supra* note 3.

producing copyrighted material. On one hand, local publishing was scant,[55] and works by Latin American scholars were barely accessible within the region.[56] On the other hand, there were few bookstores, and they mainly sold books printed overseas and sold them at extremely high prices.[57] Several reasons may explain the discouraging state of these affairs in the region, such as restrictions on communications and transport, the lack of local production of paper and other printing supplies, and the limited size of each local market, among others. Since the middle of the nineteenth century, scholars foresaw the need for advancing protection beyond national frontiers in order to promote progress in literature and science, although they warned of the relative inconvenience of protecting more developed foreign publishing industries.[58]

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55 RECAREDO TORNERO, CHILE ILUSTRADO, at 99-100 (Librerías i Agencias de El Mercurio, 1872) (stating that printing was an "industry that never had development and prosperity" in Chile and was limited to serve the government, the church, and political parties). *See also* PAULA ESPINOZA O., EDITADO EN CHILE 1889-2004, at 12 (Quilombo Ed., 2012); CLAUDIO AGUILERA ALVAREZ, ANTOLOGÍA VISUAL DEL LIBRO ILUSTRADO EN CHILE, at 19-25 (Quilombo Ed., 2014); and, SIMONÉ MALACCHINI SOTO, LIRA POPULAR: IDENTIDAD GRÁFICA DE UN MEDIO IMPRESO CHILENO, at 26-33 (Ocho Libros Ed., 2015).

56 Guillermo Matta, *Revista Literaria Américana*, EL AMERICANO, Apr. 28, 1873, at 1 (congratulating the subscription of treaties on literary interchange between Colombia and Chile, and encouraging other Latin American countries to intensify those kinds of agreements in order to overcome the lack of access and knowledge about local works within countries in the same region). *See also* ANTONIO MIGUEL ALCOVER, LOS LIBROS DE PRODUCCIÓN LATINO-AMERICANA, at 5-10 (Impr. Siglo XX, 1912) (lamenting the limited number of publications and deficiencies on the interchange of books within the region).

57 TORNERO, *supra* note 55, at 190; MARTINEZ BAEZA, *supra* note 40, at 149-152. *See also* JOSÉ VICTORINO LASTARRIA, RECUERDOS LITERARIOS, at 38 (LOM Ed., 2001) (1878) (complaining about the reduced numbers of libraries and the high cost of books).

58 Domingo Faustino Sarmiento, *Legislación sobre Imprenta como Industria*, EL PROGRESO, Nov. 16, 19 and 20, 1844, in 10 DOMINGO FAUSTINO SARMIENTO, OBRAS, at 59-68 (Mariano Moreno, 1896) (foreseeing the need for rules of international law to prevent copyright abuses, although calling for flexibilities to facilitate translation into Spanish and compilation of works, by proposing a series of protectionist measures); REYES, *supra* note 52, at 341-342 (expressing concern for international protection of copyright, although recognizing "its inconvenience" because of the unbalanced production and interchange with foreign powers);

Early domestic copyright law in Latin America, like elsewhere, only provided protection to nationals or inhabitants within frontiers.[59] It was not an exclusive restriction of copyright law, but a common limitation for domestic law based on sovereignty of states. Even if a country granted rights to foreign authors, it could not guarantee similar protection for its nationals overseas. Moreover, having protection only for nationals allowed importation of books in Spanish to Latin American countries, mainly coming from the United States and France,[60] countries that did not provide protection for exporting material, a phenomenon known as *"situational piracy"* because

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BAIRES, *supra* note 38, at 98-122 (calling attention to balancing justice and convenience by providing certain protection to foreign authors, but including protective measures that would allow the meeting of the local needs).

59 ALISON RUKAVINA, THE DEVELOPMENT OF THE INTERNATIONAL BOOK TRADE, 1870 – 1895: TANGLED NETWORKS, at 57 (Palgrave Mac Millan, 2010) (stating that *"countries developed copyright law that protected 'their own citizens' in the first half of the nineteenth century, not until much later in the century did a few countries enact laws that protected the rights of foreign authors in local markets".*). *See also* PABÓN CADAVID, DE LOS PRIVILEGIOS…, *supra* note 3, at 83-85 (mentioning that protection to foreign authors was a feature of copyright law developed in the second half of the nineteenth century, mainly in Europe).

60 *See* AUBERT J. CLARK, THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA, at 39 (Greenwood Press, 1973) (referring to the pirate American editions of Spanish books sent to South America); Pura Fernández, *En Torno a la Edición Fraudulenta de Impresos Españoles en Francia: la Convención Literaria Hispano-Francesa (1853)*, *in* ESTUDIOS DE LITERATURA ESPAÑOLA DE LOS SIGLOS XIX Y XX, at 200–209 (Consejo Superior de Investigaciones Científicas, 1998) (describing the market of pirated Spanish books published by French publishers, and the role of that trafficking in providing content to Latin America and tailoring the copyright relations between Spain and France); PABÓN CADAVID, DE LOS PRIVILEGIOS…, *supra* note 3, at 85-90 (same); and, GONZALO CRUZ, ALGO SOBRE PROPIEDAD LITERARIA 136-138 (Imprenta, Litografía y Encuadernación Barcelona, 1907) (reporting also cases of piracy of local authors by European publishers and printers). *See also*, Zorina Khan, *La Piratería de Derechos de Autor y el Desarrollo: Evidencia de los Estados Unidos en el Siglo XIX*, 17 REVISTA DE ECONOMÍA INSTITUCIONAL 21 (2007) (reviewing nineteenth century piracy in the U.S. as a mechanism for development by emphasizing the relative benefits of piracy on foreign material and positive effects on authors, publishers, and the general public through that century).

behavior legalized under one law is outlawed overseas.[61] This was highly important having in mind the limited manufacturing capacities of the region.[62]

To achieve protection beyond their borders, countries signed treaties offering reciprocity, that is, extending copyright protection to another's nationals in exchange for analogous benefit for its own nationals. However, young Latin American nations did not have numerous treaties,[63] unlike Europe, where an extensive network of treaties attempted to provide cross-border protection to authors.[64] Treaties granting reciprocity

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61 Bodó Balázs, *Coda: A Short History of Book Piracy*, in MEDIA PIRACY IN EMERGING ECONOMIES 399, 408 (Joe Karaganis ed., Social Science Research Council, 2011). *See also* Adrian Johns, *Language, Practice, and History*, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE, at 44-52 (Lionel Bently, Jennifer Davis, and Jane C. Ginsburg ed., Cambridge Univ. Press, 2010) (highlighting the evolving meaning of "piracy" not from a legal, but from an historical viewpoint in the context of book trade between seventeenth and nineteenth century); and, PETER DRAHOS AND JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?, at 23-32 (Earthscan, 2002) (arguing, based on historical evidence, that piracy is rather than a precise legal wording a *"particularly effective rhetorical tool"* and a *"customary practice in which all participate"*, particularly in the international trade of books).

62 THE BOOK TRADE OF THE WORLD: VOLUME II THE AMERICAS, AUSTRALIA, NEW ZEALAND, at 11-12 (Sigfred Taubert ed., Güterslon, 1976) (referring to the historical dependency of Latin American countries from book exportation, a still on-going phenomenon within the region). *See also* ELENA ENRÍQUEZ FUENTES, EL COMERCIO DE LIBROS ENTRE ESPAÑA Y AMÉRICA LATINA: DISONANCIA EN LA RECIPROCIDAD, at 16 (Alianza Internacional de Editores Independientes, 2008) (reporting in an extended study that Latin America buys fifty times more books from Spain than it does from the whole region, making Spain the second main importer of books to the region, only surpassed by U.S. importations).

63 In relative terms, lacking reciprocal treaties was not a problem for Latin America as primarily importing-work countries; in fact, it allowed nascent independent countries to profit from the cultural production of their former colonizers. *See* LUIS DE ANSORENA, TRATADO DE LA PROPIEDAD INTELECTUAL EN ESPAÑA (1894), at 244-245 (complaining about the lack of copyright treaties between Spain and its former colonies, and the impossibility of retaliating against them by reproducing work from their nationals because of the absence of publications there).

64 *Compare* DE ANSORENA, *supra* note 63, at 243; and, ANTONIO GARCIA LLANSÓ, MANUAL

were not a long-term solution because of their technical and diplomatic complexities, highly dissimilar scope, and absence of a common standard of protection. It was necessary to achieve some international harmonization that guaranteed similar levels of protection to authors wherever their nationality, residence, or place of publication.

2. LATIN AMERICA UNDER THE INTER-AMERICAN COPYRIGHT SYSTEM

By the end of the nineteenth century, two competing systems attempted to achieve cross-border protection for copyright: the European one, based on the Berne Convention and its successive revisions, and the Inter-American one, based on the Montevideo Treaty and several other instruments signed by countries of the Americas.

In 1886, European countries agreed to provide a common minimum legal standard of protection for copyrighted works through the adoption of the Berne

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DE LA PROPIEDAD INTELECTUAL, at 404-499 (Sáenz de Jubera Hermanos Ed., 1901) (referring to the numerous treaties signed by Spain before the adoption of the Berne Convention, including treaties with France, Belgium, Italy, Portugal, and the United Kingdom (1880); El Salvador (1884); and Colombia (1885), and later with the U.S. (1890); Guatemala and Costa Rica (1893); Mexico (1895); and Argentina and Paraguay (1900)) *with* LA PROTECCIÓN DE LOS DERECHOS DE AUTOR EN EL SISTEMA INTERAMERICANO at 38-39 (Lipszyc, Villalba, and Uchtenhagen, Universidad Externado de Colom. - Dirección Nacional de Derechos de Autor, 1998) (listing the few treaties on copyright signed by Latin American countries). Starting in the middle of the nineteenth century, Spain signed agreement with several European countries in order to prevent pirate editions of Spanish works from flooding the Latin American market. *See* FERNÁNDEZ, *supra* note 60, at 200-209 (providing background on the 1853 treaty on copyright signed by Spain and France).

Convention for the Protection of Literary and Artistic Works.[65] The Convention created a Union of countries that would provide copyright protection to authors and publishers of any literary, scientific, or artistic work from one of the party countries.[66] Protection was based on national treatment; therefore, a foreign author would enjoy the same rights that domestic law provided to domestic authors, except on the term of protection, which could not exceed that provided in the country of origin.[67] However, protection was subject to compliance with requirements and formalities set forth by the domestic law of the country of origin of the work;[68] therefore, registration could still be necessary, as was the case in France, Spain, and Portugal.[69] In spite of being negotiated by just a handful of countries, the Berne Convention was explicitly open to its accession by other countries, such as Europe's former colonies.[70]

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65 Berne Convention for the Protection of Literary and Artistic Works (as adopted at Berne, Switzerland, Sept. 9, 1886) [*hereinafter* Berne Convention – Berne Act].

66 *Id.* arts. 1-4.

67 *Id.* art. 2.

68 *Id.* art. 2.

69 In fact, formalities were in force throughout the nineteenth century in Europe, but progressively tempered, and eventually abrogated in the twentieth century, not because of philosophical reasons based on *droit d'auteur*, but for practical ones, i.e., freeing right holders from a multitude of formalities in order to achieve protection in different countries. *See* Stef van Gompel, *Les Formalités Sont Mortes, Vive les Formalités! Copyright Formalities and the Reasons for their Decline in Nineteenth Century Europe*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT, at 157-206 (Ronan Deazley, Martin Kretschmer, and Lionel Bently ed., Open Book Publishers, 2010) (documenting his analysis with copyright law from France, Germany, the Netherlands, and the United Kingdom). *See also* MANUEL DANVILA Y COLLADO, LA PROPIEDAD INTELECTUAL: LEGISLACIÓN ESPAÑOLA Y EXTRANJERA, at 743-877 (Imprenta de la Correspondencia, 1882) (providing an extensive description of foreign copyright law, particularly on then-required formalities for achieving protection in Italy, Portugal, and Spain, among other countries).

70 Berne Convention – Berne Act, *supra* note 65, arts. 18 and 19.

Successive revisions of the Berne Convention extended copyright, but did not provide enough flexibility for meeting public interest needs. The 1908 Berlin revision is probably the most influential,[71] since it abrogated any formalities for achieving copyright protection (e.g., registration, deposit, and copyright notice) by setting forth a system of automatic protection.[72] The Berlin revision also set forth a minimum term of protection – the life of the author plus fifty years post mortem[73] – which became mandatory in the 1948 Brussels Act.[74] Moral rights of authorship and integrity were also recognized with the signing of the 1928 Rome Act.[75] Flexibilities allowing the use of works without a copyright holder's authorization, on the other hand, were mainly referred to the domestic law of the parties.[76] As a result, by the middle of the twentieth century, the Berne Convention had created an automatic system of copyright protection that granted a catalog of exclusive economic and moral rights to authors of any works for their lives plus fifty years.

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71 Berne Convention for the Protection of Literary and Artistic Works (as revised at Berlin, Germany, Nov. 13, 1908) [*hereinafter* Berne Convention – Berlin Act].

72 *Id.* art. 4. Strictly, the Berne Convention does not require abrogating formalities in domestic law, but omits them for purpose of providing protection to authors of third countries, thus is, it allows formalities in the country of origin; however, for obvious reasons, countries choose to abolish formalities for both local and foreigner authors. *See* VAN GOMPEL, *supra* note 69, p. 203. *But see* Stephen P. Ladas, *Inter-American Copyright*, in 7 U. PITT. L. REV 284, 288 (1940-1941) (suggesting, wrongly, that formalities were abrogated in 1886, and mentioning mistaken examples of countries that would have had abrogated formalities from their domestic law, including Argentina and Brazil at the time).

73 Berne Convention – Berlin Act, *supra* note 71, art. 7.

74 Berne Convention for the Protection of Literary and Artistic Works (as revised at Brussels, Belgium, Jun. 26, 1948) [*hereinafter* Berne Convention – Brussels Act], art. 7.

75 Berne Convention for the Protection of Literary and Artistic Works (as revised at Rome, Italy, Jun. 2, 1928) [*hereinafter* Berne Convention – Rome Act], art. 6 bis.

76 *See* Berne Convention – Berne Act, *supra* note 65, arts. 7-8; Berne Convention – Berlin Act, *supra* note 71, arts. 9-10; Berne Convention – Rome Act, *supra* note 75, arts. 9-10; and, Berne Convention – Brussels Act, *supra* note 74, arts. 10-10 bis.

The Berne Convention was an initiative of "civilized countries," as the invitation of the Swiss government said, to achieve international protection for copyright.[77] In fact, its parties were Switzerland and the main colonial powers of the time: Belgium, France, Germany, Italy, Spain, and the United Kingdom. It is true that some non-European countries (i.e., Haiti, Liberia, and Tunisia) also were parties to the Convention; however, their participation was under their colonial status and intended to fortify the French position.[78] As a result, the Convention reflected the interests of the European countries in achieving an adequate level of protection, particularly with respect to their potential colonial markets.

Countries from the Americas did not accede to the Berne Convention but instead worked on a parallel system of international copyright protection by adopting a regional regime: the Inter-American copyright system.[79] This process started in 1889 with

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77 Ulrich Uchtenhagen, *Acerca de la Historia de las Convenciones de Derechos de Autor Latinoamericanas*, in LA PROTECCIÓN DE LOS DERECHOS DE AUTOR EN EL SISTEMA INTERAMERICANO, *supra* note 64, at 74.

78 *Id.* at 80.

79 Leading scholarships on the Inter-American copyright system include: MANUEL CANYES, PAUL A. COLBORN, AND LUIS GUILLERMO PIAZZA, COPYRIGHT PROTECTION IN THE AMERICAS UNDER NATIONAL LEGISLATION AND INTER-AMERICAN TREATIES (Pan American Union, Division of Legal Affairs, Dept. of International Law and Organization, 1950); WENZEL GOLDBAUM, CONVENCIÓN DE WASHINGTON SOBRE EL DERECHO DE AUTOR EN OBRAS LITERARIAS, CIENTÍFICAS Y ARTÍSTICAS: ESTUDIO SISTEMATIZADO Y COMENTARIOS (Casa Editora Liebmann, 1954); 1 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AD ARTISTIC PROPERTY 633-679 (The Macmillan Co., 1938); and, LA PROTECCIÓN DE LOS DERECHOS DE AUTOR EN EL SISTEMA INTERAMERICANO, *supra* note 64. *See also* Annexes, Table 1: Inter-American instruments on copyright and country parties.

the adoption of the Montevideo Treaty,[80] which recognized several exclusive economic rights on a broader category of works.[81] Parties provided protection to authors from another party country according to the domestic law of their country of origin (*lex loci originis*).[82] However, the term of protection was a discretionary decision of the parties and could be limited to the shortest term provided by the country of origin.[83] Unlike the Berne Convention, the Montevideo Treaty did not create a Union and, therefore, its accession by other countries required acceptance by existing parties to the treaty.[84]

Documentation does not specify the exact reasons why countries of the Americas rejected becoming parties to the Berne Convention and instead adopted their own regional system. It was not an attempt to deny rights to authors, which in fact were already recognized in several constitutions and regulations within the region.[85] Moreover,

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80 Treaty on Literary and Artistic Property, signed in Montevideo on Jan. 11, 1889 [*hereinafter* Montevideo Treaty].

81 *Id.* art. 3 (listing exclusive economic rights recognized by contracting parties to copyright holders, which include the power to use the literary or artistic work, to publish, to transfer, to translate or authorize the translation, and to reproduce it in any form) and 5 (extending protection to any artistic and literary work, including photography).

82 *Id.* art. 2. *See* Bellido, *supra* note 49, at 27-41 (discussing the political purpose of connecting the protection to the country of origin of the work rather than author's nationality or residence).

83 Montevideo Treaty, *supra* note 80*,* art. 4.

84 *Id.* arts. 13 and 16. This was, for instance, the case of Argentina that accepted adhesions by France (1896), Italy and Spain (1900), Belgium (1923), Austria and Germany (1927), and Hungary (1931). *See* Delia Lipszyc, *Esquema de la Protección Internacional del Derecho de Autor por las Convenciones del Sistema Interamericano*, *in* LA PROTECCIÓN DE LOS DERECHOS DE AUTOR EN EL SISTEMA INTERAMERICANO, *supra* note 64, at 38-39; LADAS, *supra* note 79, at 636 and 654. *See also* BELLIDO, *supra* note 49, pp. 49-67 (describing diplomatic and political difficulties faced by both Spain and France in order to achieve some acceptance by Latin American country parties to Spanish and French acceding to the Montevideo Convention).

85 *See supra* notes 20-51.

in several respects the protection provided by the Montevideo Treaty exceeded that provided by the Berne Convention.[86] The Montevideo treaty did not provide exclusive rights over performances and representations of musical and dramatic works. However, unlike the Berne Convention, the Montevideo Treaty listed a broader category of exclusive economic rights,[87] protected photography and choreographic works expressly,[88] and recognized exclusive rights on translations like in any other copyrighted work.[89]

The reasons why Latin American countries did not accede to the Berne Convention remain a mystery for certain scholars.[90] Some see that reluctance and the adoption of the Montevideo Treaty as a reaffirmation of independence, a rejection of European hegemony, and, over all, a strong conviction that becoming parties to the Berne Convention was inconvenient for the Americas as culture-importing countries.[91] The Americas had no reason to enjoy a worldwide agreement that would damage its

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86 Uchtenhagen, *supra* note 77, at 80 (supporting superior protection in the fact that, unlike the Berne Convention, the Montevideo Treaty listed the exclusive economic rights granted to right holders and provided express protection to photography). *See also* SINGER, *supra* note 51, at 143 (comparing the Montevideo Treaty with the Berne Convention); LADAS, *supra* note 79, at 654-655; BAIRES, *supra* note 38, at 147-160.

87 Montevideo Treaty, *supra* note 80*,* art. 3.

88 *Id.* art. 5.

89 *Id.* arts. 3 and 6.

90 José Bellido, *Latin American and Spanish Copyright Bilateral Agreements (1880-1904)*, in 12 J. WORLD INTELL. PROP. 1 (2009), at 2 (wondering why Latin American countries did not appear among signatories to the Berne Convention).

91 LA PROTECCIÓN DE LOS DERECHOS DE AUTOR EN EL SISTEMA INTERAMERICANO, *supra* note 64, at 20. *See also* Uchtenhagen, *supra* note 77, at 74-81 (explaining the Inter-American copyright system as a result of the independency of Americas' countries, the differences in cultural relations between Europe and Latin America, the evident advantage that the Berne Convention provided to European works, and the "divergent interest around printing").

terms of trade by increasing artificially the cost of access to knowledge by law. Whatever reasons motivated the adoption of the Montevideo Treaty, which was ratified by only a few countries,[92] it symbolizes the Americas' first cohesive effort to make its own way in international copyright law.[93]

Through the late nineteenth and early twentieth centuries, Latin America continued being a primary product export region, with economies specialized on a single-commodity export and high concentration of sales.[94] By the 1930s, all regional economies depended on only one good – such as coffee, bananas, and petroleum – and more than 65% of exports had destinations in only four countries: the United States, the United Kingdom, France, and Germany.[95] The First World War, the Great Depression, and new synthetic products produced a progressive decline in Latin America's terms of trade, and dissatisfaction with the externally-oriented commodity export model.[96] To overcome the inconvenience of dependence with international markets, around the

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92 *See* Uchtenhagen, *supra* note 77, at 92-93 (explaining the reason of the failure and suggesting that, in practice, the Montevideo Treaty satisfied the needs of the Argentinean publishing sector, because it got protection according to its domestic law within its influential zone, which was limited to the few country which were parties, i.e., Argentina, Bolivia, Paraguay, Peru, and Uruguay).

93 CANYES *et al.*, *supra* note 79, at 11; GOLDBAUM, *supra* note 79, at 35. *See also* BELLIDO, *supra* note 49, at 11 (stating that "the Montevideo Convention [w]as an inaugural Latin American attitude moving towards international copyright".).

94 BULMER-THOMAS, *supra* note 13, at 46-81.

95 FRANKO, *supra* note 7, at 40-43.

96 *Id.* at 50. *See also* Rosemary Thorp, *Latin America and the International Economy from the First World War to the World Depression, in* 4 THE CAMBRIDGE HISTORY OF LATIN AMERICA, *supra* note 7, at 57-81 (analyzing several changes in the world economy that impacted the Latin America's export-led model during the first quarter of twentieth century); DEAN, *supra* note 17, at 719-722 (reviewing the catastrophic effects of First World War and Great Depression on the Brazilian economy); and, BULMER-THOMAS, *supra* note 13, at 152-231.

middle of the twentieth century, Latin American countries adopted a new model of development: import substitution industrialization.[97] This model attempted to reduce economic dependency from third countries by encouraging the substitution of foreign imports with domestic production by local industries.

The new economic policy model had to propel the development of local creative industries. There are abundant examples of that process. For instance, in the middle of the 1930s, the "golden age" of Mexican cinema began, which influenced the later development of the new Latin American cinema.[98] A similar development occurred with the publishing sector in the region, which had a significant increase in production starting in the 1930s[99] based on protectionist policies, as well as the contribution by Spanish publishers and intellectuals in exile because of the Spanish Civil War and Franco's dictatorship.[100] This fueled the flourishing of the Latin American boom in

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97 FRANKO, *supra* note 7, at 50; SKIDMORE *et al., supra* note 14, at 358-360. *See also* Ricardo Ffrench-Davis, Oscar Muñoz, and José Gabriel Palma, *The Latin American Economies: 1950-1990,* in 6-1 THE CAMBRIDGE HISTORY OF LATIN AMERICA, *supra* note 7, at 159-249 (providing a comprehensive revision and evaluation of the model of import substitution industrialization thought Latin American countries in the context of the world economy).

98 Juan Pablo Silva, *La Época de Oro del Cine Mexicano: La Colonización de un Imaginario Social*, 7-13 CULTURALES 7, 9-10 (2011).

99 Tomás Lago, *Los Derechos de Autor y el Porvenir del Libro Chileno*, 14 ANALES DE LA UNIVERSIDAD DE CHILE 142, 153-157 (1934); and, BERNARDO SUBERCASEAUX, HISTORIA DEL LIBRO EN CHILE: ALMA Y CUERPO, at 133-176 (LOM Ed., 2010) (reviewing the Chilean publishing sector between 1930s and 1970s). *See also* FELIPE REYES F., NASCIMENTO, EL EDITOR DE LOS CHILENOS (Ventana Abierta Ed., 2014) (reviewing the critical role of a single foreign editor in propelling the publishing sector and local authorship in Chile).

100 José Luis de Diego, *Algunas Notas sobre la Edición en América Latina, in* IX Congreso Argentino de Hispanistas: El Hispanismo ante el Bicentenario, La Plata, April 27-30, 2010. *See also* MARTINEZ BAEZA, *supra* note 40, at 381 (reporting on the effects of the Second World War and the Spanish Civil War on the Chilean publishing sector).

literature, poetry, and social sciences during the 1960s and 1970s, particularly in the Spanish-speaking countries.

By the 1930s, however, the prevailing regional attitude remained a refusal to accede to international instruments on copyright that would perpetuate cultural dependency on Europe, particularly with regard to Spain. A paradigmatic example of different perceptions on international copyright on each side of the Atlantic is the bitter polemic that took place through the press between the Spanish philosopher José Ortega y Gasset, and the Chilean Nobel Prize-awarded poet, Pablo Neruda.[101] Ortega y Gasset used a neocolonial rhetoric and allegories to denounce the complicity between Latin American publishers and writers on piracy of books,[102] while Neruda attacked these concerns as elitist and isolated from the actual problems of writers, culture, and society as a whole.[103] Rather than assuring a worldwide copyright mechanism, Latin American scholars argued in favor of solutions that would strengthen regional production and trade.[104]

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101 Luis E. Cárcamo-Huechante, *Entre Guerras: Las Lides de Neruda con Ocampo y Revista Sur (1930-1940)*, 496 ATENEA 55 (2007) (reporting about the polemic, as well as the political and literary environment at the time on both sides of the Atlantic).

102 José Ortega y Gasset, *Ictiosauros y Editores Clandestinos: Urgencia de una Rectificación Moral*, 38 SUR 40 (1937) (deploring the primitive Latin American immorality associated with criminal publishing of noble European authorship).

103 Pablo Neruda, *Una Declaración de la "Alianza de Intelectuales de Chile para la Defensa de la Cultura" y Su Respuesta,* 41 SUR 79 (questioning the underlying interest of Ortega y Gasset when arguing in favor of publishers rather than authors, and accusing him of misplacing his courage by arguing about copyright matters and, instead, remaining silent in front the face of Franco´s dictatorship).

104 LAGO, *supra* note 99, at 159-166 (proposing a collective effort by Latin American publishers to skip intermediaries and get regional licenses and payment directly to authors).

Meanwhile, a series of successive treaties attempted to improve the Inter-American copyright system[105] until the adoption of the 1910 Buenos Aires Convention.[106] The convention required protection based on national treatment except for the term of protection,[107] and simplified formalities for getting a copyright.[108] However, despite the fact that the Buenos Aires Convention achieved broader adhesion through the American continent, scholars tend to agree that it lacked efficacy and, as a

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105 Convention on Literary and Artistic Copyrights, signed in Mexico City – Mexico, Jan. 27, 1902. O.A.S. T.S. No. 32; and, Convention on Patents of Invention, Drawings and Industrial Models, Trade Marks, and Literary and Artistic Property, signed in Rio de Janeiro – Brazil, Aug. 23, 1906. O.A.S. T.S. No. 18.

106 Convention on Literary and Artistic Copyrights, signed in Buenos Aires – Argentina, Aug. 11, 1910. O.A.S. T.S. No. 22 [*hereinafter* Buenos Aires Convention].

107 *Id.* art. 6.

108 *Id.* art. 3 (setting forth that copyright protection granted by the treaty did not require *"complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property rights"*). *See also* CANYES *et al.*, *supra* note 79, at 13 (explaining that the Buenos Aires Convention abrogated all the formalities but those requires by the country of origin); LADAS, *supra* note 79, at 661-663; and, LADAS, *supra* note 72, at 291-293 (referring the discussion on the matter during the drafting process between delegates from different countries).

result, new instruments attempted to improve the system,[109] but without similar adhesion,[110] until the 1946 Washington Convention.[111]

The Washington Convention consolidated the Inter-American copyright system. It granted not only exclusive economic rights to authors on a broad category of works, but also some moral rights, such as authorship and integrity.[112] It did not abrogate formalities in the country of origin, but rejected them for achieving conventional copyright protection in another party country.[113] However, significant differences in the

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109 Acuerdo sobre Propiedad Literaria y Artística [Agreement on Literary and Artistic Property], suscrito en el Congreso Bolivariano de Caracas, 17 de julio de 1911; and, Revision of the Convention of Buenos Aires on the Protection of Literary and Artistic Copyright, signed in La Havana – Cuba, Feb. 1, 1928. O.A.S. T.S. No. 34 [*hereinafter* La Havana Convention]. La Havana Convention was the most ambitious effort for increasing the protection provided by the Inter-American copyright system. It did not suppress formalities in the country of origin, but only required copyright notice for granting conventional protection (art. 3); suggested a term of protection for author's life plus fifty years post mortem (art. 6); recognized the moral right of integrity (art. 13 bis); and updated the regime to then-new technologies, mainly mechanical reproduction of music and cinematography (arts. 2, 4, and 5). Its purpose was to replace the 1910 Buenos Aires Convention, but it did not succeed because only a few countries ratified it.

110 *See* LADAS, *supra* note 79, at 648-650, and 654 (referring to the existence of multiple treaties simultaneously in force with effects on a limited number of countries).

111 Inter-American Convention on the Rights of the Author in Literary, Scientific ad Artistic Works, Washington D.C., Jun. 22, 1946. UN Registration: 03/20/89 No. Vol. 24373 [*hereinafter* Washington Convention]. *See also, generally,* Bryce Rea Jr., *Some Legal Aspects of the Pan-American Copyright Convention of 1946*, 4 WASH. & LEE L. REV. 10 (1946-1947) (reviewing the Convention and its consistency with U.S. copyright law); and, GUSTAVO FAUNDES SANHUEZA, CONVENCIONES INTERNACIONALES SOBRE DERECHO DE AUTOR, RATIFICADAS POR CHILE (BUENOS AIRES, WASHINGTON, Y UNIVERSAL) 73-143 (Editorial Tipográfica Salesiana, 1962).

112 *Id.* arts. II, III, IV, and XI.

113 *Id.* arts. IX and X. *See also* CANYES *et al.*, *supra* note 79, at 20 and 175; GOLDBAUM, *supra* note 79, at 78, 168, and 169 (stating that the Washington Convention open the way for abandoning the system of compulsory registration and adopting automatic protection by freeing authors from multiple registrations); and, Rea, *supra* note 111, at 23-25 (arguing that

domestic law of the contracting parties blocked an agreement on the term of protection.[114] The convention also simplified the Inter-American system by superseding previous conventions between the contracting states without affecting rights already acquired in accordance with them.[115] The flexibility of the Washington Convention allowed its adhesion for the majority of the countries of the Americas, which also furthered its actual implementation into domestic law.

Countries of the Americas provided themselves with a more flexible international copyright law that better suited their needs. Unlike the Berne Convention, the Inter-American system left the term of protection for determination by domestic laws and allowed requiring formalities for achieving domestic copyright protection, abandoning those works that did not comply with them to the public domain. Conversely, the Berne Convention provided automatic protection for a minimum term longer than those available in most Latin American countries and, therefore, would raise legal barriers for the international flow of copyrighted material. However, through the Inter-American system, countries also avoided providing protection to European authors and received access to cultural building blocks they needed. This explains why Latin American countries not only rejected becoming parties to the Berne Convention, but also declined

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formalities in the Washington Convention were a compromise between U.S. law and the principles of automatic protection adopted by the Berne Convention).

114 *See* CANYES *et al.*, *supra* note 79, at 19-20; and, GOLDBAUM, *supra* note 79, at 162-166.

115 Washington Convention, *supra* note 111, art. XVII. *See also* GOLDBAUM, *supra* note 79, at 201 *et seq.* (analyzing normative derogation in the convention).

any general adhesion to the Inter-American system by European countries; as a result, Latin America deprived their former colonizers' works of protection.[116]

By the middle of the twentieth century, in spite of their differences, Latin-American copyright laws had common features. In addition to constitutional recognition for copyright by the majority of countries,[117] specific copyright laws were in force.[118] Laws granted exclusive economic and moral rights to authors of a broad category of works. Compliance with some formalities was still essential for achieving protection, such as including copyright notice in works, depositing a number of copies at public institutions, and recording works in a public register.[119] The Washington Convention did not abrogate formalities for achieving protection in the country of origin, but they were not required for getting protection under the Convention.[120] In fact, even Brazil, which was the sole Latin American country party to the Berne Convention as of 1922,[121] still

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116 Uchtenhagen, *supra* note 77, at 78-80.

117 *See* EDWIN R. HARVEY, DERECHO CULTURAL LATINOAMERICANO: CENTRO AMÉRICA, MÉXICO Y CARIBE, at 15-16 (OEA – Depalma, 1993) (referring to the inclusion of clauses on copyright law in Latin American constitutions as part of the "*cultural constitutionalism*" of the region, which includes a broader range of cultural matters, such as protecting language diversity and archeological remains).

118 *See* CANYES *et al.*, *supra* note 79, at 161-165.

119 *Id.* at 174.

120 Washington Convention, *supra* note 111, arts. IX and X.

121 *See* ARPAD BOGSCH, THE FIRST HUNDRED YEARS OF THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, at 30 (WIPO, 1986) (referring to the status of Haiti within the Berne Convention as among the initial signatory countries, but it denounced the treaty in 1943 and acceded again to it in 1995).

required formalities in its domestic law.[122] Another feature of Latin American copyright law was the lack of agreement and well-known differences among countries in the extension of the term of protection, which fluctuated from 20 to 80 years *post mortem auctoris,* with some countries even providing perpetual protection.[123]

A regime on limitations and exceptions to the exclusive economic rights of right holders complemented the copyright regime. In fact, the Washington Convention itself set forth some limitations, such as one allowing reproduction of articles on current events in newspapers and magazines,[124] one for purposes of quotation,[125] and another allowing the translation of brief extracts of works.[126] The Convention did not prevent countries from adopting additional exceptions and, in fact, countries enacted several others within their domestic law in order to meet public interest.

In sum, by the end of the Second World War, there were two competing copyright systems: the European and the Inter-American. In simplistic terms, the European copyright system, which was open to external countries, provided automatic

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122 CANYES *et al.*, *supra* note 79, at 49-50; and, MIZUKAMI, *supra* note 35, at 290 (noting that controversy around formality requirements in Brazilian copyright law was resolved only in 1973).

123 Terms of protection, in general, were: twenty years p.m.a. in Chile, Mexico, and Peru; twenty-five years p.m.a. in El Salvador; thirty years p.m.a. in Argentina, Bolivia, Dominican Republic, and Venezuela; forty years p.m.a. in Uruguay; fifty years p.m.a. in Costa Rica and Ecuador; sixty years p.m.a. in Brazil; eighty years p.m.a. in Colombia, Cuba, and Panama; and for perpetuity in Guatemala and Nicaragua. *See* CANYES *et al.*, *supra* note 79, at 173-174.

124 Washington Convention, *supra* note 111, art. VI.

125 *Id.* art. XII (1).

126 *Id.* art. XII (2).

protection to authors for their lives plus at least fifty years, but did not provide that much flexibility for otherwise meeting public interest needs. The Inter-American system, which was limited to countries of the Americas, provided international protection for a discretionary term to authors that had complied with formalities set forth by countries of origin. Such differences between both systems made illusory any global copyright protection and required some effort for international harmonization. In fact, in 1928 there was an attempt at harmonization that failed, leading, on one hand, to a mere revision of the Berne Convention and, on the other, to the La Havana Convention, which did not attract many Latin American countries.[127]

3. ENTERING INTO THE INTERNATIONAL COPYRIGHT REGIME

The need for international harmonization on copyright became pressing after the Second World War. By then, not only was the reluctance of Latin American countries and the U.S. to adhere to the Berne Convention problematic, but also the damaged economy of Europe and the progressive loss of its possessions overseas increased difficulties for right holders. This was because of the risk that their rights would be frustrated in the case of emerging nations resulting from the decolonization of both Africa and Asia, such as Algeria, Bangladesh, India, Nigeria, and Pakistan. The fragmentation of colonial empires into newly independent states created the risk that

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127 LADAS, *supra* note 79, at 650-653 and 666-679.

they would not adhere to the Berne Convention, which made it urgent for copyright holders to unite in some way to preserve the protection for copyrights granted during the colonial era.

The Berne Convention provided a mechanism for confronting the decolonization of territories by signatory countries. This was known as the "colonial clause," which provided for continuity in copyright protection from the old to the new status of a given territory (i.e., from being a colony to an independent state).[128] However, this mechanism was not enough because it still required acceptance by former colonies. On one hand, those new developing countries were also reluctant to adopt the high standard of the Berne Convention; on the other hand, Europe needed to protect its potential market by encouraging adhesion to the Berne Convention and, at the same time, to avoid the drop out of those few developing countries that already were parties.

To overcome the gap between the needs of developing countries and the protection promoted by European ones, in 1952, under the sponsorship of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Universal Copyright Convention (UCC) was adopted.[129] It attempted to grant global protection to authors through a truly universal convention that, however, did not affect the systems

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128 Berne Convention – Brussels Act, *supra* note 74, art. 27; currently, Berne Convention for the Protection of Literary and Artistic Works (as revised at Paris, France, Jul. 24, 1971) [*hereinafter* Berne Convention – Paris Act], art. 31.

129 Universal Copyright Convention, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI. Geneva, Sept. 6, 1952. UN Registration: 09/27/55 No. Vol. 2937 [*hereinafter* UCC].

already in force.[130] A country party could achieve protection in other countries by granting national treatment and a minimal standard of protection, including a term of protection shorter than Berne and a simple system of formalities. [131] The UCC did not abrogate formalities within domestic law,[132] but set forth mere copyright notice as a condition for achieving protection under the Convention.[133] The UCC granted exclusive rights of translation, but established a flexible mechanism of compulsory licensing for translation and reproduction of works.[134] This allowed most Latin American countries to adhere to the UCC and achieve some universal protection without the need to make significant changes in their domestic law. In practice, the UCC provided a one-way bridge to the higher standards of the Berne Convention by adopting some flexibility.[135]

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130 *Id.* pmbl. *See also* Theodore R. Kupferman, *The Universal Copyright Convention Analyzed from the Inter-American Point of View*, 6 BULL. COPYRIGHT SOC'Y USA 227, 230 (1958-1959) (describing the UCC has *"a compromise between the two almost diametrically opposed theories of copyright set forth in the Pan-American and Berne Convention copyright systems"*.).

131 *Compare* UCC, *supra* note 129, arts. I, II, and IV (providing copyright protection based on national treatment to foreign works whose countries of origin were parties to the UCC for at least the author`s life plus twenty-five years) *with* Berne Convention – Paris Act, *supra* note 128, art. 7 (setting forth a term of protection for author`s life plus fifty years).

132 UCC, *supra* note 129, art. III (2).

133 *Id.* art. III (1).

134 *Id.* art. V.

135 *See* DELIA LIPSZYC, COPYRIGHT AND NEIGHBOURING RIGHTS, at 604-605, and 751 (UNESCO, 1999) (referring to the UCC as a first step in the process of accessing to the Berne Convention); RICARDO ANTEQUERA, EL NUEVO DERECHO DE AUTOR EN VENEZUELA, at 572 (Autoralex ,1994) (referring to the UCC as a bridge to the Berne Convention); and, ALFONSO LOREDO HILL, NUEVO DERECHO AUTORAL MEXICANO, at 241 (Fondo de Cultura Económica, 2000) (citing Torres Bodet's inaugural speech for the conference in which the UCC was adopted, who said, *"[t]he final document will be a complementing instrument, capable to set permanent links between the two big system of the Berne Convention and the American continent, which currently lack of regular relations, and will allow to arrive to a universal agreement")*. However, the UCC did not allow movement from the Berne Convention to the UCC, by punishing those countries that left the Berne Convention. *See* UCC, *supra* note 129, Appendix Declaration relating to Articles XVII.

The UCC achieved its purpose of providing universal copyright protection to authors. Countries in the Americas acceded to the UCC in succeeding years and obtained overseas protection for their nationals without challenging their domestic laws. Parties to the Berne Convention also joined the UCC; after all, getting lower protection for their authors was better than nothing. For these countries, however, the UCC was still an unsatisfactory solution, because of its shorter term of protection, formalistic requirements, and permissive provisions on translation. The UCC also neither encouraged adhesion to the Berne Convention standards by new countries nor was a guarantee for preventing withdrawal of the handful of developing countries that were already members. Therefore, for the Berne Convention countries, the UCC was a centering rather than a bridge, a provisional structure of international law to advance a bigger goal, which was the universal adoption of the European system. Therefore, Europe's next step for international copyright law was clear: to converge all systems around the Berne Convention.

The 1967 Stockholm Act was the first attempt at convergence,[136] by providing some flexibility but preserving the Berne Convention's long-term automatic protection. The Stockholm Act permitted countries to adopt exceptions and limitations, but only in

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[136] Berne Convention for the Protection of Literary and Artistic Works (as revised at Stockholm, Jul. 14, 1967) [*hereinafter* Berne Convention – Stockholm Act]. *See also* Quintiliano Monsalve, *La Conferencia de Estocolmo sobre Propiedad Intelectual*, 140 REVISTA DE DERECHO Y CIENCIAS SOCIALES 81, 83 (1967) (stating that the Stockholm Conference attempted to converge the European and the American system, and to attract countries that have not accessed any of those system, such as Russia).

compliance with the so-called *Berne three-step test*, which reduces such exceptions and limitations to certain special cases that do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.[137] Another flexibility was the so-called "ten-year regime" clause,[138] according to which an acceding country could allow the translation of foreign works into languages of use in the said country within ten years from their first publication. Finally, an additional protocol authorized developing countries to issue compulsory licenses for translating similar works in a shorter term.[139] In spite of its concession to developing and acceding countries, the Stockholm Act did not succeed. Right holders lobbied developed countries to prevent their ratification of the Stockholm Act, which quickly evidenced its uselessness;[140] in fact, the process for conducting a new revision of the Berne Convention took place almost immediately.

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137 Berne Convention – Stockholm Act, *supra* note 136, art. 9 (2) (permitting the reproduction of works under the expressed circumstances). *See also* Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [*hereinafter* TRIPS Agreement] (adopting similar test, but extending its scope further than reproduction and making a requirement of not unreasonably prejudicing legitimate interests with respect to the right holder).

138 Berne Convention – Stockholm Act, *supra* note 136, art. 30.

139 For background, analysis, and aftermaths of the Stockholm Act of the Berne Convention, see CARLOS MOUCHET, EL DERECHO DE AUTOR INTERNACIONAL EN UNA ENCRUCIJADA (Sociedad de Autores y Compositores de Música, 1969); Ndéné Ndiaye, *The Berne Convention and Developing Countries*, 11 COLUM.-VLA J.L. & ARTS 47 (1986-1987); SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 590-630 (Kluwer, 1987); and, SAM RICKETSON AND JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND, at 881-924 (Oxford Univ. Press, 2nd ed., 2006).

140 DRAHOS AND BRAITHWAITE, *supra* note 61, at 77; Eva Hemmungs Wirtén, *Colonial Copyright, Postcolonial Publics: the Berne Convention and the 1967 Stockholm Diplomatic Conference Revisited,* 7 SCRIPTED 532, 547 (2010).

The second attempt to converge international copyright law was conducted by consecutive conferences held in Paris in 1971 that revised both the Berne Convention and the UCC.[141] Despite their different philosophies, the conferences adopted almost identical modifications in the flexibilities provided by the UCC and those included in the Appendix of the Berne Convention via the 1971 Paris Act.[142] That is, both international instruments provided a converged mechanism allowing developing countries to issue compulsory licenses for translating and/or reproducing published copyrighted works.[143] Additionally, the Berne Convention allowed adopting copyright exceptions into domestic law, but subject to the three-step test for exceptions.[144] It also preserves the "ten-year regime" clause that allows the lapse of exclusive rights on translations, but only for acceding countries.[145] New instruments did not achieve any other convergence, but at least neutralized the risk that their previous versions represented for right holders, by limiting some flexibilities and introducing a bureaucratic and complex regime for

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141 *See* Irwin A. Olian, Jr., *International Copyrights and the Need of Developing Countries: The Awakening at Stockholm and Paris*, 7 CORNELL INT'L L. J. 81, 109 (1974) (arguing that, in fact, even when introducing a regime for compulsory licensing in favor of developing countries, the ultimate goal of the Berne Convention Act of Paris rather than designing a solution for them was working on unifying the systems of the Berne Convention and the UCC).

142 Eugen Ulmer, *The Revisions of the Copyright Conventions*, 2 INT'L REV. INTELL. PROP. & COMPETITION L. 345, 347 (1971) (stating that *"with isolated exceptions and apart from the arrangement of the two systems, the substantive provisions common to both Conventions (rules governing exception to the rights of translation and reproduction) were drafted in identical terms"*).

143 *Compare* Berne Convention – Paris Act, *supra* note 128, Appendix Special Provisions regarding Developing Countries, *with* UCC, as revised on 24 July 1971, arts. V-V *quarter*.

144 Berne Convention – Paris Act, *supra* note 128, art. 9 (2).

145 *Id.* art. 30 (2) (b).

compulsory licensing for developing countries that, eventually, made compulsory licensing completely useless for them.[146]

At that time, between the 1950s and the 1980s, most Latin American countries, which were under authoritarian regimes,[147] implemented a model of economic development based on substituting importation with domestic production by stretching industrialization of their economies. This model required an active role of the state in the economy, including state-owned enterprises, financial support to the private sector, and protectionist measures, such as high tariffs and trade restrictions; the model did not reject transnational corporations, as long as they played within the domestic economy.[148] The achievements of this model of development were uneven throughout the region,[149] but it is notable that three major book-producing Latin American countries became parties to the European copyright agreement, the Berne Convention. Brazil had acceded in 1922, benefiting from its competitive advantages in the Portuguese-language market and, in 1967, both Argentina and Mexico also acceded. It may be hypothesized that their domestic publishing sectors took advantage from protectionism of the import

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146 Alberto Cerda, *Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright*, 60 J. COPYRIGHT SOC'Y 581 (2013).

147 Scholars disagree on the exact period during which Latin America was under populist, dictatorial, or authoritarian regimes. This disagreement comes not only from the actual meaning of what is a democratic regime, but also from the noticeable differences between political facts from one country to another. Most scholars, however, state that authoritarian regimes were pervasive through Latin American between 1930s and1970s. *See, e.g.,* SKIDMORE *et al., supra* note 14, at 379-386; and, KEEN and HAYNES, *supra* note 7, at 270-274.

148 FRANKO, *supra* note 7, at 61-68.

149 *Id.* at 68-72; SKIDMORE *et al., supra* note 14, at 361-362.

substitution industrialization model, such as strong subsidies, important public purchases, and even legal benefits.

The revisions to the Berne Convention did not succeed in Latin America, however, as evidenced by the fact that only a few countries acceded to it and they failed to adopt implementing laws.[150] By the 1980s, in addition to Argentina, Brazil, and Mexico, Chile (1970) and Costa Rica (1978) became parties to the Convention. Therefore, for most countries in the region, the leading instruments on international copyright remained the Washington Convention and the 1952 UCC. Acceding to the Berne Convention, moreover, did not guarantee compliance because of the necessity of implementing domestic law;[151] for instance, as was mentioned above, Brazil still had domestic protection based on formalities as late as the 1960s.[152] Similarly, Argentina required registration for protecting translations.[153] Even worse, some country parties adopted domestic laws that violated the Berne Convention commitments; for example, Chile's 1971 copyright law reduced the term of protection from fifty to thirty years p.m.a.[154] Mexico also provided only thirty years of protection.[155] Those facts show that

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150 *See* Annexes, Table 2: International instruments on copyright and country parties.

151 Berne Convention – Paris Act, *supra* note 128, art. 36.

152 PAN AMERICAN UNION, PROTECCIÓN DEL DERECHO DE AUTOR EN AMÉRICA, at 21-23 (Unión Panamericana, 1962) (describing formalities required by Brazilian domestic law in order to achieve protection by domestic and foreign authors). *See also supra* note 122.

153 ORGANIZATION OF AMERICAN STATES - GENERAL SECRETARIAT, COPYRIGHT PROTECTION IN THE AMERICAS – ARGENTINA, at 19 (Oceana Publications, 1984).

154 *See* Claudio Ruiz, *Hacia una Dogmática para el Acceso en Chile*, in ACCESO A LA CULTURA Y DERECHOS DE AUTOR, at 48-50 (Alberto Cerda ed., Derechos Digitales, 2008) (reviewing

the Berne Convention presented three difficulties: reduced number of accessions, need of implementing law, and lack of enforcement.

By the 1970s, under pervasive dictatorships fed by the Cold War,[156] the model of economic development based on substituting importation become unsustainable, in spite of some attempts to prolong it by extending domestic markets through regional integration initiatives and injecting financial resources through external debt. This led to the most severe economic crises though the region in the early 1980s, when several countries declared their default and moratorium with international financial markets. Throughout the decade, which became known as the "lost decade" in Latin America, countries dealt simultaneously with economic instability, financial rescheduling of international debt, incipient transition to democratic governments, and increasing social discontent because of high rates of unemployment and inflation resulting from readjustment policies. After achieving some macroeconomic stabilization, through the 1990s, Latin America embarked in two parallel but twisted processes: economic restructuring and political re-democratization.

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the term of protection in Chilean copyright law from 1834 to the present, which returned to compliance with the Berne Convention by 1992).

155 ORGANIZATION OF AMERICAN STATES - GENERAL SECRETARIAT, COPYRIGHT PROTECTION IN THE AMERICAS – MEXICO, at 13 (Oceana Publications, 1984).

156 *See* Alain Rouquie*, The Military in Latin American Politics since 1930*, in 6-2 THE CAMBRIDGE HISTORY OF LATIN AMERICA, *supra* note 7, at 247-270 (providing a description of different military regimes that took place within the region between 1930 and 1980, ranging from dictatorships, quasi-institutionalized militarism, counter-revolutionary, and certain forms on reformist militarism). *See also* MEADE, *supra* note 17, at 214-233 (arguing that Latin America was a territory subject to the interference of the Soviet Union and United States world division of the post-war era, which would explain countries' political struggles at that time).

Since the 1990s, Latin American countries have moved from their previous inward model of development to a trade liberalization model.[157] Following strong recommendations from international finance institutions, countries implemented a series of market-based policies known as the Washington Consensus.[158] These policies included unilateral trade and financial liberalization, privatization of economy, deregulation of markets, fiscal control, reduction of taxes, tariffs, and social spending, among others. Based on the premise that weak contractual enforcement in Latin American discouraged investment, securing property rights became part of the Washington Consensus' solution. In that manner, intellectual property rights achieved the status of an essential component of economic development.[159] While the level of implementation and outcomes achieved with this new policy varied from country to country, by the end of the twentieth century, all countries in the region already had implemented domestic copyright law in compliance with international instruments on the matter.

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157 FRANKO, *supra* note 7, at 154-178

158 SKIDMORE *et al., supra* note 14, at 368-370. *See also,* MICHAEL REID, FORGOTTEN CONTINENT: A HISTORY OF THE NEW LATIN AMERICA 141-159 (Yale Univ. Press, 2017) (reviewing the Washington Consensus, its proposals and implementation through Latin America, and assessing its effects on local economies).

159 MIROW, *supra* note 41, at 211 (noticing that since the 1990s, drafting of modern copyright law in Latin America has attempted to attract foreign investment and became involved in regional and world trade). *See also* ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT (Westview Press, 1990) (connecting development of developing country economies with deploying stronger protection for intellectual property assets).

Latin America has also progressed continuously since the 1980s in its re-democratization.[160] Conceptualizing democracy is a contending task between scholars that exceeds the purposes of this dissertation, but there are several features characteristic of Latin America that corroborate its recent progresses. Almost every country in the region has a democratic government elected with universal vote in a multiparty system.[161] The historically elusive rule of law has been imposed through the region, although at different levels.[162] For instance, in addition to improvements in judiciaries' conditions, in several countries new institutions have stretched democratic commitments, such as ombudspersons, independent prosecutions, and constitutional courts. In recent years, human rights recognition and enforcement have received significant improvements in both domestic and international law applicable to Latin America, an issue deepened in the previous chapter.[163] Of course, depending on the country, there is still room for improvement in areas such as: public transparency and accountability; citizen

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160 *See* Rouquie, *supra* note 156, at 279-300 (analyzing the progressive demilitarization and transmission of power to civilian elected governments that took place in Latin America between 1979 and 1990). *See also* SKIDMORE *et al., supra* note 14, at 389-391.

161 *See* Frances Hagopian & Scott P. Mainwaring, *Introduction* to THE THIRD WAVE OF DEMOCRATIZATION IN LATIN AMERICA: ADVANCES AND SETBACKS, at 3 (Frances Hagopian & Scott P. Mainwaring eds., Cambridge Univ. Press, 2005) identifying only two authoritarian governments within the region by 2003: Cuba and Haiti). *See also* SKIDMORE *et al., supra* note 14, at 390 (mapping democratic, semi-democratic, and non-democratic governments within the region between 1972-2008).

162 *See* Jorge Carpizo, *Derecho Constitucional Latinoamericano y Comparado*, 114 BOLETÍN MEXICANO DE DERECHO COMPARADO 949, 972-985 (2005); Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEXAS L. REV. 1587, 1593-1594 (2010-2011); and, ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM 1810-2010, at 148-195 (Oxford Univ. Press, 2013). *See also* ALLAN R. BREWER-CARIAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS (Cambridge Univ. Press, 2009).

163 *See* Víctor Abramovich, *From Massive Violations to Structural Patterns: New Approached and Classic Tensions in the Inter-American Human Rights System*, 11 SUR – INT'L J. HUMAN RIGHTS 6 (2009).

participation; gender and racial equity; limits on corporate power; and, fights against corruption, guerrilla warfare, and drug trafficking. In the following chapter, while exploring the implementation into domestic law of international obligations assumed by Latin American countries on copyright matters, the progress and limitations of these new democratic regimes are explored.

Simultaneously, from later in the 1980s and throughout the 1990s, a new vitality reinvigorated the agenda for international copyright law. On one hand, the end of the Cold War and the increasing globalization of the economy accentuated the importance of achieving international harmonization on intellectual property. On the other hand, the challenges and opportunities offered by new digital technologies made at least some updating of the copyright system necessary. In the case of Latin American countries, this was a time for rebuilding democratic traditions, improving legal systems, and reengaging in the international arena. At the same time, Latin American countries left protectionism and import-substitution as their trade and economic policies for development;[164] instead, they embraced liberalization and privatization of their economies, and attempted by numerous means to achieve access to foreign markets.[165] In this context, intellectual

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164 Yolanda Huerta Casado, *El Tratado de Libre Comercio en Materia de Propiedad Intelectual y Sus Repercusiones en América Latina*, in DERECHO DE LA PROPIEDAD INTELECTUAL: UNA PERSPECTIVA TRINACIONAL 125, 126-128 (Manuel Becerra Ramírez ed., Inst. de Investigaciones Jurídicas – UNAM, 1998) (stating that copyright regulation in Latin America did change from protectionist policy in the 1970s based on import-substitution).

165 JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS, at 53 *et seq.* (Norton, 2003) (arguing that fiscal austerity, privatization, and liberalization of the market were the pillars of the economic politic of the 1980s and 1990s imposed by international trade and financial organizations on developing countries and transitional economies); and, M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH

property and copyright became an essential part of the package deal on international trade that Latin America endorsed. However, scholars agree that the impetus for including intellectual property was and remains external rather than internal.[166]

Changes in U.S. copyright law and policy were highly influential in Latin America. In 1988, the U.S. became party to the Berne Convention,[167] after adapting its domestic law to the treaty, mainly by granting automatic protection, although omitting moral rights.[168] Additionally, the U.S. incorporated the Berne Convention standards into its foreign trade policy at the domestic level, through Special Report 301, which pressures other countries by denying tariff preferences to those that do not provide adequate and effective protection of intellectual property rights or fair and equitable market access to United States persons who rely upon intellectual property rights.[169] At the international level, the U.S. tabled a proposal on intellectual property at the World Trade Organization (WTO), including the Berne Convention standards for copyright

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AMERICA 211 (Univ. of Texas Press, 2004) (noticing improvements in intellectual property law through the region as a way to attract foreign investment and participation in global trade).

166 Huerta Casado, *supra* note 164, at 126-133 (arguing that intellectual property harmonization in Latin America is outcome from "a tendency propelled by external factors," such as the TRIPS Agreement, the North American Free Trade Agreement, and potential accession by other countries, globalization of the economy, and unilateral pressure from the U.S., among others).

167 Berne Notification No. 121: Accession by the United States of America, Nov. 17, 1988.

168 Berne Convention Implementation Act of 1988. *See* Pub. L. No. 100-568 (Oct. 31, 1988), 102 Stat. 2853.

169 Special Report 301 has been issued since 1989, the year following U.S. accession to the Berne Convention, as an annual review of global compliance with intellectual property conducted by the Office of the United States Trade Representative (USTR) in order to encourage worldwide protection and enforcement of intellectual property by depriving infringer countries of tariff preferences.

plus additional requirements on protecting databases and software. After 102 years of avoiding the Berne Convention and ninety-nine of profiting from the flexibility of the Inter-American copyright system,[170] the U.S. became the main champion of the Berne Convention standards by exercising pressure on other countries to adopt them too,[171] and so several Latin American countries adhered to them, even before the adoption of the TRIPS Agreement.[172]

In conjunction with ongoing discussion of intellectual property rules before the WTO, some countries agreed to stronger copyright protection during negotiation of sub-regional agreements on economic integration. Such was the case of the North American Free Trade Agreement (NAFTA)[173] and Decision 351 of the Andean Community.[174]

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170 Jane C. Ginsburg and John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1 (1988-1989). However, United States' publishers did enjoy the benefits of the Berne Convention longer before that, through a legal technicality that provided protection to works simultaneously published in another country party to the convention. *See* JAMES L. BROWN, INDUSTRIAL PROPERTY PROTECTION THROUGHOUT THE WORLD, at 77-78 (U.S. Government Printing Office, 1936) (recommending the publication of American authorships' work first or simultaneously in a country party to the Berne Convention, in what was known as the "back door" that allowed United States' publishers to achieve conventional protection by printing in Canada); and, RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW BEING A SUMMARY OF THE PRINCIPLES AND PRACTICE OF COPYRIGHT WITH SPECIAL REFERENCE TO THE AMERICAN CODE OF 1909 AND THE BRITISH ACT OF 1911, at 339 (Houghton Mifflin, 1912).

171 These were the successive cases of Colombia and Peru (1988), Honduras (1990), Ecuador (1991), Paraguay (1992), Bolivia (1993), and El Salvador (1994). *See* Annexes, Table 2: International instruments on copyright and country parties.

172 TRIPS Agreement, *supra* note 137.

173 North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Dec. 17, 1992, 32 I.L.M. 605, reprinted in The NAFTA (United States Government Printing Office ed., 1993) [*hereinafter* NAFTA].

NAFTA created a free trade area among Canada, Mexico, and the U.S., and it required adopting several commitments for harmonizing regulation, including on intellectual property. Although the Andean Community has existed since 1969,[175] in the early 1990s it was revitalized through the adoption of common legal regimes in several areas, such as foreign investment, communitarian enterprises, and intellectual property, among others.[176] By then, the Andean Community included Bolivia, Colombia, Ecuador, Peru, and Venezuela.

NAFTA and Decision 351 significantly increased copyright protection among the negotiating parties. They not only strengthened substantive copyright law beyond the Berne Convention, but also introduced restrictions in flexibilities available in both international and domestic laws of the negotiating parties. For instance, NAFTA extended copyright protection to databases and software,[177] granted exclusive rental

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174 ANDEAN COMMUNITY, Decisión No. 351 Régimen Común sobre Derecho de Autor y Derechos Conexos [Decision 351 Common Regime on Copyright and Neighboring Rights], adopted by the Commission of the Cartagena Agreement, on Dec. 17, 1993, Official Gazette of the Andean Community No. 145, Dec. 21, 1993 [*hereinafter* Decision 351]. *See generally,* Ricardo Antequera, *Copyright and Andean Community Law*, 166 REVUE INTERNATIONALE DU DROIT D'AUTEUR 56 (1995); and, Ana María Pacón, *La Protección del Derecho de Autor en la Comunidad Andina*, in DERECHO COMUNITARIO ANDINO, at 299-324 (Allan-Randolph Brewer-Carías ed., Fondo Editorial Pontificia Universidad Católica del Perú, 2003).

175 Andean Subregional Integration Agreement, May 26, 1969, 8 I.L.M. 910 (as amended by Trujillo Protocol, Mar. 10, 1996) (starting a sub regional integration process between Bolivia, Colombia, Chile, Ecuador, and Peru; in 1973, Venezuela became also a party; in 1976, Chile dropped out; and, in 2006, Venezuela denounced it).

176 *See* Thomas Andrew O'Keefe, *How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise*, 30 INT'L L. 811, 818 *et seq.* (1996) (referring to the "revival" of the Andean Pact, which by the early 1990s established uniform rules encouraging free trade and attracting foreign investment, becoming one of the most innovative integration initiative in the region).

177 NAFTA, *supra* note 173, art. 1705 (1).

rights for the latter,[178] and stretched the requirements set forth by the Appendix of the Berne Convention for issuing compulsory licenses.[179] Decision 351 adopted broad national treatment granting copyright to any author, even if the author's country of origin did not grant analogous protection;[180] granted to right holders exclusive rights of renting, leasing, and the importation of works;[181] and provided copyright protection for computer programs and databases,[182] among others.[183]

NAFTA and Decision 351 also improved the international enforcement of copyright law. NAFTA did it by including a dispute settlement obligation,[184] while the

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178 *Id.* art. 1705 (2).

179 *Id.* art. 1705 (6) (introducing additional requirements to those set forth by the Appendix of the Berne Convention for issuing compulsory licenses for translation and reproduction of works in foreign languages).

180 Decision 351, *supra* note 174, art. 2 (granting national treatment to any author, even if his country of origin does not grant analogous protection).

181 *Id.* art. 13 (granting to right holder exclusive rights for *"c) public distribution of the work through selling, renting, or leasing; (d) the importation into the territory of any Andean Community member of copies made without authorization of the right holder."*).

182 *Id.* arts. 23-27 (providing copyright protection for computer programs and databases).

183 *See id.* 174, art. 60 (restoring copyright on works deprived of protection retroactively because of the omission of registration required by previous domestic laws). *Compare also* Ley No. 1322 de 1992: Ley de Derecho de Autor [Copyright Act], Gaceta Oficial, Apr. 27, 1992 (Bolivia), art. 25 (authorizing the government to issue compulsory licenses based on public need of a work of great cultural value for the country, or social or public interest) w*ith* Decision 351, art. 32 (prescribing that, in any case, compulsory licenses set forth in domestic law of Andean Community members can exceed limitations allowed by the Berne Convention or the Universal Copyright Convention). *See generally,* Alberto Cerda, *Copyright Convergence in the Andean Community of Nations,* 20 TEX. INTELL. PROP. L.J. 429 (2012) (arguing that the Andean Community failed in considering public interest when it adopted Decision 351).

184 *See* NAFTA, *supra* note 173, Ch. 20: Institutional Arrangements and Dispute Settlement Procedures.

Andean Community conferred jurisdiction on a regional tribunal,[185] which actually has issued several decisions.[186] Additionally, Decision 351 overcame another limitation of international copyright law by making unnecessary its own implementation into domestic law. The Decision is communitarian (i.e., fully applicable within the Andean Community), supranational, and self-executing, with direct and immediate effects upon both communitarian and domestic authorities.[187] As a result, NAFTA and the Andean Community facilitated both the accession to and the implementation of the TRIPS Agreement by their party countries.[188]

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185 *See* Protocol of Modification of the Treaty Establishing the Court of Justice of the Andean Community, approved at Cochabamba - Bolivia, on 28 of May of 1996.

186 *See* Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and Its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 N.Y.U. J. INT'L L. & POL. 871 (2008-2009) (describing the relations between the tribunal and both domestic courts and authorities, and finding that 97% of the cases judged by the Andean Community Tribunal of Justice are related to intellectual property, mainly trademark); and, Laurence R. Helfer, Karen J. Alter, and M. Florencia Guerzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community* , 103 AM. J. INT'L L. 1 (2009) (arguing that Andean Community Tribunal of Justice has contributed to create a rule-of-law on intellectual property within the Andean Community).

187 Eric Tremolada Álvarez, *El Derecho Andino: Una Sistematización Jurídica para la Supervivencia de la Comunidad Andina de Naciones*, 57 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL UNIVERSIDAD DE VALENCIA 35 (2006); and, HILDEGARD RONDÓN DE SANSÓ, EL RÉGIMEN DE LA PROPIEDAD INDUSTRIAL (Editorial Arte, 1995), at 86-87. To make it clear, Decision 351 overlapped with domestic law that continued in force, if not inconsistent with the common regime.

188 *See* XAVIER GÓMEZ VELASCO, PATENTES DE INVENCIÓN Y DERECHO DE LA COMPETENCIA ECONÓMICA, at 17 (Universidad Andina Simón Bolívar, 2003); and, MARCO RODRÍGUEZ RUIZ, LOS NUEVOS DESAFÍOS DE LOS DERECHOS DE AUTOR EN ECUADOR, at 48-49 (Universidad Andina Simón Bolívar, 2007). *See also* Huerta Casado, *supra* note 164, at 138 (stating that Andean Community members had a substantive legal regime compatible with standards set forth by NAFTA and the TRIPS Agreement); and, Julio Javier Cristiani, *Las Principales Disposiciones en Materia de Propiedad Intelectual en el Tratado de Libre Comercio de América del Norte y su Repercusión en la Legislación Interna Mexicana*, 1 TEMAS VARIOS 65, 67 (1997) (noting that NAFTA was inspired by TRIPS negotiations, which would explain the similarities of their commitments on copyright). *See also* Kevin C. Kennedy, *Introduction* to THE FIRST DECADE OF FREE TRADE IN NORTH AMERICA, at 6-7 (Kevin C. Kennedy ed.,

The conclusion of the TRIPS Agreement ended the remaining Latin American countries' reluctance to adopt the Berne Convention standards.[189] The TRIPS Agreement reaffirmed the Berne Convention and made it a truly universal copyright instrument; whatever the reason countries became parties to the WTO,[190] most likely to access markets for their agricultural products, they committed to comply with the Berne Convention, except on moral rights.[191] The TRIPS Agreements extended copyright protection by adopting new substantive commitments.[192] It also improved the enforcement of intellectual property, on one hand, by providing more specific commitments on enforcement for the domestic law of parties,[193] and, on the other, by establishing an institutional arrangement to monitor compliance and a dispute-settlement mechanism.[194] Finally, the TRIPS Agreement may not have been self-executing,[195] but it

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Transnational Publishers, 2004) (expressing reciprocal gratitude between drafters of NAFTA and the TRIPS Agreement). *But see* MANUEL BECERRA, LA PROPIEDAD INTELECTUAL EN TRANSFORMACIÓN (UNAM, 2004), at 35-36 (arguing that NAFTA standards were actually higher than those of the TRIPS Agreement on national treatment, transitional terms, compulsory licensing, contractual copyright law, and biotechnology, among others).

189 Acceding countries to the WTO and the TRIPS Agreement soon also adhered to the Berne Convention, i.e., Haiti and Panama (1996), Cuba, Dominican Republic, and Guatemala (1997), and Nicaragua (2000). *See* Annexes, Table 2: International instruments on copyright and country parties.

190 *See* Peter Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369 (2006) (providing four different narratives to explain the origins of the TRIPS Agreement and why developing countries became parties to it).

191 TRIPS Agreement, *supra* note 137, art. 9.

192 *See id.* arts. 10 (granting copyright on software and databases), 11 (granting exclusive rental rights on software and cinematographic works), 12 (adopting a term of protection of 50 years post author's mortem, or publication in some cases), and 13 (adopting the three-step test for exceptions and limitations).

193 *Id.* arts. 41-62.

194 *Id.* arts. 63, 64, and 68.

did require actual implementation into domestic law within a term that varied according to the level of development of a given country.[196] As was mentioned previously, in the Latin American legal system certain treaties are self-executing, but this feature is mostly limited to human rights treaties and, therefore, other instruments – such as those on intellectual property and trade – do require implementing domestic law. The implementation of the TRIPS Agreement by Latin American countries is explored in the following chapter.

The TRIPS Agreement did not address all the issues linked to new digital technologies. In fact, soon after, two additional international instruments were adopted at the World Intellectual Property Organization (WIPO), known as the WIPO Internet Treaties.[197] These treaties attempted to update copyright law in order to properly regulate new digital technologies in connection with copyright and neighboring rights. Several of their provisions reiterated commitments already established by the Berne Convention

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195 There is abundant literature discussing whether a treaty is self-executing. In general, a treaty is self-executing when its provisions became domestic law without the need for implementation, allowing its direct enforcement before a competent court. Whether a treaty is self-executing is primarily an issue of domestic law, particularly of a given country's constitutional framework. Acknowledging differences in the legal systems of parties, the TRIPS Agreement recognizes parties' freedom to determine the manner of proper implementation within their legal system and practice, thus, domestic law must determine if the treaty or its provisions are self-executing. *See* UNCTAD AND ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT, at. 17 *et seq.* (Cambridge Univ. Press, 2005); Carlos Correa, *The TRIPS Agreement and Developing Countries*, in 2 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, at 434-435 (Macrory *et al.* eds., Springer, 2005); and, DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING, HISTORY AND ANALYSIS (Thomson Reuters, 3d. ed., 2008), at 164-165.

196 TRIPS Agreement, *supra* note 137, arts. 65 and 66.

197 World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997); and, World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) [*hereinafter* WCT].

and the TRIPS Agreement, but others were innovative for international copyright law, such as requiring protection for technological measures and rights management information,[198] and recognizing the exclusive right to make a work available online.[199] Most Latin American countries have ratified both WIPO Internet Treaties and, therefore, have implemented them or are required to,[200] which the next chapter analyzes.

The WIPO Internet Treaties have similar limitations to the Berne Convention. On one hand, they lack a mechanism for enforcement, relying on countries' good will for their implementation and observance. On the other hand, in spite of their denomination, they regulate digital technologies rather than the online environment; in fact, they do not include specific rules about observance of copyright in the online environment, an issue that has been left to domestic law. The next chapter circles back on this failure and how Latin American countries address it by addressing foreign governments' pressure, corporate lobbying, and an emergent bilateralism.

In sum, the general narrative tells us that, during the last three decades, Latin America copyright law has been in a transitional period. By the end of the 1980s, most countries based protection for authors on the Inter-American copyright system. Since then, countries progressively have become parties to the European copyright system, which is based on the Berne Convention and its successive revisions. During the 1990s,

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198 WCT, *supra* note 197, arts. 11 and 12.

199 *Id.* art. 8.

200 *See* Annexes, Table 2: International instruments on copyright and country parties.

countries committed to even higher copyright standards by joining trade agreements in multilateral and sub-regional forums, such as the TRIPS Agreement, the Andean Community's Decision 351, and NAFTA. Finally, with few exceptions, Latin American countries have adhered to both WIPO Internet Treaties, which set forth innovative commitments about copyright and digital technologies. Since none of these international instruments are self-executing, except Decision 351, Latin American countries were required to implement them into domestic law. The following chapter describes that implementation and draws lessons out of that process that will be useful for addressing the implementation of future commitments on online copyright.

4. CONCLUSIONS

The absence of scholarship on the history of copyright in Latin America has reinforced some misconceptions about its evolution, from those that assume a certain uniformity in the tradition of *droit d'auteur* and deny any peculiarity to the region, to those that assume Latin American countries have only recently paid attention to copyright. This chapter has confronted those misconceptions by briefly reviewing the evolution of copyright in the region.

Latin America has a long tradition of protecting copyright. As soon as countries established their independence, and after a brief subsistence on colonial law, they recognized copyright as a constitutional right and adopted special laws on the matter

that, despite limited productive capabilities, provided protections to local creators. The inherent limitations of local laws, however, encouraged countries to create a cross-border system for protecting copyright. Instead of acceding to the Berne Convention, which would have damaged the already-unfavorable terms of commercial trade with Europe by providing protection to European works, countries of the Americas undertook the construction of the Inter-American copyright system, by agreeing to the 1889 Montevideo Treaty and a series of later copyright treaties. The Inter-American copyright system provided more flexibility to countries to meet their needs and protect their creators beyond national borders, at least among the countries of the Americas. In fact, it was the most important mechanism for providing protection to authors in the region until the end of the 1980s, when Latin American countries acceded to the Berne Convention and subsequent international instruments on copyright.

This brief review demonstrates that Latin America not only has a long tradition of protecting copyright, but also has a clear idea about the relevance of achieving that protection beyond national borders. Countries refused to accede to the Berne Convention not because they lacked a copyright tradition or sought to persist in certain legal isolation, but because it was inconvenient in relative terms, since Latin America historically has had an unfavorable commercial trade on copyrighted matters. The following chapter reviews the implementation into domestic law by Latin American countries of the several international instruments on copyright matters that they have acceded during recent decades.

Chapter III

Implementing International Copyright

by Underestimating Public Interest[1]

In a transitional political environment, Latin American countries acceded to several international instruments on copyright, as was reviewed in the previous Chapter. To come fully into force, however, those instruments required transposition into domestic law. This chapter does not provide an exhaustive explanation of the leading instruments on copyright, but briefly reviews the implementation of some key provisions of three of those leading instruments into domestic law by Latin American countries. The first section reviews critical issues resulting from the implementation of the Berne Convention by said countries.[2] The second section describes key aspects of that process regarding the TRIPS Agreement,[3] while the third section does the same with respect to the WIPO Copyright

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1 This chapter benefits from an early presentation on the matter at the Workshop International Copyright System and Access to Education: Challenges, New Access Models and Prospects for New Principles, held at the Max Planck Institute for Intellectual Property and Competition Law (Münich, May 14-15, 2012).

2 Berne Convention for the Protection of Literary and Artistic Works (as revised at Paris, France, Jul. 24, 1971) [*hereinafter* Berne Convention – Paris Act]. *See generally* S. M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS (Butterworth, 1983); SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 (Kluwer, 1987); and, SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND (Oxford Univ. Press, 2nd ed., 2006).

3 Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [*hereinafter* TRIPS Agreement]. *See generally* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) and the INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (ICTSD), RESOURCE BOOK ON TRIPS AND DEVELOPMENT

Treaty.[4] The fourth section draws some lessons from aforementioned processes of transposition of said instruments into domestic laws, which may be useful for the future and ongoing implementation of new generations of international commitments on copyright especially tailored for online environments. Finally, the fifth section describes those new commitments on international copyright, most of them resulting from bilateral free trade agreements signed in recent years by Latin American countries. The actual and potential implementation of these later commitments and their effects on compliance with human rights standards, particularly regarding criminal and online enforcement, however, are analyzed in later chapters.

This chapter provides historical evidence that, when implementing international commitments on copyright, Latin American countries for the most have met their obligations on protecting right holders, but failed on paying proper consideration to public interests. In fact, these countries have exceeded their international obligations on intellectual property, but infringed on international human rights law, a matter analyzed

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(Cambridge University Press, 2005); Carlos Correa, *The TRIPS Agreement and Developing Countries, in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS (Macrory *et al.* eds., Springer, 2005); CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A COMMENTARY ON THE TRIPS AGREEMENT (Oxford Univ. Press, 2007); DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING, HISTORY AND ANALYSIS (Thomson Reuters, 3th ed., 2008); and, RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES (Carlos M. Correa ed., Edward Elgar, 2010). In Spanish, CARLOS CORREA, ACUERDO TRIPS: RÉGIMEN INTERNACIONAL DE LA PROPIEDAD INTELECTUAL (Ed. Ciudad Argentina, 1996).

4 World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) [*hereinafter* WCT]. *See generally* MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION, AND IMPLEMENTATION (Oxford Univ. Press, 2002); and, JORG REINBOTHE & SILKE VON LEWINSKI, WIPO TREATIES 1996 (Butterworths Lexis Nexis, 2002).

deeper in successive chapters of this dissertation. This trend raises concerns about the outcome of implementing a new series of obligations on criminal and online copyright enforcement that these countries must undertake during following years.

1. IMPLEMENTING THE BERNE CONVENTION

As was mentioned above, by the early 1990s, most Latin American countries had joined the Berne Convention but still needed to implement it into domestic law. The main changes required by Berne were related to abolishing formalities for achieving conventional protection, extending the copyright term of protection for at least the author's life plus fifty years, and adopting transitional provisions for works that have fallen into the public domain because of lack of compliance with formalities. The mechanism of enforcement adopted in the TRIPS Agreement and other sub-regional agreements (i.e., NAFTA and Andean Community) accelerated the actual implementation of the Berne Convention into domestic law. As a result, all Latin American countries came soon into compliance with the minimum standards of protection granted by the Berne Convention.[5]

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5 Isadora de Norden, *Introducción*, in DIAGNÓSTICO DEL DERECHO DE AUTOR EN AMÉRICA LATINA, at 10 (CERLALC, 2007) (stating that *"in the nineties, all Latin American countries became parties to the Berne Convention and achieved the modernization of their legislation according to the international standards for copyright protection"*). *See also* Ricardo Antequera, *El Acuerdo sobre los ADPIC y los Tratados de la OMPI sobre Derecho de Autor (TODA/WCO) y sobre Interpretación o Ejecución y Fonogramas (TOIEF/WPPT): La Adaptación de las Legislaciones Nacionales y la Experiencia en los Países Latinoamericanos,* WIPO Document OMPI-SGAE/DA/ASU/05/1, 26 de octubre de 2005, paras. 8-9 (noting the compliance of Latin American countries with the Berne Convention standards, but with two apparent exceptions: the requirement of formalities for achieving copyright protection by domestic authors in Argentina and the existence of some

With regard to formalities, Latin American countries do not require foreign authors to meet any paperwork or bureaucratic procedure for obtaining protection (i.e., for recognizing the rights granted by the Berne Convention). But Latin American countries have gone beyond that protection for foreign authors. Since granting copyright to foreign authors without formalities may imply a discrimination against its own nationals, if those formalities were required of the latter, Latin American countries also have extended automatic protection to their own national authors. As a result, no formality is required for achieving copyright protection in general by either national or foreign authors.[6] The law still may require some formalities, such as registration and deposit, for mere purpose of publicity and proof,[7] but in no case as a requirement for acknowledging copyright for authors.

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copyright exceptions and limitation that exceed the three-step-test in Cuba). *See* Keith E. Markus, *Intellectual Property Rights, in* TRADE RELATIONS BETWEEN COLOMBIA AND THE UNITED STATES, at 152-154 (Jeffrey J. Schott ed., Institute for International Economics, 2006) (referring the process of modernization of copyright law in Colombia associated to the implementation of Andean Community rules before than acceding the TRIPS Agreement).

6 *But see,* Ley No. 11.723 Régimen Legal de la Propiedad Intelectual [Legal Regime Intellectual Property Act], Boletín Oficial [B.O.] Sep. 28, 1933, as updated Dec. 2009 (Argentina) [*hereinafter* Copyright Act Argentina], art. 63 (providing that *"[t]he failure to register shall lead to the suspension of the right of the author until such time as the work is registered, and such rights shall be recovered by the actual act of registration, for the term and subject to the conditions appropriate, without prejudice to the validity of the reproductions, editions, performances and any other publication made during the period in which the work was not registered."*).

7 *See, e.g.,* Ley No. 17.336 sobre Propiedad Intelectual [Intellectual Property Act], Diario Oficial Oct. 2, 1970, as updated by Ley No. 20.435, Diario Oficial May 4, 2010 (Chile) [*hereinafter* Copyright Act Chile], arts. 8 (presuming author who appears in the register) and 72 bis (presuming right holder whose name appears in the copyright notice).

All Latin American countries comply with a minimum term of protection of author's life plus fifty years. As a matter of fact, all countries analyzed in depth for this dissertation well exceed that minimum: Argentina, Brazil, Chile, Costa Rica, and Peru each grant 70 years p.m.a.; Colombia grants 80 years p.m.a; and Mexico extends the term of protection for a hundred years p.m.a. Except Chile, which extended the term for complying with the free trade agreement signed with the U.S.,[8] it is not clear why other countries have gone beyond the minimum term required by Berne.[9] Some scholars have advanced the argument that this bows to the purpose of achieving reciprocity with the term of protection adopted by the European Union.[10] This does not explain, however, the even greater additional protection granted in Colombia and Mexico.

Some countries within the region have gone beyond even what is required by the Berne Convention by providing copyright protection in cases where it was not demanded. For example, Andean Community members have granted automatic restoration of copyright to works that had fallen into public domain for lacking compliance with

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8 Copyright Act Chile, art. 12 (setting forth a term of protection of author's life plus seventy years, after being modified in 2003).

9 *But see,* World Trade Organization, Trade Policy Review Body, Trade Policy Review Mexico, Report by the Secretariat – Revision, WT/TPR/S/195, 7 January 2008, at ix-x, and para. 296 (reporting that Mexican authorities justify the extension as a measure to prevent unfair competition, and calling the attention about the need for studies on the benefits of that extension, its diminishing effects on the public domain, and impact on creation).

10 *See* Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372, 27.12.2006, art. 1. *Cf. also,* DELIA LIPSZYC, COPYRIGHT AND NEIGHBOURING RIGHTS, at 256 (UNESCO Publishing, 1999) (arguing that recent extensions are *"consistent with the enhancement of average life expectancy and also with the fact that copyright gains in value if the length of protection is prolonged"*).

formalities required in previous legislation.[11] Similarly, those countries have adopted a broad concept of national treatment by granting copyright protection not only to nationals from country parties to the Berne Convention but any author, even if their country of origin is not a party to the convention or does not provide analogous protection to its nationals.[12] For some scholars these decisions are consistent with the author's rights as a human right.[13] From this perspective, creators cannot be deprived of protection because of previous bureaucratic requirements or their own country's negligence on providing copyright protection.[14]

Concerning the rights granted by law to right holders, as depositories of the continental tradition of authors' rights, Latin American countries grant both moral and

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11 ANDEAN COMMUNITY, Decisión No. 351 Régimen Común sobre Derecho de Autor y Derechos Conexos [Decision 351 Common Regime on Copyright and Neighboring Rights], adopted by the Commission of the Cartagena Agreement, on Dec. 17, 1993, Official Gazette of the Andean Community No. 145, Dec. 21, 1993 [*hereinafter* Decision 351], art. 60 (reestablishing copyright on works deprived of protection because of the omission of registration required by previous domestic laws).

12 Decision 351, *supra* note 11, art. 2. *See* César Parga, *Intellectual Property Rights, in* TOWARD FREE TRADE IN THE AMERICAS 218 (Jose Manuel Salazar Xirinachs & Maryse Robert eds., Brookings Institution Press, 2001) (recognizing that the Andean Community provides a broad concept of national treatment, without exceptions).

13 Ulrich Uchtenhagen, *El Derecho de Autor como Derecho Humano*, 3 REVISTA DE DERECHO PRIVADO 3, 12 (1998) (suggesting copyright protection should extend to any author, disregarding their nationality, because of being a human right, and reinforcing this argument with similar approaches taking place in Argentina, Peru, and Uruguay).

14 RICARDO ANTEQUERA & MARYSOL FERREYROS, EL NUEVO DERECHO DE AUTOR EN EL PERÚ, at 61-62 (Peru Reporting, 1996) (arguing that a broad national treatment was adopted by the Decision 351 because, copyright being a fundamental right, it would be unfair leaving its recognition subject to formal requirements, making the author a victim of the negligence of their country of origin); RICARDO ANTEQUERA, DERECHO DE AUTOR, at 934 and 1014 (Dirección Nacional del Derecho de Autor, 2nd ed., 1998) (arguing that the Decision *"remedies the unfairness"* of leaving unprotected works because they lack registration accord to the repealed law).

economic rights. No agreement exists within the region about the scope and features of moral rights, but in any case each Latin American country, as aforementioned,[15] grants to authors more moral rights than those required by the Berne Convention.[16] For instance, in addition to the rights of authorship and integrity, Mexico grants to authors the right to disclose the work; the right to prevent any action on the work that might detract from its merit or prejudice its author's reputation; the right to amend the work; the right to withdraw the work from the market; and the right to object to the attribution to the author of a work not created by him or her.[17]

Regarding economic rights, some Latin American countries provide a broader recognition to economic rights granting to right owners exclusive control on any use but those uses expressly excepted by law. In other terms, some countries in the region have extended exclusive rights to any potential use of a work, even if the law does not recognize it expressly. As a result, for example, even though the text of Colombian law does not grant an exclusive right of non-profit public lending of copyrighted material, it is understood that rights holders have that right and, therefore, even public libraries must

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15 *See supra* Chap. I, notes 116-120 and accompanying text.

16 Berne Convention – Paris Act, *supra* note 2, art. 6 bis (granting moral rights to authors on their authorship and the integrity of their works).

17 Ley Federal del Derecho de Autor [Federal Law on Copyright], Diario Oficial de la Federación, Dec. 24, 1996, as consolidated Jul. 2003 (Mexico) [*hereinafter* Copyright Act Mexico], art. 147; and, Reglamento de la Ley Federal del Derecho de Autor [Regulation of the Federal Law of Copyright], Diario Oficial de la Federación, May 22, 1998, as amended Sep. 14, 2005 (Mexico), art. 21. *See also* DAVID RANGEL MEDINA, DERECHO INTELECTUAL, at 130-137 (McGraw-Hill, 1998) (referring to several cases of enforcement of moral rights in Mexico, including the writer José Vasconcelos, the well-known painter Diego de Rivera, the architect Vicente Mendiola Quezada, and the sculptor Juan Olanguíbel).

pay royalties for public lending of books.[18] Similarly, several countries grant an exclusive right on exportation of works and, as a result, exhaustion of rights is limited to the domestic market.[19] This is the case even for exportations of copyrighted works among the Andean Community members, even though these countries compose a common market.[20]

Latin American countries implemented the protections to rights holders provided by the Berne Convention, but did not take advantage of the flexibilities available in it. For instance, there is a well-known linguistic diversity in the region. In Colombia alone, there are 64 native languages and several dialects.[21] One might have suggested that, when joining the Berne Convention, Latin American countries should have adopted the "ten-year regime" clause, which would facilitate translation of works into domestic languages by lapsing that exclusive right if no translation is available within a given term.[22] But no Latin American country takes advantage of the aforementioned "ten-year regime" clause.

Latin American countries also do not use the provisions of the Appendix of the Berne Convention that allow developing countries to issue compulsory licenses for

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18 Dirección Nacional de Derecho de Autor, Legal Opinion 1-2005-4826, Mar. 9, 2005 (rejecting the existence of any exception for lending books for libraries), Legal Opinion 2-2010-4800, Nov. 30, 2010 (rejecting the existence of any exception for lending audiovisual works for libraries) (Colom.).

19 *See infra* notes 105-108 and accompanying text.

20 Alberto Cerda, *Copyright Convergence in the Andean Community of Nations*, 20 TEX. INTELL. PROP. L.J. 429, 445-450 (2012) (reviewing exhaustion of copyright in Andean Community countries).

21 CENTRO REGIONAL PARA EL FOMENTO DEL LIBRO EN AMÉRICA LATINA, EL CARIBE, ESPAÑA Y PORTUGAL (CERLALC), EL ESPACIO IBEROAMERICANO DEL LIBRO 2010, at 76 (CERLALC, 2010).

22 Berne Convention – Paris Act, *supra* note 2, art. 30 (2) (b).

translation and reproduction of some works.[23] According to the WIPO's register, only Cuba currently is listed as using the mechanism,[24] but it actually does not use it, because its actual licensing scheme differs significantly from that one set forth by the Appendix.[25] Data shows, however, that six other countries in the region have implemented compulsory licenses for translation into their domestic laws, despite not having notified the WIPO. Some countries have adopted insubstantial provisions into their domestic laws that are too ambiguous and insufficient to become operable. This is true for El Salvador,[26] Honduras,[27]

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23 Alberto Cerda, *Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright*, 60 J. COPYRIGHT SOC'Y 581 (2013).

24 Declaration by the Republic of Cuba on Berne Notification No. 270, Berne Convention for the Protection of Literary and Artistic Works, Sept. 3, 2014, available at http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_270.html.

25 Ley No. 14 del Derecho de Autor de 1977, [Copyright Act], updated (Cuba), art. 37 (setting forth a compulsory license without payment for public utility reasons). *See also* Julio Fernández Bulté, *Preface* to LILLIAN ALVAREZ, EL DERECHO DE ¿AUTOR?: EL DEBATE DE HOY, at vii-xvi (Editorial Ciencias Sociales, 2006) (recalling the decision of the Cuban government to use compulsory licenses for overcoming the book shortage created by the American blockage to the island). *But see* Caridad del Carmen Valdés Diaz, *La Facultad de Reproducción*, in SELECCIÓN DE LECTURAS DE DERECHO DE AUTOR 105 (Marta Moreno Cruz *et al.* eds., F. Varela, 2000) (arguing that this exception exceeds the standards generally admitted on copyright and it is in disharmony with the Berne Convention, and reporting that WIPO has challenged that provision).

26 Decreto No. 604 de 1993 Ley de Fomento y Protección de la Propiedad Intelectual [Act for Promotion and Protection of Intellectual Property] (El Salvador), art. 77 (providing that the competent judge shall grant compulsory license for translation and reproduction as set forth in international conventions ratified by the country, in compliance with the requirements stated by said conventions).

27 Decreto 4-99-E, 2000, Ley del Derecho de Autor y de los Derechos Conexos [Copyright and Neighboring Rights Act] consolidated 2006 (Honduras), art. 122 (providing that the government, through the Administrative Office for Copyright and Neighboring Rights, could grant non-exclusive license for the reproduction and translation of foreign works according to the provisions of articles 2 and 3 of the Appendix of the Berne Convention).

and Panama.[28] There is no evidence that these countries have issued any actual compulsory licenses. Colombia has implemented these compulsory licenses into its domestic law,[29] but the copyright authority has failed to comply with required formalities before the WIPO and argues that the pertinent provisions are, therefore, no longer in force.[30] Recently, Colombia modified its copyright act and abrogated the provisions on compulsory licensing for translation from its domestic law,[31] although the modification never entered in force because the Supreme Court nullified the modifying law.[32] In any case, such license has ever

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28 Ley No.15 (De 8 de agosto de 1994) Ley sobre el Derecho de Autor y Derechos Conexos [Copyright and Neighboring Rights Act] (Panama), art. 84 (allowing the authority designed by decree to grant non-exclusive license to translate and reproduce foreign works for the purpose and in compliance with the requirements set forth by the Universal Copyright Convention and other international covenants ratified by Panama).

29 Ley 23 de 1982 sobre Derechos de Autor [Copyright Act], Diario Oficial, Feb. 19, 1982 (Colombia) [*hereinafter* Copyright Act Colombia], arts. 45-71 (setting forth a heavily regulated system of compulsory licenses for reproduction and translation of foreign works into Spanish). *See also,* MINISTERIO DE GOBIERNO (de Colombia), Los Derechos de Autor en Colombia (1982); and, ERNESTO RENGIFO GARCÍA, PROPIEDAD INTELECTUAL: EL MODERNO DERECHO DE AUTOR, at 178 *et seq.* (Universidad Externado de Colombia, 1996).

30 Dirección Nacional de Derecho de Autor, Legal Opinion 1-2010-7340, May 21, 2010 (arguing that provisions of the copyright law on compulsory licenses are inapplicable and unnecessary) (Colom.). *But see,* Bassem Awad, Moatasem El-Gheriani, & Perihan Abou Zeid, *Egypt, in* ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT, at 49 (Armstrong *et al.* eds., UCT Press, 2010) (supporting, in an analogous case, the efficacy of the Egyptian mechanism of compulsory licensing, despite its lack compliance with notification set forth in international copyright law).

31 Ley 1.520 por Medio de la cual se Implementan Compromisos Adquiridos por Virtud del "Acuerdo de Promoción Comercial", Suscrito entre la República de Colombia y los Estados Unidos de América y su "Protocolo Modificatorio, en el Marco de la Política de Comercio Exterior e Integración Económica", Diario Oficial 13 de abril de 2012 (Colom.) [*hereinafter* Ley Lleras 2.0].

32 Corte Constitucional de Colombia, Sentencia C-011/13, de 23 de enero de 2013, Demanda de inconstitucionalidad contra la Ley 1520 de 2012 por medio de la cual se implementan compromisos adquiridos por virtud del Acuerdo de Promoción Comercial suscrito entre la República de Colombia y los Estados Unidos de América y su Protocolo Modificatorio, en el marco de la política de comercio exterior e integración económica (ruling unconstitutional the bill known as Ley LLeras 2.0 because of infringing the legislative procedure during its approval by the Congress).

been issued in the country.[33] Finally, Mexico[34] implemented a compulsory licensing provision into domestic law,[35] but never applied it either.[36] In fact, its potential use may be more complicated because of additional requirements set forth by NAFTA on this matter.[37] Mexican authorities suspect that the usefulness of the mechanism is undermined by costly paperwork and the limited scope of the licensing system.[38]

International copyright law recognized that granting exclusive economic rights to right holders, independently of their extension, may raise problems given the virtual monopoly they confer to its owner. In order to prevent these problems, international law provides and allows domestic law to adopt certain exceptions and limitations that permit

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33 RENGIFO GARCÍA, *supra* note 29, at 178 (stating that the provisions that implement the Appendix of the Berne Convention into the Colombian domestic law lack any actual application).

34 Copyright Act Mexico, art. 147; and, Reglamento de la Ley Federal del Derecho de Autor [Regulation of the Federal Law of Copyright], Diario Oficial de la Federación, May 22, 1998, as amended Sep. 14, 2005 (Mexico), arts. 38-43. *See also* GABINO CASTREJON GARCÍA, TRATADO TEÓRICO-PRÁCTICO DE LOS DERECHOS DE AUTOR Y DE LA PROPIEDAD INTELECTUAL, at 102-105 (CCD, 2001); and, FERNANDO SERRANO MIGALLÓN, NUEVA LEY FEDERAL DEL DERECHO DE AUTOR, at 163 (Editorial Porrúa – UNAM, 1998) (referring that even when the copyright act adopts a compulsory licensing based on reasons of public interest, its regulation complies with International law.).

35 *See* SERRANO MIGALLÓN, *supra* note 34, at 161 (stating that the compulsory licensing mechanism based on public interest has been available "since the first codification of the independent Mexico".)

36 Telephone Interview with Marco A. Morales Montes, Legal Director, Instituto Nacional del Derecho de Autor (Mexico) (Apr. 4, 2011).

37 North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Dec. 17, 1992, 32 I.L.M. 605, reprinted in The NAFTA (United States Government Printing Office ed., 1993) [*hereinafter* NAFTA], art. 1705 (6) (introducing additional requirements to those set forth by the Appendix of the Berne Convention for issuing compulsory licenses for translation and reproduction of works in foreign languages).

38 *Supra* note 36.

the use of copyrighted work without authorization by the rights holder, and even without payment of copyright royalties. Although there is no worldwide agreed terminology for them,[39] these copyright exceptions and limitations attempt to meet a variety of needs, from those arising from the exercise of the freedom of expression and information, the dissemination of information, the right to privacy, and the enhancement of democracy.[40] Some examples include allowing the quotation of previous works in subsequent ones, permitting reproduction of works for private use, authorizing the performance of plays by schoolchildren, and allowing the inclusion of copyrighted material in certain public records.

Whether the list of specific uses allowed through exceptions and limitations must be open or closed is a matter of domestic legislative technique. While common law countries that follow the copyright tradition provide certain freedoms to the courts to make determinations on this matter, civil law countries that follow the *droit d'auteur* tradition tend to adopt those exceptions and limitations through their legislature.[41] This

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39 SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY, at 152-153 (Oxford University Press, 2002). *See also,* JORGEN BLOMQVIST, PRIMER ON INTERNATIONAL COPYRIGHT AND RELATED RIGHTS, at 157-158 (Edward Elgar, 2014).

40 MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW, at 22-34 (Kluwer Law International, 2004) (reviewing some of the different justifications for copyright exceptions and limitations).

41 VON LEWINSKI, *supra* note 39, 56-57; PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE, at 372 (Oxford University Press, 2013).

dichotomy, which arose during the nineteenth century,[42] has softened over the years, as some civil law countries have adopted open clauses, while common law ones have provided catalogues of exceptions and limitations defined by legislative act.[43] What is relevant from an international law perspective, however, is the fact that copyright exceptions and limitations are subject to restrictions. Copyright exceptions and limitations must be limited to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. These restrictions first were set forth by the Berne Convention, which explains why they are known as the Berne three-step test.[44] They have been also incorporated in subsequent leading international instruments on copyright.[45]

Regarding copyright exceptions and limitations, Latin American countries have been highly conservative in including them into domestic law. Exceptions and limitations are highly similar in several countries in the region because they basically followed those drafted in the Tunis Model Law on Copyright,[46] drafted by the UNESCO and the WIPO in the early 1970s, plus some narrow exceptions available in Spanish law.[47] As a result of

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42 PETER BALDWIN, THE COPY-RIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE, at 82-162 (Princeton Univ. Press, 2014).

43 Martin Senftleben, *Bridging the Differences between Copyright and Legal Traditions: The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y 521 (2010).

44 Berne Convention – Paris Act, *supra* note 2, art. 9 (2).

45 TRIPS Agreement, *supra* note 3, art. 13; and, WCT, *supra* note 4, art. 10.

46 UNESCO - WIPO, Tunis Model Law on Copyright for Developing Countries (1976), available at portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf (last visited May 1, 2012).

47 Antequera, *supra* note 5, para. 50.

this, several public interest needs are not met in copyright law.[48] For instance, even when, in 2009, several Latin American countries pushed for an international treaty that grants access to copyrighted works to people with disabilities,[49] which ultimately crystalized in the 2013 Marrakesh Treaty,[50] their own domestic law did not allow that. This shameful situation has changed recently: Argentina and Chile have just provided a special exception for these people;[51] Brazil and Peru modified their domestic law in order to adopt exceptions, but so narrowly drafted that they only benefit visually disabled persons;[52]

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48 *See, e.g.,* Maria do Carmo Ferreira Dias, J. Carlos Fernández Molina, & Maria Manuel Borges, *As Excepções aos Direitos de Autor em Benefício das Bibliotecas: Análise Comparativa entre a União Européia e a América Latina*, 16 PERSPECTIVAS EM CIÊNCIA DA INFORMAÇÃO 5, 17-18 (2011) (comparing the regime of copyright exceptions for libraries in the European Union and Latin America, and concluding there is a prominent asymmetry and deficiency in the latter compared with the former). *See also,* Caridad del Carmen Valdés Díaz, *Los Límites al Derecho de Autor a Favor de Bibliotecas en los Países Latinoamericanos. Especial Referencia a Cuba,* in ESTUDIO DE LOS LÍMITES A LOS DERECHOS DE AUTOR DESDE UNA PERSPECTIVA DE DERECHO COMPARADO: REPRODUCCIÓN, PRÉSTAMO Y COMUNICACIÓN PÚBLICA EN BIBLIOTECAS, MUSEOS, ARCHIVOS Y OTRAS INSTITUCIONES CULTURALES 150-156 (María Serrano Fernández ed., Ed. Reus, 2017) (noting that several Latin American countries do not provide exceptions for libraries in their copyright law and those that do provide said exceptions lack legal harmonization); and, Patricia Díaz Charquero, *Situación de las Excepciones y Limitaciones a los Derechos de Autor en los Países del MERCOSUR desde la Perspectiva del Acceso al Conocimiento y a la Cultura*, 13ª JORNADA SOBRE LA BIBLIOTECA DIGITAL UNIVERSITARIA (Nov. 5-6, 2015) (noting the lack of copyright exceptions to assure access to knowledge among countries are members of the MERCOSUR), http://bib.fcien.edu.uy/jbdu2015/?page_id=581

49 Iheanyi Samuel Nwankwo, *Proposed WIPO Treaty for Improved Access for Blind, Visually Impaired, and Other Reading Disabled Persons*, 3 J. INTELL. PROP., INFO. TECH. & ELEC. COM. L. 203, 205 (2011) (reviewing historical background of the proposal).

50 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, celebrated in Marrakesh, June 17 to 28, 2013. WIPO Document VIP/DC/8 Rev.

51 Copyright Act Argentina, art. 36; and, Copyright Act Chile, art. 71 C.

52 Lei No. 9.610 de 19 de Fevereiro de 1998: Altera, atualiza e consolida a legislação sobre direitos autorais [Act that Changes, Updates and Consolidates the Law on Copyright] (Brazil) [*hereinafter* Copyright Act Brazil], art. 46 (1) (d); and, Decreto Legislativo 822, Ley sobre el Derecho de Autor [Copyright Act], Diario Oficial El Peruano, April 24, 1996 (Peru) [*hereinafter*

Colombia, Costa Rica, and Mexico have no analogous exceptions.[53] Of course, this does not mean that the aforementioned treaty was unnecessary; in fact, it is called to play a significant role in overcoming restrictions to the international flow of works in accessible format for people with disabilities.

The regime on copyright exceptions and limitations is particularly weak in Latin American countries for several reasons. First, Latin American countries do not have fair use and, therefore, exceptions cannot be granted by courts but instead only by the legislature. This creates a notable stagnation because the legislative process is, generally speaking, extremely time consuming. As a result, new needs do not get timely attention from the legislature, which explains the lack of an adequate regime of exceptions for software development, e-learning, and the Internet.[54] Second, the list of exceptions recognized by the legislature in Latin American countries are narrower than those adopted in the U.S. and the European Union. In fact, according to a study on this matter by

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Copyright Act Peru], art. 43 g), as amended by Ley 27.861 que exceptúa el pago de derechos de autor por la reproducción de obras para invidentes [Law that excepts copyright royalty payment for reproducing works for blind people].

53 Colombia did attempt to remediate this shameful omission by modifying its copyright act, but the modifying law was, eventually, nullified by its Supreme Court. *See supra* notes 31 and 32.

54 *See generally,* Ricardo Antequera*, Las Limitaciones y Excepciones al Derecho de Autor y los Derechos Conexos en el Entorno Digital*, WIPO Document OMPI-SGAE/DA/ASU/05/2, 26 de octubre de 2005; and, Juan Carlos Monroy Rodríguez, *Study on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities in Latin America and the Caribbean*, WIPO Document SCCR/19/4, Sept. 30, 2009 [*hereinafter* Monroy Rodríguez, *Study*]. *See also,* Juan Carlos Monroy Rodríguez, *La Industria Colombiana en el Mercado de los Nuevos Usos Digitales*, 9 REVISTA PROPIEDAD INMATERIAL 25, 28-33 (2006) (noting the lack of exceptions for online environment and the potential infringement of the three-step test when applying exceptions designed for analog to digital content in both Colombia and the Andean Community).

Consumers International, at least with regard to copyright, Latin America contains the worst rated countries in which consumers are worst served.[55] Third, several countries within the region, instead of taking advantage of copyright exceptions and limitations, have introduced a system of payment of royalties for copies, even if these copies are made for mere personal use.[56]

Despite lacking a fair use exception, Latin American courts in practice applied one in refusing to enforce copyright law in some ridiculous situations created by the lack of exceptions. A few examples would illustrate this point. In *Societe Des Auteurs v. Museo Nacional de Bellas Artes*, for instance, an Argentinean court rejected the plaintiff's argument that a copyright holder has exclusive rights to the exposition by a museum of an original painting by Chagall, because *"it was unreasonable that a museum would acquire artworks for not exhibiting them"*.[57] Similarly, the Supreme Court of Chile rejected criminal enforcement against publishers who published speeches by the 1971 Nobel Prize winner Pablo Neruda, delivered as a Senator within the National Congress, because that would undermine democratic deliberation. In a brief final judgment, the Supreme Court stated that the

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55 *See* CONSUMERS INTERNATIONAL, IP WATCH LIST 2012, available at a2knetwork.org/watchlist (last visited May 1, 2012) (ranking countries according to the fairness of their copyright law and enforcement practices regarding consumers).

56 Antequera, *supra* note 54, paras. 13-26, 30, 56 (justifying the adoption of royalties for private copies, referring to its implementation in several Latin American countries, including a limited recognition in Colombia and Peru, and encouraging the use of compulsory licenses rather than exceptions).

57 Cámara Nacional de Apelaciones en lo Civil de la Capital Federal, 14/08/2006, "Societe Des Auteurs Dans Les Arts Graphiques et Plastiques v. Asociación Amigos del Museo Nacional de Bellas Artes y otros/propiedad intelectual Ley 11.723" (Arg.).

mentioned *"speeches were related with the exercise of a political position… that cannot originate property rights because they are part of the republican debate that cannot be prevented from being known and disseminated"*.[58] And also, similarly, the Supreme Court of Justice of Colombia refused to punish a defendant for making copies of copyrighted material for a nominal fee on behalf of the legitimate content owners, that is, for assisting them to exercise the copyright exception of copies for personal use, despite lacking an adequate copyright exception in the defendant's favor.[59] Although the aforementioned verdicts seem reasonable, their effects are limited because, in civil law countries like Latin American ones, court decisions lack *stare decisis* (i.e., they are not legally binding in future cases). Therefore, for legal certainty, analogous situations still require legislative intervention.[60]

Two legal doctrines have diminished further the scope of copyright exceptions and limitations in Latin America: the comprehensive protection for exclusive economic rights and the so-called *"double three-step test"*.

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58 Corte Suprema de Chile, 31/10/2001, "Fundación Pablo Neruda v. Hernan Aguirre Mac-Kay y Leonidas Aguirre Silva" (Chile).

59 Corte Suprema de Justicia de Colombia, 30/04/2008, "Against Guillermo Luis Vélez Murillo" (Colom.). *But see* Carlos Fernández Ballesteros, *El Nuevo Contexto del Derecho del Autor en el Siglo XXI*, 1 REVISTA JURÍDICA DE PROPIEDAD INTELECTUAL 107, 127-130 (2009) (criticizing the decision of the Colombian Supreme Court for failing to protect authors' rights by introducing legal uncertainty around criminal enforcement of copyright).

60 Alberto Cerda, *Una Excepción a los Derechos Autorales para la Comunicación Pública de Obras por Pequeñas y Medianas Empresas* ["A Copyright Exception for Public Communication by Small and Medium Businesses"], 40 REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DE VALPARAÍSO 75, 83-92 (2013) (arguing for a legal amendment into the copyright act to overcome divergent courts' criteria on whether small businesses are excepted from copyright payment for purposes of turning on television and radio on their premises).

According to the comprehensive protection doctrine, copyright protection of economic rights is not limited to some uses of works but to any use. Therefore, those rights listed by the copyright act are only part of the potential control that law grants to right holders on their works. In other words, exclusive rights granted by law are not limited and, in fact, rights holders have exclusive control over any potential use of their works. This doctrine has explicit support in copyright statutes in several countries, including Brazil,[61] Costa Rica,[62] and Peru,[63] among others.[64] In Colombia, the comprehensive

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61 Copyright Act Brazil, art. 29 (providing that right holders have exclusive rights on *"any kind of use,"* listing some of them, and opening the list by granting exclusive rights on *"any other form of use that exists at present or might be devised in the future"*). *See also* Manoel J. Pereira dos Santos, *Execução Pública Musical na Internet: Rádios e TVs Virtuais*, 103 REVISTA DA ABPI 51, 52 (2009) (supporting a comprehensive protection of economic rights in the context of analyzing if the right to public performances and communications covers making works available to the public online).

62 Ley 6683, Ley de Derechos de Autor y Derechos Conexos [Copyright Act], La Gaceta, Nov. 4, 1982 (Costa Rica) [*hereinafter* Copyright Act Costa Rica], art. 16.1 j) (granting exclusive rights on *"any other form of use, processing or system known or for knowing"*).

63 Copyright Act Peru, arts. 30 (granting to right holders *"right to exploitation of works in any form or procedure"*) and 31 f) (providing that economic rights include *"any other form of use of works not excepted by law"* and qualifying the list of rights recognized by the act as *"merely illustrative and not restrictive"*). *See also* ANTEQUERA & FERREYROS, *supra* note 14, at 127-128, 155, and 177 (supporting a comprehensive scope for copyright based on articles 31 (f), 37, and 50 of the Peruvian Copyright Act).

64 In Ecuador, *see* Ley de Propiedad Intelectual [Intellectual Property Act] arts. 19, 20, and 27 (Ecuador) [hereinafter Copyright Act Ecuador] (setting forth a broad exclusive right for exploiting works). In Venezuela, *see* Ricardo Antequera, *El Derecho de Autor y los Derechos Conexos en la Legislación Venezolana, in* LEGISLACIÓN SOBRE DERECHO DE AUTOR Y DERECHOS CONEXOS 25-28 (Ricardo Antequera & Gineli Gómez Muci eds., Ed. Jurídica Venezolana, 1999) (supporting a comprehensive scope for copyright based on articles 23 of the Venezuelan Copyright Act and 18 of its Regulation). This comprehensive protection for economic rights has been also articulated in the Andean Community by its Tribunal of Justice. *See* Andean Community Tribunal of Justice, Case 24-IP-98, at para. 3 (Sept. 25, 1998) (ruling in a case on copyright protection of computer programs that *"[the copyright] economic rights are unlimited, therefore, right holder is allowed to authorize any form of exploitation of the computer program"*). *See also* Antequera, *supra* note 54, paras. 3-4 (supporting that theory and its application in several countries within the region); Antequera, *supra* note 5, para. 151 (going beyond by referring that the comprehensive protection of economic rights theory prevails in almost all the countries within the region); Ricardo Antequera, *Los Derechos Intelectuales ante el Desafío Tecnológico*

protection doctrine lacks support in the text of the law, but it is backed by the interpretation of both the copyright authority and the Constitutional Court.[65] In Mexico, the acceptance of this doctrine is debatable.[66] In Chile, this doctrine was adopted by the

¿Adaptación o Cambio?, in 1 III CONGRESO IBEROAMERICANO SOBRE DERECHO DE AUTOR Y DERECHOS CONEXOS 81, at 90-93 (1997) (arguing comprehensive exclusive rights); Ricardo Antequera, *La Propiedad Intelectual en sus Diversas Facetas, in* 1 CONGRESO INTERNACIONAL PROPIEDAD INTELECTUAL, DERECHO DE AUTOR Y PROPIEDAD INDUSTRIAL 16, at 26-27 (Universidad de Margarita, 2004); and, DELIA LIPSZYC, DERECHO DE AUTOR Y DERECHOS CONEXOS, at 176 (Ed. UNESCO/CERLALC/ZAVALÍA, 1993).

65 Constitutional Court of Colombia, *In re Maria Teresa Garcés Lloreda*, Judgment C-276/96 (Jun. 20, 1996) (Colom.) (ruling that *"The economic rights of authors, in the civil law tradition, are as many as manners of using works, and they do not have any exception other than those set forth by law, because exceptions must be specific and restricted"*); Dirección Nacional de Derecho de Autor, Legal Opinion 1-2006-4988 (Apr. 1, 2006) (supporting a comprehensive protection of economic right); and, Dirección Nacional de Derecho de Autor, Legal Opinion 1-2008-8704 (Apr. 29, 2008) (reiterating that copyright holders have a comprehensive protection for economic rights) (Colom.).

66 *See* Copyright Act Mexico, art. 27 (granting exclusive rights on "*any public use"* of works). *See also,* SERRANO MIGALLÓN, *supra* note 34, at 71 (stating that *"author's economic rights are as much as manners of using a work, not only at the time of its creation but during the whole time it is in the private domain"*). *But see* DAVID RANGEL MEDINA, DERECHO INTELECTUAL, at 149-151 (McGraw-Hill, 1998) (arguing against the reception of the doctrine on comprehensive protection of economic rights in Mexican law based on the existence of several uses of copyrighted material that are not under control of right holders).

copyright law,[67] until its recent revocation in 2010.[68] In Argentina, instead, this doctrine does not have any legal ground, other than in some maximalist scholars.[69]

The comprehensive protection doctrine creates serious challenges for balancing competing private and public interests in the copyright regulation. On one hand, this doctrine extends right holders' exclusive rights beyond a list of given uses of works. On the other, it restricts exceptions and limitations because, in principle, any potential use of works is granted as an exclusive right to authors. Additionally, in spite of some scholars' beliefs that this doctrine is consistent with the European tradition of "*droit d' auteur*,"[70] it

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67 Pablo RUIZ-TAGLE, PROPIEDAD INTELECTUAL Y CONTRATOS, at 371 (Editorial Jurídica, 2001) (supporting exclusive rights on any usage of copyrighted material); and, ELISA WALKER ECHEÑIQUE, RESPONSABILIDAD EXTRACONTRACTUAL EN EL DERECHO DE AUTOR: REFERENCIAS ESPECÍFICAS A LAS REDES DIGITALES, at 79 (unpublished Bachelor in Law thesis, University of Chile, 2007) (supporting that economic exclusive rights would be unlimited under Chilean law).

68 Daniel Álvarez, The Quest for a Normative Balance: The Recent Reforms to Chile's Copyright Law, 12 INTL. CTR. TRADE SUST. DEV., POLICY BR. 1, at 7-8 (2011); and, Alberto Cerda, *Chile*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: INTELLECTUAL PROPERTY LAW, at 63-64 (Hendrik Vanhees ed., Kluwer Law International, 2015). *But see,* Santiago Schuster and Jorge Mahú, *Chile*, in BALANCING COPYRIGHT: A SURVEY OF NATIONAL APPROACHES, at 238-239 (R. Hilty and S. Nérisson eds., Springer, 2012); and, ELISA WALKER ECHEÑIQUE, MANUAL DE PROPIEDAD INTELECTUAL, at 159 (Legal Publishing, 2014).

69 Guillermo Cabanellas, *Argentina*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: INTELLECTUAL PROPERTY LAW, at 59-60 (Hendrik Vanhees ed., Kluwer Law International, 2012) (rejecting an open list of exclusive economic rights). *But see,* DELIA LIPSZYC, DERECHOS DE AUTOR Y DERECHOS CONEXOS, at 175 (Ed. UNESCO, CERLALC, Zavalia, 1993) (arguing that exclusive economic rights are not *numerus clausus* and that copyright laws list them for mere illustrative purposes).

70 Ricardo Antequera, *El Derecho de Autor y los Derechos Conexos en el ALCA: Una Visión Panorámica de las Negociaciones,* in PERSPECTIVAS AUTORAIS DO DIREITO DA PROPRIEDADE INTELECTUAL, at 8, 23, and 24 (Helenara Braga Avancini & Milton Lucídio Leão Barcellos eds., EdiPUCRS, 2009) (supporting that adopting comprehensive economic rights and limited exceptions is a "triumph" of civil law tradition in the failed negotiations of the Free Trade Agreement of the Americas). *See also* Ana María Pacón, *La Protección del Derecho de Autor en la Comunidad Andina, in* DERECHO COMUNITARIO ANDINO, at 302 (Allan-Randolph Brewer-

also obstructs the international harmonization of copyright, even with other countries that follow the continental copyright tradition but lack the comprehensive protection approach.

The double three-step test is a doctrine that sets forth judicial restrictions on copyright limitations and exceptions already established by law. This doctrine, which some Latin American countries have incorporated into their domestic law,[71] seems to come from Spain, where it has explicit recognition in several provisions of the copyright law.[72] According to this doctrine, there are two three-step tests, one in international law and the other in domestic. The first, which is set by the Berne Convention and subsequent

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Carías ed., Fondo Editorial Pontificia Universidad Católica del Perú, 2003). *But see,* VON LEWINSKI, *supra* note 39, at 54-55 (noticing that *"many laws of the author's rights system provide for a broad right of exploitation,"* but not all of them do so).

71 *See* Copyright Act Mexico, art. 148 (adopting the double test, but only with respect to not conflicting with normal exploitation of the work); Copyright Act Peru, arts. 2 and 50 (providing that the exception must be interpreted restrictively and cannot apply to cases against fair dealing, thus is, cannot conflict with normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author or right holder). In the case of Chile, the double three-step test was abolished by the 2010 copyright reform. *See also,* Copyright Act Brazil, art. 46 VIII (adopting the double test for copyright exceptions to reproduction rights); and, Pedro Mizukami, Ronaldo Lemos, Bruno Magrani & Carlos Affonso Pereira de Souza, *Exceptions and Limitations to Copyright in Brazil: A Call for Reform, in* ACCESS TO KNOWLEDGE IN BRAZIL, at 48-50 (Lea Shaver ed., Bloomsbury, 2010) (stating that the three-step test was not itself turned into into law in Brazil, but traces of it exist in article 46 VIII).

72 Juan José Marín, *Comment, El Test de las Tres Etapas y la Comunicación Pública*, 1 REVISTA DE INTERNET, DERECHO Y POLÍTICA 21, 28 (2005) (referring to a *"overdoses of the three-step-test"* in the Spanish law that derives from the "*euphoria*" around that test at the time of its adoption into domestic law). *See also, Stéphanie Carre, France,* in BALANCING COPYRIGHT: A SURVEY OF NATIONAL APPROACHES, at 397-398 (Reto M. Hilty & Sylvie Nérisson eds., Springer, 2012) (reporting on a similar 2006 modification to French copyright law that subjects the application to each exception already recognized by law to a double additional test that reiterates two elements of the Berne three-step test, these are, that use cannot conflict with normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author).

international instruments on copyright,[73] contains an obligation to states that limits their freedom when drafting copyright exceptions and limitations. Additionally, domestic law sets forth the second test, in order to allow judicial interpretation of exceptions and limitations already adopted by law.[74] Through this mechanism, courts are empowered to prevent misuse and abuse of copyright exceptions,[75] by reviewing that the actual use of one of them does not infringe the three-step test. In other words, this doctrine has the reverse effect of the fair use doctrine in U.S. law, by allowing judges to reduce the scope of an available copyright exception in a given case.[76] This legal technicality undermines the whole purpose of having legal recognition for exceptions and limitations, since their usage is susceptible to judicial review.[77]

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73 Berne Convention – Paris Act, *supra* note 2, art. 9; TRIPS Agreement, *supra* note 3, art. 13; and, WCT, *supra* note 4, art. 10.

74 Antequera, *supra* note 54, paras. 38-42 (stating that the three-step test sets forth limits not only for *"legislators when adopting domestic law, but also for other authorities when applying that law"*).

75 Agustín González, *Comment, El Test de las Tres Etapas y la Comunicación Pública*, 1 REVISTA DE INTERNET, DERECHO Y POLÍTICA 21, 34 (2005) (explaining that this second test can be use for limiting copyright limitations).

76 Marín, *supra* note 72, at 23-28 (arguing that the double three-step test prevents into domestic law that Spain faces a questioning similar to that of the § 110(5) of the U.S. Copyright Act, that releases restaurants and other businesses that play music for the public from paying copyright royalties). *But see,* Ramón Casas Vallés, *Los Límites al Derecho de Autor*, 1 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 42, 58-59 (2007) (explaining that the double-three-step test is a rule promoted by right holders that, however, may become a double-edged sword, if courts use it for creating new exceptions, which seems very unlikely).

77 *See* Alvarez, *supra* note 68, 7-8 (referring to the then-in-force provision of the Chilean copyright act that established *"an extremely unfair test against the very few exceptions authorized by the Law, as it required the courts to perform a double test before applying any exception, which far exceeded the scope of international obligations on the matter."*).

The double three-step test doctrine raises several objections. From an international law perspective, it misunderstands the actual scope of the obligation set forth by the Berne Convention and subsequent instruments on copyright when adopting the Berne three-step test as a restriction for legislative creation of copyright exceptions and limitations, rather than a standard for judicial review of actual use of said exceptions and limitations by their beneficiaries. It creates additional challenges for international harmonization of copyright and adequate functioning of international markets regarding good and services that take advantage of copyright exceptions and limitations recognized by laws (e.g., cross-border publishing of books, and foreign provision of online services of software development). At the domestic level, the double three-step test doctrine undermines the efficacy of legislative process and decision-making, while raising legal uncertainty among potential users of exceptions and limitations. Ultimately, it inhibits the actual use of those exceptions and limitations recognized by law, but vulnerable to judicial challenge and potential liability.[78]

In sum, when Latin American countries implemented into domestic law the commitments required by the Berne Convention, they protected copyright but did not take advantage of flexibilities. On one hand, countries provide automatic protection to copyright for a longer term than that required by the mentioned convention and, in general, they have recognized a broader category of both moral and economic rights than those set forth by said convention. On the other, countries took little to no advantage

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[78] SENFTLEBEN**,** *supra* note 40, at 118-124 (referring to the three-step test as an additional safeguard regarding exceptions adopted by national legislators).

from flexibilities allowed by the Berne Convention, none of the countries have implemented either lapsing of translating rights or the compulsory licenses provided by its Appendix, and they have adopted a limited number and narrowly interpreted regime for copyright limitations and exceptions.

2. IMPLEMENTING THE TRIPS AGREEMENT

The TRIPS Agreement represented a new direction in the regulation of copyright in Latin America. The Agreement incorporated the Berne Convention into its provisions except for moral rights.[79] It also stretched intellectual property rights. In this regard, some key distinctive substantive provisions on copyright extended protection to computer programs and data compilations,[80] granted exclusive rights on the rental of at least computer programs and cinematographic works,[81] and provided protection to neighboring rights.[82] The TRIPS Agreement also improved actual enforcement of intellectual property by establishing an international dispute settlement procedure,[83] and by strengthening domestic enforcement with specific requirements on civil, administrative, criminal, and customs procedures.[84] In regard to flexibilities, the TRIPS Agreement preserved those

79 TRIPS Agreement, *supra* note 3, art. 9.

80 TRIPS Agreement, *supra* note 3, art. 10.

81 TRIPS Agreement, *supra* note 3, art. 11.

82 TRIPS Agreement, *supra* note 3, art. 14.

83 TRIPS Agreement, *supra* note 3, arts. 63-64.

84 TRIPS Agreement, *supra* note 3, arts. 41-61.

available in the Berne Convention[85] and, because of the lack of consensus among parties,[86] left the decision on exhaustion of intellectual property rights to domestic law.[87] Latin American countries have also implemented those new commitments into their national copyright laws.

Latin American countries have incorporated into their domestic laws the additional protection provided by the TRIPS Agreement to right holders. All countries extended copyright protection to computer programs (software) and compilation of data (data base),[88] and granted exclusive rights on the rental of computer programs and cinematographic works.[89] Even when not required by the TRIPS Agreement, Latin

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85 Note that, unlike the Berne Convention, however, the three-step test in the TRIPS Agreement is built around right holders instead of authors. *Compare* Berne Convention – Paris Act, *supra* note 2, art. 9 (2) *with* TRIPS Agreement, *supra* note 3, art. 13.

86 UNCTAD and ICTSD, *supra* note 3, at 104-107 (analyzing competing interpretations of article 6, and concluding that the TRIPS Agreements do not preclude WTO members from adopting their own policies and rules on exhaustion). *See also* A HANDBOOK ON THE WTO TRIPS AGREEMENT (Antony Taubman, Hannu Wager, & Jayashree Watal eds., Cambridge Univ. Press, 2012), at 18-20, 182.

87 TRIPS Agreement, *supra* note 3, art. 6.

88 *See* Antequera, *supra* note 5, paras. 13-24 (arguing that by protecting software and data base, the TRIPS Agreement only clarifies the Berne Convention, which explains why several countries already protected them through copyright). *See also,* Carlos E. Delpiazzo, *Evolución y Perspectiva del Tratamiento Jurídico del Software en América Latina*, 12 INFORMÁTICA Y DERECHO 915, 922 (1995) (concluding that, in spite of their uneven level of progress, all Latin American countries provided copyright protection to software before the adoption of the TRIPS Agreement). *But see,* EDGARDO BUSCAGLIA & CLARISA LONG, U.S. FOREIGN POLICY AND INTELLECTUAL PROPERTY RIGHTS IN LATIN AMERICA 14 (Hoover Institution – Stanford University, 1997) (stating that Latin American countries did not provide intellectual property protection on software, although based on only secondary sources of research).

89 Antequera, *supra* note 5, paras. 25-31 (noting that several Latin American countries already had granted exclusive right on rentals, while other did after becoming parties to the TRIPS Agreement).

American countries have made an exception to their continental tradition on authors' rights, by adopting specific provisions on work-for-hire for computer programs and cinematographic works. According to that tradition, actual creators of works deserve copyright protection, not those who commissioned the works,[90] but that rule excepts the creation of software and movies, in which producers rather than authors have the exclusive rights.

The matter in which Latin American countries have made most significant adjustments regarding the implementation of the TRIPS Agreement is its rules on enforcement through criminal procedures and sanctions. The TRIPS Agreement requires countries to provide for criminal procedures and penalties to be applied at least against cases of willful copyright piracy on a commercial scale.[91] Latin American countries have gone far and beyond that floor, by criminalizing almost any copyright infringement, even if committed by mere negligence and without commercial purpose. Regarding penalties, most countries have imposed disproportional punishment on copyright infringement, compared with both those imposed by developed countries and those inflicted against serious crime by Latin American countries. Criminalization and punishment of copyright infringements are far from being mere law in the books in the region. Looking at the numbers of prosecutions and convictions, one may wonder about the actual efficacy of this kind of enforcement for dissuading infringement in developing countries. It must be

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90 *See supra* Chap. I, note 94 and accompanying text.

91 TRIPS Agreement, *supra* note 3, art. 61.

said that, in addition to exceeding their commitment on criminal enforcement set by international copyright law, Latin American countries have infringed on their commitments to international human rights law. Overcriminalization and overpunishment of copyright infringements and their impact on human rights are analyzed in Chapters Four and Five.

Latin American countries have behaved conservatively when implementing adequate exceptions and limitations in relation to computer programs.[92] Most of them have adopted express exceptions allowing back-up copies (i.e., reproduction of software for purpose of security). Most of them have set forth charge copies (i.e., reproduction for purpose of installing system software into a computer), or a narrow exception permitting the adaptation of software, when it is essential for making software functional in a given computer.[93] However, unlike the United States and the European Union,[94] most Latin American countries do not have an exception covering reverse engineering of software in

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92 *See generally*, ALBERTO CERDA & CLAUDIO RUIZ, INTER-AM. DEV. BANK, INFORME SOBRE POLÍTICAS DE PROPIEDAD INTELECTUAL DEL BANCO INTERAMERICANO DE DESARROLLO at 32-48 (2007) (describing regional and domestic legal frameworks on copyright protection for software in Latin America).

93 *See* CERDA & RUIZ, *supra* note 92, at 35-46 (reviewing applicable domestic law on the matter). *But see,* Copyright Act Argentina, art. 9 (granting only an exception for back-up copies of software), and Copyright Act Mexico, art. 106 (setting forth only copyright exceptions for charge and back-up copies of software).

94 For the European Union, *see* Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009, art. 6. For the United States, *see* Sega Enterprises Ltd. v. Accolade, Inc. 977 F.2d 1510 C.A.9 (Cal.), 1992. October 20, 1992.

order to achieve the interoperability of independent programs.[95] In fact, Mexico prohibits reverse engineering by granting an exclusive right of decompiling software to right holders.[96] Currently, only Chile and Peru have an exception authorizing reverse engineering for purpose of developing an interoperable program.[97] Similarly, few countries have implemented into their domestic laws specific exceptions to rental rights allowed by the TRIPS Agreement that except *"rentals where the program itself is not the essential object of the rental."*[98] So far, only Brazil, Chile, Mexico, and Peru have implemented such an exception.[99]

As was mentioned above, the TRIPS Agreement leaves the decision about exhaustion of intellectual property to domestic law. Exhaustion of rights, also known as the first-sale doctrine in the United States,[100] is a limitation to the exclusive right of

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95 *See* ANTEQUERA & FERREYROS, *supra* note 14, at 234-236 (arguing that reverse engineering activities requires a copyright exception in domestic law). *But see*, Agustín Grijalva, *Copyright & the Internet, in* THE INTERNET AND SOCIETY IN LATIN AMERICA AND THE CARIBBEAN, at 324-325 (Marcelo Bonilla & Gilles Cliché eds., International Development Research Center, 2004) (assuring that reverse engineering is "compatible" with the fundamental principles of copyright and, therefore, it would be permitted at least in the Andean Community).

96 Copyright Act Mexico, art. 106 IV.

97 Copyright Act Chile, art. 71 Ñ b); and, Copyright Act Peru, art. 76.

98 TRIPS Agreement, *supra* note 3, art. 11.

99 Lei N.° 9.609 de 19 de Fevereiro de 1998: Lei do Software [Software Act], Diario Oficial da União Feb. 20, 1998 (Brazil) [*hereinafter* Software Act Braz.], art. 2 § 6; Copyright Act Chile, art. 71 H; Copyright Act Mexico, art. 104; and, Copyright Act Peru, art. 72.

100 17 U.S.C. § 109 (setting forth limitation on exclusive right related to distribution of copyrighted work). *See* WILLIAM F. PATRY, 4 PATRY ON COPYRIGHT (Thomson Reuters, 2012), §13:18 – §13:20 (reporting on the judicial origin of the first sale doctrine and its later codification into the copyright act). *See also,* MELVILLE B. NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT (Matthew Bender, 2011), §8.12[B][1][a] (arguing that, technically, first sale should be "first disposition by which title passes", since it applies not only to sales but any distribution).

distribution. Thus it is an exception to the monopoly of the copyright holder over the commercialization of the work.[101] At the domestic level, exhaustion of rights allows reselling works; therefore, selling second-hand books does not require any additional authorization or payment.[102] At the international level, exhaustion of rights allows so-called "parallel importations," which occur when goods are provided simultaneously through two or more legitimate channels of distribution.[103] By facilitating the circulation of goods, exhaustion of rights allows for a more intense competition among providers and, eventually, more accessible prices for consumers.[104]

Latin American countries also have acted conservatively with respect to exhaustion of copyright. In spite of the TRIPS Agreement referral to domestic law, only Chile and Costa Rica have international exhaustion of rights.[105] Argentina, Colombia, and Mexico, on the other hand, merely provide for domestic exhaustion.[106] The status of exhaustion of

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101 *See* ALFREDO VEGA, MANUAL DE DERECHO DE AUTOR, at 42 (Dirección Nacional de Derecho de Autor, 2010).

102 UNCTAD and ICTSD, *supra* note 3, at 93-94 (introducing the concept of exhaustion of rights, first sale doctrine, and parallel importations).

103 UNCTAD and ICTSD, *supra* note 3, at 93-94; A HANDBOOK ON THE WTO TRIPS AGREEMENT, *supra* note 86, at 18-20; GERVAIS, *supra* note 3, at 197-202; CORREA, TRADE RELATED ASPECTS…, *supra* note 3, at 78-90.

104 *See* VEGA, *supra* note 101, at 42 (referring that the purpose of the exhaustion of rights is to facilitate the free flow of works and cultural interchange).

105 Copyright Act Chile, art. 18; and, Copyright Act Costa Rica, art. 16.2. *See also* World Trade Organization, Trade Policy Review Body, Trade Policy Review Costa Rica, Report by the Secretariat, WT/TPR/S/180, 12 Mar. 2007, para. 221 (reporting that parallel importation of protected goods, lawfully sold on foreign markets, are allowed).

106 For Argentina, *see* World Trade Organization, Trade Policy Review Body, Trade Policy Review Argentina, Report by the Secretariat, WT/TPR/S/176, 8 Jan. 2007, para. 270 (expressing that *"parallel imports of products protected by copyright are not allowed."*); and, Pablo Wegbrait, *La Compatimentación de Mercados en el Ámbito de los Derechos de Propiedad Intelectual e Industrial: Derecho*

rights is uncertain in Brazil and Peru.[107] This clash of decisions prevents the flow of copyrighted goods and services through the region and, consequently, damages competition and consumers. What is more unintelligible is that countries with deeper processes of regional market integration have more restrictive exhaustion of rights. Unlike the European Union,[108] neither Mercosur nor the Andean Community has adopted even

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de Comercialización, Agotamiento e Importaciones Paralelas, 7 REVISTA DE DERECHO UNIVERSIDAD DE MONTEVIDEO 31, 73 (2005). For Colombia, *see* Dirección Nacional de Derecho de Autor, Legal Opinion 2-2005-6647, Jul. 14, 2005 (concluding that "the exhaustion of rights is not recognized expressly neither in the domestic nor in the communitarian law… therefore, right holder has broad and general power for controlling any distribution of his work or copies of it.") (Colom.); and VEGA, *supra* note 101, at 42-43 (suggesting that the exclusive right to importation granted by the Decision allows controlling the flow of copyrighted works from one country to another). For Mexico, World Trade Organization, Trade Policy Review Body, Trade Policy Review Mexico, Report by the Secretariat, WT/TPR/S/195, 7 Jan. 2008, para. 297 (suggesting that there is not international exhaustion because of *"holder of rights … has the possibility of authorizing or prohibiting the import of the work concerned into Mexico without his consent"*).

107 For Brazil, *see* World Trade Organization, Trade Policy Review Body, Trade Policy Review Brazil, Report by the Secretariat, WT/TPR/S/140, 1 Nov. 2004, para. 311 (stating that no rule on international exhaustion of copyright exists and, therefore, decisions on the matter are on a case-by-case basis). *But see* World Trade Organization, Trade Policy Review Body, Trade Policy Review Brazil, Report by the Secretariat, WT/TPR/S/212, 2 Feb. 2009, para. 338 (noting that in absence of provisions, the law has been interpreted as providing national exhaustion). For Peru, *see* World Trade Organization, Trade Policy Review Body, Trade Policy Review, Report by the Secretariat – Peru, WT/TPR/S/189, 12 Sep. 2007, at 61-62, para. 230 (stating that the common regime and domestic law establish specific provisions on the exhaustion of copyright and referring to a case law of the Andean Court of Justice that ruled *"parallel imports of products protected by copyright are not prohibited, unless any injury could be caused to the authors"*). *But see,* Antequera, *supra* note 70, at 28-29 (suggesting only national exhaustion by referring to the consistency of an Andean Community proposal on national exhaustion of copyright to be included in one of the draft of the Free Trade of Americas Agreement).

108 Several decisions of the European Court of Justice, based on constitutive treaties of the European Union, support at least regional exhaustion of rights within the EU; consequently, intellectual property rights cannot be used to fragment the EU common market. *See* European Court of Justice, 8 June 1971, Deutsche Grammophon Gesellschaft v Metro (ruling that free movement of goods within the common market is in conflict with prohibiting a EU member the selling of copyrighted goods initially distributed within the territory of another member, because *"the isolation of national markets, would be repugnant to the essential purpose of the treaty, which is to unite national markets into a single market"*). *But see* European Court of Justice, 24 Jan. 1989, EMI Electrola v Patricia (ruling that EU law does not preclude the application of domestic law that allows right holders to prohibit marketing works imported from another EU member *"in which they were lawfully marketed without the consent of the aforesaid owner or his licensee and in which*

regional exhaustion of rights and, therefore, domestic copyright laws still fragment the internal market created by both processes of economic integration.

In short, when Latin American countries implemented into their domestic laws the commitments required by the TRIPS Agreement, they again protected copyright holders but did not benefit from flexibilities. On one hand, countries strengthened substantive copyright by granting additional rights on a broader category of works, and improved enforcement by upgrading civil, criminal, administrative, and customs procedures to assure copyright law compliance. On the other, countries took little to no advantage from flexibilities allowed by the TRIPS Agreement, particularly on copyright exceptions and exceptions regarding software and exhaustion of rights.

3. IMPLEMENTING THE WIPO COPYRIGHT TREATY

The following international instruments on copyright relevant to the development of the Latin American law are the so-called WIPO Internet Treaties: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty.[109] These treaties

the producer of those recordings had enjoyed protection which has in the mean time expired"). *See also,* European Court of Justice**,** 20 Jan. 1981, Musik-Vertrieb membran GmbH and K-tel International v GEMA (ruling that EU law precludes applying domestic law that empowers a copyright management society respect to recordings distributed in the national market after being put into circulation within the territory of another EU member by or with the right holder's consent).

[109] World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) [*hereinafter* WPPT]; and, World Intellectual Property

introduced new rules and clarified the interpretation of certain existing rules with respect to new technologies, particularly digital ones.[110] Several provisions of the WCT restate norms already available in previous instruments, but there are four set of provisions particularly relevant for the instant analysis, those related to: phonograms and photographic works; the right to communication of works to the public; technological measures; and rights management information. These norms represent new obligations for countries party to the WCT.

Most countries within the region are already parties to both of the WIPO Internet Treaties.[111] In fact, mass adhesion of Latin American countries to those treaties was determinant for their entrance in force.[112] However, because the WIPO Internet Treaties are not self-executing, they require implementing law.[113] In spite of lacking the pressure of the mechanism of enforcement adopted by the TRIPS Agreements, almost all countries in the region have enacted implementing laws already,[114] including the few countries that have not ratified the treaties themselves.[115]

Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) [*hereinafter* WCT].

110 WCT, *supra* note 109, pmbl., and, WPPT, *supra* note 109, pmbl.

111 *See* Annexes, Table 2: International instruments on copyright and country parties.

112 Fernando Zapata, *Realidad Institucional del Derecho de Autor en América Latina, in* DIAGNÓSTICO DEL DERECHO DE AUTOR EN AMÉRICA LATINA, *supra* note 5, at 27.

113 Delia Lipszyc, *La Protección Jurídica de las Medidas Tecnológicas (o de Autotutela) en las Legislaciones de los Países Latinoamericanos y de los Estados Unidos de América*, 1 REVISTA JURÍDICA DE PROPIEDAD INTELECTUAL 73, 74 (2009) (stating that the WIPO Internet Treaties have "programmatic norms" that need implementation into domestic law).

114 *See generally,* Antequera, *supra* note 5; and, Lipszyc, *supra* note 113.

115 *See supra* Chapt. II, note 188.

The WCT provided additional protection to phonograms by requiring countries to grant an exclusive right of rental for them,[116] and abrogated the option for providing a shorter term of protection to photographic works.[117] It clarified that making a work available online is also an author's exclusive right.[118] Latin American countries have implemented into their domestic laws these provisions that benefit copyright holders by increasing the scope of their exclusive rights.[119]

No Latin American country has adopted, however, any specific exception in connection with the new scope of copyright granted by the WCT. In fact, unlike the United States,[120] no country within the region has adopted any specific exception for purpose of online education or research.[121] Similarly, unlike the European Union,[122] countries within

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116 WCT, *supra* note 109, art. 7.

117 WCT, *supra* note 109, art. 9.

118 WCT, *supra* note 109, art. 8. *See also,* Mihály Ficsor, *Nuevas Orientaciones en el Plano Internacional: Los Nuevos Tratados de la OMPI sobre Derecho de Autor y sobre Interpretaciones o Ejecuciones y Fonogramas,* in 1 MEMORIAS DEL III CONGRESO IBEROAMERICANO SOBRE DERECHO DE AUTOR Y DERECHOS CONEXOS, at 338 (Montevideo, 1997).

119 Antequera, *supra* note 5, paras. 135 *et seq.* (describing the implementation of the WCT commitments into domestic law by Latin American countries).

120 *See* Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, §13301 (incorporating provisions relating to use of copyrighted works for distance education into the U.S. Copyright Act).

121 Monroy Rodríguez, *Study*, *supra* note 54, at 104 (stating that "[t]he countries of Latin America and the Caribbean have not developed a specific set of rules concerning limitations or exceptions to the copyright applicable to the digital environment").

122 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22/06/2001, pp. 10-19 [*hereinafter* EU Copyright Directive], art. 5.1.

the region have not even adopted a specific exception for operational reproduction needed for the functioning of the Internet (cache copies),[123] something that may change, as analyzed below, with the implementation of intellectual property commitments contained in free trade agreements.[124]

The WCT requires countries to provide "*adequate and effective legal remedies*" against removing or altering any electronic rights management information without authority, and against trafficking works whose electronic rights management information has been removed or altered without authority.[125] This obligation requires implementation into domestic law,[126] and local scholars have called for criminal intervention.[127] In practice, several Latin American countries, including Brazil, Chile, Colombia, and Costa Rica, among others, have implemented this requirement by criminalizing the removal and alteration of electronic rights management information.[128] The next Chapter returns to this issue in more detail.[129]

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123 Antequera, *supra* note 54, paras. 70-72 (arguing that it is actually unnecessary to incorporate an exception for that purpose in domestic law because authorization is provided when an author makes a work available online). *Cf.* HORACIO FERNÁNDEZ DELPECH, INTERNET: SU PROBLEMÁTICA JURÍDICA, at 249-255 (LexisNexis Abeledo-Perrot, 2nd ed., 2004) (arguing that online transitory and browsing copies, as well as downloading, would not infringe copyright when an author has authorized them by uploading a work into the Internet, a sort of implicit authorization consistent with the functioning of the Internet).

124 *See, e.g.,* Copyright Act Chile, art. 71 O (adopting a specific exception for legitimate copies needed for Internet functioning).

125 WCT, *supra* note 109, art. 12.

126 Antequera, *supra* note 5, para. 212.

127 Antequera, *supra* note 5, para. 215.

128 Antequera, *supra* note 5, paras. 213-214.

129 *See infra* Chap. IV, notes 116-136 and accompanying text.

Countries party to the WCT must also provide *"adequate legal protection and effective legal remedies against the circumvention of effective technological measures … used by authors in connection with the exercise of their rights …".*[130] Those country signatories of free trade agreements with the United States have assumed additional commitments on the matter, because they must provide both civil remedies and criminal sanctions.[131] Implementation of these provisions has attracted a fair amount of scholarship in Latin America, which allows the appreciation of the significant peculiarities from country to country.[132] The next Chapter also comes back to this point.[133]

In general, Latin American countries have provided protection for effective technological measures that exceeds the obligation set forth in the WCT. Even before approving the WCT, some countries granted to authors the exclusive right to incorporate technological measures into their works.[134] Almost every country has implemented this obligation by adopting specific criminal provisions that punish the circumvention of

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130 WCT, *supra* note 109, art. 11.

131 *See* Andrew Christie, Sophie Waller & Kimberlee Weatherall, *Exporting the DMCA through Free Trade Agreements,* in INTELLECTUAL PROPERTY & FREE TRADE AGREEMENTS, at 211-243 (Christopher Heath & Anselm Kamperman Sanders eds., Hart Publishing, 2007) (exploring the exportation by the U.S. of the DMCA provisions on technological protective measures to other countries through free trade agreements, but agreeing that provisions on the matter included in the FTA signed by Chile are narrower than subsequent FTAs). *See* U.S.-Chile FTA, art. 17.7.5 a) (providing softer exigencies related to protecting against circumvention of effective technological measures).

132 *See generally,* Lipszyc, *supra* note 113.

133 *See infra* Chap. IV, notes 137-172 and accompanying text.

134 Copyright Act Peru, art. 38. *See also,* Antequera, *supra* note 54, para. 94 (referring that the Peruvian decision has been followed by Ecuador and the Dominican Republic).

technological measures. The extension of the punishment varies, but, in some cases, it exceeds ten years of prison. Even more remarkable is that the sanction is applicable in some cases even if there is no associated copyright infringement. Additionally, despite the fact that the WCT requires only anti-elusion provisions, most Latin American countries also have sanctioned potential preparatory acts by adopting anti-trafficking provisions.[135] Thus, several countries also punish making and distributing mechanisms that allow circumventing a technological measure.[136] Moreover, this punitive approach, which has been also supported by local copyright scholars,[137] does not make any distinction between punishing the evasion of measures that control access to protected material and the actual use of protected material itself.

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135 Antequera, *supra* note 54, para. 100; and, Antequera, *supra* note 5, para. 200 (referring to the broader scope of the law in Latin America). *See also* Sergio Velázquez Vértiz, *Las Obras en Formato Digital y las Medidas Tecnológicas de Protección, in* TEXTOS DE LA NUEVA CULTURA DE LA PROPIEDAD INTELECTUAL, at 168 (Manuel Becerra Ramírez coor., UNAM - Instituto de Investigaciones Jurídicas, 2009) (suggesting that protection of technological measures covers precluding the circulation of mechanisms that allow eluding those measures).

136 Antequera, *supra* note 54, para. 101 (referring to Colombia, Dominican Republic, Ecuador, Nicaragua, Peru, Paraguay, and Uruguay as countries that have enacted criminal anti-trafficking provisions).

137 Lipszyc, *supra* note 113, at 74 (stating that the exigence of *"efficacy implies necessarily criminal intervention"*); Ricardo Antequera, *La Observancia del Derecho de Autor y los Derechos Conexos en los Países de América Latina, in* DIAGNÓSTICO DEL DERECHO DE AUTOR EN AMÉRICA LATINA, *supra* note 5, at 151 (assuming the need of criminal intervention for achieving the protection of both technological measures and electronic rights management information). *See also* Antequera, *supra* note 5, paras. 200-209 (suggesting that some countries have failed in providing adequate protection because they only punish some infractions on technological measures); and, Mihály Ficsor, *Limitaciones y Excepciones en el Entorno Digital*, 1 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 14, 33-34 (2007) (arguing that the obligations set forth by the WIPO Internet Treaties on technological protective measures could be fulfilled only by criminalization).

Latin American countries have failed to adopt flexibilities and safeguards in relation with their anti-circumvention and anti-trafficking provisions. Unlike the United States and the European Union,[138] most countries have not adopted any clause allowing at least the exceptional circumvention of technological measures, such as for the purpose of reverse engineering software or evaluating copyrighted material by libraries. As a result, regulation has failed to achieve any balance between protecting a copyright holder by punishing users and omitting safeguards to satisfy legitimate public interest needs.

The situation is slightly different in the case of countries that have signed a free trade agreement with the United States, because they are required to implement exceptions that mirror those available in the Digital Millennium Copyright Act.[139] The Dominican Republic, El Salvador, Guatemala, and Honduras therefore have implemented such exceptions.[140] But their implementation has three severe limitations. First, the countries have not implemented all the exceptions available in the U.S. law, but only a subset of them.[141] Second, the countries have implemented an exception allowing circumventing a technological measure, but not allowing the use of the work.[142] And third, unlike in the U.S. that granted administrative powers to the Library of the Congress for establishing

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138 EU Copyright Directive, *supra* note 122, art. 6.4; and, 17 U.S.C. § 1201 (d)-(j).

139 *Compare* 17 U.S.C. § 1201 (d)-(j) *with e.g.* U.S.-Peru FTA, art. 16.7.4 e).

140 Monroy Rodríguez, *Study*, *supra* note 54, at 109-112.

141 *See infra* Chap. IV, note 153-157 and accompanying text.

142 *See infra* Chap. IV, notes 158-159 and accompanying text.

additional exceptions, which is allowed by free trade agreements,[143] no country in the region except for Peru has adopted such a practical mechanism.[144]

In short, when Latin American countries have implemented into their domestic laws the commitments set forth by the WCT, these countries again protected copyright but failed to implement flexibilities. On one hand, countries have implemented the treaty by increasing the scope of copyright and the protection of technological measures and rights management information including their criminal enforcement. On the other hand, most countries have not provided exceptions and limitations to these developments in order to safeguard public interest needs. In other words, following the analyses provided in the three previous sections, private interests of right holders have prevailed over public interests in the process of implementing the Berne Convention, the TRIPS Agreement, and the WCT into domestic laws by Latin American countries.

4. EXTRACTING LESSONS FROM COPYRIGHT IMPLEMENTATION

During the last twenty years, Latin American countries have become parties to leading international instruments on copyright law and implemented the legal provisions of such instruments into their domestic laws. In this process, those countries went from

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143 *See e.g.,* U.S.-Peru FTA, art. 16.7.4 f). *See also, infra* Chap. IV, notes 160-162 and accompanying text.

144 Monroy Rodríguez, *Study*, *supra* note 54, at 112.

using their own legal arrangement for protecting authors under the Inter-American copyright system to the Berne Convention, and later also to the TRIPS Agreement and the WIPO Internet Treaties. In spite of the peculiarities of each process of adhesion and implementation of each international instrument by each country, it is possible to extract some patterns. These patterns teach common lessons that are important to keep in mind in the coming years, when Latin American countries will be required to become parties to and implement a new generation of international copyright commitments that attempt to improve criminal enforcement, as well as the enforcement of these rights in the online environment.

External factors rather than internal ones have driven the Latin American development of copyright regulation, as scholars agree.[145] Adhesions to the Berne Convention, the TRIPS Agreement, and the WIPO Internet Treaties motivated countries to implement into their domestic law appropriate modifications. But new international instruments were not the only relevant external factor. The increasing globalization of the economy and the failure of the model of import substitution forced Latin American countries to open their markets and to play according to agreed-upon international rules. Additionally, the United States applied unilateral pressure to increase intellectual property

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145 BUSCAGLIA & LONG, *supra* note 88, at 2; Yolanda Huerta Casado, *El Tratado de Libre Comercio en Materia de Propiedad Intelectual y sus Repercusiones en América Latina,* in DERECHO DE LA PROPIEDAD INTELECTUAL: UNA PERSPECTIVA TRINACIONAL, at 127-133 (Manuel Becerra Ramírez ed., Instituto de Investigaciones Jurídicas – UNAM, 1998). *See generally,* SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (Cambridge Univ. Press, 2003); and, DEBORA J. HALBERT, RESISTING INTELLECTUAL PROPERTY (Routledge, 2005).

protections within the region, by threatening reluctant countries with trade sanctions. Moreover, new foreign copyright lobbies within the region played also a relevant role in pushing for copyright reforms.[146]

There are some internal factors also affecting the development of copyright in Latin America, but their effects have been less influential in the overall picture. For instance, by adopting Decision 351, the Andean Community updated its members' copyright law before the TRIPS Agreement was concluded. But the importance of the copyright common regime of the Andean Community has declined over the course of the years because of the challenges of new technologies and emerging bilateralism, among other causes.[147] Similarly, after concluding NAFTA, Mexico not only introduced significant changes into its domestic law,[148] but also played a main role in exporting its new copyright standards to other countries by including them in commercial agreements.[149] But Mexican foreign policy on the matter did not succeed, in part because its copyright

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146 *See* DIAGNÓSTICO DEL DERECHO DE AUTOR EN AMÉRICA LATINA, *supra* note 5 (recalling the role of international copyright organizations and Spanish copyright collective societies in the legal reform in Latin American countries).

147 Cerda, *supra* note 20, at 436-437 (referring to the well-known outdatedness of the Decision 351 and making a call for its update).

148 Adriana Barrueco García, *La Protección de la Creatividad Intelectual: Diez Años de Cambios, in* EL TRATADO DE LIBRE COMERCIO DE AMÉRICA DEL NORTE: EVALUACIÓN JURÍDICA DIEZ AÑOS DESPUÉS, at 39-46 (Jorge Witker coord., UNAM, 2005) (reviewing the "transformation" of Mexican copyright through implementation of the NAFTA's copyright provisions into domestic law, even beyond what was required by the treaty).

149 Martín Michaus R., *El Fortalecimiento de los Derechos en Propiedad Intelectual en México*, in 2 REVISTA JURÍDICA DE PROPIEDAD INTELECTUAL 79, 79-90 (2009) (referring to the active role of Mexico in transporting the NAFTA commitments to third countries by including them in trade agreements and in regional fora of cooperation).

standards are behind new international instruments,[150] but also because countries within the region are also reluctant to include intellectual property issues in free trade agreements.[151] For example, Chile, Colombia, Panama, and Peru do not include intellectual property in any of their recent reciprocal trade agreements, except those with the United States.

When implementing international commitments on copyright, Latin American countries appropriately have protected rights holders, but failed to take advantage of flexibilities for satisfying public interest needs, including compliance with human rights standards. This seems to be not merely a casual outcome of the implementation process but a systematic and persistent flaw. It has happened every single time a country put into effect its international obligations into domestic law. As a result, countries have increased the scope, duration, and enforcement of copyright, but failed to incorporate flexibilities into their laws, such as exceptions and limitations, compulsory licensing schemes, and others. As is analyzed below, if this tendency continues when implementing the new generation of international instruments that require enforcing rights in the online

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150 *See* RALPH H. FOLSOM, NAFTA AND FREE TRADE IN THE AMERICAS, at 265 (West, 2012) (noticing that new generation of free trade agreements, unlike NAFTA, include provisions drafted for the Internet age, from e-commerce to anti-circumvention technology and liability of Internet service providers).

151 *See* Susy Frankel, *Legitimidad y Finalidad de los Capítulos de Propiedad Intelectual en los Tratados de Libre Comercio (TLC)*, 15 REVISTA LA PROPIEDAD INMATERIAL 169, 169 (2011) (noticing that developing countries also negotiate free trade agreements but do not raise standard of protection for intellectual property). *See also* Andrew Christie, Sophie Waller, & Kimberlee Weatherall, *supra* note 131, at 222-223 (expressing similar concerns on that countries have signed agreements with the U.S. would export those provisions, especially those on technological protective measures, into other countries through subsequent trade agreements, by stating the U.S. has "enlisted" countries to "fight the battle in favour of the DMCA").

environment, Latin American countries are at risk of seriously diminishing human rights, such as privacy, free speech, and due process.

But Latin American countries not only have failed to benefit from flexibilities available in international copyright law, they also have exacerbated copyright protection. This regional tendency to overextend copyright law is less noticeable for scholars; in fact, it seems unknown in scholars' analysis. Most countries exceed the term of protection provided by the Berne Convention, while Colombian and Mexican terms go beyond what is required even by free trade agreements. All the countries provide significantly broad moral rights to authors, far more extensive than the rights to authorship and integrity required by the Berne Convention. Similarly, some countries grant to right holders a broad protection on exploitation of works by embracing a comprehensive protection for economic rights. Other countries have gone beyond international standards of protection by restoring automatically expired copyright and adopting a broad national treatment for foreign right holders.

It is hard to understand why Latin American countries have been both reluctant to take advantage of flexibilities and enthusiastic about extending copyright. It may be suggested that Latin America has a comparative advantage in copyright regulation, but no study supports such a statement. When contrasting the limited data, instead, it is possible to appreciate that Latin American copyright either fails to benefit domestic economies or the costs significantly outweigh any potential benefits. According to the World Bank's statistics, in 2012 for each dollar received by Latin American and Caribbean countries for

intellectual property rights, the region spent nine dollars; as a result, that year, the total income of the region was 1.061 billion dollars, while spending rises to 9.612 billion dollars.[152] That imbalance has aggravated during last five years, because since 2008 income has increased barely by 25%, while spending has increased by 40%.[153]

Although not comprehensive, there are some granular data on the actual economic effect of copyright within the region. Most empirical studies have shown the contribution of copyright to domestic economies, but no one has analyzed the overall cost of copyright.[154] For instance, recent WIPO studies found that Colombia and Peru are net importers of copyrighted goods and services.[155] Similarly, in Chile, according to official data, between 2003 to 2010, the revenues sent abroad by the main copyright collective society in the music sector exceeded three times those distributed among local creators.[156]

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152 WORLD BANK, World Development Indicators (The World Bank, 2013).

153 WORLD BANK, World Development Indicators (The World Bank, 2009-2013).

154 *See generally* Ernesto Piedras, *Impacto de las Industrias Culturales en las Economías de América Latina, in* DIAGNÓSTICO DEL DERECHO DE AUTOR EN AMÉRICA LATINA, *supra* note 5, at 81-109 (reviewing several recent studies on the importance of the cultural industries in the Latin American economies). *See also* World Intellectual Property Organization, WIPO Studies on the Economic Contribution of the Copyright Industries (Genève, WIPO, 2012) (analyzing the contribution of copyright in several economies, including four Latin American countries, but without reference to the costs).

155 World Intellectual Property Organization, The Economic Contribution of Copyright-Based Industries in Colombia, Creative Industries Series No. 3 (Bogota, WIPO, 2008), at 72 (stating that *"[t]he net balance… shows that imports totaled 4,800 million US dollars (CIF), more than double the figures for exports of 2,138 million US dollars."*); and, World Intellectual Property Organization, National Studies on Assessing the Economic Contribution of Copyright-Based Industries, Creative Industries Series No. 4 (Genève, WIPO, 2011), at 334 (concluding that *"copyright-based industries represent 0.8% of Peru's exports and 5.4% of its imports, making this country a net importer of intellectual property works, services and related goods and services."*).

156 INSTITUTO NACIONAL DE ESTADÍSTICA (Chile), *Serie Estadística Anual Cultura y Tiempo Libre, 2004-2011*, available at

This data suggests that copyright protects foreign businesses at the expense of domestic ones.[157]

The lack of economic rationale for overprotecting copyright is also clear in the publishing sector. Setting aside the limited technological and entertainment sectors, the publishing sector seems one in which Latin American literature provides some advantages, but its profit is still much lower than its cost. For instance, together Latin American and the Caribbean countries barely represent 2.7% of the world's book exports,[158] while such countries still rely heavily on imports from the European Union and North America.[159] In fact, Latin America historically has had a negative balance in the book trade, in favor of Spanish and American publishers.[160] This ratifies that Latin America does not have an actual economic rationale to encourage extending copyright protection on its own impulse.

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http://www.ine.cl/canales/chile_estadistico/estadisticas_sociales_culturales/cultura/cultura.php (last visit: Jul. 16, 2012).

157 Alberto Cerda, *Desafíos de la Gestión Colectiva de Derechos de Autor ante las Tecnologías Digitales en América Latina*, in LA GESTIÓN COLECTIVA ANTE EL DESAFÍO DIGITAL EN AMÉRICA LATINA Y EL CARIBE, at 207-223 (Carolina Botero *et al.* eds., Fundación Karisma, 2015) (providing additional data on how copyright benefits affect trade balance and the distribution of its royalties within Chile).

158 DIAGNÓSTICO DEL DERECHO DE AUTOR EN AMÉRICA LATINA, *supra* note 21, at 100 (providing 2009 statistics about world trade of books, in which Europe leads exportation (55,0%), followed by Asia (21,9%) and North America (19,0%)).

159 *Idem*, at 124-125 (analyzing 2007-2009 statistics, in 2009 Latin American books importation had origin in North America (29,1%) and the European Union (27,1%)).

160 *Idem*, at 132-133 (stating that "together Latin America always have had a deficit, from 650,8 million dollars in 2000 to 802,0 million dollars in 2009, and providing disaggregated data by country between 2004 and 2009).

Strengthening copyright protection while disregarding public interest needs seems, then, more a political decision than a rational one in Latin America. Unfortunately, highly descriptive Latin American scholarship is elusive on explanations about motives for such legal choices. However, by reading between the lines it is possible to extract some explanations. For instance, Decision 351 was adopted by the Commission of the Andean Community based on a report drafted by an expert committee that met twice by the end of 1993, according to one of those experts.[161] Such a quick and close process undermined deliberation about the proposal and obscured its understanding because of the lack of information.[162] Similarly, Chile's 2003 copyright reform implemented some free trade agreement commitments, including the extension of copyright term from 50 to 70 years p.m.a., by a law that was discussed in and passed by the Congress after a mere two-week legislative process.[163] And again, Colombia, after barely three weeks of legislative deliberation, passed a copyright reform to implement copyright commitments adopted in

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161 ANTEQUERA & FERREYROS, *supra* note 14, at 915 (referring to the drafting of the Decision as a task addressed by an expert committee).

162 Pacón, *supra* note 70, at 300 (complaining about the lack of information regarding the process within the expert committee that drafted Decision 351). *See also,* Ricardo Lackner, *Aproximación a los Aspectos Penales de las Modificaciones a la Ley de Propiedad Literaria y Artística (Ley No. 9.739) Introducidas por la Ley No. 17.616,* 14 REVISTA DE DERECHO PENAL 7, 11 (2004) (noting relatively rapid legislative implementation of intellectual property rules in Uruguay, in contrast to any other issue subject to international regulation).

163 Ley 19.914 que adecua la legislación que indica al Tratado de Libre Comercio con los Estados Unidos de America [Law 19.914 that adequates domestic law to the Free Trade Agreement with the United States], Diario Oficial, Nov. 19, 2003 (Chile). *Cf. also* Salvador Millaleo, *Chile: The Case of IP Opposition from Predominantly Private Interest, in* BALANCING WEALTH AND HEALTH: THE BATTLE OVER INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES IN LATIN AMERICA, at 129–168 (Rochelle Dreyfuss & César Rodríguez-Garavito eds., Oxford Univ. Press, 2014) (documenting similar lack of transparency and exclusion of public interest groups from the legislative process regarding the adoption of new patent law in Chile).

its free trade agreement with the United States, although the Constitutional Court eventually nullified it as unconstitutional for procedural reasons.[164]

The lack of transparency and public deliberation in the regulatory process is probably one of the reasons for the conservative approach of copyright law within the region. The opaqueness and lacking of deliberation are not unusual features of Latin American countries.[165] They are also present in other areas of policymaking, which translates in a diminished consideration to public interest. In fact, it may be explained by the fact that, as above said, most of these countries are still walking its re-democratization.[166] During last decade, these countries did make some significant progresses on transparency, at both normative and institutional levels.[167] This progress was at least in part result of the influence by regional mechanisms, including some decisions by the the Inter-American Court of Human Rights, a compilation of best practices and a model law approved by the Organizations of American States.[168] However, progresses on

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164 *See supra* notes 31 and 32.

165 Laurence Whitehead, *Latin American Constitutionalism: Historical Development and Distinctive Traits, in* NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES 138-139 (Detlef Nolte & Almut Schilling-Vacaflor eds., Ashgate, 2012) (criticizing the fact that, although Latin American constitutions help to concretize some rights, their rules do not answered demands for accountability and participation).

166 *See supra* Chapter I, notes 1 and 18-21, and accompanying text.

167 OPEN GOVERNMENT AND TARGETED TRANSPARENCY: TRENDS AND CHALLENGES FOR LATIN AMERICA AND THE CARIBBEAN (Nicolás Dassen & Juan Cruz Vieyra, eds., Inter-American Development Bank, 2012).

168 *Claude-Reyes* et al. Case, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006); Organization of American States, Committee on Juridical and Political Affairs, Apr. 21, 2008, OEA/SerG CP/CAJP-2599/08; and, Organization of American States, Model Inter-American Law on Access to Public Information, Jun. 8, 2010, G/RES 2607 (XL-O/10).

public transparency have not necessarily translated into assurances of a meaningful public participation yet.

The argument about lacking transparency and public deliberation seems supported by the recent legislative experiences in Brazil and Chile, that have been relatively more open and deliberative. In its 2010 copyright reform, Chile was reluctant to rely on foreign and international expertise and, instead, relied mostly on the work of its government professional staff; domestic authorities acted independently from international creative industries and local collective societies; and copyright became an issue of public concern.[169] After three years of intense legislative discussion, Chile adopted its first significant copyright reform that included public interest proposals.[170] Similarly, in Brazil, during the government of Ignacio Lula da Silva, there was broad discussion of a copyright bill, which included the participation of right holders, public officers, scholars, consumer organizations, and other members of civil society. As a result, the bill not only attempted to protect copyright but also to meet public interest needs. Unfortunately, the Brazilian initiative failed when the subsequently elected government rejected it and restarted a new process much less sensitive to public deliberation,[171] which remains ongoing. These experiences suggest that the broader society participation on copyright regulation is, the more consideration is paid to public interest needs.

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169 Alvarez, *supra* note 77, at 2, 9-11.

170 *Id.*, at 2-3.

171 *See* Pedro Paranagua, *Inside Views: Brazil's Copyright Reform: Are We All Josef K.?,* INTELL. PROP. WATCH, May 12, 2011 (reviewing the copyright reform in Brazil).

Another factor that may explain why Latin American countries have overextended copyright protection, particularly during the 1990s, is the relative lack of technical capacities. This argument comports with the lack of scholarship in the region, the relative novelty of the topic in universities, and the limited number of relevant publications.[172] This deficit progressively has been reduced through technical assistance provided by international organizations and foreign copyright collective societies. Among other, three of them have been particularly influential: the Centro Regional para el Fomento del Libro en América Latina, el Caribe, España y Portugal (CERLALC) has provided support to the publishing sector; the Spanish Sociedad General de Autores y Editores (SGAE) has provided long-term assistance to copyright collective societies in the music sector; and the World Intellectual Property Organization that, partnering with SGAE, has provided technical assistance to right holders, public officers, and regulators. However, because of the self-interests of those entities, they have provided one-sided technical assistance by encouraging the extension of copyright with a narrow consideration to public interest issues and actors.[173]

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172 *See supra* Introduction, notes 33-35 and accompanying text.

173 *See* Norden, *supra* note 5, at 7-10 (summarizing the role of CERLALC on promoting copyright through Latin America); Ulrich Uchtenhagen, *La Legislación Latinoamericana de Derecho de Autor en Comparación con las Directivas de la Unión Europea,* 1 REVISTA PROPIEDAD INMATERIAL 49, 67 (2000) (welcoming the role of SGAE, OMPI, and Spanish scholars in raising the level of protection for copyright through Latin America); Carlos Fernández Ballesteros, Panorama Actual de la Gestión Colectiva en América Latina: Mapa de las Entidades de Gestión Colectiva Existentes en la Región, WIPO Document OMPI-SGAE/DA/ASU/05/3, 1 de noviembre de 2005 (documenting the role of WIPO and copyright collective society on the diffusion of copyright through Latin America); and, Carlos Fernández Ballesteros, *Revisión de la Obra y Trayectoria de Ricardo Antequera Parilli*, 14 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR

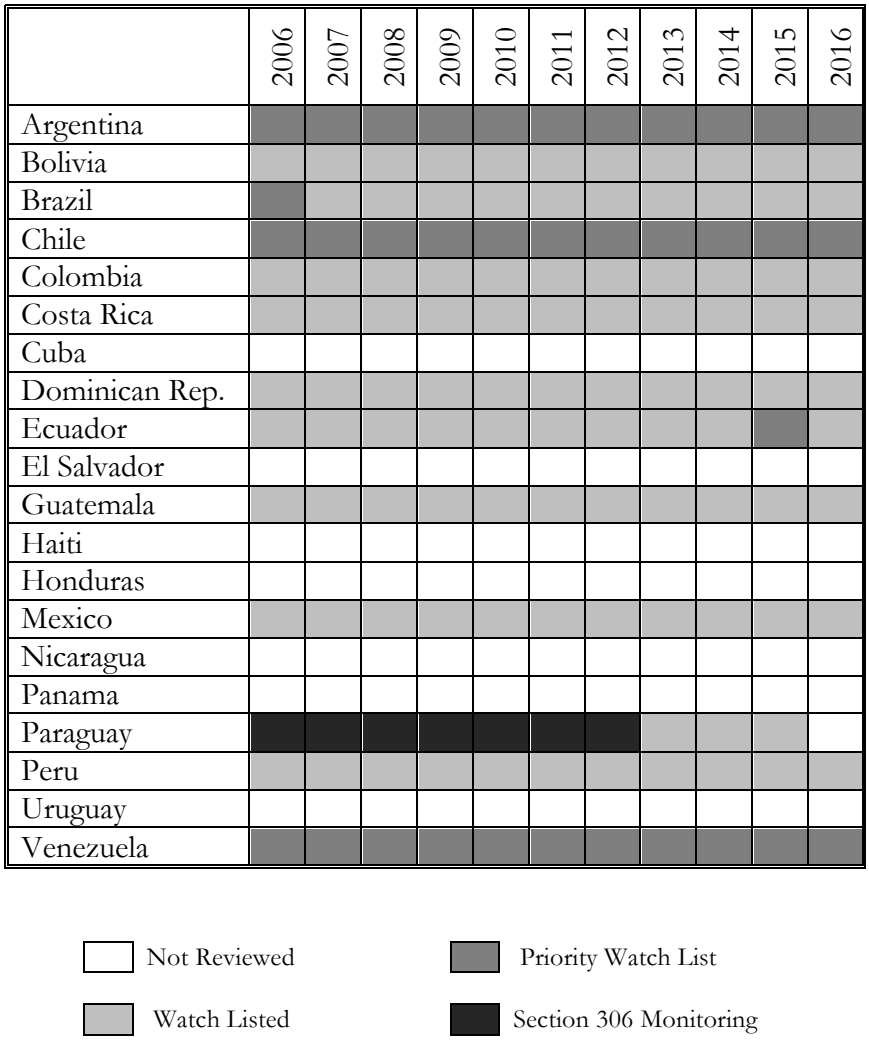
External pressure by foreign governments is also a factor that influences not only the decision to become a party to international instruments but also the drafting of implementing law. The United States Trade Representative (USTR) has championed that pressure through the so-called Special 301 Report by encouraging countries within the region to become parties to some international instruments on intellectual property, censuring the way countries implement those instruments, and encouraging the implementation of specific measures into their domestic laws. Since its beginning, the Special 301 Report has included an increasing number of Latin American countries. The 2016 version of the report included reviews of 73 countries, listed three Latin American countries in Priority Watch List and another ten in its Watch List, thus, meaning USTR has significant concerns on the development of their intellectual property laws and practices. Table 1 shows the assessment of Latin American countries by the USTR in its Special 301 Report over the last ten years.[174]

10 (2014) (reviewing the work of Antequera as the key agent of the long-term collaboration between WIPO and copyright collective societies on educating Latin Americans).

174 *See* Annexes, Table 3: Latin American countries in Special 301 Report 1989-2016.

Table 1:

Latin American Countries in Special 301 Report, 2006-2016



The USTR's Special 301 Report not only assesses countries' compliance with intellectual property, but also makes strong suggestions to each of them about how the USTR believes they should handle copyright issues and implement international

commitments. For instance, according to the 2016 Special 301 Report:[175] Argentina lacks effective intellectual property enforcement by the national government, police do not take *ex officio* actions, prosecutions can stall, cases may languish in excessive formalities, and, even when a criminal investigation reaches final judgment, infringers do not receive deterrent sentences;[176] Brazil should provide adequate resources for copyright enforcement, and deal with copyright infringement specially online;[177] Chile should amend its Internet service provider liability regime to permit effective action against any act of copyright infringement, implement protections for technological protection measures and for encrypted program-carrying satellite signals, and ensure effective procedures and deterrent remedies to right holders;[178] Colombia should prevent online piracy, enforce the law against such infringement, and implement free trade agreements obligations to address online and mobile piracy;[179] Costa Rica should prioritize copyright enforcement, by granting *ex-officio* powers to law enforcement and custom officials, take effective action against any notorious online markets within its jurisdiction, and allow for more transparency regarding enforcement;[180] Mexico should provide *ex-officio* powers to its customs officials, implement the WIPO Internet Treaties, and protect against

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175 UNITED STATES TRADE REPRESENTATIVE, 2016 SPECIAL 301 REPORT, April 2016 [*hereinafter* 2016 Special 301 Report].

176 2016 Special 301 Report, *supra* note 175, at 48.

177 2016 Special 301 Report, *supra* note 175, at 61-62.

178 2016 Special 301 Report, *supra* note 175, at 49.

179 2016 Special 301 Report, *supra* note 175, at 62.

180 2016 Special 301 Report, *supra* note 175, at 58-59.

unauthorized recording of motion pictures in theaters;[181] Peru should devote additional resources for enforcement, improve coordination among enforcement agencies, enhance its border controls, build technical capacity of its law enforcement officials, and establish limitations on liability for Internet service providers;[182] and so on.

In recent years, external pressure by special interest groups, mainly representing foreign copyright holders, has risen in the field of copyright law in Latin America. For instance, the International Federation of the Phonographic Industry (IFPI), the Motion Picture Association of America (MPAA), and the Business Software Alliance (BSA) played a significant role in the 2010 copyright reform in Chile. International publishers did it through their local association, the Chilean Book Chamber. The copyright lobby in Latin America has less experience than the patent lobby, but it accentuates the involvement of private interest tailoring of copyright law.[183] However, local lobbies also played a role, on occasions confronting their foreign counterparts.[184] In the 2010 Chilean reform, although the BSA opposed adopting an exception for reverse engineering software, the Chilean Association of Information Technologies (ACTI) backed up the measure; at the same

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181 2016 Special 301 Report, *supra* note 175, at 58.

182 2016 Special 301 Report, *supra* note 175, at 63.

183 *See* TIM HARFORD, FIFTY INVENTIONS THAT SHAPED THE MODERN ECONOMY 155-159 (Riverhead Books, 2017) (arguing that expansion of intellectual property may be explained by the fact it is valuable for its rights holders, who are willing to lobby for it, while the costs are spread widely among users, who are unlikely to campaign to object such expansion).

184 JORGE KATZ, TECNOLOGÍAS DE LA INFORMACIÓN Y LA COMUNICACIÓN E INDUSTRIAS CULTURALES: UNA PERSPECTIVA LATINOMAERICANA, at 102 (United Nations, 2006) (noticing that local industry is not the one taking advantage of intellectual property, which may explain its divergences with its foreign counterparts).

time, the Chilean Book Chamber, which represents mainly foreign publishers, rejected a package of exceptions in favor of libraries and museums, while the Chilean Association of Independent Publishers endorsed it.[185]

More studies are necessary on the social and political conditions that explain copyright law and legislative choices in Latin America. However, it is plausible to state that a broader public deliberation, a more extensive social capacity, and wider diversity of involved social organizations are factors that may help in including public interest considerations into copyright analysis, policy, and law. As democratic regimes evolve within the region, public transparency, society participation, and independent copyright regulators could help improving the status of public interests in copyright law. But, regardless of these developments, there already have been concerns with respect to the implementation of new international commitments on copyright designed for the online environment. If Latin American countries implement those obligations disregarding public interests, as they have done in the past, there is a serious risk of diminishing human rights. Before analyzing the impact of copyright regulation on human rights in next chapters, the following section describes the aforementioned new international commitments on copyright as they have been set forth by free trade agreements and outlined by other multilateral trade negotiations.

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185 *See* BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE, HISTORIA DE LA LEY Nº 20.435 MODIFICA LA LEY N° 17.336, SOBRE PROPIEDAD INTELECTUAL (Biblioteca del Congreso Nacional de Chile, 2010).

5. ADVANCING COPYRIGHT COMMITMENTS FOR ONLINE ENVIRONMENT

Over the last decade, Latin American countries have agreed to a newer set of international instruments on copyright that will require implementing law. Several countries have subscribed to bilateral collaboration agreements with the European Union that include intellectual property rules.[186] However, these agreements do not create new rules on copyright, but make previous international instruments enforceable between the contracting parties.[187] For instance, they require the ratification and implementation of both WIPO Internet Treaties. The United States also has played a leading role on intellectual property within the region, first through the failed Free Trade Agreement of the Americas, then through a series of bilateral free trade agreements, and later by two multilateral initiatives in which some Latin American countries have been involved.

The Free Trade Agreement of the Americas (FTAA) attempted to create an area of free commerce through the whole American continent, except for Cuba. The FTAA

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186 Christoph Antons & Gariela Garcia, *Initiatives on IP Enforcement beyond TRIPS: The Anti-Counterfeiting Trade Agreement and the International Medical Products Anti-Counterfeiting Task Force*, in THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: COMPARATIVE PERSPECTIVES FROM THE ASIA-PACIFIC REGION, at 125-159 (Christoph Antons ed., Wolter Kluwer, 2011) (concluding that the switch towards an intellectual property legal enforcement framework at international levels was led by developed countries, mainly the European Union, Japan, and the United States).

187 PEDRO ROFFE & MAXIMILIANO SANTA CRUZ, LOS DERECHOS DE PROPIEDAD INTELECTUAL EN LOS ACUERDOS DE LIBRE COMERCIO CELEBRADOS POR PAÍSES DE AMÉRICA LATINA CON PAÍSES DESARROLLADOS 32 (Comisión Económica para América Latina y el Caribe, CEPAL, 2006).

was a comprehensive initiative, in which negotiations included several disciplines, from agriculture, investment, and public purchases to e-commerce and intellectual property. On copyright issues, the FTAA included provisions like the Digital Millennium Copyright Act on technological measures and rights management. The FTAA granted a general exclusive rental right to authors of any work and reduced contractual barriers for transferring rights, but left copyright exceptions and limitations to domestic law. It did not include any specific provisions about enforcement for copyright online. In spite of the efforts of American diplomacy, however, the FTAA failed because of the resistance of Latin American countries led by Brazil.[188]

Even during the FTAA negotiations, some Latin American countries conducted parallel negotiations of bilateral free trade agreements (FTAs) with the United States. FTAs also are comprehensive instruments that regulate several disciplines, from environmental and labor issues to foreign investment and intellectual property. On copyright, the FTAs require extending the term of protection up to 70 years p.m.a., introducing improvement in judicial and customs procedures, and adopting specific measures for intellectual property enforcement. The FTAs include provisions on technological measures, rights management, and a regime of Internet service provider liability that mirrors the Digital

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188 On intellectual property in the FTAA, *see generally,* Parga, *supra* note 12; Concha SEGURA y Jorge MIER, *Comentarios a Raíz del Segundo Borrador del Capítulo de Derecho de Propiedad Intelectual del Área de Libre Comercio de las Américas,* in EL TRATADO DE LIBRE COMERCIO DE AMÉRICA DEL NORTE: EVALUACIÓN JURÍDICA DIEZ AÑOS DESPUÉS, *supra* note 148, at 111-139; and, Antequera, *supra* note 70.

Millennium Copyright Act.[189] In spite of being negotiated individually, FTA provisions are strikingly similar from one country to another, with some limited differences. For instance, provisions on technological measures in the FTA between the U.S. and Chile are more flexible than those in later FTAs, particularly on criminal enforcement.[190] Currently, the United States has this kind of agreement with several Latin American countries: Chile (2003); Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua (2004); Peru and Colombia (2006); and Panama (2007).

Those Latin American countries that are parties to a FTA have not exported their new intellectual property commitments to third countries.[191] For instance, Chile, Colombia, Panama, and Peru have similar free trade obligations for intellectual property with the United States and subscribed to reciprocal agreements later, but none of the latter agreements have included any provision on intellectual property. Similarly, Chile has several subsequent free trade agreements with countries of the Asia-Pacific area – such as Australia, Brunei, China, Japan, Malaysia, New Zealand, Singapore, South Korea, Vietnam, and more – but they also do not include any commitment on intellectual property or such

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189 *See generally,* ROFFE AND SANTA CRUZ, *supra* note 187.

190 *See* Bernardita Escobar Andrade, *North-South Agreements on Trade and Intellectual Property beyond TRIPS: An Analysis of US Bilateral Agreements in Comparative Perspective*, 16 J. INTELL. PROP. RTS. 477 (2011) (providing quantitative and qualitative analyses on free trade agreements negotiated by the U.S. during the first decade of this century that make evident progressive strengthening in the treaties' language on intellectual property).

191 Susy Frankel, *Legitimidad y Finalidad de los Capítulos de Propiedad Intelectual en los Tratados de Libre Comercio (TLC)*, 15 REVISTA LA PROPIEDAD INMATERIAL 169, 169 (2011) (stating that, although developing countries negotiate free trade agreements also, they "do not include improvements on intellectual property standards").

commitments are highly limited, mainly to geographical indications. Latin American countries only have included specific rules on online copyright enforcement in FTAs signed with the United States.

More recently, two multilateral initiatives involving some Latin American countries have included new obligations on copyright law that would applied to the online environments: the Anti-Counterfeiting Trade Agreement (ACTA) and the Trans-Pacific Partnership Agreement (TPPA).

ACTA was a treaty negotiated by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, Switzerland, the United States, and the European Union. From Latin America, the only country engaged in the negotiations was Mexico. The initiative aimed to establish international standards for the enforcement of intellectual property that target more efficiently the increasing problem of counterfeiting and piracy, by improving the enforcement of intellectual property. Among other measures, the treaty required granting *ex-officio* powers to criminal and customs authorities, extending border measures to in-transit goods, adopting criminal measures against circumventing technological measures and trafficking devices that allow that circumvention, and establishing specific measures for intellectual property enforcement online. In general, ACTA attempted to increase significantly the enforcement of intellectual property, going beyond any previous bilateral free trade agreement. Even though ACTA negotiation concluded in 2011, it is unlikely to enter in force. It has been barely ratified by Japan, while almost immediately rejected by both the European Union Parliament and the Mexican

Congress.[192] It still provides evidence about the most recent international trend on a comprehensive intellectual property negotiation.

A second multilateral initiative involving some Latin American countries that attempted to include new obligations on copyright was the TPPA. It was a proposed trade treaty that attempted to build an area of free commerce in the Asia-Pacific region through a comprehensive approach, which includes diverse disciplines, such as environmental, labor, telecommunications, and intellectual property issues, among others. Its negotiating parties included Australia, Brunei, Canada, Japan, Malaysia, New Zealand, Singapore, the United States, and Vietnam. Three Latin American countries also took part in its negotiation: Chile, Mexico, and Peru. Other countries expressed their interest in joining the initiative later on, including Colombia. On copyright matters, the TPPA included provisions on digital rights management, technological protective measures, criminal enforcement, and a regime of limitation of liability for Internet service providers. Although the negotiation of TPPA concluded in 2016, no country has ratified it. It should be added that after the new U.S. administration withdrew, and even when some countries have expressed interest in moving forward in spite of the American withdrawal, it is unlikely that TPPA will ever enter in force.[193]

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192 *See generally*, Focus Issue: Intellectual Property Law Enforcement and the Anti-Counterfeiting Trade Agreement (ACTA), 26 AM. U. INT'L L. REV. 543 (2011); MICHAEL BLAKENEY, INTELLECTUAL PROPERTY ENFORCEMENT: A COMMENTARY ON THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) (Edward Elgar, 2012); and, THE ACTA AND THE PLURILATERAL ENFORCEMENT AGENDA: GENESIS AND AFTERMATH (Pedro Roffe and Xavier Seuba eds., Cambridge University Press, 2015).

193 *See generally*, THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT (C.L. Lim, Deborah Kay Elms, & Patrick Low eds., Cambridge

The aforementioned bilateral trade agreements and attempted multilateral agreements present a trend on the content of negotiations related to intellectual property in general, and copyright in particular. On a substantive perspective, these instruments extend the scope of right holders' exclusive economic rights, their duration, and their enforcement on international and domestic levels. From these developments, the following Chapters of this dissertation pay closer attention to the rules about online and criminal enforcement.

The norms for enforcing copyright in the online environment are the most innovative in all the aforementioned instruments. In general, these norms follow the regime on the limitation of liability for Internet service providers (ISPs) adopted by the United States through the Digital Millennium Copyright Act. They basically exonerate ISPs from responsibility related to copyright infringements committed by their users if the ISPs comply with a highly-regulated regime of obligations. ISPs are not required to enforce copyright *ex-officio,* but they must identify those subscribers who are supposedly copyright infringers, take down infringing content, disconnect repeat copyright infringers, and cooperate with right holders in deterring copyright infringement. Each of these enforcement measures are analyzed deeper in Chapters Seventh to Ninth of this dissertation.

University Press, 2012); and, TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (Tania Voon ed., Edward Elgar, 2013).

The aforementioned international instruments also extend criminal copyright enforcement. They require criminalizing some acts beyond the traditional willful copyright piracy on a commercial scale, such as infringement on digital rights management, technological protective measures, encrypted program-carrying satellite signals, and the recording of motion pictures. They required adopting deterrent criminal penalties against copyright infringements, as well as awarding additional power to law enforcement, particularly *ex-officio* powers to police, prosecutors, judges, and even customs authorities. Some of these measures for criminal enforcement of copyright are analyzed in extent in Chapters Fourth to Sixth of this dissertation.

Whether through bilateral trade agreements or multilateral negotiations, Latin American countries have committed and are committing to implement into domestic laws some of the aforementioned measures for criminal and online enforcement of copyright. This raises concerns about the consistency of those commitments and their potential implementing laws with human rights standards, including privacy, free speech, and due process, among others. The following Chapters go deeper into these human rights concerns.

SECOND PART

CRIMINAL ENFORCEMENT

Chapter IV

Human Rights and Copyright Overcriminalization

Chapter V

Human Rights and Copyright Overpunishment

Chapter VI

Copyright Punishment Without Due Process:

Abusive Civil, Administrative, and Police Procedures

Chapter IV

Human Rights and

Copyright Overcriminalization[1]

Until recently, international copyright instruments mainly dealt with harmonizing substantive standards of protection, while their actual enforcement remained barely touched by the instruments and, therefore, left to discretion of implementing domestic laws. However, that tendency changed starting with the TRIPS Agreement, which includes significant commitments for strengthening the enforcement of intellectual property rights both nationally and internationally. This trend has been bolstered in recent years by new bilateral and multilateral trade and intellectual property negotiations. They include not only rules on substantive copyright, but also specific mechanisms designed to enforce copyright obligations on national and international levels. The most recent ones incorporate specific obligations related to customs, criminal, civil, and administrative remedies and procedures to ensure copyright compliance. The implementation of some of these enforcement

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[1] This and the following two chapters have benefited from comments to their early drafts provided by attendees in different venues, including: the Second Annual Mid-Atlantic S.J.D. Roundtable, organized by Georgetown University Law Center (Washington, DC, Dec. 7, 2012); the Second Global Congress on Intellectual Property and the Public Interest, organized by the Centro de Tecnologia e Sociedade at the Escola de Direito da Fundação Getulio Vargas (Río de Janeiro, BR, Dec. 15-17, 2012); the Intellectual Property and Human Rights Conference, organized by American University Washington College of Law (Washington, DC, Feb. 21-22, 2013); the Works in Progress in Intellectual Property (WIPIP) Conference, held at Seton Hall University School of Law (Newark, NJ, Feb. 22-23, 2013); the Second Annual Younger Comparativists Conference, held at Indiana University Robert H. McKinney School of Law (Indianapolis, IN, Apr. 18-19, 2013); and, the Seminario de Delitos Informáticos, held at the Universidad de Chile (Santiago, CL, Nov. 5-6, 2013).

measures may conflict with human rights, such as the rights to privacy, freedom of expression, and due process. Chapters Four and Five analyze some human rights issues in connection with the criminal enforcement of copyright, while Chapter Six explores these issues with regard to some civil and administrative measures of copyright enforcement.

Criminal enforcement is subject to human rights limitations. However, those limitations can prove cumbersome when confronting the extension of criminal copyright enforcement. In addition to using more innovative punitive measures, Latin American copyright law also imposes traditional criminal sanctions for infringement. These punishments raise concerns based on their questionable compliance with constitutional and human rights requirements for criminal law, by infringing the principle of legality when sanctioning acts not expressly prohibited by law; by infringing the principle of proportionality when punishing harmless behavior; and by infringing the proscription of detainment for debts when penalizing breaches of contract as opposed to criminal infractions, among others. These disapprovals increase with the tendency to expand criminal copyright enforcement by criminalizing new acts, making procedural measures more efficient, improving institutional arrangements, and conferring *ex-officio* powers upon customs, judicial, and prosecutorial authorities on the matter.

From a human rights viewpoint, copyright enforcement through criminal law is even more problematic in online environments. In most Latin American countries, criminal provisions were not drafted having in mind either digital technologies or the Internet, but analogous techniques and formats. However, because of the technologically

neutral language of criminal law, its provisions may be applicable to the online environment.[2] This raises a problem because new technologies allow easy, cheap, and perfect reproduction of copyrighted works; in fact, the Internet works precisely through successive copies of content. As a result, serious enforcement of criminal copyright with respect to online behavior may create a tension between allowing mass criminalization of the population or risking that criminal law loses its legitimacy.[3] Criminal enforcement therefore must be reviewed in light of its foundational principles that have been incorporated into international instruments on human rights and constitutional law.

Analyzing the whole universe of criminal enforcement of copyright in Latin America obviously goes beyond the limited purpose of this dissertation. Some of the features of that enforcement are not peculiar to copyright, but common to any criminal

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2 Dimitris Kioupis, *Criminal Liability on the Internet*, in COPYRIGHT ENFORCEMENT AND THE INTERNET, at 233-234 (Irini A. Stamatoudi ed., Kluwer Law International, 2010) (arguing that while digital technologies and online environment have introduced drastic changes, criminal law provisions generally are not concerned with the modus operandi of the criminal act and, therefore, they may be applicable to new technological developments; this, however, remains an issue of competing legal interpretations).

3 *See* ALESSANDRA TRIDENTE, DIREITO AUTORAL: PARADOXOS E CONTRIBUIÇÕES PARA A REVISÃO DA TECNOLOGIA JURÍDICA NO SÉCULO XXI, at 65-68 (Elsevier, 2009) (arguing that narrow limitations in the Brazilian copyright act and an indiscriminate broad criminal law threaten with *"imprisoning and punishing thousands of people"*); Kioupis, *supra* note 2, at 235 (suggesting that massive online infringement may diminish legitimacy of criminal law and force us to rethink criminal liability on copyright); RONALDO LEMOS, FUTUROS POSSÍVEIS: MÍDIA, CULTURA, SOCIEDADE, DIREITOS, at 289-291 (Editora Sulina, 2012) (expressing concern about stopping downloading by radicalization of criminal repression); Nolan Garrido, *Contemporary and Historical Comparison of American and Brazilian Legal Efforts to Corral Digital Music Piracy and P2P Software*, 16 ILSA J. INT'L & COMP. L. 675, 694-696 (2010) (arguing against precarious Brazilian regime on copyright limitations and exceptions that inflates numbers of infringement by making *"any Internet user a potential criminal and copyright infringer"*); and, MARTÍN PECOY, PROTECCIÓN PENAL DE LA PROPIEDAD INCORPORAL EN EL URUGUAY, at 83-85 (Universidad de Montevideo, 2008) (calling attention to the fact that mere non-profit downloading would be a crime according to Uruguayan domestic copyright law).

enforcement within a country, such as procedural and institutional matters, where there are insignificant differences between enforcing copyright and enforcing any other piece of law in a given country. In spite of minor peculiarities, the rules of judicial procedure and institutions, such as the police, the prosecutors, and the courts, are usually the same. Analyzing those rules and institutions from a human rights viewpoint, needless to say, already has attracted a significant amount of literature, particularly around the right to a fair trial and the due process of law.[4] Analyzing substantive criminal law and sentencing has attracted much less attention though.[5]

This and the following chapters focus, instead, on the substantive provisions of criminal copyright law, that is, provisions that define a given conduct as a copyright crime and determine punishments for that infringement. The underlying hypotheses are that, when enforcing copyright through criminal provisions, Latin American countries have been misguided by over-criminalizing (i.e., defining an excessively broad range of conduct as criminal) and over-punishing (i.e., imposing disproportionate sanctions against

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4 Victor Tadros, *A Human Right to a Fair Criminal Law*, in ESSAYS IN CRIMINAL LAW IN HONOUR OF SIR GERALD GORDON, at 103-125 (James Chalmers, Fiona Leverick & Lindsay Farmer eds., Edinburgh Univ. Press, 2010) (noting that human rights focus has been on criminal procedure rather than on substantive criminal law).

5 Andrew Ashworth, *Criminal Law, Human Rights and Preventive Justice*, in REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURE OF CRIMINAL LAW 92-93 (Bernadette McSherry, Alan Norrie, and Simon Bronitt eds., Hart Publ'g, 2009) (summarizing human rights limitations on criminal law and concluding that *"constraints imposed by the European Convention on Human Rights are significant in relation to criminal procedure, slightly less significant in matters of sentencing, and not extensive at all in the criminal law itself"*).

offenders).[6] Both aspects usually go together, but for purpose of analysis this chapter refers to copyright over-criminalization, leaving discussion of excessive punishment to the next chapter.[7]

The first section of this chapter connects the principles of modern criminal law with human rights in international instruments and Latin American constitutions. The second section describes criminal copyright enforcement in the region, by focusing on three key principles of criminal law – legality, *mens rea*, and harmfulness – that are reflected in human rights obligations set forth by international and constitutional law. The third section sets out the main challenges of newer international obligations assumed by Latin American countries that may increase over-criminalization by broadening criminal enforcement. Finally, the fourth section analyzes some strategies in place that attempt to ameliorate the noxious effects of excessive interventionism of criminal law in copyright enforcement within the region.

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6 DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW, at 3-10 (Oxford Univ. Press, 2008) (distinguishing between too much punishment and too many crimes).

7 *See* Fernando Molina, *A Comparison between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It*, 14 NEW CRIM. L. REV 123, 125-128 (2011) (distinguishing three different manifestations of overcriminalization: criminalizing conduct that harms trivial interests, criminalizing conduct that causes trivial harm to an important interest, and punishing conduct in a way that is disproportional to the harm caused).

1. CRIMINAL LAW AND HUMAN RIGHTS

Latin American criminal law has several commonalities with criminal law in other Western cultures.[8] Arising out of the Enlightenment's legal philosophy, criminal law is based on the principle of legality, which requires the law to set forth penal offenses and their penalties. From German scholarship, Latin America drew the legal interest theory (*teoría del bien jurídico*, in Spanish), that is, the underlying value protected by the law, which provides a strong and coherent theoretical framework to criminal law. Additionally, the humanization of punishment has found fertile ground in Latin America because of the influence of several, sometimes inconsistent, legal philosophies, such as the Catholic teachings on sin and penance, limitations on criminal intervention from the Enlightenment's ideas, and even the modern school of criminal abolitionism, minimalist criminal law, and critical criminology, among others.

The *principle of legality,* which was initially enounced by BECCARIA,[9] avoids the well-known arbitrariness of the Old Regime and its judiciary, by requiring that crimes and penalties must be defined by the legislature. This principle received full articulation in

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8 JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA, at 125 (Stanford Univ. Press, 3d ed., 2007) (stating that *"substantive criminal law in Western capitalist civil law countries does not differ greatly from that of common law countries"*). *See also,* EUGENIO RAÚL ZAFFARONI, CÓDIGOS PENALES EN LOS PAÍSES DE AMÉRICA LATINA (Mexico, 2000) (analyzing extensively historical influence of European criminal codes on those of Latin America).

9 CESARE BECCARIA, OF CRIMES AND PUNISHMENTS (New York, Marsilio Publishers, 1996) (1764).

FEUERBACH's restatement for the 1813 Bavarian Criminal Code, according to which *"nullum crimen, nulla pœna sine lege praevia, scripta, et stricta."*[10] This means that the legitimate exercise of criminal law by the government requires a written law passed in advance that describes in detail the crime and the applicable punishment in a given case. The principle of legality, therefore, precludes criminalization of a conduct by other than the law and prohibits the delegation of that power to other branches of government. As a result, the principle of legality requires, among other obligations, a full description of the conduct being punished by restricting judicial interpretation and forbidding legal reasoning by analogy; in fact, in cases of doubt, judges must apply the interpretation most favorable to the defendant (*principle in dubio pro-reo,* also known as *the rule of lenity*).

According to the *legal interest theory*, a criminal law must always have an identifiable underlying protected value. For instance, laws prohibiting robbery and burglary protect property, prohibiting rape protects the body and sexual self-determination, prohibiting fraud protects public faith, and so on. The proper identification of a protected legal interest by a prohibition against a given crime legitimizes criminal law, showing that it is built around socially relevant values. That identification also is useful to society because people can anticipate whether their behavior will infringe a legal interest and, therefore, may be potentially illegal. Most importantly, the legal interest theory provides coherency to criminal law, because, on one hand, it only prohibits that conduct that infringes on socially relevant values and, on the other, it sanctions them with a measure of punishment

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10 Anselm Ritter von Feuerbach, *The Foundations of Criminal Law and the Nullum Crimen Principle*, 5 (2) J. INT'L CRIM. JUST. 1005, 1005-1008 (2007) (1832).

equivalent to the relevance of the infringed social value. So, for example, crimes that result in the harm to a person deserve greater punishment than crimes against mere property. The legal interest theory provides a strong and coherent theoretical framework for criminal law in Latin America; in fact, criminal codification follows this theory by categorizing crimes according to their underlying protected legal interests.

Another relevant principle of criminal law is *mens rea,* also known as *the principle of culpability*. According to this principle, criminal law only punishes that conduct committed on purpose or at least negligently by the offender, but does not apply to involuntary behavior. As a result, criminalization requires proving a subjective intent, which is some level of psychological commitment of the offender to the criminal conduct. That requirement precludes presuming a defendant's guilt; on the contrary, everyone charged with a penal offence is presumed innocent. There are, however, some cases in which the law disregards any psychological connection of the offender and, therefore, the conduct is sanctioned anyway. Those are cases of *strict liability.* But strict liability is linked mainly to misdemeanors, not to serious crimes, and sanctions are noticeably lesser, such as in the case of speeding or improper parking, whose presumed infringers get mere fines.[11]

A third essential principle of criminal law relevant to our analysis is the *principle of harmfulness*. Because criminal law imposes the most serious kinds of legal sanctions against

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[11] Antonio Sérgio Altieri de Moraes Pitombo Fabiano, *Criminal Law and Procedure*, in INTRODUCTION TO BRAZILIAN LAW, at 206 (Fabiano Deffenti and Welber Barral eds., Kluwer Law International, 2011) (referring to the lack of strict liability under Brazilian criminal law).

infringers, it must apply those sanctions only against behavior actually susceptible of causing equally serious harm. This principle is linked with the understanding that criminal law must redress only violations of law that cannot be properly solved through other available legal mechanisms, such as civil remedies and actions. Criminal law is the *ultima ratio,* the last of society's resources to prevent undesirable behavior. The principle of harmfulness, thus, proscribes criminalization not only of harmless conduct, but also mere anticipatory offences, and paternalistic moral regulation, like criminalizing the exercise of sexual freedom between consenting adults.[12]

The leading international instruments on human rights endorse the aforementioned principles of criminal law. They recognize the right to a fair trial,[13] and proscribe self-incrimination,[14] among other rights. But, aside from restrictions on criminal procedure that have attracted significant attention from both human rights and constitutional scholars, these instruments also recognize limitations to substantive criminal law, which remain much less explored.[15]

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12 DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 14-15 (Rowman & Littlefield, 1987). *But see* Gerald Dworkin, *Paternalim*, in MORALITY AND THE LAW, at 107-136 (Richard Wasserstrom ed., Wadsworth Pub. Co., 1971) (arguing for some room for *"acceptable use of paternalistic power in cases where it is generally agreed it is legitimate"*). *See generally* JOEL FEINBERG, HARMLESS WRONGDOING: THE MORAL LIMITS OF CRIMINAL LAW (Oxford Univ. Press, 1988).

13 ADHR, arts. XXV and XXVI; UDHR, art. 10; ICCPR, arts. 9 and 14; and, ACHR, art. 8.

14 ICCPR, art. 14 (3) (g); and, ACHR, art. 8 (3).

15 Markus Dirk Dubber, *Towards a Constitutional Law of Crime and Punishment*, 55 HASTING L.J. 509, 510 (2004) (complaining that substantive criminal law has remained virtually untouched by constitutional scrutiny, which has mainly been limited to procedural aspects). *See also,* Stefan Trechsel, Comparative Observations on Human Rights Law and Criminal Law, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 26-27 (2000) (noticing the relative disconnection

All leading human rights instruments expressly recognize the cornerstone principle of legality by banning conviction for conduct that was not a criminal offence under the applicable law at the time it was committed.[16] Additionally, a penalty cannot be heavier than the applicable one at the time the penal offence was committed,[17] but an offender may benefit from a later-enacted lighter penalty.[18] International human rights law does not allow any exception to the principle of legality, not even during exceptional circumstances, such as time of war or risk to the very existence of the state.[19] It has been noted that, in fact, the classic principle of legality of criminal law is the same as the one used as an exigency for any limitation on human rights.[20]

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between substantive criminal law and human rights among scholar, although recognizing a growing awareness on its comparative analysis); WILLIAM J. STUNTZ & JOSEPH L. HOFFMANN, DEFINING CRIMES 837 (Walter Kluwer Law & Business, 2011) (noticing that American constitutional rules and text dominate criminal procedure, but have little to say about the definition of crimes and sentencing other than capital punishment); and, Markus D. Dubber, *Criminal Justice in America: Constitutionalization without Foundation*, in THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 27 (John T. Parry & L. Song Richardson eds., Cambridge Univ. Press, 2013) (arguing for a reconceptualization of the role that constitutional law plays regarding criminal justice in the United States).

16 ADHR, art. XXVI (recognizing the right to be tried in accordance with pre-existing laws); UDHR, art. 11 (2); ICCPR, art. 15; and, ACHR, art. 9. *See* IACHR, Case of Castillo Petruzzi et al. v. Peru, Judgment of May 30, 1999 (Merits, Reparations and Costs) para.121 (elaborating in the exclusion of ambiguity in criminal law language, which must provide *"a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment."*)

17 *Id.*

18 *Id.*

19 ACHR, arts. 9 and 27 (allowing for derogations of certain human rights in exceptional cases, except for the principle of legality, among others). *See also* ICCPR, arts. 4 and 15; and, European Convention on Human Rights, arts. 7 and 15.

20 BEN EMMERSON, ANDREW ASHWORTH, & ALISON MACDONALD, HUMAN RIGHTS AND CRIMINAL JUSTICE, at 379-380 (Sweet & Maxwell, 2d ed., 2007).

The principle of *mens rea* has reception in international human rights instruments through the presumption of innocence, which grants everyone charged with a penal offence the right to be presumed innocent until proved guilty according to law.[21] This presumption has been extensively explored in its procedural implications, which were drawn by the Universal Declaration by stating that guilt must be proved *"in a public trial at which [t]he [defendant] has had all the guarantees necessary for his defence."*[22] However, that presumption also has substantive effects on criminal law, by requiring legislative action consistent with human rights obligations, such as avoiding strict liability cases that disregard the psychological connection of an offender with the challenged conduct and, instead, expressly including some subjective prerequisite for punishment.

The reception of the principle of harmfulness by international instruments on human rights is less obvious. In fact, some scholars have lamented the absence of any specific human rights limitation to the *ius punendi* (i.e., the government's exercise of its criminalizing power). According to that reasoning, governments have a broad margin of appreciation when defining crimes, as long as they comply with the principle of legality and the presumption of innocence. As a result, a criminal law could punish harmless behavior and *de minimis* infractions, such as ripping one song from a CD to a computer hard drive or photocopying a few pages of a book. This reasoning supposes that, if a law

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21 ADHR, art. XXVI; UDHR, art. 11 (1); ICCPR, art. 14 (2); and, ACHR, art. 8 (2).

22 UDHR, art. 11.1

describes infringing conduct properly and culpability is proven, no positive human rights concerns can be raised.[23] I disagree with that narrow understanding.

International human rights instruments recognize the principle of harmfulness implicitly. Human rights limitations on criminal law may not be explicit, but criminal law is a limitation in itself to those rights, because it punishes exactly by restricting or denying an offender's rights, such as the right to property when sanctioning with monetary fines, and freedom of movement and residence when imposing imprisonment. Because criminal law limits human rights it is, therefore, subject to provisions on limitations set forth by international instruments on the matter. As was discussed in Chapter One, generally speaking, those instruments require limitations that must be provided by law, for a legitimate purpose, proportional, and subject to appropriate safeguards.[24] As criminal law limits human rights, it must comply with all these prerequisites, especially that it is permissible only when essential. From that viewpoint, addressing harmless behavior does not justify criminalization and, even if preventing that conduct were legitimate, criminal law is not essential for that because other mechanisms are available, from moral and social norms to less aggressive legal remedies.[25] It does not eliminate the margin of appreciation

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23 TADROS, *supra* note 4, at 125 (denying positivist status to the right to a fair criminal law as a human right, but recognizing its moral status, and arguing for its positive recognition).

24 *See supra* Chap. I, notes 149-173 and accompanying text. *See also,* Alexandre Charles Kiss, *Permissible Limitations Rights,* in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, at 290-310 (Louis Henkin ed., Columbia Univ. Press, 1981).

25 *See* Douglas Husak, *For Drug Legalization,* THE LEGALIZATION OF DRUGS, at 3 (Douglas Husak & Peter de Marneffe, Cambridge Univ. Press, 2005) (making a clear distinction between decriminalization, a basic issue that means a given conduct should not be a criminal offense, and legalization, which is a more ambiguous and complex issue).

that governments have for implementing actual criminal law, but narrows it, by introducing at least some restrictions on criminalizing harmless behavior.[26]

Latin American constitutionalism also has recognized procedural and substantive limitations on criminal law. One way it has done so, as was mentioned, is by incorporating those human rights recognized by international instruments into constitutions and, therefore, into domestic law. Another is by allowing a progressive inclusion of new human rights by adopting an open list of fundamental freedoms and rights in constitutional texts. Latin American constitutions also provide a more detailed and extensive recognition of human rights linked with criminal enforcement. This is also the case of criminal law's principles of legality, *mens rea*, and harmfulness.

Latin American constitutional law has extensively applied the principle of legality. Criminal enforcement requires a written law passed in advance that describes in detail the crime and the applicable sanctions. All constitutions recognize this principle and the non-

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26 *See similarly* EMMERSON, ASHWORTH, & MACDONALD, *supra* note 20, at 305-343 (noticing the same in the European context, even when European Convention for the Protection of Human Rights and Fundamental Freedoms leaves states free to define crimes, there are some exceptions to that principle, among them, the fact that state cannot define as criminal any conduct that constitutes *"an unjustified interference with the right to privacy, the right to freedom of expression, the right to peaceful assembly and association, or the right to peaceful enjoyment of possessions"*); and, DONALD C. CLARKE, WRONGS AND RIGHTS: A HUMAN RIGHTS ANALYSIS OF CHINA'S REVISED CRIMINAL LAW, at 41-46, 69-70 (Lawyers Committee for Human Rights, 1998) (arguing fundamental rights as a limitation to criminal enforcement and supporting decriminalization, in the context of the Chinese criminal reform, of conduct that constitutes a nonviolent exercise of internationally recognized human rights, such as freedom of expression and association, and freedom of thought, conscience, and religion).

retroactivity of criminal law,[27] except when the new law benefits the defendant.[28] In fact, some constitutions grant non-retroactivity of any law that diminishes people's rights.[29] Other constitutions emphasize the need of a clear and full description of the punishable conduct,[30] or expressly forbid analogical reasoning on criminal issues.[31] One constitution explicitly recognizes the principle of lenity, by opting for the law most favorable to a defendant in cases of doubt.[32] In addition to its constitutional recognition, the principle of legality has extensive development in criminal codifications and statutes throughout the region.

All Latin American constitutions recognize the principle of *mens rea*. Most countries expressly grant everyone the presumption of innocence until a court finds otherwise.[33] In some countries, ambiguous constitutional provisions have been overridden by in force international instruments on human rights, new criminal codifications, and judicial criteria.[34] In fact, during recent decades, most Latin American countries have

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27 Const. Arg., art. 18; C. F. Braz., art. 5.39; Const. Chile, art. 19 No. 3; Const. Colom., art. 29; Const. Costa Rica, art. 39; Const. Mex., art. 14; and, Const. Peru, art. 2 No. 24 d).

28 C. F. Braz., art. 5.40; and, Const. Chile, art. 19 No. 3.

29 C. F. Braz., art. 5.36; Const. Costa Rica, art. 34; and, Const. Mex., art. 14.

30 Const. Chile, art. 19 No. 3 (providing that *"no law could set forth penalty without a conduct expressly describe in itself."*); and, Const. Peru, art. 2 No. 24 d) (requiring that the punishable infringement must be describe "*expressly and unequivocally"*).

31 Const. Mex., art. 14.

32 Const. Colom., art. 29.

33 C. F. Braz., art. 5.57; Const. Colom., art. 29; Const. Costa Rica, art. 39; Const. Mex., art. 20.B.I; and, Const. Peru, art. 2 No. 24 e).

34 *Compare* Const. Chile, art. 19 No. 3. (providing that law cannot set forth an irrefutable presumption of criminal responsibility) *with* Criminal Procedure Code - Chile, art. 4 (granting

migrated from inquisitorial to adversarial criminal justice systems,[35] to the benefit of defendants' rights.[36] As a result, Latin America has a mixed record: on one hand, there is no room for *criminal strict liability*, that is, cases in which criminal intentions are irrelevant; on the other, you may find offenses with a reverse onus of proof on *mens rea* or in which the very occurrence of facts presumes criminal design,[37] unless the law demands specific proof by requiring willfulness, maliciousness, or another subjective connection. However, constitutional support for the presumption of innocence is, in general, forcing governments to prove some psychological connection of an offender with charged criminal conduct in order to impose any punishment.

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to defendants the right to be presumed innocent). *See,* Const. Arg., art. 18 (proscribing punishment without court judgment, without development of the presumption of innocence by either the constitution or criminal procedure law).

35 *See generally,* PETER DESHAZO & JUAN ENRIQUE VARGAS, JUDICIAL REFORM IN LATIN AMERICA: AN ASSESSMENT, POLICY PAPERS ON THE AMERICAS (Center for Strategic and International Studies, 2006) (highlighting achievements of the judicial reform on criminal law, unlike other areas of that reform).

36 *See* UNITED NATIONS, 1958 Seminar on the Protection of Human Rights in Criminal Law and Procedure, Santiago, Chile, 19 to 30 May 1958 [Report], organized by the United Nations in cooperation with the Government of Chile (New York, United Nations, 1958), at 25 (noticing that in many Latin American countries, except those that have adopted adversarial criminal procedures, *"any act or omission punishable by law is presumed to have been committed with malice"* which raises concerns about their compliance with human rights obligations); and, ZAFFARONI, *supra* note 8, at 102-107 (criticizing several institutions of substantive criminal law in Latin America because of their inconsistency with human rights standards). *But see* MERRYMAN & PÉREZ-PERDOMO, *supra* note 8, at 132 (addressing misapprehension related to absence of presumption of innocence in civil law countries, by arguing that in practice the criminal system prevents the trial of those who are not probably guilty).

37 *See* EMMERSON, ASHWORTH, & MACDONALD, *supra* note 20, at 374-376 (distinguishing between strict liability offences, thus is, *actus reus* alone, and offences with a reverse onus of proof on *mens rea*).

Latin American constitutional law has recognized the principle of harmfulness in different ways. Both Argentina and Costa Rica explicitly exclude from the competence of law acts that neither offend public morality nor order, nor injure other people.[38] In other countries, the principle of harmfulness can be extracted from constitutional provisions on limitations to fundamental rights, or through referring to international instruments on human rights, including their limitations. These constitutional limitations and references to international human rights law have been already analyzed in Chapter One.[39]

In brief, Latin American countries have adopted principles that limit the *ius punendi* (i.e., the right of the state to punish crimes) according to the requirements of modern criminal law, several of which have become recognized as human rights in both international instruments and constitutional texts. Among those principles, it is possible to highlight three milestones: the principles of legality, *mens rea*, and harmfulness. However, as is analyzed below, increasing reliance on criminal law for enforcing copyright jeopardizes those well-established principles and the underlying human rights they protect.

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38 Const. Arg., art. 19; and, Const. Costa Rica, art. 28.

39 *See supra* Chap. I, notes 139-173 and accompanying text.

2. OVERCRIMINALIZING COPYRIGHT ENFORCEMENT IN LATIN AMERICA

Latin American criminal copyright enforcement primarily is an issue of domestic law. Each country determines for itself how to enforce copyright law, by setting forth crimes and adopting punishments against infringers. In spite of their common background, the region lacks any successful initiative to harmonize not only copyright criminal enforcement, but criminal law at all. Even countries of the Andean Community, which have advanced a common regime on copyright,[40] have deferred its criminal enforcement to their domestic laws.[41] As a result, each country has adopted its own criminal provisions in an idiosyncratic fashion.

Until recently, most cases of copyright infringement lacked any criminal enforcement in Latin America, as well as in other jurisdictions.[42] In recent years, criminal

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40 ANDEAN COMMUNITY, Régimen Común sobre Derecho de Autor y Derechos Conexos [Common Regime on Copyright and Neighboring Rights Decision 351], Official Gazette of the Andean Community No. 145 (Dec. 21, 1993) [*hereinafter* Decision 351].

41 Decision 351, supra note 40, art. 57 d) (referring to domestic law the potential adoption of criminal sanctions equivalent to those apply to similar crimes).

42 PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE, at 327 (Oxford Univ. Press, 2001) (stating that criminal copyright enforcement remained *"a relatively dormant feature of copyright until the beginning of the 1980s in order to control piracy"*). *See,* FREDERICK M. ABBOTT, THOMAS COTTIER, & FRANCIS GURRY, INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY, at 608 (Aspen Publishers, 2007) (explaining the increasing tendency to enforce copyright by criminalizing because of transferring the cost of enforcement from the private to the public sector, and because of more substantial deterrent on infringers than other mechanisms). *See also, Milton Cairoli Martínez, La Tutela Penal de los Derechos Incorporales en el Uruguay,* in PROPIEDAD INCORPORAL: DERECHOS DE AUTOR Y CONEXOS, PROPIEDAD INDUSTRIAL Y MARCARIA, at 22 (Ministerio de Educación y Cultura, 1987) (noting that until recently Uruguayan copyright law mainly sanctioned infringements with monetary fines rather than criminal sanctions).

law has extended its role as a guarantee for copyright compliance.[43] In some countries, this has amounted to amending the criminal code with successive patches, while in others the copyright act includes the applicable criminal provisions. In Costa Rica, a comprehensive law on intellectual property enforcement includes criminal provisions on copyright,[44] while in Chile and Venezuela some provisions of the cybercrime act also may apply to copyright enforcement.[45] These different approaches have created barriers not only for actual enforcement through countries (e.g., for purposes of achieving criminal exequatur and extradition) but also for scholastic analysis; in fact, criminal enforcement is well known as the area of copyright law most neglected by literature and academics.[46] But the main pernicious effect of this peculiar area of copyright regulation is the lack of the traditional systematic approach of criminal law. It creates normative inconsistency by over-criminalizing and over-punishing copyright infringement, phenomena that may increase as

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43 *Id. See also,* José Francisco Martínez Rincones, *La Observancia de los Derechos de Propiedad Intelectual desde la Perspectiva del Derecho Penal*, 33-3 Capítulo Criminológico 281, 293-294 (2005),. (supporing the inevitability of criminal law protection of intellectual property); and, DELIA LIPSZYC, COPYRIGHT AND NEIGHBOURING RIGHTS, at 549 (UNESCO Publishing, 1999) (supporting criminal enforcement by saying that "legislation without sanctions to punish infringement of rights would serve no purpose").

44 Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual No. 8039, La Gaceta Oct. 5, 2000 (Costa Rica) [*hereinafter* Intellectual Property Enforcement Act Costa Rica].

45 *See* Ley No. 19.223 que tipifica figuras penales relativas a la informática, Diario Oficial Jun. 7, 1993 (Chile) (punishing computer damages, hacking, and undue disclosure of information); Ley especial contra los delitos informáticos, Gaceta Oficial Oct. 30, 2001 (Venezuela), art. 25 (punishing unauthorized use of copyrighted material through information technologies).

46 César Alejandro Osorio Moreno, *Evolución de la Protección Penal del Derecho de Autor en Colombia*, 34 REVISTA DE DERECHO UNIVERSIDAD DEL NORTE 147, 149 and 174 (2010) (complaining about the lack of scholarship on criminal copyright law in Colombia).

criminal enforcement is stretched by new obligations at substantive, procedural, and institutional levels.

In spite of their differences, there is a core of common crimes incorporated into Latin American copyright law. In general, the unauthorized use of copyrighted material is an infringement that may become a criminal offence according to domestic law depending on several factors, such as whether the use had a commercial purpose, the actual amount of produced damages, and so on.[47] Infringing moral rights also is a crime, particularly when referring to the rights of authorship and integrity.[48] Removing and altering any electronic rights management information is a crime in several of the analyzed countries.[49] Most countries already have adopted criminal laws on anti-evasion of technological measures,[50] and several have also criminal anti-trafficking provisions.[51] On the top of those crimes, domestic law punishes several other infractions in an idiosyncratic fashion, such as

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47 Copyright Act Arg., art. 71-73; Criminal Code Braz., art. 184, Software Act Braz., art. 12; Copyright Act Chile, art. 79; Criminal Code Colom., art. 271; Intellectual Property Enforcement Act Costa Rica, arts. 51, 52, 54, 55, and 58; Federal Criminal Code Mex., art. 424 III and 424 bis; and, Criminal Code Peru, art. 217.

48 Copyright Act Arg., art. 72 c); Criminal Code Braz., art. 185; Copyright Act Chile, art. 79 bis; Criminal Code Colom., art. 270; Intellectual Property Enforcement Act Costa Rica, art. 57; Federal Criminal Code Mex., art. 427; and, Criminal Code Peru, art. 216 and 219.

49 Copyright Act Chile, art. 84; Criminal Code Colom., art. 272.2; Intellectual Property Enforcement Act Costa Rica, art. 63; and, Criminal Code Peru, art. 218 d) and 220 D.

50 Criminal Code Colom., art. 272.1; Intellectual Property Enforcement Act Costa Rica, art. 62; and, Criminal Code Peru, art. 220-A.

51 Copyright Act Arg., art. 71-73; Criminal Code Colom., arts. 272.3 and 272.5; Intellectual Property Enforcement Act Costa Rica, art. 62 bis; Federal Criminal Code Mex., art. 424 bis II; and, Criminal Code Peru, art. 220 B and 220 C.

misappropriation of public domain works,[52] pretending to be a copyright collective society,[53] misappropriation of another's rights,[54] and unauthorized over-printing of copyrighted material.[55]

Table 2:
Criminal Copyright Infringements
in Selected Latin American Countries, 2017

	Argentina	Brazil	Chile	Colombia	Costa Rica	Mexico	Peru
For-profit unauthorized using of copyrighted works	✓	✓	✓	✓	✓	✓	✓
Non-for-profit unauthorized using of copyrighted works	✓	✓	✓	✓	×	×	✓
Digital rights management information related acts	×	×	✓	✓	✓	×	✓
Anti-circumventing technological protective measures	×	×	×	✓	✓	×	✓
Anti-trafficking technological protective measures	✓	×	×	✓	✓	✓	✓
Infringing on authorship and integrity of a work	✓	✓	✓	✓	✓	✓	✓
Other infringements against copyright law	✓	✓	✓	✓	✓	✓	✓

52 Copyright Act Chile, art. 80.

53 Criminal Code Peru, art. 220 b).

54 Copyright Act Arg., art. 74; Copyright Act Colom., art. 29; Intellectual Property Enforcement Act Costa Rica, art. 53; and, Criminal Code Peru, art. 220 a).

55 Copyright Act Arg., art. 72 d); Intellectual Property Enforcement Act Costa Rica, art. 56; Federal Criminal Code Mex., art. 424 II; and, Criminal Code Peru, art. 217 e).

From a human rights viewpoint, Latin American countries have over-criminalized copyright infringement by sanctioning conduct that is excepted from criminal intervention elsewhere and which potential damage could be prevented or repaired with other legal remedies. Of course, it is almost impossible to determine a global standard for the border between an illegal act that requires criminal intervention and one that does not, because of the essential territorial character of criminal law and the permissible margin of appreciation for domestic law. However, the following pages analyze the conduct that is criminalized in Latin American law and identify excessive criminal intervention by comparison with analogous provisions in the U.S. and European Union´s countries. This analysis focuses on the four basic forms of acts usually sanctioned by criminal law: unauthorized use of copyrighted material, removing and altering rights management information, crimes connected to technological measures, and violating moral rights.

2.1. Unauthorized use of copyrighted works

The drafting of criminal law on the unauthorized use of copyrighted works varies from country to country. Unlike other provisions on copyright, such as those recognizing exclusive rights and limitations, criminal clauses on the matter vary noticeably, which prevents a common understanding of them regionally. While some of them may look consistent with human rights obligations on criminal law, others raise several and serious concerns.

A primary concern is related to the infringement of the principle of legality in some jurisdictions by an overly broad definition of what constitutes criminal behavior.[56] This is the case of Brazil which, since 1940, has punished "*violating copyright,"* without more description.[57] This criminal law has been criticized for infringing the principle of legality by not providing a full description of the sanctioned crime and, instead, referring to a civil regulation to determine it.[58] In recent years, amendments have been introduced to the law in order to aggravate some particular acts,[59] but none of the amendments have resolved questions based on infringing the principle of legality. Something similar happens in Chile, where a law sets forth a residual crime consisting of any infraction to the copyright act and its regulation other than those specifically defined by law, although the law punishes these

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56 *But see,* Ricardo Lackner, *Aproximación a los Aspectos Penales de las Modificaciones a la Ley de Propiedad Literaria y Artística (Ley No. 9.739) Introducidas por la Ley No. 17.616*, 14 REVISTA DE DERECHO PENAL 7, 14-15 (2004) (suggesting another infraction to the principle of legality in the absence of a definition of work for purpose of criminal enforcement, which, therefore, provides protection to a broad category of material through an open clause of works that includes *"any production of intelligence"*).

57 Criminal Code Braz., art. 184; and, Software Act Braz., art. 12.

58 Antonio Murta Filho*, Aspectos Penais Inovadores da Recente Lei 9.609/98, de 19/2/98,* 29 REVISTA DA ABPI 29, 30-31 (1997) (recognizing that a criminal provision sanctioning one who "violates copyright" is excessively broad and constitutes an incomplete criminal law (in Portuguese, *"uma norma penal em branco"*); and, Túlio Lima Vianna, *A Ideologia da Propriedade Intelectual: a Inconstitucionalidade da Tutela Penal dos Direitos Patrimoniais de Autor*, 12 ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 933, 941-942 (2006). *See also* Pedro Henrique Arazine de Carvalho Costandrade, *Dos Novos Paradigmas da Propriedade Intelectual: da Inconstitucionalidade da Tutela Penal do Direito de Autor*, 5 REVISTA ELETRÔNICA DO IBPI INSTITUTO BRASILEIRO DE PROPRIEDADE INTELECTUAL 41, 85-88 (2011); and, ALEXANDRE PIRES VIEIRA, DIREITO AUTORAL NA SOCIEDADE DIGITAL, at 55-61 (Montecristo Ed., 2011) (arguing that art. 184 of the Brazilian Criminal Code is unconstitutional on several grounds).

59 Carvalho Costandrade, *supra* note 58, at 78-79.

residual crimes with only fines.[60] In fact, use of wide-open clauses on criminal enforcement of copyright has been recognized as a tendency in the region.[61]

The same criticism could be applied to Argentinean law that, influenced by French law,[62] punishes one *"who defrauds the intellectual property rights recognized by copyright law"*.[63] Even when the law provides a better description of other aggravated crimes,[64] the basic scheme for criminal enforcement remains the above-quoted text,[65] which lacks a detailed description of what exactly is the punishable conduct, what are the protected rights, or

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60 Copyright Act Chile, art. 78. *See also* Alfredo Etcheberry, *Aspectos Penales en Materia de Derechos de Autor: Ilícitos Penales en la Legislación Chilena,* in 7 CONGRESO INTERNACIONAL SOBRE PROTECCIÓN DE LOS DERECHOS INTELECTUALES: DEL AUTOR, EL ARTISTA, Y EL PRODUCTOR, at 512-513 (Santiago de Chile, 1992) (noticing the infringement of the principle of legality because lacking a definition on copyright crime, although minimizing this problem by arguing it would be a mere administrative penalty). *Similarly,* Andrés Grunewaldt, *Delitos contra los Derechos de Autor en Chile*, 2 REVISTA CHILENA DE DERECHO Y TECNOLOGÍA 95, 108-110 (2013); and, ELISA WALKER ECHEÑIQUE, MANUAL DE PROPIEDAD INTELECTUAL 291-292 (Legal Publ'g, 2014) (referring to the openness and broad language of Chilean criminal law on the matter). *But see infra* Chap. VI, notes 123-176 and accompanying text (reviewing application of human rights standards on due process to administrative penalties).

61 DELIA LIPSZYC, COPYRIGHT AND NEIGHBOURING RIGHTS, at 553 (UNESCO Publishing, 1999).

62 CARLOS MOUCHET & SIGRIDO AUGUSTO RADAELLI, DELITOS CONTRA LOS DERECHOS INTELECTUALES: LA LEY ARGENTINA 11.723, at 31 and 51 (Librería Jurídica de Valerio Abeledo, 3th ed., 1935) (pointing out the influence of both the 1793 French copyright act and the 1810 Napoleonic Criminal Code that punished copyright infringement as *contrefaçon*). *But see* LIPSZYC, *supra* note 61, at 555 (arguing that that drafting came from the 1879 Spanish law and was adopted by some Latin American countries, including Argentina).

63 Copyright Act Argentina, art. 71.

64 Copyright Act Argentina, arts. 72, 72 bis, and 73. *See also* Xiangxiang Ma, *Introducing Argentine Copyright Law: Criminal Penalties Regime,* in REPORT ON COPYRIGHT CRIMINAL LAW IN THE WORLD, at 524-525 (Shizhou Wang ed., People's Public Security Press, 2008) (explaining that article 71 applies to any fraud, while article 72 specifies certain special types of fraud).

65 *See* CARLOS ALBERTO VILLALBA & DELIA LIPSZYC, EL DERECHO DE AUTOR EN ARGENTINA, at 267-321 (La Ley, 2001).

how infringement takes place. That legal vagueness had created an evolving court criteria that initially left infractions unpunished by requiring prosecutors to meet the unachievable exigencies of criminal fraud,[66] but later extended criminal enforcement for protecting all rights granted to the right holder by law.[67] This lack of determination defeats the purpose of the principle of legality, which is to provide a clear distinction to people between legal and illegal acts, let alone the fact that those criminal provisions refer to the whole statute on copyright without distinction based on the actual harm of the infringing conduct.[68]

Similar criticism was raised against Spanish criminal code that punished one *"who deliberately infringes copyright."*[69] Scholars argued that that generic language was unconstitutional for infringing the principle of legality,[70] which required courts to provide a narrow interpretation that limited criminal enforcement until 1987, when an amendment

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66 VILLALBA & LIPSZYC, *supra* note 65, at 272-274. MOUCHET & RADAELLI, *supra* note 62, at 65-81 (arguing that reference to defrauding moves courts to demand trickery or deceit, a requirement impossible to fulfill in most cases of copyright infringement).

67 VILLALBA & LIPSZYC, *supra* note 65, at 277-280. *See also* HORACIO FERNÁNDEZ DELPECH, MANUAL DE DERECHOS DE AUTOR, at 163 (Editorial Heliasta, 2011) (ratifying that modern case law does not required trickery or deceit in order to punish copyright crime).

68 LIPSZYC, *supra* note 61, at 553-554 (justifying open criminal clauses on the need to deal with technological progress, although recognizing it jeopardizes fundamental guarantees).

69 Decreto 3096/1973, de 14 de septiembre, por el que se publica el Código Penal, texto refundido conforme a la Ley 44/1971, de 15 de noviembre, Boletín Oficial del Estado, núm. 297 de 12 de diciembre de 1973, art. 534 (Spain).

70 *See* Enrique Gimbernat Ordeig, *Otra Vez: Los Delitos contra la Propiedad Intelectual (Al Mismo Tiempo, Algunas Reflexiones sobre los Delitos con Objeto Plural Inequívocamente Ilícito, sobre los de Actividad y sobre el Ámbito de Aplicación de los Artículos 13 y 15 del Código Penal)*, 15 ESTUDIOS PENALES Y CRIMINOLÓGICOS 99, 100 (1991); and, Carmen Armendáriz León, *Delitos Relativos a la Propiedad Intelectual Referencia al Tipo Básico del Art. 270 CP*, 42 ICADE: REVISTA DE LAS FACULTADES DE DERECHO Y CIENCIAS ECONÓMICAS Y EMPRESARIALES 267, 272 (1997).

corrected it by providing a fair description of the forbidden acts.[71] In spite of the Spanish influence in both criminal and copyright law through the region, those arguments and the resulting amendment have passed absolutely unnoticed for Latin American copyright scholars,[72] except in Costa Rica, where the Supreme Court declared unconstitutional the provision of the copyright act that punishes one who violated the law, because of infringing the principle of legality granted by the Constitution.[73]

The definition of criminal copyright seems better drafted in Uruguay, whose copyright law lists the acts that constitute a crime.[74] However, scholars also have criticized that legislation because, under the appearance of compliance with the principle of legality, the number of potential acts covered by an open list of crimes fails to provide legal certainty and, instead, grants excessive room for judicial discretion.[75] This is also true of

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71 Ley Orgánica 6/1987, de 11 de noviembre, por la que se modifica la sección III del capítulo 4.º, título XIII del libro II del Código Penal. Boletín Oficial del Estado, núm. 275 de 17/11/1987 (Spain).

72 *But see,* LIPSZYC, *supra* note 61, at 554 (arguing for a detailed description of criminal copyright infringement in order to prevent jeopardizing guarantees of criminal law, as well as leaving copyright unprotected).

73 Supreme Court of Justice (Costa Rica), Oct. 9, 1992 (ruling unconstitutional paragraph c) of article 117 of the copyright act that punished those who violated any provision of the law that was not punished by another specific provision, because of its flagrant infringement on the article 39 of the Constitution that consecrates the principle of legality on criminal law).

74 Copyright Act Uruguay, art. 46 A (criminalizing who *"publishes, sells, reproduces or makes another to reproduce…; distributes; stocks in order to distribute to public, or makes available…"* a work).

75 MARTÍN PECOY, PROTECCIÓN PENAL DE LA PROPIEDAD INCORPORAL EN EL URUGUAY, at 35 and 40 (Edit. Universidad de Montevideo, 2008). *See also,* 2 MIGUEL LANGON, CÓDIGO PENAL Y LEYES PENALES COMPLEMENTARIAS DE LA REPÚBLICA ORIENTAL DEL URUGUAY, at 855 (Edit. Universidad de Montevideo, 3rd ed., 2010); and, Lackner, *supra* note 56*,* at 12 (qualifying the drafting of criminal provisions as "*shocking*", because of listing 22 potential acts that infringe copyright and, therefore, are susceptible of punishment). *But see,* Romeo Grompone, *Sanciones Civiles y Penales en Materia de Derechos de Autor,* in PROPIEDAD

Colombia and its even longer list of criminal copyright acts,[76] for which punishment exceeds unauthorized exercise of exclusive economic rights by criminalizing, for instance, transporting and mere possession of infringing copies. This way, Colombia not only punishes one who, lacking authorization, reproduces or sells infringing works, but also one who merely keeps them. The latter scenario is far from being a mere law on the books. In fact, this was the case of Oscar Ramirez, a Colombian citizen condemned to four years of imprisonment for merely keeping with him sixteen CDs with infringing music.[77]

The definition of criminal copyright seems complete when the law describes punishable acts by a fair remission to exclusive rights or, even better, by direct restatement of them. This is the case of Peru's criminal code, which states precisely forbidden conduct,[78] and Costa Rica, whose law has several provisions that provide a comprehensive description of the proscribed acts.[79] Some scholars have suggested that even those

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INCORPORAL: DERECHOS DE AUTOR Y CONEXOS, PROPIEDAD INDUSTRIAL Y MARCARIA, at 72-73 (Montevideo, Ministerio de Educación y Cultura, 1987) (arguing in favor of an open criminal clause to prevent any legislative omission, particularly having in mind the variety and complexities of the contemporaneous world).

76 Criminal Code Colom., art. 271 num. 1 and 5 (criminalizing who, among other acts, *"1) … reproduces a work…, transports, stocks, keeps, distributes, imports, sells, offers, acquires for selling or distributing, or provides under any circumstances such copies; … 5) arranges, makes or uses, by any mean or procedure… a copyrighted work"*.).

77 Primer Interno con Brazalete Electrónico Fue Condenado por Comprar CD Piratas, El Tiempo (Bogotá), Feb. 6, 2009.

78 Criminal Code Peru, art. 217 (listing the exclusive rights which exercise by other than authorized user constitutes a crime).

79 Intellectual Property Enforcement Act Costa Rica, arts. 51 and 52 (criminalizing public performance, communication, and making publicly available of a work), 54 and 55 (punishing copying works), and 58 (sanctioning non-authorized exercise of exclusive right of adaptation, translation, and modification).

provisions may infringe the principle of legality, for providing an incomplete idea of forbidden acts by referring to other pieces of law, mainly to technical legal wording of copyright act.[80] However, most scholars see no problem with legal references. As opposed to a sort of "blanket law," providing legal references is a mere legal drafting technique that refers to another law for providing the content of criminal provisions,[81] which seems reasonable having in mind the current technicalities of copyright law.

In general, criminal law punishes the unauthorized use of copyrighted works. In addition to a proper authorization by right holders, defendants are also excused by law from having to obtain such authorization when using works based on copyright exceptions and limitations.[82] Some Latin American laws suggest that only the author or right holder can provide that authorization, or omit that a law also can grant it.[83] Despite this, from a criminal law viewpoint, an exception is a justification defense that defines a conduct

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80 César Alejandro Osorio Moreno, *Evolución de la Protección Penal del Derecho de Autor en Colombia*, 34 REVISTA DE DERECHO UNIVERSIDAD DEL NORTE 147 (2010) (arguing that Colombian criminal copyright provisions infringe the principle of legality, by making reference to another law for complete knowledge of prohibited conduct, and they would infringe the Constitution because of regulating fundamental rights and, therefore, would require a different legislative process and preventive constitutional review by the Constitutional Court). *See,* Const. Colom., arts. 152-153.

81 ENRIQUE CURY, LA LEY PENAL EN BLANCO, at 26-29 (Editorial Temis. S.A., 1988); SANTIAGO MIR PUIG, DERECHO PENAL PARTE GENERAL, at 33-34 (Reppertor, 5th ed., 1998); and, FRANCISCO MUÑOZ CONDE AND MERCEDES GARCÍA ARÁN, DERECHO PENAL: PARTE GENERAL, at 36 (Tirant lo Blanch, 2nd ed., 1996).

82 JORGE MARIO OLARTE & MIGUEL ANGEL ROJAS, LA PROTECCIÓN DEL DERECHO DE AUTOR Y LOS DERECHOS CONEXOS EN EL ÁMBITO PENAL, at 42-44 (Dirección Nacional de Derechos de Autor, 2010).

83 *See, e.g.,* Intellectual Property Enforcement Act Costa Rica, arts. 51, 52, 55, 56, and 58 (criminalizing some acts committed *"without authorization by author, right holders, or who represent them"*); and, Criminal Code Peru, art. 217 (criminalizing acts committed *"with previous and written authorization by author or rights holder*").

"otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure."[84] For instance, quoting a work is accepted worldwide as a use authorized by law and, therefore, there is no criminal sanction against its exercise.[85] Therefore, both authorizations, those provided by a right holder and those granted by law, prevent criminal enforcement against the respective user.

In Latin American countries, unfortunately, justification based on copyright exceptions and limitations are narrow for several reasons. First, as we explored in the previous chapter, in several countries, the comprehensive copyright doctrine and the double three-step test restrict relying on the law for exercising exceptions.[86] Second, the number and scope of available copyright exceptions and limitations are far less, when compared, for instance, with European Union and U.S. law.[87] Third, those exceptions are

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84 LIPSZYC, *supra* note 61, at 551 (supporting that application of criminal sanction does not take place when use falls within the scope of copyright exceptions). *See also* Grunewaldt, *supra* note 60, at 110-112 (discussing the actual legal effect of copyright exceptions on criminal law); and, Peter W.H. Heberling, *Note, Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 916 (1975). While scholars agree that copyright limitations prevent criminal enforcement, they disagree on their nature from a criminal law viewpoint. Some scholars see copyright exceptions and limitations as a justification that eliminates illegality of acts, other authors argue exceptions are part of the objective description provided by law. In my opinion, that disagreement is the outcome of lacking a common understanding about copyright limitations, ranging from unprotected material (such as public domain and non-original works) to exceptional circumstances that must comply with the three-step test. That distinction, however, may be relevant for purpose of allocating *onus probandi* on criminal acts among litigating parties.

85 *See* Berne Convention for the Protection of Literary and Artistic Works, art. 10.1 (providing, in fact, a compulsory exception for quotation).

86 *See supra* Chap. III, notes 61-70 and accompanying text (analyzing comprehensive copyright protection for economic rights in Latin American law); and Chap. III, notes 71-78 and accompanying text (analyzing the double-three-step test in Latin American copyright law).

87 *See, e.g.,* Maria Ferreira Dias, Carlos Fernández Molina, and Maria Manuel Borges*, As Excepções aos Direitos de Autor em Benefício das Bibliotecas: Análise Comparativa entre a União Européia e a América*

considered *numerus clausus* and, therefore, there is no room for judicial determination.[88] Fourth, with the exception of Chile, no other country in the region has exceptions specifically designed for the online environment.[89] Additionally, some scholars also have argued that most exceptions in force apply only to offline uses, not online. As a result, the legal justifications for using copyrighted works are significantly less available in Latin America and, therefore, the potential scope of criminal intervention is broader.[90]

A second concern about criminal copyright enforcement from a human rights viewpoint is connected to the principle of *mens rea*. Criminal copyright enforcement does not apply to all unauthorized uses of works; usually there are additional legal requirements. In fact, the TRIPS Agreement, the one international instrument that requires criminal enforcement of copyright, only demands it against some *"willful"* piracy.[91] Consistent with

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Latina, 16 PERSPECTIVAS EM CIÊNCIA DA INFORMAÇÃO 5 (2011) (comparing copyright exception in favor of libraries in the European Union and Latin America, and confirming notorious asymmetries and deficiencies in the latter one).

88 LIPSZYC, *supra* note 61, at 58, 181, and 223 (arguing copyright exceptions are *numerous clausus* and must be interpreted and applied restrictively). *See supra* Chap. I, notes 113-115 and accompanying text. *See also supra* Chap. III, notes 46-60 and accompanying text.

89 *See supra* Chap. I, notes 121 and 122, and accompanying text.

90 Pedro Mizukami, Ronaldo Lemos, Bruno Magrani & Carlos Affonso Pereira de Souza, *Exceptions and Limitations to Copyright in Brazil: A Call for Reform,* in ACCESS TO KNOWLEDGE IN BRAZIL, at 45-54 (Lea Shaver ed., Bloomsbury, 2010) (arguing that in Brazil criminal law is not the last resort of enforcement and that a narrow regime of exceptions and limitations produce mass copyright infringement and, therefore, mass criminal enforcement, because any infringement is automatically a criminal offence, and exemplifying with scholarly use of copyrighted material and file sharing in Brazil). *See also,* Yuqing Yuchi, *Summary of Brazilian Copyright Protection and Criminal Law,* in REPORT ON COPYRIGHT CRIMINAL LAW IN THE WORLD, *supra* note 64, at 510-517 (describing the increasing reliance on criminal law for enforcing copyright in Brazil, that, since 2003, has punished any unauthorized usage, with or without commercial purpose, with more severe sanctions).

91 TRIPS Agreement, art. 61. *But see* BANKOLE SODIPO, PIRACY AND COUNTERFEITING: GATT TRIPS AND DEVELOPING COUNTRIES 234-235 (Kluwer Law International, 1997)

the aforementioned treaty, in the U.S., infringement must be done "*willfully*,"[92] meaning that the infringer must have actual knowledge that the act in question is a copyright infringement.[93] The mere evidence of unauthorized use, by itself, is not sufficient to establish willful infringement.[94] Similarly, in the European Union, copyright crime principally is limited to intentional crime and does not include negligence.[95] For instance, Spain initially required crimes to be committed *"intentionally,"*[96] but later it imposed a more narrow subjective exigency by demanding crimes to be committed *"for damaging another"* and *"for profit,"*[97] meaning that the defendant not only pursued the act in question purposely but also in order to achieve some commercial gain.[98] International and comparative law,

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(arguing for requiring defendants to prove their innocence in order to facilitate criminal enforcement of intellectual property, and lamenting the omission of a clear rule on this matter by the TRIPS Agreement).

92 §506 (a) (1) US Copyright Act. *See also,* Tunez Model Law on Copyright for Developing Countries (UNESCO – WIPO, 1976), §15.

93 MELVILLE B. NIMMER & DAVID NIMMER, 5 NIMMER ON COPYRIGHT (Matthew Bender, 2011), §15.01[A][2] (noting that the law requires more than an intent to copy, but a *"voluntary, intentional violation of a known legal duty,"* for instance when a defendant has been subject to a previous permanent injunction against copyright infringement).

94 §506 (a) (2) U.S. Copyright Act.

95 Shizhou Wang, *Study on Criminal Liability of TRIPS*, in REPORT ON COPYRIGHT CRIMINAL LAW IN THE WORLD, *supra* note 64, at 51. *See also* Kioupis, *supra* note 2, at 237-238 (clarifying that, in most European legal systems, criminal liability presupposes infringement, but not all infringement is a crime, because of the *ultima ratio* of criminal enforcement, which supplements civil and administrative enforcement).

96 1944 Criminal Code Spain, art. 534, as ammended and consolidated by Decreto 3096/1973, de 14 de septiembre, BOE núm. 297, de 12 de diciembre de 1973 (Spain) (punishing with imprisoning and fines one "who intentionally infringes copyright").

97 Criminal Code Spain, art. 270. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, BOE núm. 281 de 24 de noviembre de 1995 (Spain).

98 *See,* Luz María Puente Alba, *El Ánimo de Lucro y el Perjuicio como Elementos Necesarios de los Delitos contra la Propiedad Intelectual,* 21 REVISTA PENAL 103 (2008) (arguing for a restrictive interpretation of "for profit" and "damages" in Spanish provisions that punish copyright crime in order to limit infringement to acts oriented to commercializing or exploiting economic rights significantly); and, Carmen Armendáriz León, *Delitos relativos a la Propiedad Intelectual:*

then, prove that criminal copyright enforcement requires some high-level psychological connection between the offender and the infringing act.

Latin American countries have mixed records on applying the principle of *mens rea* in criminal copyright enforcement. Mexico and Venezuela seem to be the only countries whose laws require acting "*maliciously*," forcing prosecutors to prove some psychological connection of the offender with the charged criminal behavior.[99] But, as said previously, another subjective exigency that ameliorates criminal enforcement on unauthorized use of copyrighted work is limiting that enforcement to some sort of for-profit infringement. This is the case of the U.S., whose law generally requires infringement done *"for purpose of commercial advantage or private financial gain."*[100] This is not the case in Latin American copyright law, where criminalized infringement disregards the infringer's motivation. Committing infringement for commercial purposes, with for-profit motives, or for obtaining financial gain may be relevant, however, to aggravate the punishment in a given

Referencia al Tipo Básico del Art. 270 CP, 42 ICADE: REVISTA DE LAS FACULTADES DE DERECHO Y CIENCIAS ECONÓMICAS Y EMPRESARIALES 267 (1997) (analyzing relevant Spanish criminal law). *See also,* Alberto Cerda, *Proyecto de Ley Corta sobre Piratería: Modifica la Ley 17.336 sobre Propiedad Intelectual*, 4 REVISTA CHILENA DE DERECHO INFORMÁTICO 191, 196-197 (2004) (criticizing criminalization of not-for-profit acts, because of exceeding international demands and opening room for ambiguity before Chilean domestic courts).

99 Criminal Code Mexico, art. 424; and, Copyright Act Venezuela, arts. 119 to 121. *See also,* José Francisco Martínez Rincones, *La Protección Penal de los Bienes Jurídicos Intelectuales en la Ley sobre el Derecho de Autor Venezolana*, 12 (16) REVISTA PROPIEDAD INTELECTUAL 114 (2013) (analyzing Venezuelan criminal copyright law and noting copyright crimes must be committed maliciously or purposely).

100 17 U.S. Code § 506 - Criminal Offenses (punishing willfully infringement of copyright). *But see* Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J. L. & TECH. 469, 481-485(2010-2011) (describing the continued expansion of criminal penalties for copyright infringement in the United States, disregarding or minimizing commercial motives for criminalizing certain infringements).

case.[101] In fact, only Costa Rica and Mexico have excluded criminal enforcement from not-for-profit infringement. In sum, when criminalizing copyright infringement, most Latin American countries do not require willfulness expressly and disregard distinguishing between for-profit and not-for-profit infringement.[102]

What is the actual effect of not having an explicit requirement of willfulness when criminalizing copyright infringement? It basically modifies the burden of proof. In some countries, by presuming that the infraction was committed at least negligently, they reverse the obligation to prove intent. In other countries, that reversal has been rejected and the plaintiff still needs to prove some level of maliciousness, but, unlike U.S. law, it can be presumed from factual circumstances.[103] As a result, the general absence of a requirement for willfulness obviously facilitates criminal copyright enforcement in Latin America and erodes the human right to be presumed innocent.

A third concern related to criminal copyright enforcement from a human rights perspective is compliance with the principle of harmfulness, which reserves criminalization

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101 *See* Copyright Act Argentina, art. 72 bis (setting forth aggravated forms of copyright crime); Criminal Code Brazil, art. 184; Copyright Act Chile, art. 83 (establishing aggravated crimes in case of organized crime); Criminal Code Peru, arts. 217 and 218 (aggravating punishment against acts committed for "commercial purpose or another kind of economic advantage.").

102 Grunewaldt, *supra* note 60, at 105, 119, and 128 (calling attention to the deficiency of the Chilean copyright law because it omits an explicit *mens rea* requirement). *See also* WALKER, *supra* note 60, at 289-290 (referring to the elimination of requirements regarding *mens rea* in Chilean criminal law on this matter).

103 Olarte & Rojas, *supra* note 82, at 36-37 (arguing that this would be the case in Colombian criminal code).

to damaging acts, and avoids turning harmless acts and even minor harmful actions criminal. Consistently, the TRIPS Agreement demands criminal enforcement only against some acts of piracy, those committed *"on a commercial scale."*[104] This language attempts to focus enforcement on organized crime and excludes private scale infringement,[105] as well as *de minimis* infractions.[106] This criterion has been ratified by a recent WTO Panel Report on intellectual property enforcement in China that did not find a violation of the TRIPS Agreements by the fact that a country excludes *de minimis* infringement from criminal enforcement, even if it were willful copyright piracy on a commercial scale.[107] In sum, while international human rights preclude criminalizing harmless behavior, international trade law only demands criminal enforcement against seriously harmful copyright infringement. It does not mean minor infractions are free from liability, because of their potential

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104 TRIPS Agreement, art. 61.

105 Firas Massadeh, *Intellectual Property Enforcement: Criminal Law Aspects in Light of TRIPS Agreement,* in UNIVERSITY OF TURIN AND WIPO WORLDWIDE ACADEMY, MASTER OF LAWS IN INTELLECTUAL PROPERTY POST-GRADUATE SPECIALIZATION COURSE ON INTELLECTUAL PROPERTY: COLLECTION OF RESEARCH PAPERS 2004, at 525-526 (WIPO, 2005). *See also,* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) & THE INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (ICTSD), RESOURCE BOOK ON TRIPS AND DEVELOPMENT, at 620 (Cambridge Univ. Press, 2005) (assuring that isolated acts of infringement are not subject to the TRIPS Agreement, even if made for profit); and, DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING, HISTORY AND ANALYSIS, at 491-492 (Thomson Reuters, 3rd ed., 2008) (rejecting the interpretation of the TRIPS clause as a synonym of commercial activity, but rather as "demonstrable, significant commercial impact").

106 TRIPS Agreement, art. 60 (suggesting less strong enforcement against *de minimis* infraction, by allowing exclusion from customs *"small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments"*).

107 WTO Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Mar. 20, 2009). *See,* Peter Yu, *TRIPS Enforcement and Developing Countries*, 26 AM. U. INT'L L. REV. 727 (2011), at 731-734; and, MICHAEL BLAKENEY, INTELLECTUAL PROPERTY ENFORCEMENT: A COMMENTARY ON THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA), at 203 *et seq.* (Edward Elgar Publ'g, 2012).

enforcement through other legal mechanisms, such as civil remedies or administrative measures.

Latin America also has a mixed record on applying the principle of harmfulness when enforcing copyright through criminal law. In most countries, prejudice is neither required for purpose of criminalizing copyright infringement nor relevant for determining the actual punishment.[108] However, this legal criterion is being challenged by courts who, based on constitutional law, demand some level of harm for enforcing criminal law against copyright infringers. This has become a well-established exigency in Argentina,[109] but remains an ongoing judicial issue in Brazil and Colombia, as discussed below.[110] In Chile, instead, infringement is criminalized even if no damage takes place, but the degree of damage becomes relevant at least for purpose of determining punishment.[111]

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108 Copyright Act Argentina, arts. 71-74; Criminal Code Brazil, art. 184; Criminal Code Colombia, art. 271; and, Criminal Code Peru, arts. 217-218. *See also* Criminal Code Mexico, art. 424 (criminalizing copyright piracy, but, unlike other countries, limiting criminal law to malicious and for-profit infringement); and, Copyright Act Uruguay, art. 46 A (criminalizing copyright infringements, but requiring, alternatively, *"for-profit purpose or purpose of causing unjustified prejudice"*).

109 *See* CARLOS A. CARNEVALE, DERECHO DE AUTOR, INTERNET Y PIRATERÍA: PROBLEMÁTICA PENAL Y PROCESAL PENAL, at 91-93 (Ad-Hoc, 2009).

110 *See infra* notes 252-267 and accompanying text.

111 Copyright Act Chile, art. 79 inc. 2. *See also,* Grunewaldt, *supra* note 60, at 121-123, and 137-138 (calling attention to the absence of criteria on level of damages for activating criminal enforcement, although articulating some legal defenses in cases of *de minimis* infringement, and referring to the relevance of the amount of damages to determine the applicable punishment); and, Andrés Grunewald*, Análisis de Contenido del Proyecto de Ley sobre Propiedad Intelectual*, 34 BOLETÍN DEL MINISTERIO PÚBLICO 278, at 282 (2008) (noting that damages may become relevant for purpose of determining punishment but not for criminalizing the infringement).

Costa Rica seems to have a thoughtful process of selective criminalization based on the principle of harmfulness. On one hand, it makes certain infringements criminal only if prejudice takes place, such as overprinting and unauthorized translation.[112] On the other hand, harm is not necessary for other crimes, such as unauthorized reproduction and public performance, but still relevant for determining punishment.[113] However, the law adds an interpretative criterion, according to which, criminal sanctions shall apply at least to harmful piracy of copyright on a commercial scale, including significant copyright infringement with the purpose of achieving commercial advantage or private financial gain.[114] This language, which was introduced only recently into domestic law,[115] suggests that courts may not apply punishment to some harmless copyright infringements.

In sum, Latin American countries have made criminal law an extremely powerful tool for enforcing copyright by generally criminalizing any unauthorized use of copyrighted works, by limiting legal justifications, and by disregarding willfulness, infringing motives, and the amount of damages. These developments on criminal copyright raise concerns about compliance with some human rights limitations to criminal enforcement, particularly with the principles of legality, *mens rea*, and harmfulness.

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112 Intellectual Property Enforcement Act Costa Rica, arts. 55, 56, and 58.

113 Intellectual Property Enforcement Act Costa Rica, arts. 51, 52, 54, 55, 59, and 60.

114 Intellectual Property Enforcement Act Costa Rica, art. 70.

115 Ley 8656 del 18-07-8, Modificación de varios artículos de la Ley de Procedimientos de Observancia de los Derechos de Propiedad Intelectual N°8039, publicada en La Gaceta, 11 de agosto de 2008 (Costa Rica).

2.2. Removing and altering digital rights management information

Digital rights management information (RMI) is data incorporated into works that allows identifying a work, its authors, right holders, terms and conditions of use, and the representation of such information. Attaching that data to works facilitates managing copyright on works, particularly in digital environments. For this reason, the WIPO Copyright Treaty (WCT) requires its parties to provide *"adequate and effective legal remedies"* against removing and altering that information, and against making available works knowing that information has been removed or altered without authority.[116] However, the treaty does not demand criminalizing those acts, because the negotiating parties to the treaty lacked agreement about criminal intervention.[117]

Even though the international obligation is limited in providing adequate and effective legal remedies, several Latin American countries have implemented that commitment into domestic law by criminalizing both the removal or the alteration of RMI, as well as the making available of works knowing that RMI has been removed or altered. In Costa Rica, such acts are punished with imprisonment, but the law provides some exceptions.[118] Colombia and Peru also sanction those acts with incarceration, but only if

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116 World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) [*hereinafter* WCT], art. 12.

117 *See infra* note 138.

118 Intellectual Property Enforcement Act Costa Rica, art. 63 (punishing with 1 to 5 years of imprisonment, but adopting exceptions for some public interest institutions, such as libraries and law enforcement agencies).

committed for a commercial purpose.[119] Chile, instead, punishes those acts only with fines,[120] while Brazil sets forth some economic compensation.[121] Neither Argentina nor Mexico has implemented into domestic law those WCT provisions.

The criminalization of acts related to removing and altering RMI also may raise some human rights concerns. The concerns are not based on the principle of legality, because criminal copyright law provides a detailed and comprehensive description of what is being punished. However, those crimes raise some human rights concerns based on their violation of the principle of *mens rea* by disregarding the presumption of innocence, and the principle of proportionality by punishing preparatory acts rather than damaging ones. The following paragraphs review these concerns, while additional issues arising from its disproportional punishment are analyzed in the next Chapter.

A primary concern about the criminal enforcement of RMI-related acts is its compliance with the principle of *mens rea* and, therefore, with the right to be presumed innocent. Someone who removes or alters electronic information of a work by mere mistake or ignorance does not deserve criminalization, because there is no psychological

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119 Criminal Code Colombia, art. 272 No. 2 (sanctioning with 4 to 8 years of prison one who removes or alters RMI, and who makes works available which RMI has been removed or altered); and, Criminal Code Peru, art. 220 D (criminalizing same conduct with imprisonment up to 2 years).

120 Copyright Act Chile, art. 84.

121 Copyright Act Brazil, art. 107 III and IV.

connection with the supposed infringement.[122] A similar exigency could be formulated for criminalizing one who makes available a work from which RMI has been removed or altered. This is why the WIPO Copyright Treaty requires legal measures only *"against any person knowingly performing any of [those] acts knowing, or with respect to civil remedies having reasonable grounds to know."*[123] Then, international instruments on copyright seem to have a consistent approach to the application of human rights standards to criminal law.

In Latin America, some countries explicitly require that the punishment of RMI-related acts require that the defendant acted with knowledge of removing or altering RMI, or making available a work with removed or altered information.[124] Costa Rica, however, imposes a knowledge requirement only with regard to making RMI-altered works available, but not for removing or altering the RMI itself.[125] Even worse is the case of Colombia, whose law does not require infringer´s knowledge for any RMI-related crime.[126] Here, because of harsh criticism,[127] the government introduced a bill rectifying the criminal

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122 This would be the case, for instance, of one who changes music format from .wav to .mp3 by using software that does not keep any metadata from the original format, including RMI that would be removed automatically in that process.

123 WCT, *supra* note 116, art. 12.

124 Copyright Act Chile, art. 84 (requiring *"knowledge"* or *"having had knowledge"*); Criminal Code Peru, art. 220 D (requiring *"for purpose of commercialization or another kind of economic advantage"* or *"knowledge"*).

125 Intellectual Property Enforcement Act Costa Rica, art. 63.

126 Criminal Code Colombia, art. 272 No. 2.

127 *See* Ernesto Rengifo García, *Un Nuevo Reto del Derecho en la Edad de la Información*, 12 REVISTA PROPIEDAD INMATERIAL 105 (2008); and, Jhonny Pabón, *Los Riesgos de las Medidas Tecnológicas de Protección: El Caso de los DVD*, 12 REVISTA PROPIEDAD INMATERIAL 121 (2008).

code,[128] but it did not come into force after the Constitutional Court judged it unconstitutional, albeit for different reasons.[129]

What is the effect of not having an explicit knowledge requirement in connection with crimes related to RMI? Basically, prosecutors do not need to prove any high-level psychological connection between the offender and the infringement. It does not mean that lacking actual knowledge is irrelevant for criminal law, on the contrary, it may still be an issue in court. But the burden of proof is reversed and, therefore, the defendant would need to prove the lack of knowledge of the infringement and that this circumstance prevents criminal responsibility. In other words, the presumption of innocence has been diminished.

A second human rights concern about criminalizing acts related to RMI is the violation of the principle of proportionality by punishing preparatory acts rather than damaging ones. This argument emphasizes *ius punendi* is legitimate only for restoring, at

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128 Ley 1.520 por Medio de la cual se Implementan Compromisos Adquiridos por Virtud del "Acuerdo de Promoción Comercial," Suscrito entre la República de Colombia y los Estados Unidos de América y su "Protocolo Modificatorio, en el Marco de la Política de Comercio Exterior e Integración Económica," Diario Oficial 13 de abril de 2012 [*hereinafter* Ley Lleras 2.0], art. 17 (requiring that RMI-related crimes be committed *"for achieving economic advantage or private economic gain,"* that making such works available were committed *"knowing that information was removed or altered,"* and adopting exceptions in favor of some institutions).

129 Corte Constitutional de Colombia, Sentencia C-011/13, de 23 de enero de 2013, Demanda de inconstitucionalidad contra la Ley 1520 de 2012 por medio de la cual se implementan compromisos adquiridos por virtud del Acuerdo de Promoción Comercial suscrito entre la República de Colombia y los Estados Unidos de América y su Protocolo Modificatorio, en el marco de la política de comercio exterior e integración económica (ruling that the bill known as Ley LLeras 2.0 was unconstitutional because of infringing the legislative procedure for its approval by the Congress).

least symbolically, the damage produced by criminal acts, but there is not much room for criminal law without prejudice; harmless infractions must be handled through other legal remedies, such as torts or contract law. Copyright holders argue that criminal law intervention is needed in advance because of the disconnection between RMI crimes and damages; thus, one who commits a RMI-related crime might not be the one who causes actual damages to right holders. It is still possible to counter-argue that this logic potentially results in two criminal acts, one for infringing copyright and another for attacking RMI (but not copyright), which seems quite excessive, particularly when the latter is being punished even more than the former. Such is the case in Colombia, which used to punish unauthorized for-profit use of copyrighted works with two to five years of imprisonment, while RMI-related crimes were punished by imprisonment from four to eight years.[130] We will return to this issue in the next Chapter.

Another argument on excessive criminal intervention with respect to RMI-related acts has been raised in Peru because of its unnecessarily broad scope of criminal law on the matter. While the WIPO Copyright Treaty deals with Internet and digital technologies and requires adequate and effective legal remedies concerning with *"electronic"* rights management information,[131] domestic law also criminalizes acts related to non-electronic

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130 *Compare* Criminal Code Colombia, art. 271 (punishing non-authorized use of copyrighted material) *with* Criminal Code Colombia, art. 272 No. 2 (sanctioning RMI related crimes).

131 WCT, *supra* note 116, art. 12.

information,[132] which is beyond international obligations.[133] That imputation also could be extended to the copyright laws of Chile and Costa Rica.[134] In Colombia, the government attempted to extend criminal definition also to non-electronic information,[135] but failed.[136] Even if pro-criminalization arguments are successful as to electronic data, they seem less plausible for non-electronic data, because the latter lacks the pervasive effects of the Internet and digital technologies and because of existing other legal mechanisms for enforcing rights, if that were necessary.

In sum, when enforcing copyright on RMI through criminal law, some Latin American countries have exceeded international law obligations by not just criminalizing but overcriminalizing acts related to RMI. In doing so, it is possible to identify some human rights violations in relation to the principles of *mens rea* and harmfulness and, consequently, to the presumption of innocence and the right to a proportional criminal law.

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132 Copyright Act Peru, art. 2 No. 50; and, Criminal Code Peru, art. 220 D.

133 Eduardo Oré Sosa, *Delitos contra el Derecho de Autor*, 9 REVISTA ELECTRÓNICA DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD DE LA RIOJA 335, 349 (2011).

134 Copyright Act Chile, arts. 84 and 85; and, Intellectual Property Enforcement Act Costa Rica, arts. 63 and 2 bis b).

135 Ley Lleras 2.0, *supra* note 128, art. 17.

136 *See supra* note 129.

2.3. Crimes related to technological measures

Technological protective measures (TPM) are devices incorporated into works to protect the works from unauthorized uses. Right holders argue these measures are essential for protecting copyright, particularly in the digital environment, because of the restrictions they impose on potential uses that violate their exclusive rights. The WCT requires countries to provide *"adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights … and that restrict acts … not authorized by the authors concerned or permitted by law."*[137] As with RMI, the treaty does not criminalize eluding the aforementioned measures, because its negotiating parties lacked agreement on that point.[138]

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137 WCT, *supra* note 116, art. 11.

138 Fernando Zapata, *Los Tratados de la OMPI de Diciembre de 1996,* in 2 III CONGRESO IBEROAMERICANO SOBRE DERECHO DE AUTOR Y DERECHOS CONEXOS 1053 (Montevideo, OMPI – IIDA – Gobierno de Uruguay, 1997) (referring to opposition of Asian countries for lack of agreement on criminal enforcement during negotiations of the WIPO Copyright Treaty); and, Miguel Angel Emery, *Internet, Multimídia e Direitos de Autor: Coexistência Difícil*, Raul Hey (moderador), Sergio Bairon & Miguel Angel Emery, in ANAIS DO XVII SEMINÁRIO NACIONAL DE PROPRIEDADE INTELECTUAL 1997, pp. 108-118, at 117-118 (ABPI, 1997) (reporting on the lack of agreement around criminalizing TPM in the WIPO Internet Treaties). *See also,* SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY, at 464-465 (Oxford Univ. Press, 2002); PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE, at 345 (Oxford Univ. Press, 2013); JORGEN BLOMQVIST, PRIMER ON INTERNATIONAL COPYRIGHT AND RELATED RIGHTS, at 207 (Edward Elgar, 2014); and, JORG REINBOTHE & SILKE VON LEWINSKI, THE WIPO TREATIES ON COPYRIGHT: A COMMENTARY ON THE WCT, THE WPPT, AND THE BTAP, at 172-173 (Oxford Univ. Press, 2nd ed., 2015). *See also,* Manuel Antonio Rodríguez, *Derechos de Autor y Derechos Conexos en la Sociedad de la Información: el Entorno Digital,* in 2 CONGRESO INTERNACIONAL PROPIEDAD INTELECTUAL, DERECHO DE AUTOR Y PROPIEDAD INDUSTRIAL, at 522-529 (Universidad de Margarita, 2004) (supporting that, in spite of tendency to criminalize eluding TPM, the WIPO Internet Treaties allow for non-criminal sanctions, as well as the free trade agreement signed between the U.S. and Chile).

Although the WCT does not ask for criminal enforcement, several Latin American countries have nonetheless implemented such measures into domestic law by adopting specific criminal provisions against circumventing technological measures and other related acts. It is difficult to understand why these countries have opted for criminal enforcement, when international law barely requires adequate legal protection and effective legal remedies, which may be achieve through different mechanisms, such as civil and administrative remedies. One may hypothesize that lawmakers misunderstood the actual scope of the WCT obligations on this matter, since leading scholarship in the region has argued in favor of criminal enforcement, including experts that were actually engaged in WIPO capacity building through the region. One of them has gone as far as stating that the implementation of these WCT rules require criminal laws.[139] We may also add that United States Trade Representative (USTR) has encouraged, first, the adhesion and implementation of the WCT by its country partners and, then, the adoption of measure of enforcement beyond civil procedure and remedies, if not directly the criminalization of TPM related acts.[140]

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139 MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION, at 550 (Oxford Univ. Press, 2002) (assuring that criminal penalties were needed by the WCT); and, Mihály Ficsor, *Limitaciones y Excepciones en el Entorno Digital,* 1 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 14, at 33-34 (2007) (stating that the only way of implementing the WIPO Internet Treaties is through criminal law). *See also,* HORACIO FERNÁNDEZ DELPECH, MANUAL DE DERECHOS DE AUTOR 161-162 (Heliasta, 2011).

140 *Compare* UNITED STATES TRADE REPRESENTATIVE, 2002 SPECIAL 301 REPORT, 2002, at 2-3 (urging other governments to ratify and implement the two WIPO Internet Treaties), *with* UNITED STATES TRADE REPRESENTATIVE, 2002 SPECIAL 301 REPORT, 2002 (deploring the lack of criminal enforcement regarding TPMs in Argentina, Chile, India, and Thailand).

Several Latin American countries have adopted criminal clauses for assuring compliance regarding TPMs. This is the case in Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Peru, among others.[141] Note that, although several of these countries have free trade agreements with the U.S., they criminalized acts related to TPMs even before becoming party to these agreements. On the other hand, Argentina and Chile have not adopted specific criminal measures against eluding TPMs, while Brazil imposes only civil responsibility.[142] Mexico has adopted a narrow criminal provision that, instead, punishes only for-profit making devices or systems that deactivate TPMs on computer programs.[143] In the case of Venezuela, eluding TPMs has been defined as a crime by the cybercrime law.[144] Other countries´ cybercrime law includes hacking and unauthorized access as a crime,[145] but using those crimes for punishing eluding TPMs on copyrighted material may have a marginal impact, since these

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141 Criminal Code Colombia, art. 272; Intellectual Property Enforcement Act Costa Rica, arts. 62 and 62 bis; Copyright Act Dominican Republic, art. 169; Criminal Code El Salvador, art. 227 A; Criminal Code Guatemala, art. 274; Criminal Code Honduras, art. 248 and Implementing Law of the Free Trade Agreement, Dominican Republic, Central America, and the United States, art. 32; Copyright Act Paraguay, arts. 167 and 170; Criminal Code Peru, art. 218; and, Copyright Act Uruguay, art. 46.

142 Copyright Act Brazil, art. 107 I (imposing civil liability on those who alter, eliminate, modify or make useless, in any way, technical devices incorporated into protected works and productions in order to prevent or restrict their copy).

143 Criminal Code Mexico, art. 424 bis II.

144 Special Law Against Cybercrime Venezuela, art. 9.

145 JACOPO GAMBA, PANORAMA DEL DERECHO INFORMÁTICO EN AMÉRICA LATINA Y EL CARIBE 21-26 (Comisión Económica para América Latina y el Caribe, 2010) (providing a comprehensive report on cybercrime laws in Latin American countries); Marcelo Temperini, *Delitos Informáticos en Latinoamérica: Un Estudio de Derecho Comparado – 2da Parte*, in ANALES DEL 14º SIMPOSIO ARGENTINO DE INFORMÁTICA Y DERECHO 129-139 (2014) (reviewing Latin American law on cybercrime); and, Marcelo Temperini*, Delitos Informáticos en Latinoamérica: Un Estudio de Derecho Comparado – 1ra Parte*, 2° CONGRESSO NACIONAL DE ENGENHARIA INFORMÁTICA/SISTEMAS DE INFORMAÇÃO (Nov. 13-14, 2014), http://conaiisi.unsl.edu.ar/portugues/2013/82-553-1-DR.pdf

laws rather focus on sanctioning unapproved access into digital networks and computers than copyrighted content. Later, this chapter will look at Argentina, Chile, and Brazil. For now, the analysis focuses on those countries that have opted for criminalizing acts related to technological measures and how that may infringe human rights.

The WCT dictates protecting some technological measures, but not all of them. Protection is required for those technological measures that qualify as "*effective*" for protecting works from the "*not authorized*" exercise of *"exclusive rights*." When transposed into domestic law, all those additional requirements help to tailor criminal law to address serious infringements by excluding such intervention with respect to circumventing technological measures that do not fulfill these requirements. Latin American copyright law, however, has not always followed those standards and, therefore, sometimes has increased the scope of criminal copyright enforcement with respect to circumventing technological measures.

The WCT, along with the U.S. Copyright Act and the European Union's Copyright Directive, protect only technological measures that are effective.[146] As scholars and courts have broadly discussed the concept of effectiveness, it is needless to extensively revisit this

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146 §1201 (a) (1) (A), and §1201 (a) (3) (B) US Copyright Act; and, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001 [*hereinafter* Copyright Directive], art. 6.3.

here.[147] For purposes of this section, effectiveness will be defined as an element that reduces the scope of criminal law, by limiting punishment to eluding those technical measures that are successful to some extent in preventing unauthorized uses of copyrighted material. That discussion initially was unnecessary in Latin America because countries criminalized evasion of any measure, whether efficient or not. However, as domestic law has been modified to mirror the U.S. law because of FTA obligations, some countries have limited criminal enforcement to effective technological measures.

The WCT does not protect technological measures themselves, but only those used in connection with copyright. The extent of that protection is also arguable: while some authors limit its reach to economic exclusive rights, others have argued for protection even of moral rights.[148] Certainly, the protection granted by the WCT does not apply to interests beyond the rights exercised by authors, such as underlying public domain works. In Latin America, through copyright reforms, countries have adopted criminal provisions against eluding technological measures, but that protection has existed independent from copyright itself.[149] When implementing FTAs, Colombia and Peru

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147 DELIA LIPSZYC, NUEVOS TEMAS DE DERECHO DE AUTOR Y DERECHOS CONEXOS at 188-190 (UNESCO - CERLALC – Zavalía, 2004) (discussing the meaning of "effectiveness" regarding the protection of technological measures).

148 Carlos Alfonso Matiz Bulla, *Delitos Contra los Derechos de Autor en el Nuevo Código Penal (Ley 599 de 2001)*, 5 REVISTA PROPIEDAD INMATERIAL 3, 12-13 (2002) (doubting whether criminal provisions on TPMs apply for protecting moral rights). *See also,* Jhonny Pabón, *Medidas Tecnológicas de Protección en el Tratado de Libre Comercio con los Estados Unidos de América*, 10-11 REVISTA PROPIEDAD INMATERIAL 93, 104 (2006-2007).

149 Ernesto Rengifo García, *Un Nuevo Reto del Derecho en la Edad de la Información*, 12 REVISTA PROPIEDAD INMATERIAL 105, 110-112, and 116 (2008) (complaining about providing protections to TPMs independently of any copyright infringement, because they could be used

reduced the scope of their criminal provisions on TPMs by requiring copyright infringement, instead the latest FTAs have move forward by requiring criminal action independent of any copyright infringement, which is also true of implementing laws in Costa Rica and other Central American countries. Additionally, Latin American countries still provide analogous criminal enforcement for TPMs that protect the access to copyrighted works (access control) rather than the exercise of any exclusive copyright (rights control).[150]

Protection provided by the WCT does not apply when right holders or the law has authorized circumventing technological measures. Leaving aside authorizations granted by right holders, comparative law shows countries making an effort to harmonize protection for TPM and exercise of copyright exceptions and limitations. In the European Union, the Copyright Directive allows domestic law to adopt a given number of exceptions;[151] as a result, for instance, Spain and Italy have adopted specific exceptions and procedures to assure their actual efficacy.[152] In the U.S., the Copyright Act sets forth some statutory

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abusively for protecting more than copyright, such as public domain content). *See also* Jhonny Pabón, *Los Riesgos de las Medidas Tecnológicas de Protección: El Caso de los DVD*, 12 REVISTA PROPIEDAD INMATERIAL 121, 146 (2008).

150 Pabón, *supra* note 149, at 132 (criticizing the recognition in favor of copyright holders of a virtual right to control access to works protected with TPMs as inconsistent with promoting access to knowledge and contrary to constitutional requirements on the matter).

151 Copyright Directive, supra note 146, arts. 5 and 6.

152 *See* Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia [Intellectual Property Act], BOE Apr. 22**,** 1996, as amended by Real Decree 20/2011, BOE Dec. 31, 2011 (Spain), art. 161 (requiring copyright holder to grant access to works protected with technological measures under certain circumstances at the request of the authorities and other beneficiaries); Legge 22 aprile 1941, n. 633 sulla

exceptions,[153] but also permits some exceptions by regulation from the Library of Congress.[154] In Latin America, countries initially did not adopt exceptions, but when implementing FTA obligations some countries did adopt specific exceptions allowing circumvention,[155] which mirror the ones available in the Digital Millennium Copyright Act.[156]

Exceptions to eluding TPMs, however, have three severe limitations in their implementation into domestic law by Latin American countries. First, countries have not implemented all the exceptions available in the U.S. law, but only a subset of them.[157] Second, countries have implemented exceptions allowing circumventing a technological measure, but not allowing the use of the work.[158] Consequently, for example, a software

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protezione del diritto d'autore e di altri diritti connessi al suo esercizio [Law for the Protection of Copyright and Neighboring Rights], as amended up to Decree-Law No. 64 of April 30, 2010) (Italia), art. 71 quinquies.

153 §1201 (c) to (j) U.S. Copyright Act.

154 §1201 (a) (1) (B) to (E) U.S. Copyright Act.

155 Juan Carlos Monroy Rodríguez, *Study on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities in Latin America and the Caribbean*, WIPO Document SCCR/19/4, September 30, 2009, at 109-112. *See also* Pabón, *supra* note 148, at 105 (noting that the implementation of the free trade agreement's provisions on TPMs could be a chance to introduce exceptions into Colombian domestic law).

156 *Compare* 17 U.S.C. § 1201 (c)-(j) *with, e.g.,* U.S.-Peru FTA, art. 16.7.4 e).

157 *Compare, e.g.,* 17 U.S.C. § 1201 (c)-(j) (providing exemptions on the protection of technological measures) *with* Copyright Act Peru, arts. 165 B and 165 D (providing similar exceptions, but those listed c and g under U.S. law). *See also,* Andrew Christie, Sophie Waller, & Kimberlee Weatherall, *Exporting the DMCA through Free Trade Agreements,* in INTELLECTUAL PROPERTY & FREE TRADE AGREEMENTS, at 217 (Christopher Heath & Anselm Kamperman Sanders eds., Hart Publ'g, 2007) (missing some flexibilities on TPM regime available in the DMCA but absent in FTAs' language).

158 Rengifo García, *supra* note 149, at 114-115 (noting that Colombia *"skipped a step"* when implementing into domestic law the FTA's provisions on TPMs that allow circumventing them, but omitted adopting the respective copyright exceptions.).

developer may circumvent a technical measure to access a computer program, but still cannot reverse engineer the program.[159] And third, unlike in the United States, which granted administrative powers to the Library of Congress for establishing additional exceptions,[160] countries in the region have not adopted such a practical mechanism,[161] except for Peru.[162] All those flexibilities are allowed by free trade agreements, but Latin American countries have not taken full advantage of them.[163] As a result, legal justifications for breaking TPMs are less significant in Latin America and, therefore, the scope of criminal law is relatively broader through the region than in other countries.[164]

Punishing the circumvention of technological protective measures in Latin America raises some concern because of infringing on the principle of harmfulness.[165] It

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159 *See, e.g.,* Intellectual Property Enforcement Act Costa Rica, art. 62 (providing exceptions on the protection of technological measures, including one for reverse engineering) and Copyright Act Costa Rica, arts. 67-76 (lacking any general copyright exception for reverse engineering).

160 §1201 (a) (1) U.S. Copyright Act.

161 Monroy Rodríguez, *supra* note 155, at 112.

162 Copyright Act Peru, art. 196 B VI (empowering domestic copyright authority – the Dirección de Derechos de Autor del Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual, INDECOPI – to issue periodic general authorizations for eluding TPMs).

163 *See, e.g.,* U.S.-Peru FTA, art. 16.7.4 f).

164 In comparative law, there is another factor that reduces the scope of criminal copyright enforcement on technological measures, available in the U.S. Copyright Act and some Latin American that have implemented FTA provisions, which is a legal absolute excuse in favor of nonprofit libraries, archives, and educational institutions, among others. However, it does not decriminalize conduct related to technological measures, but only prevents criminal sanctions against a given offender.

165 Pabón, *supra* note 148, at 112 (stating that the solution adopted by the Colombian law violates some principles of criminal law, such as *ultima ratio* and minimal intervention). *See also* Rengifo García, *supra* note 149, at 116 (complaining about excessive criminal intervention on

is arguable that circumventing deserves criminalization, but if it does, criminal action should be reserved to cases of actual damages to a right holder's economic exclusive rights, not mere access to copyrighted works or when there is no copyright infraction. Additionally, the fact that the regime of exceptions to anti-circumvention provisions is narrow within the region engenders broader room for criminal enforcement than elsewhere. Moreover, several Latin American countries not only have anti-circumventing provisions but also anti-trafficking ones. In other words, it is also a crime to commercialize, export, or otherwise traffic technology, products, services, or devices primarily intended to circumvent technological measures.[166] Scholars disagree about the necessity of criminalizing these acts because of their essentially preparatory character and the difficulties for distinguishing whether their usages are legitimate or not.[167]

The principle of *mens rea* is also at stake vis-a-vis Latin American law on crimes related to technological protective measures. Unlike U.S. law, which requires these crimes must be committed *"willfully and for purpose of commercial advantage or private financial gain,"*[168] Latin American countries have adopted both anti-circumventing and anti-trafficking provisions but without subjective requirements on the defendant's act. This is the case of Costa Rica, for instance, whose law omits any mention of a subjective requirement;[169] as

technological measures that makes of criminal law not the 'ultima ratio' but the 'prima ratio' for protection); Pabón, *supra* note 149, at 131-132 (stating that Colombian provisions on TPMs *"collides with the principle of minimal intervention of criminal law"*).

166 *See* DELIA, *supra* note 147, at 186-188.

167 Rengifo García, *supra* note 149, at 117-118.

168 §1204 (a) U.S. Copyright Act.

169 Intellectual Property Enforcement Act Costa Rica, arts. 62 and 62 bis.

indicated previously, this does not mean that that requisite is irrelevant for criminal law, but its omission reverses the *onus probandi* by asking the defendant to prove he or she lacked criminal purpose, which, ultimately, prevents a finding of criminal responsibility. For instance, a defendant must argue and prove ignorance of circumventing a measure or that the commercialized device was primarily intended for circumventing a measure, or, knowing those circumstances, that he or she thought it was legal or at least not forbidden by law. In plain language, as a result of the aforementioned omission, the presumption of innocence has been diminished by reversing the burden of proof.

Interestingly, implementation of free trade agreement obligations on this matter seems to provide a chance for resolving some of the human rights concerns related to infringing the principle of *mens rea* in criminal enforcement of acts related to TPMs. In 2009, Peru modified its domestic law following U.S. standards for technological measures, including the exigency of acting "for commercial purpose or another kind of financial advantage."[170] Colombia did attempt to incorporate subjective requirements for those crimes,[171] but the bill failed because the Constitutional Court declared its unconstitutionality, although on different grounds.[172]

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170 Criminal Code Peru, arts. 220 A to 220 C.

171 Ley Lleras 2.0, *supra* note 128, art. 17 (requiring that defendant acted *"for purpose of achieving a commercial advantage or private financial gain"*).

172 *See supra* note 129.

In short, Latin American countries have made criminal law the primary mechanism for enforcing technological protective measures. Criminal enforcement includes anti-circumventing and anti-trafficking provisions for technological measures that protect both using and accessing works, even if no copyright exists. Additionally, countries have not adopted an adequate regime on copyright exceptions allowing circumvention. As a result, the scope of criminal intervention on technological measures is quite broad in most Latin American countries and raises human rights concerns based on the infraction of the well-set principles that limit criminal law, such as the principles of harmfulness and *mens rea*.

2.4. Crimes against moral rights

Before analyzing the criminal enforcement of moral rights, it is necessary to review briefly those rights.[173] In most countries, especially those that follow the author's rights tradition, like Latin American ones, the law not only grants exclusive economic rights to authors but also some personal rights, known as *moral rights*. The Berne Convention, which is the leading international instrument on copyright, recognizes the rights of authorship and integrity of the work,[174] and also allows countries to confer additional rights on authors.[175] Enforcing those rights, which are non-transferable and last at least until the

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173 *See supra* Chap. I, notes 116-120 and accompanying text.

174 Berne Convention, art. 6 bis (1).

175 Berne Convention, art. 5.

expiry of the economic rights,[176] remains a decision of domestic law.[177] The TRIPS Agreement, on other hand, deprives these moral rights of the WTO's enforcement mechanism by excluding them expressly from its scope.[178]

Because they lack international harmonization and enforcement, countries have different approaches to moral rights. In some jurisdictions those rights barely are recognized and their enforcement is dubious, for example, in Russia and the United States.[179] In other jurisdictions, in spite of being part of the author's rights tradition, moral rights are recognized but they lack autonomous criminal enforcement and sanctions, unless criminal actions have also affected economic rights. This is, for instance, the case of Spain.[180] In Latin America, in spite of peculiarities, moral rights enjoy a high level of recognition and protection, as explained below.

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176 Berne Convention, art. 6 bis (2).

177 Berne Convention, art. 6 bis (3).

178 TRIPS Agreement, art. 9.1.

179 *See* MIRA T. SUNDARA RAJAN, COPYRIGHT AND CREATIVE FREEDOM: A STUDY OF POST-SOCIALIST LAW REFORM, at 205-233 (Routledge, 2006) (arguing for author's moral rights in post-communist Russia based on human rights); and, ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES (Stanford Law Books, 2010).

180 Gimbernat Ordeig, *supra* note 70, at 112 (concluding that "copyright crimes *always* affect exploitation rights, and … infractions on moral rights without economic effects are *never,* by themselves, criminal acts".). *See also,* Víctor Gómez Martín, *La Protección Penal de los Derechos de Autor sobre los Programas Informáticos: Un Ejemplo de la Naturaleza Patrimonialista de los Delitos contra la Propiedad Intelectual en el CP de 1995,* 66 REVISTA DEL PODER JUDICIAL 143, 197-198 (2002) (concluding that scholars agree on that in force Spanish criminal law does not punish mere infringement on moral rights, but recognizing some discussion about criminalizing its enforcement *de lege ferenda*).

Latin American countries provide broader recognition and protection to moral rights than international instruments. In addition to authorship and integrity, Latin American domestic laws may grant to authors other moral rights on: disclosing the work, publishing it pseudonymously or anonymously, removing the work from the market, accessing the only available copy of a work, and opposing false attribution of authorship.[181] There is no agreement on the duration of these rights, but on the fact that those additional rights are inalienable, non-transferable, and last at least for author's life. In fact, as was said, some jurisdictions recognize them as human rights, while it still remains unclear which of them and to what extent.[182] But, particularly relevant for our analysis, Latin American countries also provide significant legal protection to moral rights through criminal law.

Almost all Latin American countries provide criminal protection to the rights of authorship and integrity, meaning that a work must circulate unaltered and with the name of its author, unless its creator authorizes otherwise.[183] That protection, however, is not autonomous and also requires affecting some exclusive economic rights, usually by

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181 *See supra* Chap. I, note 119 and accompanying text.

182 *See supra* Chap. I, notes 174-210 and accompanying text.

183 Copyright Act Argentina, art. 72; Copyright Act Chile, art. 79 bis; and, Intellectual Property Enforcement Act Costa Rica, art. 57; Criminal Code Peru, arts. 216 and 218. *See also* Criminal Code Mexico, art. 427 (criminalizing only acts against authorship). In the case of Brazil, article 185 of the Brazilian criminal code punished usurping author's name with 6 months to 2 years of imprisonment, until 2003, when that provision was repealed; however, article 184 still remains in force, which punishes copyright violations with 3 months to a year of prison and potentially applies to crimes against moral rights. *See,* Lei No. 10.695, de 1º de Julio de 2003, D.O.U. de 2.7.2003.

publishing the work. Also, the infringer has to act with knowledge or maliciously, which prevents criminalizing mere negligent behavior. These crimes overlap at least in part with some outrageous practices of plagiarism,[184] which makes them less controversial from legal and social order viewpoints,[185] particularly if the crimes' definitions include subjective exigencies and a connection with economic rights that permits assuming some harm other than to moral feelings. The main human rights concern about these crimes remains, however, if they really deserve criminal enforcement, especially when other mechanisms are available for addressing infringement.

The Supreme Court of Colombia has attempted to justify criminalizing infringement of the right of authorship,[186] by confronting a hypothesis of plagiarism that was not included in the criminal code.[187] A university professor of literature published in

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184 *See,* Isabella Alexander, *Inspiration or Infringement: the Plagiarist in Court,* in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 10-15 (Lionel Bently, Jennifer Davis, & Jane C. Ginsburg eds., Cambridge Univ. Press, 2010) (noticing partial overlap between plagiarism and copyright, particularly in relation with moral rights, and recognizing that in the British law plagiarism in most commonly address by civil actions grounded in copyright law, while in some circumstances the tort of passing off and the law of theft may be useful for sanctioning plagiarism).

185 Lionel Bently, Jennifer Davis, & Jane C. Ginsburg, *Editors' Preface,* in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE, at xviii (Lionel Bently, Jennifer Davis, & Jane C. Ginsburg eds., Cambridge Univ. Press, 2010). *See also* Ernesto Rengifo García, *El Derecho de Autor en el Derecho Romano*, 26 REVISTA DE DERECHO PRIVADO 1 (2001) (tracking moral rights in Roman law). *But see,* Karin Grau-Kuntz, *Direito de Autor: Um Ensaio Histórico,* REVISTA DA ESCOLA DA MAGISTRATURA REGIONAL FEDERAL: EDIÇÃO ESPECIAL DE PROPRIEDADE INTELECTUAL, at 63-106 (EMARF, 2011) (arguing that Roman plagiarism provided moral rather than legal protection to authorship because of religious beliefs and recognition, and that moral rights actually emerged only in the Modern Age with its anthropocentric cultural environment).

186 Corte Suprema de Justicia de Colombia, No. 31.403, 28.05.2010, "Against Luz Mary Giraldo de Jaramillo" (Colom.).

187 Criminal Code Colombia, art. 270 No. 1 (criminalizing who *"publishes … an unreleased work"*.).

a foreign magazine an article based substantively on her student's dissertation, an act in principle without criminal reproach because the law limits punishment in relation to "unreleased" works,[188] which technically was not the case of the dissertation. In spite of express legal text, the court convicted the defendant to two-year imprisonment by arguing that moral rights are human rights incorporated into domestic law through the constitution and, therefore, they deserve criminal protection.[189] In conclusion, according to the court, criminalizing infringing acts on moral rights is justified based on the human rights status of moral rights.

The Supreme Court of Colombia's judgment has attracted a great deal of criticism from scholars. Some of them reject the underlying idea that the constitution is a criminalization plan; in fact, the circumstance of moral rights also being human rights does not allow concluding their protection demands criminal law, particularly if there are other more efficient and proportional mechanisms of enforcement,[190] as has happened with several attacks on other human rights, such as privacy and honor. Through this decision,

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188 N.B.: The law uses the word "*inédito*", which in Spanish and in this context means "written but not published yet", or "unreleased."

189 *See* Ley 890 de 2004, Diario Oficial No. 45.602, de 7 de julio de 2004 (increasing penalties for copyright infringements, in the case of violation to moral rights term of imprisonment was increase from 2 to 5 years to 32 to 90 months).

190 César Alejandro Osorio Moreno, *¿Es Legítima la Protección Penal de los Derechos Morales de Autor?*, 18 OPINION JURÍDICA (UNIVERSIDAD DE MEDELLÍN) 143, 151-155 (2010). *See also,* Gómez Martín, *supra* note 180, at 203-205 (recognizing relevance of constitutional values, but rejecting consequential criminal enforcement of them); and, Marcela Palacio Puerta, *Colombia - A Place Where You Could Be Sentenced to Two Years in Jail for Plagiarism: A Crime that Does Not Exist!*, 1 J. INTELL. PROP. STUD. 61 (criticizing the Supreme Court's decision because of reflecting somehow the prevalence of moral rights protection as human rights over criminal law principles also recognized by both constitutional and human rights law).

the court suggests a comprehensive criminal protection for moral rights, but omits that the same constitution, as well as international instruments on human rights, grant to everybody the right to not be held guilty of any act or omission that *"did not constitute a penal offence… at the time when it was committed."*[191] The court grievously violated this fundamental principle by punishing an act that, in spite of all its moral reproach, was not defined as a crime by the law.[192]

Other countries in Latin America also punish infringing the author's moral right to control releasing one's own work. This is the case of Argentina, although it only punishes that infraction in connection with publishing the work.[193] Instead, Peru has a stand-alone crime for those who make public an unreleased work without the author's permission;[194] it does not require exercising any economic rights or any exigency related to the psychological commitment of the infringer. Therefore, under the disproportional terms of Peruvian law, the mere act of showing to others an unreleased work would constitute a crime. Similar criticism can be made against Peru's law on plagiarism that

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191 UDHR, art. 11 (2). *See also*, ADHR, art. XXVI; ICCPR, art. 15; and, ACHR, art. 9.

192 *But see,* Ernesto Rengifo García, *¿Es el Plagio una Conducta Reprimida por el Derecho Penal?*, 14 REVISTA LA PROPIEDAD INMATERIAL 303, 313 (2010) (rejecting accusation of violation of the principle of legality, by arguing that the constitution is also part of the criminal legal order and provides protection for moral rights, independently from the fact a work is released or not). *See also,* ANDREY RODRÍGUEZ & ANDRÉS ROJAS, PROTECCIÓN JURÍDICA DEL DERECHO MORAL COMO DERECHO FUNDAMENTAL (Universidad Libre, 2011), at 32-36 (criticizing the drafting of article 270 as a "linguistic dysfunction" and supporting the court's judgment on complementing the omission of criminal code with constitutional provisions in order to punish infringement on moral rights).

193 Copyright Act Argentina, art. 72.

194 Criminal Code Peru, art. 218.

punishes one who *"spreads"* a work as one's own,[195] which would punish even the uninspired lover who copies some of Neruda's sonnets in a letter to his sweetheart.[196]

In sum, the criminalization of infringing on moral rights in Latin American also raises some human rights concerns as a result of violating the foundations of criminal law, such as the principles of *mens rea* and legality, particularly in Colombia and Peru. But the principal worry as to human rights is the disproportional criminalization of acts that should not deserve imprisonment and that could be efficiently and properly handled through other legal, or even extra-legal, mechanisms. The criminalization of moral rights infringement is, however, just part of a whole picture of overcriminalization of copyright infringement within the region.

3. STRETCHING CRIMINAL COPYRIGHT ENFORCEMENT

Until the TRIPS Agreement, no leading international instrument on copyright had required specific criminal measures. Neither the Berne Convention nor the UCC has provisions on the matter. In fact, in the Tunis Model Law, which heavily influenced the drafting of several Latin American laws, criminal sanctions were not compulsory and,

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195 Criminal Code Peru, art. 219.

196 *See* Gimbernat, *supra* note 180, at 108 *infra* 8 (attributing a similar example to Quintano, as a criticism against excessive criminalization of plagiarism in former Spanish law).

therefore, they could be omitted or referred to criminal codification.[197] The WIPO Internet Treaties demand adequate and effective legal remedies, but the negotiating parties did not agree on explicit criminal measures. At the regional level, Decision 351 completely refers criminal enforcement to domestic law.[198] In sum, for the most, countries have been free to criminalize copyright infringement or not.

The TRIPS Agreement is the first international instrument that calls for criminal actions on copyright enforcement. Criminal procedures and penalties are required *"at least in cases of willful … copyright piracy on a commercial scale."*[199] Otherwise, countries still can provide criminal procedures and penalties, but only if they wish.[200] Available remedies must include imprisonment and/or monetary fines sufficient to deter infringement, consistent with the level of penalties applied for crimes of corresponding gravity.[201] Similar

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197 Commentary on §15 Tunez Model Law on Copyright for Developing Countries (UNESCO – WIPO, 1976). In fact, drafters avoided language that could suggest sanctions had to be criminal. *See,* Informe Final del Comité de Expertos Intergubernamentales Encargado de Elaborar una Ley Modelo sobre Derecho de Autor para los Países en Vías de Desarrollo, document TUNIS/UNESCO/OMPI/CML.2/7, 20 May 1976, at 8.

198 Decision 351, art. 57 d).

199 TRIPS Agreement, art. 61.

200 Wang, *supra* note 95, at 46-47 (stating that TRIPS grants discretional criminal enforcement in cases other than piracy, including negligent copyright infringement, which enforcement is not encouraged by TRIPS).

201 TRIPS Agreement, art. 61.

wording also was included in the 1994 NAFTA,[202] as well as the Budapest Convention on Cybercrime.[203]

A new generation of trade treaties progressively has increased obligations on criminalizing copyright infringement throughout Latin America.[204] The 2003 U.S.-Chile FTA encourages criminal anti-circumventing provisions,[205] but demands criminal anti-trafficking provisions and criminalization of infringement related to RMI, at least when they are committed willfully and for achieving a commercial advantage.[206] It allows criminal actions for protecting encrypted program-carrying satellite signals.[207] The 2004 FTA signed by the U.S. with Central American countries, instead, demands criminal actions against all the aforementioned acts.[208] This agreement made criminalizing any misconduct related to RMI independent of any copyright infringement.[209] Additionally, the treaty parties were required to adopt criminal procedures and sanctions against willful copyright piracy on a

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202 NAFTA, art. 1717.

203 Convention on Cybercrime, Nov. 23, 2001, E.T.S. 185, art. 10 (requiring parties to criminalize copyright infringement committed willfully, on a commercial scale and by means of a computer system), and its Explanatory Report paras. 107-117.

204 Christie, Waller & Weatherall, *supra* note 157, at 219 (noticing the American tendency to increase the level of protection in free trade agreements progressively, since *"each agreement act[...]s as a template for the next agreement"*).

205 U.S.-Chile FTA, art. 17.7.5 (a).

206 U.S.-Chile FTA, arts. 17.7.5 (b), and 17.7.6 (a).

207 U.S.-Chile FTA, art. 17.8 (c) 1.

208 U.S.-CAFTA-DR, arts. 15.5.7 (a) (requiring criminal anti-circumventing and anti-trafficking provisions), 15.5.8 (a) (demanding criminal actions against eluding and altering RMI and other related conducts), and 15.8.1 (setting forth criminal offences related for protection of encrypted program-carrying satellite signals).

209 U.S.-CAFTA-DR, art. 15.5.7 (c).

commercial scale, including willful importation and exportation of pirated goods, but excluding cases of *de minimis* financial harm.[210] The 2006 FTAs signed between the U.S. with Colombia and Peru built on top of previous trade agreements by dictating criminal actions against all the aforementioned acts and more.[211] These later agreements eliminated the *de minimis* exception to punishing piracy,[212] and demanded criminal procedures and sanctions against two new acts, even if no copyright piracy takes place: trafficking in counterfeit labels affixed or designed to be affixed to works,[213] and trafficking in counterfeit documentation or packaging for computer programs.[214]

Latin American countries implemented their commitments on criminalization of copyright infringement into domestic law, in part because of the free trade agreement obligations, and in part because of U.S.-government pressure. There is no need to exhaustively review this implementation, but some examples could help to illustrate latter statement. Mexico introduced copyright crimes in its criminal code for the first time in

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210 U.S.-CAFTA-DR, art. 15.11.26 (a).

211 U.S.-Peru FTA, arts. 16.7.4 (a) (d) (requiring criminal anti-circumventing and anti-trafficking provisions, even if no copyright infringement exists); 16.7.5 (a) (criminalizing eluding and altering RMI and other related conducts), 16.8 (demanding criminal offences for protection of encrypted program-carrying satellite signals), and16.11.26 (adopting a broad concept of piracy that includes exportation and importation of pirate goods). *See also* same provisions in the U.S.-Colombia FTA.

212 *See* U.S.-Peru FTA, art. 16.11.26 (omitting mention to *de minimis* exception). *See also* same provision in the U.S.-Colombia FTA.

213 U.S.-Peru FTA, art. 16.11.28 (a). *See also* same provision in the U.S.-Colombia FTA.

214 U.S.-Peru FTA, art. 16.11.28 (b). *See also* same provision in the U.S.-Colombia FTA.

1996,[215] and, as a result of USTR pressure,[216] successive amendments have increased both offenses and penalties[217] to comply with NAFTA requirements.[218] In 2003, Chile introduced crimes related to RMI into its copyright law immediately after signing its FTA with the U.S.[219] and, in 2010, introduced new crimes and significantly higher penalties.[220] Costa Rica modified its law on intellectual property enforcement in 2006 and again in 2008, in order to meet the requirements of the CAFTA.[221] Peru modified its domestic law in order to meet its commitments to criminalize a broad variety of copyright infringements,[222]

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215 Horacio Rangel Ortiz, *La Usurpación de Derechos en la Nueva Ley Autoral Mexicana y su Reforma,* in ESTUDIOS DE DERECHO INTELECTUAL EN HOMENAJE AL PROFESOR DAVID RANGEL MEDINA, at 377-378 (Manuel Becerra comp., UNAM, 1998) (referring that before copyright infringements and crimes were in the copyright act). *See also,* Arturo Luis Cossío Zazueta*, La Reforma Penal y los Derechos de Autor,* in ESTUDIOS DE DERECHO INTELECTUAL EN HOMENAJE AL PROFESOR DAVID RANGEL MEDINA, at 397-404 (Manuel Becerra comp., UNAM, 1998). For the previous regulation on the matter, *see,* Juan Ramón Obón León, *La Competencia Desleal y los Delitos en el Marco Jurídico del Derecho de Autor,* in CUADERNOS DEL INSTITUTO DE INVESTIGACIONES JURÍDICAS: TECNOLOGÍA Y PROPIEDAD INTELECTUAL, at 839-855 (UNAM, 1988).

216 José Carlos G. Aguiar, *La Piratería como Conflicto: Discursos sobre la Propiedad Intelectual en México*, 38 ÍCONOS: REVISTA DE CIENCIAS SOCIALES (QUITO) 143, 153 (2010).

217 *See* Horacio Rangel Ortiz, *La Reforma Penal y la Propiedad Intelectual*, 29 JURÍDICA 219, 230-238 (1999) (describing the successive reforms that took place during the second half of the 1990s).

218 Rangel Ortiz, *supra* note 215, at 381-382.

219 Ley 19.914 que Adecua la Legislación que Indica al Tratado de Libre Comercio con los Estados Unidos de América, D.O. 19.11.2003 (Chile).

220 Daniel Alvarez, *The Quest for a Normative Balance: The Recent Reforms to Chile's Copyright Law*, 12 INTL. CTR. TRADE SUST. DEV., POLICY BR. 1, 2-3 (2011).

221 Ley Nº 8686 sobre Reforma, Adición y Derogación de varias normas que regulan materias relacionadas con Propiedad Intelectual, publicada en La Gaceta el 26 de noviembre de 2008 (Costa Rica).

222 *See* Decreto Legislativo 1.076 que Aprueba la Modificación del Decreto Legislativo 822, Ley sobre el Derecho de Autor, El Peruano 28.06.2008; Ley 29.263 que Modifica Diversos Artículos del Código Penal y de la Ley General de Aduanas, El Peruano 02.10.2008; and, Ley 29.316 que Modifica, Incorpora y Regula Diversas Disposiciones a fin de Implementar el Acuerdo de Promoción Comercial Suscrito entre el Perú y los Estados Unidos de América, El Peruano 14.01.2009.

while Colombia attempted to do so through the so-called Ley Lleras 2.0,[223] which ultimately was declared unconstitutional for procedural reasons.[224]

A newer wave of increasing criminal copyright enforcement may occur for those Latin American countries that still have to implement commitments adopted in previous trade agreements, or have engaged in negotiations of recent bilateral and multilateral trade agreements. Such would have been the case of Mexico in signing the Anti-Counterfeiting Trade Agreement (ACTA), although it ultimately did not ratify.[225] It would had been also the case of parties to the Trans-Pacific Partnership Agreement (TPPA), whose negotiation involved Chile, Mexico, and Peru. On different levels, these instruments required increasing enforcement of copyright by criminal law. Although it is unlikely that either ACTA or TPPA will ever be in force, a brief review of them provides a picture of the international trend towards the criminalization of ever broader categories of copyright infringements.

ACTA attempted to increase criminal copyright enforcement through institutional, procedural, and substantive commitments. At the institutional level, ACTA required countries to grant *ex-officio* powers to courts, prosecutors, and customs authorities, which would have facilitated law enforcement by transferring costs from right holders to public

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223 *See supra* nota 128.

224 *See supra* nota 129.

225 In fact, on July 18, 2012, only days after the Executive had signed ACTA, the Mexican Congress rejected it.

budgets. At the procedural level, ACTA would have made enforcement easier by introducing presumptions benefitting right holders, and extending remedies and injunctions. At the substantive level, the U.S. tabled a proposal built on the top of free trade agreements and,[226] therefore, all aforementioned criminal provisions were included in ACTA, except the one on protecting encrypted program-carrying satellite signals. Presumably because of European Union reluctance, the final text did not include criminal demands on digital rights management information and technological protective measures. As a result, all other provisions are in ACTA, particularly those on piracy, exporting and importing, labeling and packaging. But ACTA went beyond FTAs by adopting three new key provisions on criminal enforcement: first, extending liability, potentially criminal, to legal entities for copyright offenses;[227] second, extending criminal liability for aiding and abetting;[228] and, finally, suggesting criminal enforcement against unauthorized camcording of motion pictures.[229]

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226 BLAKENEY, *supra* note 107, at 263-264 (stating that U.S. wished to export the DMCA and intellectual property chapter of free trade agreements into ACTA). *See also,* Christie, Waller & Weatherall, *supra* note 157, at 211-243 (exploring the exportation by the U.S. of the DMCA provisions on TPMs to other countries through free trade agreements).

227 ACTA, art. 24.5. *See* BLAKENEY, *supra* note 107, at 213 (suggesting that ACTA was cautious because of *"most common law jurisdictions attribute criminal responsibility to corporations"* already).

228 ACTA, art. 24.4. *See* BLAKENEY, *supra* note 107, at 211-212 (suggesting that extending criminal responsibility for aiding and abetting by ACTA was still narrow given previous drafting, U.K. and U.S. laws on the matter, that would allow for punishing even beyond).

229 ACTA, art. 24.3 (suggesting criminal procedures and sanctions against unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public). *See* BLAKENEY, *supra* note 107, at 210-211 (supporting criminalization of camcording because of losses it produces).

The TPPA attempted to consolidate and make uniform dissimilar provisions on criminal copyright enforcement available through ten years of experience in different free trade agreements.[230] As a result, the TPPA proposal tabled by the U.S. includes all previous crime clauses on institutional, procedural, and substantive issues. The only exception is the ACTA's clause that extended liability to legal entities for criminal offences, presumably omitted because of its inconsistency with the domestic laws of other negotiating countries or in order to avoid resistance to the TPPA by local business communities from those countries. Without the European Union involved in ongoing negotiations,[231] criminal provisions crystallized easier in the TPPA,[232] which would have increased challenges for Latin American countries to comply with additional intellectual property commitments consistent with human rights obligations.

In addition to treaty obligations, the USTR pushes for increasing intellectual property criminalization and punishment through Latin America in several ways. First, the USTR supervises actual implementation of provisions on intellectual property of free trade agreements into the domestic law of the United States' trade partner countries. Second,

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230 Barbara WEISEL, Assistant U. S. Trade Representative for Southeast Asia and the Pacific, USTR TPP Stakeholders Briefing, Washington D.C.,19 June 2012 (recognizing dissimilar levels of protection for intellectual property among free trade agreements and that, as a result, the TPPA has "differences to reconcile").

231 *See* BLAKENEY, *supra* note 107, at 279-280 (suggesting that adverse comments by European authorities forced including some safeguards in ACTA, which, ultimately, prevented crystallization of more radical measures of enforcement initially established in the agreement).

232 Alberto Cerda, *Trans-Pacific Partnership Agreement and New Governance on International Trade*, 20 PUB. DIPLOMACY MAGAZINE 39 (2013) (arguing that the unbalanced bargaining power among negotiating parties and the comprehensive scope of negotiations make its adoption more plausible).

the USTR demands implementation according to its understanding of negotiated provisions, even if it distorts the actual meaning of commitments; for instance, when insisting that Chile must amend its ISP liability regime to permit effective and expeditious action against online piracy,[233] although FTA commitments have been fulfilled, as it is explained below.[234] Third, even absent treaty obligations, the USTR suggests that countries go further by adopting criminal measures for enforcing copyright, for example by encouraging Argentina and Mexico to fight online piracy, and Mexico to implement the WIPO Internet Treaties and measures against unauthorized camcording of movies.[235] Fourth, once countries have adopted a legal framework according to the USTR's desires, it calls attention to actual enforcement by courts, prosecutors, and customs authorities, which is currently the case with Colombia, Costa Rica, and Peru.[236] The USTR exercises continuous and tireless pressure on the region to impose ever more stringent intellectual property rules, including those on its criminal enforcement.

In the coming years, then, criminal copyright enforcement may increase even more because of international commitments assumed by Latin American countries and the pressure of foreign governments. That increasing reliance on criminal law for enforcing copyright may intensify even more criminalization and punishment in disregard of human rights limitations to *ius punendi*.

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233 UNITED STATES TRADE REPRESENTATIVE, 2017 SPECIAL 301 REPORT 53 (2017).

234 *See infra* Chapters 7 to 9.

235 *Id.*, at 51-52 (Argentina), and 62-63 (Mexico).

236 *Id.*, at 63-64 (Costa Rica), 67 (Colombia), and 68 (Peru).

4. HUMAN RIGHTS RESILIENCE TO COPYRIGHT OVERCRIMINALIZATION

Resilience is a concept from social science that refers to the ability of people to, on one hand, endure adverse circumstances and, on the other, beyond resistance, be able to develop positively despite those unfavorable conditions.[237] Resilience allows communities and people to build a healthy condition of life despite an unhealthy environment.[238] The previous sections connected human rights with criminal law by identifying some of the main limitations that the former imposes on the latter; then, by reviewing criminal copyright law in Latin American, this chapter has raised some concerns about violations of human rights obligations. Those concerns may increase because of newer international instruments that stretch criminal enforcement of copyright by dismissing human rights. This section, instead, focuses on legal resilience and considers some court decisions and legislative initiatives adopted to resist criminal copyright excesses, thus enabling human rights obligations to prevail.

Overcriminalization creates severe and multiple social problems. According to Douglas HUSAK, a leading scholar on criminal enforcement, criminalizing in excess,

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237 S. Vanistendael, *La Resiliencia: Un Concepto Largo Tiempo Ignorado*, 5 (3) REVISTA: LA INFANCIA EN EL MUNDO 5 (1994).

238 Michael Rutter, *Resilience: Some Conceptual Considerations*, 14 (8) J. OF ADOLESCENT HEALTH 626 (1993).

among other counterproductive effects: punishes less-favored communities because of selective enforcement, corrodes public trust, facilitates corruption and abuse, increases the cost of law enforcement, diminishes foreign policy, and causes *"erosion of our precious civil liberties."*[239] Those effects may explain the reluctance of some courts to enforce criminal copyright beyond what seems reasonable to them, particularly when law enforcement conflicts with granted constitutional and human rights. The next paragraphs briefly examine human rights resilience in judicial decisions, and their achievements and limitations in Latin American countries.

Compliance of criminal law with the principle of legality from a constitutional or human rights viewpoint has been an issue in Brazil, because of vagueness of the criminal code provision that punishes *"violating copyright."*[240] In 2004, the Court of Justice of Minais Gerais declared that that provision infringes the principle of legality, because its vagueness prevents understanding what is the actual infringement not only by common people but also by criminal law scholars.[241] However, later decisions have rejected that argument of unconstitutionality and, therefore, applied penalties to defendants.[242] The same human

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239 Husak, *supra* note 25, at 91-95 (reviewing negative effects of over-criminalizing drug consumption when arguing for its decriminalization).

240 Criminal Code Braz., art. 184; and, Software Act Braz., art. 12.

241 Tribunal de Justiça de Minas Gerais Ap. No. 1.0172.04.910501-5/001, Relator: Erony da Silva, 23.11.2004 (Brazil) (resolving that *"the wording 'violating copyright' is extremely vague and even criminal law specialists couldn't precise its actual meaning, much less a street vendor without legal education. Lacking knowledge of the law is an excuse if it is not clear enough to permit anyone to understand, even potentially, its meaning"*).

242 *See infra* notes 256 and 257, and their accompanying text.

right concerns may be raised in Argentina, where the law punishes one who *"defrauds copyright."*[243] Other Latin American countries do not seem to create similar questions for criminal copyright law, probably because their provisions give a fair idea of what is actually being sanctioned. Another likely explanation is that those arguments of legal uncertainty are being handled not like constitutional or human rights issues, but like a strictly criminal one that analyzes if a given behavior meets all the elements of a given crime described by law. For instance, in Mexico, courts have dismissed criminal charges for unauthorized use of copyrighted works against businesses that have used them after failing to pay previously agreed fees to collective copyright societies.[244] Similarly, in Colombia, there are some court decisions that have refused criminal charges for keeping infringing works when a defendant merely carries them but there is no evidence of maintaining them.[245] Likewise, until introducing a 1998 amendment to the copyright act,[246] Argentinean courts disagree on whether the crime of violating copyright applied to infringements on software, since

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243 Copyright Act Argentina, art. 71.

244 2o. Tribunal Colegiado del 10º Circuito [T.C.C.] [Second Court of the Tenth Circuit], Semanario Judicial de la Federación y su Gaceta, Novena Epoca, tomo V, Mayo de 1997, Tesis XIV 2º 64 P, Página 604 (Mex.) (setting forth that the existence of an agreement with collective copyright society excludes the lack of authorization required by the law).

245 Corte Suprema de Justicia de Colombia, 21/03/2007, "Against Alvarez Rivera" (Colom.) (distinguishing between 'keeping' infringing works, which is a punishable crime, and 'carrying' those works, which is not). *But see,* Francisco Bernate Ochoa, *La Protección Penal del Derecho de Autor,* in PROPIEDAD INTELECTUAL: REFLEXIONES 384-386 (Ricardo Metke Méndez, Édgar Iván León Robayo & Eduardo Varela Pezzano eds., Universidad del Rosario, 2012) (criticizing the court decision because of being restrictive in its interpretation of criminal statute and arguing for an extensive interpretation that would result in conviction against the prosecuted one).

246 Ley No. 25.036 que modifica los Artículos 1, 4, 9 y 57 e incorpora el Artículo 55 bis a la Ley N° 11.723 en relación con el Software y las Bases de datos, B.O., Nov. 11, 1998 (Arg.) (amending the Argentinean copyright act in order to provide protection to software and data bases).

this kind of work was hardly in the mind of lawmakers when adopting criminal provisions on copyright in 1933.[247]

Rather than contesting the compliance of criminal copyright law with the principle of legality, Latin American courts have avoided punishing infringements through judicial interpretation. In this kind of cases, defendants commit crimes but courts develop copyright exceptions in order to exonerate infringers from criminal charges. A couple of examples on this trend are provided by court decisions in Chile, Brazil, and more prominently Colombia. However, this trend has certain limitations. They are still decisions with limited effect, issued in a case-by-case analysis, that provide some guidelines to public prosecutors and criminal judges, but, according to the civil law tradition, are not technically binding in later cases. In order to achieve general effects those court interpretations would required being embarrassed by the legislative by modifying the respective copyright act.

In Chile, the local Supreme Court rejected criminal charges against a publisher who published speeches by the 1971 Nobel Prize winner Pablo Neruda, delivered as a Senator within the National Congress. At that time, the law rather than granting copyright on the

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247 Corte Suprema de Justicia de la Nación [CSJN], 23/12/1997, "Autodesk Inc. V. Oscar A. Pellicori, y otros / recurso extraordinario," Jurisprudencia Argentina [J.A.] (1998)-III-319) (Arg.) (rejecting recur against a lower court decision that deciding that copying computer programs without copyright holder's authorization was not a crime). *See* Pablo Palazzi, *La Protección Jurídica de los Programas de Ordenador (A Propósito de un Reciente Fallo de la Corte Suprema de Justicia de la Nación)*, 7 REVISTA ELECTRÓNICA DE DERECHO INFORMÁTICO (1999); Ron Gorbett, *The Judicial of Intellectual Property Rights in Argentina – Is Society Being Served?,* 10 Currents Int'l Trade L.J. 3 (2001) (blaming the local court system for failing to provide criminal enforcement againts software piracy in Argentina).

public servant for works produced in its public position, it granted those rights to the respective public agency.[248] However, the publisher did not ask for authorization by either the National Congress or the Neruda´s Foundation that owns the copyright on the writer´s work. In spite of lacking any authorization, the Supreme Court rejected the criminal charges because that would undermine democratic deliberation, since *"speeches were related with the exercise of a political position… that cannot originate property rights because they are part of the republican debate that cannot be prevented from being known and disseminated"*.[249] By this reasoning, the Supreme Court understood that political speeches were in the public domain, even when domestic copyright law does not make that explicit. On the contrary, the law does not provide that such speeches are public domain works[250], and a recent law amendment has reassured that the respective public agency owns that copyright, although it has allowed waiving those rights.[251]

Another series of examples are provided by some Brazilian court decisions that rejected the need for criminal sanctions because the defendants' conduct lacked harmful effects.[252] In 2008, a first instance court refused to condemn the defendant, a street vendor,

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248 Copyright Act Chile, art. 88 (granting to government agencies copyright on public officers' creations).

249 Corte Suprema de Chile, 31/10/2001, "Fundación Pablo Neruda v. Hernán Aguirre Mac-Kay y Leónidas Aguirre Silva" (Chile).

250 Copyright Act Chile, art. 11 (listing public domain works, without mention to governmental material).

251 Copyright Act Chile, art. 88 (currently, granting to government agencies copyright on public officers' creation, but allowing the waiver of those exclusive rights).

252 TRIDENTE, *supra* note 3, at 70 (reporting that some scholars and judicial decisions state an exception for private use by arguing that this kind of usage should be legal under the premise of *"ius usus innocui",* thus a right for using works in any harmless way).

of infringing copyright by trafficking pirate material, because his conduct was not harmful enough and there were more efficient ways than criminal punishment to prevent infringement and sanction the defendant.[253] And again in 2009, a court denied criminal charges against another defendant, who ran a small shop selling infringing material, because criminal responsibility requires *"a relevant offence to the legal interest protected by criminal law to justify punishment."*[254] In both cases, the courts recalled the principle of harmfulness and excepted harmless conduct from penalties, despite having criminal provisions that sanction them, as Brazil's criminal code punishes unauthorized use of copyrighted works, even if there is no damage and the infringer has non-profit purposes.[255] Most Brazilian courts, however, have expressly dismissed defense arguments for exoneration based on infraction to the principle of harmfulness,[256] including several decisions by the highest courts of the country, the Supremo Tribunal Federal and the Superior Tribunal de Justiça.[257]

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253 8a Vara Criminal do Belo Horizonte, 24.06.2008 (Braz.).

254 8a Vara Criminal do Belo Horizonte, No. 04.327.596-5, "Against Adilson Lopes," 28.04.2009 (Braz.).

255 Criminal Code Braz., art. 184; and, Software Act Braz., art. 12.

256 Juízo de Direito da Comarca de Jequeri – Minais Gerais, No. 0355.08.011964-5, "Against Maria Efigênia da Silva Barros", 03.02.2009 (Braz.); and, 3a Vara Criminal de Divinópolis – Minais Gerais, No. 0223 08 251082-5, "Against Jucimara Araújo Ribeiro," 17.03.2010 (Braz.).

257 Supremo Tribunal Federal (S.T.F.), Habeas Corpus HC 104467, Relatora: Ministra Cármen Lúcia, 08.02.2011, Diário do Judiciário Eletrônico [D.J.e.], 09.03.2011; S.T.F., Habeas Corpus HC 98898, Relator: Ministro Ricardo Lewandowski, 20.04.2010, D.J.e., 21.05.2010. Superior Tribunal de Justiça (S.T.J.), Rec. Esp. Crim. No. 2012/0048965-4, Relator: Ministra Laurita Vaz, 21.05.2013, D.J.e., 28.05.2013; S.T.J., Rec. Esp. Crim. No. 2011/0228223-4, Relator: Ministro Sebastião Reis Júnior, 07.05.2013, D.J.e., 16.05.2013; S.T.J., Rec. Esp. Crim. No. 2012/0258303-3, Relator: Ministro Campos Marques, 07.05.2013, D.J.e., 10.05.2013; S.T.J., Habeas Corpus No. 2012/0027858-0, Relator: Ministro Jorge Mussi, 16.04.2013, D.J.e., 24.04.2013; S.T.J., Rec. Esp. Crim. No. 2012/0252040-3, Relator: Ministro Marco Aurélio Bellizze, 12.03.2013, D.J.e., 18.03.2013; S.T.J., Habeas Corpus No. 2012/0029449-3, Relator:

By the end of 2013, the Superior Tribunal de Justiça ended the lack of agreement among different Brazilian courts on whether criminal charges could be dismissed because of insignificant damages to copyright holders. In a case against a woman who owned an store that displayed for selling 170 DVDs and 172 CDs with infringing content, the Court ruled that neither social tolerance nor the amount of damages could be argued for preventing criminal charges against one selling pirated material.[258] This led the Court to adopt a *súmula vinculante,* this is, a legally binding interpretation that must be follow by lower courts,[259] according to which, *"Proven the facts and responsibility, displaying for sale pirated CDs and DVDs constitutes the crime set forth by article 184 § 2º of the Criminal Code."*[260] This ruling prevents any contrary court decision on the matter and displaces the responsibility for mitigating excessive criminal enforcement from the Judiciary to the Legislature.

Decisions by the Supreme Court of Justice of Colombia challenging criminal copyright law due to the lack of harmful effects are, however, the most relevant for both

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Ministro Og Fernandes, 07.03.2013, D.J.e., 20.03.2013; S.T.J., Rec. Esp. Crim. No. 2011/0306370-0, Relator: Ministra Alderita Ramos de Oliveira, 05.02.2013, D.J.e., 25.02.2013; S.T.J., Rec. Esp. Crim. No. 2010/0084049-5, Relator: Ministra Maria Thereza de Assis Moura, 26.09.2012, 202, D.J.e., 04.12.2012, 305; S.T.J., Habeas Corpus No. 2011/0181787-0, Relator: Ministra Assusete Magalhães, 06.09.2012, D.J.e., 26.09.2012; S.T.J., Habeas Corpus No. 2010/0105854-4, Relator: Ministro Adilson Vieira Macabu, 12.06.2012, D.J.e., 28.06.2012; S.T.J., Rec. Esp. Crim. No. 2010/0062519-6, Relator: Ministra Maria Thereza de Assis Moura, 17.04.2012, D.J.e., 30.04.2012. (Braz.).

258 S.T.J., Rec. Esp. Crim. No. 1.193.196-MG (2010/0084049-5), Relator: Maria Thereza de Assis Moura 23.10.2013, 232, D.J.e., 28.10.2013, 750 (Braz.).

259 *See supra* Chap. I, note 90 and accompanying text.

260 S.T.J., Súmula 502, 23.10.2013, 232, Diário do Judiciário Electrônico [D.J.e.], 28.10.2013, 750 (Braz.).

the level of the tribunal and the effects it has produced. In 2008, the Supreme Court reversed a decision against a defendant who, in 1999, was digitalizing music from vinyl records and cassettes to CDs on request by their legitimate content owners for a nominal fee. Despite lacking an adequate copyright exception in the defendant's favor, the Supreme Court exonerated him because *"his conduct did neither cause unreasonable or excessive prejudice nor conflict with normal exploitation of the work."*[261] A distinctive feature of this decision is that the court, in practice, used the three-step test not for creating a copyright exception but rather criminal justification, this is, the conduct is still illegal but a criminal measure is excessive for facing that particular infringement. This judicial interpretation opens a general criterion to determine whether a given behavior must be punished by criminal law.

The aforementioned decision is also important because of its demonstrative effects on lower courts, even if it does not have the value that common law countries give to judicial precedent. In fact, the next year the Supreme Court, to an extent reasoning about the principle of harmfulness in criminal law, ratified a decision by an inferior court that absolved the defendant.[262] For illustrating its rejection of charges, the court referred to the absurdity of prosecuting a public servant for misfeasance in public office for taking a piece of paper from his office for personal purposes, or a parent for crimes against the family for a one-day delay in paying child support, or a practical joker for injuries after cutting a

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261 Corte Suprema de Justicia de Colombia, No. 29188, 30.04.2008, "Against Guillermo Luis Vélez Murillo" (Colom.).

262 Corte Suprema de Justicia de Colombia, No. 31362, 13.05.2009, "Against José Daniel Acero Sanagome" (Colom.).

friend's hair during his sleep.[263] That is the level of absurdity that would imply punishing one defendant, a street vendor, who was detained by police when offering for sale two pirated copies of two non-fiction books. Even when the defendant's conduct meets all the formal requirements of criminal law, it does not meet the substantive ones, because that innocuous act was beyond reasonable criminal law.

Surprisingly, the court did not stop hearing the case, but it went forward by calling explicitly the attention of the prosecutorial authorities to the questionable actual need for bringing legal proceedings against harmless behavior. No study has checked the actual effect on law enforcement by the court's decision, but interviewed experts believe that, since then, actual prosecution has focused on serious, harmful copyright crimes.[264] This result may suggest that the Colombian Supreme Court decisions helped to tailor a criminal policy that resists excesses and makes human rights prevail, but that is not the case. In addition to copyright advocates' rejection,[265] the copyright office has resisted those decisions,[266] which evidences the absence of agreement. Plus, because those court's decisions lack *stare decisis*, they are not compulsory in future cases. In fact, the very same

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263 *Id.*

264 Interview with Andrés IZQUIERDO, Professor on Intellectual Property at the Universidad Javeriana (Bogotá, Colom.) (Aug. 6, 2012).

265 Carlos Fernández Ballesteros, *El Nuevo Contexto del Derecho del Autor en el Siglo XXI,* 1 REVISTA JURÍDICA DE PROPIEDAD INTELECTUAL 107, 127-130 (2009) (criticizing the decision of the Colombian Supreme Court because of failing in protecting author's right by introducing legal uncertainty around criminal copyright enforcement).

266 Olarte and Rojas, *supre* note 82, at 58-64 (arguing against decriminalization of minor copyright infringements because it would mistake the protected legal interest by criminal law, and rejecting Supreme Court's decisions that exonerated from criminal responsibility offenders of that kind of infringements).

Supreme Court has resolved cases on analogous circumstances in a different was. In 2009, the Supreme Court sentenced to four years of imprisonment another street vendor, who was detained after offering for sale some pirated works. In doing so, the Court rejected the defendant's argument that her act was not relevant from a criminal law viewpoint, after balancing the number of copyrighted material (19 CDs and 4 DVDs) and the absence of evidence proving the supposed harmless effects of the infringement on right holders.[267]

The Supreme Court of Justice of Colombia has advanced the application of its doctrine on lack of harmful effects to the Internet by expressly considering that downloading copyrighted works is not a crime. The court's consideration was issued in a case that was not about online infringement but mere digitalization of content, in which by applying the principle of harmlessness, the Court stated, *"criminal law cannot focus on prosecuting users who … download available music"*.[268] Thus, the Supreme Court seems to limit criminal copyright enforcement by excluding cases of non-profit and harmless behavior, such as digitalizing and downloading content, even when no such copyright exceptions explicitly exist to support that judicial decision. No decision by a Colombian superior court has been made on uploading copyrighted content, however. In fact, a recent judicial case

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267 Corte Suprema de Justicia de Colombia, No. 30.532, 21.10.2009, "Against Luz Helena Huérfano" (Colom.).

268 *Id.* (stating that *"[s]imilarly, given the case that in Internet there are millions of songs, criminal law cannot focus on prosecuting users that, taking advantages from that circumstance, download available music, because in that case like in any other in which a person act without profit and damaging purposes to the work or economic interest of right holders, it is impossible to state the existence of a punishable conduct, because it does neither hurt nor jeopardize the legal interest protected by law."*). *But see,* Bernate Ochoa, *supra* note 245, at 386-391 (criticizing the court decision and arguing the court should have adopted the criteria of mass crimes, this is, a type of crime in which multiples victims are minimally affected, but whose accumulated damage is relevant enough to deserve punishment).

that involves a young biologist, who in 2011 posted in Scribd someone else's 2006 dissertation on amphibians' taxonomy,[269] may provide a first chance to the Colombian courts to rule on this matter. A first instance tribunal dismissed the criminal charges for copyright infringement,[270] but a final decision is still pending before a court of appeal.

In Argentina, a recent decision by the federal court of appeals has opened a different argument for challenging excessive criminalization in copyright enforcement. In a case against an impoverished foreign street vendor, the court nullified his prosecution because the defendant erred in law, since he was ignorant of the infringing nature the commercialized content, which was a common practice in his social environment.[271] As a result of such an error, the defendant did not meet the requirements of *mens rea* since he thought the act was legal and, therefore, he could not be blamed for it.

Reliance on court decisions as a mechanism of human rights resilience in the face of criminal copyright excesses has had, however, limited results in Latin America. There is only a limited number of cases on the matter and, as was said, according to the civil law

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269 Diego Gómez, *Sharing Is Not a Crime,* 13 DIGITAL RIGHTS LATIN AMERICA & THE CARIBBEAN, July 30, 2014, http://www.digitalrightslac.net/en/compartir-no-es-delito/ (last visited Aug. 2, 2017).

270 Bogotá Circuit Criminal Court No. 49, 24.05.2017, "Against Diego Alejandro Gómez Hoyos" (Colom.) (rejecting criminal action against defendant because of lacking commercial purpose and his acts, nonprofit sharing of copyrighted material through a website, a common practice among scientific researchers, including the plaintiff, could be "assimilated" to a copyright exception).

271 Cámara Nacional de Apelaciones en lo Criminal y Correccional, 30.05.2014, "F. V., R. C. – Procesamiento" (Arg.).

tradition, decisions lack *stare decisis*, so they do not cause or prevent changes in jurisprudence.[272] Some courts have even issued contrary decisions. In Colombia, for instance, a court decision has infringed the principle of legality by extending the application of criminal clauses in order to protect an author's moral rights.[273] An Argentine court, on the other hand, absolved a university professor who posted texts of contemporaneous philosophy because, it reasoned, if any infraction took place, it would be when users download content into their computers, not when the defendant uploads the works online.[274] The aforementioned and other decisions create serious legal uncertainty about the limits of criminal copyright enforcement by extending it to unintended areas and persons, which may diminish constitutional and human rights.

In sum, in order to face the excesses of criminalization by Latin American copyright law, some local courts have explored more progressive interpretations by narrowing down the scope of criminal provisions, enlarging and even creating copyright exceptions and limitations. Although said court attempts are valuable, their actual effect is very limited in Latin America because of its civil law tradition. Consequently, in order to

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272 *See* Alberto Cerda, *Una Excepción a los Derechos Autorales para la Comunicación Pública de Obras por Pequeñas y Medianas Empresas,* 40 REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DE VALPARAÍSO 75, 83-92 (2013) (reviewing contradictory decisions in Chilean case law on copyright royalties against small businesses turning on radio and television in their premises).

273 Corte Suprema de Justicia de Colombia, No. 31.403, 28.05.2010, "Against Luz Mary Giraldo de Jaramillo" (Colom.). *See also supra* notes 186-192 and accompanying text.

274 Juzgado Nacional en lo Criminal de Instrucción No. 37 (Buenos Aires) 57.627-08, 13.11.2009, "contra Potel Horacio Rubén s/infracción Ley 11.723" (accepting prosecution's arguments that while defendant's uploading may be a reproduction under copyright law, but it is each user who downloads files with copyrighted works who infringes the law).

achieve a lasting, general, comprehensive, and binding policy that reduces overcriminalization would require actual legislative intervention. The following paragraphs briefly explore some legislative actions that, although still reduced, attempt to mitigate excessive criminalization of copyright enforcement.

In spite of the general tendency to aggravate criminal responsibility for copyright infringement, it is still possible to find some legal initiatives involved in criminal enforcement resilience to overcriminalizing and, instead, strongly supportive of human rights. Again, this chapter focuses on defining a given behavior as criminal, while the next chapter analyzes how legislatures have also introduced some criteria of reasonability on determining applicable punishment, that is, resisting the overpunishment temptation. Having that in mind, it is possible to distinguish two different phenomena: on one hand, a deliberate choice to not criminalize a given conduct, even if it is illegal; on the other, a decision to relieve from criminal enforcement a conduct that was already punishable. Technically, only the second one deserves the name of decriminalization. However, identifying whether a given case is decriminalization or not would require an extremely detailed study not only of in force criminal copyright law, but also its confusing historical roots that, in some cases, go back to nineteenth century regulations. That is why the following pages use the expression decriminalization indistinctively and focus only on law in force.

The principle of legality is a key principle of modern criminal and human rights law that has been diminished in some countries within the region by drafting overly broad

criminal clauses. This is the case of Argentina and Brazil. Most countries' laws, however, provide a fair description of criminal conduct, even if they are still too broad regarding the requirements set forth by international copyright law. Because of the technical character of copyright law, referring to other bodies of law cannot be avoided entirely, but a mere general reference to a full copyright act clearly infringes the principle of legality by hiding the actual meaning of the criminal law not only from common people but even from experts.[275] It also infringes the principle of harmfulness by criminalizing whatever "violation" or "fraud" is committed against copyright.[276]

To comply with human rights obligations, Mexican law explicitly requires willfulness of criminal behavior. This is consistent with modern criminal law that sets forth a presumption of innocence, a human rights standard that must be protected by governments when drafting their domestic laws. Such a presumption is also consistent with international instruments on copyright enforcement that, in general, require criminal procedures and sanctions only against certain willful infringements. Unfortunately, most Latin American countries omit that requirement when drafting criminal copyright law and, as a result, the burden of proof is placed on the supposed offenders, who have to prove a lack of high-level psychological connection with their acts in order to prevent criminal responsibility.

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275 *See* Newton Paulo Teixeira dos Santos, *Informática e Direito Autoral*, 24 REVISTA DA ABPI 35, 36 (1996) (referring to the complexities of criminal provisions on copyright which would required any Internet user to have "a full-time lawyer at hand").

276 *See supra* notes 56-73 and accompanying text.

Several Latin American countries comply with the principle of harmfulness by opting to not criminalize innocuous behavior.[277] For instance, some countries do not criminalize unauthorized use of copyrighted material unless there is at least a minimum level of damage. That is the case of Costa Rica. Other countries limit criminal intervention to infractions committed for some sort of commercial purpose, which is the case of both Costa Rica and Mexico. As the next chapter analyses, some countries at least penalize according to the level of damages, but they still punish *de minimis* infringement, while others do not make any distinction, punishing not only smugglers and pirates but also ordinary citizens who may infringe on copyright.

A clear example of decriminalization took place in Costa Rica. In 2006, this country modified its law by adopting criminal provisions against commercial-scale copyright infringement, which is sanctioned with imprisonment up to five years, according to the level of damages. The law, however, set forth specific exceptions in favor of universities, libraries, and other public interest institutions. After some years in force, the law nonetheless had proven to be an efficient mechanism for restricting those institutions by instead threatening criminal actions against their service providers (such as outsourced photocopy services). As a result, in 2012, the Legislature approved the so-called "Photocopying Act," an amendment decriminalizing some copyright infringement when

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277 *See* Lackner, *supra* note 56*,* at 22-26 (noticing increasing risk on the harmfulness principle by intellectual property law, but arguing usefulness of that principle for stopping excessive enforcement, because even when not receipted expressly by copyright law, it is part of general criminal law).

committed by those providers in favor of public interest institutions.[278] Copyright holders successfully lobbied the Executive to veto the bill,[279] which unleashed mass demonstrations by students through the second half of that year,.[280] Finally, the situation resolved when the President adopted an interpretative presidential decree that allows the functioning of reproduction services attached to educational institutions.[281]

The space permitted for human rights resilience before the judiciary and decriminalization by domestic legislatures is narrowing, however, because of new obligations being imposed on criminal copyright law. Treaties require criminal answers for acts related to technological measures even without copyright infringement, passing over the *de minimis* exception for enforcing the law, extending liability to legal persons, expanding criminal responsibility to aiding and abetting, and so on. Moreover, treaties are circumventing the principle of harmfulness by presuming statutory damages. They also reduce the scope of potential justifications by submitting any copyright limitation and exception to the Berne three-step test and ignoring those exceptions freed from that

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278 Asamblea Legislativa de la República de Costa Rica, Proyecto de Ley 17.342 que reforma varios artículos de la Ley de procedimientos de Observancia de Derechos de Propiedad Intelectual No. 8039 de 12 de Octubre de 2000 y sus reformas (Ley para proteger el derecho a la educación frente a los excesos cometidos en las leyes de propiedad intelectual), aprobado el 19 de junio de 2012.

279 Laura Chinchilla, Presidenta de la República, a Víctor Emilio Granados, Presidente de la Asamblea Legislativa, Veto al Decreto Legislativo No. 9054, 12 de septiembre de 2012.

280 Jenny Cascante Gonzalez, *Costa Rica: Students Protest Veto of 'Photocopying Law'*, available at http://infojustice.org/archives/27502 (Oct. 12, 2012).

281 Decreto 37417 – JP, Adición de un Artículo 35 Bis al Reglamento a la Ley de Derechos de Autor y Derechos Conexos, La Gaceta 04 de febrero del 2013 (Costa Rica), art. 1.

restrictive test. This is not to say that all those developments are designed to affect criminal copyright enforcement, but they may create unintended consequences on criminal law and more serious risks for human rights involved in criminal enforcement.

5. SOME PRELIMINARY CONCLUSIONS

Human rights limit the state's power to criminalize and punish. Those limitations are rooted in classical principles of modern criminal law and have been received by international instruments on human rights as well as by domestic constitutional law. In Latin America, however, those limitations have had problems addressing criminal enforcement of copyright law.

Latin American criminal enforcement of copyright widely has exceeded international law requirements. While the leading instrument on intellectual property, the TRIPS Agreement, demands enforcement at least against willful copyright piracy on a commercial scale, countries within the region have gone far beyond that requirement, by criminalizing infringement on moral rights, and acts related to technological measures. Even more dramatic is that criminal enforcement is taking place with notorious violations to settled human rights, by eroding the principle of legality, circumventing the right to be presumed innocent, and relying disproportionally on criminal law. As a result, Latin American exhibits copyright overcriminalization, a phenomenon that may increase in coming years.

Some scholars, case law, and legislative initiatives have challenged the compliance of copyright regulation with the human rights obligations of substantive criminal law. These attempts to ameliorate the noxious effects of excessive criminalization of copyright infringement have had limited and mixed outcomes. Thus, there is a pressing need for uncovering those human rights violations in order to bring criminal copyright enforcement back in line with human rights. Chapter Ten provides some recommendations on the matter. The next chapter, on the other hand, probes into another excess on criminal law enforcement in Latin America with human rights implications: copyright overpunishment.

Chapter V

Human Rights and

Copyright Overpunishment

In the modern state, punishment is by definition a government monopoly.[1] Neither tribe nor corporation has the right to impose penalties for criminal conduct, only the state. However, punishment is subject to human rights limitations as is any other state action. This chapter discusses those human rights restrictions on government power to punish copyright infringers and argues that Latin American countries – and maybe countries from other regions too – are overpunishing by violating some of those well-established human rights limitations.

The first section of this chapter briefly describes the limitations on the state's power to punish that are recognized by international and regional instruments on human rights as well as by constitutional law in Latin American countries. The following sections discuss human rights violations under two specific circumstances related to copyright enforcement within the region. The second section claims that in some copyright infringements, imposing imprisonment as punishment violates the proscription of detention for debts. The third section makes apparent that Latin American countries are imposing disproportional punishments on copyright infringers

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1 ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 74-76 (Cambridge Univ. Press, 5th ed., 2010) (arguing that sentencing and punishment are state actions); and, MARK C. MURPHY, PHILOSOPHY OF LAW: THE FUNDAMENTALS 114 (Blackwell Publ'g, 2007).

and, therefore, violating underlying human rights standards. The final section elaborates on some conclusions on the topic.

1. PUNISHMENT AND HUMAN RIGHTS

Since the dawn of civilization, there has been a continuous progression towards limiting the power of government to punish. In spite of its severity, the *lex talionis*, in English better known as 'an eye for an eye' or the law of retribution, was incorporated in the Hammurabi Code and the Bible as attempts to abolish excesses of revenge and introduce some measure of rationality into penalties.[2] In 1215, the Magna Carta recognized the principle of proportionality when imposing penalties against offenders.[3] Later, during the Age of Enlightenment, scholars argued that the law must define unlawful conduct and applicable punishments in advance, that is, legal definition must happen before that a person performs an act that could qualify as a crime. During the last century, significant progress was made to humanize penalties, by abolishing cruel and degrading punishments, softening sanctions, improving penitentiary conditions, and so on. Those general principles inform not only modern criminal law but also international

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2 J. Dyneley Prince, *The Code of Hammurabi*, 8 AM. J. THEOLOGY 601, 607 (1904).

3 Magna Carta, art. 20 (providing that *"A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his "contentment"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage" if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighborhood"*).

instruments on human rights and, in the case of Latin America, they too have been incorporated into constitutional law.

The leading international instruments on human rights set forth specific limitations to the power of states to punish criminal behavior. All of them recognize expressly the cornerstone principle of legality that requires a previous written law setting forth both crime and punishment.[4] Humanization of penalties is granted by: abolishing double jeopardy;[5] proscribing cruel, inhuman, or degrading punishment;[6] limiting a penalty to the actual offender;[7] endorsing progressive eradication of the death penalty;[8] prohibiting imprisonment for debts;[9] and recognizing a rehabilitative purpose for punishment.[10] Additionally, explicit provisions that limit criminal enforcement also have been incorporated into other special international instruments on human rights, such as the conventions against torture,[11] on children's rights,[12] and on enforced disappearance,[13] among others.

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4 ADHR, art. XXVI (recognizing the right to be tried in accordance with pre-existing laws); UDHR, art. 11; ICCPR, art. 15; and, ACHR, art. 9.

5 ACHR, art. 8 (4).

6 ADHR, arts. XXV and XXVI; UDHR, art. 5; ICCPR, arts. 7 and 10; and, ACHR, art. 5 (2).

7 ACHR, art. 5 (3).

8 ICCPR, art. 6; ACHR, art. 4; and, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (Dec.15, 1989).

9 ADHR, art. XXV; ICCPR, art. 11; and, ACHR, art. 7 (7).

10 ICCPR, art. 10; and, ACHR, art. 5.

11 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 16 (providing that *"Each State Party shall*

Latin American countries have incorporated into domestic law human rights limitations to government's punishing power. For that purpose, countries have made international instruments on human rights enforceable through domestic law and, at the same time, both constitutions and statutory regulation include and develop those rights in detail. However, as explained below, Latin American countries have failed to some extent to effectuate human rights in the criminal punishment of copyright infringement.

Several reasons may explain the overpunishing approach of criminal copyright law in Latin America. Until recently, most countries lacked specific criminal provisions on copyright infringement and instead relied on existing crimes set forth in outdated criminal codifications, such as fraud and counterfeit.[14] Other countries relied on administrative offences for sanctioning copyright infringement, but only with fines. Through the second half of the twentieth century, technology allowed new forms of exploitation of copyrighted works, copyright evolved by granting additional exclusive rights to owners, and international law required adopting criminal enforcement – at least in cases of willful copyright piracy on a commercial scale. Latin American countries upgraded their domestic law to those new challenges, but, just like they disregarded

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undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment").

12 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 37.

13 International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

14 CARLOS VIÑAMATA PASCHKES, LA PROPIEDAD INTELECTUAL 91 (Ed. Trillas, 1998) (stating that, until 1947, Mexico prosecuted copyright infringement as falsification).

public interest requirements when modernizing copyright law, they disregarded human rights obligations on criminal punishment. This overlooking of human rights has aggravated through the years with the tendencies to rely on criminal law for enforcing copyright and to increase punishment for copyright infringement.

Unlike human rights instruments, international instruments on intellectual property have emphasized an enforcement of copyright that relies heavily on penalties. On one hand, human rights argue for a resocialization approach, the prevailing criminal policy at the time the leading instruments on the matter were adopted,[15] which justifies punishment as a method for rehabilitating the offender.[16] On the other hand, until the 1990s, copyright punishment was essentially an issue of domestic law. The TRIPS Agreement, however, changed that scenario by requiring the adoption of deterring penalties. The Agreement requires adopting imprisonment and/or monetary fines, and even permits those punitive measures to be consistent with *"the level of penalties applied for crimes of a corresponding gravity,"* as long as they are *"sufficient to provide a deterrent."*[17] This rationale of deterrence, which lacks empirical evidence and raises concerns about

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15 JOHN F. GALLIHER, CRIMINOLOGY: HUMAN RIGHTS, CRIMINAL LAW, AND CRIME 344-354 (Prentice Hall, rev. ed., 1989) (arguing that human rights became a concern of criminology only with Edwin Sutherland and the liberal criminology school, whose ideas on *resocialization* were dominant from the 1930's through the early 1970's, unlike the previous positivist school that privileged a deterrence approach and considered human rights a secondary concern, while for the new American conservative school human rights would be an absolute foreign issue).

16 ICCPR, art. 10; and, ACHR, art. 5. *See also,* ASHWORTH, *supra* note 1, at 86.

17 TRIPS Agreement, art. 61.

exemplary sentences,[18] claims punishment must prevent other people from committing offences (general deterrence) or deterring the same person from committing new offences (special deterrence).[19] Unfortunately, the deterrence rationale prevailed in the TRIPS Agreement and has been adopted by subsequent multilateral instruments on intellectual property, encouraging excessive punishments to prevent crime instead of rehabilitating people.[20]

International law has conflicting viewpoints on the purpose of punishment. While international human rights law endorses resocialization, international intellectual property law supports deterrence. The first approach requires sanctions that allow convicts to embrace prevailing social values and to re-enter into the society, instead, the latter one emphasizes the prevention of new criminal activity by the same offender or other members of the society. These different perspectives lead to certain normative and theoretical implications regarding sentencing of certain crimes – like terrorism, political crime, and parricide – and forms of punishments – like death penalty, mutilation, and life imprisonment. To which extend these views have concrete impact on the punishment of copyright infringement may be arguable. On one hand, the actual determination of punishment, specially in the case of imprisonment, depends on several other factors, such as the level of reliance that a given society has on criminal law, system, and enforcement. On the other, as scholars have pointed out, actual criminal law grows out

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18 ASHWORTH, *supra* note 1, at 79-84.

19 ASHWORTH, *supra* note 1, at 78-79 (explaining the deterrence rationale for punishment).

20 MURPHY, *supra* note 1, at 116-132 (reviewing different theories on the role of punishment).

of a variety of different views on the purposes of punishment.[21] Consequently, there is still certain indeterminacy on the level of punishment that would be permissible under one viewpoint or another.

Latin American countries, in brief, have adopted human rights limitations to punishment. Among those rights, it is possible to highlight three touchstones: the principle of legality, the principle of proportionality, and the prohibition of imprisonment for debts. However, as is analyzed below, increasing reliance on criminal law for enforcing copyright jeopardizes those well-established principles and the underlying human rights they protect. The following sections discuss human rights violations under specific circumstances related to copyright enforcement within the region. Section Two argues that in some copyright infringements, imposing imprisonment as a punishment violates the proscription on detention for debts. Section Three elaborates on how Latin American countries are imposing disproportional punishments on copyright infringement and, therefore, violating underlying human rights standards. Section Four summarizes some conclusions on copyright overpunishment.

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21 *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (Oxford Univ. Press, 1962) (mixing utilitarian and retributive theories for explaining criminal punishment); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 46-55 (Hill and Wang, 1976); Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19 (1988) (arguing the lack of clear guidance for making a clear distinction on the purpose of punishment by judges and lawmakers); and, Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFFALO CRIM. L. REV. 443, 450 (2004) (referring to a mix theory in which punishment has utilitarian purposes, but is subjected to retributive limits).

2. IMPRISONMENT FOR COPYRIGHT DEBTS

The prohibition of imprisonment for debts is an achievement of modern criminal law. It received early recognition in the Americas through the nineteenth century. Imprisonment for debts was abolished by Mexico (1812),[22] Peru (1832),[23] the United States (1833),[24] Costa Rica (1854),[25] Chile (1868), [26] Argentina (1872),[27] Colombia (1886),[28] and others. Imprisonment for debts remains a for a while in Europe.[29] In Italy, for instance, it was abolished only in 1942.[30] A more belated abolition of imprisonment for debts took place in England. During the nineteenth century, British prisons were filled with inmates who had not committed any crime but only had unpaid debts. In fact,

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22 ENRIQUE DE OLAVARRIA Y FERRARI, INFORME ACERCA DE LOS SISTEMAS PENITENCIARIOS 222 (Imprenta del Gobierno en Palacio, 1873).

23 MIGUEL A. DE LA LAMA, 1 LEGISLACIÓN MERCANTIL DEL PERÚ: COMPILADA, ANOTADA Y CONCORDADA 286 (B Gil Editor, 1877).

24 ALICIA BANNON, MITALI NAGRECHA, & REBEKAH DILLER, THE HIDDEN COSTS OF CRIMINAL JUSTICE DEBT 19 (Brennan Center for Justice at New York University School of Law, 2010) (the United States eliminated the imprisonment of debtors under federal law in 1833, and many states following suit, at a time in which some states imprisoned three to five times as many individuals for debt as for actual crimes).

25 SALVADOR JIMENEZ, 2 ELEMENTOS DE DERECHO CIVIL Y PENAL DE COSTA RICA 334 (Imprenta Nacional, 1876).

26 MARÍA ANGÉLICA ILLANES, CHILE DES-CENTRADO: FORMACIÓN SOCIO CULTURAL REPUBLICANA Y TRANSICIÓN CAPITALISTA 244-247 (LOM Ed., 2003) (reviewing the abolition of imprisonment for debts in Chile and documenting the release of around 400 inmates from local prisons at the time the law was enacted).

27 SEGUNDO V. LINARES QUINTANA, ANALES DE LEGISLACIÓN ARGENTINA 943 (Editorial La Ley, 1954).

28 Corte Constitucional de Colombia, Sentencia C-292/08, 02.04.2008 (Colom.).

29 DE OLAVARRIA Y FERRARI, *supra* note 22, at 219-223 (reviewing imprisonment for debts in European countries).

30 Gianfranco Purpura, *La Pubblica Rappresentazione dell'Insolvenza: Procedure Esecutive Personali e Patrimoniali al Tempo di Cicerone*, in 7 FIDES HUMANITAS IUS: STUDI IN ONORE DI LUIGI LABRUNA 4541 (Editorial Scientifica, 2007).

Charles Dickens' family to some extent was forced to live within a London penitentiary for a while, an experience that colored his work, in which he denounced the heartache of imprisoned life. In 1869, a new bankruptcy regulation abolished the imprisonment for debts in England, but only partially, since it remains in force until the 1960s.[31]

At the time when the leading human rights instruments were adopted, there still was no agreement about the proscription of imprisonment for debts. In fact, the 1948 Universal Declaration omits any mention of the topic and so do other regional instruments on the matter, like the European Convention on Human Rights and the African Charter on Human and Peoples' Rights.[32] Through the years, the European approach moderated itself by adopting a specific protocol that granted the right to not be deprived of liberty because of a *"contractual obligation."*[33] This language was also

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31 Sean McConville, *Local Justice: The Jail*, in OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 309-310 (Noval Morris & David J. Rothman eds, Oxford Univ. Press, 1995) (examining the progressive abolition of imprisonment for debts in England).

32 *See* Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5; and, African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

33 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto as amended by Protocol No. 11, Strasbourg, 16.IX.1963, art. 1 (prohibiting the imprisonment for debts by providing that *"[n]o one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation"*). *See also,* Jeroen Schokkenbroek*, Prohibition of Deprivation of Liberty on the Ground of Inability to Fulfil a Contractual Obligation,* THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, at 937-938 (Pieter van Dijk, Fried van Hoof, Arjen van Rijn, & Leo Zwaak eds., Intersentia, 4th ed., 2006) (concluding that the prohibition has a "very limited scope", since it does not apply in case of reluctance to pay, neither to fraudulent acts by debtor, nor detention order by a court on legal grounds); and, CHRISTOPH GRABENWARTER, EUROPEAN CONVENTION ON HUMAN RIGHTS: COMMENTARY 410 (C.B. Beck, Hart, Nomos, and Helbing

appropriated by the 1966 International Covenant on Civil and Political Rights.[34] The latter instrument went forward on the matter, by prohibiting any derogation on this right, even under a public emergency that threatens the very existence of the state.[35]

Human rights instruments adopted in the Americas were noticeably more progressive on abrogating debtors' imprisonment, not only because of contractual obligation but also those from other sources of obligations. The 1948 American Declaration expressly assures that *"[n]o person may be deprived of liberty for nonfulfillment of obligations of a purely civil character,"*[36] and the later 1969 American Convention recognized that *"[n]o one shall be detained for debt."*[37] This language extended a debtor's right to liberty from obligations originated in contract to those created by law. This conclusion is corroborated not only by eliminating the adjective "contractual" before the noun "obligation," but also by adopting the sole exception to that right: imprisonment ordered by a court for the nonfulfillment of duties of support,[38] which is a paradigmatic legal obligation.

Lichtenhahn Verlag, 2014) (noticing the narrow scope of the prohibition of imprisonment for debt and calling attention that it "remains to this day without significance").

34 ICCPR, art. 11.

35 ICCPR, arts. 4 (2) and 11.

36 ADHR, art. XXV.

37 ACHR, art. 7 (7).

38 ACHR, art. 7 (7). *Compare* Proposal of Inter-American Convention on Protection of Human Rights, art. 6 (allowing exceptions by law) *with* American Convention on Human Rights, art. 7 (narrowing that exception to fulfillment of duties of support), in Documents of the 1969 Inter-American Conference on Human Rights (*Travaux Préparatoires*) OAS Document OEA/Ser.K/XVI/1.2.

Consistent with regional instruments on human rights, Latin American constitutions proscribe any measures that deprive of liberty for debts, whether contractual or not. While some constitutions prohibit imprisonment for debt or obligations civil in nature,[39] others proscribe any measure privative of freedom, such as imprisonment, detention, and arrest.[40] Exceptionally and again consistently with regional instruments on human rights, countries allow imprisonment for nonfulfillment of support duties.[41] Whatever the language, the basic constitutional principle is that no one can be subject to any measure that restricts their liberty because of a breach of contract or any other mere civil infraction.

In recent years, the ban on imprisonment for debts juxtaposed with copyright enforcement in Latin America has created areas of increasing concern. The prohibition blocks any enforcement of contractual obligations through deprivation of liberty. Mexican courts, for instance, have rejected criminal actions against defendants who contracted with plaintiffs for the exploitation of copyrighted material but failed to pay the agreed amount.[42] However, in spite of the broad terms in which the regional

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39 Const. Costa Rica, art. 38; and, Const. Mex., art. 17.

40 Const. Colom., art. 28.

41 Const. Peru, art. 2 No. 24 c). *See also,* C. F. Braz., art. 5.67 (denying imprisoning for debts, except in cases of non-fulfillment of support duties and *"depositário infiel"*, which is technically a hypothesis of fraud). *But see* Supremo Tribunal Federal (S.T.F.), Súmula Vinculante 25, Dec. 16, 2009, D.O.U. de 23.12.2009 (Brazil) (providing a compulsory court interpretation, according to which *"civil imprisoning of unfaithful depositary is illegal, whatever the kind of deposit").*

42 2do Tribunal Colegiado del 10º Circuito, Amparo Directo 146/97. José Alfredo Jiménez Hernández. 10 Abril 1997, Semanario Judicial de la Federación y su Gaceta, Novena Epoca, tomo V, Mayo de 1997, Tesis: XIV 2º 64 P, Página 604 (Mex.) (rejecting accusation because

instruments on human rights endorse the proscription of imprisonment for debts, copyright law still takes advantage of deprivation of liberty for enforcing legal obligations of a civil nature.

Compulsory licensing is a source of controversy surrounding the proscription against imprisonment for debts in Latin America. Countries in the region have incorporated several mechanisms of compulsory licensing into their domestic law, such as those allowing broadcasting of protected works, translation and reproduction of works in foreign languages into local ones, and, more recently, reproduction of works for personal purposes. The law authorizes the use of works through these licenses, while right holders, collective copyright societies, or administrative authorities determine the price for such usage. Problems arise when users take advantage of the authorizations without payment and right holders attempt criminal actions against infringers. Even when both regional instruments on human rights and domestic constitutional law forbid imprisonment of debtors, users are still subjected to penalties that restrict their liberty.

In 2006, imprisonment for copyright debt originating from compulsory licensing attracted constitutional attention in Ecuador. Years before, the country had modified its copyright law by introducing a compulsory license that allows private copies of works for personal use with financial compensation,[43] which must be paid by the importer or

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of *"the very existence of that arrangement excludes an essential element of copyright crime: the lack of authorization"*).

43 Ley de Propiedad Intelectual, Registro Oficial 320 de 19 de mayo de 1998 [*hereinafter* Intellectual Property Act Ecuador], art. 105.

manufacturer of needed equipment and media used for making such copies, like CD-ROM's, DVD's, and others.[44] According to the law, non-payment of compensation is subject to fines,[45] while one who makes private copies in a medium or with equipment that has not paid compensation incurs a copyright violation,[46] which is sanctioned with imprisonment of up to two years.[47] The constitutionality of the law was challenged on several grounds; one of them because the copyright violation was susceptible of criminal charges punished with imprisonment, which would infringe constitutional rights.[48]

The Constitutional Court of Ecuador dismissed arguments about the law's sanction violating the prohibition of imprisonment for debt. In a brief and cryptic statement, the court stated that the questioned norm does not impose prison for non-payment of fees, but only for copying copyrighted works using equipment and media that have not paid the financial compensation.[49] In other words, the law does not

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44 Intellectual Property Act Ecuador, art. 106.

45 Intellectual Property Act Ecuador, art. 107.

46 Intellectual Property Act Ecuador, art. 108.2.

47 Art. 325 (setting forth imprisonment from one month to two years and fines for certain copyright violation).

48 Constitución Política de 1998, R.O. No. 1, 11 de Agosto de 1998 (Ecuador), art. 23.4 (providing that *"art. 24.: without prejudice of the rights set forth by the Constitution and international instruments in force, the government shall recognize and guarantee to people that: 4) no one shall suffer imprisonment for debts, court costs, taxes, fines, nor any other obligation, except for nonfulfillment of duties of support"*). The 1998 Constitution of Ecuador was derogated by the 2008 Constitution, which reproduces identical language when recognizing and guaranteeing the right to not be deprived of liberty for debts. *See,* Constitución Política de 2008, R.O. No. 449, 20 de Octubre de 2008 (Ecuador), art. 66.29 c).

49 Tribunal Constitucional de Ecuador, 0001-2005-TC, 02/05/2006, cons. 18º, (stating that *"the appellant wrongly interprets the norm by understanding that who does not pay the fines will be sanctioned with prison, but, actually, the norm sanctions who made private copies on supports or with equipment that have not paid the legal compensation, which is essentially different and moreover consequent, because the law*

sanction the exporter or manufacturer who has neglected the payment, but the end-user of a device for which the exporter or manufacturer did not pay compensation. This inexplicable decision infringes the proscription of imprisonment for debts by punishing users, who are authorized by law under a compulsory license for making copies for personal purposes, for failing to pay compensation to right holders. Even worse, the decision violates another well-established human rights standard for punishment that limits the penalties to the person of the actual offender,[50] by punishing not the exporter or manufacturer who should have paid compensation, but the person who uses the device downstream.[51]

The challenge of criminal enforcement of copyright by imprisonment has gone further in Latin America. In recent years, some scholars have raised concerns about human rights compliance of the whole enforcement of economic exclusive rights through punitive measures that deprive one of liberty.[52] While criminal enforcement of moral rights seems properly rooted in human rights and constitutional standards, that would not be the case of the enforcement of economic rights by punishing the

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sets forth that illegal private copies are copyright crimes"). Gaceta Constitucional - Tribunal Constitucional, Marzo-Junio 2006 No.19, Quito –Ecuador, at 52-61.

50 ACHR, art. 5 (3).

51 *But see* Esteban Argudo Carpio, *La Remuneración Compensatoria por Copia Privada en el Ecuador: Evolución Legislativa y Jurisprudencial,* 1 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 246 (2007) (celebrating the decision of the Ecuadorian constitutional court).

52 Túlio Lima Vianna*, A Ideologia da Propriedade Intelectual: a Inconstitucionalidade da Tutela Penal dos Direitos Patrimoniais de Autor,* 12 ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 933, 944-946 (2006). *See also* Pedro Henrique Arazine de Carvalho Costandrade, *Dos Novos Paradigmas da Propriedade Intelectual: da Inconstitucionalidade da Tutela Penal do Direito de Autor*, 5 REVISTA ELETRÔNICA DO IBPI INSTITUTO BRASILEIRO DE PROPRIEDADE INTELECTUAL 41, 92-93 (2011).

unauthorized use of copyrighted works, since, ultimately, what is being enforce is a payment owed to copyright owners for their authorization. Following that reasoning, the enforcement of economic rights would camouflage actual imprisonment of debtors for obligations of a civil character. To be clear, this argument, which lack support by any court, does not argue for decriminalization of enforcing economic rights, but for excluding imprisonment as a potential penalty for infringing on those rights.

Enforcing the crime of unauthorized use of a copyrighted work may be merely a scheme for achieving payment of a debt by threatening with criminal actions and imprisonment. It seems necessary, however, to draw some distinctions. If the cause of action is a contractual obligation or compulsory licensing, human rights violations seem apparent. It also is an unauthorized use of a work when the right holder is willing to provide authorization and, in fact, has in place a mechanism for providing it, because the failure to pay is the real cause of action. This also would be the case of some practices of general licensing for online streaming of music, and clearance copyright mechanisms. Here, the right holder has provided a general authorization subject to remuneration and is enforcing this payment through a criminal provision that involves privation of liberty, which infringes the proscription of imprisonment for debts. If right holders do not have in place a mechanism for providing authorizations subject to payment, it is more likely that the unauthorized use of copyrighted work does not threaten imprisonment for a mere debt and, maybe, the use actually violates the right holder's control on work. This is not to say that imprisonment should not apply to theft and shoplifting of physical goods offered for sale, since in latter cases there are additional elements of unfairness

that prevent qualifying those cases as mere infraction of a civil obligation, such as violence or intimidation in the case of theft, as well as deprivation of physical property in both theft and shoplifting. However, none of those circumstances take place in mere unauthorized use of copyrighted material, since there is neither intimidation nor violence on the victim. There is not deprivation of any physical property (*corpus mechanicum*), but only intellectual property (*corpus misticum*).

In recent years, copyright collective societies have increased their threats of criminal enforcement against end-users and others.[53] Those practices may raise and intensify concerns based on rights granted by international instruments on human rights and constitutional law before both domestic and regional fora. Among them, the proscription of imprisonment for debts challenges the imprisonment of copyright debtors, particularly in cases where existing compulsory or general licenses are available.

3. IMPOSING DISPROPORTIONAL PUNISHMENT

Once a state decides to sanction a given copyright infraction as a crime, it is necessary to determine the applicable punishment. According to classical criminal law

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53 *See,* LA GESTIÓN COLECTIVA ANTE EL DESAFÍO DIGITAL EN AMÉRICA LATINA Y EL CARIBE (Carolina Botero Cabrera, Luisa Fernanda Guzmán Mejía & Karen Isabel Cabrera Peña eds., Fundación Karisma, 2015). *See also,* Ernesto Rengifo García, *Recientes Reformas Normativas del Derecho de Autor en Colombia,* 3 REVISTA MEXICANA DEL DERECHO DE AUTOR 166, 172-177 (2013) (reviewing the numerous amendments recently introduced into the Colombian copyright act to prevent collective societies' abuses against both their own members and users).

scholarship, the amount of penalty correlates with damages produced by the criminal act; punishment must be proportional. This is the basic idea of the *lex talionis*, pursuant to which penalties resemble the offence committed in kind and degree, although in modern societies punishment has a more humanized taste. Of course, this does not exclude considering other factors, such as social and personal circumstances surrounding the crime, but the primary measure of proportionality is the level of harm caused to a relevant social value; the more serious the damages and the more significant the social values, the higher the punishment.

This section argues that Latin American countries are imposing disproportional punishment on copyright infringement and, therefore, violating underlying human rights standards. Neither a human right to a proportional punishment nor an actual measure of proportionality is obvious, however.[54] For those reasons, this section starts by discussing the existence of a human right to a proportional punishment in both international human rights and domestic constitutional law. Then, it briefly analyses methodological mechanisms for determining a measure of proportionality for punishment. And, finally, it makes apparent that criminal copyright enforcement has exceeded that proportionality in several Latin American countries by overpunishing copyright infringers.

In spite of the fact that leading international instruments on human rights do not provide expressly for punitive proportionality, the underlying principle of limiting power

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54 *See* ASHWORTH, *supra* note 1, at 68 and 96 (noting that human rights have had *"less application to sentencing than other stages of the criminal process,"* in reference to the European Convention).

of states for applying criminal sanctions appears in all of them. A measure of proportion is found in several provisions of each of those instruments, by proscribing cruel, inhuman, or degrading punishment;[55] limiting the penalty to the offender;[56] endorsing progressive eradication of the death penalty;[57] and prohibiting imprisonment for debts.[58] All instruments, therefore, make demands for excluding some disproportional punitive measures. This suggests to some scholars that, beyond those limitations on extreme forms of punishment, states have significant margin of appreciation for sanctioning in their domestic law, thus, states would be free to determine the amount of punishment to impose on offenders. As aforementioned, I disagree with that narrow literal interpretation of human rights obligations on punishment.

International human rights law imposes exigencies on punitive proportionality. This follows, in my opinion, from the fact that punishment is a measure that restricts or deprives an offender of rights, such as liberty of movement (e.g., imprisonment), property (e.g., monetary fines), and even some political rights (e.g., voting and being elected). Any measure that restricts or deprives those rights must comply with standards on limitations set forth by human rights law. The worldwide standard for evaluating compliance of measures that restrict human rights, as was analyzed in Chapter One, is

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55 ADHR, arts. XXV and XXVI; UDHR, art. 5; ICCPR, arts. 7 and 10; and, ACHR, art. 5 (2).

56 ACHR, art. 5 (3).

57 ICCPR, art. 6; ACHR, art. 4; and, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (Dec.15, 1989).

58 ADHR, art. XXV; ICCPR, art. 11; and, ACHR, art. 7 (7).

precisely the test of proportionality.[59] Therefore, as a human rights limitation, the punishment must be proportional to the offense and, correlatively, people have a right to proportional punishment.

Based on the European Human Rights Convention, Andrew ASHWORTH, a criminal law scholar who chairs the United Kingdom Sentencing Advisory Panel, has advanced a series of arguments for subjecting punishments to human rights law. According to him, disproportional sentencing could be prevented by arguing that the severity of the sentence violates the requirement that measures restricting human rights must be both *"necessary in a democratic society"* and proportional.[60] A second argument is that disproportional punishment may infringe the exigency that no person can be deprived of rights *"except in the public interest and subject to the conditions provided for by law."*[61] Later, ASHWORTH suggested another argument by invoking the right to liberty and security of person together with the proscription of torture and other inhuman or

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59 *See supra* Chap. I, notes 164-170 and accompanying text. *See also,* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 72 (2008) (referring to the worldwide extension of the principle of proportionality among international human rights court and constitutional courts, among others).

60 BEN EMMERSON, ANDREW ASHWORTH, & ALISON MACDONALD, HUMAN RIGHTS AND CRIMINAL JUSTICE 671-675 (Sweet & Maxwell, 2d ed., 2007) (suggesting challenging punishment severity through articles 8 and 11 of the European Human Rights Convention).

61 EMMERSON, ASHWORTH, & MACDONALD, *supra* note 60, at 675-676 (suggesting such argument based on article 1 of the Protocol No. 1 on Enforcement of certain Rights and Freedoms not included in Section I of the Convention).

degrading treatment or punishment, or even on its own, in order to rule out disproportionate sentencing.[62]

The 2000 European Union Charter of Fundamental Rights recognizes expressly the principle of proportionality on criminal offences and penalties, by providing that *"The severity of penalties must not be disproportionate to the criminal offence,"*[63] a clause that enshrined both case law of the Court of Justice of the Communities and common constitutional tradition of EU members.[64] This explicit recognition makes ASHWORTH's arguments unnecessary in the European Union context; however, they still remain useful for those countries who are parties to the European Convention, as opposed to the Charter.

In Latin America, both regional and international instruments on human rights provide defenses against disproportional punishment. In addition to the explicit

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62 ASHWORTH, *supra* note 1, at 68-69 (referring to articles 5 and 3 of the European Human Rights Convention, respectively). *See also* EMMERSON, ASHWORTH, & MACDONALD, supra *note* 60, at 676 (providing an additional argument against disproportional sentencing, but based on violation of European Community law, because a one-year prison term for driving without a valid license would infringe the free movement of persons).

63 Charter of Fundamental Rights of the European Union, signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000, Official Journal of the European Communities 18.12.2000, art. 49 (3).

64 Council of the European Union, Charter of Fundamental Rights of the European Union: Explanations relating to the Complete Text of the Charter, at 68 (Luxembourg, Office for Official Publications of the European Communities, 2001). *See also,* Valsamis Mitsilegas, *Principles of Legality and Proportionality of Criminal Offences and Penalties,* in THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1351-1371 (Steve Peers, Tamara Hervey, Jeff Kenner, & Angela Ward eds., Hart Publ'g, 2014) (analyzing background and content of the right to proportional punishment in the European Union Charter of Fundamental Rights, as well as its effects into communitarian and domestic laws).

proscription of more unacceptable forms of punishment, such as cruel and inhuman penalties, all those instruments recognize that measures that restrict human rights must comply with specific standards on limitations and restrictions.[65] Therefore, punishment, which is the paradigmatic limitation that government can impose on its citizens' rights, must adjust to human rights law.

Human rights instruments do not provide the only defense against disproportional punishment in Latin America. Constitutional frameworks also recognize the principle of proportionality of criminal law. In fact, several constitutions not only prohibit cruel and inhuman sanctions,[66] but also capital punishment.[67] In the same spirit, to avoid being disproportional, some countries forbid measures such as exile, perpetual imprisonment, confiscation, and hard labor, among others.[68] The Mexican Constitution goes further in limiting punishment by referring explicitly to the proportionality of

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65 ADHR, art. XXVIII; and, ACHR, arts. 29 and 30.

66 Const. Arg., art. 75 No. 22 (grating constitutional status to the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); Const. Colom., art 12 (proscribing forced disappearance, torture, as well as cruel, unhuman, or degrading penalties and treatment); C. F. Braz., art. 5.47; Const. Mex., art. 22; and, Const. Peru, art. 2 No. 24 (h).

67 C. F. Braz., art. 5.47; Const. Colom., art. 11; and, Const. Mex., art. 22.

68 C. F. Braz., art. 5.47 (banning capital, perpetual, and cruel punishments, hard labor, and exile); Const. Chile, art. 19 No. 7 (prohibiting confiscation and deprivation of social security rights); Const. Colom., art. 34 (proscribing exile, perpetual imprisoning, and confiscation); Const. Costa Rica, art. 40 (prohibiting cruel, degrading, and perpetual punishment, as well as confiscation); and, Const. Mex., art. 22 (prohibiting capital punishment, mutilation, infamy, marking, whipping, beating, any torment, excessive fine, confiscation, and any other unusual and significant punishment).

punishment with respect to crimes and the affected legal interests.[69] In Argentina, scholars argue that proportionality is implied in the constitution, when excluding harmless acts from court interference.[70]

Briefly, both regional instruments on human rights and Latin American constitutional law require a measure of proportionality in criminal punishment. Sometimes that exigency is explicit, but, in most cases, it is the outcome of a systematic interpretation of law. People may not have a right to fair punishment, but certainly they have the right to a punishment in compliance with human rights obligations, including legality, humanity, and proportionality. The latter exigency does not eliminate the margin of appreciation that countries have for determining the applicable punishment in a given case, but it certainly introduces a criterion of limitation on the state's power to punish.

The fact that people convicted of a crime have a right to a fair amount of punishment does not inform us how to determine a proportional measure for sanctioning. International human rights have set forth some limitations, such as encouraging progressive eradication of capital punishment, and proscribing cruel and inhuman penalties. But countries still preserve significant leeway for setting forth the sanctions for a given crime, which may vary according to the circumstances and for

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69 Const. Mex., art. 22 (stating that *"all punishment must be proportional to the crime and affected legal good"*).

70 CARLOS A. CARNEVALE, DERECHO DE AUTOR, INTERNET Y PIRATERÍA: PROBLEMÁTICA PENAL Y PROCESAL PENAL 93 (Ad-Hoc, 2009) (referring to article 19 of the Constitution of Argentina).

criminal-policy reasons from one country to another. Research into fair punishment also connects, moreover, with the very purpose of criminal sanctions, a topic in which there is abundant literature, from those who see punishment as a deterrent that prevents individuals and society from criminal behavior to those who see it as pure retaliation, a way in which society restores its values. Therefore, because of its relativism and different underlying purposes, it is difficult to establish *ex-ante* what is the "fair amount of punishment."

An additional problem, therefore, for determining punitive proportionality from a human rights viewpoint is the lack of agreement on the very purpose of punishment. Judging that a given measure that restricts human rights is proportional requires measuring that proportionality in relation to a legitimate purpose,[71] but disagreement on the purpose of punishment has long existed. Most scholars distinguish at least five different goals: resocialization emphasizes the rehabilitation of the offender; incapacitation attempts to make it impossible for the offender to commit crimes again; deterrence highlights preventing the offender and third parties from committing crimes; restitution focuses on compensating the victim; and retribution stresses that society is entitled to similarly harm the offender.[72] Although international human rights instruments endorse resocialization and international instruments on intellectual property

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71 *See supra* Chap. I, notes 158 *et seq.* and accompanying text. *See also,* Gloria Lorepa, *Principio de Proprocionalidad y Control Constitucional de las Leyes Penales,* in EL PRINCIPIO DE PROPORCIONALIDAD EN LA INTERPRETACIÓN JURÍDICA 211-256 (Miguel Carbonell coor., Librotecnia, 2010) (reviewing the application of the principle of proportionality on both the definition of an act as a crime and the determination of its punishment, although assuming that the primary purpose of the penalty is preventing crime).

72 *See supra* note 20.

support deterrence,[73] scholars agree that actual criminal law is grows out of a variety of different views on the purposes of punishment.[74]

Despite previous considerations, it is still possible to determine what constitutes overpunishing by comparing the level of sanctions imposed on the same conduct from one country to another. This process, which I call *comparison with comparative law,* allows us to identify when a country seems to apply too much punishment for a given conduct contrasted with other countries. This would allow to say that, for instance, Peru overpunishes copyright infringement, since it applies a punishment four times greater than Spain for piracy.[75] However, this approach may be misleading, because reliance on high punishments as a tool of public policy may be generally stronger in some countries than others. Moreover, the relativism of the public interests protected by criminal law challenges the accuracy of such an analysis and, in addition, it assumes that somehow there exists a legitimate cross-border measure of punishment.

To overcome the limitations of a mere external comparison on overpunishment, it is also necessary to compare the punitive reaction of the same country against a set of its own defined criminal behaviors. This process, which I call *comparison within domestic law*, allows us to identify when a country is punishing excessively a conduct according to its

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73 *See supra* notes 15-20 and accompanying text.

74 *See supra* note 21 and accompanying text.

75 *Compare* Copyright Act Peru, art. 217 (punishing commercial unauthorized reproduction of copyrighted material with imprisonment from 4 to 8 years) *with* Criminal Code Spain, art. 270 (punishing commercial unauthorized reproduction of copyrighted material with imprisonment from six months to four years).

own internal punitive standards for other cases. For example, it seems disproportionate that Argentina applies more severe punishments to unauthorized use of copyrighted material than to producing child pornography.[76] This approach may raise concerns in some circumstances, however, because of the potential relative character of the values that are enforced through criminal law, which may explain why, for instance, some countries punish harder offenses against property than sexual assault, or vice versa. Interestingly, several studies have called attention to the fact that, in spite of certain reservations, there apparently is a significant rate of agreement on the scale of offense-seriousness, ranking violent offences as most serious, followed by property offenses against individuals, and then white-collar crime.[77] Following this logic, it does look like that Peruvian criminal law overpunishes copyright infringement by imposing greater punishment on copyright piracy that in certain cases of homicide.[78]

In the instant analysis, we use both comparisons with comparative law and within domestic law to find that Latin American countries overpunish copyright infringement. In other words, as explained below, these countries impose excessive punitive sanctions on crimes related to copyright. The U.S. Supreme Court, which has

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76 *Compare* Criminal Code Argentina, art. 128 (punishing child pornography production and distribution with imprisonment from 6 months to 4 years) *with* Copyright Act Argentina, art. 72 bis (punishing commercial unauthorized reproduction of copyrighted material with imprisonment from one month to 6 years).

77 ASHWORTH, *supra* note 1, at 106-108. Ashworth develops an ordinal scale of proportionality on criminal sentencing, although it is not comprehensive and omits certain crimes, such as terrorism, child pornography, and copyright piracy. *Id.* at 108-148.

78 *Compare* Criminal Code Peru, art. 106 (punishing homicide with imprisonment from 6 to 20 years) *with* Copyright Act Peru, art. 217 (punishing commercial unauthorized reproduction of copyrighted material with imprisonment from 4 to 8 years).

made ambivalent rulings on overpunishment,[79] occasionally has used a similar analysis, although comparing different American states' criminal law to determine overpunishment.[80] However, its analysis incorporates a third element that requires assessing the harshness of the penalty against the gravity of the offence.[81] This dissertation does not incorporate that additional element because, as some criminal law scholars have argued, it is meaningless in this context, since copyright penalties may not qualify as grossly disproportional. An absolute assessment of gravity of offense against harshness of penalty is relevant from a human rights viewpoint generally, but it is not regarding punishment against copyright crimes, since most radical form of punishments, like death penalty, do not apply to these cases. In fact, most countries limit sanctions to imprisonment, monetary fines, and other accessory penalties. In this sense, our approach is closer to that proposed by VON HIRSCH, whose methodology also incorporates two comparisons: domestic sentence levels for similar crimes and cross-jurisdictional sentence levels for similar offences.[82]

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79 Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 (4) THE MODERN L. REV. 541, 544-546 (2004) (discussing reluctance of U.S. Supreme Court to endorse constitutional enforcement for the principle of proportionality on punishment). *See also,* Ruth Kannai, *Preserving Proportionality in Sentencing: Constitutional or Criminal Issue*, 9 CAN. CRIM. L. REV. 315, 339-346 (2005) (discussing the controversy around on whether the scope of the Eighth Amendment of the U.S. Federal Constitution applies to disproportional punishment).

80 Zyl Smit & Ashworth, *supra* note 79, at 552-557 (reviewing U.S. Supreme Court's tripartite test for determining disproportionality).

81 Solem v. Helm, 454 U.S. 370 (1982).

82 A. VON HIRSCH, CENSURE AND SANCTIONS 17-19 (Oxford Univ. Press, 1993). *See also,* Kannai, *supra* note 79, at 321-325 (suggesting an ordinal and cardinal analysis for sentence levels).

3.1. Comparing Copyright Punishment in Comparative Law

This analysis compares criminal copyright punishment in Latin America and a set of Western developed countries: Australia, France, Germany, Italy, Portugal, Spain, and the United States. All the selected Western developed countries are members of the Organization for Economic Cooperation and Development (OECD), a leading intergovernmental organization that promotes policies to improve the economic and social well-being of people around the world.[83] As Western countries, all arise from a common legal tradition with Latin America and, in fact, some have been particularly influential in the region on several legal areas. These circumstances would suggest that Latin American countries would reach similar outcomes on criminal copyright punishment as the selected Western developed countries, but they do not.

An extensive revision of idiosyncratic copyright crimes would exceed the purpose of this dissertation and, therefore, we focus here on punishment to the archetypical copyright infringement: unauthorized commercial use of copyrighted material. Criminal sanctions of this conduct reflects in various ways the exigency of international trade law to punish willful copyright piracy on a commercial scale,[84] although Latin American countries criminalize beyond that standard.[85] While there are

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83 Note: Despite being developing countries, both Mexico and Chile are also OECD-members, but for our analysis they are part of the Latin American region.

84 TRIPS Agreement, art. 61.

85 *See supra* Chap. IV (arguing Latin American countries over-criminalize copyright infringement).

differences in the way this conduct is described by domestic laws, all them provide some criminal clause against unauthorized use of works for commercial purposes, on a commercial scale, for profit, for achieving a commercial advantage, or using other similar language. Additionally, this basic criminal conduct may be aggravated by concomitant circumstances (e.g., copyright organized crime, repeat offender, and so on) and, therefore, subject to greater sanctions. This comparison, therefore, is limited to commercial unauthorized use of copyrighted material.

Criminal copyright law has a variety of sanctions. In addition to granting compensatory damages to right holders, the law usually imposes fines against infringers and some term of imprisonment. Additionally, some accessory penalties may be applicable, such as prohibitions on holding public office, possessing firearms, voting, and so on. This comparative analysis does not address the entire range of potential penalties applicable to unauthorized commercial use of copyrighted material, but rather solely on imprisonment. Leaving aside capital punishment, which has been practically eradicated from Latin America, imprisonment is the sole serious criminal sanction because it affects freedom of movement. Imprisonment is also a determinant sanction, since usually its extension determines the duration of accessory penalties. In all analyzed countries, judges determine the specific term of imprisonment imposed on an infringer from a range provided by law. The actual term in a given case varies according to the level of the infringer's involvement in the misconduct, the level of execution of the crime, and other circumstances that may mitigate or aggravate the penalty. This comparison

disregards those modifier conditions and instead compares the basic applicable penalty that deprives the infringer of freedom.

Table 3:
Term of Imprisonment for Unauthorized Commercial Use of Copyrighted Material, by Country (April 2015)

	Country	Years of Imprisoning								
		1	2	3	4	5	6	7	8	
Latin American	Argentina	■	■	■	■	■	■			1 month to 6 years
	Brazil		■	■	■					1 to 4 years
	Chile			■	■	■				541 days to 5 years
	Colombia					■	■	■	■	4 to 8 years
	Costa Rica		■	■	■	■				1 to 5 years
	Mexico		■	■	■	■	■			6 months to 6 years
	Peru					■	■	■	■	4 to 8 years
OECD Countries	Australia	■	■	■	■	■				Up to 5 years
	France	■	■	■						Up to 3 years
	Germany	■	■	■	■	■				Up to 5 years
	Italy		■	■	■					6 months to 3 years
	Portugal	■	■	■						Up to 3 years
	Spain		■	■						6 months to 2 years
	United States	■	■	■	■	■				Up to 5 years

Compared to OECD countries, Latin American reliance on imprisonment for enforcing copyright is higher in practically all parameters. Table 3 shows applicable jail terms, as of April 2015, in cases of unauthorized commercial use of copyrighted work. The table refers to penalties per offence by law, although the actual penalty applied in a given case may vary according to circumstances that aggravate or ameliorate criminal responsibility, such as lacking a criminal record, being a repeat offender, and so on. According to this table:

- The average minimum term of imprisonment for copyright infringement is twelve times greater in Latin America (629 days) than in OECD countries (52 days). In fact, in several OECD countries the minimum imprisonment starts

at just one day, while in Latin America, the minimum starts at a month in Argentina and extends to 4 years in Colombia and Peru.

- The average maximum term of imprisonment for copyright infringement is also greater in Latin America (6 years) than in OECD countries (3 years and 8 months). Actually, Latin America has the highest jail terms, including: Argentina and Mexico (up to 6 years), Colombia and Peru (up to 8 years).

- The average term of imprisonment for copyright infringement is, again, twice as long in Latin America (46 months) than in OECD countries (23 months). In fact, the average actual imprisonment of copyright infringers in the U.S. is 18 months,[86] far lower than the minimum punishment in Colombia and Peru (4 years).

- Even excluding from this analysis Colombia and Peru, the countries with the most prolonged sentencing for copyright crimes, on average Latin American countries still have longer minimum (296 days) and maximum (5 years and 2 months) terms of imprisonment for copyright infringement, compared with OECD countries´ minimum (52 days) and maximum (3 years and 8 months) terms.

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86 *See* UNITED STATES COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 2010: ANNUAL REPORT OF THE DIRECTOR (2011), available at http://www.uscourts.gov/Statistics/JudicialBusiness.aspx (Last visited: November 25, 2012).

Even considering countries that provide less disproportional sanctioning for copyright infringement in Latin America, like Brazil and Costa Rica, there is still a significant difference in the nature of imprisonment that makes that punishment harder in Latin America than in OECD countries. The TRIPS Agreement requires countries to punish copyright piracy with *"imprisonment and/or monetary fines."*[87] In compliance with that Agreement, most OECD countries set forth prison as an alternative penalty to fines. Latin American countries, instead, impose jail and fines as a mandatory cumulative penalty.[88] In other words, judges in Latin America must apply imprisonment plus monetary penalties to copyright infringers, while judges in OECD countries can choose to impose only one of these sanctions. This clearly shows a higher reliance by Latin American criminal law on imprisonment for enforcing copyright.

In brief, when compared to OECD countries, Latin American countries impose markedly greater terms of imprisonment against those who infringe copyright by making unauthorized use of works. As the previous chapter states, copyright scope is broader throughout the region, granting both comprehensive protection to exclusive rights and narrower copyright exceptions, and its criminal enforcement is more extensive than required by international law. The previous pages show that, contrary to what has been

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87 TRIPS Agreement, art. 61.

88 Ricardo Antequera, *El Acuerdo sobre los ADPIC y los Tratados de la OMPI sobre Derecho de Autor (TODA/WCO) y sobre Interpretación o Ejecución y Fonogramas (TOIEF/WPPT): La Adaptación de las Legislaciones Nacionales y la Experiencia en los Países Latinoamericanos*, WIPO Document OMPI-SGAE/DA/ASU/05/1, 26 de octubre de 2005, at 23 (reporting on the prevailing application of compound penalties, consistenting of both imprisonment and monetary fines, by Latin American countries).

suggested by some scholars,[89] when punishing through imprisonment, Latin America has greater minimum, maximum, and average jail terms for copyright infringement than OECD countries. Additionally, while imprisonment is an alternative sanction to monetary penalties in other jurisdictions, in Latin America it is a mandatory compound penalty. Therefore, copyright infringers within the region are usually sanctioned with fines, imprisonment, and some other accessory penalties.

3.2. Comparing Copyright Punishment with Domestic Criminal Law

The fact that Latin American countries punish copyright infringement more harshly than OECD countries is not conclusive evidence of specific overpunishment on copyright enforcement, because those countries may, generally speaking, rely on criminal measures more heavily than others. A comparative law analysis does not necessarily result in that conclusion. For that purpose, one must conduct a comparison of the reliance on imprisonment for different violations in Latin America's domestic criminal law. This would help to assess whether those countries inflict some disproportional punishment on all sorts of crimes or particularly on copyright infringement.

Table 4, below, shows a range of terms of imprisonment, as of April 2015, for a series of copyright related crimes in Latin America. In addition to commercial copyright

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89 REPORT ON COPYRIGHT CRIMINAL LAW IN THE WORLD 58-62 (Shizhou WANG ed., People's Public Security Press, 2008) (suggesting that criminal enforcement is actually stronger in developed than in developing countries because innovation requires a reliable environment for information and technique bases).

infringement, it takes into consideration non-profit copyright violation, which is also a crime in several counties in the region. Because of the idiosyncratic character of criminal law, definitions vary from one country to another, which makes it difficult to compare. Here, the comparison is of the base punishment applicable to the criminal conduct most frequently enforced, the unauthorized reproduction of copyrighted material. Finally, Table 4 incorporates a set of other copyright crimes, including: removing and altering digital rights management information, anti-eluding and anti-trafficking technological measures, and violating moral rights. Again, because of the variety of applicable conduct criminalized by Latin American countries, this comparison limits the violation of moral rights to false attribution of authorship.

Certain issues relevant to punishing copyright infringement in Latin America provide evidence of a high reliance on criminal measures for achieving law enforcement. First, as Chapter Four pointed out, except for Costa Rica and Mexico, countries in the region criminalize the unauthorized use of copyrighted material not only when committed for commercial purposes, but also for non-profit ones. This contradicts the image of copyright infringers as "pirates," who seek financial gain by violating the law, by depicting the various common people, librarians, teachers, and those who work at universities, museums, and small businesses, who are threatened with criminal actions. One such example is Oscar Ramirez who, on August 4, 2006, bought sixteen CDs in Valledupar, northeastern Colombia. Minutes later, the police seized the CDs and arrested him. Two years later, while he was fulfilling his conscription duty in the police service, he was notified of his conviction and sentencing to four years of prison for

possessing the CDs. After partial compliance with the penalty, he was allowed to finish his remaining term subject to electronic monitoring through a bracelet that permits him to walk within the city of Bogotá.[90]

Second, in addition to the prevailing tendency to criminalize both commercial and non-profit copyright infringements, some Latin American countries punish both categories of conducts with similar or the same severity. In fact, as Table 4 shows, Argentina and Colombia sanction both kinds of infringement with exactly the same prison term. Peru slightly distinguishes the two, but still imposes a six-year prison term

Table 4:
Term of Imprisonment for Copyright Related Crimes, by Country (April 2015)

Country	Non-profit copyright use (1)	Commercial copyright use (1)	Removing digital RMI	Circumventing TPM	Anti-trafficking TPM	Moral rights infraction (2)
Argentina	1 month-6 years	1 month-6 years	N/A	N/A	N/A	1 month-6 years
Brazil	3 months-1 year	1-4 years	(3)	(3)	N/A	3 months-1 year
Chile	1-540 days	541days-5 years	(4)	N/A	N/A	61-540 days
Colombia	4-8 years	4-8 years	4-8 years	4-8 years	4-8 years	32-90 months
Costa Rica	N/A	Up to 5 years	1-5 years	1-5 years	1-5 years	Up to 5 years
Mexico	N/A	6 months-10 years	N/A	N/A	3-10 years (5)	6 months-6 years
Peru	2-6 years	4-8 years	Up to 2 years	Up to 2 years	Up to 2 years	1-3 years

Notes: (1) based on punishment for unauthorized reproduction; (2) based on punishment for violating right of attribution of authorship; (3) copyright law sets forth civil responsibility only; (4) copyright law punishes with fines only; (5) law set forth penalties only on acts related to software.

[90] Primer Interno con Brazalete Electrónico Fue Condenado por Comprar CD Piratas, El Tiempo (Bogotá), Feb. 6, 2009.

for non-profit uses. Brazil and Chile seem to be the only countries that make a significant distinction between commercial and non-profit infringements for purposes of determining the level of punishment. Costa Rica and Mexico do not make a distinction among commercial and non-profit copyright infringement for purpose of punishment, they rather have opted for no criminalizing latter infractions, this is, the distinction is relevant in an earlier stage of criminal policy, when deciding to exclude non-profit infringements from any criminal sanction. Indiscriminate punishment in countries like Argentina and Colombia not only restricts users and restrains innovation, but also violates human rights by applying disproportionate penalties.

Third, a feature that is common to punishment of copyright infringement throughout the region is that the law does not allocate penalties according to the level of damage caused by the infringement. This gradation would allow for some proportionality between a particular infringement and its applicable sanction, by imposing harsher punishments on more serious infractions and lesser punishments on less important ones. Except for Chile and Costa Rica,[91] all other Latin American countries fail to set a ratio between the term of imprisonment and damages by the copyright infringer and, therefore, whatever the amount of injury, the applicable penalty is essentially the same. Colombia previously had an attenuated penalty for less damaging infringements, but its

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91 *See* Copyright Act Chile, art. 79 (determining the level of punishment according to the amount of damages coming from copyright infringement, although several other crimes lack such standard of proportionality); and, Intellectual Property Enforcement Act Costa Rica, arts. 51-52, 54-57, 59-60, and 61 bis (gradating level of penalties according to amount of damages to rights holder, with some exceptions).

last reform increased the punishment and abrogated any mitigating circumstances.[92] In the end, Latin American judges can apply any penalty within the range provided by law, leaving it up to their discretion how to tailor criminal policy and imposing great uncertainty on those being prosecuted.

Fourth, related with graduating punishment, criminal law punishes acts that have produced an actual significant damage on social values and, therefore, should not apply with the same severity to trivial and meaningless infringement. Costa Rica, for instance, punishes minor infractions with mere fines and reserves imprisonment for more weighty violations.[93] Unfortunately, this is not the prevailing approach in Latin America, where countries apply the same measure of punishment to trifling copyright infringements as they do to egregious ones. Even countries that use the proportional approach with other crimes against property do not apply it to copyright, such as Chile and Colombia, which use some proportional punishment regarding larceny and fraud but not copyright.[94]

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92 *See* César Alejandro Osorio Moreno, *Evolución de la Protección Penal del Derecho de Autor en Colombia*, 34 REVISTA DE DERECHO UNIVERSIDAD DEL NORTE 147, 168 (2010) (analyzing punishment increases by Ley 1032, June 22, 2006).

93 Intellectual Property Enforcement Act Costa Rica, arts. 51-52, 54-57, 59-60, and 61 bis (imposing only fines on copyright infringements whose damages are lower than around $3,500; those fines could increase to four times the amount of actual damages, however).

94 *Compare* Criminal Code Chile, arts. 446 y 494 bis (graduating the punishment according to the value of subtracted goods and, until 2006, leaving *de minimis* larceny unpunished) *with* Copyright Act Chile, art. 79 (setting forth imprisonment for copyright infringement, even if there are no damages). Also, *compare* Criminal Code Colom., art. 271 (imposing imprisonment in case of copyright infringement of economic rights, even if there are no damages) *with* Criminal Code Colom., arts. 239, 265, and 268 (graduating punishment on larceny and damages according to the amount of subtracted and damaged goods).

Not all Latin America countries have criminalized acts related to digital rights management information (RMI) and technological protective measures (TPM), but those that have turned those acts into crimes usually impose punishments similar to unauthorized commercial use of copyrighted material. The decision to not criminalize such conduct may be explained by the absence of specific requirements on the matter by international law. Such is also the case of violations of moral rights but, here, Latin American countries have opted to criminalize and punish such violations with significantly high penalties. Generally, moral rights infringers receive punishments similar to those applicable to unauthorized use of copyrighted material. The most radical case in this area is Colombia, which has increased penalties and punishes such crimes with fines plus imprisonment for more than seven years.[95]

Latin American countries indiscriminately punish different copyright infringements with the same rigor. In general, it has become irrelevant whether the infringer receives commercial advantages, whether the infraction actually damages copyright holders, or even the extent of the damages. This aggressive criminal policy for enforcing copyright violates human rights by disregarding circumstances that would allow for proportional punishment.

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[95] Ley 890 de 2004 por la cual se modifica y adiciona el Código Penal [Law that Modifies and Amends the Criminal Code], Diario Oficial Jul. 7, 2004 (Colom.), art. 14 (incrementing criminal punishments, which in the case of crimes against moral rights went from two to five years of imprisonment and monetary fines, to 32 to 90 months of imprisonment and monetary fines).

Moving from copyright-related crimes to other common crimes, Table 5 shows the term of imprisonment for certain crimes by country. It includes unauthorized use of copyrighted material, both commercial and non-profit. For the purpose of analogy with other crimes against property, Table 5 includes larceny instead of robbery or fraud, because the latter acts have additional requirements – such as violence, threat of force, or deception – that are absent in copyright infringement.[96] Finally, Table 5 incorporates a set of other common crimes, which allows comparing the level of punishment for other criminal conduct that contravenes relevant social values, including producing child pornography, rape, and homicide.

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96 *See also* MODEL PENAL CODE § 223 (including crimes against intangible property as a theft). *But see,* Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 474-476 (2010-2011) (discussing the analogy between intellectual property infringements and other property crimes, and arguing that, because intangible and non-rivalrous, the analogy may work even better with other property crimes, such as vandalism and criminal conversion). *Cf. also*, Mariana Carbajal, *La Tecnología, con Parche de Pirata,* PÁGINA 12, June 28, 2005 (quoting Delia Lipszyc, a local copyright expert, suggesting an analogy with robbery by stating that copyright infringement *"is like someone going to a bookstore and taking books without paying"*).

Table 5:
Term of Imprisonment for Certain Crimes, by Country (April 2015)

Country	Non-profit copyright use	Commercial copyright use	Larceny	Child porn	Rape	Homicide
Argentina	1 month-6 years	1 month-6 years	1 month-2 years	6 months-4 years	6-15 years	8 years-perpetuity
Brazil	3 months-1 year	1-4 years	1 month-4 years	4-8 years	6-10 years	12-30 years
Chile	1-540 days	541 days-5 years	61 days-5 years	10-15 years	5-15 years	10 years-perpetuity
Colombia	4-8 years	4-8 years	1-6 years	6-8 years	3-15 years	25-40 years
Costa Rica	N/A	Up to 5 years	1 month-3 years	3-8 years	10-16 years	20-35 years
Mexico	N/A	6 months-10 years	Up to 10 years	7-12 years	8-20 years	30-60 years
Peru	2-6 years	4-8 years	1-3 years	4-6 years	4-8 years	6-20 years

An initial conclusion that can be drawn from Table 5 above is that, as researchers have learned about other jurisdictions,[97] Latin American criminal law shows a progression in the level of punishment imposed on non-copyright related crimes, according to the social relevance of the underlying values being affected. In general, the crime of larceny protects property and deserves a lower level of imprisonment; the crimes involving child pornography protect children's physical and mental well-being and the crime of rape protects sexual self-determination, both of which deserve higher punishments; while, the crime of homicide protects life and its penalty is the highest, including life imprisonment. No country in Latin America imposes the death penalty for any crime. This suggests certain proportionality between the applied punishment and the

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97 ASHWORTH, *supra* note 1, at 106-108 (noticing that, despite certain reservations, there is an apparently high rate of agreement on scale offence-seriousness through jurisdictions, by ranking violent offences as most serious, followed by property offences against individuals and white-collar crime).

underlying protected values, which, as discussed previously, is common with other jurisdictions.

Criminal law provides a range of imprisonment and judges are required to determine the exact amount of punishment to be imposed in a given case. As a result, there is potential overlap in terms of jail for crimes that protect different social values. For instance, in Mexico, the term of imprisonment for child pornography charges ranges from seven to twelve years, while rapists may be imprisoned for eight to twenty years.[98] Notably, no country imposes a higher punishment on larceny than homicide and, in most countries, rape and child pornography are punished more harshly than larceny; the punishment of a crime against property does not overlap with penalties set forth for violating other social values. In other words, Latin American criminal law clearly employs a certain proportionality when imposing penalties: crimes against property receive lower punishment than crimes against children's well-being, sexual self-determination, and life. But the criminal enforcement of copyright breaks with this rationale.

It may be supposed that copyright crimes should deserve a softer punishment than larceny because, while misappropriation takes place in both acts, deprivation only happens in the latter one. In other words, in the case of copyright violations, copyright holders still have and can exploit their works, but, in most cases, victims of larceny can

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98 Criminal Code Mexico, arts. 202 and 265 (criminalizing producing child pornography and rape, respectively).

no longer use the goods from which property have been deprived. This seems to be the rationale behind lower and analogous punishments against larceny and unauthorized use of copyrighted material in certain countries, such as Brazil, Chile, and Mexico. Most other Latin American countries, however, impose higher punishments on copyright infringement than on larceny. This is the case in Argentina, Colombia, Costa Rica, and Peru, whose laws set forth not only higher maximum terms of imprisonment but also, in most cases, higher minimum terms of imprisonment for copyright infringers than for thieves.

Why are copyright infringers punished more harshly than thieves in Latin America? There is no clearly articulated explanation, but several arguments have been suggested. It may be argued that the greater punishment is due to the fact that copyright infringers not only affect right holders' property, but also authors' moral rights.[99] This argument would be misleading though, because there is a whole set of different crimes and penalties specifically designed to redress the violation of moral rights.[100] It has been also suggested that the harsher punishment is due to links of copyright infringement to

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99 JORGE MARIO OLARTE & MIGUEL ANGEL ROJAS, LA PROTECCIÓN DEL DERECHO DE AUTOR Y LOS DERECHOS CONEXOS EN EL ÁMBITO PENAL 58-62 (Dirección Nacional de Derechos de Autor, 2010) (rejecting decriminalization of *de minimis* copyright infringement on economic rights because that kind of infringement violates economic and moral rights, which justifies its punishment even if no damages occur). *See also,* Oscar Pellicori, *La Ley de Propiedad Intelectual y el Derecho Penal en la Argentina*, 13 DERECHOS INTELECTUALES 65, 70 (2007) (arguing that the foundation of criminalizing copyright infringement is the author´s moral rights rather than the economic ones, which would be the difference between enforcing intellectual property and common property on tangibles goods).

100 *See* Chap. IV, *supra,* notes 173-196 and accompanying text.

terrorism and drug dealing.[101] But, in addition to lacking any evidence of any significant connection, both empirical studies and case law show no relation between organized crime and copyright infringers, who usually are street vendors taking advantage of progressively less expensive technologies for copying.[102] Moreover, such circumstances

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101 R. Craig Woods, *The United States-Chile Free Trade Agreement: Will It Stop Intellectual Property Piracy or Will American Producers Be Forced to Walk the Plank?*, 10 L. & BUS. REV. AM. 425, 434 (stating that lack of copyright enforcement is somehow result of insufficient incentives, including corrupt public official, organized crime, inefficient judiciary); Isabella Pimentel, *Infração à Propriedade Intelectual: Quem Paga?,* 74 REVISTA DA ABPI 18 (2005) (suggesting a connection between intellectual property infringement and terrorism, although in places other than Latin America); Michael M. DuBose, *Criminal Enforcement of Intellectual Property Laws in the Twenty-First Century*, 29 COLUM. J.L. & ARTS 481, 484-486, and 492-493 (2006) (arguing links between intellectual property infringement with organized crime and terrorism, although recognizing most online infringement is committed by citizens without criminal records); Steve Cisler, *Pirates of the Pacific Rim*, 39-4 LEONARDO 377, 379 (2006) (endorsing claims of connections between Latin American copyright piracy and terrorism, organized crime, and national security concerns); Maria Savio and Diana Muller, *Combatting Counterfeiting and Piracy in Latin America*, in NEW YORK L.J. (Apr. 28, 2008) (stating that intellectual property infringment goes "hand in hand with organized crime, terrorism, drug trafikking, money laundry and tax evasion," without documentation). *See also,* FREDERICK M. ABBOTT, THOMAS COTTIER, & FRANCIS GURRY, INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY 661 (Aspen Publishers, 2007) (accepting the lack of evidence between intellectual property infringements and organized crime, but arguing that the aim of criminal law on the matter is "to prevent" those infringements from being used to finance "broader criminal enterprises such as trafficking in narcotics and funding terrorist activities"). *Cf.* Francisco Bernate Ochoa, *La Prorección Penal del Derecho de Autor,* in PROPIEDAD INTELECTUAL: REFLEXIONES 357-364 (Ricardo Metke Méndez, Édgar Iván León Robayo & Eduardo Varela Pezzano eds., Universidad del Rosario, 2012) (arguing agaisnt criminalization of copyright infringment as a violation of the economic order or the right to property, but as an infraction against the authors´rights).

102 *See,* John C. Cross, *Mexico*, in MEDIA PIRACY IN EMERGING ECONOMIES 305-326 (Joe Karaganis ed., Social Science Research Council, 2011) (describing the functioning of Mexican piracy and Tepito, one of its main local markets, and arguing piracy is an economic activity conducted by street vendors and their families); José Carlos G. Aguiar, Smugglers, Fayuqueros, Piratas: Transitory Commodities and Illegality in the Trade of Pirated CDs in Mexico, 36 POLAR: POLITICAL AND LEGAL ANTHROPOLOGY REVIEW 249 (2013) (providing ethnographic description of the transition from smuggling to pirating by street vendors in Mexico, as a result of NAFTA's commercial openness and the penetration of digital technologies); José Carlos G. Aguiar, *Policing New Illegalities: Piracy, Raids, and Madrinas,* in VIOLENCE, COERCION, AND STATE-MAKING IN TWENTIETH-CENTURY MEXICO: THE OTHER HALF OF THE CENTAUR 159-181 (Wil G. Pansters ed., Stanford Univ. Press, 2012) (describing Mexican war against piracy in the context of a shift of local merchants from

could explain why penalties are aggravated in some cases, which in fact the law permits,[103] but not why copyright infringers are punished more harshly in general. Finally, it may be suggested that copyright infringement deserves greater punishment in the case of tax evasion, but that argument fails to address the fact that other crimes against property rarely result in the payment of taxes and that the proper place for handling this issue is not copyright law, but tax regulation. There is no reason, except for pure deterrence, for imposing greater sanctions on copyright infringers than on thieves, but Latin America still does it.

At the political level, it is possible to establish some relation between the increase of imprisonment terms in Latin American copyright enforcement and U.S. policies towards the region. Not surprisingly, USTR has also used its monitoring and reporting

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locally produced goods to transnational bootlegged products). *See also,* ANA MARÍA GUTIÉRREZ IBACACHE, PIRATERÍA EN CHILE: UNA PROPUESTA DE POLÍTICA PÚBLICA 53-54 (Policía de Investigaciones de Chile, 2007) (describing book piracy a phenomenon that takes place in hundreds of different street spots in Chile); Pedro N. Mizukami *et al., Brazil*, in MEDIA PIRACY IN EMERGING ECONOMIES 253-262 (Joe Karaganis ed., Social Science Research Council, 2011) (saying that there is "no evidence of wider linkages between the pirate economy and organized crime," instead, arguing that piracy is mainly exercised by street vendors and small shops, whose work is facilitated by increasing availability of cheap copying technologies, which is supported by abundant ethnographic studies conducted within the country); Henry Stobart, *Bolivia*, in MEDIA PIRACY IN EMERGING ECONOMIES 327-338 (Joe Karaganis ed., Social Science Research Council, 2011) (providing ethnographic description of media piracy in Bolivia and supporting this phenomena is part of an informal market led by individual street vendors); José Carlos G. Aguiar, *Stretching the Border: Smuggling Practices and the Control of Illegality in South America,* 6 NEW VOICES SERIES 1 (2010) (analyzing practices of smuggling in the tri-border region that compresses Argentina, Brazil, and Paraguay); and, José Carlos G. Aguiar, *Cities on Edge: Smuggling and Neoliberal Policies at the Iguazú Triangle*, 33 SINGAPORE J. OF TROPICAL GEOGRAPHY 171 (2012) (describing tensions between petty smugglers and law enforcement in the tri-border region as a paradox between neoliberal principles and actual trade regulation and surveillance).

103 *See, e.g.,* Copyright Act Chile, art. 83 (aggravating punishment on copyright infringers when infraction is committed by organized crime).

system for claiming infringing countries do not apply penalties deterrent enough against copyright infringers to dissuade infringement. For instance, the 301 Special Report in 2017 claims that in Argentina infringers do not receive deterrent sentences, recommends that Mexico impose deterrent penalties against infringers, and suggests to Brazil that stronger deterrent penalties are critical to make sustained progress on intellectual property.[104] In the past, USTR has also complained about legislative attempts to reduce criminal penalties and to adopt punishment not dissuasive enough, as well as against the judicial tendency to impose low penalties.

A more significant relation could be stated between U.S. policies regarding countries that have signed free trade agreements with the U.S. within the region. This is the case of Chile, Colombia, Mexico, and Peru, among others. In the case of Chile, for instance, right after signing a trade agreement in 2003,[105] the government adopted implementing law,[106] but it did not satisfy USTR's expectations because of lacking deterrent penalties.[107] This became one of the main concerns of the USTR during the following years.[108] The tone of these complaints softened when the Chilean Executive introduced another bill into the Congress to implement additional free trade agreement

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104 UNITED STATES TRADE REPRESENTATIVE, 2017 SPECIAL 301 REPORT, 2017, at 51, 63, and 66.

105 United States-Chile Free Trade Agreement, June 6, 2003, available at https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text (last visit: May 6, 2017).

106 Ley No. 19.914, Diario Oficial Nov. 19, 2003 (Chile) (implementing provisions of the free trade agreement signed with the U.S.).

107 UNITED STATES TRADE REPRESENTATIVE, 2005 SPECIAL 301 REPORT, 2005, at 38.

108 UNITED STATES TRADE REPRESENTATIVE, 2006 SPECIAL 301 REPORT, 2006, at 34; and, UNITED STATES TRADE REPRESENTATIVE, 2007 SPECIAL 301 REPORT, 2007, at 25.

obligations, which included an increase in criminal penalties.[109] That new tone remained until early 2010, when the law actually increased penalties.[110] Since then, the USTR, instead of criticizing the penalties set forth by the law, complained about the tendency to apply minimum sentences for piracy in Chile, which may not effectively deter future infringement.[111] It may not be possible to establish a causal relation between U.S. policy and increasing overpunishment in those Latin American countries that are parties to free trade agreements, but there is at least a concomitant relation between said policy and over-punitive copyright laws in the region.

The level of punishment for copyright infringement also fails to compare equitably with other common crimes in Latin America.[112] In Argentina and Peru, as well as Colombia, Costa Rica, and Mexico, depending on the court's discretion, copyright violators are punished with higher penalties than those guilty of child pornography charges. Similarly, Peru and, depending on the court's discretion, in Colombia and Mexico, the unauthorized use of copyrighted material may be punished by the same penalty as for sexual assault, elevating copyright protection to the level of sexual self-determination. Incredibly, this even holds true with respect to homicide, at least in Peru,

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109 UNITED STATES TRADE REPRESENTATIVE, 2008 SPECIAL 301 REPORT, 2008, at 35; UNITED STATES TRADE REPRESENTATIVE, 2009 SPECIAL 301 REPORT, 2009, at 18.

110 Ley No. 20.435, Diario Oficial May 4, 2010 (Chile) (modifying the intellectual property act that regulates copyright in Chile).

111 UNITED STATES TRADE REPRESENTATIVE, 2010 SPECIAL 301 REPORT, 2010, at 25.

112 *See* MARTÍN PECOY, PROTECCIÓN PENAL DE LA PROPIEDAD INCORPORAL EN EL URUGUAY 170 (Universidad de Montevideo, 2008) (suggesting that copyright law, like other special regulations, has distorted the harmonic, although sometimes archaic, system of the 1934 Uruguayan criminal code).

where courts can mete out lesser penalties for killing somebody, under certain circumstances, than for copyright infringement. With the exception of Mexico, which imposes harsh penalties across the board for all crimes against property, data suggests that, in the Latin American countries addressed here, punishment for copyright infringement does not follow the general pattern of proportionality between penalties and the underlying values affected by the crime.

This brief description of Latin America's punishment regime suggests that criminal law applies disproportionate penalties against copyright infringers. In fact, countries have adopted similar terms of imprisonment to redress commercial and non-profit violations, failing to graduate sanctions to reflect the level of damages, and imposing imprisonment for trivial violations. Additionally, countries also have introduced significant penalties against moral rights infringers. When comparing the punishment for copyright-related crimes with other felonies, in several countries copyright penalties are higher than other crimes against property, child pornography, and sexual self-determination. This makes apparent that, generally, punishment of copyright crime in Latin America lacks proportionality and, therefore, conflicts with human rights standards on the matter.

4. SOME CONCLUSIONS

Both human rights and constitutional laws limit criminal punishment, but those limits have been crossed by criminal law when punishing copyright infringement in Latin America.

The first human rights violation occurs by infringing the prohibition of imprisonment for debts. Courts correctly have rejected using criminal law to enforce copyright contracts. However, case law is more ambiguous on punishing debts arising from compulsory licensing schemes, in which the law underlying a given payment authorizes the use of works. In my opinion, imprisonment also would violate human rights when there is a general licensing system in place, because the punishment would end up a mere mechanism for collecting royalties. The fact that imprisonment is impermissible for those infringements, however, does not prevent that other criminal penalties may apply.

The second human rights violation happens when disproportional punishment is imposed on copyright infringers. Most international instruments on human rights and domestic constitutions do not include an explicit right to a proportional punishment, and seem to merely exclude the most outrageous forms of penalties, which would provide a broad margin of appreciation to states on the matter. However, a systematic interpretation of those instruments makes evident that governments must apply punishment proportionally, since the penalty is by definition a human rights limitation

and, therefore, subject to respective provisions on limiting those rights. As a result, states are still free to determine applicable criminal sanctions in a given case, as long as they are proportionate.

Latin America punishes copyright infringements more harshly than other jurisdictions. While international law allows punishment with either fines or imprisonment and, in fact, OECD countries apply imprisonment as an alternative form of punishment, Latin American countries apply the two as a mandatory compound penalty, that is, imprisonment is applied in addition to fines and accessory punishments. Additionally, in comparing the prison terms for copyright infringers, Latin America has higher minimum, maximum, and average terms than OECD countries. Evidence makes apparent the strong reliance of Latin American countries on deprivation of liberty as a measure of punishment against copyright infringement.

The use of disproportionate punishment is also apparent when analyzing Latin American domestic law. Countries punish all copyright infringement – including the mere contravention of moral rights – indiscriminately with same rigorousness, by disregarding whether the infringer achieves commercial advantages, whether the infraction actually injures copyright holders, and even the amount of those damages. When comparing the punishment for copyright related crimes with other felonies, copyright penalties are higher than other crimes against property, and even crimes against child pornography and protecting sexual self-determination. This makes apparent

that, in general, the punishment of copyright crime in Latin America lacks proportionality and, therefore, conflicts with human rights standards on the matter.

A third form of human rights violation occurs when countries apply criminal punishments but not through criminal courts and, therefore, in disregard to human rights exigencies on due process. To relieve the criminal system, some countries are transferring jurisdiction on copyright infringement to administrative authorities, customs officials, and civil courts; however, the measures and decisions those bodies are allowed to adopt may really be punitive in nature. This creates a para-criminal enforcement that evades a defendant's fundamental rights as granted by both international instruments on human rights and constitutional law. The next chapter expands the discussion on this form of enforcement in connection with the right to due process of law.

Chapter VI

Copyright Punishment Without Due Process:

Abusive Civil, Administrative, and Police Procedures

The previous chapters have argued that Latin American countries rely too heavily on criminal enforcement of copyright, by adopting overly-broad definitions of crimes and applying excessive punishments on infringers. These phenomena may become even more problematic as digital infringement replaces analogous. However, a typical refrain to this argument claims that the actual application of the law differs from the law on the books, specifically that lesser punishments are imposed in practice. If true, this argument would make our human rights concerns groundless. Limited available data suggests, on the contrary, that excessive criminal copyright punishment is applied extensively within the region and, therefore, the aforementioned apprehensiveness about human rights is justified.

It should be recalled that an intense judicial reform has taken place in criminal procedure through Latin America, which has allowed transitioning from an inquisitorial system to an adversarial system of justice. Although outcomes differ by country, judicial criminal reform has attempted to manage rampant criminal rates, to guarantee defendants' fundamental rights, and to provide legal stability on property rights in order to attract

foreign investment.[1] Thus, judicial reform has had competing narratives and interests, which certainly are expressed in the relative intensity of criminal enforcement of intellectual property. Even countries that generally have succeeded in judicial reform, such as Chile and Mexico, have unleashed the criminal enforcement of copyright, by exceeding by far the requirements of international trade law and infringing international human rights law.[2]

As a reaction against the increasing expansion of criminal copyright enforcement, some scholars have recommended extracting copyright issues from the criminal forum and re-depositing them into civil or administrative mechanisms of adjudication. These well-intentioned suggestions may be defeated, however, if that transference of jurisdiction retains the power to impose punitive measures in fact while circumventing the rules and fundamental guarantees related to criminal enforcement, especially the guarantee of due

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1 *See* Elin Skaar, *Un Análisis de las Reformas Judiciales de Argentina, Chile y Uruguay*, 34 AMÉRICA LATINA HOY 147, 176-177 (2003) (concluding that judicial reforms on criminal matters, that happened throughout Latin America, were conducted for three competing reasons: adopting a criminal system in compliance with human rights standards; granting legal certainty on property rights for attracting foreign investment; and, facing the challenge of increasing criminality).

2 *See* Chapters IV and V. *Also compare* Julio A. Rios-Figueroa, *Institutional Design and Judicial Behaviour: Constitutional Interpretation of Criminal Due Process in Latin America, in* NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES 267-287 (Detlef Nolte & Almut Schlling-Vacaflor eds., Ashgate, 2012) (arguing that Mexican courts have achieved a significant improvement on protecting criminal due process by limiting discretion of public prosecutors, policy, and military personnel) *with* Chapter VI Section 4 (showing a significant gap in the numbers of actions of copyright enforcement conducted by law enforcement officials and actual court cases). *See also,* Christoph Antons, *Introduction,* in THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: COMPARATIVE PERSPECTIVES FROM THE ASIA-PACIFIC REGION, at 2-3 (Christoph Antons ed., Wolter Kluwer, 2011) (noticing similar tensions between general systems of law enforcement and particular mechanisms of intellectual property enforcement in Asian countries).

process related to criminal trials. This is an issue that may attract future scholarship in Latin America, as new institutional, procedural, and substantive arrangements strengthen copyright regulation in general, and particularly its enforcement.

The first section of this chapter analyzes some of the limited statistics on the criminal enforcement of copyright throughout the region in order to refute accusations that Latin America lacks such enforcement. The following sections then focus on some practices of para-criminal enforcement that subvert defendants' fundamental rights by punishing them via bodies other than criminal courts. The second section recalls some of those fundamental rights, particularly the right to due process of law, especially in its exigencies related to criminal enforcement. The third section examines potential violations of defendants' human rights in civil litigation in relation to damage indemnification that resembles punishment rather than compensation. The fourth section deals with punishment-like practices by administrative copyright authorities, for example by sanctioning certain copyright infringements and adopting preventive measures. The fifth section raises concerns about the arbitrariness of law enforcement officials, both police officers and prosecutorial authorities, whose practices subvert fundamental rights related to law enforcement. Finally, the sixth section expands on some conclusions on the topic.

1. ACTUAL NUMBERS OF CRIMINAL COPYRIGHT ENFORCEMENT

Until now, this dissertation has argued that criminal copyright enforcement has infringed human rights by both overcriminalizing and overpunishing, that is, it has defined copyright crimes too broadly and punished them excessively. The previous chapters provide some examples of human rights violations related to such punishment, such as the imprisonment of copyright debtors, the imposition of disproportionate penalties, and punishment without the guarantees of criminal enforcement. One might claim that those human rights violations are meaningless because, under what appears to be a pervasive myth of Latin America as a land without rule of law, there is an endemic failure of criminal copyright enforcement through the region.[3] This section contests that position by providing actual data on criminal copyright enforcement through the region and

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[3] *See e.g.,* Marcos J. Basso & Adriana C.K. Vianna, *Intellectual Property Rights and the Digital Era: Argentina and Brazil,* 34 U. MIAMI INTER-AM. L. REV. 277 (2003) (arguing that lack of compliance by Argentina and Brazil with international obligations on intellectual property derives from delays in enacting domestic laws that put into full force the international intellectual property agreements, but to an even greater degree from lacking law enforcement); R. Craig Woods, *The United States-Chile Free Trade Agreement: Will It Stop Intellectual Property Piracy or Will American Producers Be Forced to Walk the Plank?,* 10 LAW & BUS. REV. AM. 425 (2004) (raising skepticism about enforcement of intellectual property in Chile, and Latin America in general); and, Felipe Pavez Sepúlveda, *Observancia de Derechos de Propiedad Intelectual: ¿El Vaso Medio Lleno o Medio Vacío? Aciertos y Desaciertos en la Normativa y Políticas de Protección de los Derechos*, 17 LA SEMANA JURÍDICA 1, 6 (2012) (recognizing some progress in Chilean domestic criminal enforcement of copyright, but calling for additional specialized prosecutors, because the existing ones are *"focusing on other contingent or higher social relevant issues"* and therefore do not prosecute). *Cf.* Walter Park, *Intellectual Property Rights and Foreign Direct Investment: Lessons for Central America, in* GETTING THE MOST OUT OF FREE TRADE AGREEMENTS IN CENTRAL AMERICA 305 (J. Humberto Lopez & Rashmi Shankar eds., The World Bank, 2011) (concluding a statistical study on foreign investment and patents by calling to improve enforcement of the whole intellectual property regime, although the basis for his recommendation arose only from USTR reports).

comparing it with U.S. data, a country known for heavy reliance on incarceration as criminal policy.[4]

The prevailing caricature of Latin America as a pirate region without intellectual property enforcement differs from actual data.

Comparing numbers on criminal enforcement between countries in the region is complicated, because the available data lacks reliability, comprehensiveness, and symmetry.[5] Leaving aside partisan sources of data, official statistics differ within a country

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4 *See* ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA (Picador, 2nd ed., 2013) (providing 40-year study that corroborates heavy reliance on incarceration against both violent and non-violent crimes by the U.S., which has become the most punitive developed nation in the world); and, JAMES KILGORE, UNDERSTANDING MASS INCARCERATION: A PEOPLE´S GUIDE TO THE KEY CIVIL RIGHTS STRUGGLE OF OUR TIME 11-12 (The New Press, 2015) (providing some statistics about the excessive reliance on imprisonment by the U.S., whose 2 million prisoners represent 25% of the incarcerated population worldwide). *See also,* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (Belknap – Harvard Univ. Press, 2013).

5 *See* Elias Carranza *et al., Monitoring the Crime Situation: A Developing Country Perspective*, 5 FORUM ON CRIME AND SOC'Y 111 (2006) (emphasizing institutional and source limitations for

according to their source, whether it is the police, prosecutors, or the judiciary, and at the local or national level. Additionally, law enforcement is related to legal language and, therefore, statistical parameters differ between countries; for instance, while some countries record the number of criminal charges, others count actual defendants, and some of them pay closer attention to the flow of cases or the number of court decisions. Aside from those restrictions, throughout the first decade of the twenty-first century, most Latin American countries moved from an inquisitive to an adversarial system of criminal justice, which have significantly different measuring standards; this is true of Argentina, Chile, Costa Rica, Colombia, and Peru, among others. In most of these countries, both systems coexisted for a while, making a statistical analysis of criminal enforcement particularly challenging.

Another main inconvenience for getting specific statistics about a given criminal act is data aggregation, which makes extremely difficult, if not impossible, to determine the actual numbers related to any specific crime, including those related to copyright. In some countries, the official statistics accumulate data on copyright crime with other crimes against property or crimes subject to special laws, which makes it difficult to identify any tendency of criminal copyright enforcement. This is particularly true when the data was aggregated at its source (i.e., local courts and prosecutors), making any subsequent

processing data on crime within developing countries and providing recommendation for improvements by capacity-building, computerization, and the technical support by relevant international actors). *See also,* RONALDO LEMOS, FUTUROS POSSÍVEIS: MÍDIA, CULTURA, SOCIEDADE, DIREITOS 304-305 (Ed. Sulina, 2012) (referring to lack of reliability of piracy numbers provided by copyright entities in Brazil).

disaggregation almost impossible. This is, for instance, the case in Argentina, where is not possible to get any disaggregated data on copyright enforcement.[6] This is also true of Costa Rica, where, leaving aside the number of convictions per year, statistics on criminal copyright enforcement are aggregated by geography or by criminal categories that do not allow for further analysis.[7]

An additional inconvenience for comparative statistical analysis, especially over time, is the lack of continuity on statistical series. This is the case of Peru, for instance, where statistical series on criminal copyright enforcement are continued only regarding judicial work flow and allocation of special prosecutors. Other than that, statistics only occasionally disaggregate copyright cases and convictions.[8] This is also the case of Brazil, whose system of criminal statistics has been subject to serious criticism,[9] which encouraged the federal government to lead an ongoing initiative for building a unified system for national statistics that, nonetheless, remains limited mainly to serious violent

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6 *See* PODER JUDICIAL DE LA NACIÓN (Argentina), Oficina de Estadísticas, Estadísticas 2002-2013, *available at* https://www.pjn.gov.ar/07_estadisticas/ (last visited May 9, 2017).

7 *See* PODER JUDICIAL (Costa Rica), Departamento de Planificación, Estadísticas Judicial 2001-2015, *available at* https://www.poder-judicial.go.cr/planificacion/index.php/estadistica/estadisticas-judiciales (last visited May 9, 2017).

8 *See* MINISTERIO PÚBLICO FISCALÍA DE LA NACIÓN (Peru), Estadísticas 2007-2015, *available at* http://www.mpfn.gob.pe/estadisticas (last visited May 9, 2017).

9 Renato Sergio de Lima, *Produção da Opacidade: Estatísticas Criminais e Segurança Pública no Brasil*, 2 COLEÇÃO SEGURANÇA COM CIDADANIA: SISTEMAS DE INFORMAÇÃO, ESTATÍSTICAS CRIMINAIS E CARTOGRAFIAS SOCIAIS 48 (2009) (criticizing the opacity of Brazilian criminal statistics as well as the lack of perspective on its use for tailoring public policies).

crimes.[10] With all that, both Peru and Brazil still provide some fragmented data that could be used for purpose of analysis. For instance, some statistics allow finding that between 2005 and 2007 Brazilian federal courts heard 2,180 cases of criminal copyright infringement per year,[11] while in 2010 there were only 534 convictions for copyright infringement.[12]

Currently, some Latin American countries have official, comprehensive, and disaggregated data available for comparison. This is true for Mexico, Chile, and Colombia. For the purpose of analysis, we compare those countries' numbers with the United States. Leaving aside data related to idiosyncratic rules of procedure, such as the number of detentions, seizures, and police actions, it is still possible to identify some valid points of comparison. One such point is the final outcome of criminal enforcement. After all, whatever the rules of procedures and guarantees of the defendant, there are still some common final outcomes, namely: the number of people who are prosecuted and sentenced for infringing copyright law, and the extent of their punishment. Almost all the aforementioned countries process this kind of data. But before jumping into any comparison, a few comments should be highlighted about each of these countries' data.

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10 *See* MINISTERIO DE JUSTICIA (Brazil), Sistema Nacional de Informações de Segurança Pública, Prisionais e sobre Drogas, *available a*t https://www.sinesp.gov.br/inicio (last visited May 9, 2017).

11 *See* FÓRUM BRASILEIRO DE SEGURANÇA PÚBLICA (Brasil), ANUÁRIO DO FÓRUM BRASILEIRO DE SEGURANÇA PÚBLICA, 2006-2007, *available a*t http://www.forumseguranca.org.br/atividades/anuario/ (last visited May 9, 2017).

12 Diógenes Muniz, *Condenação por Pirataria no Brasil Cresce 110% em um Ano*, FOLHA DE SÃO PAULO, Jan. 22, 2011 (reporting on statistics provided by the Brazilian Movies and Music Antipiracy Association).

Mexico is the country with the longest statistical series, dating back to 1997, although it has been unavailable since 2012.[13] During the decade between 2002-2011, Mexican authorities conducted an average of 5,919 police raids and seizures a year based on copyright infringement. During the same time, an average of 526 people were detained yearly on copyright infringement grounds. However, only an average of 153 were prosecuted and 24 convicted per year. In 2011, 44 people were convicted for copyright crime in the country. The significant gap between actions by the police and prosecutors is explored later in this chapter.[14] For now, it is clear that, independent of their actual level of efficacy, there are many criminal copyright enforcement actions in Mexico.

Chile's data on criminal copyright enforcement covers 2001 to 2015.[15] This series includes the period in which the country transitioned progressively from an inquisitorial to an adversarial system of criminal justice, running two parallel systems for almost a whole decade. This circumstance forces data compilation from different sources through the period in order to have a comprehensive and complete picture of criminal enforcement in

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13 *See* INSTITUTO NACIONAL DE ESTADÍSTICAS Y GEOGRAFÍA (Mexico), Estadísticas Judiciales en Materia Penal 1997-2012, *available at* http://www.inegi.org.mx/est/contenidos/proyectos/cubos/ (last visited May 9, 2017).

14 *See, infra*, notes 177-193, and accompanying text.

15 *See* INSTITUTO NACIONAL DE ESTADÍSTICAS (Chile), Anuario de Justicia, 2001-2015, *available at* http://www.ine.cl/canales/chile_estadistico/estadisticas_sociales_culturales/justicia/justicia.php (last visited May 10, 2017); INSTITUTO NACIONAL DE ESTADÍSTICAS (Chile), Cultura y Tiempo Libre, 2005-2012, *available at* http://www.ine.cl/canales/chile_estadistico/estadisticas_sociales_culturales/cultura/cultura.php (last visited May 10, 2017).

the country. It should be highlighted that, as time passes, the data sets have become richer in information, going from just police actions, to also covering prosecutorial work, and court processing. Having said that, Chile does not process data on prosecutions, but of trials of the accused. Between 2001 and 2007, Chile tried an average of 178 defendants per year. Between 2007 and 2011, under the new criminal procedure regime, the number of defendants tried increased to 1,906 per year.[16] Available data shows that an average of 1,780 people was convicted each year from 2007 to 2015. In 2011 alone, Chilean courts convicted 1,862 people of copyright infringement. Chile is also the only Latin American country that processes disaggregated data about terms of imprisonment for copyright infringement, as analyzed below, although only by range of punishment.

Colombia's statistical series is comprehensive from 2006 to 2015. Data focuses on workflow, though, rather than on enforcement. For instance, it covers the numbers of special prosecutors working on intellectual property enforcement, court decisions on the matter, and training provided to law enforcement officials, as well as cases that enter and leave the court system.[17] A subset of data, covering 2008-2015, provides information about

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16 Several factors may be responsible for the exponential increase in prosecutions for copyright infringement in Chile, such as the new criminal procedure regime working in full (2005), a jurisprudential switch by the Supreme Court that disregards proving infringing content is copyrighted by relying on the automatic protection of copyright (2007), and the creation of a specialized unit on intellectual property within the police (2008), among others.

17 *See* FISCALÍA GENERAL DE LA NACIÓN (Colom.), Indicadores de Gestión y Estadísticas 2006-2014, *available at* http://www.fiscalia.gov.co/colombia/gestion/estadisticas/ (last visited May 10, 2017).

yearly prosecutions and convictions.[18] Between those years, an annual average of 80 people were prosecuted and 44 convicted on charges based on copyright infringement. In 2011 alone, Colombian courts convicted 63 people for copyright crimes.

The United States has available a comprehensive set of official data on criminal enforcement at the federal level, since 1997, which has included desegregated data on copyright matters since 2002.[19] Through the years, the data has become more inclusive. In fact, starting in 2010, the data sets include information such as rate of conviction, extension of sentencing on copyright infringers, duration of criminal procedures, and more. Between 2002 and 2016, an average of 41 people were prosecuted each year for copyright infringement, and 37 people convicted, mainly as the result of plea bargains.

There are several potential comparative analyses of data between Chile, Colombia, Mexico and the U.S., especially between 2008 and 2011, when almost all these countries produced relevant and comparable data. A full analysis is beyond the purpose of this section, since it is limited mainly to recognizing the existence of actual criminal enforcement of copyright in Latin America and, therefore, the relevance of conducting a human rights assessment. However, a brief comparison to the U.S. evidences that criminal

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18 *See* FISCALÍA GENERAL DE LA NACIÓN (Colom.), Desempeño de la Fiscalía General de la Nación: una mirada desde los indicadores (2008-2015), *available a*t http://www.fiscalia.gov.co/colombia/wp-content/uploads/Informe-de-indicadores-2008-2015.pdf (last visited May 10, 2017).

19 *See* UNITED STATES COURTS, Judicial Business of the U.S. Courts, 1997-2016: Annual Report of the Director, 1997-2016, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness.aspx (last visited May 10, 2017).

copyright enforcement is stronger in Latin America than in the U.S. Comparison is here limited mainly to data prosecution and convictions between 2008 and 2011, as shown below in Table 6.

Table 6:
Prosecution and Conviction for Copyright Crimes,
by Country between 2008-2011

	Prosecutions				Convictions			
	2008	2009	2010	2011	2008	2009	2010	2011
Chile	6,166	6,030	5,367	4,464	2,492	2,473	2,233	1,862
Colombia	74	55	84	76	25	42	48	63
Mexico	54	162	249	391	16	13	25	44
United States	81	60	130	81	*	*	77	40

Notes: (*) Not available disaggregated data.

The number of people prosecuted for copyright infringement is comparatively lower in the U.S. than the analyzed Latin American countries. During the 2008-2011 period, as shown above in Table 6, an annual average of 88 people were indicted for copyright crimes in the U.S., while Mexico prosecuted an average of 214 people per year, despite having a population almost three times smaller. Colombia, with a population seven times smaller than the U.S., prosecuted an annual average of 72 people. The wildly disproportionate numbers of prosecutions in Chile need no further comment, other than highlighting they are off the charts.

The high levels of copyright criminal prosecutions become particularly relevant when keeping in mind that, like other jurisdictions, prosecution is in itself a punishment in Latin America. In addition to the social stigma of being involved in a criminal case, prosecuted people could be subject to certain restrictive measures during criminal procedures, such as restrictions for leaving the country, house arrest, and even preventive detention within public facilities. In fact, the main problem of the Latin American penitentiary system is overcrowding, since most of the inmates are *"prisoners without sentencing"*, that is, people stuck in the process of being prosecuted for years.[20] During the last decade, judicial reforms to the criminal system have attempted to reduce those noxious effects, by optimizing enforcement, reducing procedural timing, and enhancing defendants' rights.

The number of people convicted for copyright infringement is also significant in the analyzed countries. As Table 6 shows, between 2008-2011, an average of 25 people was convicted each year in Mexico, and 45 were convicted in Colombia. Chilean numbers are again disproportionate, as an average of 2,265 people were convicted for copyright criminal charges per year. In 2011 alone, Chilean courts convicted 1,862 people of copyright infringement. In the case of the U.S., disaggregated data is not available for the whole period, but in 2010 and 2011, respectively, 77 and 40 people were convicted. This

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20 Elías Carranza, *Situación Penitenciaria en América Latina y el Caribe ¿Qué Hacer?*, 8 ANUARIO DE DERECHOS HUMANOS 31 (2012) (analyzing the intolerable state of penitentiary system within Latin America and its two main problems: overpopulation of inmates and lack of personnel, both of which have gotten worse from 1980-2010, including a still significant number of prisoners without sentencing that ranges from 20% in Chile to almost 80% in Costa Rica).

data proves the existence of actual convictions in analyzed Latin American countries. Although absolute numbers look fairly similar throughout the region, when comparing numbers in relative terms, it becomes apparent that copyright criminal conviction rates are higher in Latin American countries than in the U.S.

Significant differences in the level of enforcement appear when comparing and contrasting countries' data on relative terms, which allows determining how extensively a given phenomenon prevails in a given place. In criminal statistics, the most usual relative term for comparison is the ratio between the number of criminal occurrences and the population in a given country. Below, Table 7 shows the absolute numbers and ratios of prosecutions and convictions for every 10 million inhabitants in countries with available data for 2011.[21] The ratio of prosecutions and convictions for criminal copyright violations to inhabitants is higher in any analyzed Latin American country compared with the U.S. For instance, the ratio of prosecution to inhabitants in Mexico is twenty times higher than in the U.S., while the conviction ration is three times higher. In the case of Chile, the ratios of indictments and convictions for copyright infringement is several hundred times higher than in the U.S. Even Costa Rica, in spite of having a small number of convictions, has a higher ratio compared with the U.S. These numbers alone say a lot about the actual level of criminal enforcement of copyright through the region.

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[21] For methodological purposes, numbers are based on population by countries estimated by the World Bank for 2011. *See* WORLD BANK, ATLAS OF GLOBAL DEVELOPMENT (World Bank, 4th. ed., 2013).

Table 7:
Prosecution and Conviction for Copyright Crimes, by Country and Ratios in 2011

	Population (in millions) (1)	Prosecutions (2)	Convictions (2)	Prosecution Ratio (for 10 million people)	Conviction Ratio (for 10 million people)
Chile	17.27	4,464	1,862	2,584.8	1,078.2
Colombia	46.93	76	63	16.2	13.4
Costa Rica	4.73	*	1	*	2.1
Mexico	114.79	391	44	34.1	3.8
Peru	29.40	*	57	*	19.4
United States	311.59	57	40	1.8	1.3

Notes: (1) 2011 population by World Bank, Atlas of Global Development (HarperCollins Publishers, 4th. ed., 2013); (2) Official statistics from respective countries; (*) Not available disaggregated data.

Although the evidence is inconclusive, data also suggests that the average term of imprisonment for copyright infringers is higher in Latin America than in the U.S. According to official data, in 2010, U.S. federal courts convicted 77 defendants of copyright violation. Of those, 20 were imprisoned for an average of 18.3 months; 56 were given probation for an average of 25.1 months; and, one of them received a fine only.[22] The only Latin American country that processes data about terms of imprisonment is Chile, although only by range of punishment. Between 2001-2008, the imprisonment imposed in the country was: 55% from 61 to 540 days; 5% from 541 days to three years; and 4% for more than five years. The Chilean numbers do not appear significantly

22 *See* UNITED STATES COURTS, Judicial Business of the U.S. Courts, 2010-2016: Annual Report of the Director, 2010-2016, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness.aspx (last visited May 10, 2017) (publishing disaggregated data on sentencing of copyright infringers, starting in 2010).

different from those in the U.S., but it must be kept in mind that Chile is one of the Latin American countries with the lightest punishment for copyright infringement. This fact suggests that copyright punishment may be higher in terms of imprisonment periods in Latin America as a region, especially recalling that in some countries – e.g., Colombia and Peru – the minimum penalties far exceed those being actually applied in the U.S.

In sum, the available data indicate that vigorous criminal copyright enforcement takes place in Latin America. The data may not be enough for testing the level of efficiency of such enforcement,[23] whether as to the specific or general deterrence effects. But scrutinizing those aspects of enforcement goes beyond the purpose of this section. This section has a more limited purpose, which is to make apparent that criminal law does apply to copyright infringement in the region. This makes it relevant to conduct an assessment of criminal copyright enforcement in Latin America in light of fundamental human rights standards for criminal law established by international instruments on human rights and domestic constitutional law, as shown in previous chapters.

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[23] As a matter of fact, scholars disagree about measuring the efficacy of criminal system based on actual numbers (specific deterrence) or on actual effects of mass control (general deterrence); such efficacy may be achieved by punishing a scapegoat. *See* Jeffrey Polet, *Punishing Some, Disciplining All: Foucault and the Techniques of Political Violence,* in THE PHILOSOPHY OF PUNISHMENT AND THE HISTORY OF POLITICAL THOUGHT 199-218 (Peter Karl Koritansky ed., Univ. of Missouri Press, 2011) (exploring the implication of Foucault's theories on punishment and mass social control).

2. THE RIGHT TO DUE PROCESS OF LAW

The significant role that criminal law plays in enforcing copyright in Latin America has called the attention of some scholars, who have argued for decriminalization of at least certain copyright infringements and their enforcement through other mechanisms, such as civil litigation or administrative adjudication.[24] These scholars not only call for the

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[24] MARTÍN PECOY, PROTECCIÓN PENAL DE LA PROPIEDAD INCORPORAL EN EL URUGUAY 78 (Universidad de Montevideo, 2008) (arguing against criminalization of copyright infractions because it lacks proportionality, there is a better suited administrative regime of sanctions, and it focuses wrongly on trivial rather than serious crime). *See also,* MIGUEL LANGON, 2 CÓDIGO PENAL Y LEYES PENALES COMPLEMENTARIAS DE LA REPÚBLICA ORIENTAL DEL URUGUAY 855 (Edit. Universidad de Montevideo, 3d ed., 2010) (agreeing that criminal punishment does not provide actual protection to right holders' interest); Cocepción Carmona Salgado, *Sujetos Penalmente Protegidos en la Reforma de 1987 sobre Propiedad Intelectual,* in JORNADAS DE ESTUDIO SOBRE NUEVAS FORMAS DE DELINCUENCIA 349-350 (Consejo General del Poder Judicial, 1988) (arguing for decriminalization of copyright infringement and in favor of administrative and civil remedies); and, Enrique Orts Berenguer, *Propiedad Intelectual, Nueva Tecnologías y Derecho Penal,* in DERECHOS DE PROPIEDAD INTELECTUAL EN LA NUEVA SOCIEDAD DE LA INFORMACIÓN: PERSPECTIVAS DE DERECHO CIVIL, PROCESAL, PENAL E INTERNACIONAL PRIVADO 158 (Ed. Comares, 1998) (arguing for copyright enforcement through administrative and civil remedies rather than criminal ones). *Cf.* Romeo Grompone*, Sanciones Civiles y Penales en Matria de Derechos de Autor,* in PROPIEDAD INCORPORAL: DERECHOS DE AUTOR Y CONEXOS, PROPIEDAD INDUSTRIAL Y MARCARIA, at 65-67 (Ministerio de Educación y Cultura, 1987) (arguing also for increasing copyright enforcement through administrative agencies, although also for extending criminal enforcement); MARÍA JULIA PELÁEZ CHÁVEZ, LA PROTECCIÓN EFECTIVA DE LAS IMÁGENES EN EL INTERNET DESDE LA APLICACIÓN DE LAS NORMATIVIDAD RELATIVA AL DERECHO DE AUTOR 81-82 (unpublished LL.M. on Intellectual Property and Competition, Pontificia Universidad Católica del Perú, 2013) (suggesting that bureaucratic requirements and slowness of procedures make criminal actions the less used, instead stakeholders rely on administrative and civil enforcement); Yolanda Huerta Casado, *El Tratado de Libre Comercio en Materia de Propiedad Intelectual y sus Repercusiones en América Latina,* in DERECHO DE LA PROPIEDAD INTELECTUAL: UNA PERSPECTIVA TRINACIONAL 148 (Manuel Becerra Ramírez ed., Instituto de Investigaciones Jurídicas – UNAM, 1998) (arguing that the punitive approach on intellectual property is mistaken about right holders' purposes and interests, which would be receiving compensation for infringements); Cristina Guerra & Ricardo Pinho, *Combating Intellectual Property Infringement at the Border: A Look at the Systems in Brazil, Argentina, and Uruguay*, 5 LANDSLIDE 29 (2012-2013) (arguing for strengthening intellectual property enforcement by administrative customs authorities in the Southern Cone of Latin America).

application of classical principles of criminal law that limit its intervention, but also raise questions about the efficacy of criminal enforcement, the relative social cost of enforcing copyright through punitive measures, and the actual monetary cost of enforcing copyright with public resources. Their suggestions seem properly oriented, since copyright essentially serves to protect private interests, so it is reasonable to leave most of its enforcement to private actions and limit public involvement to the most outrageous circumstances.[25]

The suggestion to reduce criminal enforcement of copyright by transferring competence on its infringement to authorities other than criminal courts raises some concerns, however. These concerns include that such a transference of jurisdiction may include also the power to impose the same or similar punitive measures, which would subvert fundamental rights related to criminal enforcement, in particular the guarantee of due process.[26] The following sections analyze briefly some of those concerns based on specific experiences of enforcement measures adopted through administrative copyright authorities, civil courts, and other law enforcement agents within the region. But, before

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25 Shizhou Wang, *Study on Criminal Liability of TRIPS,* in REPORT ON COPYRIGHT CRIMINAL LAW IN THE WORLD 43 (Shizhou Wang ed., People's Public Security Press, 2008) (reporting that the language "intellectual property rights are private rights" in the TRIPS Agreement was added by the end of its negotiation to emphasize countries were not required to take *ex-officio* enforcement, but refer infringement to be solved between involved parties). *See also*, DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING, HISTORY AND ANALYSIS 156 (Thomson Reuters, 3th ed., 2008); Nuno PIRES DE CARVALHO, THE TRIPS REGIME OF PATENT RIGHTS 32-33 (Kluwer Law International, 2002); and, UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 11 (Cambridge Univ. Press, 2005).

26 Dimitris Kioupis, *Criminal Liability on the Internet,* in COPYRIGHT ENFORCEMENT AND THE INTERNET 239 (Irini A. Stamatoudi ed., Kluwer Law International, 2010) (drawing attention to a tendency to circumvent criminal law guarantees when imposing sanctions by administrative bodies, such as the three strikes provided by French copyright law).

discussing those experiences, it seems necessary to provide some context about the right to due process of law. Providing an entire justification for the right to due process far exceeds the purpose of this dissertation, but a short explanation is needed in order to build the argument that certain forms of enforcing copyright may infringe this human right.

Due process initially was formulated in connection with criminal enforcement, but it has become a right that applies to any person facing a decision by authorities with jurisdictional powers, whether criminal or not. International instruments on human rights also impose additional requirements on criminal enforcement and guarantees for those facing criminal charges. This has led to an increase in scope of the right to due process, as well as a deepening of its specific requirements. This increase is particularly evident in the American Convention on Human Rights (ACHR), which took advantage of previous instruments when formulating the right to due process.[27]

It must be highlighted that the right to due process cannot be derogated. The American Convention forbids the suspension of "the judicial guarantees essential for the protection of such rights."[28] In fact, as the Inter-American Commission notices, no human rights body has referred to a real emergency that would require derogation to the right to

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27 LAURENCE BURGORGUE-LARSEN & AMAYA UBEDA DE TORRES, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY 659 (Oxford Univ. Press, 2011) (referring influences of previous instruments on the drafting of the American Convention's clause on due process).

28 ACHR, art. 27.

a fair trial, not even temporarily.[29] On the contrary, the Inter-American Court of Human Rights has emphasized the relevance of the due process under emergencies, exactly when it is most needed in order to prevent governmental abuse.[30] Countries still preserve a significant margin of appreciation for implementing the rules related to the right to due process set forth by international instruments on human rights into domestic law, but countries cannot suppress that right.

The Inter-American Court of Human Rights (IACHR) has prolific case law on the due process of law,[31] which makes it possible to classify the exigencies of due process into three sets of guarantees, which focus on: the court, the proceeding, and the accused.[32]

2.1. A competent, independent, and impartial tribunal

The first set of human rights law provisions related to due process refers to the courts, that is, the organizations with jurisdictional power. According to the American

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29 Inter-Am. C.H.R., Report on Terrorism and Human Rights, OAS Document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., Oct. 22, 2002, para. 246. The Commission does explore certain limited room for movement on due process, but only in the context of fighting terrorism, not enforcing copyright.

30 Inter-Am. Ct. H.R., Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations, (ser. A) No. 8, paras. 21-27 (Jan. 30, 1987).

31 BURGORGUE-LARSEN & UBEDA DE TORRES, *supra* note 27, at 646-649 (noting that the clauses on due process and on judicial protection are those with most jurisprudence at the IACHR, which often blends them in its analysis).

32 BURGORGUE-LARSEN & UBEDA DE TORRES, *supra* note 27, at 645 *et seq.* (providing an analysis of due process in the Inter-American Court of Human Rights based in such triple distinction).

Convention, courts must be competent, independent, and impartial. Although the wording of the American Convention, which speaks about the "tribunal," may suggest these guarantees are limited to civil and criminal courts,[33] the IACHR has resolved that the nature of the procedural body is irrelevant and what matters is the protection of the substantive rights.[34] Consequently, the aforementioned guarantees apply to any body exercising jurisdictional functions,[35] whether criminal, civil, or administrative tribunals.[36]

The exigencies of competency, independence, and impartiality apply to both the courts and the judges. The English version of the American Convention may suggest that they refer only to the court itself, by using the word "tribunal." The Spanish, Portuguese, and French versions of the American Convention, however, make the exigencies regarding

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33 ACHR, art. 8 (1) (providing that "[e]very person has the right to . . . a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature"). *See also* ADHR, art. XXVI (requiring a court to be previously established by preexisting laws); UDHR, art. 10 (requiring an independent and impartial tribunal); and, ICCPR, art. 14 (1) (requiring a competent, independent, and impartial tribunal established by law).

34 BURGORGUE-LARSEN & UBEDA DE TORRES, *supra* note 27, at 650 (assuring *that "the procedural body is irrelevant, what matters is the protection of a substantive rights"*.).

35 *Yatama v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, para. 149 (June 23, 2005) (considering that "all the organs that exercise functions of a substantially jurisdictional nature have the obligation to adopt just decisions based on full respect for the guarantee of due process.").

36 Documents of the 1969 Inter-American Conference on Human Rights (Travaux Préparatoires) OAS Document OEA/Ser.K/XVI/1.2 [*hereinafter* ACHR Travaux Préparatoires], at 194-195. *See also,* Inter-Am. C.H.R., *supra* note 29, para. 401 (supporting exigencies on due process for administrative bodies, since "[t]he principle of due process, with this degree of flexibility, applies not only to court decisions, but also to decisions made by administrative bodies", in the context of process for deportation of foreigners).

to both "judge or tribunal."[37] This implies that the conventional exigencies refer to both the actual person of the magistrate as well as the institution of the court. This has been ratified by the IACHR, which, following the European Court of Human Rights, requires both subjective and objective impartiality,[38] to the extent that even appearances become important.[39]

A "competent" tribunal is that one previously determined by law to know and decide a given case because of its jurisdiction over the person, subject matter, time, and place.[40] This has been an issue with some extensive case law by the IACHR in deciding about the right competence of military courts for judging among civilians and human rights abuses.[41] It has been suggested that a competent tribunal would imply also an exigency for having judges professionally qualified.[42]

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37 *Compare* the English version (referring to *"a competent, independent, and impartial tribunal"*) *with* the Spanish (*"un juez o tribunal competente, independiente e imparcial"*), Portuguese (*"um juiz ou tribunal competente, independente e imparcial"*), and French (*"un juge ou un tribunal compétent, indépendant et impartial"*) versions.

38 BURGORGUE-LARSEN & UBEDA DE TORRES, *supra* note 27, at 656-657.

39 *Herrera Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, para. 170 (July 2, 2004) (receiving the influence of the ECHR on both subjective and objective impartiality).

40 THOMAS M. ANTKOWIAK & ALEJANDRA GONZA, THE AMERICAN CONVENTION ON HUMAN RIGHTS 188-189 (Oxford Univ. Press, 2017) (analyzing the expression competent in the ACHR and the IACHR case law, mainly associated with delimiting the competence of military courts).

41 Graciela Rodríguez Manzo, *La Administración de Justicia, Independiente, Imparcial y Competente como Presupuesto del Debido Proceso*, in EL DERECHO HUMANO AL DEBIDO PROCESO: SUS DIMENSIONES LEGAL, CONSTITUCIONAL Y CONVENCIONAL 55, 65-68 (Carlos Pérez Vázquez ed., Tirant Lo Blanch, 2014) (discussing the competence of military courts in the IACHR's jurisprudence).

42 Haji N.A. Noor Muhammad, *Due Process of Law for Persons Accused of Crime,* in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 147 (Louis Henkin ed., Columbia Univ. Press, 1981).

An "independent" tribunal is that one that is not subject to interference and pressure from other branches of the government and their members.[43] The IACHR has had the chance to elaborate on the criteria of independence in connection with separation of powers in some recent cases.[44] According to the IACHR, independence supposes three elements: setting forth an adequate appointment process, ensuring a fixed term in the office, and preventing pressure on the judiciary.[45]

An "impartial" tribunal is that one that has no vested interest, premeditated decision, or preference for any of the litigating parties.[46] This principle is closely related to the right to equal treatment, the rejection to unjustified delays on imparting justice, and the proscription of judges "without face," a practice that used anonymous magistrates when judging terrorist crimes, because of preventing an impartiality assessment.[47] In fact,

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43 Noor Muhammad, *supra* note 42, at 147-149 (linking courts' independence with separation of powers, in which judiciary is not subject to control or influence by the legislature or executive branches).

44 *See* ANTKOWIAK & GONZA, *supra* note 40, at 190-191 (analyzing the expression independent in the ACHR and the IACHR case law). *See also,* Scott Davidson, *The Civil and Political Rights Protected in the Inter-American Human Rights System,* in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 245-247 (David J. Harris & Stephen Livingstone eds., Clarendon Press Oxford, 1998) (elaborating on the more detailed requirements for a competent, independent, and impartial tribunal identified by the Inter-American Commission on Human Rights).

45 BURGORGUE-LARSEN & UBEDA DE TORRES, *supra* note 27, at 655.

46 ANTKOWIAK & GONZA, *supra* note 40, at 191-193.

47 Rodríguez Manzo, *supra* note 41, at 61-63.

the IACHR requires having in place a procedure for challenging judges in order to preserve impartiality.[48]

2.2. A fair and public hearing

The second group of provisions of the American Convention refers to due process and guarantees regarding proceedings, whether criminal or not. Here, there are three basic requirements: procedures must take place in a reasonable time, parties should be provided adequate means for defense, and procedures must be held in public.[49] "A reasonable time" is a relative term that requires considering a few factors in proceedings.[50] "Adequate means of defense" supposes respecting both equity of arms and the adversarial principle.[51] Publicity contributes to fair trial,[52] although there are some permissible and qualified exceptions.[53] Additionally, the IACHR supports an extensive interpretation of certain

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48 Apitz Barbera et al. v. Venezuela, 2008 Inter-Am. Ct. H.R. (ser. C) No. 182, paras. 63-65 (Aug. 5, 2008) (considering that a procedure for challenging judges is part of guarantying to the parties the impartiality of courts).

49 ACHR, art. 8 (1) (providing that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time."). *See also,* ADHR, art. XXVI (requiring an impartial and public hearing); UDHR, art. 10 (providing that "[e]veryone is entitled in full equality to a fair and public hearing"); and, ICCPR, art. 14 (1) (requiring a fair and public hearing).

50 *Genie Lacayo v. Nicaragua*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 30, para. 77 (Jan. 29, 1997) (following the ECHR doctrine by analyzing different factors that determine a reasonable time).

51 *Ivcher Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, para. 107-110 (Feb. 6, 2001) (ruling that a procedure conducted with the exclusive presence of the public authorities, in which a party is prevented from intervening, fully informed, in all the stages, despite being the person whose rights were being determined, infringes the right to due process).

52 *Palamara Iribache v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, para. 168 (Nov. 22, 2005).

53 *See* ACHR, art. 8 (5). *See also,* ICCPR, art. 14 (1).

provisions of the American Convention that recognize rights on criminal matters,[54] which also must be applied to procedures other than criminal ones.[55]

2.3. Guarantees on criminal charges

The third and final set of provisions of the American Convention recognizes certain specific guarantees to those who are accused of criminal charges. They include: the right to be presumed innocent; the right to a translator; the right to be informed of the charges; the right to a defense and the attorney-client privilege; the right to introduce evidence; the right to not self-incriminate; the right to appeal; the right to be free from double jeopardy; the prohibition against retroactive criminal law; and the prohibition against certain forms of punishment, among others.[56] International instruments on human rights provide significantly more guarantees to those facing criminal charges, because of the serious implications such procedures may bring on those being prosecuted, as

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54 *See* ACHR, art. 8 (2).

55 Inter-Am. Ct. H.R., Exceptions to the Exhaustion of Domestic Remedies (art. 46(1), 46(2)(A) and 46(2)(B) American Convention on Human Rights), (ser. A) No. 11, para. 28 (Aug. 10, 1990); and, *Ivcher Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, para. 103 (Feb. 6, 2001). *See also,* Sergio García Ramírez*, El Debido Proceso: Concepto General y Regulación en la Convención Américana de Derechos Humanos*, 117 BOLETÍN MEXICANO DE DERECHO COMPARADO 637, 668-669 (2006) (noticing that the IACHR gives an "expansive" interpretation to article 8.2 of the Convention, by making those guarantees applicable to matters other than criminal cases). *But see* Davidson, *supra* note 44, at 243 (supporting a narrow application of article 8 (2) that *"deals solely with the conduct of criminal cases"*.); and, CECILIA MEDINA QUIROGA, LA CONVENCIÓN AMERICANA: VIDA, INTEGRIDAD PERSONAL, LIBERTAD PERSONAL, DEBIDO PROCESO Y RECURSO JUDICIAL 285-293 (Universidad de Chile, 2005) (arguing for an application of article 8 (2) limited to criminal procedures, although allowing for an extensive interpretation of article 8 (1)).

56 ACHR, art. 8 (2) to 8 (5). *See also,* ADHR, art. XXVI; UDHR, arts 10 and 11; and, ICCPR, art. 14 (2) to 14 (7).

punishment diminishes, and sometimes even deprives, certain fundamental rights of convicted persons.

Determining the application of these guarantees in favor of the accused requires distinguishing between offences, cases, or charges of criminal nature from those of civil nature. These are autonomous conventional concepts and, therefore, while countries have margin of appreciation for making determinations into domestic law, their classification is not necessarily decisive,[57] since such freedom may defeat the purpose of international law.[58] Unfortunately, neither the American Convention nor the jurisprudence of the IACHR elaborates on this crucial distinction.[59] However, the European Court of Human Rights has delved into this differentiation and its reasoning may be useful, since the language of the European Convention shares similarities with the American Convention,[60] and may become adopted by the IACHR, which, in fact, has an intense dialogue with its European peer.

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57 PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 264 (Oxford Univ. Press, 2011).

58 BEN EMMERSON, ANDREW ASHWORTH, & ALISON MACDONALD, HUMAN RIGHTS AND CRIMINAL JUSTICE 192-193 (Sweet & Maxwell, 2nd ed., 2007).

59 MEDINA QUIROGA, *supra* note 55, at 284-285.

60 *Compare* ACHR, art. 8, *with* the European Convention on Human Rights, adopted in Rome, Nov. 4, 1950 [*hereinafter* European Convention on Human Rights], art. 6.

In order to draw the line between civil and criminal procedures, the European Court of Human Rights has adopted a flexible test, known as the *Engels criteria*.[61] This criteria considers the classification of the offence under domestic law, the nature of the offence, and the severity of the sanction.[62] The classification of the offence under domestic law is a starting point, although not a decisive one: that is to say, the fact that the law defines an offence as a criminal one is decisive, but the failure to classify an offence as criminal is not, since that would undermine the protection of human rights.[63] The nature of the offence is determined by its procedural rules, the underlying purpose of the procedure, the public commitment to enforcing the law, as well as comparative analysis with other Council of Europe members.[64] The third consideration – the severity of the sanction – is key, particularly if it includes imprisonment, although significant monetary fines may qualify as criminal punishment, as with even minor fines with "clearly deterrent

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61 *Engels and other v. Netherlands*, 22 Eur. Ct. H.R. (ser. A) (1976). In the U.S., the Supreme Court has developed a seven nonexclusive, unweitghted factors test for determining if a given measure is criminal or civil in nature. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). *See also,* Gabriel J. Chin, *Collateral Consequences of Criminal Conviction,* in THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 205 (John T. Parry & L. Song Richardson eds., Cambridge Univ. Press, 2013 (critizicing the limited constitutionalization of punishment by American jurisprudence).

62 *Engels and other v. Netherlands*, 22 Eur. Ct. H.R. (ser. A) (1976). *See also* EMMERSON *et al., supra* note 58, at 193-196 (analyzing the Engels criteria in the ECHR jurisprudence); CHRISTOPH GRABENWARTER, EUROPEAN CONVENTION ON HUMAN RIGHTS: COMMENTARY 108-113 (C.B. Beck, Hart, Nomos, & Helbing Lichtenhahn Verlag, 2014) (analyzing the meaning of "criminal charge" in the European Convention on Human Rights and ECHR case law); Pieter van Dijk & Marc Viering, *Right to a Fair and Public Hearing,* in THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, at 539-556 (Pieter van Dijk, Fried van Hoof, Arjen van Rijn, & Leo Zwaak eds., Intersentia, 4th ed., 2006) (analyzing the Engels criteria).

63 *See* EMMERSON *et al., supra* note 58, at 193-194.

64 *See* EMMERSON *et al., supra* note 58, at 194-195.

and punitive purpose."[65] This is not a cumulative test and, therefore, the existence of one factor may be enough for ruling a certain measure is punitive and, consequently, that its application must satisfy the exigencies of due process set forth in favor of the criminally accused.[66]

Most jurisprudence of the European Court of Human Rights refers to punishment applied by final sentencing, but there is also some case law that applies the Engels criteria to provisional measures adopted by jurisdictional authorities.[67] In addition, the Court has ruled that certain measures are punishment in some circumstances. For instance, the Court has ruled that confiscation can properly be regarded as punitive even if its purpose is to deprive an offender of ill-gotten gains, if the way it pursues that purpose has the trappings of punishment.[68] As Professor Andrew Ashworth put it, although the measure has preventive and reparative arms, it has also punitive ones, because of the mechanism for

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65 *See* EMMERSON *et al., supra* note 58, at 195 (referring to several ECHR cases supporting this criteria).

66 *See* LEACH, *supra* note 57, at 264. *See also*, EMMERSON *et al., supra* note 58, at 195-196; and, Paul Lemmens, *The Right to a Fair Trial and Its Multiple Manifestations: Article 6(1) ECHR*, in SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS 299 (Eva Brems & Janneke Gerards eds., Cambridge Univ. Press, 2013) (referring to the alternative character of the Engels criteria's elements).

67 Alex Metzger, *A Primer on ACTA: What Europeans Should Fear about the Anti-Counterfeiting Trade Agreement*, 1 J. INTELL. PROP., INFO. TECH. & E-COM. L. 109, 113 (2010) (arguing that, under European human rights law, specific safeguards are required for protecting defendants' fundamental rights when implementing provisional measures).

68 *Welch v. United Kingdom*, 307 Eur. Ct. H.R. (ser. A) No. 17440/90 (1995). *See* EMMERSON *et al., supra* note 58, at 221-222 (analyzing ECHR jurisprudence on preventive measures).

determining its amount and having imprisonment by default.[69] Similarly, even if domestic law qualifies a certain detention as preventive, courts can rule it to be punishment, because of its effects, its extension, and being decreed by a court.[70] When ruling a detention to not be punishment, courts have called attention to its proportionality and safeguards for preserving due process on the implementation of other procedural measures, such as search and seizure.[71]

From European Court of Human Rights case law, it is possible to conclude that the relevant factor for considering a given measure as punitive is its actual aim. Therefore, rather than attending the name and appearances of a given measure under domestic law, court will analyze its true purpose. As a result of that approach, whatever its formal denomination, certain measures adopted by jurisdictional bodies, whether at sentencing or even during proceedings, may qualify as criminal punishment, if their actual policy objective is deterrence.[72]

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69 Andrew Ashworth, *Criminal Law, Human Rights and Preventive Justice,* in REGULATING DEVIANCE: THE REDIRECTION OF CRIMINALISATION AND THE FUTURE OF CRIMINAL LAW 95 (Bernadette McSherry, Alan Norrie, & Simon Bronitt eds., Hart Publ'g, 2009) (stating that *"[t]he court held that the confiscation order does amount to a "penalty", since its effects and associated procedures were very much those of a punishment. It noted that the measure had punitive as well as preventive and reparative aims; that the order was calculated by reference to "proceeds" rather than profit, and therefore had a reach beyond the mere restoration of the status quo ante; and that the order was enforceable by a term of imprisonment in default"*).

70 *M v. Germany*, Eur. Ct. H.R., No. 19359/04, (2009). *See also* EMMERSON *et al., supra* note 58, at 229 (noticing certain confusion coming from ECHR case law on preventive detention, which would remain open to debate).

71 *See Furke v. France*, 16 Eur. Ct. H.R. 297 (1993); and, *Niemietz v. Germany*, 16 Eur. Ct. H.R. 97 (1993).

72 *See* Lemmens, *supra* note 66, at 299-301 (analyzing the gradual broadening scope of the autonomous concept of the term "criminal" by ECHR case law).

In brief, the right to due process of law applies not only to criminal enforcement but to any exercise of jurisdictional functions. It includes the right to a competent, independent and impartial tribunal; the right to a fair trial; and several guarantees related to criminal enforcement. The following sections analyze how certain forms of copyright enforcement through civil courts and administrative agencies may infringe the right to due process of law in Latin America.

3. PUNISHMENT BY CIVIL COURTS: NON-COMPENSATORY DAMAGES

Some scholars have recommended decriminalizing copyright infringement and directing it instead to civil courts, which are better suited for dealing with essentially private interests.[73] This recommendation seems appropriate for achieving the goal of protecting right holders by compensating their damages rather than by punishing infringers. It is also consistent with the TRIPS Agreement, which purposely qualifies intellectual property as a "private interest" in order to mitigate the public commitment to its criminal enforcement.[74] Moving competence on copyright matters from criminal to civil courts raises some concerns, however, because of the risk of subverting the rules and guarantees of criminal

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73 PECOY, *supra* note 24, at 79 (suggesting *"re-privatization of copyright conflict,"* by giving back its solution to concerned stakeholders).

74 *See, supra* note 25.

law. This may occur when courts award non-compensatory damages that resemble criminal sanctions.[75]

The determination of damages started becoming an issue of concern for international copyright only since the TRIPS Agreement.[76] It requires countries to have compensatory damages available in domestic law,[77] although it allows also some non-compensatory damages.[78] As a result of the flexibility provided by the TRIPS Agreement, all Latin American countries fulfilled in advance their obligations on the matter,[79] based on their domestic laws that award compensation for actual damages – both moral and material damages – to victims of infringement.

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75 Kioupis, *supra* note 26, at 239 (calling attention to circumvention of criminal law guarantees by using non-criminal procedures, which would be the case of punitive damages that ruin defendants).

76 *See* PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 320-321 (Oxford Univ. Press, 2001) (noticing that international law "provides few minimum standards on the remedies for copyright infringement," which started to be introduced by the end of twenty century); and, Luis Felipe Botero Aristizábal, *La Indemnización de Perjuicios en las Acciones de Infracción a los Derechos de Propiedad Intelectual: Una Revisión Crítica del Caso Colombiano frente a los Retos de la Globalización*, 10-11 REVISTA LA PROPIEDAD INMATERIAL 23, 29-36 (2006-2007) (noting the lack of provisions on damages in international copyright and neighboring rights, until the TRIPS Agreement).

77 TRIPS Agreement, art. 45 (1).

78 TRIPS Agreement, art. 45 (2). *See also,* UNCTAD-ICTSD, *supra* note 25, at 593-594 (highlighting the optional character of the provision on non-compensatory damages); and, GERVAIS, *supra* note 25, at 455.

79 Ricardo Antequera*, El Acuerdo sobre los ADPIC y los Tratados de la OMPI sobre Derecho de Autor (TODA/WCO) y sobre Interpretación o Ejecución y Fonogramas (TOIEF/WPPT): La Adaptación de las Legislaciones Nacionales y la Experiencia en los Países Latinoamericanos*, WIPO Document OMPI-SGAE/DA/ASU/05/1, 26 de octubre de 2005, at 19 (reporting full compliance of Latin American countries with TRIPS Agreement's standards on damages, at least through general provisions of domestic law on compensation). *But see,* Botero Aristizábal, *supra* note 76, at 41-42 (lamenting the absence in Colombian law of provisions on punitive and pre-established damages, as well as vacillation of courts on granting moral damages).

There are some common features among Latin American countries regarding damages. Generally speaking, each country´s domestic law allows for compensating damages coming from illegal acts.[80] This statement makes evident that in order to get compensation, a plaintiff must probe not only the occurrence of an illegal act, but also the existence of harm, a causal connection between infringement and injuries, as well as the actual amount of harm that should be compensated. Although in some cases the burden of proof may be ameliorated –for instance, proving the existence of an infringement could be facilitated by a previous criminal court ruling–, the rules on *onus probandi* still impose significant burden on plaintiffs. In fact, these rules are cumbersome in some cases, for instance when proving harms caused against immaterial assets –such as someone´s honor and credit, the rights to privacy, and intellectual property– and moral damages.

Through Latin America, copyright holders have achieved a relative success on advocating for adopting exceptional mechanisms that alleviate the burden of proof for getting compensation originated as a copyright infringement, by making unnecessary to provide evidence on actual damages and even delinking damages from actual harm. In

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80 *See, e.g.,* LUIS CARLOS PLATA LÓPEZ, RESPONSABILIDAD CIVIL POR INFRACCIONES AL DERECHO DE AUTOR 156-159 (Ediciones Uninorte – Grupo Editorial Ibáñez, 2010) (reviewing the determination of damages in Colombian copyright law);, Guillermo Cabanellas, *Argentina,* in INTERNATIONAL ENCYCLOPAEDIA OF LAWS FOR INTELLECTUAL PROPERTY LAW 70 (Hendrik Vanhees ed., Kluwer, 2016) (noting that determining damages on copyright matters follows general rules set forth by law in Argentina); and, Karen Isabel Cabrera Peña, *Consideraciones sobre la Determinación del monto del Daño por Infracciones al Derecho de Autor en Entornos Digitales*, 21 REVISTA IUS ET PRAXIS 503 (2015) (comparing the determination of damages related to copyright infringement in Colombia, Spain, and the United States).

other terms, adopting mechanisms for determining monetary award to copyright plaintiffs that are not necessarily connected with actual harm. In fact, in recent years, several countries have committed to implement into domestic law mechanisms of non-compensatory damages on intellectual property,[81] some already have implemented similar provisions in domestic law.

Through the region, the mechanisms and underlying reasoning for granting non-compensatory damages vary from one country to another. A brief description of some of them may be useful to approach this subject. In Brazil, the copyright act states some statutory damages in order to overcome evidentiary limitations, according to which, when the number of infringing copies were unknown, the infringer has to pay the value of three thousands copies, in addition to the value of seized infringing material.[82] In Mexico, also to alleviate the burden of proof, the copyright act assures that compensation cannot be lower than forty percent of the retail value of infringed copyrighted goods and services.[83] The evidentiary justification for adopting non-compensatory damages becomes more elusive, however, in the case of those countries that have adopted them as part of the process of implementing into domestic law obligations assumed through free trade

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81 *See, e.g.,* Botero Aristizábal, *supra* note 76, at 42-44 (congratulating provisions of the free trade agreement signed with the United States, which requires damages based on the infringer's profit and pre-established damages in order not only to compensate the victim but also to deter infringements).

82 Copyright Act – Brazil, art. 103. *See* PEDRO PARANAGUA & SERGIO BRANCO, DIREITOS AUTORAIS 133-134 (Editora FGV, 2009)

83 Copyright Act – Mexico, art. 216 bis.

agreements signed with the United States. In Peru, for instance, copyright holders can choose to sue for actual damages plus the profits of the infringer that are attributable to the infringement and are not already taken into account in determining injury, or a pre-established monetary award determined by law.[84] This is also the case of Costa Rica,[85] and Chile.[86] In latter country, courts are also allowed to determine the damages based on factors other than actual harm, such as the retail value of infringing material, the seriousness of infringement, and even the creator´s reputation;[87] even more, without need to prove any harm, right holders could request flat-rate damages, which would be determined based on the seriousness of infringement, although with a legal cap.[88]

Non-compensatory damages are a source of disagreement and a long-standing problem of harmonization between legal systems. Countries of the common law tradition, particularly the United States,[89] accept some non-compensatory damages as part of the mechanisms for achieving law enforcement and discouraging infringement, by imposing

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84 Copyright Act – Peru, art. 196.

85 Intellectual Property Enforcement Act Costa Rica, arts. 40 and 40 bis.

86 Copyright Act – Chile, art. 85 E. *See* ELISA WALKER ECHEÑIQUE, MANUAL DE PROPIEDAD INTELECTUAL 324-325 (Legal Publishing, 2014) (describing the determination of damages in domesctic law); and, Alberto Cerda, *Chile,* in INTERNATIONAL ENCYCLOPAEDIA OF LAWS FOR INTELLECTUAL PROPERTY LAW 76-77 (Hendrik Vanhees ed., Kluwer, 2015) (reviewing the determining damages on copyright matters in Chilean law).

87 Copyright Act – Chile, art. 85 E.

88 Copyright Act – Chile, art. 85 K.

89 John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391 (2004) (stating that, in spite of some controversy over their appropriateness, punitive damages are widely available in common law countries and, in recent years, claims for those damages have increased).

on defendants the payment of recompense to plaintiffs beyond actual harm, such as presumptive and statutory damages, aggravated and additional damages, as well as punitive and exemplary damages.[90] Countries of the civil law tradition, including continental Europe and Latin America, reject permitting compensation to become a source of enrichment for plaintiffs and, therefore, limit compensation to remedy actual damages, either economic or moral.[91] Scholars have argued that the roots of those different approaches on non-compensatory damages are found in the more categorical distinctions between restorative and deterrent functions of law drawn by civil law countries when compared to common law ones.[92] But, whatever the historical explanation, the fact is the distinction between legal systems on non-compensatory damages remains sharp.[93]

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90 *See* DAVID I BAINBRIDGE, INTELLECTUAL PROPERTY 150 (Pearson, 5th ed., 2002) (recognizing that although additional damages are available in British copyright law and seem to be asked for more frequently nowadays, they are awarded only rarely). *See also,* LIONEL BENTLY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 1105-1106 (Oxford Univ. Press, 2nd ed., 2004) (providing similar analysis in British law regarding both punitive and statutory additional damages); and, Pamela Samuelson, Phil Hill, & Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, But For How Long?,* 60 J. COPYRIGHT SOC.'Y U.S.A. 529 (2013) (reporting on the increasing incorporation of non-compensatory damages for copyright infringement in foreign jurisdictions because of obligations assumed through free trade agreement signed with the United States).

91 JOHN HENRY MERRYMAN & ROGELIO PÉREZ PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 124 (Stanford Univ. Press, 3d. ed., 2007). *See also,* Olenka Woolcott Oyague & Germán Flórez Acero, Protección del Derecho de Autor: Implicaciones del TLC entre Colombia y Estados Unidos 62-67(ASTREA – Universidad Católica de Colombia, 2015) (analyzing free trade agreement obligations on non-compensatory damages and its inconsistency with Colombian civil law tradition that limits damages to compensation of loss).

92 Sir Henry Brooke, *A Brief Introduction: The Origins of Punitive Damages,* in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 1-3 (Helmut Koziol & Vanessa Wilcox ed., Springer Wien New York, 2009) (reporting the origins of non-compensatory damages in late eighteenth century English law).

93 Helmut Koziol, *Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? Comparative Report and Conclusions,* in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, *supra* note 92, at 275-276 (concluding that "punitive damages are undoubtedly

The lack of agreement on non-compensatory damages became apparent during the recent negotiation of ACTA,[94] in which the European Union refused to agree on statutory pre-established damages for being *"impermissibly punitive."*[95] A similar reluctance arose about presumptions of damages and additional damages.[96] In spite of lacking international agreement on the matter, the United States has included mechanisms to provide non-compensatory damages for copyright within its bilateral trade negotiations.[97] Some of these mechanisms include: establishing presumptive damages that free plaintiffs of the burden of proof; awarding statutory damages that are based on legal pre-

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one of the topics where the common law and continental European civil law seem worlds apart," although recognizing they are not "diametrically opposed"), and at 282-288 (concluding that rejection to punitive damages prevails among European scholars and courts, although supported by some on violation of immaterial property rights). *But see,* André Gustavo Corrêa de Andrade, *Indenização Punitiva*, 85 REVISTA DA ABPI 55 (2006) (referring to the *"crisis of the reparatory paradigm"* and, in spite of recognizing differences between civil law and common law traditions on punitive damages, arguing that punitive damages are in place under the appearance of moral damages, that, under case law and scholarship, repair the victim and, at the same time, punish the victimizer in order to prevent harmful behavior against a human being's dignity and personhood rights). *See also,* John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507 (2007) (pointing out some limited reception of punitive damages in certain civil law countries, as well as acceptance of more permissive American awards of punitive damages by other common law countries).

94 Metzger, *supra* note 67, at 111-112 (analyzing consistency of the ACTA drafts with European Union law on civil damages, including their scope, measurement, and proof).

95 MICHAEL BLAKENEY, INTELLECTUAL PROPERTY ENFORCEMENT: A COMMENTARY ON THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) 147 (Edward Elgar Publishing, 2012). *See also,* Samuelson *et al., supra* note 90, at 564-569 (reporting on treatment of non-compensatory damages in the TRIPS Agreement, ACTA, and TPPA).

96 BLAKENEY, *supra* note 95, at 143-152 (noticing that the TRIPS Agreement required compensation for actual damages, while ACTA has a pool of pre-established, presumptive, and additional damages).

97 Samuelson *et al., supra* note 90, at 578-580 (listing free trade agreements that include provisions on non-compensatory damages and noticing progressive hardening in their drafting).

determination rather than actual harm; granting punitive damages in order to deter infringement; and extending damages not only to compensate harm but also deprive defendants of any related income.[98] Since 2003, all free trade agreements signed by the United States with Latin American countries include a mixture of those non-compensatory damages.

International human rights law does not prohibit non-compensatory damages, but the application of such damages still raises concerns. Scholars and domestic constitutional courts have called attention to the punitive nature of such damages,[99] which creates potential infringement of substantive principles of criminal law and procedural safeguards that have been already recognized as fundamental rights.[100] Lately, these apprehensions

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98 Samuelson *et al., supra* note 90, at 536-541. *See also,* PLATA LÓPEZ, *supra* note 80, at 177-181 (reviewing provisions on damages included in the free trade agreement signed between Colombia and the United States that would require updating the legal framework of the former one).

99 Koziol, *supra* note 93, at 276-280 (discussing theoretical conceptions and misconceptions on punitive damages among American scholars). *See also,* MARIANO YZQUIERDO TOLSANA & VICENTE ARIAS MÁIZ, DAÑOS Y PERJUICIOS EN LA PROPIEDAD INTELECTUAL: POR UNA NUEVA REGULACIÓN 181-182 (Fundación Arte y Derecho - Trama Ed., 2006) (arguing for adopting punitive damages and unjust enrichment as compensatory mechanisms in Spanish copyright law, although recognizing their punitive nature); and, R. Moretti, *Tutela y Protección Civil de la Propiedad Intelectual: Una Mirada Reflexiva desde el Ejercicio Profesional*, DIARIO CONSTITUCIONAL, 27 Dec. 2017 (arguing that some provisions on damages in the current copyrigh law would be unconstitutional because of disregarding actual harm and focusing on actual infraction, becoming of awarded damages an infrigment on the prohibition against double jeopardy).

100 Nils Jansen & Lukas Rademacher, *Punitive Damages in Germany, iIn* PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, *supra* note 92, at 76-77 (calling attention on constitutional concerns related to punitive damages, because of potentially infringing the principle of legality in criminal law, as well as the proscription of double jeopardy). *See also,* Koziol, *supra* note 93, at 302 (noticing that punitive damages conflict with principle of legality in criminal law, which applies to define a conduct as crime as well as to measuring the punishment, and criminal procedure safeguards).

also have echoed in common law countries.[101] Given the fact that non-compensatory damages do not indemnify harm but punish for infringement, their imposition should not take place through civil litigation, but before criminal courts with proper respect to all guarantees of due process related to criminal enforcement, as international courts on human rights have ruled.

Both the European and the Inter-American Courts of Human Rights have adopted the approach of granting damages to the extent they are necessary for repairing victims from violations, including pecuniary and non-pecuniary losses suffered.[102] Therefore,

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101 *See, e.g.,* Mark A. Geistfeld, *Due Process and the Deterrence Rationale for Punitive Damages,* in THE POWER OF PUNITIVE DAMAGES: IS EUROPE MISSING OUT?, 107-118 (Lotte Meurkens & Emily Nordin eds., Intersentia, 2012) (reviewing U.S. Supreme Court's recent decisions that limit punitive damages in order to avoid infringement on the due process clause of the Constitution because the defendants lacked the procedural safeguards of criminal law); Pamela Samuelson & Ben Sheffner, *Unconstitutionally Excessive Statutory Damages Awards in Copyright Cases*, in 158 U. PA. L. REV. PENNUMBRA 53 (2009) (confronting their views around constitutionality of grossly excessive statutory damage awards in U.S. law in relation to the right to due process); and, Vanessa Wilcox, *Punitive Damages in the Armoury of Human Rights Arbiters,* in THE POWER OF PUNITIVE DAMAGES: IS EUROPE MISSING OUT?, *supra* note 101*,* at 517 (calling attention about tension of English judges between common law tradition and the principles of the European Court of Human Rights on rejecting punitive damages).

102 LEACH, *supra* note 57, at 465-474 (concluding that the European Court of Human Rights accepts damage claims for compensating both pecuniary and non-pecuniary losses, if applicants establish a clear causal link between violation and claimed damages); EMMERSON *et al., supra* note 58, at 50-56 (analyzing European Court case law on pecuniary and non-pecuniary damages); Viviana Krsticevic, *Reflexiones sobre la Ejecución de las Decisiones del Sistema Interamericano en Protección de Derechos Humanos,* in IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: JURISPRUDENCIA, NORMATIVA Y EXPERIENCIAS NACIONALES 22-28 (Viviana Krsticevic & Liliana Tojo eds., Center for Justice and International Law, 2007) (noticing that the IACHR imposes full compensation of damages); and, BURGORGUE-LARSEN & UBEDA DE TORRES, *supra* note 27, at 228-234 (reporting that the IACHR awards compensation broad enough to compensate loss suffered, both material and immaterial damages, as well as compensation for life project). *But see,* JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 245-246 (Cambridge Univ. Press, 2nd ed., 2013) (agreeing on the complete compensation of the IACHR, but noting that, more recently, it left behind an autonomous

courts' awards include compensation for losses that are not economic in nature, also known as moral damages, such as for anxiety, emotional distress, and non-material alteration of life conditions.[103] The IACHR has been explicit that the nature and amount of compensation must be proportional to the harm caused,[104] and therefore they must be in relation to violations, proved injuries, and measures requested for repairing such injuries.[105]

Both the European Court and the Inter-American Court have endorsed full compensation but rejected awarding non-compensatory damages. The European Court awards just satisfaction by putting the plaintiff in the position as if the violation had not happened, but award neither exemplary nor aggravated forms of damages.[106] The IACHR has been extremely explicit on this matter: on one side, it has ruled reparation is not

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compensation for life project). *See also,* CLAUDIO NASH, LAS REPARACIONES ANTE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 39-40 (LOM Ed., 2004) (noting that the life project is still a confusing and deficiently elaborated concept in the IACHR's jurisprudence).

103 PASQUALUCCI, *supra* note 102*,* at 229-245.

104 *Castillo Páez v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, para. 51 (Nov. 27, 1998); *Case of the 19 Merchants v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, paras. 221-223 (July 5, 2004).

105 *Paniagua Morales et al. v. Guatemala*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 76, para. 79 (May 25, 2001); *Ticona Estrada et al. v. Bolivia*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 191, para. 110 (Nov. 27, 2008); *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, 2010 Inter-Am. Ct. H.R. (ser. C) No. 217, para. 262 (Sept. 1, 2010); *Case of J. v. Peru*, 2013 Inter-Am. Ct. H.R. (ser. C) No. 275, para. 384 (Nov. 27, 2013); *Caso García Cruz y Sánchez Silvestre v. México*, 2013 Inter-Am. Ct. H.R. (ser. C) No. 273 para. 64 (Nov. 26, 2013); *Case of Osorio Rivera and Family Members v. Peru*, 2013 Inter-Am. Ct. H.R. (ser. C) No. 274, para. 237 (Nov. 26, 2013); and, *Liakat Ali Alibux v. Suriname*, 2014 Inter-Am. Ct. H.R. (ser. C) No. 276, para. 139 (Jan. 30, 2014).

106 EMMERSON *et al., supra* note 58*,* at 52-53 (analyzing case law in which the European Court rejects awarding non-compensatory damages). *See also,* Wilcox, *supra* note 101, at 500 (noting that, although the practice of the European Court of Human Rights on damages is unpredictable, its position is *"clear and unequivocal"* on rejecting awarding punitive damages in its jurisprudence).

intended to enrich or impoverish the victim or heirs,[107] but to compensate suffered loss, both material and immaterial;[108] on the other, punitive or exemplary damages have a different purpose, likely a fine rather than reparation, and the IACHR is not a penal court empowered to award those damages.[109] In sum, although courts reject granting non-compensatory damages, they do not rule those damages a human rights infringement, but rather a matter of criminal law.

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107 *Garrido and Baigorri v. Argentina*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, para. 43 (Aug. 27, 1998); *Castillo Páez v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, para. 53 (Nov. 27, 1998); *Blake Case*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 48, para. 34 (Jan. 22, 1999); *Paniagua Morales et al. v. Guatemala*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 76, para. 79 (May 25, 2001); *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, para. 205 (Jun. 21, 2002); *Case of the Caracazo v. Venezuela*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 58, para. 78 (Aug., 2002); *Cantos Case*, 2002 Inter-Am. Ct. H.R. (ser. C) No. No. 97, para. 79 (Nov. 28, 2002); and, *Case of the 19 Merchants v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, para. 223 (Jul. 5, 2004).

108 *Velasquez Rodríguez v. Honduras*, 1990 Inter-Am. Ct. H.R. (ser. C) No. 7, para. 38 (July 21, 1989); *Godínez Cruz Case*, Inter-Am. Ct. H.R. (ser. C) No. 8, paras. 24-25 (Jul. 21, 1989); *Velasquez Rodríguez v. Honduras*, 1990 Inter-Am. Ct. H.R. (ser. C) No. 9, para. 27 (Aug. 17, 1990); *Castillo Páez v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, para. 53 (Nov. 27, 1998); *Garrido and Baigorri v. Argentina*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, para. 43 (Aug. 27, 1998); *Paniagua Morales et al. v. Guatemala*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 76, para. 76 (May 25, 2001); *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, para 203 (June 21, 2002); *Case of the Caracazo v. Venezuela*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 58, paras. 77-78 (Aug., 2002); *Cantos Case*, 2002 Inter-Am. Ct. H.R. (ser. C) No. No. 97, paras. 76 and 79 (Nov. 28, 2002); *Case of the 19 Merchants v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, paras. 221-223 (July 5, 2004); *Gómez Paquiyauri Brothers v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, para. 189 (Jul. 8, 2004); *García Cruz and Sánchez Silvestre v. México*, 2013 Inter-Am. Ct. H.R. (ser. C) No. 273 para. 65 and 97 (Nov. 26, 2013); *Case of Osorio Rivera and Family Members v. Peru*, 2013 Inter-Am. Ct. H.R. (ser. C) No. 274, para. 236 (Nov. 26, 2013); and, *Case of J. v. Peru*, 2013 Inter-Am. Ct. H.R. (ser. C) No. 275, para. 415 (Nov. 27, 2013). *See also* NASH, *supra* note 102, at 57-62 (compiling IACHR case law ruling integral compensation, including both material and moral damages).

109 *Velasquez Rodríguez v. Honduras*, 1990 Inter-Am. Ct. H.R. (ser. C) No. 7, paras. 37-38 (Jul. 21, 1989); Godínez Cruz Case, Inter-Am. Ct. H.R. (ser. C) No. 8, paras. 35-36 (Jul. 21, 1989); and, *Garrido and Baigorri v. Argentina*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, paras. 43-44 (Aug. 27, 1998).

Several reasons have been argued for opposing the award of punitive damages in human rights fora. They are not only contrary to the legal tradition of countries that accepted jurisdiction of international courts on the matter,[110] but also inconsistent and counterproductive. International human rights law already provides for true general measures with preventive purposes that fit better than mere deterrence through private benefit.[111] Additionally, punitive damages may backlash against human rights courts that, unlike domestic jurisdictions, are based on countries' collaboration.[112] In the case of Latin America, it has been added that punitive damages may discourage that collaboration because they sanction countries with limited budgets, particularly in cases of mass human rights violations, rather than actual wrongdoers.[113] Neither the European nor the Inter-American Courts of Human Rights have presented other reasons, however, for their rejection of punitive damages besides exceeding fair compensation and lacking criminal jurisdiction.

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110 Wilcox, *supra* note 101, at 500-501 (explaining reluctance on adopting punitive damages by the European Court of Human Rights because of legal tradition of most country members, limiting just satisfaction to ensure *restitution in integrum).*

111 Wilcox, *supra* note 101, at 502 (agreeing on banishing on punitive damages by human rights courts because preventive purposes could be achieved through general measures). *See also,* Dinah Shelton, *Reparations in the Inter-American System, in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS, *supra* note 44, at 169-172 (providing recommendation for improving reparations by the IACHR, such as extending the scope of non-pecuniary measures, advancing a general fund for compensations, and reviewing practices on cost and attorney's fees, but no recommendation on adopting non-compensatory damages).

112 Wilcox, *supra* note 101, at 502 (emphasizing that, unlike domestic jurisdictions, countries' collaboration is key in human rights mechanisms and punitive damages could undermine that goal).

113 PASQUALUCCI, *supra* note 102*,* at 193 (arguing against awarding of non-compensatory damages within the IACHR, because of, even if justified, being counterproductive in the Latin American economic context and its adoption may create backlash against the court).

From a human rights viewpoint, non-compensatory damages that pursue deterrent purposes are punishment and, therefore, they are subject to the guarantees that international instruments on human rights grant to those who are accused of criminal charges. This seems clear in the cases of punitive and exemplary damages, whose very denominations emphasize their deterrent rather than compensatory nature.[114] This seems to be also the case of certain forms of additional and aggravated damages that are calculated on factors other than compensating suffered harm. Even those lighter forms of non-compensatory damages have raised concerns because their disproportionality, which may uncover their true punitive nature and, therefore, violation of human rights. This was the case of a decision by the Chilean Constitutional Court that ruled unconstitutional a provision of the patent law,[115] to some extent similar to another available in the copyright act,[116] that allows to calculate compensation based on the patent infringer's profit rather than on the victim's harm because of "notoriously" lacking proportionality.[117]

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114 Koziol, *supra* note 93.

115 Ley No. 19.039 Establece Normas Aplicables a los Privilegios Industriales y Protección de los Derechos de Propiedad Industrial, Diario Oficial Jan. 25, 1991, as updated by Ley No. 19.996, Diario Oficial March 11, 2005 (Chile), art. 108 (providing that *"the compensantion of damages could be determined, at plaintiff' choice, according to the general rules or any of the following rules: b) the profit obtained by the infractor as a result of the infraction"*.).

116 Copyright Act (Chile), art. 85 E (providing that *"the court could, also, sanction the infractor to pay the obtained gains, resulting from the infraction and that have not been considered when determining the damages"*.)

117 Constitutional Tribunal (Chile), STC 2437-13, final judgment, 14 Jan. 2014, cons. 33º to 38º (ruling unconstitutionality of the article 108 b) of the Chilean industrial property act, because of "notoriously" lacking proportionality, when allowing to calculate compensation based on the patent infringer's profit rather than on the victim's harm); and, Constitutional Tribunal (Chile), STC 2365-12, final judgment, 14 Jan. 2014, cons. 34º to 39º (ruling in the same order). *But see,* Enrique Barros Bourie, *Restitución de Ganancias por Intromisión en Derecho Ajeno, por Incumplimiento Contractual y por Ilícito Extracontractual*, in DERECHO DE DAÑOS 39, 72, 73

Instead, non-compensatory damages set forth in order to overcome evidentiary limitations on determining and measuring damages, without deterring aim, are more likely to be in compliance with international instruments on human rights. This may be the case of certain statutory and presumptive damages.[118] In fact, the Mexican Supreme Court has had the opportunity for ruling on the constitutionality of a mechanism for statutory damages provided by the copyright law, according to which compensation cannot be lower than forty percent of the retail price for the respective copyrighted goods or services.[119] According to the court, those damages are neither an unusual nor cruel punishment, do not infringe on the equal protection guarantee, and by adopting them the Legislature did not infringe on the principle of legality.[120]

(Enrique Barros Bourie, María Paz García Rubio & Antonio M. Morales Moreno eds., Fundación Coloquio Jurídico Europeo – Fontamara, 2013) (praising the unconstitutional provisions as rules against unjust enrichment rather than rules for redressing damages). *See also,* Manoel J. Pereira Dos Santos, *Principais Tópicos para uma Revisão da Lei de Direitos Autorais Brasileira*, 100 REVISTA DA ABPI 61, 67 (2009) (arguing disproportionality of the article 103 of the Brazilian copyright act that allows awarding damages for three thousand copies, in addition to seized infringing copies, when the actual number of latter ones is unknown).

118 *See* Alessandro P. Scarso, *Punitive Damages in Italy,* in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES, *supra* note 92, at 109-110 (challenging the punitive nature of non-compensatory damages that relieves plaintiff of burden of proof). *See also,* Koziol, *supra* note 93, pp. 305-306 (admitting some damages other than compensatory, such as statutory damages, for evidentiary purposes in violation of immaterial property rights); and, PLATA LÓPEZ, *supra* note 80, at 177180-181 (agreeing to adopt statutory damages in Colombian law in order to overcome evidence constraints).

119 Copyright Act (Mexico), art. 216 bis (providing that in no case the compensation of damages for copyright infringement would be lower than forty percent of the retail price for the original product or service that infringes copyright exclusive rights).

120 Suprema Corte de Justicia de la Nación, 4 de marzo de 2009, amparo directo en revisión 1916/2008 (Mex.); and, Suprema Corte de Justicia de la Nación, 4 de marzo de 2009, amparo directo en revisión 1917/2008 (Mex.). *See* Roberto Garza Barbosa*, El Derecho de Autor, las Nuevas Tecnologías, y el Derecho Comparado: Una Reflexión para la Legislación Nacional y Sus Desarrollos Jurisprudenciales*, 142 BOLETÍN MEXICANO DE DERECHO COMPARADO 41, 75-79 (2015)

Even non-compensatory damages set forth to overcome evidentiary limitations may require a closer scrutiny. For instance, when Brazil adopted the rule allowing to award the value of three thousand copies in addition to the value of seized infringing works, the evidentiary challenge was associated to copyright piracy by book publishers. In such a context, assuming that infringement had a certain scale, specially if its actual size was unknown, was reasonable.[121] However, as digital technologies have made the reproduction of copyrighted material easier and cheaper, that legal provision has become the source of abuses by a growing business model of litigation. Street vendors and other small infringers that are detained with a handful of illegal compact discs are, ultimately, being sued for compensating damages for seized material plus three thousand additional copies. Consequently, these non-compensatory damages have become less about overcoming evidentiary limitations and more about scapegoating by imposing disproportional monetary punishment on infringers.

In sum, from a human rights viewpoint, certain forms of non-compensatory damages are in fact penalties and, therefore, their imposition should be subject to guarantees recognized in favor of those accused of criminal charges. Other forms of non-compensatory damages may be acceptable in civil fora, if their aim is overcoming

(praising the Mexican Supreme Court's decisions and arguing for an increase from that forty to a hundred percent).

121 PARANAGUA & BRANCO, *supra* note 82.

evidentiary limitations. In the latter case, however, damages must be subject to certain safeguards to prevent disproportionality.[122]

4. PUNISHMENT BY ADMINISTRATIVE AGENCIES

Each Latin American country has a local administrative authority with competence to govern copyright issues, although its size and the extension of its faculties vary from one country to another.[123] In most countries, the main task of that administrative authority is carrying out the copyright register, in which authors record their creations as well as transfers of economic rights. Since countries acceded to the Berne Convention, which provides automatic protection and abrogates formalities for achieving it,[124] the register remains an atavistic institution and registration essentially satisfies mere evidentiary purposes. This is the case of Argentina, Brazil, Chile, and Costa Rica. Other countries have copyright agencies with a broader mandate that, in addition to carrying out the register, includes developing and implementing certain copyright related public policies, as well as promoting and advising on copyright issues. This is the case of Colombia's National

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122 Samuelson *et al., supra* note 90, at 544-564 (referring certain flexibilities adopted by countries when implementing non-compensatory damages into their domestic law, although noting cynical displeasure of some U.S. policymakers that reject those flexibilities, despite their availability in domestic U.S. law).

123 Copyright Act Argentina, arts. 65 *et seq.*; Lei No. 5.988, de 14 de Dezembro de 1973, Diário Oficial da União [D.O.U.] de 18.12.1973 (Braz.), arts. 17 *et seq.*; Copyright Act Chile, arts. 72 *et seq.*; Copyright Act Colombia, arts. 253 *et seq.*; Copyright Act Costa Rica, arts. 95 *et seq.*; Copyright Act Mexico, arts. 208 *et seq.*; and, Copyright Act Peru, arts. 168 *et seq.*

124 Berne Convention, art. 5 (2) (providing conventional protection no subject to any formality).

Copyright Directorate, Mexico's National Institute of Copyright, and Peru's National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), although the scope of their jurisdiction and attributions vary.

Some countries have granted law enforcement authority to these copyright administrative bodies, allowing them to supervise compliance, prosecute infringers, sanction infractions, and even adopt injunctions.[125] In Colombia, for instance, after several scandals related to the mismanagement of collective copyright societies,[126] the law was amended to strengthen the public authority's supervisory powers and jurisdictional faculties, including the power to impose sanctions against infringing societies.[127] In Mexico, in addition to having faculties for mediation and managing a system of arbitration,[128] the copyright authority has jurisdictional power for prosecuting and punishing with monetary fines a broad catalogue of misdemeanors,[129] including "any

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125 *Cf.* GUAN H. TANG, COPYRIGHT AND THE PUBLIC INTEREST IN CHINA 94-123 (Edward Elgar, 2011) (providing extensive review on administrative bodies that are "quasi-judicial power to enforce copyright law" in China, when "public interest" is compromised, although noting that such ambiguous language provides room for enforcing not only for public welfare and social value, but also for protecting copyright holders).

126 *See* LA GESTIÓN COLECTIVA ANTE EL DESAFÍO DIGITAL EN AMÉRICA LATINA Y EL CARIBE (Carolina Botero Cabrera, Luisa Fernanda Guzmán Mejía, & Karen Isabel Cabrera Peña eds., Fundación Karisma, 2015) (reporting on collective copyright societies' mismanagement and abusive practices in Colombia and Latin America).

127 Decreto 3942 de 25 de Octubre de 2010, Por el cual se reglamentan las Leyes 23 de 1982,44 de 1993 y el artículo 2, literal c) de la Ley 232 de 1995, en relación con las sociedades de gestión colectiva de derecho de autor o de derechos conexos y la entidad recaudadora y se dictan otras disposiciones.

128 Copyright Act Mexico, arts. 217-228.

129 Copyright Act Mexico, arts. 229-236. *See also,* STEPHEN ZAMORA *et al.,* MEXICAN LAW 672-675 (Oxford Univ. Press, 2004) (reviewing improvements in copyright enforcement in Mexico, but calling attention to the fact that procedures have not been used vigorously).

infringement coming from interpretation of the copyright act and its regulations."[130] Similarly, the Peruvian copyright authority has *ex-officio* jurisdiction for apprehending "violations of any law provision,"[131] and for sanctioning them with a wide category of measures, such as temporary and permanent closure of businesses, seizure of goods, payment of copyright royalties, restorative measures, and monetary fines, among others.[132]

Granting administrative bodies the authority to enforce the law, including sanctioning powers, has several advantages, such as allowing for specialization of law officials, speeding up procedures, and building proactive enforcement. In fact, in Latin America, administrative enforcement authorities are common in several areas of the law, such as social security, consumer protection, data privacy, and labor law, among others. However, as any governmental act that limits fundamental rights, punitive actions exercised by administrative bodies are subject to exigencies set forth by both international instruments on human rights and constitutional frameworks. Among those requirements, sanctioning actions adopted by administrative bodies must be based on due process standards, some of which seem to be missing in certain such cases in Latin America, as explained below.

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130 Copyright Act Mexico, art. 229 XIV.

131 Copyright Act Peru, arts. 173 to 175, and 183 to 185.

132 Copyright Act Peru, arts. 186 to 194. *See also,* Copyright Act Peru, arts. 165-167.

4.1. Administrative penalties and due process

Administrative procedures must comply with the exigencies of due process set forth by international instruments on human rights. This includes, as previously mentioned, a procedure before a competent, independent, and impartial tribunal, as well as a fair and public hearing.[133] Whether administrative procedures that impose sanctions on people must comply (and to which extent) with the additional rights granted to those who face criminal charges remains debatable among scholars. Some have attempted to draw a clear distinction between sanctioning administrative and criminal law,[134] while others see in both fields of law an expression of *ius punendi* that barely varies on degree.[135] Scholars agree, however, on incorporating into those administrative procedures analogous rules of due process to those set forth in criminal law because, ultimately, both imply restrictions imposed by the state on people's fundamental rights.[136]

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133 *See, supra* notes 31-55 and accompanying text.

134 *See* ALEJANDRO NIETO, DERECHO ADMINISTRATIVO SANCIONADOR (Tecnos, 5th ed., 2012) (arguing for sanctioning administrative law independent from criminal law, although subject to certain limitations in favor of fundamental rights, such as legality, proportionality, and culpability). *See also,* Cristian Román Cordero, *El Derecho Administrativo Sancionador en Chile,* 16 REVISTA DE DERECHO UNIVERSIDAD DE MONTEVIDEO 89 (2009).

135 Eduardo Cordero, *Concepto y Naturaleza de las Sanciones Administrativas en la Doctrina y Jurisprudencia Chilena*, 20 REVISTA DE DERECHO UNIVERSIDAD CATÓLICA DEL NORTE 79 (2013) (arguing that administrative sanction and criminal punishment are ontologically the same and, therefore, subject to certain constitutional constraints, although these constraints are stronger in criminal law because of the seriousness of its penalties). *See also,* Eduardo Cordero, *El Derecho Administrativo Sancionador y Su Relación con el Derecho Penal*, 25 REVISTA DE DERECHO (VALDIVIA) 131 (2012) (providing extensive historical reference on the scholar's discussion about distinctions and similarities between criminal punishment and administrative sanctions in civil law countries).

136 *See* NIETO, *supra* note 134, at 46-47 (extracting several constitutional limitations on sanctions imposed by administration based on the exigency of legality set forth by the Spanish constitution, including non-retroactivity, prohibition of double jeopardy, and *mens rea*, among

The IACHR has not have the chance to elaborate on the rules of due process that would apply to sanctioning administrative procedures. Having in mind the extensive interpretation of rules on due process on criminal matters that the IACHR has extended to procedures other than criminal ones,[137] it is possible to foresee that it would endorse the application of those rules on administrative procedures that lead to sanctions on persons. In fact, even the European Court on Human Rights, which has a more conservative approach to due process, has extensive case law ruling that countries must provide to defendants in these administrative procedures the same safeguards that are granted to those facing criminal charges.

The European Court on Human Rights has applied the Engels criteria in several cases involving the application of penalties for administrative offences. In all them, the court disregards the qualification of the offence under domestic law and, instead, relies on the nature and purpose of the sanction. In *Ozturk v. Germany*, the court found that the imposition of a fine for a minor traffic infringement was punishment, in spite of being a case decriminalized by transferring competence from criminal to administrative authorities, because the penalty was intended to be punitive and deterrent in its effects. In

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others); Eduardo Cordero, *LAS Bases Constitucionales de la Potestad Sancionadora de la Administración,* 39 REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DE VALPARAÍSO 337, 346-347 (2012) (supporting that "both punishment and administrative sanctions are subject to a common constitutional framework... both substantive and procedural, such as legality, *mens rea*, non-retroactivity, and fair, rational, and previous procedure).

137 *See, supra* note 55.

its ruling, the court rejected the idea that the "relative lack of seriousness of the penalty at stake . . . divest[s] an offence of its inherently criminal character."[138] Similarly, the court has addressed the application of guarantees of due process set forth in favor of those under criminal charges in cases concerning a fine and license suspension for traffic infringement,[139] a fine with imprisonment by default for failing to wear a seat-belt,[140] minor motoring offences,[141] penalty points for speeding,[142] fines against nuisance,[143] and imposition of substantial and minor tax surcharges.[144] In sum, for the European Court of Human Rights, if administrative offences are punished with penalties that attempt deterrence, they are criminal in nature and, therefore, their imposition must comply with the guarantees of due process on criminal matters.

It has been suggested that, unlike the jurisprudence of the European Court of Human Rights, provisions on criminal due process set forth by the American Convention would apply only to offences of a certain level of gravity.[145] It is said that this narrow interpretation is based on the expressed intention of drafters to exclude minor offenses,

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138 *Ozturk v. Germany*, 6 Eur. Ct. H.R. 409 (1984) (ruling applicable the right to a translator).

139 *Lutz v. Germany*, 10 Eur. Ct. H.R. 182 (1987) (ruling applicable the presumption of innocence).

140 *Schmautzer v. Austria*, 21 Eur. Ct. H.R. 511 (1995) (ruling application of guarantees of due process on criminal charges).

141 *Gradinger v. Austria*, 328 Eur. Ct. H.R. 64 (1995) (ruling application of prohibition on double jeopardy); and, *Olivera v. Switzerland*, 28 Eur. Ct. H.R. 289 (1999).

142 *Malige v. France*, 28 Eur. Ct. H.R. 578 (1998).

143 *Lauko v. Slovakia*, 33 Eur. Ct. H.R. 40 (1998)

144 *Bendenoun v. France*, 18 Eur. Ct. H.R. 54 (1994); and, *Jussila v. Finland*, 45 Eur. Ct. H.R. 39 (2007).

145 EMMERSON *et al., supra* note 58, at 229.

known as "*faltas*" in most Latin American countries, by using the wording "serious crime." [146] However, that interpretation is only supported by an internal U.S. memorandum, [147] and lacks support in the *travaux préparatoires* of the American Convention.[148] It should be noted that the initial proposal of the convention referred not to crimes but criminal matters, and then was amended to match the Universal Declaration and the International Covenant on Civil and Political Rights by referring to a generic "criminal offense,"[149] as the European Convention on Human Rights.[150] In contrast, only one provision of the American Convention refers to serious offences using that wording with regard to limiting the death penalty.[151] What actually happened in the drafting process was that delegations from the United States and Trinidad and Tobago, neither of which were actual parties to the Convention, requested the translation of the wording crime into English as serious crime.[152] Their request, however, did not go through the official

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146 LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1366-1367 (The Bobbs-Merrill Company, 1973). *See also,* THOMAS BUERGENTHAL & ROBERT E. NORRIS, HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM (Oceana Publications, 1982) (providing English translation to documentation of the drafting process of the American Convention, as well as U.S. internal memoranda on the matter).

147 U.S. Delegation Report on the 1969 Inter-American Human Rights Conference (mimeo, 1970), at 22-23. This report is reproduced fully in 3 SOHN and BUERGENTHAL, *supra* note 146; and, in part, in BUERGENTHAL and NORRIS, *supra* note 146, at 1361-1373.

148 *See* ACHR Travaux Préparatoires, *supra* note 36.

149 *Compare* IACHR, art. 8 (2) (writing about "criminal offense") *with* ICCPR, art. 14 (2) (referring to "criminal offence") and UDHR, art. 11 (wording "penal offence"). *See also,* ACHR Travaux Préparatoires*, supra* note 36*,* pp. 104-105.

150 European Convention on Human Rights, art. 6 (2) and (3) (referring to "criminal offence").

151 *Compare* IACHR, art. 8 (2) (referring to due process on criminal offenses) *with* IACHR, art. 4 (2) (limiting death penalty to "the most serious offences").

152 ACHR Travaux Préparatoires*, supra* note 36, at 443.

translation. In sum, there is no reason to support a narrow reading of the American Convention that excludes guarantee of due process with respect to minor offences.

In brief, although there is no case law by the Inter-American Court of Human Rights on the application of the guarantees of due process to administrative procedures that lead to sanctions, the extensive interpretation that the court makes of those rules, as well as the interpretation provided by the European Court of Human Rights for analogous provisions and the drafting history of the American Convention, lead us to anticipate that the Inter-American Court will extend to those procedures the rules of due process set forth in favor of those facing criminal charges. As a matter of fact, several constitutional courts within the region have already extended the guarantees of due process set forth for criminal cases in favor of those facing administrative charges.[153] This should lead to the revision of some patterns of administrative enforcement of copyright, whose compliance with human rights standards on due process is being challenged, such as the infraction of the principle of legality by having open clauses that define infringements, and the inadmissible reversion of the presumption of innocence, among other procedural

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153 Constitutional Court (Chile), case 244, final judgement, 26 de agosto de 1996 para. 9 (stating that *"those principles set forth by the Constitution on criminal matters must be applied, in general, in sanctioning administrative law, because both are expression of the state's ius puniendi"*). *See also,* ROMÁN CORDERO, supra *note* 134, at 95-97 (discussing Chilean Constitutional Court's case law on the matter); Camila Boettiger Philipps, *El Derecho Administrativo Sancionador en la Jurisprudencia del Tribunal Constitucional*, 20 REVISTA ACTUALIDAD JURÍDICA 577 (2009); *and,* María Lourdes Ramírez Torrado, *Reflexiones acerca del Principio de Proporcionalidad en el Ámbito del Derecho Administrativo Sancionador Colombiano,* 12 REVISTA ESTUDIOS SOCIO-JURÍDICOS 155 (2010) (discussing Colombian Constitutional Court's case law on the principle of proportionality applied on sanctions imposed by administrative agencies).

safeguards provided by human rights instruments in favor of those facing the government's punitive power.

4.2. Administrative preventive measures

Copyright enforcement through administrative authorities may attract human rights scrutiny not only because of its punishing faculties, but also for its power to issue injunctive orders. Although international law requires countries to provide certain forms of injunctive relief, such as the seizure of infringing goods,[154] it does not indicate exactly which authority must adopt those measures. In most Latin American countries, courts are entitled to adopt measures to prevent ulterior damages to right holders, such as ordering the suspension of supposedly illegal activities and impounding goods. In some countries, like Mexico and Peru, administrative copyright authorities have faculties for adopting some injunctions,[155] which may raise human rights concerns based on due process, particularly when measures are of a punitive nature.

Human rights concerns related to injunctions adopted by administrative authorities enforcing copyright are not new; in fact, it is possible to find records of similar problems as far back as the 1980s, when the Supreme Court of Panama nullified a law granting to an administrative authority power for forceful entry and seizure of goods,

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154 *See* Berne Convention, art. 16 (requiring country parties to implement seizure of infringing material)

155 Copyright Act Mexico, art. 210; and, Copyright Act Peru, arts. 169-194.

without a court order, for enforcing intellectual property law.[156] In the coming years, those concerns may resurface because of the increasing number of international instruments requiring countries to confer to administrative bodies, such as custom authorities, the power for adopting some preventive injunctions.[157] In fact, these faculties already have been problematic for countries dealing with online copyright infringement, as the experiences of Chile and Peru show.

Between 2007 and 2010, the Chilean legislature debated a copyright reform that included a regime of notice and takedown for online infringing content,[158] which adoption was required by the free trade agreement signed with the U.S.[159] Unlike its American counterpart, which relies on direct requests from copyright holders to Internet service providers,[160] the Chilean government recommended adopting an expedited judicial procedure for notice and takedown. Unable to persuade local authorities to adopt a regulation similar to the U.S. one, the USTR recommended implementing into domestic

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156 *See* Mónica Sanchez, *Piracy in Latin America: Panama Attempts to Curb Illegal Reprinting and Reproduction of Copyrighted Matter*, 2 LOY. INTELL. PROP. & HIGH TECH. L. Q. 30 (1997), p. 34 (referring the decision by the Supreme Court of Panama that declared unconstitutional article 75 of the local copyright act that would allow the administrative authority to seize material and ruling its authority was limited to inspecting establishments).

157 *See* Frederick M. Abbott, *An Overview of the Agreement: Contents and Features,* in THE ACTA AND THE PLURILATERAL ENFORCEMENT AGENDA 35-40 (Pedro Roffe & Xavier Seuba eds., Cambridge Univ. Press, 2015) (summarizing new measures of intellectual enforcement before civil courts and administrative bodies in ACTA).

158 *See* Alberto Cerda, *Limitación de Responsabilidad de los Prestadores de Servicios de Internet por Infracción a los Derechos de Autor en Línea*, 41 REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DE VALPARAÍSO 121 (2014) (describing and analyzing from a human rigths perspective the Chilean regime of limitation of liability for Internet service providers).

159 Free Trade Agreement U.S.-Chile, art. 17.11.23.

160 U.S. Code, Title 17 – Copyright Act, § 512 (c).

law a procedure for taking down supposedly infringing online content through an administrative body rather than by a court order.[161] Eventually, lawmakers rejected the recommendation by designing a judicial mechanism, consistent with local legal tradition, as well as in compliance with both international human rights and constitutional provisions on due process.[162] Chapter Eight of this dissertation deepens on this issue.[163]

A recent unprecedented preventive measure adopted by the Peruvian administration against online copyright infringement has generated some concerns from a human rights viewpoint. In December 2013, alerted by the news, the copyright administration initiated a procedure against the website thepiratebay.pe for hosting infringing content. Based on preliminary evidence, news reports, and foreign court decisions finding against similar overseas websites, the copyright administration decided to suspend the functioning of the website by requiring the entity that manages the country code top level domain to deactivate its service.[164] The decision was adopted in a procedure initiated and controlled exclusively by the administration, no potential plaintiff acted in the case, the potential defendants were not summoned or even notified; in fact, the only notification in the whole procedure was given to a third party, the provider of domain name services, which was notified in order to implement the restrictive measure. In

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161 Alberto Cerda*, Chile, in* INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CYBER LAW 129-130 (Jos Dumortier ed., Kluwer Law International, 2014).

162 Cerda, *supra* note 161, at 131-132.

163 *See, infra* Chap. VIII, notes 74-101 and accompanying text.

164 National Institute for the Defense of Competition and Protection of Intellectual Property - INDECOPI (Peru), decision 00601-2013/CDA-INDECOPI, Dec. 16, 2013.

addition to adopting an absolute *inaudita parte* decision in an exceptionally fast-tracked procedure, which took barely three working days since the original news reports, the measure of suspending the functioning of the service was not temporary, but of indefinite duration. Although the decision may look somewhat adequate for preventing infringement, the unprecedented action of the copyright administration raises some concerns about its compliance with the basic requirements of due process.

The Peruvian attribution to the copyright administrative agency of authority for imposing preventive, *exofficio, inaudita parte* measures with punitive nature, such as the permanent take down of a whole website, is being followed in other countries. In 2016, Ecuador adopted a law that allows the domestic copyright administrative authority to order the suspension of a website functioning because of alleged infringement.[165] Similarly, in 2015, the Mexican copyright authority issued an order blocking the access to a whole website because of alleged copyright infringement. The affected party, however, appealed against the administrative decision on constitutional grounds. Ultimately, in 2017, the Supreme Court ruled that the administrative measure was disproportionate and infringed on the right to free speech.[166]

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165 Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación, Registro Oficial 9 de diciembre de 2016 (Ecuador), arts. 559 *et seq.*

166 Libertad de expresión ejercida a través de la red electrónica (Internet). La protección de los derechos de autor no justifica, en sí y por sí misma, el bloqueo de una página web, Segunda Sala de la Suprema Corte de Justicia de la Nación [SCJN], Semanario Judicial de la Federación, Décima Época, Junio de 2017, Tesis 2a. CIX/2017 (10a.) (Mex.) (ruling that blocking a whole website cannot be justified on mere copyright infringment, that measure must be limited to a specific content in order to meet the constitutional requirements of necessity and proportionality). *See* Roberto Garza Barbosa*, La Suprema Corte de Justicia de la Nación y la Imposición de Medidas Preliminares a los Proveedores de Servicios de Internet*, 148 BOLETÍN MEXICANO

A similar measure was adopted in Argentina. However, unlike its Peruvian counterpart, the Argentinean case shows a closer attention to due process requirements. In May 2014, at the request of the music industry and copyright collective societies, a court issued an injunction ordering local ISPs to block access to a number of *The Pirate Bay*'s online sources.[167] In order to comply with the decision, the court ordered the National Commission on Communications to notify local ISPs.[168] Although adopted *inaudita parte,* a competent, independent, and impartial court adopted the decision, after a request by rights holders that followed a legal procedure in which evidence was incorporated and weighed. On this case, the administrative authority only acted as messenger of the court decision rather than an adjudicating body.[169]

Administrative bodies exercising jurisdictional powers on copyright issues have mixed records from a due process perspective. On one hand, their competence has not

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DE DERECHO COMPARADO 459 (2017) (reviewing previous case law by the Mexican Supreme Court on preliminary injunctions adopted by administrative authorities against Internet service providers to bock access to a website because of copyright infringement).

167 Juzgado Civil 64, 11.03.2014, "CAPIF Cámara Argentina de Productores de Fonogramas y otros c/ The Pirate Bay s/ Medidas Precautorias" (Arg.) (ordering to local ISPs to block DNS and IP numbers related to The Pirate Bay, but rejecting similar request to search engine services, as well as refusing emphatically to grant to copyright holders a blanket license to extend the list of blocked DNS and IP number without judicial control, because of latter measure would become censorship).

168 La Justicia ordena el bloqueo de The Pirate Bay en la Argentina, LA NACIÓN, 30.06.2014. *See,* COMISIÓN NACIONAL DE COMUNICACIONES, Nota CNC No. 123, 26.06.2014 (communicating the decision to local ISPs).

169 Darren Meale, *A Triple Strike against Piracy as the Music Industry Secures Three More Blocking Injunctions*, 8 (8) J. INTEL. PROP. L. & PRAC. 591 (2013) (noticing that similar decisions have been adopted in the U.K., but, unlike the Peruvian case, those measures have been decreed by court orders issued at copyright holders' request).

been challenged, mainly because, unlike ordinary courts, they are usually staffed with specialized personnel knowledgeable on copyright matters. On the other hand, their lack of independence, and in some cases impartiality, are arguable. It must be highlighted that none of the analyzed copyright authorities enjoy any of the requirements on independence identified by the IACHR. These authorities are appointed and could be removed by the executive branch and, therefore, are subject to its pressure. This is true for Colombia,[170] Ecuador,[171] Mexico,[172] and Peru.[173] There are also objections about their impartiality, particularly in the case of the Colombian copyright authority that has declared its institutional mission is *"only protecting authors and right holders."*[174] While neither the Mexican nor the Peruvian administrative copyright agencies have embraced such an open partisan position, the fact they have exercised their power by adopting *ex-officio*, *in limine litis*, and *in*

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170 Decreto 2041 de 24 de agosto de 1991 por el cual se crea la Dirección Nacional del Derecho de Autor como Unidad Administrativa Especial, se establece su estructura orgánica y se determinan sus funciones (Colombia), arts. 1 and 5 (establishing by Presidential decree the local copyright authority as part of the executive branch, whose head is designated by the executive).

171 Codificación de la Ley de Propiedad Intelectual, Registro Oficial 28 de diciembre de 2006 (Ecuador), arts. 332 *et seq.* (establishing the local copyright administrative authority, whose head is designated by the Executive).

172 Copyright Act Mexico, arts. 208-212 (establishing the copyright administrative authority as part of the executive, whose head is designated and removed by the federal executive).

173 Decreto Supremo 107-2012-PC, Modificaciones al Reglamento de Organización y Funciones del Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual - INDECOPI (Peru), D.O. El Peruano, Oct. 25, 2012 (regulating by Presidential decree the organization and functions of the local copyright authority, which is part of the executive branch).

174 As a matter of fact, the institutional mission of the Colombian copyright agency is, *"strengthening the due and adequate protection to rights holders by contributing to the development of a culture of compliance with copyright and neighboring rights"*. *See* http://www.derechodeautor.gov.co/web/guest/misionyvision (last visited May 21, 2017).

audita parte preventive measures on copyright matters is hardly attributable to an impartial jurisdictional body.[175]

Guarantees of due process on proceedings, particularly those related to adequate means of defense, seem arguable in the Latin American context. They are better set in civil litigation and recent judicial reforms have urged their implementation into criminal procedures, but remain elusive in administrative proceedings. This may be explained, following Mirjan Damaška's argument, because administrative bodies implement policies rather than resolve differences,[176] which encourage governments to adopt inquisitorial rules of procedure rather than adversarial ones. Although these objections may not apply to the case of the Mexican copyright authority when providing services of mediation and arbitration, they certainly apply to the Peruvian authority that, as was explained above, enjoys rules of procedure that allow acting on its own initiative and granting precautionary measures without hearing the involved parties, even in preliminary stages of proceedings.

Although human rights constraints for administrative enforcement, particularly in the field of copyright, is not a new issue, its relevance will increase in coming years, along the growing tendency to rely on it for enforcing intellectual property, by transferring more

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175 *Cf.* Rosalía Quiroz Papa de García, *Sanción al Plagio de Obras Literarias en el Instituto Nacional de Defensa de la Competencia y la Protección de la Propiedad Intelectual (Indecopi) en Perú*, INVESTIGACIÓN BIBLIOTECOLÓGICA, Vol. 28, No. 68 (2014), pp. 115-162 (reporting that over two third of the legal actions for infringment on moral rights are initiated *ex-officio* by the copyright authority in Peru).

176 MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY (Yale Univ. Press, 1986) (providing comparative law analysis on procedural law).

power to custom authorities, tax administrations, telecom authorities, copyright agencies, and so forth.

5. PUNISHMENT BY LAW ENFORCEMENT OFFICIALS

Aside from criminal punishment of copyright infringement through administrative authorities and civil courts, there are other sources of concern regarding the compliance with human rights when enforcing copyright. This is the case of actions by law enforcement officials. The discretionary powers of police and prosecutors have attracted the attention of scholars for quite some time, since Edwin H. SUTHERLAND studied the discriminatory nature of their work on enforcing the law against white-collar crime, which he called the "differential implementation of the law."[177] More recently, William J. STUNTZ has identified official discretion as one of the main reasons that explains the current dysfunction in criminal system, because of being a source of discriminatory justice.[178] Although these concerns have focused on American society, they are somehow applicable to criminal enforcement in Latin America, particularly in the area of copyright law, as is explained below.

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177 EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (Dryden Press, 1949).

178 WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 1-6 (Belknap – Harvard, 2013).

Chile can provide many examples of arbitrary selectiveness on the criminal enforcement of copyright by law officers during the period when copyright reform was under debate in the country. In 2007, the main local retail company Falabella had to remove from its shop windows a clothing collection depicting a drawing of a punk panda that was used by its provider without authorization by the creator.[179] Later that year, BancoEstado, a government-owned financial institution, abruptly terminated a television campaign that showed a pet talking with the personalities depicted on Chilean paper money, after the Chilean Central Bank, the financial entity that supplies local currency, argued potential copyright infringement.[180] In 2008, lawmakers that had introduced a bill adopting a graduated response against online copyright infringers retracted it,[181] after bloggers discovered the legal initiative was drafted using pirated software in a well-known attorney's office specializing in intellectual property.[182] In 2009, the president and the legal adviser of the main collective copyright society resigned, after a journalist documented the president using pirated software in one of his presentations about the ongoing copyright reform.[183] In all of these cases, in spite of their broad coverage by the media and flagrant

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179 *Cony Sturm, Panda Punk, o las peripecias de un diseño Creative Commons*, FAYERWAYER, Jun. 30, 2011.

180 *Banco Central Pide a Banco Estado Retirar Campaña*, LA NACIÓN, Sept. 3, 2007; *Banco Central Obliga a Retirar Publicidad con Billetes*, EL MERCURIO, Sept. 3, 2007; and, *Central Se Mandó al Pecho por Copión a Pato del BancoEstado*, LA CUARTA, Sept. 4, 2007.

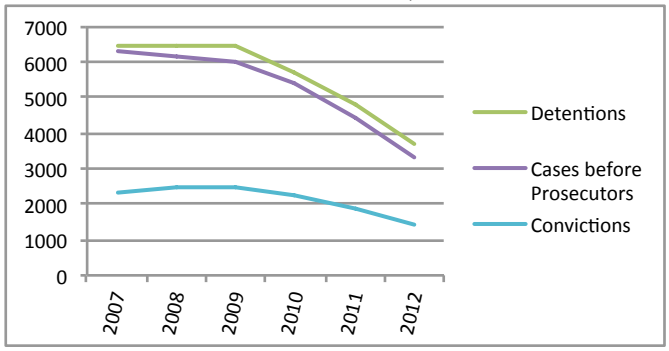
181 Cámara de Diputados (de Chile), Proyecto de Ley sobre Protección de la Creación en Internet **(**Boletín No. 6280-19), de 17 de diciembre de 2008 (punishing illegal file-sharing with disconnecting uers from the Internet, from three months to up to one year, in addition to other applicable penalties).

182 *Ley de Propiedad Intelectual: Artistas y Público en Distintos Escenarios*, LA NACIÓN, Jan. 1, 2009.

183 *Fernando Ubiergo Renunció a la SCD Luego de Ocupar Pecé con Programas Piratas,* LA CUARTA, Jan. 6, 2009; *Ubiergo Explica Renuncia a la SCD*, EL MERCURIO DE VALPARAÍSO, Jan. 7, 2009; *Fernando Ubiergo Bromea en Su Último Discurso a la Cabeza de la SCD***,** EL MERCURIO, Jan. 8, 2009; *Renunció*

copyright infringement, neither police action nor prosecutorial powers were exercised. On the contrary, reading of abundant case law makes apparent that local law enforcement has focused its efforts instead on flea markets and street vendors.

Table 8:
Measures of Copyright Criminal Enforcement in Chile, 2007-2012



Data Source: Instituto Nacional de Estadísticas, Chile.

The evidence about the arbitrary enforcement of copyright law in Chile is not solely anecdotal. According to official data released by police and prosecutors between 2007 and 2012,[184] thousands of people are subject to detention each year by police for copyright infringement, but only 38% of them are convicted. As shown above in Table 8, there is a significant gap between, on one hand, detentions and cases brought by prosecutors and, on the other, actual convictions. In fact, 6% of detentions do not even

el Director General de la SCD, EL MERCURIO, Jan. 12, 2009; *Renunció Caporal de la Sociedad Chilena del Derecho de Autor,* LA CUARTA, Jan. 13, 2009; *Santiago Schuster: 'Para Mí No Era Un Trabajo, Era Una Causa',* EL MERCURIO, Jan. 18, 2009; and, *Siento Que No Comprendieron el Sentido de Mi Renuncia,* EL MERCURIO, Feb. 22, 2009.

184 Note: Data used in this section differs slightly from that used in the first section (including Table 4). Data in the first section corresponds to prosecutions and convictions, while data in this section includes information on detentions by police, whose numbers became available only since 2007. This difference explains the contrast in periods covered by Table 4 and 5.

generate a case for prosecutors. Part of the gap between cases and convictions may be explained because of prosecutorial discretion and applying certain alternative mechanisms of enforcement (such as compensatory agreements and conditional suspension of criminal procedures). Whatever the explanation, the numbers show that two-thirds of those thousands who are detained by police and held for up to 24 hours without court order, as permissible under local law, may never have a day in court.

More striking than Chile's experience on arbitrary enforcement of copyright law by prosecutors and police officers is the case of the Mexican *"war against piracy,"* which took place during the first decade of this century. This war is a well-documented one whose numbers show a dysfunctional system of enforcement with widespread infractions on due process.[185]

After signing NAFTA, Mexico was required to improve its domestic law on intellectual property.[186] Enforcement remained a pendent issue, however, and foreign

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185 José Carlos G. Aguiar, *Nuevas Ilegalidades en el Orden Global: Piratería y la Escenificación del Estado de Derecho en México*, 196 FORO INTERNACIONAL 403, 409-418 (2009) [*hereinafter* Aguiar, *Nuevas Ilegalidades*]; and, José Carlos G. Aguiar, *La Piratería como Conflicto: Discursos sobre la Propiedad Intelectual en México*, 38 ÍCONOS: REVISTA DE CIENCIAS SOCIALES (QUITO) 143, 153 (2010) (reporting increasing on policy anti-piracy actions between 1995 and 2008) [*hereinafter* Aguiar, *La Piratería*]. *See also,* José Carlos G. Aguiar, *Neoliberalismo, Piratería y Protección de los Derechos de Autor en México*, 62 RENGLONES: REVISTA ARBITRADA EN CIENCIAS SOCIALES Y HUMANIDADES 1 (2010); and, John C. Cross, *Mexico,* in MEDIA PIRACY IN EMERGING ECONOMIES 315-317 (Joe Karaganis ed., Social Science Research Council, 2011) (describing measures of law enforcement against piracy in Mexico).

186 *See* Aguiar, *La Piratería*, *supra* note 185, at 153 (reporting that 2004 amendment to copyright law that criminalizes illegal reproduction and sell of copyrighted material as a serious organized crime was outcome of USTR pressure on Mexico's government at the time). *See also,* ZAMORA *et al., supra* note 129, at 660-675 (reporting on improvements in substantive and procedural

entities clamored for its attention.[187] Until 2000, when Vicente Fox, a former President of Coca-Cola Mexico and someone acutely aware about the importance of intellectual assets, took office. The first year of his administration, barely two hundred police raids and searches had been brought against intellectual property infringers. This changed in the years succeeding his mandate, in which police actions skyrocketed by several thousands, as shown below in Table 9, through mass seizures of entire commercial neighborhoods, involving thousands of police officers and even helicopters. Bad publicity and demonstrations against police excesses led to changes on tactics that avoided irritating the masses, by implementing nighttime police raids and seizures without warrant.[188] In spite of Fox leaving office, police actions continue on thousands, although in reduced numbers. Between 2002 and 2011, an average of 5,519 police raids and searches were conducted, 526 people were detained, and 152 prosecutions took place each year.

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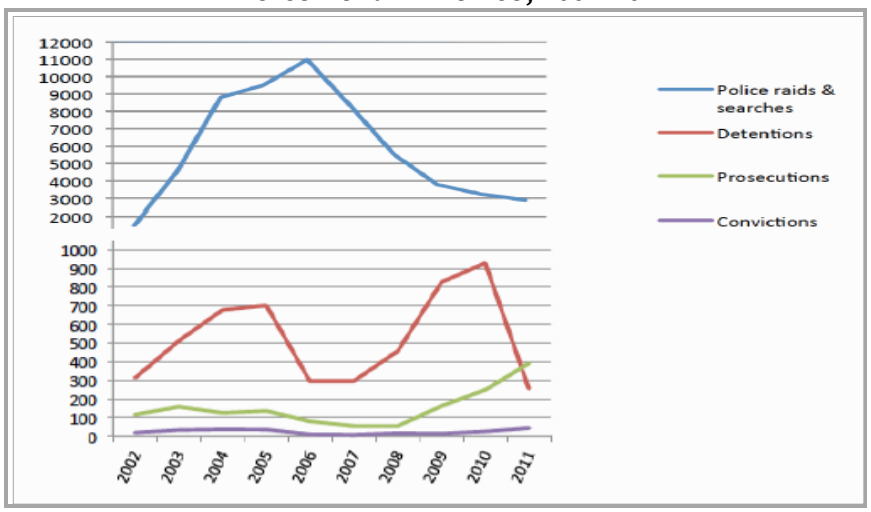
copyright law resulting from implementing NAFTA obligations); and, JORGE A. VARGAS, 4 MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS 24-26 (West Group, 2001).

187 Aguiar, *Nuevas Ilegalidades*, *supra* note 185, at 405-408 (describing increasing criminalization of copyright infringement in Mexico as the result of pressure by international organizations, foreign government, and transnational corporate initiatives); and, Aguiar, *La Piratería*, *supra* note 185 (arguing that criminalization of piracy in Mexico is not the outcome of national interest but result of *"a punitive perspective emanating from networks of international interests and transnational actors characteristic of global neoliberalism"*).

188 Aguiar, *Nuevas Ilegalidades*, *supra* note 185, at 409-418. *See also,* Aguiar, *La Piratería*, *supra* note 185, at 153 (reporting increasing on policy anti-piracy actions between 1995 and 2008).

Table 9:
Measures of Copyright Criminal Enforcement in Mexico, 2002-2011



Data Source: Inst. Nacional de Estadísticas y Geografía, and Procuradoría General de la República, Mexico.

The significant disproportionality among the number of different actions of enforcement, as shown above in Table 9, raises concerns about their arbitrariness. For instance, in 2006, although police raids and searches climbed up to 11 thousand, they barely led to 300 detentions and 9 convictions. Similarly, in 2008, 456 people were detained for infringing the law; however, only 54 were prosecuted. During the analyzed decade, an average of 23 people were convicted each year for copyright piracy, i.e., one out of every 23 detained or one out of 6 prosecuted. Under the Mexican legal regime, persons who are detained and prosecuted may be deprived of their freedom under the harsh conditions of the local penitentiary system, for up to 24 hours in the case of detention, and for as long as the criminal procedure lasts in cases of prosecution. As a matter of fact, by 2011, over

40% of the penitentiary population in Mexico were imprisoned without conviction, but subject to the deprivation of freedom.[189]

The Mexican numbers make apparent that it is the police and prosecutorial authorities who are enacting punitive measures against supposed copyright infringers rather than the judiciary. Those presumed innocent infringers are being deprived of the privacy of their homes and businesses, of their property over supposedly infringing material, of the freedom of movement for more or less time, without any final court's finding of actual copyright violation.[190] This all-out war, in addition to undermining the rule of law, is scorning human rights standards set forth in both international instruments and constitutional framework,[191] particularly on due process.

The aforementioned cases of Chile and Mexico illustrate how certain practices of copyright enforcement infringe human rights standards in Latin America. This shows not only a divorce between the rules on due process of law and actual practices of copyright enforcement, but a more systematic and comprehensive problem of law enforcement with human rights. It is hardly defensible that Mexican nighttime raids without warrants comply

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189 Carranza, *supra* note 20, at 42.

190 *Cf.* Prashant Reddy & Sai Vinod, *The Constitutionality of Preventing "Video Piracy" through Preventive Detention in Indian States*, 7 (3) J. INTEL. PROP. L. & PRAC. 194 (2012) (reporting about detention of certain copyright infringers for months without trial, under some Indian states' laws, which would infringe constitutional allocation of power and the right to due process).

191 Aguiar, *Nuevas Ilegalidades*, *supra* note 185, at 418-422 (arguing that the appearance of a rule of law on enforcing copyright through extreme measures of criminal law against informal local market, of dubious constitutionality, cover a questioning on how and for whom the rule of law works).

with basic exigencies to prevent arbitrary interference with privacy.[192] Similarly, it is difficult to explain the gap between enforcement actions by police, on one side, and actual prosecution and conviction, on the other, except by drawing a line between law enforcement's permissible discretional power and impermissible discrimination.[193] Although most Latin American countries have implemented judicial and procedural reforms that, among other purposes, attempt to achieve consistency with human rights, when copyright enforcement is unleashed, it creates significant tension with the aforementioned human rights.

6. SOME CONCLUSIONS

Human rights violations committed when punishing copyright infringers in Latin America are not merely theoretical, they actually happen. Contrary to common belief that these countries do not enforce the law, the available data, although limited, suggests that criminal copyright punishment is extensively applied within the region. This does not argue efficiency, but existence of a significant level of actual criminal copyright enforcement, which, as is shown in Chapters Four and Five, above, takes place by violating standards of fundamental rights for criminal law set forth by both international instruments on human rights and domestic constitutional law.

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192 ACHR, art. 11 (2).

193 ACHR, art. 1.

In order to relieve the excessive reliance on the criminal system for enforcing copyright, it has been suggested that the law be enforced through administrative authorities and civil courts. The underlying idea of this recommendation is that, if those other mechanisms perform efficiently, there is no need for criminal law intervention. However, this enforcement redesign cannot be the back door for applying measures that are punitive in nature through non-criminal courts without the guarantees that due process requires for criminal law.

This chapter briefly maps some of the human rights challenges that enforcing copyright through non-criminal courts may raise, particularly from the right to due process of law. A first group of concerns refers mainly to the lack of independence and impartiality of administrative bodies enforcing the law. A second group raises concerns about the compliance of certain procedural rules applied by copyright administrative bodies and their effects on the rights to a fair hearing. A third and significant set of questions emerges from the rights to due process applied to those who are subject to criminal charges before non-criminal courts. Certain objections may arise from civil litigation, particularly in the case of non-compensatory damages with deterrence rather than restorative purposes. Similarly, power conferred to administrative authorities for sanctioning and adopting preventive actions may qualify as punitive and, therefore, should be subject to those additional guarantees set forth by international human rights law in favor of criminally accused. Finally, practices and statistics on enforcement suggest that discretional powers of law

officials are problematic from a human rights viewpoint because of their discriminatory effects on due process.

Although this thesis agrees with relieving the criminal enforcement of copyright by transferring jurisdiction on copyright infringement to administrative authorities and civil courts, it calls attention to the potential use of these mechanisms of decriminalization in order to subvert defendants' fundamental rights as granted by both international instruments on human rights and constitutional law. In the coming years, however, achieving an adequate transference of jurisdiction on copyright enforcement may become even more challenging, because of the increasing tendency to strengthen protection by conferring a broader role to civil litigation and administrative bodies on enforcing copyright law.

THIRD PART

ONLINE ENFORCEMENT

Chapter VII

Identifying Supposed Infringers and Information Privacy

Chapter VIII

Taking Down Content and the Right to Due Process

Chapter IX

The Graduated Response from a Human Rights Viewpoint

Chapter VII

Identifying Supposed Infringers and Information Privacy[1]

In spite of its novelty, the right to privacy has received extensive reception in international instruments on human rights and Latin American constitutional texts. Initially it was conceptualized as the right to be let alone, but the increasing progression of technologies has broadened its meaning to become the right to control information about oneself. More recently, scholars have emphasized that, beyond its individual interest, the right to privacy has a social value as a prerequisite for democratic societies and respect for human rights.

Enforcing copyright in online environments may require identifying supposed infringers and, therefore, companies that provide access to the Internet, among other services, could be compelled to collaborate with law enforcement by disclosing the identity of their subscribers.[2] As a matter of fact, some countries have already imposed specific

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1 This chapter benefits from comments to its early draft provided by attendees to the Third Annual Workshop on International and Comparative Law, at the Law School of Washington University (St. Louis, Mar. 1-2, 2013).

2 *But see,* ARTICLE 29 DATA PROTECTION WORKING PARTY, Working Document on Data Protection Issues related to Intellectual Property Rights, adopted on 18 January 2005. Xxxx/05/EN WP104 (concluding, after conducting a broad public consultation of the matter, that, among the issues that create tension between enforcing copyright and protecting the right to privacy were the processing of personal data connected to technological protective measures, the access to Internet subscribers' personal data for copyright enforcement, and the implementation of policies for disconnecting users).

obligations on those service providers in order to cooperate with enforcing the law, including copyright.

The right to privacy is not an absolute right and, therefore, could be subject to limitations. But, from a human rights viewpoint, allowing identification of users by service providers is a limitation to the right to privacy that must comply with specific requisites that authorize eclipsing this right. Such a limitation must be set forth by law because of compelling public interest considerations in a democratic society, and also must be subject to appropriate safeguards.

This chapter analyzes the conflict between rules on identifying supposed online copyright infringers and the right to privacy, that is, the right to control information about oneself. The first section contextualizes the role of Internet service providers (ISPs) on copyright infringement online; several countries have adopted a legal framework that attempts to balance the functioning of the Internet with copyright enforcement by limiting the liability of ISPs that collaborate with enforcing the law. Among other obligations, ISPs are required to identify their subscribers for the purpose of law enforcement, which is described in the second section. Through trade agreements, several Latin American countries have committed to implementing similar legal frameworks into domestic law, which creates some tensions with the right to privacy as the right to control information about oneself. On one hand, countries in the region have a peculiar model of overlapping comprehensive constitutional and statutory protections for the right to privacy, which provides a high level of protection, at least in theory. On the other hand, there are special

risks, such as misunderstandings around the actual effects of an ISP's regime on limitation of liability and the existence of in-force data retention laws throughout the region. These issues are analyzed in sections three and four, while the fifth section provides guidelines for implementing obligations on identifying supposed copyright infringers in compliance with human rights commitments.

1. ONLINE COPYRIGHT INFRINGEMENT AND ISPS' LIABILITY REGIME

Internet is a serious challenge for copyright. The very functioning of Internet requires making successive copies of information that flows through it, which potentially may infringe copyright, if the right holder has not allowed them. Currently, it is clear that making available copyrighted material through the Internet is an exclusive right, but the law exempts those temporary copies needed for the purpose of allowing online communications and, therefore, browsing is not illegal. This is also the prevailing understanding within the region.[3] But, besides the aforementioned temporary copies needed for browsing, users take advantage of the Internet by downloading, uploading,

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3 *But see,* Santiago Schuster, *Propiedad Intelectual en Internet: Responsabilidad Legal en las Redes Digitales,* in 2 CONGRESO INTERNACIONAL PROPIEDAD INTELECTUAL, DERECHO DE AUTOR Y PROPIEDAD INDUSTRIAL 555 (Merida - Venezuela, Universidad de Margarita, 2004) (suggesting that, in the case of those countries that lack an exception for catching copies, *"for now, … that exploitation requires previous authorization* [by right holder]."). *See also,* José Fariñas, *La Responsabilidad de los Prestadores de Servicios en Internet por Infracciones al Derecho de Autor y los Derechos Conexos*, 8 REVISTA PROPIEDAD INTELECTUAL 165, 194 (2005) (suggesting the need for right holder's authorization by stating that exploitation of works lacks support by any copyright exception in Venezuela).

sharing, mailing, and mixing content, among other uses that potentially may infringe copyright. In addition to users' liability, right holders have attempted to hold liable those who provide Internet-related services for infringements committed by their subscribers and users. The underlying assumption is that ISPs should be liable because they facilitate infractions through their technical services, in addition to the fact that they are easier to locate and have greater financial capacity than their users.[4] Accepting right holders' pressure to make ISPs responsible for their users infringement would have stagnated online development, an outcome that has been prevented by legislative actions through regulation that exonerates ISPs from liability for infringing content, under certain circumstances.

There is no international legal framework governing ISPs' liability for their subscribers' infringements, but there are some leading approaches.[5] The United States has a vertical approach that generally provides absolute immunity to ISPs from such kind of liability,[6] excepting copyright issues, in which the law provides a regime on limitation of

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4 Raquel Xalabarder, *La Responsabilidad de los Prestadores de Servicios en Internet (ISP) por Infracciones de Propiedad Intelectual Cometidas por sus Usuarios*, 2 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 54, 54 (2007). *See also,* MARÍA VÁSQUEZ, RESPONSABILIDAD DE LOS INTERMEDIARIOS Y PRESTADORES DE SERVICIO EN INTERNET 16-21 (unpublished Bachelor in Law thesis, Univ. of Chile, 2008).

5 *See* Miguel Peguera Poch, *¿Inmunidad para el Mensajero? La Protección Otorgada a los Proveedores de Servicio de Internet en el Derecho Europeo y Español*, 2 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 54, 17-46 (2007) (comparing both the American and the European Union approaches). *See also,* Raquel XALABARDER, *supra* note 4, pp. 56-69; and, Lorena Piñeiro, *Responsabilidad de los ISPs por Violaciones a la Propiedad Intelectual: Estados Unidos, Europa y Chile*, 5 REVISTA CHILENA DE DERECHO INFORMÁTICO 171, 174-182 (2004).

6 47 U.S.C. §230: US Code - Section 230: Protection for private blocking and screening of offensive material.

liability.[7] In the European Union, communitarian law sets forth a comprehensive horizontal approach that excludes from any responsibility ISPs (information society services, in E.U. language) for any content-related infringement committed by their users.[8] In order to benefit from a limitation of liability, in both European and U.S. regulations, ISPs must comply with some specific obligations that vary according to the nature of services they provide. In a nutshell, regulation provides a *"safe harbor"* to ISPs, by exonerating them from liability for their subscribers' infringements, if the ISPs cooperate with rights holders and act merely in their technical capabilities, by not controlling, initiating, or directing communications (for instance, by choosing content and recipients).

Latin American countries, in general, have lacked regulation on ISPs' liability for their subscribers' copyright infringements analogous to that in the U.S. and E.U. The absence of specific norms regulating potential liability of ISPs, however, does not mean a complete lack of regulation.[9] Each Latin American country already has general provisions

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7 Public Law 105-304: Digital Millennium Copyright Act, Oct. 28, 1998.

8 Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. (L 178), 17/07/2000. *But see,* Dimitris Kioupis, *Criminal Liability on the Internet,* in COPYRIGHT ENFORCEMENT AND THE INTERNET 243-249 (Irini A. Stamatoudi ed., Kluwer Law International, 2010) (arguing criminal liability on third parties, including ISPs that fail to comply with legal duties).

9 Juan Carlos Lara & Claudio Ruiz, *Responsabilidad de los Proveedores de Servicio de Internet (ISPs) en Relación con el Ejercicio del Derecho a la Libertad de Expresión en Latinoamérica* [Liability of Internet Service Providers (ISPs) and the Exercise of Freedom of Expression in Latin America], in HACIA UNA INTERNET LIBRE DE CENSURA: PROPUESTAS PARA AMÉRICA LATINA [Towards an Internet Free of Censorship: Proposals for Latin America] 45-108 (Eduardo A. Bertoni ed., Universidad de Palermo, 2012) (concluding, after reviewing the domestic law of several Latin American countries, that absent specific rules on ISP liability, general provisions on civil liability, as well as some criminal provisions on child pornography and crimes against honor, may still apply). *See also,* Horacio Rangel Ortiz, *El Derecho de Autor y el Ciberespacio en la Jurisprudencia de América Latina en la Primera Década del Siglo XXI*, 1 REVISTA MEXICANA DE

on legal liability and torts that could be used against online service providers to redress infractions committed by their subscribers.[10] But those provisions are not tailored to the digital environment and, therefore, raise some questions and legal uncertainties. For instance, until 2010, when Chile implemented into domestic law the provisions of a free trade agreement on Internet liability regime, local scholars disagreed about the actual

DERECHO DE AUTOR 7 (2012) (reviewing some of the landmark cases on copyright and the Internet in Latin America).

10 *See* Marcelo di Pietro Peralta (mod.), Miguel Peguera Poch, Manoel Joaquim dos Santos, Paulo Rosa, & Daniel Seng, *Roundtable As Responsabilidades dos Provedores de Acesso no Ambiente Digital e a Legislação Autoral*, in ANAIS DO SEMINÁRIO INTERNACIONAL SOBRE DIREITO AUTORAL 36-37 (Ministério da Cultura, 2008) (referring that, despite lacking specific rules on ISP liability for copyright infringement, Brazilian courts have set a general principle that providers of mere access to the Internet are not liable for copyright infringement, and content providers are potentially liable according to the nature of the information and services); and, Demócrito Rainaldo Filho, *A Jurisprudência Brasileira sobre Responsabilidade do Provedor por Publicações na Internet*, 7 REVISTA EL DERECHO INFORMÁTICO 25 (2011) (analyzing the progression of Brazilian case-law on ISP responsibility for content provided by users, highlighting a recent decision by the Sao Paulo Supreme Court holding that an ISP is not responsible for content provided by users unless, having been notified of infringing content, the ISP fails taking adequate measures). *See also,* Fariñas, *supra* note 3, at 191-196 (reviewing Venezuelan domestic law potentially applicable on the matter).

liability of Internet and telecommunication service providers for copyright infringement.[11] Similar disagreements still occur in Brazil,[12] as well as in Argentina.[13]

Through free trade agreements, several countries within the region have committed to implementing into their domestic laws a regime on ISP liability that mirrors

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11 *Compare* Schuster, *supra* note 3, at 563-566 (discussing ISP liability for copyright infringement and arguing that, in order to exonerate ISPs from liability, the law requires their support with enforcement *"on the contrary, common rules on extra-contractual liability could affect them"*) and Santiago Schuster, *Comentarios a la Sentencia de la Corte de Apelaciones de Concepción, Chile*, 3 ANUARIO ANDINO DE DERECHOS INTELECTUALES 431 (2007) (congratulating a court decision for imposing a duty of supervision on ISPs over their subscribers) *with* Cristian Maturana, *Responsabilidad de los Proveedores de Acceso y de Contenidos en Internet*, 1 REVISTA CHILENA DE DERECHO INFORMÁTICO 17, 27 (2002) (rejecting any ISP liability for infringing content provided by third parties for lacking any legal base and for being inconsistent with freedom of expression). *See also,* VÁSQUEZ, *supra* note 4, at 61-65 (arguing an ISP is presumptively liable for copyright infringement committed by its users because it creates risk for copyright holders and *"breaches its obligation to keep watch and control, among others"*), and at 102 (arguing that an ISP would be subject to joint liability according to general rules set forth by the Civil Code, but omitting any specific legal ground on the matter); and, Iñigo de la Maza Gazmuri, *Responsabilidad de los Proveedores de Servicios de Internet por Infracción a los Derechos de Autor*, 1 CUADERNO DE ANÁLISIS JURÍDICO 33, 54-61(2004) (reporting on the legal uncertainty about ISP liability under Chilean domestic law).

12 Pedro N. Mizukami *et al., Brazil,* in MEDIA PIRACY IN EMERGING ECONOMIES 232 (Joe Karaganis ed., Social Science Research Council, 2011) (reporting divergences on ISP liability for their users' acts, and concluding that *"The application of copyright law to online intermediaries and their users, consequently, remains unsettled in Brazil"*).

13 Mónica M. Boretto, *Reflexiones sobre el Futuro del Derecho de Autor*, 8 ARS BONI ET AEQUI 17, 23-24 (2012) (referring to "erratic" Argentinean jurisprudence on liability for online copyright infringement, in absence of an specific law on this matter); María Pérez Pereira, *La Evolución Jurisprudencial en Latinoamerica en torno a la Responsabilidad de los ISP*, 12 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 64, 68 (2012) (noting the lack of regulation on ISP liability in Argentina); Pablo Palazzi, *Copyright Criminal Complaint against YouTube Dismissed in Argentina*, 9 J. INTEL. PROP. L. & PRAC. 177, 177-179 (2014) (reporting on Argentinean case law and its disagreement on civil liability of ISPs for online infringement); and, Adriana Norma Martínez & Adriana Margarita Porcelli, *Alcances de la Responsabilidad Civil de los Proveedores de Servicios de Internet (ISP) y de los Proveedores de Servicios Online (OSP) a Nivel Internacional, Regional y Nacional: Las Disposiciones de Puerto Seguro, Notificación y Deshabilitación,* 6 PENSAR EN DERECHO 117*,* 156-166 (2015) (reporting on disagreement regarding ISPs' liability in Argentinean literature, case law, and legislative attempts).

the one in the U.S. copyright law.[14] Similar obligations, in a strengthened fashion, also have been incorporated into recent negotiations of multilateral instruments on intellectual property and trade,[15] in which some Latin American countries have been involved.[16] Implementing those commitments into domestic law may help reduce legal uncertainty by at least clarifying the cases in which an ISP is not liable for copyright infringements committed by its subscribers.[17] But it does not resolve when an ISP actually is liable for its subscribers' behavior, an issue that remains still under domestic law competence.[18] Additionally, countries may resolve legal ambiguity on ISP liability with respect to

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14 PEDRO ROFFE & MAXIMILIANO SANTA CRUZ, LOS DERECHOS DE PROPIEDAD INTELECTUAL EN LOS ACUERDOS DE LIBRE COMERCIO CELEBRADOS POR PAÍSES DE AMÉRICA LATINA CON PAÍSES DESARROLLADOS 44 (Comisión Económica para América Latina y el Caribe - CEPAL, 2006).

15 MICHAEL BLAKENEY, INTELLECTUAL PROPERTY ENFORCEMENT: A COMMENTARY ON THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) 287-288 (Edward Elgar Publ'g, 2012) (referring to corporate pressure for including provisions on enforcement by ISP into ACTA). *See also,* Rita Matulionyte, *ACTA's Digital Chapter: Remaining Concerns and What Can Be Done*, in THE ACTA AND THE PLURILATERAL ENFORCEMENT AGENDA: GENESIS AND AFTERMATH 115-142 (Pedro Roffe & Xavier Seuba eds., Cambridge Univ. Press, 2015).

16 *See* Alberto Cerda, *Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy*, 26 AM. U. INT'L L. REV. 601 (2011) (arguing that, despite including some safeguards, ACTA fails to provide adequate protection to the right to privacy, particularly in connection with personal data).

17 Mónica Ramírez Hinestroza, *La Responsabilidad de los ISP desde el Punto de Vista de los Contenidos*, 13 REVISTA LA PROPIEDAD INMATERIAL 283, 292-293 (2009) (recognizing that FTA provisions may introduce legal certainty to ISPs doing businesses in Colombia, after analyzing the application of in force general regime of responsibility for online contents).

18 *See infra* notes 115-118 and accompanying text.

infringements other than copyright related by either extending implementing law to those cases,[19] or providing foundations for analogous judicial interpretation for said cases.[20]

Copyright regime on ISP liability raises serious human rights concerns, however. Additional detailed description about this regime is provided in successive chapters, at this point, however, it seems necessary to highlight some of the duties that ISPs should assume in order to exonerate themselves from liability and how they conflict with well-settled human rights obligations. According to the aforementioned free trade agreement commitments, countries should create legal incentives for ISPs to: collaborate with right holders to discourage copyright infringement; block access to or take down online infringing content; identify users who may be copyright infringers; and, eventually, disconnect from the Internet those users who are repeated infringers. Even when ISPs are not required to monitor their subscribers' behavior, in practice, they have become responsible for "policing the Internet" on behalf of copyright holders.[21]

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19 Óscar Montezuma Panez, *Regulando al Intermediario: El Régimen de Limitación de Responsabilidad para los Proveedores de Servicios de Internet en el Acuerdo de Promoción Comercial Perú-Estados Unidos,* 184 ACTUALIDAD JURÍDICA 41, 45 (2009) (suggesting to extend in the near future the scope of rules on limitation of liability adopted for copyright to other legal matters).

20 Matías Hercovich Montalba, *Responsabilidad de los ISP por Contenidos Ilícitos o Infractores de Terceros*, 2 REVISTA CHILENA DE DERECHO Y TECNOLOGÍA 113, 132 (2013) (suggesting that courts could interpret and apply rules set forth by copyright law to issues other than copyright); and, Alberto Cerda, *Cyber Law in Chile*, *in* INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CYBER LAW 121 (Jos Dumortier ed., Kluwer Law Int'l, 2014).

21 Hong Xue, *Enforcement for Development: Why not an Agenda for the Developing World?,* in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVE 145 (Carlos Correa & Xuan Li eds., South Centre, 2009) (arguing that ISPs have been forced to become real *"private police for copyright enforcement"*.).

The aforementioned commitments, improperly implemented into domestic law, could jeopardize free speech and access to knowledge, the right to privacy and data protection, the due process of law, and the presumption of innocence, among other human rights. This and the following two chapters explore some of those measures that attempt to enforce copyright online by potentially diminishing human rights.

2. ISPs' Obligation to Identify Online Users

The law requires subjects to whom legal effects are attributed: creditors and debtors, victims and victimizers, plaintiffs and defendants, and so on. Legal attribution is a well-set process in face-to-face relations, but in the online environment, attribution can be somewhat complex. Online anonymity is not an accidental feature and, particularly since the commercial boom of the Internet, identifying and tracking users have become a main goal for both businesses and governments. A variety of technical and legal mechanisms have been adopted for the purpose of identifying online users, such as electronic signatures, login and passwords, and biometric authentication, among others. One of the mechanisms for identifying a given online user is correlating the number of its Internet connection with personal data processed by the respective ISP.

ISPs long have been in the position to identify online users through IP addresses. An IP address is a number assigned to each device connected to a computer network by an ISP in order to allow online communications, which is part of the technical protocol of

Internet. By knowing the IP address, the day, and the time of a given connection, ISPs are able to identify the computer connected and, consequently, the most likely Internet user's identity and physical address.[22] Currently, several countries require ISPs to process that information in order to contribute to criminal prosecution, especially in so-called "cybercrime."[23]

In the European Union, as noted above, there is a horizontal approach that regulates the liability of ISPs for infringing content, but this legal framework does not require any obligation to identify users. On one side, the 2000 E-Commerce Directive allows EU members to impose obligations on ISPs to provide information to competent public authorities about illegal activities by users of their services with whom they have storage agreements.[24] On the other side, the 2001 Copyright Directive requires adopting appropriate sanctions and remedies against infringement without prejudicing the

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22 In processing IP addresses to identify users, it is necessary to have in mind the difference between dynamic and permanent IP addresses; the first one can vary with each connection, while the latter is permanently linked to a given computer. This tracking system allows identifying a computer rather than a given user. In fact, in some cases, particularly with dynamic IP addresses, it is necessary to adopt additional technical measures in order to identify a specific user. This would be the case in an open network. For instance, universities require users to adopt a user and password, while cybercafés usually require users to identify and to register their identity on paper records. *See* Orin S. Kerr, *Digital Evidence and the New Criminal Procedure,* in CYBERCRIME: DIGITAL COPS IN A NETWORKED ENVIRONMENT 224-228 (Jack M. Balkin *et al.* ed., New York Univ. Press, 2007).

23 Convention on Cybercrime, adopted by Council of Europe, Budapest, November 23, 2001 (ETS No. 185). *See*, Susan W. Brenner, *The Council of Europe's Convention on Cybercrime,* in CYBERCRIME: DIGITAL COPS IN A NETWORKED ENVIRONMENT, *supra* note 22, at 207-220.

24 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [*hereinafter* E-Commerce Directive], arts. 15 and 18.

provisions on privacy and data protection,[25] while the 2004 Intellectual Property Enforcement Directive requires adopting measures to guarantee judicial enforcement of the law.[26] But, as the European Court of Justice (ECJ) ruled in the *Promusicae case*, in which a Spanish copyright collective society demanded ISP Telefónica to disclose the identification and physical addresses of Internet users of a file sharing software, community law does not demand EU members to impose an obligation on ISPs to communicate such personal data to authorities in order to ensure effective protection of copyright.[27]

Community law does not mandate, but would allow, EU members to require ISPs to identify users, according to the ECJ decision in the *Promusicae case*. However, in implementing this kind of obligation into the domestic level, EU members must balance fundamental rights, and national authorities must interpret their national law in a manner consistent with fundamental rights and with the other general principles of community law, such as the principle of proportionality.[28] As was analyzed in Chapter One,[29] the latter

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25 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, arts. 8 and 9.

26 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, art. 8.

27 European Court of Justice, Case C-275/06, Productores de Música de España (Promusicae) v. Telefónica de España SAU, E.C.R. (2008).

28 *Id.*

29 *See supra* Chap. I, notes 164-170 and accompanying text.

balance is a complex test that still leaves a "*considerable degree of discretion*,"[30] which requires that a given measure must be: necessary, in that there is no another way able to achieve the purpose; appropriate, in that it is suitable for satisfying its purpose; and, proportionate *stricto sensu*, that is, reasonable in relation with the right which it pretends to protect. As a result of the cryptic decision, scholars disagree about the aftermaths of the *Promusicae case*, ranging from those that claim the ECJ recommends adopting an obligation to identify users,[31] to those that see an implicit rejection of such kind of obligation because it lacks proportionality.[32] While some authors value the margin of appreciation that the ECJ decision leaves for the moral autonomy of each EU member,[33] most of them seem highly

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30 Xavier Groussot, *Rock the KaZaA: Another Clash of Fundamental Rights*, 45 COMMON MARKET L. REV. 1745, 1761 (2008).

31 Ramón Casas Vallés, *A la Caza del Pirata P2P: El Necesario Equilibrio entre el Derecho de Autor y el Derecho a la Protección de la Intimidad*, 2 WIPO MAGAZINE 10, 11 (2008). *But see,* Ramón Casas Vallés, *Pursuing the P2P Pirates: Balancing Copyright and Privacy Rights*, 2 WIPO MAGAZINE 10, 11 (2008) (avoiding an encouragement statement).

32 Kate Brimsted & Gavin Chesney, *The ECJ's Judgment in Promusicae: The Unintended Consequences – Music to the Ears of Copyright Owners or a Privacy Headache for the Future? A Comment*, 24 COMPUTER L. & SEC. REP. 275, 275-279 (2008).

33 Ronan McCrea, *Religion as a Basis of Law in the Public Order of the European Union,* 16 COLUM. J. EUR. L. 81 (2009/2010).

concerned with the negative effects on the adequate functioning of the internal market,[34] and the potential risks for fundamental rights, particularly on information privacy.[35]

The European Union's legal framework usually is characterized as highly protective of the right to privacy and protection to personal data, but those rights have been put at risk in online copyright enforcement. In 1995, the Data Protection Directive set forth a comprehensive legal regime for processing personal data related to physical persons, by automatic or manual processing, by both the public and private sectors.[36] In 2016, that comprehensive regime was strengthened with the adoption of the General Data Protection Regulation, which will be fully in force by 2018.[37] This comprehensive legal

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34 *See* Fanny Coudert & Evi Werkers, *In The Aftermath of the Promusicae Case: How to Strike the Balance?*, 18 INTER. J. L. & INFO. TECH. 50 (2010); Christopher Kuner, *Data Protection and Rights Protection on the Internet: The Promusicae Judgment of the European Court of Justice*, 5 EUR. INTEL. PROP. REV. 199 (2008) (calling the attention to absence of incentives and resources in the public sector for enforcing the law, which would compel to provide better mechanism to civil enforcement by private parties); Irini A. Stamatoudi, *Data Protection, Secrecy of Communications, and Copyright: Conflicts and Convergences – The Example of Promusicae v. Telefonica,* in COPYRIGHT ENFORCEMENT AND THE INTERNET, *supra* note 8, at 223-231 (expressing concern for a *"uniform (and legally binding) solution"* within the European Union, after reviewing progression of domestic law after the *Promusicae case*); and, Groussot, *supra* note 30, at 1763-1764.

35 Mercedes Soto García, *The Right to Privacy and the Right to Intellectual Property in Internet: the Promusicae Case, A Significant Judgment of the European Court of Justice*, 51 BULL. TRANSILVANIA U. BRASOV 188 (2009) (calling attention to the risks for freedom created by the decision); and, Peter Oliver, *The Protection of Privacy in the Economic Sphere before the European Court of Justice*, 46 COMMON MARKET L. REV. 1443 (2009) (complaining that the ECJ lost the whole purposes of the data protection community law, which are protecting people's privacy and allowing the establishment and functioning of an internal market).

36 Council Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC) [*hereinafter* Data Protection Directive].

37 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC, 2016 O.J. (L. 119) 05/04/2016 [*hereinafter* General Data Protection Regulation].

framework has been complemented by a specific directive on data processing in the telecommunication and Internet sectors,[38] as well as the Data Retention Directive,[39] which encouraged EU members to lay down into domestic law an obligation on ISPs for collecting, processing, and disclosing personal data of their users for the purpose of law enforcement.[40]

Because service providers already had data retention obligations by law, copyright holders pushed for accessing personal information in order to enforce intellectual property.[41] The *Promusicae* case was an achievement for privacy advocates, because the ECJ made clear EU members were not obliged to provide access to data processed by ISPs, in the context of civil copyright enforcement. This criterion was ratified later, in the *Tele2* case, by holding that community law does not preclude EU members from imposing an obligation to disclose to private third parties personal data relating to the Internet traffic

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38 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

39 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [*hereinafter* Data Retention Directive].

40 Data Retention Directive, *supra* note 39, whereas 21.

41 Stefano Rodotá, *La Conservación de los Datos de Tráfico en las Comunicaciones Electrónicas*, 3 REVISTA DE INTERNET, DERECHO Y POLÍTICA 53, 55 (2006) (alerting about the temptation of copyright holders to benefit from data retention laws to enforce their interests). *See also*, Rafael Sánchez, *La Protección de Datos de Carácter Personal, ¿Un Obstáculo para la Protección Efectiva de los Derechos de Propiedad Intelectual en el Entorno Digital?*, 4 REVISTA JURÍDICA DE PROPIEDAD INTELECTUAL 139, 164 (2011) (arguing for amending the Spanish copyright law in order to allow accessing to Internet users' personal data for purpose of civil copyright enforcement, after rejecting the narrow interpretation of communitarian law by the ECJ on the *Promusicae* case).

in order to enable them to bring civil proceedings for copyright infringements, under the limitations set forth in *Promusicae* case.[42] But the court in *Tele2* went beyond that by holding that, even when E-Commerce Directive limits data retention to ISPs that provide storage,[43] the obligation to identify users could be imposed on mere access providers. Otherwise, according to the ECJ's ruling, the protection guaranteed to intellectual property by community law would be substantially diminished, because access providers alone are in possession of personal data that make it possible to identify an infringer.[44]

In 2014, the ECJ went further by nullifying the Data Retention Directive, which imposed on ISPs the obligation to store data about their users for purpose of law enforcement.[45] According to the ECJ, the Data Retention Directive enabled a wide-ranging and particularly serious interference with the fundamental rights to the respect for private life and to the protection of personal data, without that interference being limited to what is strictly necessary. The ECJ´s decision not only nullified the common framework set by the European Union, but also set in motion a revision of implementing law adopted by EU members on this matter. As a result, until the EU figures out a new policy for assuring the identification of online users for law enforcement, copyright holders do not have the support of a data retention legal framework for enforcing their interests.

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42 European Court of Justice, Case C-557/07, *Oberster Gerichtshof (Austria) - LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH*, E.C.R., paras. 29, 42-46, and decisions 1 and 2 (2009).

43 E-Commerce Directive, *supra* note 24, art. 15.2.

44 European Court of Justice, *supra* note 42 paras. 42-46, and decision 2.

45 Joined Cases C-293/12, C-594/12, Digital Rights Ireland, E.C.R. (2014).

In a nutshell, community law does not require EU members to obligate ISPs to identify users that supposedly infringe copyright, but would allow adopting that kind of rule into domestic law, even by ISPs that provide mere access. Lacking a common understanding at the community level about identifying online copyright infringers has become troublesome in the European Union, particularly in the context of implementing a *graduated response* (*i.e.,* sanctioning with disconnection from the Internet those who infringe copyright repeatedly) into domestic law and introducing significant recent changes in community telecommunication law, as Chapter Nine explains.[46] However, in implementing obligations on identifying infringers, several predicates must occur: a legislative body must enact a law setting the applicable rules;[47] the rules and their interpretation must be consistent with the community law, general legal principles and, in particular, with fundamental rights;[48] and, the information must be delivered to competent public authorities.[49]

In the United States, the Digital Millennium Copyright Act (DMCA) is the piece of regulation that sets forth rules that ISPs must follow to avoid liability for online copyright infringement committed by their Internet users. The DMCA does not create a

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46 *See infra* Chap. IX, notes 2-16 and accompanying text.

47 Data Protection Directive, *supra* note 36, art. 7.

48 European Court of Justice, Case C-557/07, *supra* note 27.

49 E-Commerce Directive, *supra* note 24, art. 15 (2).

general duty to monitor or control users,[50] but instead imposes several obligations that assist copyright holders in enforcing the law, including identifying certain users, particularly those that use hosting services, who supposedly have infringed copyright.[51] Since 2003, the Recording Industry Association of America (RIAA) has used this mechanism extensively to identify and then sue end-users of P2P systems for civil copyright infringement,[52] in part because the DMCA sets forth a highly expeditious procedure to identify an infringer, with minimal showings and without filing a real suit.[53] Basically, by filing some documents,[54] any copyright owner or person authorized can request the clerk of any district court to issue a subpoena to an ISP to identify an alleged infringer,[55] by disclosing certain information to the copyright owner or an authorized person.[56]

The scope of the DMCA provisions on identifying users is limited to those ISPs that provide hosting services, though. In a landmark case, Verizon refused to provide any

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50 §512 m) of the U.S.C., Title 17 – Copyright Act.

51 §512 h) of the U.S.C., Title 17 – Copyright Act.

52 Thomas P. Owen & A. Benjamin Katz, *RIAA v. Verizon Internet Services, Inc.: Peer-to-Peer Networking Renders Section 512(h) Subpoenas under the Digital Millennium Copyright Act Obsolete*, 24 LOY. L.A. ENT. L. REV. 619, 619 (2004).

53 Peter P. Swire, in Julie E. Cohen *et al., Copyright & Privacy – Through the Privacy Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 273, 276 (2005); Owen & Katz, *supra* note 52, at 620; Alice Kao, *RIAA v. Verizon: Applying the Subpoena Provision of the DMCA*, 19 BERKELEY TECH. L.J. 405, 410 (2004); and, MELVILL B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT §12.B.09 [A][1] (Matthew Bender rev. ed., LexisNexis, 2017).

54 §512 h) (2) of the U.S.C., Title 17 – Copyright Act.

55 §512 h) (1) of the U.S.C., Title 17 – Copyright Act.

56 §512 h) (3) and (5) of the U.S.C., Title 17 – Copyright Act.

information about its subscribers to RIAA, by arguing that an ISP that provides mere access or transmission is not compelled to deliver information of its users, because the provision on identifying users only applies to ISPs storing infringing works.[57] For its part, the RIAA argued that the law compelled Verizon to identify users, otherwise the whole purpose of the law would be defeated and, additionally, there was no policy justification for limiting the subpoena scope.[58] The court of appeals expressed sympathy for RIAA's concern, but considered that Congress was called to extend the scope of the provision, and that the obligation to identify users did not apply to ISPs that merely provide access to the Internet, which was the case of Verizon.[59] In a second case, Verizon argued that the same obligation is unconstitutional, because the law authorizes court to issue a subpoena in absence of a pending case or controversy, which would infringe the Judicial Power clause of the Constitution,[60] and because the absence of greater safeguards to protect Internet users' anonymity produces a chilling effect on free speech. However, by deciding on statutory rather than on policy grounds, the court avoided addressing any constitutional concern.[61]

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57 §512 h) (2) (A) of the U.S.C., Title 17 – Copyright Act (requiring, in order to issue the subpoena, a copy of the notification described in subsection (c) (3) (A), which does not apply to ISPs that do not store copyrighted material, but provide mere access to the Internet). *But see*, Trevor A. Dutcher, *A Discussion of the Mechanics of the DMCA Safe Harbors and Subpoena Power, as Applied in RIAA v. Verizon Internet Services*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 493 (2005).

58 *See* Frank Chao, *Piracy Deserves No Privacy*, 2 DUKE L. & TECH. REV. 1 (2003) (agreeing with RIAA's argument and arguing that Internet users have not privacy in front of ISP, because they process their personal data in the technical process of providing service).

59 *RIAA v. Verizon Internet Services, Inc.*, 351 F.3d 1229, 1237 (D.C. Cir. 2003), *cert. denied,* 543 U.S. 924 (2004).

60 U.S. Constitution, art. III.

61 Peter P. SWIRE, in Cohen *et al., supra* note 53, at 273 *et seq.*

Verizon was a triumph for privacy advocates, but it did not affect seriously RIAA's policies, because the RIAA still can use an alternative mechanism for identifying supposed infringer, which is the subpoena available to any litigant who desires to sue an unknown defendant by filing against a *John Doe*. This mechanism, which consist on identifying users of P2P protocols through a Doe lawsuit plus a discovery subpoena, provides more substantive and procedural protections for Internet users, but it is not enough to avoid misuse and abuse of procedure. As a result, copyright owners still have mechanisms for forcing ISPs to identify supposed infringers.[62] Since 2011, copyright holders have attempted the use of these subpoena mechanisms for identifying masses of P2P infringers, with has raised conflicting decisions by courts because of consideration on free speech, personal jurisdiction, joint liability, abusive and extortionate practices of litigation.[63] Some authors have argued that these provisions are excessively permissive and seriously threaten the right to privacy,[64] in addition to free speech.

The United States has exported the DMCA legal framework to third countries, including several Latin American ones, through a series of free trade agreements. Since 2003, all those agreements have included a specific clause that requires country parties to lay down into their domestic law an obligation for ISPs to identify users who supposedly

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62 Kao, *supra* note 53, at 418, 422-426; and, Owen & Katz, *supra* note 52, at 632-634.

63 NIMMER & NIMMER, *supra* note 53, at §12.B.09 [A][4]; and, JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI, AND MAUREEN A. O´ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 514-515 (Wolter Kluwer, 3rd. ed., 2010).

64 Peter P. SWIRE, in Cohen *et al., supra* note 53, at 273 *et seq.*

have committed copyright infringement, similar to the DMCA provision on the matter. The following pages analyze potential risks to the right to privacy that can result from implementing these kinds of obligations into Latin America's domestic law, followed by some recommendations on the matter. But, first, it reviews the protection of personal information as a human and constitutional right in Latin America.

3. INFORMATION PRIVACY AND HABEAS DATA IN LATIN AMERICA

The formulation of the right to privacy took place belatedly in the nineteenth century, when BRANDEIS and WARREN elaborated it as the right to be let alone.[65] In spite of its relative novelty, it made its way to leading international instruments on human rights, including the American Convention on Human Rights.[66] However, leaving aside its extensive treatment in Europe,[67] the right to privacy still has an extremely generic recognition, usually mixed with other legal interests, such as the rights to inviolability of home and communication, and the rights to honor and image, among others. The Inter American Human Rights Court has issued some limited judgments on this matter, by ruling that depriving a parent of custody of her children because of her sexual orientation

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65 Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

66 ADHR, art. 5; UDHR, art. 12; ICCPR, art. 17; and, ACHR, art. 11.

67 *See infra* notes 80-83 and accompanying text.

infringes on her privacy,[68] and that prisoners are not deprived of privacy because of imprisonment.[69] Most of the decisions, however, refer to privacy infringements in connection with other fundamental rights, such as in cases of sexual violence and other gross human rights violations.[70] The Court has not elaborated on either the right to privacy generally or information privacy in particular. But this omission hasn't been an obstacle for better elaboration in domestic law.

In the late 1960's, the increasing power that technology provided for processing personal information raised concerns about democratic society's need to adopt limitations in order to protect human rights.[71] This led to an evolution of the right to privacy, in the formulation of Charles FRIED, the right to privacy became the right to control information

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68 *Atala Riffo and daughters v. Chile*, 2012 Inter-Am. Ct. H.R., (ser. C) No. 239, paras. 161-174 (Feb. 24, 2012).

69 Norín Catrimán et al. (Leaders, members and activist of the Indigenous Mapuche People) v. Chile, 2014 Inter-Am. Ct. H.R., (ser. C) No. 279, para. 390 (May 29, 2014).

70 THOMAS M. ANTKOWIAK & ALEJANDRA GONZA, THE AMERICAN CONVENTION ON HUMAN RIGHTS 119 (Oxford Univ. Press, 2017) *See also,* Carlos J. Zelada & Eduardo Bertoni*, Apuntes sobre la Vida Privada desde la Jurisprudencia de la Corte Inter Americana de Derechos Humanos*, 1 FORSETI 123 (2013) (reviewing cases law on the right to privacy before the Inter American Human Rights Court, mainly connecting the right to privacy with gross human rights violations and intimacy rather than information privacy); and, María Solange Maqueo Ramírez, Jimena Moreno González, & Miguel Recio Gayo, *Protección de Datos Personales, Privacidad y Vida Privada: la Inquietante Búsqueda de un Equilibrio Global Necesario*, 30 REVISTA DE DERECHO (VALDIVIA) 77, 83-85 (2017) (summarizing case law by the Inter American Human Rights Court on the right to privacy and noting lack of jurisprudence regarding personal data protection).

71 *See*, Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968) (proclaiming that scientific discoveries and technological advances may endanger the rights and freedoms of individuals and will require continuing attention).

about oneself.[72] Starting in the 1970's, such concerns provoked developed countries to enact laws that regulate the automatic processing of personal data, initially by state actors, and later also by the private sector. Maybe because of its novelty, this right has several denominations: information privacy in the United States,[73] informational freedom or informational self-determination in Europe,[74] and Latin America,[75] where it is also known as *habeas data*.[76] Some scholars, instead, view controlling personal information as a mere new dimension of the right to privacy.[77] But, whatever and wherever its name, this right

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72 Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968). *See also,* ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (Atheneum, 1967) (understanding privacy as the right to control personal information).

73 DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 1-2 (Wolters Kluwer, 3rd ed., 2009) (referring to "information privacy"); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000) (referring to "informational privacy"). *See also,* Charles Fried, *supra* note 72, at 482 (stating that "*privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves*."); and WESTIN, *supra* note 72, at 7 (expressing that *"Privacy is the claim of individual, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"*).

74 Vittorio Frossini, *Los Derechos Humanos en la Sociedad Tecnológica*, 2 ANUARIO DE DERECHOS HUMANOS 101, 101-115 (1983); PABLO LUCAS MURILLO DE LA CUEVA, EL DERECHO A LA AUTODETERMINACIÓN INFORMATIVA: LA PROTECCIÓN DE LOS DATOS PERSONALES FRENTE A LA INFORMÁTICA (Ed. Tecnos, 1990); and, Antonio Enrique Pérez-Luño, *Los Derechos Humanos en la Sociedad Tecnológica*, 21 CUADERNOS Y DEBATES 1 (Centro de Estudios Constitucionales, 1989).

75 HUMBERTO NOGUERA, EL DERECHO A LA LIBERTAD DE OPINIÓN E INFORMACIÓN Y SUS LÍMITES 152-153 (Lexis-Nexis, 2002); ALFREDO CHIRINO SÁNCHEZ & WINFRIED HASSEMER, EL DERECHO A LA AUTODETERMINACION INFORMATICA Y LOS RETOS DEL PROCESAMIENTO AUTOMATIZADO DE DATOS (Ed. Del Puerto, 2003).

76 *See* OSCAR PUCCINELLI, EL HABEAS DATA EN INDOIBEROAMÉRICA (Temis, 1999); and, PABLO PALAZZI, LA TRANSMISIÓN INTERNACIONAL DE DATOS PERSONALES Y LA PROTECCIÓN DE LA PRIVACIDAD (Ad-Hoc, 2002).

77 EMILIO SUÑÉ, TRATADO DE DERECHO INFORMÁTICO 29-31 (Universidad Complutense 2000); ANTONIO ORTI VALLEJO, DERECHO A LA INTIMIDAD E INFORMÁTICA (Ed. Comares, 1994); OLGA ESTADELLA YUSTE, LA PROTECCIÓN DE LA INTIMIDAD FRENTE A LA TRANSMISIÓN INTERNACIONAL DE DATOS PERSONALES 24-33 (Ed. Tecnos, 1995); MIGUEL ANGEL EKMEKDJIAN AND CALOGERO PIZZOLO, HABEAS DATA: EL DERECHO A LA INTIMIDAD FRENTE A LA REVOLUCIÓN INFORMÁTICA (Edic. Depalma, 2nd ed., 1998); and,

includes the power of people to choose to whom, when, how, and for what purpose to reveal their personal information. Information privacy allows people to control their data, not only for satisfying someone's individual interest in preventing others from knowing about his private life, but also to meet the social interest in preserving necessary preconditions for exercising fundamental rights and the functioning of democratic order.

The United States was the first country to adopt a specific law protecting data privacy. In addition to constitutional clauses that provided protection for the right to privacy with respect to the government,[78] the United States adopted the Fair Credit Reporting Act (1970) and the Privacy Act (1973). In the following years, the United States enacted a number of federal laws (as did several states) for regulating the processing of personal information by both the private and public sectors in some specific contexts.[79] As a result, data privacy has become a highly tailored legal framework, but also a fragmentary one, which leaves open loopholes; for example, there are special data privacy laws for telecommunication providers and also for medical services, but not for providers

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PEDRO GRIMALT SERVERA, LA RESPONSABILIDAD CIVIL EN EL TRATAMIENTO AUTOMATIZADO DE DATOS PERSONALES 22-25 (Ed. Comares, 1999).

78 SOLOVE & SCHWARTZ, *supra* note 73, at 33; and, ANITA L. ALLEN, PRIVACY LAW AND SOCIETY 183 *et seq.* (Thomson, 2007) (stating that the right to privacy lacks an express recognition in the U.S. Constitution, but it is protected through several constitutional amendments, which provide protection against government intrusion on private life, but not against private parties).

79 Among the rambling lattice of federal and state laws, by way of example, can be mentioned the Fair Credit Reporting Act (1970), the Consumer Credit Reporting Reform Act (1996), the Electronic Funds Transfer Act (1978), the Right to Financial Privacy Act (1978), the Cable Communications Policy Act (1984), the Electronic Communications Privacy Act (1986), the Video Privacy Protection Act (1988), the Telephone Consumer Protection Act (1991), the Driver's Privacy Protection Act (1994), the Telecommunications Act (1996), the Aviation and Transportation Security Act (2001), and the Can Spam Act (2003).

of online storage of medical records. U.S. data privacy law, particularly with respect to the private processing of personal information, relies on the "*notice and choice*" principle; people must be notified of the processing of their data and have the choice to opt-out. Self-regulation and self-control, rather than governmental overseeing of data processing, are essential for the proper functioning of this model.

The E.U. also has been exceptionally proactive in adopting a common regime for the processing of personal data. During the 1970's, several E.U. members adopted domestic laws on data privacy, but this was not enough; the proper functioning of the internal market and a complete protection for the right to privacy required some legal harmonization through the Union. The E.U. carried out this process first through the Strasburg Convention (1981), then the Data Protection Directive (1995), and later the General Data Protection Regulation (2016).[80] As a result, E.U. members progressively have built a harmonized and comprehensive legal framework that regulates automatic and manual processing of personal data related to physical persons by the public and private sectors. The framework recognizes the right to control the information about oneself and, therefore, processing of personal data requires consent of the data subject or a legal

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[80] *See* Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Jan. 28, 1981, E.T.S. No. 108 (attempting for first time the harmonization of personal data protection law among countries of the European community); Council Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC); and, Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [*hereinafter* General Data Protection Regulation], 2016 O.J. (L 119) 1–88.

authorization; the enforcement of the law is strengthened through an independent public authority on data protection. Additionally, to achieve protection beyond borders, the E.U. regulates international transfers of personal data from its territory, by banning transfers to third countries, unless the importing country provides an adequate level of protection, which is determined by E.U. authorities.[81] Several other directives complement this general framework by adapting its principles to specific contexts of personal data processing.[82] Ultimately, the E.U. has recognized the protection of personal data as autonomous human rights, different than the right to privacy, in its regional human right charter.[83]

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81 General Data Protection Regulation, *supra* note 80, whereas 101-108; and, General Data Protection Regulation, *supra* note 80, arts. 44-50. *See also,* Data Protection Directive, *supra* note 36, whereas 56-60; Data Protection Directive, *supra* note 36, arts. 25 and 26 (requiring an "*adequate*" level of protection in third countries before data can be transferred to them and setting forth some limited exceptions); and, Commission Decisions on the Adequacy of the Protection of Personal Data in Third Countries, Eur. Commission, http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/indexen.htm (last visited June. 18, 2017) (listing countries that provide adequate level of protection and those to which some transfers of data have been accepted by EU authorities).

82 *See, e.g.,* Council Directive 2002/58, 2002 O.J. (L 201) 37 (EC) (adopting the Directive on Privacy and Electronic Communications); and, Council Directive 2006/24, 2006 O.J. (L 105) 54 (EC) (adopting the Data Retention Directive).

83 *Compare* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5; 213 U.N.T.S. 221, art. 8 (recognizing the right to privacy) *with* Charter of Fundamental Rights of the European Union, 2000/C 364/01, O.J. 18.12.2000, art. 7 (recognizing the right to privacy), and 8 (recognizing the right to protection of personal data). *See also,* Maris Burbergs, *How the Rights to Respect for Private and Family Life, Home and Correspondence Became the Nursery in Which New Rights Are Born,* in SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS 316 (Eva Brems & Janneke Gerards eds., Cambridge Univ. Press, 2013) (referring to the rights on collection and use of data as part of new rights that have achieved autonomous status from the right to privacy).

Until the late 1990's, data privacy protection was not a serious concern in Latin America.[84] From a political viewpoint, before the end of the Cold War and the progressive decline of pervasive dictatorships, data privacy protection played an extremely marginal role in the region. From a technical perspective, countries lacking technological capabilities instead focused on reestablishing and reinforcing democratic governments, advancing transitional justice, and being able to meet the challenges of protecting human rights in the most urgent and drastic cases. Only during the last decade has Latin America started the process of creating data privacy protections. Despite its recent emergence, significant progress has been made throughout the region in adopting a legal framework on data privacy, by transiting progressively from a model based on comprehensive constitutional rules and fragmentary statutory provisions to a model based on both constitutional and statutory comprehensive protection.[85] However, the regulatory process has not been either homogeneous or unidirectional, on the contrary, it still shows an idiosyncratic approach.[86]

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84 ESTADELLA YUSTE, *supra* note 77, at 59-60 (arguing that developing countries did not pay attention to protection of informational privacy because of divergent interests, since they saw in technology an opportunity for development, were under totalitarian regimes, or considered privacy concerns to lack a global scope). In addition, the technological capabilities for processing personal data were also limited in those countries, relatively speaking.

85 *See* Lorenzo Villegas, *Protección de Datos Personales en América Latina: Retención y Tratamiento de Datos Personales en el Mundo de Internet,* in HACIA UNA INTERNET LIBRE DE CENSURA: PROPUESTAS PARA AMÉRICA LATINA, *supra* note 9, at 125-164 (referring to a Latin American model of information privacy law, in which protection is moving from constitutional grounds to comprehensive regulation, when arguing for deregulation on the matter). *But see,* Alberto Cerda, *Protección de Datos Personales y Prestación de Servicios en Línea en América Latina, in* HACIA UNA INTERNET LIBRE DE CENSURA: PROPUESTAS PARA AMÉRICA LATINA, *supra* note 9, pp. 165-180 (describing Latin American data privacy law as a transitional model with overlap between comprehensive constitutional and regulatory protections, in arguing for strong information privacy law within the region). *See also,* PALAZZI, *supra* note 76; and, OSCAR PUCCINELLI, PROTECCIÓN DE DATOS DE CARÁCTER PERSONAL (Astrea, 2004).

86 *See* ARISTEO GARCÍA GONZÁLEZ ET AL, PROTECCIÓN DE DATOS Y HABEAS DATA: UNA VISIÓN DESDE IBEROAMÉRICA (Daniel A. López Carballo ed., Agencia Española de

As a starting point, Latin American law provides fragmentary statutory protection for data privacy. Civil law provides some protection, particularly with respect to people's personal data processed by tax administrations, banking and financial systems, credit reporting services and, in a more limited fashion, by telecommunication services. Rules on extra-contractual civil responsibility and some narrow criminal provisions – e.g., about violating correspondence, privacy intrusion, and home inviolability – provide some additional protections. Therefore, at least for protecting privacy from serious violations, Latin American countries provide some legal remedies, even when limited, marginal, and sometimes inefficient. But this fragmentary statutory protection is the baseline, which limitations have been ameliorated by an additional comprehensive constitutional protection.

Latin American constitutionalism has protected the right to control information about oneself thought a constitutional right to privacy. Today, unlike in the United States,[87] the right to privacy has an express and autonomous recognition in almost all the constitutions of the region.[88] Even when the scope of the right to privacy is less broad

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Protección de Datos, 2015) (providing a comprehensive review of data protection and habeas data among countries in both Latin America and the Iberian Peninsula).

87 *See supra* note 78.

88 Const. Arg., arts. 18 and 19; C. F. Braz., art. 5.10; Const. Chile, art. 19 No. 4; Const. Colom., art. 15; Const. Costa Rica, art. 24; Const. Mex., art. 6 II; Const. Peru, art. 2.7; Const. Venez., art. 60 No. 1. *See also,* Eduardo Gregorio Esteva Gallicchio, *El Derecho a la Protección de la Vida Privada y el Derecho a la Libertad de Información en la Doctrina y en la Jurisprudencia en Uruguay*, 6 ESTUDIOS CONSTITUCIONALES 15 (2008) (referring to the implicit recognition of the right to privacy in the Uruguayan constitution); and, MARTÍN RISO FERRAND, DERECHO CONSTITUCIONAL 576 (Fundación de Cultura Universitaria, 2nd ed., 2006) (reporting

than in the United States, Latin American courts have recognized that privacy includes the right to control information about oneself.[89] Additionally, several countries have set forth the so-called *habeas data* right, an autonomous constitutional right to control personal data, even if it does not refer to what may be considered private issues.[90] In all those constitutions, the right to control information about oneself (data privacy) is independently recognized from the right to privacy and, as a matter of fact, those two rights are delinked, which implies constitutional protection for personal data, even if information is not private and/or is publicly available.

In addition to recognizing a constitutional right to control personal information, Latin American countries provide constitutional remedies for enforcing that right. Among those remedies, the most relevant are the so-called *amparo proceedings* and the *acción de habeas data*. The *amparo proceeding* has been used profusely in Latin America for protecting data privacy, as well as other fundamental rights.[91] In Chile, there are records of intensive use of this constitutional remedy since the early 1980's in cases involving improper processing

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scholars' discussion about the exact provision of the Uruguayan Constitution that supports the right to privacy).

89 *See, e.g.,* Supreme Court of Justice, Constitutional Court, case 118-2002, March 2, 2004, *Boris Rubén Solórzano v. Dicom Centroamérica y General Automotriz* (El Salvador) (rejecting the plaintiff's argument that the defendant had infringed her right to privacy, by informing old breach of contract of credit, since the information was updated and mentioned the fact that the debt was paid); in Chile, *see infra* 92.

90 Const. Arg., art. 43; C. F. Braz., art. 5 LXXII; Const. Colom., art. 15; Const. Mex., art. 6 II and III; Const. Peru, art. 2.6; and, Const. Venez., arts. 28 and 60 No. 2.

91 *See supra* Chap. I, notes 47-64 and accompanying text.

of personal information.[92] It also has been abundantly used in Colombia and Costa Rica for enforcing data privacy against public health systems, police officers, judicial records, and land registrars, among several others. The *acción de habeas data* is another constitutional remedy that allows enforcing data privacy – and also the access to public information. This procedure is widely used in Argentina,[93] which has granted it at federal and provincial levels.[94] With fewer requirements than *amparo*,[95] *habeas data* has become the primary remedy in cases of improper processing of personal data.

Although constitutional remedies, like aforementioned *habeas data*, facilitate the actual enforcement of the rights to control personal information, they do have their own limitations. These constitutional remedies are an expeditious mechanism for challenging an act that infringes someone´s constitutional rights, including actions taken by state and non-state actors, as well as action taken under color of law. These remedies permits

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92 EMILIO RIOSECO ENRÍQUEZ, EL DERECHO CIVIL Y LA CONSTITUCIÓN ANTE LA JURISPRUDENCIA 70-71 (Ed. Jurídica de Chile, 1996) (referring to several data privacy cases before the Chilean Supreme Court and Courts of Appeals since the early 1980's).

93 ELECTRONIC PRIVACY INFORMATION CENTER & PRIVACY INTERNATIONAL, PRIVACY AND HUMAN RIGHTS, 2006: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS (2007) (reporting abundant judicial cases of habeas data before Argentinean courts). *See also,* Article 29 Data Protection Working Party, Opinion 4/2002 on the level of protection of personal data in the Argentina, Oct. 3, 2002, WP 63.

94 Const. Arg., art. 43.3 (setting forth an action to obtain information on personal data registered in public and private databases, and to request suppression, rectification, confidentiality or updating of said data). *See* MARCELA BASTERRA, PROTECCIÓN DE DATOS PERSONALES: LEY 25.326 Y DECRETO 1558/01 COMENTADOS 194 (UNAM, 2008) (discussing that, by 2008, around two third of provincial constitutions and one third of provincial statutes had introduced habeas data).

95 *Compare* Const. Arg., art. 43.1 (conferring action of *amparo* when no other more suitable judicial remedy exists) *with* Const. Arg., art. 43.3 (conferring habeas data in any event).

preventing and ending infringing actions, for instance, the unauthorized collection of personal information, the illegal transfer of personal data, and discriminatory practices of processing said data. However, these mechanisms have their own limitation. For instance, these remedies cannot be used for challenging a law duly adopted by the legislature or for appealing court decisions by litigating parties, because of existing other legal mechanisms for exercising constitutional control against legislative and judicial decisions.[96]

Providing protection to data privacy through constitutional provisions, as almost all Latin American countries do, has some advantages. It fills in loopholes of fragmentary statutory regulation, provides a flexible regulatory approach and, when accompanied by constitutional remedies, provides an efficient mechanism for enforcing the right to control personal data. But it has some disadvantages too, such as the high transactional cost of enforcement, particularly in countries with concentrated systems of constitutional review, as well as the fact it generally does not apply against legislative acts, whose constitutional control is governed by different legal remedies. The main problem, however, is that judging through constitutional provisions that, as has been pointed out by Robert ALEXY,[97] are based on general principles rather than in concrete rules, creates some level of legal uncertainty. This doubt may be resolved through reference to judicial precedent, which still is an oddity in civil law countries,[98] or legislative regulation, which, as will be addressed

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96 *See supra* Chap. I, note 65 and accompanying text.

97 ROBERT ALEXY, TEORÍA DE LOS DERECHOS FUNDAMENTALES 86-87 (Centro de Estudios Constitucionales, 1993) (making a clear distinction between rules and principles).

98 *See supra* Chap. I, notes 88-91 and accompanying text.

below, has been the case of some Latin American countries. Another important negative factor is that this regulatory approach does not satisfy European Union standards of protection and, therefore, Latin American countries suffer restrictions on importing personal data from the European Union, which raise obstacles for operating some businesses.[99] This data privacy protection model, based on comprehensive constitutional clauses overlapping with fragmentary statutory provisions, prevails in Latin America, and it is in force in Bolivia, Brazil, Ecuador, Venezuela, and most Central American countries.

In recent years, however, several countries in Latin America have developed an overlapping comprehensive constitutional and statutory protection for the right to control personal data. In 1999, Chile became the first Latin American country to adopt a comprehensive law on data privacy,[100] which protects against unfair processing of personal data by both the public and private sectors, but fails to regulate the international transference of data and establish a supervisory public authority on the matter. Soon after, other main economies in the region began adopting comprehensive laws on personal data protection, strongly motivated to remove obstacles for doing businesses with the European Union,[101] including: Argentina (2002) and Uruguay (2008), both already qualified

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99 *But see,* Andrés Guadamuz, *Habeas Data: The Latin-American Response to Data Protection*, 2 J. INFO., L. & TECH. 1 (2000) (arguing that constitutional protection may allow a country to qualify as one that provide an adequate level of protection, according to E.U. standards).

100 Ley No. 19.628 sobre Protección de la Vida Privada [Law No. 19.628 for the Protection of Private Life], Diario Oficial, Aug. 28, 1999 (Chile).

101 *See* Artemi Rallo Lombarte, *Regional Approaches to Data Protection and International Transfers of Personal Data: Latin America, in* Workshop on International Transfers of Personal Data, Brussels, Oct. 21, 2008 (reporting that, according to statistics from the Spanish data protection authority, around 40% of special authorizations issued between 2005 and 2008 were required

as safe harbor countries by the European Union, and more recently, Colombia and Mexico (2010), Costa Rica and Peru (2011), while Brazil is discussing a bill that also would follow the European Union path.

The emerging Latin American model of protection for personal data, which merges peculiarities of Latin American constitutionalism with comprehensive data protection law under European influences, implies significant substantive progress. In the coming years, however, the region will face different challenges to data protection. At the domestic level, countries have to work on consolidating comprehensive legal and constitutional regulations; improving efficiency of their enforcement systems; updating legal regimes to address new issues, such as biometry, algorithmic decision-making, illegal surveillance, e-commerce and online services; and harmonizing data protection laws with the needs associated with the use of personal information on criminal enforcement and the fight against terrorism. At the international level, the main challenges for Latin American countries would be achieving international harmonization within and outside the region, particularly with the European Union in light of the recent adoption of the General Data Protection Regulation; exploring the enforcement of data privacy through the Inter-American Human Rights System, which still has failed to play any significant role on the matter;[102] and exploring some regional engagement by the Organization of

by Latin American entities, because of the inadequate protection of personal data in their countries of origin).

102 *See supra* note 70.

American States, which has shown only timid efforts on this matter.[103] The following pages focus on the challenges to information privacy by online copyright enforcement, particularly on obliging ISPs to identify users who supposedly have infringed on copyright law.

4. Special Risks on Identifying Online Users in Latin America

Most Latin American countries lack specific provisions governing the identification of users by ISPs for purposes of copyright enforcement, but general provisions about disclosing documents available in old procedural codifications may apply. Those provisions allowing documental disclosure, however, are not tailored for digital environment. They are designed for dealing with limited and precise records and pieces of tangible evidence, not with large, massive, and digital information such as that processed by ISPs. Additionally, traditional disclosure of information enjoys proper mechanisms for safeguarding the right to privacy, whether information is obtained from the affected party or third parties. Judges, prosecutors, police officers, and parties are familiar and well aware of limitations, procedures, and warranties that deal with traditional disclosure. Reducing

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103 Since 1996, the Organization of American States has been working on a Model Inter-American Law on Access to Public Information, whose later drafting includes language on the protection of personal data, although its provisions are regressive compared with comparative and international laws, as well as prevailing constitutional and legal frameworks adopted by Latin American countries. More information at the Department of International Law of the Secretariat for Legal Affairs of the Organization of American States http://www.oas.org/es/sla/ddi/protecciondatospersonalesleymodelo.asp (last visit: June 18, 2017).

the legal uncertainty of applying those old rules to online communications and increasing the risk of disproportional disclosure encourage adopting specific rules for identifying online users. From that viewpoint, adopting a framework for accessing personal data and identifying online users that harmonizes with human rights obligations seems a progress, but if they poorly balance competing interests, it could jeopardize people's rights and the essential conditions for democratic societies.

Since 2003, free trade agreements signed by the United States with several Latin American countries requires parties to have in place procedures for identifying users.[104] Unlike other enforcement mechanisms, free trade agreements (FTAs) provide broad maneuvering room for implementing this obligation by allowing procedures to be *"administrative or judicial."*[105] Those procedures allow right holders who *"have given effective notification of claimed infringement"* to obtain information in order to identify a supposed infringer. This requirement suggests that, just like the DMCA, this obligation is limited to ISPs that provide some storage services, not to providers of mere access, because the effective notification requirement does not apply to latter ones. Finally, showing further sympathy with copyright holders, the FTAs require that those procedures allow obtaining information *"expeditiously,"* without mentioning the users' rights. In fact, FTAs do not

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104 Note: Although normative references are made to the FTA U.S.-Chile, almost all of these provisions are also available in other free trade agreements between the United States and other Latin American countries, if not all of them.

105 FTA U.S.-Chile, art. 17.11.23 (h) (providing that *"[e]ach Party shall establish an administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer").*

provide any safeguards for users' fundamental rights at jeopardy with those procedures, but, again, country parties still have enough room for designing these procedures in compliance with human rights obligations.

Countries are not required to comply with FTAs by implementing a special procedure for identifying supposed copyright infringers, they can comply by using procedures already in place. The FTAs allow it.[106] In fact, other countries did not introduce amendments into their domestic law because they already provided general mechanisms for identifying users for law enforcement. This is, for instance, the case of Australia.[107] However, Chile and Costa Rica introduced special regulations on the matter by providing judicial procedures for identifying supposed infringers. Both countries nominally attempt to harmonize this obligation with *"the principles of due process that each [p]arty recognizes as well as with the foundations of its own legal system,"*[108] particularly by providing special protections to personal data into their domestic laws. In 2011, through the so-called Ley Lleras 1.0,

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106 FTA U.S.-Chile, art. 17.11.2 (a) (setting forth that provisions about intellectual property enforcement do not *"create any obligation ... to put in place a judicial system for the enforcement of intellectual property rights distinct from that already existing for the enforcement of law in general"*), and footnote 26 (clarifying that *"[n]othing in this Chapter prevents a Party from establishing or maintaining appropriate judicial or administrative procedural formalities for this purpose that do not impair each Party's rights and obligations under this Agreement"*).

107 E-mail from Jessica Coates, ARC Centre of Excellence for Creative Industries and Innovation, Queensland University of Technology, to the author (Feb. 8, 2010) (indicating that Australia did not modify its copyright law in order to fulfill with the free trade agreement, since its general procedure law had already a provision that allows copyright owner to required information to ISPs in order to identify an infringer).

108 FTA U.S.-Chile, art. 17.11.1. *See also* Chap. VIII, notes 55-64 and accompanying text (elaborating on the room for maneuvering that free trade agreements grant to country parties, particularly in connection with implementing procedures for notice and take down content that infringes copyright).

Colombia attempted to implement this obligation with a special judicial procedure,[109] but the bill failed, after being withdrawn by its proponent because of its potential noxious impact on the freedom of speech.[110]

Different countries' experiences highlight significant risks posed by implementing into domestic law this obligation of ISPs to identify users. The first one is a series of misunderstandings about the regime on ISP limitation of liability, which may be the result of transplanting a legal framework designed for a common-law country into developing countries that follow the civil law tradition. Another risk arises because several Latin American countries have data retention laws that require ISPs to collect, process, and disclose the personal data of users, normally for the purpose of criminal enforcement. And, obviously, copyright holders are tempted to enjoy the benefits of data retention laws for the purpose of enforcing their rights by pushing for the adoption of enabling laws or mere practices of cooperation with local ISPs.

Countries committed to implement a regime limiting ISP liability for copyright infringements through FTAs have several misconceptions about it. In some cases, the misunderstanding affects the whole scope of the regulation; for instance, when extending

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109 Proyecto de Ley No. 241 de 2011, por la cual se regula la responsabilidad por las infracciones al derecho de autor y los derechos conexos en internet (Colombia) [*hereinafter* Ley Lleras 1.0].

110 El Espectador (Nov. 16, 2011): "Senado archiva Ley Lleras" [(Colombian) Senate Archives the Lleras Act], available at http://www.elespectador.com/impreso/politica/articulo-311671-senado-archiva-ley-lleras (last visit: Apr. 11, 2014) (reporting the decision of lawmakers to withdraw the bill known as Ley Lleras 1.0).

the regime not only to entities that provide services but also to any person.[111] Extending exoneration of liability to physical persons and noncommercial entities may be seen as an achievement,[112] but it omits the significant costs that the regime imposes on ISPs. The costs of implementing such regime are difficult to match for individual people that manage community networks providing Internet service in developing countries. Left behind by commercial providers, in recent years, numerous initiatives of community networks are taking advantage from a range of new technologies for assuring Internet access to isolated and marginalized populations in Latin America. Among the several examples are Rhizomatica providing services to native communities in southern Mexico, NUPEF supplying Internet access to Amazonian communities in Brazil, and AlterMundi delivering service to mountain villages in Cordoba, Argentina.[113] Imposing the costs of implementing measures for copyright enforcement on nonprofits that work on closing the digital divide

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111 *Compare* § 512 (k) (1) (A) Copyright Act (conceptualizing service provider as "an entity offering" certain services) *with* Reglamento sobre la Limitación a la Responsabilidad de los Proveedores de Servicios por Infracciones a Derechos de Autor y Conexos de Acuerdo con el Artículo 15.11.27 del Tratado de Libre Comercio República Dominicana-Centroamérica-Estados Unidos, publicado en La Gaceta, el 16 de diciembre de 2011 (Costa Rica), art. 3 (conceptualizing service provider as "any physical or legal person" that provide certain services). *See also,* Alberto Cerda, *Chile,* in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CYBER LAW 120-121 (Jos Dumortier ed., Kluwer Law Int'l, 2014) (reviewing the legislative discussion surrounding this point in Chile, which, eventually, limits the scope of provision to companies that provide services).

112 *See* Peguera Poch, *supra* note 5, at 20-21 (complaining about the exclusion of non-commercial ISPs from the Spanish regulation, but recognizing that law may apply by analogy).

113 On community networks, *generally see,* ICTS FOR INCLUSIVE COMMUNITIES IN DEVELOPING SOCIETIES (Jacques Steyn and Darelle van Greunen eds., Cambridge Scholars Publ'g, 2015); USAID, CARIBOU DIGITAL & THE DIGITAL IMPACT ALLIANCE, CLOSING THE ACCESS GAP: INNOVATION TO ACCELERATE UNIVERSAL INTERNET ADOPTION (USAID and the Digital Impact Alliance, 2017); and, CARLOS REY-MORENO, SUPPORTING THE CREATION AND SCALABILITY OF AFFORDABLE ACCESS SOLUTIONS: UNDERSTANDING COMMUNITY NETWORKS IN AFRICA (Internet Society, 2017).

among marginalized communities is not required by FTAs, but some policymakers misunderstand the scope of obligations laid down by said agreements and, consequently, have suggested to impose such burden on individuals and noncommercial networks.

In other cases, misjudgments extend to the actual safety provided by safeguards within the regime for ISP limitation of liability. This is, for example, the case of monetary compensation provided to prevent misusing procedures. In common law countries, these compensations are meant to deter copyright holders from abusing enforcement procedures. In countries with a civil law system, which is the case in Latin America, however, monetary compensation does not discourage misusing procedures by rights holders. Compensation does not work as a safeguard for a number of reasons, but mainly because it is limited to actual damages and it lacks enforcement through class actions.[114] However, the key mistake in Latin America is the role of the regime on ISP liability and the actual responsibility of ISPs for copyright infringements committed by their users.

Some Latin American scholars do not realize that ISPs that comply with obligations set forth by FTAs are exonerated of liability for their users' copyright infringement. Free trade agreements, just like the DMCA and the European Union's Directive, do not prejudge liability of ISPs that is still subject to the applicable law of the

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114 *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 124 (Stanford Univ. Press, 3d. ed., 2007) (reviewing differences between civil and common law countries around damages); and, ÁNGEL R. OQUENDO, LATIN AMERICAN LAW 710-712 (Foundation Press, 2006) (referring to modest role that collective suits have played in Europe and Latin America compared with the common law system).

land, being another state or country laws. But these instruments provide ISPs with a *"safe harbor,"* that is, an exoneration of liability for their users' infraction, if ISPs fulfill certain exigencies. In other words, the FTAs do not define when an ISP is responsible, but, at least, they state when it is not.[115] While some Latin American scholars have avoided providing a clear explanation on the matter,[116] others have argued that ISPs that do not comply with the implementing law are *ipso facto* liable for their users' infringement,[117] without even meeting the usual requirements for liability set forth under domestic law. The most pernicious interpretation, however, states that compliance by ISPs with obligations set forth in copyright law does not prevent finding them responsible under the general regime of responsibility available in domestic law. This latter misunderstanding

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115 Piñeiro, *supra* note 5, at 185 (expressing that FTA introduces *"scopes of no-liability"*.). *See also,* Peguera Poch, *supra* note 5, at 47-51 (arguing that inapplicability of the exoneration of liability does not imply ISP liability necessarily). *Similarly,* Xalabarder, *supra* note 4, at 57; Óscar Montezuma Panez, *Regulando al Intermediario: El Régimen de Limitación de Responsabilidad para los Proveedores de Servicios de Internet en el Acuerdo de Promoción Comercial Perú-Estados Unidos,* 184 ACTUALIDAD JURÍDICA 41, 43 (2009) (supporting that neither the DMCA nor the European Union Directive on E-Commerce rule liability on the ISP that fails in complying with their provisions, a matter that is resolved according to the general norms on liability of a given country); and, Wilson Rafael Ríos Ruiz, *Eventos y Eximentes de Responsabilidad de los Proveedores de Servicios de Internet ante las Infracciones a los Derechos de Propiedad Intelectual Realizados por sus Suscriptores,* in PROPIEDAD INTELECTUAL: REFLEXIONES 224 (Ricardo Matke Méndez, Édgar Iván León Robayo & Eduardo Varela Pezzano eds., Ed. Universidad del Rosario, 2012).

116 *See* Lara & Ruiz, *supra* note 9, at 81.

117 *See* Carlos Castellanos, *Responsabilidad Extracontractual de los ISP por las Infracciones que sus Proveedores de Contenidos Cometen contra el Derecho de Autor y los Derechos Conexos de Terceras Personas en Colombia*, 6 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 132, 173-178 (2009) (stating that, according to FTA, ISPs must prove they fulfill all obligations set forth by law, otherwise they are *"presumed guilty"*.). *See also,* Fernando Zapata López, *Tratado de Libre Comercio con Estados Unidos de Norteamérica y el Derecho de Autor (interview by Jhonny Pabón)*, 11 EL DERECHO DE AUTOR: ESTUDIOS, CENTRO COLOMBIANO DEL DERECHO DE AUTOR (CECOLDA), at 5-6 (arguing that ISPs have objective responsibility, just like one *"who shoots a gun, drives a car or an airplane,"* but can avoid that responsibility by meeting the safe harbor requirements).

pervaded legislative discussion in Chile, as well as the Colombian bill known as Ley Lleras 1.0.[118]

Holding an ISP responsible for its users' copyright infringement, despite it fulfilling all its obligations set forth by copyright law on limitation of liability, is a serious mistake. This is unfair for ISPs that have to adopt and pay for a new set of obligations to enforce copyright without receiving any legal certainty about their own liability in return. It is a mistake for countries because it fails to meet even extremely minimal standards of international harmonization around the limited circumstances in which an ISP cannot be liable. In fact, this defeats the very purpose of having regulation on this matter within an international agreement, since an ISP whose operations and practices assure immunity in a given country does not get similar assurances in another country even if their legal frameworks mirror each other.

More importantly for our analysis is the fact that holding an in-compliance ISP responsible for its users' copyright infringement creates multiple risks for its subscribers' human rights. In fact, that misunderstanding puts perverse incentives on ISPs for collaborating with copyright holders far beyond what is required by law, just in order to avoid responsibility and, consequently, it diminishes Internet users' human rights. For

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118 *See* Ernesto Rengifo García, *Toward the Extension of Obligations to Other Intermediaries in the Internet*, 18 REVISTA LA PROPIEDAD INMATERIAL 167, 182-185 (2014) (discussing that a regime on limitation of liability for ISP as that set forth by the US-Colombia trade agreement does not exclude civil liability based on general rules of Colombian Civil Code and Andean Community law).

instance, identifying users beyond cases in which an ISP is required by law raises concern for the right to privacy, and similarly taking down supposed infringing content beyond what is provided by law creates apprehensiveness from a free speech and due process perspective. In other words, holding an in-compliance ISP responsible for its users' online infringement may unleash a level of collaboration with enforcement that exceeds compliance with human rights.

A second significant risk related to implementing an obligation to identify users by ISPs is that several Latin American countries have data retention laws. These laws require ISPs to collect personal information from and about their users, store it for a given period, and disclose it under request by authorities for specific purposes. Generally speaking, these data retention laws have been designed to allow the identification of criminals in the online environment, particularly in cases of serious crime, such as online child pornography and terrorist attacks. As a matter of fact, most of these laws have been adopted in the region at the instances of law enforcement agencies for purpose of protecting childhood or national security.

Data retention laws, unfortunately, not always have included appropriate safeguards and limitations for this processing of personal information. For instance, Mexico does not set a limit for preserving date,[119] while Chile barely set a minimum term

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[119] Ley Federal de Telecomunicaciones [Federal Telecommunication Act - Mexico], *as amended,* Diario Oficial, 9 de febrero de 2009 (Mex.), art. 44 XII and XIII (imposing upon telecommunications companies unlimited obligations to preserve and release their subscribers' personal information).

for keeping it,[120] as a result, in both countries ISPs may retain data indefinitely. Similarly, even when this kind of regulation is adopted under the guise of preventing or helping to prosecute serious crime, such as terrorism and child pornography, Mexico allows using retained data for a far broader category of infractions.[121] In Ecuador, where data retention is imposed not by law but a mere presidential decree,[122] administrative and police authorities do not need even a court order to require users' personal information from their ISPs.[123]

In addition to insubstantial legal safeguards for privacy in data retention laws, ISPs are subject to increasing pressure for disclosing their users' personal data beyond the terms of the law. This pressure comes from prosecutors evading a court-order requirement, law enforcement officials ignoring legal procedures, and even courts failing to exclude illegally obtained evidence. As a result, ISPs may finish collaborating beyond legal mandates, while Internet users rarely are aware about intrusions into their online privacy. In this muddled

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120 Código Procesal Penal [Criminal Procedure Code Chile], *as amended,* Diario Oficial, 13 de agosto de 2011 (Chile), art. 222 (requiring telecommunication companies to preserve personal data of users for a term *"no less than one year"*). *See* Daniel Álvarez & Alberto Cerda, *Sobre la Inviolabilidad de las Comunicaciones Electrónicas: Comentario a Propósito de la Ley N°19.927 que Tipifica los Delitos de Pornografía Infantil*, 1 ANUARIO DE DERECHOS HUMANOS 137, 141-142 (2005) (criticizing several extremely flexible features of the Chilean data retention law).

121 *Compare* Criminal Procedure Code Chile, art. 222 (allowing access to data for purpose of prosecuting felonies) *with* Federal Telecommunication Act - Mexico, art. 44 XIII (permitting access to data by prosecutors for investigating blackmail, threat, kidnapping, or any serious or organized crime).

122 Consejo Nacional de Telecomunicaciones – CONATEL, Resolución TEL 477-16-CONATEL-2012, 11 de julio de 2012 (Ecuador).

123 *Id.*, art. 29 (9) (requiring ISPs to provide users' personal data to the telecommunication authority on request).

environment, it is no wonder copyright holders will attempt to enjoy the benefits of a data retention law for purpose of enforcing their rights by pushing for legal amendments or agreements with ISPs, just as they did in the European Union.

There is an extensive body of literature on data retention law and its diminishing effects on human rights, particularly in the context of the European Union's community law.[124] This had led to challenging compliance of that regulation with fundamental rights as defined by regional instruments on human rights and constitutional law. In fact, recently the Federal Constitutional Court of Germany, the most influential court on information privacy within civil law countries,[125] nullified several data retention provisions in its domestic law because they violated the right to privacy.[126] Constitutional courts in other members of the European Union have made similar findings, such as the Czech Republic and Romania.[127] Data retention laws are a regression from protecting privacy that, under

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124 *See, e.g.,* Lukas Feiler, *The Legality of the Data Retention Directive in Light of the Fundamental Rights to Privacy and Data Protection*, 1 (3) EUR. J. L. & TECH. (2010) (arguing that data retention infringes the principle of proportionality *stricto sensu,* by violating both the fundamental right to privacy as well as the fundamental right to data protection).

125 The Federal Constitutional Court of Germany formulated the right to control personal information as informational self-determination, when ruling partially unconstitutional the 1982 Census Act. Later, this criterion was followed by the Spanish Constitutional Court in a series of decisions that guided to recognize an autonomous right to control personal information, namely informational freedom. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 1 BvR 209, 269, 362, 420, 440, 484/83 (F.R.G.); Tribunal Constitucional, S.T.C., 254/1993, Jul. 20, 1993 (B.O.E. 18/8/1993) (Spain); and, Tribunal Constitucional, S.T.C., 60/1998, Mar. 16, 1998 (B.O.E. 22/4/1998) (Spain).

126 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 2, 2010, 1 BvR 256/08 (Germany).

127 Romanian Constitutional Court, Decision No.1258, Oct. 8, 2009, Official Gazette No. 798, Nov. 23, 2009 (Rom.); Ústavního soudu Ceská republika (US) [Constitutional Court], nález Ústavního soudu to Jménem republiky, Mar. 22, 2011 (Czech Rep.).

the guise of preventing crime, as Stefano RODOTÀ said, have created whole *"nations of suspects."*[128]

In its recent landmark decision, the European Court of Justice has ruled that the Data Retention Directive is invalid because it infringes the right to privacy and the right to protection of personal data.[129] The ruling is astonishing and may lead to a significant review of local implementing law by European Union members. It also may influence legislative outcomes in Latin American countries, since both data protection and data retention laws throughout the region mainly follow the European Union model. Unable to take advantage of retained data, countries would be forced to leave behind retrospective processing of personal data for law enforcement and, instead, adopt mechanisms for prospective processing of such data, a practice that may be adopted also for purpose of enforcing copyright online.

Latin America has a mixed record on data retention laws so far. In countries that adopted data retention laws some time ago, concerns about conforming the obligations of data retention laws to human rights only recently started to arise. In 2009, the Supreme Court of Argentina declared unconstitutional its data retention law for violating the right

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128 Rodotá, *supra* note 41, at 57 (arguing that data retention law breaks the principle of objective on personal data regulation and the need of data subjects' consent, by allowing a massive collect of data that destroy the presumption of innocence).

129 Joined Cases C-293/12 and C-594/12, Request for a preliminary ruling under Article 267 TFEU from the High Court (Ireland) and the Verfassungsgerichtshof (Austria), E.C.R. (2014).

to privacy by authorizing the abusive processing of personal data.[130] In 2011, the Constitutional Tribunal of Chile nullified a bill that, under the pretext of combating child pornography, would extend for a longer term an already available data retention law to cybercafés and commercial hotspots, because of arbitrary discrimination against those providers and their users.[131] However, there are also regressive policies in the region. In 2016, the Mexican Supreme Court upheld the constitutionality of a law that compels the country's telephone operators and ISPs to retain data about their subscribers´ communications for two years.[132] At the same time, other countries are adopting similar kinds of regulation, which is currently the case of Chile (2000), Colombia and Ecuador (2012), as well as Paraguay (2013), and more recently Brazil (2014) and Peru (2015).[133]

Although Latin American countries have comprehensive protection for the right to control personal information, data retentions laws still challenge the promise of protection. On one hand, unlike the E.U., Latin American countries have little to no governmental overseeing of processing of personal data, including data retention by ISPs and telecommunication companies. As a result, there are not public policies to prevent

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130 Corte Suprema de Justicia, 24/2/2009, "Halabi, Ernesto c/ P.E.N. - Ley 25.873 - dto. 1563/04 s/ amparo ley 16.986," (Arg.).

131 Tribunal Constitucional, 12/7/2011, Proyecto de ley que sanciona el acoso sexual de menores, la pornografía infantil y la posesión de material pornográfico. Boletín No. 5837-07 / control de constitucionalidad (Chile).

132 Suprema Corte de Justicia de la Nación, 4 de mayo de 2016, recurso de revisión 964/2015 (Mex.).

133 MARIANNE DÍAZ, RETENCIÓN DE DATOS Y REGISTRO DE TELÉFONOS MÓVILES (ONG Derechos Digitales, 2017) (providing a general description of data retention laws in several Latin American countries).

infringing processing of data. On the other hand, generally speaking, enforcement through the judiciary is retrospective, therefore, it fails on preventing infringement and, in the best case scenario, it helps to rectify a wrongdoing. Constitutional remedies, such as *amparo proceeding* and *habeas data*, may be useful in some exceptional cases. For instance, these remedies could be used to prevent the actual implementation of a publicly disclosed agreement between copyright holders and and ISP for identifying users beyond cases allowed by the law, or to redress the access to retained data by law enforcement officials acting under the color of law. However, these remedies cannot rectify a legislative mistake, such as in the case of the Chilean and Mexican data retention laws that omit establishing an ending date for retaining personal data.

In recent years, it has become apparent that data retention laws imposing massive and indiscriminate processing of Internet users' personal data are contrary to human rights obligations. A tailored and proportional regime of data preservation seems more in compliance with those obligations, if it provides adequate substantive, procedural, and formal safeguards. Analyzing these precautions is beyond the purpose of this work, but it is important to call the attention of lawmakers and judges to call into copyright holders' attempt to access that data in order to enforce mere copyright infringement by using DMCA-like mechanisms or other available tools in domestic law. A well-tailored data retention law is still an exceptional regime that restricts the human right to privacy and, therefore, it must be applied in accordance with laws enacted for reasons of *general interest*

and in accordance with the *purpose* for which such restrictions have been established.[134] This suggests that, in general, copyright infringement may be excluded from the scope of any data retention law.

5. IDENTIFYING USERS IN COMPLIANCE WITH HUMAN RIGHTS

For several Latin American countries, implementing provisions on identifying users for enforcing copyright infringement laws is an intricate issue from a human rights viewpoint. On one hand, unlike European Union members, they are committed to implement those procedures because of free trade agreements. On the other hand, unlike the United States, several countries already have in place data retention laws that insufficiently guarantee users' rights, which may also be misused for enforcing intellectual property. Governments are primarily responsible for setting forth adequate legal rules on identifying users that supposedly have infringed copyright. Those rules must comply with formal, substantive, and procedural safeguards for peoples' human rights. But, because human rights also are enforceable against non-state actors in Latin America, ISPs and copyright holders must pay close attention to ensure that implementing operations do not violate human rights, by processing, providing, using, or requiring information beyond what is allowed by the law.[135] This is probably the main reason why some Latin American

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134 ACHR, art. 30.

135 Édgar León and Eduardo Varela, *Una Colisión Peer to Peer: Habeas Data Versus Derechos de Autor*, 120 VNIVERSITAS 237, 245-248 (2010) (arguing that ISPs that identify users become

legislatures have adopted specific regulations on identifying Internet users for online copyright infringement, in order to build a delicate, sometimes elusive, regime that balances competing interests.

Implementing procedures for identifying Internet users through agreements between business community members is, in principle, unlawful within the region. Encouraged by the experience of some other countries, local copyright holders have suggested that ISPs should agree with collaborating on copyright enforcement by identifying supposed infringers, among other measures.[136] But that kind of proposal does not fit the Latin American legal system. As was previously noted, constitutional clauses have horizontal effects by making constitutional rights enforceable not only against government but also against non-state actors, which is consistent with international obligations on human rights assumed by Latin American countries.[137] Additionally, several countries have adopted comprehensive data protection laws, whose rules apply to both the public and private sectors.[138] The fact that free trade agreements require parties to encourage collaboration within the business community on enforcing the law does not

responsible for infringing constitutional rights, in addition to infringing data protection laws in some Latin American countries).

136 Paulo Rosa, in di Pietro Peralta *et al.*, *supra* note 10, at 38 (suggesting that because of knowledge by ISPs that provide access about the copyright infringement on file sharing, they should collaborate with right holders in promoting copyright, as British stakeholders do).

137 *See supra* Chap. I, notes 35-45 and accompanying text.

138 *See supra* notes 84-103 and accompanying text.

imply,[139] under any circumstance, that such a joint effort may endanger users' rights.[140] Both constitutional and statutory provisions, therefore, provide a highly narrow space for collaboration, which certainly forbids any conventional measure that diminishes users' rights, such as implementing procedures for identifying Internet users without an enabling law.

Given limitations for business collaboration on the matter, it has been suggested to impose clauses on subscribers' contracts with ISPs authorizing their identification to interested third parties, such as copyright holders. But this proposal is unlikely to succeed in Latin America, because of legal limitations to liberty of contract. Fundamental rights granted by international instruments on human rights and domestic constitutional frameworks are inalienable and,[141] therefore, a contract cannot impose a general waiver on users' right to privacy. In addition, in several countries, telecommunication and consumer protection laws prohibit abusive contractual clauses and, in some cases, specify the exact allowed contractual terms. And, even if a provider obtains such unconditional

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139 *See, e.g.,* FTA U.S.-Chile, art. 17.11.23 (a) (i).

140 *See* Corte Constitutional de Colombia, Sentencia C-750/08, de 24 de julio de 2008, Revisión de constitucionalidad del "´Acuerdo de promoción comercial entre la República de Colombia y los Estados Unidos de América´, sus ´cartas adjuntas´ y sus ´entendimientos´, suscritos en Washington el 22 de noviembre de 2006" y la Ley aprobatoria No. 1143 de 4 de julio de 2007 (ruling that the FTA U.S.-Colombia was consistent with the Colombian constitution, but pointing out that its interpretation, application, and implementation must be consistent with fundamental rights granted by both the Constitution and international instruments on human rights).

141 ADHR, pmbl. (recognizing the *"essential rights of man ... based upon attributes of his human personality"*); UDHR, pmbl. (recognizing *"equal and inalienable rights of all members of the human family"*); ICCPR, pmbl. (recognizing *"equal and inalienable rights of all members of the human family"* and that *"these rights derive from the inherent dignity of the human person"*; and, ACHR, pmbl. (recognizing *"essential rights of man ... are based upon attributes of the human personality"*).

authorization, it can be nullified or revoked later by the respective subscribers by exercising the right to delete or to oppose any further processing of their personal data, which are standard rights granted by data protection laws.[142] The underlying principle of Latin American law, therefore, is that contracts cannot abrogate constitutional rights.

But the right to privacy is not absolute and, therefore, there are some permissible limitations. This is the case of its corollary too, the right to information privacy. Neither the Universal Declaration nor the American Convention refer to specific limitations to the right to privacy,[143] but their general clauses on limitations are applicable.[144] The International Covenant on Civil and Political Rights does not include any provision on the matter,[145] but countries have at least implied authority to impose limitations on the right to privacy.[146] United Nations recommendations on personal data processing,[147] like other

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142 *See, e.g.,* Ley No. 19.628 sobre Protección de la Vida Privada [Law No. 19.628 for the Protection of Private Life], Diario Oficial, Aug. 28, 1999 (Chile), art. 12; Ley 25.326 de Protección de los Datos Personales, B.O., Nov. 2, 2000 (Arg.), art. 16; Ley 18.331 de Protección de Datos Personales y Acción de Habeas Data, D.O, Aug. 18, 2008 (Uruguay), arts. 13-17; and, Ley 29.733 de Protección de Datos Personales, D.O. El Peruano, Jul. 3, 2011 (Peru), art. 47.

143 UDHR, art. 12; and, ACHR, art. 11.

144 UDHR, art. 29; and, ACHR, arts. 30 and 32.

145 Alexandre Charles Kiss, *Permissible Limitations on Rights,* in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 290-310 (Louis Henkin ed., Columbia Univ. Press, 1981) (analyzing limitations and exceptions to human rights in the ICCPR).

146 Fernando Volio, *Legal Personality, Privacy, and the Family*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 145, at 192 (supporting implied authority).

147 UNITED NATIONS, Guidelines Concerning Computerized Personal Data Files, adopted by the General Assembly on 14 December 1990 [*hereinafter* United Nations Guidelines], § A.6. Power to make exceptions.

international instruments on the matter,[148] also allow adopting some limitations. Throughout Latin America, local constitutions as well as domestic data protection laws recognize specific limitations on processing personal information. In sum, it is a well-set understanding that the right to privacy, including the right to control personal data, is not absolute and it may be subject to certain limitations.

Countries are not free to limit the right to privacy in any way they choose, however. Like any other limitation to human rights, both international and constitutional laws establish restrictions on governments' power for limiting the right to privacy. Leaving aside a data subject's acquiescence, governments are allowed to adopt limitations if they comply with formal, substantive, and procedural requirements. A formal precondition is that law must provide limitations. A substantive prerequisite is that limitations must comply with a standard of legitimacy, a reasonable purpose that justifies their adoption. A procedural exigency, from a human rights viewpoint, implies that people affected by exceptions have the right to an effective remedy before a court for questioning an act that violates their fundamental rights. When adopting a limitation that allows processing Internet users' personal information by ISPs for purpose of copyright enforcement, governments must comply with the aforementioned formal, substantive, and procedural requirements.

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148 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 23 September 1980 [*hereinafter* OECD Guidelines], para. 10; Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28 January 1981 [*hereinafter* Strasbourg Convention], art. 9; Asia-Pacific Economic Cooperation Privacy Framework, adopted in the XVI Ministerial Meeting, in Santiago of Chile, on 17-18 November 2004 [*hereinafter* APEC Privacy Framework], para. 13.

5.1. An enabling law

A limitation to the right to privacy allowing identification of Internet users, who supposedly have infringed copyright, must be determined by the law. Legality is a common exigency in all international instruments on human rights,[149] and most specific instruments on information privacy.[150] The objective of this prerequisite is "*avoiding arbitrary restrictions on rights by requiring that limitation be established by general rules … normally imposed by legislature.*"[151] Therefore, unless the law authorizes measures taken by executive authorities, such as police and administration, they are prohibited as an improper way for limiting privacy in general, and allowing the identification of online users in particular. By the same token, as was indicated above, in Latin America, setting an obligation to identify Internet user through private agreements between ISPs and copyright holders is proscribed because of the enforceable nature of human rights against both state and non-state actors.

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149 UDHR, art. 29.2 (establishing that limitation must be *"determined by law"*); ACHR, art. 30 (prescribing that limitations *"may not be applied except in accordance with laws"*); and, ICCPR, art. 17.1 (banishing *"unlawful interference"* with the right to privacy).

150 OCDE Guidelines, para. 10 b) (allowing setting forth exceptions *"by the authority of law"*); Strasburg Convention, art. 9 (2) (permitting exception *"provided for by the law"*); and, United Nations Guidelines, §A.6 (relaxing this requirement in order to embrace different legal regimes, by requiring that exceptions be *"expressly specified in a law or equivalent regulation"*). *But see,* APEC Privacy Framework, para. 13 b) (weakening this requirement by allowing exceptions set forth in accordance with by law or *"made known to the public"*, but omitting any measure of equivalence for latter alternative).

151 Kiss, *supra* note 145, at 304-305.

In Latin America, limitations of fundamental rights necessarily must be set forth by law. As a result, for the purpose of identifying supposed infringers of copyright, which is an exception to the right to privacy, countries use provisions of the in-force law or new specific provisions adopted by legislative branches. This basic exigency unfortunately has been violated in some countries within the region. In Costa Rica, even after the free trade agreement with the United States was approved by the legislature, provisions on identifying users required an implementing law, which, surprisingly, was done through mere presidential decree.[152] However, the decree refers to the intellectual property enforcement act, which was adopted by the legislature. Similarly, in Peru, data retention has been adopted through a mere presidential decree.[153] Less reasonable is the case of the data retention law in Ecuador, where, through mere regulation, the local telecommunication authority has imposed on ISPs the obligation of enrolling users, processing their personal information, and disclosing their data to that administrative body.[154]

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152 Reglamento sobre la Limitación a la Responsabilidad de los Proveedores de Servicios por Infracciones a Derechos de Autor y Conexos de Acuerdo con el Artículo 15.11.27 del Tratado de Libre Comercio República Dominicana-Centroamérica-Estados Unidos, art. 19, La Gaceta, 16 de Diciembre de 2011 (Costa Rica).

153 Decreto Legislativo 1182, que regula el uso de los datos derivados de las telecomunicaciones para la identificación, localización y geolocalización de equipos de comunicación, en la lucha contra la delincuencia y el crimen organizado, D.O. El Peruano, 11 de julio de 2015 (Peru).

154 Consejo Nacional de Telecomunicaciones – CONATEL (Ecuador), Resolución TEL 477-16-CONATEL-2012, 11 de julio de 2012, arts. 29 (9) and 37.

5.2. A legitimate purpose

Having a law allowing the identification of Internet users who are supposed copyright infringers is not enough for comply with human rights obligations. As was explained in Chapter One,[155] such a limitation to the right to privacy also must satisfy some substantive exigencies. The limiting measure can be neither arbitrary nor abusive,[156] meaning it cannot lack or exceed a legitimate purpose. As a result, first, a measure that limits the right to privacy must have a purpose that legitimizes intrusion into Internet users' privacy and, second, the measure must be proportional in relation with its own purpose.

A limitation on Internet users' privacy needs a legitimate purpose. No international instrument on human rights formalizes circumstances that legitimatize interferences with the right to privacy, aside from proscribing arbitrary or abusive ones. However, both the Universal Declaration and the American Convention provide general guidelines on limiting human rights.[157] As was discussed previously, these instruments mandate that limitations are allowed only for the purpose of securing due recognition and respect for the rights and freedoms of others, as well as reasons of general interest, in a democratic society. International instruments on information privacy refer to similar legitimatizing purposes in detail. For instance, the United Nations Guidelines authorizes exceptions *"only*

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155 *See supra* Chap. I, notes 149-173 and accompanying text.

156 UDHR, art. 12 (proscribing *"arbitrary interference"* with privacy); ICCPR, art. 17 (proscribing also *"arbitrary interference"* with privacy); and, ACHR, art. 11.2 (prohibiting *"arbitrary or abusive interference"* with privacy).

157 UDHR, art. 29 (2); and, ACHR, arts. 30 and 32 (2).

if they are necessary to protect national security, public order, public health or morality, as well as, inter alia, the rights and freedoms of others, especially persons being persecuted."[158] All those instruments make clear that limitations must be justified by an overriding reason of public or national interest in a democratic society, which importance makes permissible prevailing over a human right.

The key problem is determining whether copyright enforcement constitutes an overriding reason of public or national interest that allows setting forth an exception against the right to privacy of Internet users. On one hand, preventing right holders under any circumstance to identify users who have infringed their copyright would deprive their right of actual meaning in the online environment. But, on the other hand, allowing indiscriminate identification under the guise of minimal infringement would be an excessive intrusion on user rights. As the TRIPS Agreement properly states, intellectual property, including copyright, are essentially "private rights"[159] and achieving adequate protection for the rights to privacy and personal data is important, not just for individual interests, but also to protect societal values, because they are essential in the very idea of democracy and as safeguards of other human rights. This suggests that enforcing copyright may constitute an overriding reason only if it becomes an issue of public interest.

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158 United Nations Guidelines, §A.6. *See also,* Strasburg Convention, art. 9 (2); and, APEC Privacy Framework, para. 13.

159 TRIPS Agreement, pmbl. (recognizing that intellectual property are "private rights"). *See,* Shizhou Wang, *Study on Criminal Liability of TRIPS*, in REPORT ON COPYRIGHT CRIMINAL LAW IN THE WORLD (Shizhou Wang ed., Beijing, People's Public Security Press, 2008), pp. 38-74, pp. 46-47 (recalling that language in the TRIPS Agreement's preamble attempted precisely to limit criminal enforcement of intellectual property).

Copyright enforcement is not always a public interest issue. Some copyright advocates argue that copyright is always relevant from a public interest viewpoint, because of an author's human rights, of being a source of income for the fiscal budget, and even of some public security impact by emphasizing piracy's connections with terrorism and drug trafficking. The first argument is misleading because of the limited scope of copyright as a human right.[160] The second one is equivocal because tax regulation and enforcement run parallel to any potential copyright enforcement and are based on a different set of policy considerations. In addition to lacking any empirical evidence, the latter argument is a vague fallacy and, certainly, it does not apply to copyright infringement in Latin America.[161] However, some copyright enforcement may be justified on public interest reasons.

Setting forth an exception to the right to privacy in order to facilitate copyright enforcement may be allowed in some cases of criminal nature. It may be permissible, for instance, in cases of serious crime or felonies, but not for mere misdemeanors.[162] Criminal law already has criteria for distinguishing the relevance of the public interest involved on criminal enforcement in a given case, for instance, by grading punishment, by limiting

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160 *See supra* Chap. I, notes 174-210 and accompanying text.

161 *See supra* Chap. V, notes 101-102 and accompanying text.

162 *Similarly*, Kioupis, *supra* note 8, at 251-253 (arguing for enforcing only serious copyright crime, but supporting a maximalist approach that would include nonprofit infringement and skipping the analysis on usual commercial scale requirement).

enforcement to or of *ex parte* procedures,[163] and by allowing the suspension of prosecution, among others. Thus, criminal law already provides some useful criteria for weighing the public interest involved in enforcing the law and, therefore, such criteria should be applied in order to determine when to allow an intrusion on Internet users' privacy rights for purpose of enforcement. International copyright law also provides some additional criteria for balancing the level of public interest involved in enforcing the law, for instance, by allowing countries to exclude from enforcement *de minimis* import infringement, which suggests excluding intrusive measures in case of non-commercial copyright infraction of small quantities.[164]

In general, enforcing copyright through a civil forum would not justify providing access to the personal data of Internet users. This kind of enforcement, rather than achieving public interest purposes, attempts to provide compensation to damaged private interests and, therefore, hardly can override the right to privacy because of the social interest in protecting and preserving the right to privacy. However, it may be fair to recognize that providing access to personal data in order to identify a supposed infringer may be allowed in cases of civil enforcement that overlap with criminal enforcement against serious copyright felonies. But this standard would be still problematic for most

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163 Note: Depending on domestic criminal procedural law, prosecution may be an exclusive prerogative of public authorities or a matter in which private litigants may also intervene. In fact, in some countries, there are certain criminal cases that could be prosecuted only by private litigants, because of the prevailing interest being enforced is rather private than public, such as in crimes like defamation, libel, slander, and calumny.

164 TRIPS Agreement, art. 60.

Latin American countries that, as analyzed in Chapters Four and Five, rely heavily in criminal law for enforcing copyright.

Any enabling legitimate purpose cannot be either arbitrary or discriminatory. On one hand, international human rights law proscribes arbitrariness from any limitation on the right to privacy.[165] On the other hand, international human rights law requires equal protection and nondiscrimination,[166] which forbids distinctions based on race, sex, language, creed, or other factors.[167] In Chile, a recent court decision found unconstitutional a bill that would require data retention only regarding cybercafés and commercial hotspots, because of arbitrary discrimination against those providers and their users, since these facilities mainly provide online access to people that cannot afford Internet access at home.[168] Therefore, the bill seemed to discriminate against low-income people by depriving them of the right to privacy online.

In sum, a general interest argument allowing a permissible exception on the right to privacy, in order to facilitate copyright enforcement, can be articulated in cases of serious criminal infringement but not in cases of either misdemeanor or civil enforcement, except when the latter overlaps with serious criminal copyright infraction. Unfortunately,

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165 *See supra* note 156.

166 UDHR, art. 2; ICCPR, arts. 2 and 26; ICESCR, art. 2.2; ADHR, art. 2; and, ACHR, art. 24.

167 ADHR, art. 2.

168 Tribunal Constitucional, 12/7/2011, Proyecto de ley que sanciona el acoso sexual de menores, la pornografía infantil y la posesión de material pornográfico. Boletín No. 5837-07 / control de constitucionalidad (Chile).

this distinction lacks any consideration in the domestic law of countries that have implemented an obligation upon ISPs to identify Internet users who supposedly have infringed copyright. Neither Chile nor Costa Rica appear to distinguish in purpose between criminal or civil enforcement in requiring the identification of supposed copyright infringers by their respective ISPs, nor does the Colombia bill Ley Lleras 1.0.

5.3. A proportional application

In addition to having a legitimate justification for adopting an exception to the right to privacy, a given measure must be applied proportionally with regard to its purpose. As was analyzed in Chapter One, international human rights instruments call for the principle of proportionality.[169] International instruments on data privacy also refer to the aforementioned principle, for instance, the APEC Privacy Framework expressly states that permissible exceptions should be *"limited and proportional to meeting [their] objectives."*[170] This implies that a given intrusive measure must be adequate, necessary, and proportional with its purpose.

First, to comply with human rights obligations, an ISP's identification of a supposed copyright infringer must be an *adequate* measure for purpose of law enforcement. This means that the measure must be suitable for determining infringers, by facilitating or

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169 *See supra* Chap. I, notes 164-170 and accompanying text.

170 APEC Privacy Framework, para. 13 a). *See also,* United Nations Guidelines, §A.6 (stating that exceptions are allowed only if they are *"necessary"* to satisfy determined purposes).

allowing their identification. However, as was aforementioned, using IP numbers for purpose of identifying users is not an infallible method, in fact it merely works as a proxy that reduces the number of potential suspects. On one hand, there are several techniques for covering up the actual IP number in usage. They are available not for law infringement but for legitimate purposes of anonymizing online communications, such as providing protection for journalists' sources and human rights defenders. On the other hand, in some cases IP numbers may be correlated with a number of potential users of a shared network, such as patrons of a library, customers of a cybercafé, students at a university, and employees at workplace; if no additional mechanism for identifying users is in place, IP numbers seems inadequate for the purpose of identifying a given user, in those circumstances.

Second, allowing the identification of supposed infringers by ISPs must be also a *necessary* measure for copyright enforcement. This means that the measure must be the only, or at least the most moderate, method available for satisfying the purpose. Generally speaking, using IP numbers will be the sole actual mechanism at hand for identifying or at least closing in on, a user and, therefore, ISPs would be required to identify their subscribers. However, if a less intrusive mechanism for identifying supposed infringers is available, that one must be privileged over such requests to ISPs.

Third, the identification of Internet users for the purpose of copyright enforcement also must be a *proportional* measure. This requirement calls for balancing the benefits of requesting ISPs to identify a user in a given case against the detrimental effects

on the user's rights. For instance, a measure for identifying a supposed infringer should be inadmissible if the committed infraction is harmless, particularly if taking down the infringing content is enough to prevent potential damaging effects.

In order to comply with human rights obligations, as a starting point, a regime requiring ISPs to identify Internet users for law enforcement must be written down by law for legitimate purposes. Additionally, the application of rules must comply with the principle of proportionality, which requires that a measure be adequate, necessary, and proportional. Resolving if a measure provided by law exceeds the scope of a permissible exception due to infringing the principle of proportionality bring us to another human rights exigency: the adoption of appropriate safeguards.

5.4. Appropriate safeguards

Granting access to personal information of users for copyright enforcement is a risky proposition because information could be used for other purposes, such as blackmail, or political or religious persecution, among others. For that reason, the United Nations recommends setting forth *"appropriate safeguards"* when adopting exceptions to the right to privacy in relation to the processing of personal data,[171] in order to prevent procedural abuses and undesirable outcomes. An analysis of comparative law on the matter shows

[171] United Nations Guidelines, §A.6.

several mechanisms that could be used for purpose of preventing abuse and misuse of the procedures for identifying supposed copyright infringers.

A key safeguard is demanding a court order requiring ISPs to identify a given user. This allows judges to evaluate the legitimacy of a request by right holders, by analyzing if all the legal prerequisites are in place, for instance, that: i) there is an IP number connected to likely illegal activities; ii) this IP number is managed by the requested ISP; iii) this ISP is one that provides storage of content; iv) the content infringes copyright; v) there is no *prima facie* legitimate reason for denying the request; and vi) the right holders provide documentation, evidence, and guarantees required by law to obtain court order. In addition, to ensure compliance with all the elements for presuming sufficient legal basis, through this *ex-ante procedure*, the court can prevent misuse and abuse of data retention laws by denying requests that attempt to elude compliance with the regulations. Court should be empowered to dismiss requests based on *de minimis* copyright infringement or cases in which content seem to be used under copyright exceptions and limitations, or under a constitutional base, such the exercising of the right to free speech.

A court order requesting ISPs to identify users is a minimal safeguard adopted by countries on this matter. The scope and intensity of a court's analysis on the prerequisites may vary, from a highly formalized check, like the one set forth in the United States by the DMCA, to more rigorous one, like the one suggested by the European Court of Justice in the *Promusicae case*. In Latin America, both Chile and Costa Rica demand a judicial order for requiring ISPs to disclose the identity of a given user for purpose of copyright

enforcement.[172] In such circumstances, implementing a system of direct request from copyright holders to ISPs would violate the law, in addition to fundamental rights set forth by those countries' constitutions and international instruments on human rights.[173]

Judicial intervention may act as an adequate safeguard not only by permitting the issuance of an identification request only after checking compliance with all legal requirements, but also by allowing the court to review the disclosed information in camera in order to evaluate the convenience of revealing it to right holders. In fact, in the United States, this has prevented usage of the mechanism for blackmailing or embarrassing users of content considered to be socially inappropriate, such as pornography, extreme political views, and some sexual practices. In the European Union, community law requires information to be provided to the court, not to the parties directly. Similarly, Costa Rica allows courts to prevent the disclosure of information when it refers to sensitive or intimate data and is irrelevant to elucidate the case.[174] In the case of Chile, the law is not clear, but general principles of law and the nature of applicable procedural rules suggest that a court may deny revealing information to the copyright holder in limited circumstances.

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172 Chile Copyright Act, art. 85 S; and, Costa Rica Intellectual Property Enforcement Act, art. 19.

173 Alex Metzger, *A Primer on ACTA: What Europeans Should Fear about the Anti-Counterfeiting Trade Agreement*, 1 J. INTEL. PROP., INFO. TECH. & E-COM. L. 109, 114 (2010) (criticizing ACTA language on identifying supposed online copyright infringers because it would allow identification under direct request of right holders to ISPs).

174 Costa Rica Intellectual Property Enforcement Act, art. 19.

In addition to judicial control over identifying procedures, there are other appropriate measures for preventing abusive and undesirable outcomes, like adopting specific norms on responsibility. For instance, Costa Rica has put on copyright holders an obligation to pay damages to data subjects and ISPs, in cases of abused procedures, which includes providing false information about infringements.[175] However, as was aforementioned, monetary compensation has limited deterrent effects in Latin American civil law countries. This may explain why Chile not only sets forth an obligation to compensate but also criminalizes one who provides false information for purpose of copyright enforcement.[176]

There are other safeguards for protecting privacy in cases of abusive and undesirable outcomes from identifying procedures. One of them is establishing rules for subsequent processing of obtained information; this is the case of Chile, where the law lays down a clear obligation to process the information according to the country's personal data protection act.[177] Another safeguard is excluding illegally-obtained information as evidence in courts. Several countries in Latin America have adopted rules excluding evidence obtained through infringing fundamental rights by the government as well as by

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175 Costa Rica Intellectual Property Enforcement Act, art. 20.

176 *See* Copyright Act Chile, art. 85 T and Criminal Code Chile, art. 197 (imposing up to five years and monetary fines on one who knowingly provides false information related to supposed copyright infringements).

177 Copyright Act Chile, art. 85 S (referring to rules set forth by the data protection act).

non-state actors, which may apply in cases when an Internet user's personal information has been obtained unlawfully.[178]

Finally, international instruments on human rights recognize everyone's right to the protection of the law against arbitrary or abusive interferences or attacks on the right to privacy.[179] As was explained in Chapter One, the American Convention on Human Rights is even more precise, when setting forth the right to judicial protection, according to which, everyone has the right to a simple and prompt judicial recourse for protection against acts that violate their fundamental rights.[180] This right has evolved in Latin American countries into a profuse recognition of constitutional remedies for protecting human rights – such as *amparo* proceedings, *habeas data* actions, and others –[181] which may apply as additional defenses in cases of arbitrary use or abuse of procedures for identifying supposedly copyright infringers.

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178 CARLOS A. CARNEVALE, DERECHO DE AUTOR, INTERNET Y PIRATERÍA: PROBLEMÁTICA PENAL Y PROCESAL PENAL 59-75 (Ad-Hoc, 2009) (discussing that copyright collective entities have used the agent provocateur as a technique for collecting IP numbers of supposed online infringers and arguing that such practice is forbidden by the Argentinean constitution, whether conducted by public or non-state actors and, consequently, any evidence collected through that technique must be excluded from court).

179 ADHR, art. V; UDHR, art. 12; ICCPR, art. 17 (2); and, ACHR, art. 11 (3).

180 ACHR, art. 25.

181 *See supra* Chap. I, notes 47-65 and accompanying text.

In sum, the right to privacy is a human right that not only protects an individual's interests, but also is an essential component of democratic societies and a precondition for full enjoyment of other fundamental rights. The right to privacy is not absolute, however, and there are certain permissible limitations that may apply for purposes of law enforcement. But, according to international human rights instruments and constitutional law, Latin American countries must comply with several requirements in order to set a specific limitation allowing ISPs to disclose their subscribers' personal information for copyright enforcement. First, only a law can provide that kind of limitation. Second, a legitimate purpose must justify limiting the right to privacy. Third, the actual application of that limitation must be proportional. And, fourth, appropriate safeguards must be in place in order to prevent procedural abuses and undesirable outcomes, a key element of which would be continued judicial control over disclosing procedures, among other preventive measures.

Chapter VIII
Taking Down Content and the Right to Due Process

Copyright grants to authors and their assignees exclusive rights to the economic exploitation of their creations. Those rights would be meaningless if copyrighted works were disseminated without authorization. For that reason, international instruments on copyright have required countries from the beginning to adopt rules to protect exclusive rights by preventing infringing material from entering and circulating within domestic markets. The enforcement of those rules, however, has become problematic when dealing with online infringement. Ultimately, this has led to the adoption of specific procedures for preventing massive copyright infringement by putting in place expeditious remedies for taking down infringing content from the Internet. This chapter examines some of those procedures.

The first section of this chapter describes briefly the approach adopted in the European Union, the United States, and Canada, where the discussion around taking down infringing content has occurred in the context of granting limited liability to ISPs. Those procedures are still exceptional throughout Latin America, but they might become increasingly more available, because several countries within the region have committed to implement such procedures into domestic law, by assuming specific obligations on the matter through free trade agreements signed with the United States. These countries have been tempted to follow the model of the Digital Millennium Copyright Act, which sets forth a private mechanism for taking down infringing content. However, this model is cumbersome for Latin American countries because it does not fit their legal system in which private actors are also subject to respect human rights and, as a result, as the second section in this chapter analyzes, there is much less room for private copyright enforcement, because of its questionable compliance with due process.

Although some Latin American countries are committed to implementing procedures for taking down copyright infringing content from the Internet, they are not forced to adopt a private model. In fact, they have room to maneuver in implementing procedures consistent with their own legal system. At this point, there are two alternative models on the matter in Latin America. The first is a judicial model, in which a supervising tribunal ensures that copyright holders' claims are justified and balances the competing interests, particularly users' fundamental rights; this model is championed by Chile and Costa Rica, countries that already have implemented it into their domestic law. The second is an administrative model, in which an administrative agency would supervise the proper functioning of notice and take down procedures; this administrative model has been recently adopted by Ecuador. The third and fourth sections of this chapter elaborate on both models and evaluate them in light of certain human rights obligations, particularly those related to the right to due process of law. Finally, the fifth section consolidates the main points of this chapter.

1. INTERNET LIABILITY REGIME AND TAKING DOWN CONTENT

As was aforementioned, there is no international legal framework governing ISPs' liability for their subscribers' infringements, but the United States and the European Union have played leading roles on the matter.[1] In the United States, the Communications Decency Act provides general immunity to ISPs from liability on infringing content, except on federal criminal liability and intellectual property claims.[2] However, the relevant comparison for purpose of this dissertation is the Digital Millennium Copyright Act, a law that provides ISPs a regime of limitation of liability

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1 *See supra* Chap. VII, notes 5-8 and accompanying text.

2 47 U.S.C. § 230 (excluding intellectual property and federal crimes from the immunity granted to interactive computer service for any information provided by another information content provider).

regarding copyright-infringing content.[3] In contrast, in the European Union, the Directive on E-Commerce adopts a comprehensive horizontal approach that excludes any responsibility of ISPs on any content-related infringement – whether copyright or not – committed by their users.[4] In order to benefit from limited liability, in both approaches ISPs must comply with certain obligations that vary according to the nature of the services they provide. One of those obligations is removing or blocking the access to infringing content, although there are differences on this matter.

In the United States, the Digital Millennium Copyright Act adopted a private procedure for taking down infringing material, which only applies for copyright infringement.[5] In order to take down a given content, the affected copyright holder must give to the respective ISP a written notice that includes the identity of the copyright owner, identification of the infringing material, and its location, among other information.[6] After receiving the notice, the ISP must confirm that the notice complies with the minimal requirements set forth by the law and, if so, it must expeditiously remove or block access to the infringing material.[7] After taking down the content, the ISP must communicate to the subscriber who posted the supposed infringing content that it has been taken down.[8] At this point, the concerned subscriber could challenge the notice by sending a counter-notice to the ISP, which must communicate it to the affected copyright holder, as well as advise that the content will be replaced online, unless the ISP is notified that the copyright holder has filed a lawsuit on the matter.[9] Thus, the supposed infringing content is taken down by a private procedure, with neither

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3 17 U.S.C. § 512.

4 Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [*hereinafter* EU Directive on E-Commerce], 2000 O.J. (L 178), 17/07/2000.

5 MICHAEL L. RUSTAD, GLOBAL INTERNET LAW 654 (West Academic Publ'g, 2014).

6 17 U.S.C. § 512(c).

7 17 U.S.C. § 512(g)(1).

8 17 U.S.C. § 512(g)(2).

9 17 U.S.C. § 512(g)(3).

a court order nor an administrative decision, but the mere direct request by the copyright holder to the ISP.

In the European Union, the Directive on E-Commerce has adopted a common framework of limited liability in favor of ISPs that mentions the removal or disabling of access to content that infringes either copyright or another piece of law.[10] However, because of its comprehensive scope and the variety of legal systems of European Union members, the Directive adopts more high-level language on this matter. In brief, in order to achieve limited liability, ISPs that store information must expeditiously remove or disable access to infringing material upon obtaining *"actual knowledge"* of the infringement or if *"a court or an administrative authority has ordered such removal or disablement"*.[11] The latter language makes evident that the Directive does not resolve the details of take-down procedures, but leaves them to the domestic law of its members, although it also requests that these procedures must be undertaken in the observance of the principle of freedom of expression,[12] and encourages self-regulation on the matter.[13] Thus, European Union law lacks a common procedure for taking down infringing content and delegates to member-states the adoption of specific rules for those procedures.

In 2005, Canada adopted a regime of limited liability for ISPs,[14] including the codification of a practice already in place among main local operators, known as "notice and notice,"[15] which differs from those provided by the United States and the European Union. According to this system, a copyright holder could request that an ISP notify one

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10 EU Directive on E-Commerce, arts. 13 and 14, and whereas 45.

11 EU Directive on E-Commerce, arts. 13.1.e and 14.1.b.

12 EU Directive on E-Commerce, whereas 46.

13 EU Directive on E-Commerce, whereas 49.

14 Bill C-60, An Act to Amend the Copyright Act, 1st Sess., 38th Parl., 2005 (as read at first reading by the House of Commons 20 June 2005) (Canada).

15 Gregory R. Hagen, *'Modernizing' ISP Copyright Liability,* in FROM 'RADICAL EXTREMISM' TO 'BALANCED COPYRIGHT': CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 362 (Michael Geist ed., Irwin Law, 2010) (reporting in the previous practice by local ISPs).

of its subscribers of an infringement committed by making available or downloading copyrighted material.[16] The requested ISP forwards the notice to its subscriber, who could take down the infringing content voluntarily.[17] However, the provider cannot disclose the personal information of its subscribers, nor remove nor block access to the content (unless a court orders it to do so), nor terminate its users' service.[18] There are conflicting views on this system: while copyright holders argue it is ineffective,[19] scholars value its balance of competing interests, because it shows concern for Internet users' fundamental rights.[20]

Latin American countries generally lack specific laws on taking down copyright infringing content from the Internet.[21] They do have laws on preventing infringing content from entering and circulating in their markets, according to international

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16 Copyright Act Canada, Sec. 40 (1).

17 Copyright Act Canada, Sec. 40 (2).

18 Hagen, *supra* note 15, at 383-393 (reporting on notice and notice provisions, as well as on certain data retention and rejection of graduated response in Canadian law).

19 *See* International Intellectual Property Alliance: Special 301 Report on Copyright Protection and Enforcement (2013), at 129 (complaining about lack of track on the system, which does not allow for distinguishing first-time infringers from serial offenders), *available at* http://www.iipa.com/2013_SPEC301_TOC.htm (last visited Apr. 2, 2014). *See also,* United States Trade Representative, 2012 Special 301 Report, at 25 (encouraging Canada to fully address the challenges of piracy over the Internet); United States Trade Representative, 2011 Special 301 Report, at 27; and, United States Trade Representative, 2010 Special 301 Report, at 25.

20 David Lametti, *How Virtue Ethics Might Help Erase C-32's Conceptual Incoherence*, in FROM 'RADICAL EXTREMISM' TO 'BALANCED COPYRIGHT': CANADIAN COPYRIGHT AND THE DIGITAL AGENDA, *supra* note 15, at 334 (referring to the Canadian notice and notice mechanism as *"a way to protect the rights of copyright-holders on the internet while not trenching on the potentially legitimate rights of users."*). *See also,* Daniel Gervais, *User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32,* in FROM 'RADICAL EXTREMISM' TO 'BALANCED COPYRIGHT': CANADIAN COPYRIGHT AND THE DIGITAL AGENDA, *supra* note 15, at 447-475 (expressing support for an *ex-post facto* control, like that of the notice and notice, but reproaching to lawmakers for failing in provide compensation for unpaid file-sharing of music).

21 *See supra* Chap. VII, notes 9-13 and accompanying text (referring the absence of legal frameworks on limitation of liability in favor of ISPs for their users' online behavior).

standards set forth by the Berne Convention and the TRIPS Agreements.[22] However, the latter rules are designed to deal with analogous content and become insufficient when confronting online content. The region provides plenty of anecdotal accounts of decisions attempting to tackle online infringement by adopting inappropriate measures, such as court judgments suggesting ISPs should control users, ordering ISPs to turn off their servers, indicating liability on domain name service providers, and so on. While some of those decisions could be explained because of the novelty of the problems for local courts and judges' ignorance of technology, these decisions also show the lack of a systematic approach through the region on how to regulate online infringement.[23]

Over the last decade, several Latin American countries have committed to implementing mechanisms of notice and take down for copyright infringing content into their domestic law through free trade agreements signed with the United States. This is the case of Chile (2003), Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic (2004), Colombia and Peru (2006), and Panama (2007). Mexico also was willing to commit the adoption of similar norms through the Anti-Counterfeiting Trade Agreement and the Trans-Pacific Partnership Agreement, but, eventually, both agreements were not ratified and the country remains lacking a procedure for notice and take down.[24] All those instruments reflect to some extent the DMCA and, therefore, their provisions are limited to copyright infringement. Scholars, however, have expressed their expectation that laws implementing those free trade

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22 Berne Convention, art. 16 (setting forth provisions on seizure of infringing copies or copyrighted material); and, TRIPS Agreement, arts. 42-60 (setting forth minimal rules on criminal and administrative procedures and measures, as well as border measures against goods that infringe intellectual property).

23 Claudio Ruiz Gallardo & Juan Carlos Lara Galvéz, *Responsabilidad de los Proveedores de Servicios de Internet (ISPs) en relación con el Ejercicio del Derecho a la Libertad de Expresión en Latinoamérica*, in HACIA UNA INTERNET LIBRE DE CENSURA: PROPUESTAS PARA AMÉRICA LATINA 107 (Eduardo A. Bertoni ed., Universidad de Palermo, 2012).

24 We may anticipate, however, that given the identity of some of the negotiating countries in ACTA and TPPA, it is very likely that a regime of limitation of liability for ISPs regarding copyright infringements committed by their users would be included in the renegotiation of the North Atlantic Free Trade Agreement (NAFTA).

agreement obligations will become the cornerstone for more comprehensive norms that also would provide clear rules for infringing content other than copyright, or at least the adoption of analogous criteria by domestic courts.[25]

Of the abovementioned countries, only Chile and Costa Rica have adopted special norms on notice and take down of copyright infringing content, while other countries within the region have unsuccessfully attempted to adopt such laws or have bills under discussion in their Legislatures. Their experiences show some of the complexities of implementing notice and take down procedures in harmony with Latin American countries' legal systems. As was mentioned, both domestic constitutional frameworks and international human rights obligations limit the flexibility for direct private enforcement and, therefore, a mechanism of notice and take down similar to that adopted by the DMCA seems unlikely to take hold in the region. In recent years, however, an alternative model for the notice and take down procedure has been under discussion in the region. It does not follow the direct private mechanism adopted by the DMCA, nor the judicial system models embraced by Chile and Costa Rica. This alternative model relies in the intervention of an administrative authority and it has been championed by Ecuador, but also is under consideration in other Latin American countries. The next section probes the problem of notice and take down procedures, while the ones following analyze the two alternative formulas that Latin American countries are considering for implementing notice and take down procedures: judicial and administrative mechanisms.

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25 *See supra* Chap. VII, notes 19 and 20 and accompanying text.

2. HUMAN RIGHTS CONSIDERATIONS FOR PRIVATE NOTICE AND TAKE DOWN PROCEDURES

The legislative choice made by the DMCA for notice and take down procedures regarding copyright infringing content rests on private enforcement: copyright holders directly request ISPs to expeditiously take down or block the access to infringing material. Neither judicial nor administrative authorities intervene during the procedure that leads to removing content or disabling its access. In fact, courts only become involved if the copyright holder files a copyright lawsuit or initiates another legal action after the content provider has challenged the notice by submitting a counter-notice. Meanwhile, the supposed infringing content already has been taken down or its access has been blocked.

The DMCA's private procedure for taking down infringing content has been subject to significant criticism. Copyright holders have argued that the procedures actually are not efficient enough and would require some improvements in order to achieve an adequate protection of their interests.[26] Although the system seems to work for major media and large corporations, small and medium-sized enterprises as well as individuals face difficulties dealing with this mechanism of enforcement.[27] Additionally, the inaccuracy of claims and abuse of procedures by copyright holders have raised concerns because of their deleterious effects on certain fundamental rights, particularly on free speech.[28] All these recriminations have contributed to an ongoing revision of the

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26 Darren Pogoda, Attorney-Advisor for Copyright, Office of Policy & Int'l Affairs, USPTO, Remarks at the Dep't of Commerce Multistakeholder Forum: Improving the Operation of the DMCA Notice and Takedown System (Mar. 20, 2014).

27 *Id.*

28 *Id.*

procedure by the U.S. government that has facilitated private agreements and adoption of best practices by different stakeholders in order to overcome such criticisms.[29]

Numerous anecdotes as well as empirical studies evidence the excesses and abuses committed by copyright holders in issuing take down requests to ISPs. They range from requesting YouTube to take down a short video of a toddler dancing to a song,[30] to requiring the removal of an adverse review of an album, erasing embedded videos released by the depicted artists themselves, removing adverse political speech or criticism against business management, and so on.[31] By 2006, an empirical study already found that many requests attempt to remove content protected by fair use or other substantive defenses, and claims had very thin copyright or no copyrightable subject matter at all,[32] leading to the conclusion that this procedure has a chilling effect on free speech.[33] More recently, a 2016 study shows that from those DMCA-notices that have been automatically created, sent, and processed, more than thirty percent have questionable validity.[34] The same study found that from requests made by smaller

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29 Angela Simpson, Deputy Assistant Sec'y, Nat'l Telecomm. & Info. Admin., Remarks at the Dep't of Commerce Multistakeholder Forum: Improving the Operation of the DMCA Notice and Takedown System (Mar. 20, 2014).

30 *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1151-52 (N.D. Cal. 2008) (ruling that copyright holders must first consider whether material posted on Internet constitutes 'fair use' before requesting to take down a given content, in a case in which a user posted on YouTube her baby dancing to the song "Let's Go Crazy" by Prince).

31 *See* ELECTRONIC FRONTIER FOUNDATION, Take Down Hall of Shame (collecting a number of cases on abusive notice and take down procedures), *available at* https://www.eff.org/takedowns (last visited Apr. 28, 2014).

32 Jennifer M. Urban & Laura Quilter, *Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act,* 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 666 (2006). *See also,* JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 69-81 (Stanford Law Books, 2011).

33 Urban & Quilter, *supra* note 32, at 683.

34 JENNIFER M. URBAN, JOE KARAGANIS, & BRIANNA L. SCHOFIELD, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 11-12 (American Assembly & Berkeley Law, 2017) (finding that 4.2% of the requests targeted material that did not match the supposed copyright infringing material, and 28.4% raised questions about their validity).

senders, presumably individuals and small businesses that have not automated their processing, 63.6% were either problematic or had questionable validity.[35]

The massive infringement of online copyright and the need for an expeditious mechanism for taking down infringing material has been one of the main arguments for the DMCA notice and take down procedure, a non-bureaucratic model in which copyright holders directly request ISPs to block or remove infringing material. More information about the actual functioning of this model has been provided by one of the main operators of the Internet, Google, through its Transparency Report that includes an extensive data set about requests by copyright holders for online enforcement of their rights.[36] According to Google, until October 2017, it has received almost three billion DMCA requests for copyright removal. In 2009 alone, it received more than 25 million DMCA notices per month, more than half of them targeting competing businesses and more than one third with no valid copyright grounds.[37] In January 2017, Google took down more than 16 million URLs because of DMCA notices, although 99.95% of them were not even indexed by the company.[38] Online copyright infringement may be massive, but these numbers make apparent that DMCA direct request procedures, rather

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35 *Id.*, at 87-88 (finding that 4.2% of requests targeted content that did not match the identified infringed work, 28.4% had questionable copyright claims, and 31% were problematic because of defective compliance with the statutory requirements, potential fair use defenses, and other reasons).

36 *See* GOOGLE, Transparency Report, *available at* https://transparencyreport.google.com (last visited Sept. 28, 2017).

37 *See* GOOGLE, Internet Service Provider Copyright Code of Practice – TCF Consultation Draft (Mar. 6, 2009) (submitting comments to the New Zealander Telecommunications Carriers' Forum's Consultation on a Draft of the Internet Service Provider Copyright Code of Practice related to Section 92A of the 1994 Copyright Act), *available at* www.tcf.org.nz/content/ebc0a1f5-6c04-48e5-9215-ef96d06898c0.cmr (last visited Apr. 28, 2014).

38 *See* Submission from Google to the Hon. Karyn Temple Claggett, Acting Register of Copyrights, U.S. Copyright Office (Feb. 21, 2017) *available at* http://cdn.michaelgeist.ca/wp-content/uploads/2017/02/Google-Additional-Comments-USCO-Section-512-Study.pdf (last visited Oct. 14, 2017).

than solving the problem of online infringement, have created a new problem, that is, the abuse and misuse of the notice and take down procedures themselves.

In recent years, the negative effects of private mechanisms of notice and take down have called the attention of international organizations competent on human rights. The 2011 Report of the UN Special Rapporteur on Freedom of Expression, for instance, analyzed the Internet and the exercise of free speech and other human rights, including several references to intermediaries' liability, copyright enforcement, and specifically on notice and take down procedures.[39] Although the Report favors the inclusion of rules on the matter by the United States and the European Union in order to protect intermediaries from liability,[40] it also highlights all sort of abuses because users lack the resources for challenging take down requests, while ISPs are not suited to make determinations on whether a given content is illegal, delete content to avoid liability, or use a system that lacks transparency.[41] In fact, the Report rejects the delegation of censorship measures to a private entity and, instead, welcomes initiatives that do not require ISPs to remove or block content without notification of a court order on the matter.[42]

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39 UNITED NATIONS, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue. UN Doc. A/HRC/17/27, May 16, 2011.

40 UNITED NATIONS, *supra* note 39, para. 41.

41 UNITED NATIONS, *supra* note 39, para. 42.

42 UNITED NATIONS, *supra* note 39, para. 43; *see also,* Joint Declaration on Freedom of Expression and the Internet, adopted June 1, 2011, by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, para. 2 (b) (stating that *"[a]t a minimum, intermediaries … should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied)"*); and, Joint Declaration about Free Speech on the Internet, adopted Jan. 20, 2012, by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression and the Inter-American Commission of Human Rights (IACHR) - Organization of American States (OAS) Special Rapporteur on Freedom of Expression (recognizing, in the

Abuse of private procedures for taking down supposed infringing content could become even more problematic in Latin America, because of its wide protection of copyright. As was mentioned, Latin American countries provide broader recognition of and protection to moral rights, and several countries grant comprehensive protection of economic rights, two circumstances that extend the scope of potential claims for removing content from the Internet.[43] Copyright limitations and exceptions play a narrow role in those countries,[44] which restrict the grounds for counter-notice by content providers. Additionally, most countries rely excessively on criminal enforcement of copyright, by adopting significant punishments for meaningless infringement,[45] a factor that discourages users from challenging even minimal accusations by copyright holders.

Private procedures for taking down supposed infringing content are also problematic in Latin America because they conflict with its own legal systems and practices. International human rights law requires countries to respect, promote, and protect those rights, which means states must adopt measures for preventing their violation not only by state actors but also by non-state actors.[46] In turn, that international obligation has been implemented into domestic law by constitutional frameworks that make fundamental rights enforceable against both state and non-state actors.[47] Given the evidence of the harmful effects of private notice and take down procedures on

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context of discussion at the U.S. Congress of the Stop Online Piracy Act (SOPA) and the PROTECT IP Act, as *"a legitimate objective in seeking to protect intellectual property rights,"* but expressing concerns on their impact on free speech, particularly on *"extrajudicial 'notice-and-termination' procedure,"* as well as on blocking entire websites if only a small portion of its content is infringing).

43 *See supra* Chap. I, notes 106-107 and 116-120; and, Chap. III, notes 15-20 and accompanying text.

44 *See supra* Chap. I, notes 108-115 and accompanying text.

45 *See supra* Chap. IV and V (analyzing overcriminalization and overpunishment in Latin American enforcement of copyright).

46 *See supra* Chap. I, notes 41-42 and accompanying text.

47 *See supra* Chap. I, notes 35-40 and accompanying text.

fundamental rights, the aforementioned peculiarity of these countries' legal system leaves little to no room for unchecked private enforcement mechanisms.

In Latin America, there are also numerous accounts of political misuse of private direct procedures for taking down supposed copyright infringing content. Ecuador has been the regional champion on misusing the DMCA for censoring adverse political messages.[48] In 2013, the documentary 'Acoso a Intag' by Pocho Álvarez was taken down from YouTube, because it included twenty seconds of President Correa's speech blaming indigenous communities for diminishing the country´s development by opposing mining companies. In 2014, another video in which President Correa praised the police for violent repression against students' demonstrations was taken down from YouTube. A similar fate was suffered by a critical documentary by filmmaker Santiago Villa that also included footage of President Correa, while Twitter removed cartoons posted by Diana Amores that expressed critical political viewpoints. In 2014, DMCA requests for taking down content were issued by an outsourced private service on behalf of the Ecuadorian government, today, said requests are mainly issued by a governmental agency. Usuarios Digitales, a local digital rights nonprofit, has documented 19 similar cases of said copyright misuse in just 2016.[49] Ecuador is not alone, however, similar cases have been documented in Brazil and Colombia, in which politicians, religious groups, and businesses have taken full advantage of the flexible DMCA private procedures for

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48 Eduardo Bertoni & Sophia Sadinsky, *The Use of the DMCA to Stifle Free Expression*, 13 REVISTA DE DERECHO, COMUNICACIONES Y NUEVAS TECNOLOGÍAS 3 (2015) (reporting in the misuse of the DMCA in the United States and Latin American countries). *See also*, *La Censura en Ecuador Llegó a Internet,* EL PAÍS, Dec. 14, 2014*,* by José Miguel Vivanco & Eduardo Bertoni (documenting Ecuadorian misuse of DMCA mechanism for notice and taking down online content); and, Organization of American States Inter-American Commission on Human Rights, 2 *Annual Report of the Office of the Special Rapporteur for Freedom of Expression: Annual Report of the Inter-American Commission on Human Rights*, 2014, ¶ 403-410,OEA/Ser.L/V/II Doc. 13 (Mar. 9, 2015).

49 USUARIOS DIGITALES, RESUMEN MONITOREO 2016-2017 (reporting on government infringements on digital rights in Ecuador, including copyright misuse, hacking, fake news, denial-of-service attacks, and others), *available at* http://www.usuariosdigitales.org/reporte-monitoreo-internet-201-2017/ (last visited Oct. 9, 2017).

taking down purported copyright infringing content that actually silence adverse viewpoints.[50]

Private notice and take down procedures conflict with the right to the due process of law, which has been granted by both international instruments on human rights, as well as domestic constitutional frameworks through the region. According to the American Convention on Human Rights, *"[e]veryone has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."*[51] This right obviously is implicated in resolving a request for taking down content, since making such a decision determines the rights and obligations among the concerned parties.[52]

The fact that the legal determination is made by a private entity becomes irrelevant within the Latin American legal system, because constitutional law also obligates non-state actors to respect the right to due process of law, as well as other human rights. As a matter of fact, there is abundant case law making private actors responsible for violating the right to due process in the region, such as business associations for expelling their affiliates, trade unions for imposing sanctions against their members, and even companies for adopting disciplinary measures against their employees. In Brazil, for instance, in a landmark case on enforcing fundamental rights

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50 Bertoni & Sadinsky, *supra* note 48, at 9.

51 ACHR, art. 8 (1).

52 *But see* MARÍA VÁSQUEZ, RESPONSABILIDAD DE LOS INTERMEDIARIOS Y PRESTADORES DE SERVICIO EN INTERNET 96-97 (unpublished Bachelor in Law thesis, University of Chile, 2008) (rejecting the argument in favor of a judicial notice and take down because of human rights obligations on due process would apply only to criminal enforcement); and, Elisa Walker Echeñique*, Implementing the IP Chapter of the FTA between Chile and the USA: Criticisms and Realities from a Developing Country Perspective*, 9-2 SCRIPTED 233, 257 (2012) (discarding argument in favor of judicial take down procedures based on due process because said procedures lack criminal nature).

against non-state actors,[53] the Federal Supreme Court ruled against a collective copyright society that had expelled one of its members because it denied him the right to self-defense.[54]

A primary objection to private notice and take down procedures, from the perspective of the right to due process of law, is the fact that it infringes on the exigency of a competent, independent, and impartial tribunal.[55] ISPs are not jurisdictional authorities, nor do they have the legal expertise for judging whether a given content is infringing. Although their independence from the government is feasible, their impartiality is at stake, particularly in the case of vertical integration between copyright holders and service providers. But even if they are able to achieve a certain impartiality, ISPs have strong incentives for taking down supposed infringing content in order to avoid any liability to copyright holders and, therefore, to fail in protecting their own subscribers.

Some scholars reject the idea that ISPs play a jurisdictional role on private notice and take down procedures.[56] According to their view, ISPs are mere messengers that

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53 INTERNATIONAL COMMISSION OF JURISTS, ACESSO À JUSTIÇA: VIOLAÇÕES DE DIREITOS HUMANOS POR EMPRESAS – BRASIL 5-7 (International Commission of Jurists, 2011) (analyzing corporate responsibility on human rights violations in Brazil).

54 Supremo Tribunal Federal, RE 201.819/RJ, Relator: Min. Gilmar Mendes, 11.10.2005, D.J. 27.10.2006 (ruling against a copyright collective society that had expelled one of its members, because of *"nobody could be punished, even by a private association, without having right of defense"* and that sanctioning power of a private entity *"is not unlimited, but subject to public order and must assure fundamental rights of members"*).

55 ACHR, art. 8 (1) (providing that "[e]very person has the right to ... a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."). *See also,* ADHR, art. XXVI (requiring a court previously established by preexisting laws); UDHR, art. 10 (demanding an independent and impartial tribunal); and, ICCPR, art. 14 (1) (requesting a competent, independent and impartial tribunal established by law). *See supra* Chap. VI, notes 33-48 and accompanying text.

56 VÁSQUEZ, *supra* note 52, at 102-103 (rejecting the argument of ISP judging validity of notice request, because it must take down content without any additional judgment). *But see,* Lorena

delete infringing content and communicate a copyright holder's request to the respective content provider. ISPs, according to them, must not judge the request, but merely check that it meets certain formal requirements. If anyone is making a decision on the matter, these scholars argue, it is the copyright holder, since the law empowers it to make the request to remove the content.[57] This explanation is, however, problematic, because it puts the copyright holder in the roles of both judge and party to the action, which is a more obvious violation of the due process of law requirement of a competent, independent, and impartial tribunal.

A second requisite for the right of due process of law is a fair hearing. As is discussed above,[58] a fair hearing presupposes the meeting of three requirements: procedures must take place in a reasonable time, they must be held in public, and parties should be provided the adequate means for defense. The last requirement, according to the Inter-American Court of Human Rights, demands respecting both equality of arms and the adversarial principle.[59] These demands are unmet when implementing a private procedure for notice and take down of supposed infringing material, because a content provider does not have a chance to be heard before the material is removed or its access blocked. Although the content provider could challenge copyright holder's notice by submitting a counter-notice later on, until then it is deprived of its fundamental rights, not only freedom of expression but also other correlated rights, by the mere request of another private party.

Piñeiro, *Responsabilidad de los ISPs por Violaciones a la Propiedad Intelectual: Estados Unidos, Europa y Chile*, 5 REVISTA CHILENA DE DERECHO INFORMÁTICO 171, 190 (2004) (arguing ISPs play a jurisdictional role on private mechanisms of enforcement).

57 VÁSQUEZ, *supra* note 52, at 96 (arguing that direct take down requests do not put ISPs in a position to assess or judge said requests, since that is the copyright holders' responsibility).

58 *See supra* Chap. VI, notes 49-55 and accompanying text.

59 *Ivcher Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, para. 107 (Feb. 6, 2001) (considering that a defendant's rights have been violated if he or she has been prevented from intervening in procedures, fully informed, in all the stages, despite being the person whose rights were being determined).

Implementing a private procedure for notice and take down of supposed infringing material thought business agreement is also cumbersome in Latin America because of several legal obstacles. In addition to the aforementioned broad protection granted copyright and the limited room for private enforcement because of international human rights and constitutional laws, other fields of law constrain the implementation of a private notice and take down procedure. Consumer protection law, for instance, regulates the relations between goods and services providers and their end-users, including several provisions that prevent abusive practices against consumers. Criminal law sets forth certain crimes, such as interception of correspondence and privacy intrusion, whose terms could apply to those who block online communication even if it is without actually accessing the content. Telecommunication law provides additional restrictions by setting forth minimal requirements on the quality of services incompatible with implementing private take down procedures, as well as imposing administrative and criminal sanctions against providers that infringe those legal obligations. Among the latter constraints, it should be highlighted the increasing adoption of net neutrality laws through Latin America,[60] whose provisions prohibit any attempt for implementing private procedure for notice and take down without explicit authorization by the legislature.

In the Latin American legal system, net neutrality laws cement constitutional mandates that prohibit discrimination by both state and non-state actors, by preventing those who provide Internet access from discriminating between online communications.[61] Thus, net neutrality laws are a natural development of local

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60 OONA CASTRO, SIVALDO PEREIRA DA SILVA, & PABLO VIOLLIER, NEUTRALIDADE DE REDE NA AMÉRICA LATINA: REGULAMENTAÇÃO, APLICAÇÃO DA LEI PERSPETIVAS. OS CASOS DO CHILE, COLÔMBIA, BRASIL E MÉXICO (Intervozes & Derechos Digitales, 2017) (documenting net neutrality laws throughout Latin America).

61 *See* Alberto Cerda, *Neutralidad de la Red y Libertad de Expresión*, 4 REVISTA CUESTIÓN DE DERECHOS 67, 73-77 (2013) (analyzing net neutrality law in the Latin American constitutional context, particularly in Chilean one). *See also*, DAWN C. NUNZIATO, VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE (Stanford University Press, 2009) (arguing, in the U.S. legal context, that Congress should pass a law on

constitutional frameworks, which may explain their recent and rapid adoption throughout the region.[62] These laws guarantee neither access to everyone nor affordability, although they also may help in achieving those public policy objectives; in fact, providers still could offer different plans at different prices. Net neutrality assures that service quality is not diminished by arbitrary measures adopted by a provider, such as degrading or slowing down speed, conditioning access to certain equipment, or blocking access to certain services or content. In order to achieve their aims, net neutrality laws impose on access providers a series of obligations, including, among others: a duty to provide enough and adequate information to users about provided services and a duty to restrain from blocking, interfering, discriminating, retarding, or restricting the right of Internet users to use, send, receive, or offer a given content, application, or service.[63]

Net neutrality laws prevent implementing a private procedure for taking down supposed copyright infringing content, by forbidding service providers from blocking or denying access to a given content, whether on their own initiative or at a copyright holder's request. Net neutrality laws provide an exception allowing certain legitimate interceptions of communications for purposes of law enforcement, although they are limited to cases in which competent public authorities obtain it by court order. Additionally, those laws usually set forth a limited exception circumscribed to legitimate network management at a given user's request as well as for purposes of network safety.

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or require the Federal Communication Commission to implementing net neutrality principles for online communications).

62 Currently, Latin American countries that enjoy net neutrality by law are: Chile (2010), Colombia (2011), Peru (2012), Mexico (2013), and Brazil (2014). Other countries have granted net neutrality by regulation, which is the case of Paraguay (2009), Ecuador (2012), and Argentina (2013). Additionally, legal amendments on the matter are under legislative discussion in Argentina, Mexico, and Uruguay.

63 Jeremy Carp, Isabella Kulkarni, and Patrick Schmidt, *Transparency, Consumers, and the Pursuit of an Open Internet: A Critical Appraisal, in* REGULATING THE WEB: NETWORK NEUTRALITY AND THE FATE OF THE OPEN INTERNET 49-69 (Zack Stiegler ed., Lexington Books, 2013) (arguing why providing information to customers is not enough in order to guarantee net neutrality).

However, none of those exceptions is broad enough for allowing the implementation of private procedures for taking down copyright infringing content.

Although human rights concerns obstruct the adoption of private mechanisms of enforcement, such as direct requests from copyright holders to ISPs for taking down supposed infringing content, those concerns do not prevent adopting mechanisms more in tune with human rights obligations. After all, on one side, most human rights are relative in terms of allowing for certain permissible exceptions and, on the other, it would be unfair to deny copyright holders any mechanism for preventing and halting unauthorized uses of their work online.[64] In order to overcome such dilemmas, Latin American countries, especially those committed to implementing a notice and take down procedure for copyright infringing content, have adopted a system in which a public authority assesses the validity of copyright holders' claims before requesting an ISP to take down or block the access to a given content, the process of which is explained in the sections below.

Before delving into the Latin American procedures for taking down infringing content, it seems necessary to elaborate on the degree of freedom countries have for implementing such systems. Most countries within the region – including Argentina, Brazil, and Mexico – have not committed to any international obligation on the matter and, therefore, are free to adopt or reject such a regime, as well as design it according to their specifications. Several other Latin American countries, however, already have made express commitments on the matter through free trade agreements signed with the United States that require implementation of notice and take down into domestic law. The following paragraphs answer the question of how free these latter countries are to implement those obligations, and to what extent, into domestic law.

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64 *See supra* Chap. I, notes 149-173 and accompanying text.

When implementing into domestic law obligations assumed through international instruments, countries have certain freedoms to make necessary adjustments. This principle has been expressly recognized by the leading international instrument on intellectual property, the TRIPS Agreement, in its first provision in the following terms, *"[m]embers shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."*[65] This clause provides to countries some maneuvering room for adapting obligations to their particular social, cultural, and economic circumstances in order to prevent the situation where mere transplanting of those obligations would defeat actual compliance or cause unintended effects, as well as guarantee harmonization with other international obligations and legal systems. Implementation, however, cannot become the back door for avoiding compliance with international obligations.[66]

It could be argued that the obligation to adopt notice and take down procedures set forth by the free trade agreements between the United States and several Latin American countries does not provide maneuvering room for its implementation into domestic law. Even inexperienced readers would note the numerous, extensive, and detailed provisions in free trade agreements that refer to the matter, most of them a literal copy of the DMCA, whose provisions are fully in force. According to this argument, countries should limit implementation to merely transplanting translated versions of those provisions into domestic law. This interpretation, however, is wrong.

Although free trade agreements provide detailed provisions on notice and take down procedures, they still leave broad maneuvering room for their implementation into

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65 TRIPS Agreement, art. 1 (1).

66 *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (entered into force Jan. 27, 1980), arts. 26 (setting forth the principle '*pacta sunt servanda*') and 27 (rejecting the use of domestic law as an excuse for failing to meet international obligations).

domestic law.[67] First, general declarations and provisions of free trade agreements assure the need for implementation.[68] Second, general obligations related to the enforcement of intellectual property rights reaffirm implementation according to the needs of the domestic legal system,[69] with particular reference to those resulting from due process of law.[70] Third, specific provisions on limitation of liability for ISPs grant such maneuvering room for implementation.[71] In fact, those who argue for adopting a system of direct notice from copyright holder to ISPs struggle with a free trade agreement's provision that requires a court order for blocking access to a given online location or for terminating specified accounts.[72] Fourth, provisions related to the entry in force of free trade agreements reiterate the need for implementation, including those provisions

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67 Note: Although the following references are made to the FTA U.S.-Chile, almost all, if not all, of them are available in other free trade agreements signed by the U.S. with other Latin American countries.

68 FTA US-Chile, preamble (making express mention to need for implementation, although limited to environmental protection and conservation), arts. 1.2.2 (requiring parties to interpret and apply this treaty *"in accordance with applicable rules of international law"*), 1.3 (affirming existing rights and obligations under other international instruments), and 1.4 (requiring parties to *"ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement"*).

69 FTA U.S.-Chile, arts. 17.11.1 (providing that *"[e]ach Party shall ensure that procedures and remedies set forth in this Article for enforcement of intellectual property rights are established in accordance with its domestic law"*) and 17.11.2 (a) (making clear that treaty obligations do not require *"to put in place a judicial system for the enforcement of intellectual property rights distinct from that already existing for the enforcement of law in general"*). *See also,* FTA U.S.-Chile, footnote 26 (clarifying that *"[n]othing in this Chapter prevents a Party from establishing or maintaining appropriate judicial or administrative procedural formalities for this purpose that do not impair each Party's rights and obligations under this Agreement"*).

70 FTA U.S.-Chile, art. 17.11.1 (setting forth that *"procedures and remedies . . . shall be made available to the holders of such rights in accordance with the principles of due process that each Party recognizes as well as with the foundations of its own legal system"*).

71 FTA U.S.-Chile, footnote 38.

72 FTA U.S.-Chile, arts. 17.11.23 (e) (providing that "*if the service provider qualifies for the limitation with respect to function (b)(i), court ordered relief to compel or restrain certain actions shall be limited to measures to terminate specified accounts, or to take reasonable steps to block access to a specific, non-domestic online location*").

related to the online enforcement of copyright.[73] Consequently, free trade agreements do not demand directly transplanting DMCA provisions into domestic law, but rather implementing a system of notice and take down inspired by the DMCA, although in accordance with each country's legal system, particularly with its requirements for the due process of law.

3. JUDICIAL NOTICE AND TAKE DOWN PROCEDURES

Some Latin American countries have implemented notice and take down procedures for infringing content, such as Chile and Costa Rica, which did so as a result of obligations assumed through free trade agreements with the United States. Chile and Costa Rica did not, however, merely transplant the treaty language into domestic law, but took advantage of the aforementioned maneuvering room in their implementation. Paraguay adopted similar procedures on its own initiative, inspired by both the European Union's Directive on E-Commerce and the U.S Copyright Act. Other countries have introduced bills on the matter, including Brazil, Colombia, and Mexico, but have failed so far to obtain legislative approval. The following paragraphs briefly describe those initiatives and highlight their main achievements and failures from a human rights viewpoint.

In Chile, implementing the law on notice and take down procedures was preceded by intense academic debate. Some scholars argued for adopting the DMCA model, by transplanting into domestic law a mechanism that would allow copyright holders directly to request ISPs to take down infringing content, which would guarantee higher effectiveness of copyright protection.[74] Other scholars emphasized the potential

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73 FTA U.S.-Chile, arts. 17.12.2 (providing implementing terms for certain provisions, including those related to online enforcement of copyright).

74 Santiago Schuster, *Propiedad Intelectual en Internet: Responsabilidad Legal en las Redes Digitales, in* 2 CONGRESO INTERNACIONAL PROPIEDAD INTELECTUAL, DERECHO DE AUTOR Y

negative implications for freedom of speech at private enforcement's hands and, instead, suggested implementing this particular free trade agreements obligation by incorporating judicial control on procedures of notice and take down.[75] The latter view prevailed and, in fact, some of its proponents would come to play a central role in advancing those ideas before both the Executive branch and the Legislature during the subsequent discussion of the copyright reform.[76]

In 2010, Chile adopted a judicial mechanism for notice and take down. Affected copyright holders or their representatives can request a court order to take down infringing content from the Internet or to block its access.[77] The measure could be decreed at any moment during the trial, or under exceptionally serious circumstances as a preliminary injunction *inaudita parte*, with previous assurance through a bond by the requestor to the court's satisfaction. The request must identify the plaintiff and the defendant, the affected rights, the rights holder, and the manner in which the rights are infringed, as well as precisely identify the infringing content and its location in the respective provider's network or system. If the request meets all the requirements and the measure does not affect other legitimate content, the court must issue, without delay, an order for taking down or blocking access to the infringing content, notice of which

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PROPIEDAD INDUSTRIAL 548-571 (s.e., 2004); VÁSQUEZ, *supra* note 52, at 100-101 (arguing for implementing a procedure for notice and take down like the DMCA, plus a compulsory register of ISPs run by the government).

75 Cristian Maturana, *Responsabilidad de los Proveedores de Acceso y de Contenidos en Internet*, 1 REVISTA CHILENA DE DERECHO INFORMÁTICO 17 (2002); Piñeiro, *supra* note 56; DANIEL ALVAREZ, LIBERTAD DE EXPRESIÓN EN INTERNET Y EL CONTROL DE CONTENIDOS ILÍCITOS Y NOCIVOS (unpublished Bachelor in Law thesis, University of Chile, 2004); Iñigo de la Maza Gazmuri, *Responsabilidad de los Proveedores de Servicios de Internet por Infracción a los Derechos de Autor*, 1 CUADERNO DE ANÁLISIS JURÍDICO 33, 63 (2004) (suggesting judicial control on the matter); PAULA JARAMILLO, ACCESO A LA CULTURA Y REGULACIÓN DE DERECHO DE AUTOR: DESDE LA PERSPECTIVA DEL TRATADO DE LIBRE COMERCIO CHILE-ESTADOS UNIDOS Y EL ACUERDO DE ASOCIACIÓN CON LA UNIÓN EUROPEA (unpublished LL.M. in Law thesis, University of Chile, 2008).

76 Elisa Walker Echeñique*, supra* note 52, at 253-254 (summarizing the arguments in favor and against judicial procedure for noticing and taking down copyright infringing content during the legislative discussion).

77 Copyright Act Chile, art. 85 Q.

must be properly given to the ISP. The affected content provider could reestablish the access to the content by challenging the court order through a request that meets analogous requirements and includes any additional supporting evidence, the submission of which implies acceptance of the court's jurisdiction for resolving the case in a summary trial.

When a court decrees taking down or blocking content, it not only must pay attention to potential damages to the copyright holder, but also must balance all competing interests, by considering the burdens imposed on service providers, users, and subscribers, as well as the technical feasibility and efficacy of the measure, and the availability of less burdensome measures to assure respect of copyright.[78] As a result of this balancing, a court could deny a given request. Another safeguarding measure in the Chilean implementing law is the inclusion of special rules on responsibility.[79] According to the law, one who knowingly provides false information on copyright infringement must compensate the affected party for any damages resulting from subsequent actions taken by the ISP. However, because of the limited dissuasive effects of compensatory damages in civil law countries, the law also criminalizes the copyright holder's abuse of this procedure with imprisonment of up to five years and monetary fines.[80]

Chilean lawmakers attempted to balance the competing interests at stake by implementing a judicial procedure for notice and take down of infringing content from the Internet. During the legislative discussion, however, the United States Trade Representative (USTR) expressed its displeasure with that procedure and argued for adopting a system like the U.S. one, pursuant to which copyright holders could submit requests directly to ISPs to take down supposed infringing content, without the necessity

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78 Copyright Act Chile, art. 85 R inc. 3.

79 Copyright Act Chile, art. 85 T.

80 Criminal Code Chile, art. 197.

of a court order.[81] Members of the Congress emphatically rejected such private mechanism of enforcement, because it would infringe the constitutional guarantees of due process and because they knew of the abuses that the private system had occasioned in the United States.[82] In the alternative, the USTR suggested a procedure before an administrative body, such as the local telecommunication agency, but that did not attract the support of lawmakers who, at that time, were convinced the judicial procedure was the only one in compliance with both constitutional law and international instruments on human rights.[83]

The Chilean notice and take down procedure has had a mixed record. Its main achievement has been to introduce significant substantive and procedural safeguards for preventing abuse of procedure by copyright holders and, at the same time, providing an

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81 Cable from the U.S. Embassy in Santiago to the Dep't of Commerce, the Dep't of Agriculture, the Sec'y of State, *et al,* Feb. 21, 2008: Chile: Post Recommends Chile Remain on Priority Watch List, para. 10 (referring to the engagement of the U.S. Embassy in the Chilean legislative process); and Cable from the U.S. Embassy in Santiago to the Dep't of Commerce, the Dep't of Justice, the Treasury Dep't, & the Sec'y of State, Dec. 12, 2008: Intellectual Property: Members of Congress Pledge Assistance in Fulfilling FTA Commitments, para. 4. *See also,* Dirección General de Relaciones Económicas Internacionales (Chile), Minuta de Reunión Chile-Estados Unidos, celebrada a través de videoconferencia el primero de noviembre de 2007 (stating that, in meetings, *"US strongly encourages that Chile develop (sic) a significantly simpler and more expeditious alternative mechanism with a notice without the need for a court order…"*).

82 *See supra* note 32.

83 Alberto Cerda, *Limitación de Responsabilidad de los Prestadores de Servicios de Internet por Infracción a los Derechos de Autor en Línea* [Internet Service Providers' Limitation of Liability for Online Copyright Infringement], 41 REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DE VALPARAÍSO 121, 142 (2014) (describing the alternatives considered by the Chilean congress for notice and take down procedures). *See also,* Elisa Walker Echeñique, *supra* note 52, at 252 (referring the normative alternatives available before the Chilean congress); Alberto Cerda, *Cyber Law in Chile, in* INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CYBER LAW 129-130 (Jos Dumortier ed., Kluwer Law International, 2014); and, Sergio Amenabar, *El Tratado de Libre Comercio con los Estados Unidos y la Propiedad Intelectual en el Marco de Otros Acuerdos Internacionales*, in LA PROPIEDAD INTELECTUAL EN CHILE Y EL TRATADO DE LIBRE COMERCIO CON LOS ESTADOS UNIDOS 22 (Chilean-American Chamber of Commerce, 2010) (noting that a judicial procedure for taking down copyright infringing content was a legal choice made by the Legislature because of constitutional concerns about direct requests by copyright holders to ISPs would become a mechanism for private censorship).

expeditious mechanism of enforcement, by mandating judicial control thought a simplified procedure over the matter.[84] The procedure has not enjoyed success with rights holders, however, who prefer to approach infringing content providers directly with private notices, including threatening them with criminal actions that are broadly available in domestic law.[85] These private notices are used against content providers whose identity is known, either because they disclose it (e.g., by including contact information on their websites) or it is easily obtainable (e.g., by retrieving info from WHOIS systems). In sum, the law sets a balance in formal procedures, but fails to provide guidelines for private extra-judicial procedures in the face of overcriminalized copyright enforcement.

In 2011, Costa Rica became the second Latin American country to implement into domestic law those provisions of free trade agreements related to the online enforcement of copyright, including specific provisions on notice and take down of infringing content.[86] According to its law, a copyright holder can send a written request to an ISP to notify a content provider of supposed infringing material, who, within fifteen days, must take down the content voluntarily or challenge the request by summiting a counter-notification.[87] If the content provider neither answers nor takes down voluntarily the infringing material, the ISP then must do it. If, on the other hand, the content provider challenges the notice, the ISP cannot take down the material and

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84 The Copyright Act does not set a given term for issuing the court order, but it simplifies paperwork, allows for preliminary requests, and requires courts to issue the order without delay, wording flexible enough for accommodating the actual amount of work of a given court. In practice, depending on the location of a court and diligence of requestor, it may take from one day to a couple of days from submitting the request.

85 *See supra* Chap. IV, notes 60 and 111, and accompanying text.

86 Reglamento sobre la Limitación a la Responsabilidad de los Proveedores de Servicios por Infracciones a Derechos de Autor y Conexos de Acuerdo con el Artículo 15.11.27 del Tratado de Libre Comercio República Dominicana-Centroamérica-Estados Unidos, publicado en La Gaceta, el 16 de diciembre de 2011 (Costa Rica) [*hereinafter* ISP Regulation Costa Rica].

87 ISP Regulation Costa Rica, arts. 16-17.

the interested copyright holder must pursue legal action before a court.[88] Additionally, as a safeguard, the law provides for civil liability and criminal responsibility in case of abuse of procedures.[89] In sum, if the content provider challenges the notice, content can be taken down only with a court order.

The Costa Rican notice and take down procedure also relies on judicial control, but additionally introduces certain elements that increase its efficacy in pretrial stages. First, it imposes on ISPs an obligation to cooperate in enforcing the law, by requiring them to communicate to content providers those notices of infringement that copyright holders have issued. Second, it requires content providers to make a decision in order to challenge a notice or not, before taking down any content. Third, it requests ISPs to take down only content whose providers have not challenged the initial notice. If a conflict arises, by the content provider challenging the issued notice, the matter rises to the level of enough legal relevance that it needs to be resolved in court.

Although Chile's law also obliges ISPs to communicate to their subscribers notices of supposed infringement issued by copyright holders,[90] it does not allow for full implementation of the Costa Rican model, because it lacks a request for decision by the content provider, as well as an obligation to take down content identified by unchallenged notices. It must be noted that pretrial notices do not constitute a threat of criminal action in Costa Rica, since its copyright criminal enforcement is less harsh than that of other Latin American countries, including Chile, where even not-for-profit and harmless infringement is punishable.[91] Thus, there are fewer chances of unintended chilling effects on content providers subject to these pretrial notices based on disproportional criminal enforcement.

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88 ISP Regulation Costa Rica, arts. 18-19.

89 ISP Regulation Costa Rica, arts. 6 and 16.

90 Copyright Act Chile, art. 85 U.

91 *See supra* Chap. IV, notes 60 and 111, and accompanying text.

Paraguay recently adopted rules on notice and take down procedures that mix the influences of both the European Union and the United States laws.[92] Following the European Union's Directive on E-Commerce, the law sets forth comprehensive rules on ISP liability for infringing content that include an obligation to take down infringing content as soon as having "effective knowledge" that it infringes third parties' rights. Such knowledge is acquired through a notification by the competent administrative or judicial authority.[93] But, inspired by the DMCA model, in the specific case of intellectual property infringements, rights holders can issue direct notices to ISPs requesting them to take down infringing content, although the law does not indicate the specific requirement for such requests.[94] Unlike the U.S. law, however, the latter procedure applies not only for enforcing copyright, but also any other intellectual property assess. The law does not provide for any special safeguards to prevent abuse of procedure and, although it sets forth certain monetary sanctions, they apply only against the ISP that fails to comply with its obligation to take down infringing content.[95]

Paraguayan law on notice and take down procedures deserves several comments from a human rights viewpoint. First, it is unclear the reasons that justify distinguishing between notice and take down procedures for enforcing intellectual property rights from those for enforcing other third party rights (those related to, e.g., child pornography, defamation, or privacy infringing content) and, subsequently, how that distinction is not arbitrary discrimination.[96] Second, it seems that the rules infringe the due process of law, by leaving the notice and take down decision completely to the copyright holders' discretion, without a fair hearing before an independent tribunal. Third, the law fails to provide any specific safeguard to prevent abuse of procedure by copyright holders, since

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92 Ley N° 4868/2013 sobre Comercio Electrónico, publicada en la Gaceta Oficial, el primero de marzo de 2013 (Paraguay) [*hereinafter* E-Commerce Act Paraguay]

93 E-Commerce Act Paraguay, arts. 12-14, and 18.

94 E-Commerce Act Paraguay, art. 16.

95 E-Commerce Act Paraguay, art. 36.

96 *See,* ADHR, art. II; UDHR, art. 7; ACHR, art. 24; and, ICCPR, art. 26 (granting, all of them, to everyone the right to equal protection by the law).

there is no judicial control, whether associated with civil or criminal responsibility. Similarly, the law does not provide any mechanism to ISPs for rejecting the enforcement of a given copyright holder's request, because such a rejection would compromise its own civil liability. What is most striking about the Paraguayan law is how the underlying pressure for raising the level of protection for intellectual property is shaping and twisting legal institutions, to the point of tailoring a truly special online regime that disassociates from the rest of its legal system.

Brazil has also approved a law that includes specific norms on notice and take down of infringing content, other than copyrighted one, as part of the bill known as the *Civil Legal Framework*.[97] This law has set forth the principles, guarantees, rights and duties for Internet usage within the country, including general norms on online data protection, net neutrality, data retention, and intermediary liability. As part of the net neutrality obligations, the law prohibits access providers from interfering, degrading, and blocking online communications, except under limited circumstances, none related to copyright enforcement.[98] As part of the provisions related to ISPs, the law grants them limited liability for third party content, unless those providers fail to comply with a court order requesting them to take down specific infringing content for reasons other than copyright infringement.[99] In other words, ISPs would be able to adopt procedures for notice and take down in their own terms of service,[100] but, in order to enjoy limited liability, they must comply with court orders regarding infringing content, except on the

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97 Lei No. 12.965 de 2014, estabelece princípios, garantias, direitos e deveres para o uso da Internet no Brasil (Brazil) [*hereinafter* Marco Civil Brazil].

98 Marco Civil Brazil, art. 9.

99 Marco Civil Brazil, arts. 18-21.

100 ANA CRISTINA AZEVEDO P. CARVALHO, MARCO CIVIL DE INTERNET NO BRASIL: ANÁLISE DA LEI 12.965/14 E DO DIREITO DE INFORMAÇÃO 133 (Alta Books Editora, 2014); CARLOS AFFONSO PEREIRA DE SOUZA, MARIO VIOLA & ROLANDO LEMOS, UNDERSTANDING BRAZIL'S INTERNET BILL OF RIGHTS 47-49 (Instituto de Tecnología & Sociedade do Rio de Janeiro, 2015); and, CARLOS AFFONSO SOUZA & ROLANDO LEMOS, MARCO CIVIL DA INTERNET: CONSTRUÇÃO E APLICAÇÃO 100-102 (Editar Editora Associada, 2016).

copyright issue, as expressly excluded from the scope of the law.[101] The procedures for taking down copyright infringing content remain unresolved pending the outcome of another bill on copyright still being drafted by the government. Recent political events, however, make unlikely any legislative discussion on copyright matters in Brazil for years to come.

Leaving aside the dysfunctional procedures of notice and take down adopted by Paraguay and Brazil, and focusing on those adopted by Chile and Costa Rica, it is possible to highlight some common patterns. Both countries struggled to design a procedure that both complies with free trade agreement duties and respects international human rights obligations. Both countries realized that leaving notice and take down requests completely at the copyright holders' discretion was counterproductive from a human rights viewpoint. As a result, they incorporated judicial control, as a key safeguard for preventing abuse of procedures that could diminish human rights. Additionally, special rules on civil liability and criminal responsibility were incorporated in those countries' implementing laws, in order to prevent superfluous and groundless claims that could harm users' rights, inhibit reliance on copyright exceptions, and erode legal certainty. As the TRIPS Agreement would put it, these countries went through the method of implementing within their own legal system and practice.

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101 CARVALHO, *supra* note 100, at 133-134 (noticing the potential serious consequences for the right to information since a court should decide on the legality of a giving content); CELSO ANTONIO PACHECO FIORILLO, O MARCO CIVIL DA INTERNET E O MEIO AMBIENTE DIGITAL NA SOCIEDADE DA INFORMAÇÃO 107-109 (Saraiva, 2015) (complaining about unconstitutionality and inequality of provisions because of excluding copyright matters); SOUZA, VIOLA & LEMOS, *supra* note 100, at 51 (noticing that copyright exception was introduced in the final review of the bill at demand from national broadcasters); SOUZA & LEMOS, *supra* note 100, at 105-106; and, DANIEL ARNAUDO, BRAZIL, THE INTERNET AND THE DIGITAL BILL OF RIGHTS: REVIEWING THE STATE OF BRAZILIAN INTERNET GOVERNANCE 9 (Igarapé Institute, 2017) (stating that law excluded copyright because of intending to take a *"punitive tact . . . in alignment with more extreme copyright enforcement regulations, such as the U.S. Digital Millennium Copyright Act"*).

4. FROM JUDICIAL TO ADMINISTRATIVE NOTICE AND TAKE DOWN PROCEDURES

Judicial procedures for notice and take down of copyright infringing content have been subject to criticism. Most of the disapproving analyses have referred to the Chilean model, since the Costa Rican one has passed mainly unnoticed. For instance, the International Intellectual Property Alliance, a comprehensive coalition of trade associations that represents American companies, has stated that, although the 2010 copyright reform put Chile closer to compliance with obligations to establish effective notice and takedown measures, the adopted procedures fall short in efficiently reducing online piracy.[102] The U.S. Trade Representative has echoed those criticisms and, in successive Special 301 Reports, has requested that Chile *"amend its ISP liability regime to permit effective and expeditious action against online piracy."*[103]

Criticisms about judicial notice and take down procedures do not challenge the model's compliance with free trade agreements obligations.[104] This could be explained because judicial notice and take down procedures are an alternative admitted by free

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102 International Intellectual Property Alliance, *Special 301 Report on Copyright Protection and Enforcement: Chile* (2013), at 22-26, *available at* http://www.iipa.com/2013_SPEC301_TOC.htm (last visited Mar. 19, 2014).

103 U.S. Trade Representative, 2016 Special 301 Report, at 53; *see also* U.S. Trade Representative, 2016 Special 301 Report, at 49; UniteU.S. Trade Representative, 2015 Special 301 Report, at 57; U.S.Trade Representative, 2014 Special 301 Report, at 44; U.S. Trade Representative, 2013 Special 301 Report, at 28; U.S. Trade Representative, 2012 Special 301 Report, at 26; and, U.S. Trade Representative, 2011 Special 301 Report, at 28.

104 *See,* TPPA, Annex 18-F Annex to Section J (granting a grandfather exception to Chile regarding its implementation of the United States – Chile FTA on Internet service providers' limitation of liability). *See also, Senado Aprobó Ley de Propiedad Intelectual,* EL MERCURIO, Jan. 14, 2010; and, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, *Special 301 Report on Copyright Protection and Enforcement: Chile* (2010), at 22, 25-26 *available at* http://www.iipa.com/2013_SPEC301_TOC.htm (last visited Mar. 20, 2014). *But see,* VÁSQUEZ, *supra* note 52, at 95 (stating that by implementing a judicial notice and take down procedure, Chile would not only infringe (or fulfilling partially) a free trade agreement's obligation for setting for an expeditious procedure, but also fail in establishing legal incentives and diminishes the importance of who is in charge of handling notification within ISP, which is a basic component of U.S. regulation).

trade agreements for implementing this measure of enforcement into domestic law, in order to harmonize enforcement measures with the peculiarities of a given legal system and satisfy exigencies related to due process of law.[105] In the case of Chile, the judicial model harmonizes the aforementioned free trade agreement obligations with the scope of human rights obligations under its legal system. As a matter of fact, Chile's procedure for notice and take down copyright infringing material has been designed to meet standards that protect third parties' rights from any other infringing content,[106] although introducing some additional expeditiousness, which makes apparent the consistency of the notice and take down procedure adopted by the copyright law with the local legal system.

Criticisms against judicial notice and take down procedures challenge that that model is not efficient enough against massive online piracy.[107] So far, however, neither copyright holders nor U.S. trade authorities have elaborated on their claim of ineffectiveness, whether that determination is result of comparative analysis of effectiveness on other areas of law enforcement within the country, or analysis with a variety of models available in comparative law. In fact, qualifying the judicial model as ineffective became an argument articulated even before the law was in force, making apparent its mere bias and propagandistic nature.[108] What these criticisms fail to

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105 *See supra* notes 67-73 and accompanying text.

106 Pedro Huichalaf, *Reforma a la Ley de Propiedad Intelectual en Chile*, 3 EL DERECHO INFORMÁTICO 13, 15 (2010) (stating that the notice and take down procedures set forth by Chilean copyright law is exactly the same procedure that any other person affected by online illegal content should use for blocking or removing it).

107 VÁSQUEZ, *supra* note 52, at 100 (stating that Chilean procedure is *"more slow, expensive and thorny that the one set forth by the DMCA, that was the FTA's model and, therefore, [should be] the Chilean model"*.). *See also,* ELISA WALKER ECHEÑIQUE, MANUAL DE PROPIEDAD INTELECTUAL 343-345 (Legal Publishing, 2014) (criticizing judicial procedures for taking down infringing content for being slow).

108 *See* U.S. Trade Representative, 2010 Special 301 Report, at 25 (expressing, one month before the copyright reform became law, that *"it appears that the legislation fell short of fully addressing Chile's multilateral and bilateral commitments"*.). *See also,* International Intellectual Property Alliance, Special 301 Report on Copyright Protection and Enforcement: Chile (2010), at 22-23, *available at* http://www.iipa.com/rbc/2010/2010SPEC301CHILE.pdf (last visited Mar.

recognize is that rules on notice and take down procedures are as much about protecting copyright as protecting fundamental rights implicated in enforcement actions and that, to achieve both, some compromise is needed.

These criticisms, though baseless, have caused other Latin American countries required to implement notice and take down procedures into domestic law to reconsider their options beyond a judicial model. This is true, for instance, of Colombia that, for second time, has attempted to implement a notice and take down procedure,[109] through the so-called Ley Lleras 1.0 that would fulfill free trade agreements obligations on copyright enforcement online.[110]

Although the text on online enforcement of copyright in the free trade agreement signed by Colombia and the United States does not differ substantively from that subscribed by Chile and Costa Rica, the Ley Lleras 1.0 did not attempt a judicial model of notice and take down, but a direct private mechanism that would allow copyright holders submit direct requests to ISPs to takedown or block access to supposed infringing content. This decision seemed motivated by the criticism of the USTR to the judicial model, as well as in an interpretation that overstates the meaning of

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19, 2014) (arguing, four months before the publication of the copyright reform, that the judicial notice and take down procedure adopted by Chile is *"unworkable,"* as well as *"troubling, as it would have required rights holders to request and obtain a court order to remove the infringing content, a process totally out-of-step with international practice"*). *See also,* VÁSQUEZ, *supra* note 52, at 93-95 (referring to right holders' opposition raised by adopting a judicial notice and take down procedure in Chile).

109 Juliana Vargas Prieto, *Responsabilidad de los Prestadores de Servicios de Almacenamiento de Datos por Infracciones a Derechos de Autor: Una Propuesta para la Regulación Colombiana*, 10 REVISTA DE DERECHO, COMUNICACIONES Y NUEVAS TECNOLOGÍAS 1, 23-24 (2013) (referring to the first Colombian attempt to implement a notice and take down procedure in 2001, when a bill that followed the European Union's Directive on E-Commerce was introduce into the Legislature, which would provide a comprehensive safe harbor to ISPs for infringing content, but it did not get approval).

110 Proyecto de Ley No. 241 de 2011, por la cual se regula la responsabilidad por las infracciones al derecho de autor y los derechos conexos en internet (Colombia) [*hereinafter* Ley Lleras 1.0].

some side letters related to ISPs.[111] Those letters merely specify the minimum requisites that copyright holders' requests must meet for taking down infringing content, but they have been used for arguing that an implementing law must adopt a system allowing direct action from copyright holders to ISPs, since the letters, rather than the very text of the free trade agreement, would detail the rules of procedure.[112]

The Ley Lleras 1.0 attracted broad criticism from legal scholars and activists, mainly because of its potential harmful effects on free speech. Critics rejected the absence of any preventive control over copyright holders' claims of infringement. As a matter of fact, the bill not only moves away from a model of judicial control, but also fails to provide any special safeguard measures to prevent abuse of procedure by rights holders. Courts would intervene only after content was already taken down, and only if the affected content provider challenged the copyright holder's decision and sought to recover the content by suing. Eventually, that criticism led the sponsoring lawmaker to withdraw the bill because of its diminishing effects on free speech.[113]

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111 Letter from John K. Veroneau, Deputy U.S. Trade Representative, to Jorge Humberto Botero, Minister of Commerce, Industry and Tourism, Republic of Colombia (Nov. 22, 2006); and, Jorge Humberto Botero, Minister of Commerce, Industry and Tourism, Republic of Colombia, to Letter from John K. Veroneau, Deputy U.S. Trade Representative (Nov. 22, 2006). *But see,* Wilson Rafael Ríos Ruiz, *Eventos y Eximentes de Responsabilidad de los Proveedores de Servicio de Internet ante las Infracciones a los Derechos de Propiedad Intelectual Realizadas por sus Suscriptores,* in PROPIEDAD INTELECTUAL: REFLEXIONES 284 (Ricardo Metke Méndez, Édgar Iván León Robayo & Eduardo Varela Pezzano eds., Universidad del Rosario, 2012) (expressing its support for a judicial or administrative procedure for notice and take down in Colombia, in spite of said side letters).

112 *See, e.g.,* Óscar Montezuma Panez, *Regulando al Intermediario: El Régimen de Limitación de Responsabilidad para los Proveedores de Servicios de Internet en el Acuerdo de Promoción Comercial Perú-Estados Unidos* 184 ACTUALIDAD JURÍDICA 41, 44-45 (2009) (stating, in reference to analogous letter in the FTA U.S.-Peru, that *"[i]t must be highlighted that that procedure is detailed in a side letter to the FTA on ISP liability"*). *But see* Andrés Jaramillo Mejía, *Limitaciones a la Responsabilidad de los Proveedores de Servicios de Internet: Una Obligación para Colombia Derivada del TLC*, 2 REVISTA IBEROAMERICANA DE DERECHO DE AUTOR 76, 83-86 (2007) (commenting on mentioned side letters and the limited room for maneuvering that the free trade agreement gives to Colombia on procedures of notice and take down, but still enough for considering a procedure before court or administrative authorities).

113 Senado archiva Ley Lleras, EL ESPECTADOR, Nov. 16, 2011 (reporting the decision of lawmakers to withdraw the bill known as Ley Lleras 1.0), *available at*

Key deficiencies in the Ley Lleras 1.0 were that the bill lacked any control to prevent abuse of procedures, resulting in potential negative effects on free speech. As a result of such defects, local legal scholars have advanced the need to introduce some preventive measures, at least in the form of an administrative agency that ensures rights holders' requests meet requirements and balances copyright protection with other competing interests, including fundamental rights.[114] Unlike with courts, procedures before administrative agencies tend to reach more expeditious decisions and enjoy a higher level of specialization, features that would make them more efficient for protecting copyright, especially in light of massive online infringement. This administrative model of enforcement, which was suggested as an alternative by the United States during the discussion of the Chilean copyright reform,[115] has attracted significant attention not only in Colombia, but also in Mexico and Peru, and was recently adopted by Ecuador.

Although not required by any international commitment on the matter, the Mexican Congress is considering an administrative procedure of notice and take down for copyright infringing content. Since December 2013, there has been a bill under legislative discussion that would provide a comprehensive framework for fighting online copyright infringement, even though it would not grant ISPs any limited liability.[116] The mentioned bill would empower an administrative authority to order an ISP to:

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http://www.elespectador.com/impreso/politica/articulo-311671-senado-archiva-ley-lleras (last visited Apr. 11, 2014).

114 Vargas Prieto, *supra* note 109, at 27-31 (arguing for an administrative control on notice and take down procedures in Colombia). *See also,* Ríos Ruiz, *supra* note111, at 284.

115 *See supra* notes 81-83 and accompanying text.

116 Iniciativa que reforma y adiciona diversas disposiciones de la Ley de la Propiedad Industrial, de la Ley Federal del Derecho de Autor y del Código Penal Federal, suscrita por los diputados Aurora Denisse Ugalde Alegría y Héctor Humberto Gutiérrez de la Garza, del Grupo Parlamentario del PRI, Gaceta Parlamentaria, año XVII, número 3919-VIII, martes 3 de diciembre de 2013 (Mexico) [*hereinafter* Copyright Bill Mexico].

communicate notices of infringement to its subscribers;[117] identify supposed infringers;[118] restrain the usage of a supposed infringer' account;[119] and, take down not only a given content but also whole websites that presumptively infringe copyright.[120] The chosen authority is neither the copyright nor the telecommunication one, but the local patent office,[121] which would be able to issue orders and initiate legal actions against supposed infringers not only *ex-parte*, but also *ex-officio*.[122] This bill raises several human rights concerns, some of which are analyzed in other chapters of this dissertation.[123] Here, the purpose is only to note that enforcement through administrative authorities is seen as an alternative compromise between purely private and court-supervised enforcement.

Strengthening copyright enforcement through administrative authorities is also an alternative being considered in Peru. Like other countries in the region, Peru must implement free trade agreement obligations on copyright online enforcement, including the adoption of notice and take down procedures. According to interviewed scholars,[124] although there is no official position paper on the matter yet, Peru is struggling with implementing alternatives. A system based on direct requests from rights holders to ISPs is not under consideration, because it presumptively would be rejected. A judicial model, like that adopted by Chile and Costa Rica, seems as unfeasible because of lack of trust and efficiency in the local court system. As a result, an administrative model would seem

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117 Copyright Bill Mexico, arts. 202 bis, 202 bis 1, 202 bis 3, and 202 bis 4.

118 Copyright Bill Mexico, arts. 202 bis 2, and 202 bis 9.

119 Copyright Bill Mexico, art. 202 bis 12.

120 Copyright Bill Mexico, art. 199 bis.

121 Copyright Bill Mexico, art. 60.

122 Copyright Bill Mexico, arts. 202 bis 1, and 202 bis 6.

123 *See supra* Chap. VII (analyzing identification of Internet users by ISPs for purpose of copyright enforcement); and *see infra* Chap. IX (analyzing implementation of graduated response against online copyright infringers).

124 Email from Oscar Montezuma, law professor at the Universidad de Piura and the Pontificia Universidad Católica de Perú, to the author (Mar. 21, 2014) (in file with author); and, telephone interview with Miguel Morachimo, attorney and director at ONG Hiperderecho (Jan. 22, 2013).

to meet requirements on specialization, trustworthiness, and effectiveness. In fact, those who work on implementing free trade agreements into domestic law would be inclined to confer to an administrative agency, such as one competent on copyright or telecommunications, the power to enforce copyright online, including the control over requests for taking down infringing content.

In late 2016, Ecuador adopted a comprehensive legal framework on the social economy of knowledge, creativity and innovation,[125] which includes a new copyright regime[126] and new provisions on intellectual property enforcement.[127] Among these provisions, the law created an administrative enforcement authority that is dependent on the Executive branch through the Secretary of Higher Education, Science, Technology, and Innovation.[128] The administrative agency has some sanctioning power, although it is mainly limited to monetary fines. It would also adopt injunctions against intellectual property infringements, including *ex-officio* and *in limine litis* measures, although such measures could only be issued upon request if there is evidence supporting a reasonable presumption of infringement.[129] Injunctions include, among others, ordering the infringer or ISP to cease online public communication of certain content, and even to cease the website service for presumptive infringement.[130] The institutional design of Ecuadorian administrative enforcement for intellectual property seems to comply with most due process of law requirements, but lacks needed independence for a jurisdictional body. The alignment of local enforcement with human right law has not prevented,

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125 Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación, Registro Oficial, Dec. 9, 2016 (Ecuador).

126 *Id.*, arts. 100-262.

127 *Id.*, arts. 538-597.

128 *Id.*, arts. 10-11.

129 *Id.*, arts. 559, and 563.

130 *Id.*, art. 565.

however, the misuse of third countries' more flexible notice and take down procedures by the Ecuadorian government.[131]

The model of online copyright enforcement through administrative authorities might be reinforced in Latin America by the adoption of the Law on Sustainable Economy, also known as Ley SINDE, in Spain, a country that still exercises a huge influence on the region, particularly among Spanish speaking countries.[132] This law grants to an administrative agency, the Commission on Intellectual Property of the Ministry of Culture, power for enforcing copyright law by adopting measures against online service providers that infringe the law commercially, or cause harm, or are able to harm copyright holders.[133] The mentioned administrative agency cannot request any measure against mere users, except for suspension of services and taking down infringing material against content providers. In fact, the law allows the agency to require not only taking down specific content, but also shutting down a whole website, even if it does not exercise any exclusive rights but only links to other sites with infringing content and P2P applications, among others.[134] However, if the affected provider challenges the order or refuses voluntary compliance, the administrative agency cannot force compliance since the compulsory enforcement of the measure requires judicial approval.

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131 *See supra* notes 48-50 and accompanying text.

132 Ley 2/2011, de 4 de marzo, de Economía Sostenible, B.O.E. 5 de marzo de 2011 (Spain).

133 Fernando Carbajo Cascón, *Aspectos Sustantivos del Procedimiento Administrativo para la Salvaguarda de Derechos de Propiedad Intelectual en Internet*, 15 REVISTA DE INTERNET, DERECHO Y POLÍTICA 7, 9-12 (2012) (interpreting broadly the circumstances in which the Commission on Intellectual Property would be able to intervene against online copyright infringement). *See also,* CARLOS ROGEL VIDE & EDUARDO SERRANO GÓMEZ, TENSIONES Y CONFLICTOS SOBRE DERECHO DE AUTOR EN EL SIGLO XXI: MATERIALES PARA LA REFORMA DE LA LEY DE PROPIEDAD INTELECTUAL 140-155 (Fundación Coloquio Jurídico Europeo, 2012) (analizing the administrative enforcement of copyiright in Spanish law).

134 Carbajo Cascón, *supra* note 133, at 13-15 (supporting an extensive power of the Commission on Intellectual Property for adopting measures of enforcement against a broad variety of online services).

Granting administrative bodies the faculties for enforcing the law has some advantages, such as allowing for specialization, speeding up procedures, building proactive enforcement, managing potential massive requests, and, in some countries, avoiding the limitations of an inadequate court system. Additionally, administrative enforcement is permissible under human rights law. However, implementing such administrative procedures for enforcing copyright law may still raise some human rights concerns, by infringing on the prohibition against arbitrary discrimination and equal protection by the law, as well as the right to due process of the law.

Leading international instruments on human rights recognize everyone's right to equal protection by the law, which is a result of the right to equality before the law and the protection against discrimination.[135] This right prevents the state from exercising discrimination when protecting people's rights, for instance, by granting special mechanisms of protection for certain rights with respect to others. This right would be infringed if countries were required to provide special or additional protection in certain cases without a reasonable justification; an accusation that the TRIPS Agreement, the leading instrument on international intellectual property law, avoids by clarifying that it does not create an obligation on parties to a system of enforcement of intellectual property different from that for the enforcement of the law in general.[136] In other terms, while international human rights law forbids unequal protection, international intellectual property law does not require it.

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135 ADHR, art. II (stating that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor"); UDHR, art. 7 (recognizing that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law"); ACHR, art. 24 (granting the right to equal protection in the following terms "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law"); and, ICCPR, art. 26 (providing that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law").

136 TRIPS Agreement, art. 41 (5).

Enforcing the law in the online environment raises challenges absent from its enforcement in analogous environments and, therefore, it is reasonable to adopt special norms for achieving compliance with the law on the Internet. But adopting special rules for better and more efficient protection of copyright, leaving aside any other infringing content, seems less reasonable. Extracting the jurisdiction on copyright issues from ordinary courts to deposit it on administrative authorities would require some justification, particularly when leaving behind matters that seem of higher public interest that affect third parties' rights, such as the prohibitions against online child pornography, defamation, and privacy infringing content, as well as material that risks national security and public safety, among other potential illegal content. From that point of view, it seems apparent that when countries use administrative enforcement as a mechanism for granting better and more efficient protection to copyright, but leave other urgent issues subject to a "second class" enforcement, there is some ground for arguing violation of the right to equal protection of the law.

Two requirements of due process of law are that tribunals must be independent and impartial. The meanings of those requirements already have been explored elsewhere,[137] so here a summary will suffice. Due process requirements apply not only to courts but also to any entity exercising jurisdictional functions, such as an administrative agency dealing with legal conflicts.[138] On one side, the independence of tribunals, i.e., their autonomy from other branches of the government, requires setting forth an adequate appointment process, ensuring a fixed term of office, and preventing pressure on tribunals.[139] In Latin America, neither copyright nor telecommunication administrative authorities are independent from the Executive branch, of which they are part.[140] On the other side, tribunal impartiality attempts to establish that jurisdictional bodies are nonpartisan with respect to litigant parties. This feature cannot be claimed

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137 *See supra* Chap. VI.

138 *See supra* Chap. VI, notes 33-36 and accompanying text.

139 *See supra* Chap. VI, notes 43-45 and accompanying text.

140 *See supra* Chap. VI, notes 170-175 and accompanying text.

with respect to copyright authorities in Latin America, some of which are defined statutorily as protectors of copyright holders, while others enjoy powers hardly attributable to an impartial jurisdictional body.[141] Thus, granting to administrative authorities jurisdictional power to take down content for copyright infringement would conflict with some essential features of the right to due process of law, because those authorities lack full independence and have diminished impartiality.

Other exigencies of the right to due process of the law require that jurisdictional functions must be carried out through a fair hearing. As aforementioned, in the last decade, there has been an enormous effort to improve the court system throughout the region, not only by increasing the number of courts, but also adopting more modern, efficient, and human rights-oriented rules of procedure. Although improvements have been introduced into administrative justice in the region, their outcome is questionnable. As a result, law enforcement through administrative bodies has a mixed record. On one side, it realizes the human right to a fair hearing, by granting decisions within a reasonable time,[142] at least from copyright holders' viewpoint. On the other side, that enforcement remains a work in progress with respect to granting adequate means of defense in order to respect both equality of arms and the adversarial principle, which provide to litigating parties the opportunity to have knowledge of and comment on evidence and arguments before a court makes a decision.[143] Administrative authorities are more exposed to influence by certain stakeholders, their geographical concentration tends to disregard underserved areas, and, in some cases, certain procedural rules require urgent updates to meet basic requirements for a fair hearing.

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141 *Id.*

142 ACHR, art. 8 (1) (providing that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time."). *See also,* IACHR, January 29, 1997, Merits, Genie Lacayo v. Nicaragua, Series C No. 30, para. 77.

143 *Ivcher Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, para. 107 (Feb. 6, 2001) (holding that defendants' rights have been violated if has been prevented from intervening in procedures, fully informed, in all the stages, despite being the person whose rights were being determined).

In sum, human rights do not prevent enforcing the law through administrative bodies, but extricating solely copyright issues from the court system in order to grant to them a more efficient enforcement raises human rights concerns. First, such a policy measure brings up objections because it infringes on the right to equal protection of the law, by arbitrarily distinguishing issues that deserve more efficient compliance with the law. Second, administrative enforcement within Latin America lacks conformity on basic exigencies of the right to due process of law, because administrative authorities are neither independent nor impartial on copyright issues. Third, although with a mixed record, most Latin American' administrative procedures run too short for meeting the requirements of an adequate means of defense related to the right to due process of law. Countries interested in implementing a system of notice and take down copyright infringing content through administrative authorities, which is permissible under human rights law, however, have to deal with aforementioned human rights concerns.

5. SOME CONCLUSIONS

Procedures for taking down online infringing content to protect copyright holders must be balanced with adequate protection to users' fundamental rights. Currently, most Latin American countries lack a legal framework for dealing with that sort of infringement. Several of them, however, have committed to implementing those procedures as part of a regime on limitation of liability in favor of ISPs, according to free trade agreement obligations subscribed with the United States. For such countries, implementing into domestic law those procedures raises some human rights concerns.

One alternative for implementation is to follow the DMCA's model of direct private enforcement, which allows copyright holders to directly request an ISP to remove or block access to infringing material. This model, however, is problematic for Latin American countries, because of their broad protection to copyright, several legal constraints, and their limited room for private enforcement given their international

human rights obligations and constitutional frameworks. Although the law provides for responsibility in order to prevent abuse of procedures, it is not clear to which extent those rules constitute sufficient safeguards.[144] As a result, those countries committed to implementing procedures for taking down infringing content have explored a model that better suits their legal system, by incorporating a supervising public authority.

In this context, Chile and Costa Rica have implemented judicial procedures for notice and take down of copyright infringing content. Although they fully meet human rights standards, copyright holders and the USTR have heavily criticized the judicial model for not being efficient enough in protecting copyright. Aware of both those criticisms and the legal impossibility of adopting a mechanism of private enforcement, countries within the region are considering procedures before administrative authorities. However, unlike a judicial model, special administrative procedures for protecting copyright in the online environment bring up certain human rights objections related to the prohibition on arbitrary discrimination, the right to equal protection by the law, and the right to due process of the law. If there is some role for an administrative model of notice and take down procedures in Latin America, its proponents should confront those human rights concerns by designing a model that complies with them.

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144 Royce Fichtner & Troy Strader, *Automated Takedown Notices and Their Potential to Generate Liability under Section 512(f) of the Digital Millennium Copyright Act*, 6 J. INTEL. PROP. L. & PRAC. 51 (2011) (expressing doubts on the usefulness of rules on responsibility for abuse of procedure adopted by the DMCA, including in cases of using software for sending automatic requests).

Chapter IX

The Graduated Response

from a Human Rights Viewpoint

The increasing penetration of the Internet, the development of broadband access, and the possibility of digitizing works have created new challenges for copyright holders in enforcing their rights in the online environment. Right holders have attempted several successive enforcement strategies on the national level, from suing ISPs on the ground of secondary liability, to suing Internet users after identifying them through subpoenas. Most recently, enforcement has extended to the removal of links to specific infringing content from websites, and even the removal of whole websites. This mosaic of measures, however, has been subject to numerous criticisms and concerns.

In recent years, a handful of countries have implemented a new measure of copyright enforcement known as the *three strikes policy* or the *graduated response.* This measure consists of sending to Internet users successive notices, warning them about their supposed copyright infringements and, eventually, in cases of repeat infringement, adopting certain sanctions, such as bandwidth reduction, blocking services, temporary account suspension, and even termination of services. Through international instruments on trade or intellectual property, several Latin American countries have committed to implement into their domestic law some graduated response policy against Internet users for repeat copyright infringement. Adopting and implementing this measure, however,

raise serious concerns about compliance with human rights obligations by violating the right to privacy and data protection, the right to due process, and the presumption of innocence, among others. The focus of this chapter is to analyze precisely some human rights implications of the graduated response.

The first section of this chapter describes and analyzes the graduated response in the context of copyright enforcement from a comparative law viewpoint. In spite of the idiosyncratic approaches by different domestic regulations, there are some common features of this measure in both in-force legislation and some proposed bills in different countries. It becomes apparent that implementing a graduated response may conflict with several human rights, which are analyzed in subsequent sections of this chapter. Section two considers this measure in relation to the right to access the Internet, while section three briefly refers to free speech, both of which have received increasing interest from scholars and policy makers. The fourth section analyzes some challenges to information privacy posed by the graduated response, which implementation may require online monitoring of users and a mass processing of personal data. Finally, the fifth section argues that the graduated response is an inherently punitive measure and, therefore, its application must be subject to the right to due process and the presumption of innocence, among other human rights requirements for criminal enforcement. This viewpoint permits balancing copyright enforcement and human rights obligations, although the costs seem high enough to discourage making the graduated response a general sanction, narrowing its practical application to cases where the proportionality of infringement may require such a form of punishment.

1. INTERNET LIABILITY REGIME AND THE GRADUATED RESPONSE

No international instrument on copyright expressly requires implementing the graduated response, which is essentially a matter of domestic law. In fact, the graduated response is not a widespread policy among countries; on the contrary, only a handful of countries have adopted it into their legal systems.[1] There are significant differences from one country to another, but it is still possible to identify some common features and choices in implementing the graduated response, as this chapter analyses below. In all the cases, the proposals have been controversial, particularly in France, because it raised opposition by both national and European Union institutions.[2]

In June 2008, once approved by the executive branch, the former French President Sarkozy, at the insistence of the music record industries, submitted to the Parliament a bill that would implement the graduated response, by authorizing disconnection of Internet users who have participated in illegal P2P downloading. The bill, which was based in a previous agreement between right holders and ISPs,[3] was

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1 *See* Serona Elton, *Graduated Responses to Online Piracy: Approaches Taken in the United States and Around the World,* in MUSIC AND LAW 37-58 (Mathieu Deflem ed., Emerald, 2013) (describing, albeit with ambivalence, the implementation of the graduated response in some countries).

2 Geert Demuijnck, *Illegal Downloading, Free Riding and Justice,* in NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY 281-282 (Annabelle Lever ed., Cambridge Univ. Press, 2012) (describing the French HADOPI bill and its controversies).

3 IOULIA KONSTANTINOU, THE COMPATIBILITY OF A GRADUATED RESPONSE SYSTEM AT EU LEVEL WITH THE FUNDAMENTAL HUMAN RIGHTS TO PRIVACY, DATA PROTECTION

known as the HADOPI Act, because the acronym of the *Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet*, the French name of the administrative agency that supervises compliance with that law.

In brief, the law set forth an administrative obligation for ISPs to ensure that their connections are not used to infringe copyright; specifically, each ISP must supervise its own subscribers. The law also imposed an obligation on subscribers, by requiring them to adopt technical safeguards for others using their networks, under threat of sanction, in order to prevent copyright infringement. A commission of the aforementioned HADOPI was authorized to sanction infringements through a graduated response procedure. Pursuant to that procedure, copyright collective societies would notify the agency of supposed infringements. After the agency obtained the supposed infringer's personal information from the ISP, it would send the subscriber a warning notice by e-mail. In case of a second infringement within six months, the agency would send the subscriber another email or a registered letter. In case of a third infringement within a year after the first warning notice, the agency could suspend the supposed infringer's Internet access for up to one year, but subscribers still would have to pay for the suspended service. Subscribers that failed to supervise others using their network also could be suspended, irrespective of the identity of the actual infringer, for up to one month. Later on, the sanction for negligent failure to secure a network was

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AND FREEDOM OF EXPRESSION 17-19 (unpublished thesis for LL.M. in Law and Technology, Tilburg Univ., 2014) (providing background information about the French law, particularly on the previous business agreement, as well as limitations based on personal data protection law).

abrogated. To enforce the ban, the agency maintains a black list of infringers, which ISPs must consult before providing service to new customers.

Copyright law with an industrial-era approach attempts to regulate new technologies and generations.

Sarkozy's initiative faced resistance on both national and communitarian levels. On the domestic level, the National Commission for Informatics and Liberties (CNIL), the French data protection authority, which is required to issue a report on the matter by law,[4] expressed serious concerns about the bill, which did not provide enough guarantees to ensure a fair balance between the right to privacy and copyright protection.[5] On the

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4 Act N°78-17 of January 1978 on Data Processing, Data Files and Individual Liberties, amended by the Act of 6 August 2004 relating to the protection of individuals with regard to the processing of personal data and by the Act of 12 May 2009 relating to the simplification and clarification of law and lightening of procedures, art. 11 (4) (a).

5 *Loi Antipiratage: le Gouvernement Critiqué par la CNIL*, LA TRIBUNE, Nov. 3, 2008.

communitarian level, the European Parliament, in discussing the Telecom Package, a major modification to the European Union legal framework on telecommunications, approved an amendment that requires a judicial decision before restricting Internet users' rights. Sarzozy's bill did not satisfy that exigency; for that reason, under pressure from the French government,[6] the European Commission deleted the mentioned amendment, which, however, was put back by the European Parliament.

Despite these oppositions, the French Parliament approved the bill, although it did introduce some modifications to mitigate its excesses. The changes were not enough, however, to avoid a decision by the French Constitutional Council that declared the HADOPI Act partially unconstitutional.[7] According to the Constitutional Council, the original act, especially the sanction powers of the agency, infringed the constitution because it was contrary to the principle of presumed innocence, and violated the freedom of expression and communication. Therefore, sanctioning users is not a power to be granted to an administrative agency, but only to a court of law. In the aftermath of the Constitutional Council, the French Parliament remedied the unconstitutionality by adopting a new law, known as HADOPI 2, that transferred the authority to disconnect Internet users from the administrative body to criminal courts.[8]

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6 *Letter from the French President Sarkozy to the European Commission President Barroso*, LIBÉRATION, Oct. 6, 2008.

7 Conseil Constitutionnel [CC] [Constitutional Council], Decision No. 2009-580DC, June 10, 2009, Act furthering the diffusion and protection of creation on the Internet.

8 Assemblée Nationale, Loi 2009-1311 du 28 octobre 2009 relative à la Protection Pénale de la Propriété Littéraire et Artistique, J.O., Oct. 29, 2009.

The decision of the French Constitutional Council also had effects on the communitarian level. In 2009, the European Parliament approved the Telecom Package, including the polemical amendment resisted by Sarkozy's government. According to that amendment, *"measures taken by countries regarding end-users' access … shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law."*[9] The clause, which has influences from both the French Constitutional Council and the European Court of Justice on the previously analyzed *Promusicae* case,[10] attempts to prevent the adoption of the graduated response by domestic law when it infringes human rights obligations.

As was said above, the HADOPI Act was modified in order to meet fundamental rights standards and become in force. During its first four years, the authority issued thousands of first and second warning letters, but only one copyright infringer was convicted with the graduated response. There is disagreement among scholars about the actual efficacy of the law on preventing copyright infringement, from those who argue that the copyright public awareness causes consumers to move from

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9 Directive of the European Parliament and of the Council of 24 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorization of electronic communications networks and services, also known as the Telecom Package, art. 1 (1) (b).

10 *See supra* Chap. VII, notes 24-35 and accompanying text.

infringing to legitimate content,[11] to other researchers who find the law has no substantial deterrent effect,[12] and even some arguing the law never has reached its intended target.[13] In 2013, the French government shifted its policy, by revoking the graduated response for being disproportionate and ineffective.[14] Instead, following a recommendation by an official working group,[15] France replaced its graduated response mechanism with a system of automatic fines on repeat infringers and prioritized copyright enforcement against commercial piracy and sites that profit from pirated material.[16]

But France is not the only country that has attempted to use the graduated response as a tool for copyright enforcement. In fact, while some countries have

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11 Brett Danaher *et al., The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*, 62 J. OF INDUS. ECON. 541 (2012).

12 Michael A. Arnold *et al., Graduated Response Policy and the Behavior of Digital Pirates: Evidence from the French Three-Strike (Hadopi) Law* (2014).

13 Primavera De Filippi & Danièle Bourcier, *"Three-Strikes" Response to Copyright Infringement: The Case of HADOPI*, in THE TURN TO INFRASTRUCTURE IN INTERNET GOVERNANCE: INFORMATION TECHNOLOGY AND GLOBAL GOVERNANCE 125-152 (Francesca Musiani et al. eds, Palgrave Macmillan, 2016). *See also,* Rebecca Giblin, *Evaluating Graduated Response,* 37 (2) COLUM. J.L. & ARTS 147 (2014).

14 Décret 2013-596 du 8 juillet 2013 supprimant la peine contraventionnelle complémentaire de suspension de l'accès à un service de communication au public en ligne et relatif aux modalités de transmission des informations prévue à l'article L. 331-21 du code de la propriété intellectuelle, J.O., 9 juillet 2013.

15 Pierre Lescure, *Mission Acte II de l´Exception Culturelle: Contribution aux Politiques Culturelles à l'ère Numérique* (2013), *available at* http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescure/files/docs/all.pdf (last visited Aug. 20, 2017).

16 *France Drops Controversial 'Hadopi Law' After Spending Millions,* THE GUARDIAN, Jul. 9, 2013, by Siraj Datoo (citing French official spokesperson´s statements).

expressed reluctance to implement such a measure,[17] a few already have done so. Currently, this is the case in South Korea, Taiwan, the United Kingdom, New Zealand, and more recently, through private agreements between ISPs and copyright holders, Ireland and the United States.

In April 2009, South Korea, a country with a history of strong governmental interventionism on the Internet,[18] modified its copyright act to include a provision with the graduated response.[19] According to the law, the Minister of Culture, Sports, and Tourism may order ISPs to suspend, for up to six months, the accounts of those users who have been warned three times for transmitted illegal reproductions of copyrighted works.[20] In order to prevent abuse of this sanction, the order must be examined previously by a committee of the Korea Copyright Commission, an administrative body whose members are nominated by the aforementioned Minister. The committee conducts a hearing of the ISP and the account holder. Unlike the French model, the

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17 *See e.g.,* Patrick Van Eecke & Maarten Truyens, *Recent Events in EU Internet Law*, 13 No. 2 J. Internet L. 21 (Aug. 2009) (rejection by the Netherlands); *German Gov't To Tighten Copyright Law*, BILLBOARD, Oct. 27, 2009, by Wolfgang Spahr (rejection by Germany); and, *Spanish Govt Rules Out Three-Strikes Law*, BILLBOARD, Nov. 05, 2009, by Howell Llewellyn (rejection by Spain).

18 Byoungil Oh, *Republic of Korea* (Report), in GLOBAL INFORMATION SOCIETY WATCH 150-152 (APC and Hivos, 2009).

19 South Korean Copyright Act, art. 133 bis.

20 South Korean Copyright Act, art. 133 bis (2) (adopting the suspension accounts, but not the permanent termination of them, as the bill was proposed).

Korean measure does not suspend subscriber access to other ISPs' services or email accounts.[21]

In May 2009, Taiwan enacted safe harbor provisions, requiring ISPs to have a graduated response policy in order to be eligible for limitation of liability. Pursuant to this policy, ISPs must adopt and inform users that their services will be terminated in whole or in part after they have received three notifications of infringement from copyright holders.[22] Once an ISP receives a notification by a copyright holder of alleged infringement by one of its users, the ISP must forward the notification to that user by e-mail.[23] Additionally, to prevent abuse,[24] the law imposes civil liability on any party who intentionally or negligently files a false notification of infringement or a false counter-notification.[25]

In April 2010, after unsuccessfully encouraging a self-regulatory approach between ISPs and copyright holders,[26] the United Kingdom enacted the extremely

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21 Doug Jay Lee, Misung Kim, & Won Hong, *Annual Report 2009 Korea APAA Copyright Committee*, at 5-6.

22 Taiwan Copyright Act, art. 90 quinquies (1) (2).

23 Taiwan Copyright Act, art. 90 quinquies (2).

24 Erik Chen & Mark Brown, *Taiwan Enacts ISP "Safe Harbour" Amendments to Copyright Act*, 25 COMPUTER L. & SEC. REV., 389-390 (2009). *See also,* Marcus Clinch, *Implementing Regulations for ISP Safe Harbor Amendments Announced*, 25 COMPUTER L. & SEC. REV., 597-598 (2009) (saying that *"[t]he amendments… appear to have been carefully thought through to appease those parties lobbying for the inclusion of a 'three-strikes' mechanism while ensuring that the ISP and individual users of connection services have a degree of protection"*).

25 Taiwan Copyright Act, art. 90 duodecies.

26 Eleanor Dallaway, *Music Piracy Born Out of a 'Something for Nothing' Society*, INFOSECURITY 17-

controversial Digital Economy Act, an extensive legal framework that modifies the Communications Act by, among other measures, adopting the British version of the graduated response. According to the law, an ISP that receives a copyright infringement report from a copyright owner must notify the accused subscriber of the report.[27] If subscribers continue in suspected of illegal file-sharing after the ISP issues the warning letters, they can face technical measures, such as limiting the speed or other capacity of the service, preventing or limiting access to particular material or service, suspending the service, or limiting it in "another way."[28] The law also includes some safeguards: in order to protect users' privacy, ISPs shall not provide a subscriber's identity to copyright owners, except by judicial order;[29] affected subscribers may appeal the measures,[30] although the *onus probandi* is on users;[31] and, affected subscribers who win their appeals may obtain compensation and reimbursement for reasonable costs.[32]

In 2011, New Zealand amended its copyright law by introducing an improved

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20, April 2008; Christian L. Castle & Amy E. Mitchell, *What's Wrong With ISP Music Licensing?,* 26.3 ENT. & SPORTS L. 4, 7 (2008); and, Maria Mercedes Frabboni, *File-Sharing and the Role of Intermediaries in the Marketplace: National, European Union and International Developments,* in COPYRIGHT ENFORCEMENT AND THE INTERNET 133-136 (Irini A. Stamatoudi ed., Wolters Kluwer, 2010) (describing business negotiation for implementing a private mechanism of copyright enforcement in the U.K. before the adoption of the Digital Economy Act).

27 Communications Act 2003, amendment by the Digital Economy Act 2010, § 124 A.

28 *Id.,* § 124 G (3).

29 *Id.,* §§ 124 A (8) (c), and 124 B (2) (b).

30 *Id.,* § 124K (granting jurisdiction to the First–tier Tribunal, a generic tribunal established by Parliament under the Tribunals, Courts and Enforcement Act 2007).

31 *Id.,* § 124K (6) (a) and (b).

32 *Id.,* § 124K (7).

version of the graduated response. Some time ago, this country had introduced the polemical measure in its law,[33] but it never become effective because of its extremely concise text; the initiative generated strong criticisms of its legality, effectiveness, and fairness,[34] which led the government to introduce a new text that become law.[35] According to the 2011 law, to enforce copyright against file sharing at the instigation of copyright owners, ISPs must issue infringement notices to the alleged infringers;[36] after three notices, the copyright owner may ask for an order from a court requiring the ISP to suspend the user's account for up to six months.[37] To prevent abuses by copyright owners, as with the British law, the bill adopts some safeguards: ISPs cannot reveal the personal information of their subscribers, except by a specific judicial order;[38] accused subscribers may challenge notices directly with the copyright owner;[39] and, the suspension must be adopted by a court procedure, where the subscriber can challenge the charges.[40]

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33 Copyright (New Technologies) Amendment Act 2008.

34 Jason Rudkin-Binks & Stephanie Melbourne, *The New "Three Strikes" Regime for Copyright Enforcement in New Zealand - Requiring ISPs to Step Up to the Fight*, 20(4) ENT. L. REV. 146 (2009); and, Peter Oilier, *New Zealand Joins Rush to Amend ISP Laws*, No. 179 MANAGING INTEL. PROP. 22 (2008).

35 Copyright (Infringing File Sharing) Amendment Act. *See,* Rebecca Giblin, *On the (New) New Zealand Graduated Response Law (and Why It's Unlikely to Achieve Its Aims)*, 62(4) TELECOMM. J. AUSTL. 54.1, 54.1-54.4 (2012) (describing the law and arguing it will not achieve its purposes).

36 Copyright (Infringing File Sharing) Amendment Act*,* §§ 122 C to 122 F.

37 *Id.,* §§ 122 I to 122 P.

38 *Id.,* §§ 122 Q.

39 *Id.,* §§ 122 G and H.

40 *Id.,* §§ 122 I to 122 0.

In Ireland, in early 2010, the government facilitated an agreement between the telecommunication providers and copyright associations to address online copyright infringement that included implementing the graduated response.[41] This agreement requires ISPs to suspend users who have accumulated three infringements, and terminate the services of those with four. During implementation of the agreement, the local data protection authority sent an enforcement notice to Eircom, one of the ISPs involved, in order to prevent infraction of the data protection act. In 2013, after a long judicial battle led by the main music recording companies, the Irish Supreme Court backed the graduated response by dismissing the data protection authority's complaint against the implementation of the said measure because of a formal flaw, which consisted in having omitted the statutory requirement for reasons on the notice of infringement by the mentioned authority.[42] Thus, the court did not reach the substance of the data protection law, which could be raised again by the local data protection authority.

In the U.S., although the Digital Millennium Copyright Act (DMCA) provides the necessary tools to implement the graduated response,[43] copyright holders were

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41 *See, Putting Up Barriers to a Free and Open Internet*, THE IRISH TIMES, Apr. 16, 2010, by Karlin Lillington. *See also,* Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT'L L. REV. 559, 576-577 (2011) (reviewing background and implementation of private ordering graduated response in Ireland).

42 Irish Supreme Court, *EMI Records (Ireland) Ltd & Ors v Data Protection Commissioner and Eircom Ltd.* [2013] IESC 34, 3 Jul. 2013, paras. 6-7 (discussing the general obligation to give reason by administrative authorities within Irish law and the specific exigency of giving reason set forth by the data protection act on the matter).

43 Michael P. Murtagh, *The FCC, the DMCA, and Why Takedown Notices Are Not Enough*, 61 HASTINGS L. J. 233 (2009) (arguing that DMCA allows adopting a three strikes policy as a reasonable network management, also consistent with the Federal Communication

unsuccessful in pushing the government to adopt it.[44] Eventually, right holders reached a comprehensive agreement with the major ISPs by creating a private entity, the Center for Copyright Information, which has implemented a mechanism of graduated response against copyright infringement. Since 2013, the Center has managed a system for sending successive warnings to supposed copyright infringers and allowing participating ISPs to adopt some repressive measures of punishment against them, such as compulsory online copyright lectures, blockage of certain sites, and temporary interruption of service.[45]

The United States has impelled other countries through free trade agreements to implement into their domestic law a legal framework that enables the graduated response by reproducing DMCA language. Since 2003, all free trade agreements signed by the United States with other countries include provisions that require parties, on one side, to provide legal incentives to ISPs to *"cooperate"* with copyright owners in enforcing their rights and,[46] on the other, to condition ISPs' limitation of liability for their users' infringement to adopt and implement a policy for *"termination"* of repeat infringers' accounts.[47] More recently, the United States has put similar provisions on the table in negotiations of other international instruments, such as the Anti-Counterfeiting Trade

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Commission about net neutrality).

44 *Copyright Protections in Broadband Plan Debated*, TELECOMMUNICATIONS REPORTS, Feb. 1, 2010, Vol. 76, No. 3, at 14-15. *See also,* Bridy, *supra* note 41, at 572-576.

45 Center for Copyright Information, *What Is the Copyright Alert System?, available at* http://www.copyrightinformation.org/the-copyright-alert-system/ (last visited Apr. 12, 2014).

46 *See, e.g.,* FTA U.S.-Chile, art. 17.11.23 (a) (i).

47 *See, e.g.,* FTA U.S.-Chile, art. 17.11.23 (d) (i).

Agreement (ACTA) and the Trans-Pacific Partnership Agreement (TPPA).[48] Although said agreements eventually failed, they do show unequivocal interest in encouraging third countries to adopt the graduated response as a measure for copyright enforcement.

The most explicit attempt to include a measure for disconnecting users took place during the negotiations of ACTA. ACTA had an interpretative footnote that validated the three strikes policy by mentioning it expressly as an example of a measure that could be adopted and reasonably implemented by online service providers to address the unauthorized storage or transmission of materials protected by copyright or related rights and thereby allow the ISP to qualify for the limitation of liability related to online material.[49] The inclusion of that footnote and the respective provisions were severely criticized by the European authorities on data protection, according to which, the text of ACTA encouraged the implementation of the controversial measure, authorizing a large scale monitoring or systematic recording of data that would be

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48 Christoph Antons & Gabriela Garcia, *Initiatives on IP Enforcement beyond TRIPS: The Anti-Counterfeiting Trade Agreement and the International Medical Products Anti-Counterfeiting Task Force,* in THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: COMPARATIVE PERSPECTIVES FROM THE ASIA-PACIFIC REGION 149 (Christoph Antons ed., Wolter Kluwer, 2011) (noting the similarity in language between the DMCA and ACTA).

49 *See,* Anti-Counterfeiting Trade Agreement, Consolidated Text, Informal Predecisional/Deliberative Draft, January 18, 2010, PIJIP IP ENFORCEMENT DATABASE, http://sites.google.com/site/iipenforcement/acta (follow "Full Leaked Text Dated January 18, 2010" hyperlink) (including a footnote with express mention to the three strikes policy in the then leaked version of ACTA). *See also,* European Union Directorate-General for Trade, ACTA Negotiations (Sept. 30, 2009), Ref. 588/09.

contrary to the EU law, but omitting appropriate "minimum standards for the enforcement."[50]

Presumably because of such criticism, the final text of ACTA did not mention directly the graduated response among the footnotes or the interpreted provision.[51] However, ACTA still provides some legal support for implementing that policy, by requiring the promotion of cooperative efforts within the business community,[52] a clause that brings to mind the Irish, the initial British, and the United States way for implementing the graduated response, but omits any mention of appropriate safeguards.[53]

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50 *See* Opinions of the European Data Protection Supervisor on the Current Negotiations by the European Union of an Anti-Counterfeiting Trade Agreement, 2010 O.J. (C 147) 1. *See also,* Letter from the Article 29 Data Protection Working Party to the Commissioner, Mr. Karel de Gucht, regarding the Data Protection and Privacy Implications of the Anti-Counterfeiting Trade Agreement (Jul. 15, 2010), *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2010_07_15_letter_wp_commissioner_de_gucht_acta_en.pdf.

51 Anti-Counterfeiting Trade Agreement, Consolidated Text Prepared for Public Release Public Predecisional/Deliberative Draft, Oct. 2, 2010, PIJIP IP ENFORCEMENT DATABASE, http://sites.google.com/site/iipenforcement/acta (follow "Official Text - October 2, 2010" hyperlink). *See also,* Alex Metzger, *A Primer on ACTA: What Europeans Should Fear about the Anti-Counterfeiting Trade Agreement*, 1 J. INTEL. PROP., INFO. TECH. & E-COM. L. 109, 114-115 (2010) (pointing out that, by allowing three strikes policy, even if ACTA did not impose it, political cost of implementing it into domestic law would be reduced); and, Antons & Garcia, *supra* note 48, at 150 (reporting that the lack of agreement among negotiating parties on intellectual property online enforcement led to omit such provisions from ACTA).

52 ACTA*,* art. 2.18.3.

53 *See* Bridy, *supra* note 41*,* at 569-572 (suggesting that, in spite of no explicit mention to graduated response in the ACTA Agreement, it remains under the cover of cooperation within businesses communities, as private implementations of that punitive measure in the United States and Ireland suggest); and, Alberto Cerda, *Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy*, 26 AM. U. INT'L L. REV. 601, 630-636 (2011). *But see,* MICHAEL BLAKENEY, INTELLECTUAL PROPERTY ENFORCEMENT: A COMMENTARY ON THE ANTI-COUNTERFEITING TRADE

The TPPA text proposed by the United States also supported the implementation of the graduated response by country parties.[54] Its text mirrored the language of previous free trade agreements by requiring parties to provide legal incentives to ISPs to cooperate with copyright owners[55] and by conditioning ISP limitation of liability on adopting and implementing a policy of terminating repeat infringers' accounts.[56] This is precisely the language that supports implementing the graduated response in the United States through private agreements between ISPs and copyright holders. It could be argued that neither the main text of the agreement nor its footnotes support the graduated response, because they do not mention it expressly, but the absence of such express reference become irrelevant since the remaining provisions support the graduated response implicitly.

As was discussed above, several Latin American countries have committed, through free trade agreements signed with the United States, to implement into their domestic law the graduated response against Internet users for repeat copyright infringements. As of today, Chile and Costa Rica are the only Latin American trade partners that have adopted into their domestic law the DMCA language in its entirety on

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AGREEMENT (ACTA) 289 (Edward Elgar Publ'g, 2012) (disagreeing on that ACTA imposes a graduated response mechanism, even implied or sub-textually).

54 Secret TPP Treaty: Advanced Intellectual Property Chapter for All 12 Nations with Negotiating Positions. WikiLeaks Release: Nov. 13, 2013, available at http://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf (last visited Apr. 12, 1014) [hereafter, TPPA].

55 TPPA, art. QQ.I.1: {Internet Service Provider Liability}.

56 *Id.*

business cooperation and requiring ISPs to adopt a policy of termination in order to qualify for safe harbor.[57] In brief, setting aside their differences, both countries grant to courts discretionary powers to terminate the data storage services of infringers with previous convictions for copyright infringement. Actual application of the graduated response is limited in these countries, however, because of additional statutory and constitutional constraints. The sanction applies to subscribers who have infringed the copyright law, but not against those who have failed to protect their networks from infringement by third parties. Similarly, the sanction does not affect Internet access services, nor have general effects and, therefore, it does not prevent convicted users from contracting new services with other providers.[58]

Other legislative initiatives in Latin America also have attempted to implement some graduated response mechanisms for online copyright enforcement. During the negotiation of ACTA, a Mexican lawmaker introduced a bill using a graduated response, but gave up after negative civil society reactions.[59] Similarly, in Brazil a lawmaker introduced a legislative proposal on the matter,[60] but eventually withdrew for lack of governmental support.[61] The most noticeable failed legislative attempt to implement the

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57 Copyright Act Chile, art. 85 O; and, ISP Regulation Costa Rica, art. 6 (a).

58 Alberto Cerda, *Cyber Law in Chile,* in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CYBER LAW 130-131 (Jos Dumortier ed., Kluwer Law Int'l, 2014).

59 *See* Carina García, *PAN Descarta la Ley Döring,* EL UNIVERSAL, Feb. 1, 2012.

60 *See* Daniela Arrais & Rafael Capanema, *A Internet e a Lei: Governos Buscam Controlar Uso da Rede; Internautas Denunciam Ataque à Privacidade*, FOLHA DE SÃO PAULO, Jul. 8, 2009.

61 E-mail from Pedro PARANAGUA, law professor, Center for Technology and Society of Fundação Getulio Vargas School of Law in Rio de Janeiro, to the author, Apr. 26, 2010 (on

measure into domestic law was the so-called Ley Lleras 1.0,[62] through which the Colombian government tried to implement obligations of online copyright enforcement assumed with the United States through a free trade agreement. The bill allowed any court, even if lacking jurisdiction, to order the disconnection of a supposed copyright infringer anytime during the procedure, including as a preliminary *inaudita parte* injunction.[63] After citizens mobilized against the bill because of its diminishing effects on free speech, the sponsoring lawmaker withdrew it.[64]

Despite the differences among domestic regulations, it is possible to identify some common features in the graduated response. First, in all cases, this policy has been implemented as a measure not to protect against every kind of illegal online activity, but only against copyright infringement. In other words, this measure has not been designed to punish other objectionable online behavior, such as online child pornography, phishing, spamming, or any other. Second, the policy consists of punishing supposed infringers by degrading, blocking, suspending, or terminating their online services, although there is no agreement on the nature, scope, and duration of such measures.

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file with the author). *See also,* Pedro N. Mizukami *et al.*, *Brazil,* in MEDIA PIRACY IN EMERGING ECONOMIES 233 (Joe Karaganis ed., Social Science Research Council, 2011) (reporting about a failed attempt to introduce legislation on graduated response in Brazil).

62 Proyecto de Ley No. 241 de 2011, por la cual se regula la responsabilidad por las infracciones al derecho de autor y los derechos conexos en internet (Colombia) [*hereinafter* Ley Lleras 1.0].

63 Ley Lleras 1.0, art. 13 (setting forth a rule that would adopt graduated response in Colombian law).

64 Senado Archiva Ley Lleras, EL ESPECTADOR, Nov. 16, 2011 (reporting the decision of lawmakers to withdraw the bill known as Ley Lleras 1.0).

Third, before sanctions issue, users must receive warnings through successive notices about copyright infringements committed with their Internet accounts.

However, there are still wide differences among the domestic implementations of the graduated response. Most of those distinctions rest in the level of involvement of government in its implementation, ranging from complete private agreements through businesses cooperation, often under some governmental pressure, to mandatory imposition by law. The different levels of government implication on implementing the graduate response affects the answers to questions such as: Who decides what qualifies as an infringement? Who decides whether a user is sanctioned? What are reasonable safeguards for users' rights? How is a user identified? Who handles users' personal data and how? Answering these sorts of questions creates several and serious legal dilemmas for implementing a policy of graduated response, some of which are explored herein.

Before addressing the human rights concerns, however, it must be noted that the graduated response raises not only legal concerns but also technical ones. From a technological viewpoint, copyright enforcement (and also network management) must face tactics used by file sharers to hide the nature of their traffic and content, and even their own identities.[65] Additionally, users may defeat the law by developing new

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65 *See* Kevin Bauer, Dirk Grunwald & Douglas Sicker, *The Arms Race in P2P*, in 37TH RESEARCH CONFERENCE ON COMMUNICATION, INFORMATION AND INTERNET POLICY, September 2009.

technologies and services,[66] or moving on to those already available that are outside the scope of the law.[67] Analyzing those objections, however, is beyond the purpose of this dissertation, which instead focuses on legal objections to the graduated response. Therefore, the following sections focus on how a graduated response law can jeopardize human rights and then explore the opportunities for implementing a system of graduated responses in compliance with those rights.

2. RIGHT TO ACCESS THE INTERNET

Fueled by the Arab Spring, there has been intense debate about access to the Internet as a human right. On one side, some authors have rejected the idea because they feel it degrades the human rights philosophy and confuses an enabling technology with an end in itself.[68] On the other, some commentators have viewed with excitement a clear signal of such recognition in landmark decisions, such as the 2009 Broadband Act in Finland,[69] the 2010 French Constitutional Council judgment on HADOPI Act,[70] the

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66 *Hackers Franceses Desafiam Governo e Criam Programa que Torna Toda Conexão Wi-Fi Aberta*, O GLOBO - RIO DE JANEIRO, Jul. 10, 2009 (referring the development of a system known as *Hadopi Router* which very purpose is opening any wireless connection, allowing its use by unauthorized users and, therefore, making impracticable the appropriate identification of users by IP numbers).

67 Giblin, *supra* note 35, at 54.6 (referring the migration to non-P2P system by New Zealander users in order to avoid effects of the graduated response law). *See also,* Demuijnck, *supra* note 2, at 279-280 (referring to techniques that make impossible enforcing compliance, from hiding IP numbers to migrating to overseas online storage services).

68 Vinton CERF, *Internet Access Is Not a Human Right*, NEW YORK TIMES, Feb. 5, 2012, A25.

69 Amendment to the Communications Market Act, Sept. 2009 (Finland), Sec. 60 d (331/2009)

2011 UN Report on Free Speech,[71] and the 2012 UN Resolution on the Internet, among other instruments.[72] But, even though all those decisions recognize the relevance of the Internet for the realization of human rights, neither they nor other international instruments articulate an autonomous right to Internet access.[73]

Human rights are an historical product; they are codified, but not petrified, by international instruments. In fact, those instruments make clear that human rights tend toward a progressive realization; their recognition, formulation, scope, and enforcement progress with the years. What today may look like a chimera could become a reality of

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on universal service obligation concerning network service (imposing on network operators designated as a universal service operator an obligation to provide, at a cost-based price, to provide the service needed for connecting to a telecommunications network).

70 Conseil Constitutionnel, *supra* note 7, para. 12. *See* Jan-Herman Reestman & W.T. Eijsbouts, *Internet Piracy and the European Political and Legal Orders*, 5 EUR. CONST. L. REV. 169 (2009) (stating that the Constitutional Council decision in the HADOPI case makes a constitutional right of access to the internet). However, the Constitutional Council did not support an autonomous right to access to the Internet, instead, it understood that access to the Internet is a condition for the realization of free expression.

71 UNITED NATIONS, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue. UN Doc. A/HRC/17/27, May 16, 2011.

72 UNITED NATIONS, General Assembly, Human Rights Council, Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet. UN Doc. A /HRC/20/L.13, June 29, 2012.

73 INSTITUTO NACIONAL DE DERECHOS HUMANOS, INTERNET Y DERECHOS HUMANOS 16 (INDH, 2013) (recognizing that Internet access is not a human right *per se,* but the tendency of international bodies on human rights is considering a government obligation to develop public policies in order to achieve high quality universal access). *But see,* Joint Declaration on Freedom of Expression and the Internet, adopted June 1, 2011, by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, para. 6 (c) (referring to "the right to access the Internet" and its lessening by the disconnection of users, although this recognition lacks any legally binding effects).

human rights tomorrow, as has happened with environmental rights, the right to unionize, the right to control personal information, and so on. The fact that Internet access is not a human right today does not prevent its future recognition as such a right. In the context of this chapter, the recognition of a right to access the Internet by international instruments on human rights would not prevent implementing a graduated response, but, at least in Latin American countries, would provide constitutional safeguards for that right.

On the domestic law level, discussion about a constitutional right to access the Internet also has been taking place in Latin America. In fact, Mexico has the honor of becoming the first country to recognize a constitutional right to access the Internet, by amending its Constitution in 2013. According to the amendment introduced into the provisions related to free speech and information privacy, government must guarantee the right to access information and communication technologies, including both broadband and the Internet.[74] Additionally, the constitutional amendment lays down a series of obligations on the government: it must set forth conditions for effective competition on the provisions of services;[75] Congress is empowered to adopt laws on the matter;[76] and, the executive branch is in charge of implementing a comprehensive policy of universal digital inclusion that, among other goals, requires that at least 70% of homes

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74 Const. Mex., art. 6.

75 Const. Mex., art. 6.

76 Const. Mex., art. 17 XVII.

and 85% of businesses have access to the Internet according to international standards, as well as broadband in public facilities.[77]

Lawmakers in other Latin American countries have introduced bills in order to amend local constitutions to recognize such an autonomous right. This has been the case in Colombia,[78] as well as in Chile.[79] However, those proposals have not been passed yet. Courts also have been conservative in recognizing such a right; in fact, no case law addresses this issue, with the sole exception of a judgment by the Supreme Court of Costa Rica that recognized a specific fundamental right for accessing the Internet,[80] but as a rhetorical argument pushing for liberalization of public telecommunication rather than ruling for a specific public policy on Internet access.

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77 Const. Mex., art. 14th transitory.

78 Proyecto de Acto Legislativo N° 05 de 2011 Senado 128 de 2011 Cámara por el cual se constituye el acceso a internet como derecho fundamental, se modifica el artículo 20 de la Constitución Política y se dictan otras disposiciones (Colombia) (introducing a constitutional amendment that would guarantee the right to access the Internet).

79 Proyecto de ley que establece la garantía del acceso universal a las tecnologías de la información y la comunicación (Boletín 6987-07 de 16 de junio de 2010) (Chile) (introducing a constitutional amendment that would recognize *"the freedom and the right to access, under egalitarian conditions, to the information and communication technologies, and to the Internet, whatever means used and geographical location of users"*).

80 Corte Suprema de Costa Rica, Sala Constitutional, final judgment, Andrés Oviedo et al. v. Ministerio de Ambiente, Energía y Telecomunicaciones et al., 30 Jul. 2010 (ruling, in a case about the government's delay in starting the allocation of spectrum for cell phone services according to FTA's commitments, that it infringes not only the right to a prompt justice and in strict accordance with the laws, but also *"other fundamental rights, such as the consumer's freedom to choice …, the right to access to new information technologies, the right to equality and the eradication of the digital divide …, the right to access to the Internet through the interfaces chosen by consumers and users, and the entrepreneurs and trade freedoms"*).

It may be argued that recognizing Internet access as a constitutional right may degrade the status of rights already recognized, and would not advance any public policy for granting actual access. But rather than focusing on the potential effects of degrading constitutional provisions, the question is, what is the level of relevance that Internet access has as a precondition for full realization of personhood. And, even if states cannot *"hand out megaphones"* under the guise of providing effective free and universal access to the Internet,[81] a constitutional recognition can reinforce public policies consistent with that purpose, such as developing infrastructure, providing access subsidies, supporting community networks, and so on. Recognizing Internet access as a fundamental right not only would encourage governments to promote it, but also to respect and protect it, by preventing initiatives that attempt to diminish that right. Given the horizontal effects of constitutional rights in Latin America, which is, that rights are legally binding and enforceable not just against the public but also the private sector,[82] a constitutional right to Internet access would have effect on both the public and the private sectors that, at the very least, would be required to respect and protect people´s Internet access.

But even though Internet access is not recognized specifically as either a human or a constitutional autonomous right, it has come to play an essential role in social, economic, and political integration of populations. As Table 7 shows, by 2015, two out

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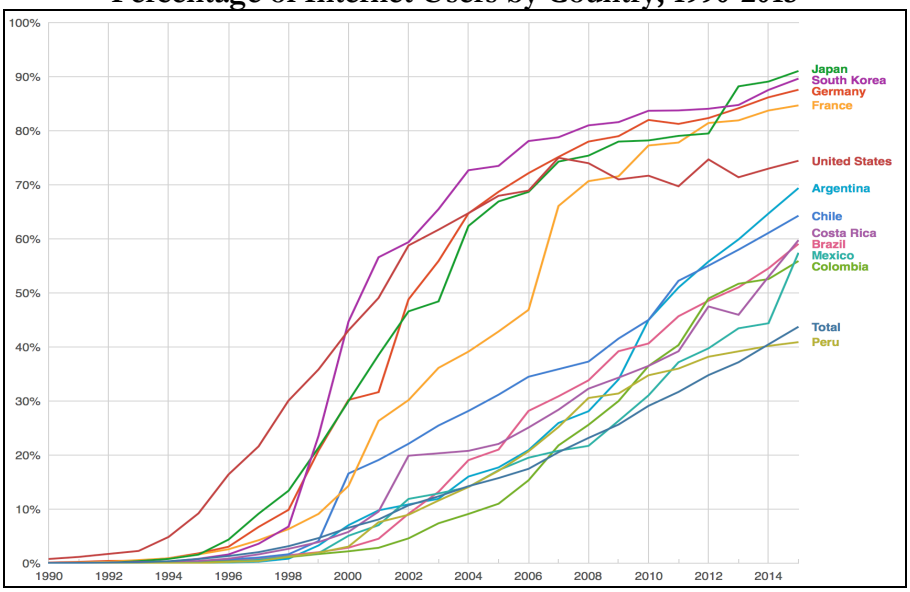
81 OWEN FISS, THE IRONY OF FREE SPEECH (Harvard Univ. Press, 1996) (arguing that free speech not only prevent government censorship but also requires it to empower social discourse by providing certain means).

82 *See supra* Chap. I, notes 35-45 and accompanying text.

of every five persons in the world has used the Internet; Latin America is over the global average, but still far from most developed countries. Not only the number of Internet users is increasing but also the amount of time people spend connected, from a few minutes per day not many years ago to continuous connection nowadays, to a variety of online services, such as e-learning, e-banking, e-commerce, and telemedicine, among others. A clear example of the current level of Internet penetration can be seen in Chile where, since 2009, more than 98% of taxpayers declare and pay taxes online,[83] making it unnecessary for government to open new offices for in-person filings.

Table 10:
Percentage of Internet Users by Country, 1990-2015



Source: International Telecommunication Union, by Google Public Data 2017.

83 *Operación Renta: 98,45% de Declaraciones Fueron Hechas por Internet*, DIARIO LA NACIÓN, May 11, 2009.

Because of the relevance of Internet access for full development of personhood in modern times, even if not a human right, disconnecting people implies depriving, or at least eroding, the right to participate in social life and implicates certain human rights, such as free speech, property, association, and access to knowledge, among others. Disconnecting people from the Internet would raise an obstacle for their individual and social development, similar to ostracism in the classic Greece or exile in Latin America's former dictatorships.

One may not have a right to Internet access, but certainly one has the liberty to contract for Internet access service, subject to availability. Just like anyone can contract for a phone service as long as a company provides it, people cannot be prevented from contracting for Internet access service. It is true that Latin American countries impose limitations on contractual liberty, but those restrictions are set forth by law and must comply with constitutional and human rights exigencies. This should also be the case when implementing a policy that requires disconnecting and banning Internet users for supposed copyright infringement.

This argument may be articulated for almost every single activity carried out online that has constitutional and human rights implications. In countries in which doing paperwork before a tax administration, accessing first aid services, enrolling for university access tests, applying for scholarships, bidding on public purchases, and making freedom of information act requests dictate online access, banning people from the Internet seriously undermines various constitutional and human rights. It does not

prevent implementing a policy that supposes disconnecting Internet users, but it demands such a measure be subject to provisions on limiting fundamental rights set forth by international instruments on human rights and domestic constitutional law. This is the underlying reasoning that supports how implementing the graduated response may violate the freedom of expression, because, as the French Constitutional Council suggested, in modern societies Internet access is a precondition for the actual enjoyment of freedom of expression.

3. FREEDOM OF EXPRESSION

Copyright was conceived, to some extent, as a free speech device, as was mentioned in Chapter One,[84] because granting to authors exclusive rights on their works would allow them to build a future, by freeing them from private patronage and state censure. This had to boost an author's free expression. But at the same time, the monopoly created by copyright imposes a significant restriction on other people's freedom of expression in using copyrighted content. In other words, copyright creates a dilemma because it encourages the free expression of some people by limiting that of others. This tension has increased in recent years because of copyright expansion clashing with opportunities offered by technology. There is a significant amount of literature that deals with this dilemma. The following paragraphs focus on it only briefly

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84 *See supra* Chap. I, notes 130-133 and accompanying text.

in the context of implementing a system of graduated response against supposed copyright infringers.

Freedom of expression and communication is essential for a democratic society, and a precondition for the real enjoyment of other rights, which has been recognized by all international instruments on human rights and constitutional frameworks.[85] From a human rights viewpoint, freedom of expression not only refers to being free to express ideas and opinions, but also the right to seek, receive, and impart them. With the development of digital technologies, most of that freedom is exercised in online environments, by accessing online media and broadcasters, by phoning through IP, by texting, by e-mailing and blogging, and so on. As more persons become users of online communication systems for longer terms, the more intertwined are freedom of expression and accessing to the Internet, to the extent that depriving people of Internet access diminishes their free expression. This has been the reasoning of the French Constitutional Council when it ruled unconstitutional the HADOPI Act, because *"in the current state of affairs … the participation in democratic life and expression of ideas and opinions includes the freedom to access to those services* (Internet)."[86]

Concerns about the noxious effect of the graduated response on free speech have also been expressed in other jurisdictions. In Colombia, the lawmaker who initially

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85 ADHR, art. IV; UDHR, art. 19; ICCPR, art. 19; ACHR, art. 13 (1); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10; and, Charter of Fundamental Rights of the European Union, art. 11.

86 *See supra* note 70.

sponsored a bill that would set forth the graduated response into domestic law eventually withdrew it because, in his words, *"facing the dilemma between freedom on expression and intellectual property rights, we privilege the speech."*[87] A recent report by the National Human Rights Commission of Korea pays close attention to certain measures of copyright enforcement, including the domestic version of the graduated response, by expressing doubts about its effectiveness and its restrictive effects on the rights to culture and information, as well as calling for its review in light of other constitutional rights and its derogation, if necessary.[88]

In 2012, the United Nations recognized that the Internet is a relevant instrument for developing and exercising human rights in general, and freedom of expression in particular.[89] One year before, the Report of the UN Special Rapporteur on Freedom of Expression expounded widely on the synergies of Internet access with the exercise of free speech and other human rights.[90] It calls attention to the different ways of violating free speech online, from arbitrary blocking and filtering of content, criminalizing legitimate expressions, imposing liability on intermediaries, cyber-attacks, inadequately protecting personal data privacy, and disconnecting Internet users for intellectual

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87 *See supra* note 64

88 NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, *Report on Information and Communication Technologies and Human Rights* (National Human Rights Commission of Korea, 2013).

89 UNITED NATIONS, General Assembly, Human Rights Council, Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet. UN Doc. A /HRC/20/L.13, June 29, 2012.

90 UNITED NATIONS, *supra* note 71.

property infringement.[91] In addition to expressing alarm about the disconnection of Internet users, the Rapporteur considered that particular measure disproportionate and a violation to international human rights and, consequently, urged States to repeal or amend existing copyright laws that allow users disconnection, and to refrain from adopting such laws.[92]

Although the UN Special Rapporteur on Freedom of Expression initially opined that the graduated response was contrary to international human rights law, mere weeks later, he refined his opinion. The Joint Declaration on Freedom of Expression and the Internet, issued by all specialized rapporteurs on the matter, is interesting in two senses: first, it recognizes a right to Internet access, although that recognition lacks legally binding effects; and, second, it refers to denying such access as a punishment that only could be justifiable in highly restrictive circumstances.[93] The French Constitutional Council also endorsed this opinion. Although the Council declared unconstitutional the first HADOPI Act for violating the freedom of expression and the presumption of innocence, ultimately it allowed implementing a graduated response as a punitive measure imposed through criminal courts, in compliance with the guarantees of due process recognized in favor of those charged criminally. We return to this interpretation below.

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91 UNITED NATIONS, *supra* note 71, paras. 28-59.

92 UNITED NATIONS, *supra* note 71, paras. 58, 78, and 79.

93 Joint Declaration on Freedom of Expression and the Internet, *supra* note 73, para. 6 (c).

Freedom of expression and the right to privacy have a synergic interaction, although most often it is highlighted how protecting privacy limits free speech. The UN Special Rapporteur on Freedom of Expression comments on that synergy when stating that an inadequate protection to the right to privacy and data protection is another way to erode freedom of expression online.[94] It is not a surprise, then, that implementing the graduated response supposes a significant risk for the right to privacy, as is explained below.

4. RIGHT TO INFORMATION PRIVACY

As has been mentioned, the right to privacy has expanded from the right to be left alone to the right to control the information about oneself, also known as the right to data protection.[95] This right has received various means of protection in different countries, but not in a harmonized manner. In fact, there are enormous differences in the way it is protected around the world. In some countries, like the EU countries, there is a comprehensive legal regime for data protection, which regulates personal data processing related to physical persons, by automatic or manual process, by the public and private sectors.[96] In other countries, like in the United States, there is a fragmentary legal framework, with several specific regulations at federal and state levels that govern

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94 UNITED NATIONS, *supra* note 71, paras. 53-59, and 82-84.

95 *See supra* Chap. VII, notes 65-77 and accompanying text.

96 *See supra* Chap. VII, notes 80-83 and accompanying text.

the processing of personal information in specific contexts by specific data controllers.[97] Latin America is in transition from a model of protection based on comprehensive constitutional rules and fragmentary statutory provisions to a model based on both comprehensive constitutional and statutory protection.[98] As a result of these differences, even when privacy is a global concern, it is essentially regulated at the domestic level, where the implementation of foreign solutions may conflict with local legal systems.

There are several hypotheses of risk in processing personal data in the context of implementing a regime of graduated response. In an extremely simplified process, in order to sanction supposed infringers, it is necessary first to process the personal information that would allow identifying those infringers, identify them, and then process their personal information in order to actually impose and enforce the graduated response. Each of those stages presupposes an enabling legal framework that allows processing personal data (even if available online) and, ultimately, sanctioning supposed infringers with degrading, suspending, or disconnecting them from the Internet.

Before actually identifying a user who faces the potential application of the graduated response, there is significant processing of personal information. Someone, presumably a copyright collective society or another entity acting in its behalf, must

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97 *See supra* Chap. VII, notes 78-79 and accompanying text.

98 *See supra* Chap. VII, notes 84-86 and accompanying text.

collect information about online behavior,[99] particularly IP numbers used by a given user to connect to P2P networks, as well as the times of infringement and references to infringed copyrighted material. Meanwhile, ISPs must preserve the traffic data of their subscribers. Traffic data is the information that is needed to trace the source of a chain of communication from a point of origin to a point of destination,[100] and includes data indicating the communication's origin, destination, route, time, date, size, duration, and type of underlying service.[101] On the other hand, content data refers to the communication content, that is, the actual communicated message, such as the text of an e-mail.[102] Only traffic data is the kind of data that, as was said in previous chapter, certain countries may require ISPs to retain by law *ex-ante,* at least for some serious crime.[103] As a result of this limitation, however, copyright holders can find themselves deprived of access to that data in order to identify a supposed copyright infringer.

Once copyright holders have collected IP numbers and the date and time of connection, and, at the same time, ISPs have retained traffic data, the next step to identify users is to match up both sets of data. As a result of this processing of crossed

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99 Alain Strowel, *The Graduated Response in France: Is It the Good Reply to Online Copyright Infringements?,* in COPYRIGHT ENFORCEMENT AND THE INTERNET, *supra* note 26, at 149 (referring the fact that monitoring is performed by *"sworn agents of right owners groups (and collecting societies) that have been accredited by the Ministry of Culture"*).

100 Explanatory Report of the Convention on Cybercrime (ETS No. 185), paras. 28-31.

101 Convention on Cybercrime, Budapest 23.XI.2001 (ETS No. 185) (Nov. 23, 2001), *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm [*hereinafter* Convention on Cybercrime], art. 1 (d).

102 Explanatory Report of the Convention on Cybercrime (ETS No. 185), para. 209.

103 *See supra* Chap. VII, notes 119-133 and accompanying text.

data, it could be possible to identity Internet users and their contact information, which would allow issuing to them as many warnings as required. However, in certain jurisdictions, this simple step could be obstructed if it lacks an enabling law. In fact, as the experiences of the European Union and the United States described in previous Chapter show, an ISP does not necessarily have to provide access to the personal data of its subscribers to copyright holders.[104]

Implementing a graduated response against supposed copyright infringers requires keeping records of infringers. Preserving such records is essential to eventually identifying those repeat infringers that could be sanctioned, as the graduated response is designed not for punishing an isolated infringement but recurring ones. In the United Kingdom and New Zealand, ISPs must keep those records, since they handle notifications and counter-notifications, and they cannot reveal subscribers' personal data, except by court order. In Taiwan, on the other hand, those records are the responsibility of the administrative authority, since it controls notifications to Internet users. That was also the case in France, while the HADOPI Act was in force.

Implementing a graduated response also requires keeping records of those who have been sanctioned, although the scope of those records varies according to the nature, duration, and scope of the measure. In Korea, they must be kept by ISPs, because disconnection has a limited effect and does not prevent users from accessing the

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104 *See RIAA v. Verizon Internet Services, Inc.*, 351 F.3d 1229, 1237 (D.C. Cir. 2003), *cert. denied,* 543 U.S. 924 (2004); and, Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, E.C.R. (2008).

Internet through another ISP. Instead, in countries where disconnection produces general effects, by banning the supposed infringer from the Internet, as it did in France, the public authority handled the sanction records, allowing different ISPs to consult them before contracting service with a new customer.

Implementing the graduated response should require having some legal framework for the protection of privacy in relation to the online monitoring of Internet users and the processing of their personal data. This has been an issue of significant concern for domestic authorities, as aforementioned, as well as for communitarian authorities in the European Union.[105] We return below to balancing the implementation of a graduated response with the right to privacy.

5. THE GRADUATED RESPONSE IN COMPLIANCE WITH HUMAN RIGHTS

According to the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, international instruments on human rights prohibit implementing a mechanism of graduated response into

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105 *See, e.g.,* ARTICLE 29 DATA PROTECTION WORKING PARTY, Working Document on Data Protection Issues related to Intellectual Property Rights, adopted Jan. 18, 2005. Xxxx/05/EN WP104 (calling attention about the tension between enforcing copyright and protecting the right to privacy regarding several measures of enforcement, including the implementation of policies for disconnecting users).

domestic law because of its disproportionality,[106] an opinion that is also shared by some scholars.[107] As a result, he recommended that countries repeal or amend existing laws that set forth the graduated response, and restrain from adopting such laws.[108] Later on, however, the Special Rapporteur accepted that disconnecting users might be compatible with human rights obligations, although only under certain limited circumstances.[109] This hesitant attitude by the main UN authority on the matter makes clear how conflicted the graduated response is from a human rights viewpoint. It shows also that this measure may or may not infringe on human rights obligations depending on the peculiar features of its specific implementation. As explained below, a more complex analysis does not necessarily result in the conclusion that the graduated response is impermissible under human rights law.

Most human rights are not absolute, thus, they admit certain limitations.[110] In fact, neither of the fundamental rights directly affected by the graduated response – that is, freedom of speech and the right to privacy – are absolute and, therefore, it is possible

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106 *See* UNITED NATIONS*, supra* note 71, para. 78.

107 Carolina Botero, Andrea Sánchez, & María Soto, *Libertad de Expresión y Derecho de Autor en Campañas Políticas en Internet* 20-21 (Tribunal Electoral del Poder Judicial de la Federación, 2013) (rejecting any measure of disconnection from the Internet because of human rights implications).

108 *See* UNITED NATIONS*, supra* note 71, para. 79.

109 *See* Joint Declaration on Freedom of Expression and the Internet, *supra* note 73, para. 6 (c).

110 *See supra* Chap. I, notes 149 *et seq.* and accompanying text.

to adopt some permissible exceptions in their regards.[111] It is possible to envision, however, certain cases in which a measure of graduated response may affect other fundamental rights in an unpredictable manner, for instance when health services are provided online or other emergency needs require online communications. But this does not rule out the graduated response, it only asks for enough safeguards in order to prevent unintended consequences. As a matter of fact, said safeguards usually are provided by countries' domestic law, for instance, by preventing that the application of the graduated response affects phone services or at least the functioning of emergency phone numbers.

The fact that the graduated response could be a permissible limiting measure under international law does not, however, completely free governments to impose it at will on copyright infringers. Limitations on human rights are subject to special constraints set forth by international instruments on human rights and domestic constitutional law, as analyzed elsewhere.[112] In order to determine to which extent an actual application of the graduated response could be compatible with human rights obligations, we must distinguish the nature of the measure itself (that is, the graduated response) from its procedural implementation (that is, related monitoring of users and processing of personal data).

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111 *See also* KONSTANTINOU, *supra* note 3, at 31-59 (focusing human rights concerns against graduated response on privacy, data protection, and freedom of expression). *See supra* Chap. VII, notes 143-148 and accompanying text.

112 *See supra* Chap. I, notes 153-173 and accompanying text (analyzing limitations on human rights in general); *supra* Chap. VII, notes 143 *et seq.* and accompanying text (analyzing limitations on the rights to privacy in particular).

From a human rights viewpoint, the graduated response is a form of punishment.[113] As was explained previously, in order to determine whether a given measure is punitive, the European Court of Human Rights has applied the so-called *Engels criteria*, a non-cumulative test that considers the classification of the offence under domestic law, the nature of the offence, and the severity of the sanction.[114] In the case of the graduated response, disconnecting a user from the Internet neither ends nor prevents a specific copyright infringement; it neither re-socializes the wrongdoer nor compensates damages to rights holders. In fact, disconnecting a user via the graduated response purely meets the aim of punishment: it deters the infringer, and potentially other users, from contravening copyright law and, at the same time, it incapacitates the offender from committing infringements while the measure lasts. In light of human rights law, the graduated response is punishment.

From a comparative law viewpoint, some jurisdictions have recognized the penal character of the graduated response. The fact that British law euphemistically refers to the graduated response as a "technical measure" is irrelevant, since its intrinsic nature is punitive.[115] Similarly irrelevant is the fact that some jurisdictions enlist private actors, through business agreements, to implement the graduated response. In contrast, the French Constitutional Council recognized the punitive nature of the graduated response

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113 *See* Joint Declaration on Freedom of Expression and the Internet, *supra* note 73, para. 6 (c) (stating that *"[d]enying individuals the right to access the Internet as a punishment"*).

114 *See supra* Chap. VI, notes 61-66 and accompanying text.

115 *See supra* Chap. VI, notes 63 and 72 and accompanying text.

when ruling unconstitutional the first HADOPI Act and, therefore, refusing to empower an administrative body with sanctioning power and, ultimately, forcing the Legislature to give criminal courts the authority to impose such a penalty. The Chilean Congress did the same when adopting the sanction against "repeat offenders,"[116] a language with unequivocal pedigree in criminal law that refers to those who have been convicted previously of similar crimes,[117] an interpretation supported even by orthodox voices on intellectual property.[118] Similar arguments could be advanced for most Latin American countries.[119]

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116 Copyright Act Chile, art. 85 R inc. 2. (referring, in Spanish, to "infractores reincidentes", i.e., repeat offenders).

117 Criminal Code Chile, art. 12.

118 International Intellectual Property Alliance, Special 301 Report on Copyright Protection and Enforcement: Chile (2013), available at http://www.iipa.com/2013_SPEC301_TOC.htm (last visited Nov. 25, 2013), at 26 (supporting that in order to apply the graduated response, offender must have two previous convictions for copyright violation). *See,* DANIEL ALVAREZ, LIBERTAD DE EXPRESIÓN EN INTERNET Y EL CONTROL DE CONTENIDOS ILÍCITOS Y NOCIVOS 134 (unpublished Bachelor in Law thesis, University of Chile, 2004); and, Cerda, *supra* note 58, at 131.

119 Criminal Code Arg., art. 50; Criminal Code Braz., art. 63; Criminal Code Chile, art. 12; Criminal Code Costa Rica, art. 39 (defining repeat offender as who commits a new crime after being convicted for another); Federal Criminal Code Mexico, art. 20; and, Criminal Code Peru, art. 46 B (defining repeat offence as a circumstance that aggravates criminal responsibility on who, after fulfilling a previous punishment, commits a new willful crime within a given term). In Colombia, although repeat offence is also a circumstance that aggravates criminal responsibility, it lacks a legal definition, but the Constitutional Court has provided it. *See* Corte Constitutional de Colombia, Sentencia C-077/06, de 8 de febrero de 2006, Demanda de inconstitucionalidad contra los Arst. 25 (parcial) y 26 (parcial) de la Ley 43 de 1990 (defining repeat offence as a circumstance that aggravates criminal responsibility by worsening the sanction imposed on an infringer offender who already has been punished for committing other offences). In the United States, *see* David Nimmer, *Repeat Infringers,* 52 J. COPYRIGHT SOC'Y 167 (2005) (discussing, instead, the ambiguity of the language in the U.S. law).

Since the graduated response technically is a punitive measure that deprives or diminishes an offender's rights,[120] from a human rights viewpoint, it is a matter of legislative action. Even more, international instruments state that nobody can be convicted of a crime that was not an offence by law at the time of its commission, or punished with a heavier penalty than that applicable at that time by law.[121] Because of the level of seriousness of punitive measures, the degree of precision required for criminal law is higher than for other human rights limitations, since both the description of a crime and its correlative penalty must be sufficiently provided by law. In countries that have opted for legislative intervention on the matter, only some seem to provide a sufficiently precise description of the particular circumstances that require the graduated response. This is the case of France and the United Kingdom. For Latin American countries that have implemented the graduated response into domestic law, although they precisely detail the kind of offender that could receive the penalty, they fail to specify the exact crime that deserves that punishment, as well as certain details of the sanction, such as whether the graduated response is the main, additional, alternative, or a compound penalty. This lack of determination infringes both international human rights and constitutional laws, which may deter the respective local courts to actually apply this punitive measure.

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120 *See* KONSTANTINOU, *supra* note 3, at 51-54. *See also,* Stefan Trechsel, *Comparative Observations on Human Rights Law and Criminal Law*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 6 (2000) (stating that "punishment constitutes a most serious interference with human rights").

121 ADHR, art. XXVI; UDHR, art. 11; ICCPR, art. 15; and, ACHR, art. 9.

The requirement to enact the graduated response in law raises an additional point from a human rights perspective: there is no room for private enforcement. Since human rights law requires a law enabling the graduated response, it rules out adopting the measure by mere agreement between business communities. This is particularly true for Latin American countries, where fundamental rights are constitutionally enforceable against both state and non-state actors.[122] This raises some issues with regard to the graduated response used in the United States and Ireland, where implementation rests on private agreement between copyright holders and Internet operators, which, despite being consistent with their domestic constitutional frameworks, seems to infringe on international human rights law. This makes apparent that this sort of business cooperation, a language incorporated in free trade agreements signed by several Latin American countries with the United States, has much smaller scope within these countries' legal system, because both international and constitutional laws restrain private enforcement actions to measures that do not infringe Internet users' fundamental rights.

As a punitive measure, human rights law requires that the graduated response must be proportional to the criminal offence, an exigency examined previously.[123] Rapporteurs on Freedom of Expression have also called the attention on this point by qualifying the graduated response as an "extreme measure" that would be justified "only

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122 *See supra* Chap. I, notes 35-45 and accompanying text.

123 *See supra* Chap. V, notes 54-82 and accompanying text (discussing application of the principle of proportionality on determining the measure of punishment).

where less restrictive measures are not available."[124] Whether the graduated response is proportional is a determination that rests on the specificity of the measure, which, as mentioned, varies significantly from one country to another, as well as on the seriousness of the respective crime. On the latter point, it should be recalled that the graduated response is a specific punitive measure being applied not against harmful hacking, child pornography, or another similar felony, but against copyright infringers, which makes it difficult to articulate its proportionality. This is not to deny its potential application in certain limited cases of serious copyright crime, but it seems more challenging to remain consistent with human rights when applied against negligent users that merely fail to protect their networks and against non-commercial *de minimis* copyright infringers. In fact, the arguable proportionality of the graduated response in these cases polluted its implementation in France,[125] as well as its inclusion in the final text of the ACTA.[126]

For those Latin American countries that have implemented the graduated response into domestic law, its proportionality also has been an issue. The measure may look at first something radical, since it terminates the services provided by a given ISP, without previous degradation, blocking, or suspension of such services. However, in both Chile and Costa Rica, the measure refers only to services of online data storage, and applies exclusively against repeat infringers who have previous convictions of copyright infringement, circumstances that militate in favor of the proportionality of the measure.

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124 Joint Declaration on Freedom of Expression and the Internet, *supra* note 73, para. 6 (c).

125 *See supra* notes 3-16 and accompanying text.

126 *See supra* notes 49-53 and accompanying text.

Despite this, determining the proportionality of the punishment requires comparing it with the criminal offence to which is applied, a comparison that has provided mixed records in the region. Criminal copyright enforcement in Costa Rica has been subject to a strict constitutional scrutiny on its proportionality, by limiting criminal actions to willful, harmful, and commercial copyright infringement. This argues in favor of supporting the graduated response. In contrast, Chile provides a looser scrutiny to criminal enforcement of copyright that, in spite of some improvements through the last decade,[127] still covers almost any infringement.[128] As a result, the graduated response potentially applies to unintended, harmless, and not-for-profit infringement, which weakens the argument about its proportionality. This distinction is particularly relevant for Latin American countries, since, as was analyzed in Chapter Four, most of them are closer to Chile's overcriminalization of copyright infringement rather than to Costa Rica's more proportional criminal copyright enforcement.[129]

The American Convention on Human Rights imposes an additional restriction on punitive measures: the punishment must not extend to any person other than the criminal.[130] In the case of the graduated response, it should not apply to someone other than the actual copyright infringer. This restriction has been seen as insufficient in some countries, which also have applied some graduated response to those users who have

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127 Andrés Grunewaldt, *Delitos contra los Derechos de Autor en Chile*, 2 REVISTA CHILENA DE DERECHO Y TECNOLOGÍA 95, 97-98 (2013) (noting certain improvements on the drafting of copyright related crimes in Chilean law).

128 Copyright Act Chile, Art. 78. *See supra* Chap. IV, note 60.

129 *See supra* Chap. IV.

130 ACHR, art. 5 (3).

failed to protect their networks even if they do not infringe someone else's copyright directly. In France, for instance, punishing negligent users was attempted by introducing a questionable strict liability crime into HADOPI Act, which later was repelled. In Latin America, neither Chile nor Costa Rica extend the penalty to someone other than the actual repeat infringer, which is consistent with their international human rights obligations, as well as with the rejection of punishment based on strict liability by countries with civil law systems.

Some authors object to the fact that the graduated response not only affects the copyright infringer, but also may affect innocent third parties, such as other members of a family or community that use the same Internet service.[131] This objection, however, has at least two mitigating circumstances. First, although international human rights law circumscribes punishment to the actual infringer, it does not prevent the collateral damages that punishment may occasion on third parties. Imprisonment, for example, may deprive not only the convict from freedom, but also, as a negative externality, it diminishes the convict's family from emotional and economic support. Second, when introducing into domestic law the graduated response, most countries tend to include some safeguard mechanisms to prevent unintended effects, such as affecting third

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131 Nicolas Suzor & Brian Fitzgerald**,** *The Legitimacy of Graduated Response Schemes in Copyright Law*, 34(1) UNSW L. J. 1, at 10-11 (2011) (concluding that, under current graduated response schemes, in most cases the law would penalize not just copyright infringers, but everyone they live with).

parties; this was, for instance, the case of France.[132] Neither Chile nor Costa Rica, however, have introduced analogous safeguards, which may be explained because of the narrow scope of their measure (i.e., termination of online storage services), as well as the concession to courts of discretional powers for ordering that measure, which allows for balancing third parties' competing interests.[133]

International human rights law sets forth several limitations on the state power to punish in order to protect the right to due process of the law.[134] This certainly applies when imposing the graduated response on copyright infringers.[135] Since due process has been analyzed elsewhere,[136] here we will only briefly summarize its requirements. A first set of guarantees related to the due process grants to everyone the right to a fair and

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132 HADOPI Act, art. L. 331-30 (providing that the suspension applied only to access to public online communication services and to electronic communications and, if this access service was purchased as part of commercial composite services that included other types of services, such as telephone or television services, suspension did not apply to these latter services).

133 Copyright Act Chile, art. 85 R (providing that, when ordering certain measures of copyright enforcement, courts must take into consideration the burden on the ISP, users, and subscribers, the potential damage to the right holders, the technical feasibility and efficacy of the measure, and the existence of less cumbersome measures for assuring enforcement); and, ISP Regulation Costa Rica, art. 18 (providing that, for imposing the termination of a user's service, the court must evaluate the evidence regarding the relative burden on the service provider and the damage to the right holder, the technical feasibility and efficacy of the measure, as well as the existence of less cumbersome and relatively more effective measures of enforcement).

134 *See* ADHR, art XXVI; UDHR, arts. 8 and 10; ICCPR, art. 14; ACHR, art. 8 (1); and, Charter of Fundamental Rights of the European Union, art. 47.

135 *See,* Joint Declaration on Freedom of Expression and the Internet, supra note 73, para. 6 (c) (stating that denying individuals the right to Internet access is a measure that must be ordered by a court). *See also*, Constitutional Council, *supra* note 7, para. 16.

136 *See supra* Chap. VI, notes 24 *et seq*., and accompanying text.

public hearing,[137] which so far seems only infringed by those countries that allow for imposing the graduated response through private mechanisms of enforcement. A second set of due process guarantees refers to the requirement of a competent, independent, and impartial tribunal, which applies not only to resolving criminal accusations, but also to determining rights and obligations of another nature.[138] This particular matter was a concern of the French Constitutional Council when ruling unconstitutional the first HADOPI Act, because it granted punitive power to an administrative body instead of a court.[139] Similar concerns could be raised with respect to the graduated response implementation by South Korea. Fortunately, Chile and Costa Rica seem in compliance with international human rights law on the matter, since both countries have empowered local courts to decree their version of the graduated response.

A third set of guarantees on due process recognizes certain specific safeguards in favor of those who face criminal charges. They include the right to be informed of the charges, the right to a defense, the right to not self-incriminate, the right to appeal, the right to be free from double jeopardy, and so on.[140] Among those rights, one presents particular challenges for implementing the graduated response. That is the right to be presumed innocent, which enjoys broad recognition in domestic constitutions, as well as

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137 *See supra* Chap. VI, notes 49-55 and accompanying text.

138 *See supra* Chap. VI, notes 33-48 and accompanying text.

139 Constitutional Council, *supra* note 7, para. 17.

140 ACHR, Art. 8 (2) to 8 (5). *See also,* ADHR, Art. XXVI; and, ICCPR, Art. 14 (2) to 14 (7).

in the main international instruments on human rights,[141] which background can be traced to the Declaration of the Rights of Man and of the Citizen.[142] This right assumes in principle that a defendant is innocent and, consequently, sets the burden of proof on the prosecution in order to prove the defendant is guilty of the imputed crime. This right may be affected in limited cases in order to serve the public interest in prosecuting certain serious crimes and maintaining a workable criminal system, for instance by requiring a defendant to prove some limited exculpatory circumstances, such as having authorization when a crime consists of performing a given conduct without such authorization.

Because of the evidentiary difficulties for proving someone has infringed copyright online by uploading, downloading, sharing, or making available a given copyrighted content, countries that have implemented the graduated response into domestic law have reversed the burden of proof. In practice, this means that the supposed infringement is presumed, as well as the participation in it by a given Internet user, who must prove innocence in order to avoid criminal sanctions. This reversion of the burden of proof threatens the very values the presumption of innocence is designed to protect, because it puts average users in an insurmountable position by requiring them to provide extremely technical evidence, which impossibility guarantees an adverse sentencing. Even worse, in some countries the law completely disregards the supposed

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141 UDHR, art. 11 (1); ICCPR, art. 14 (2); ACHR, art. 8 (2); and, Charter of Fundamental Rights of the European Union, art. 48.

142 Declaration of the Rights of Man and of the Citizen of 1789, art. 9.

infringer's presumption of innocence, by defining strict liability crimes, such as when punishing users who fail to protect their networks from infringement by third parties. In sum, in some cases the graduated response has impermissibly diminished, if not completely abrogated, the presumption of innocence.

At this point, it has been argued that, from a human rights viewpoint, the graduated response cannot be ruled out *in limine litis* and, consequently, determining whether it infringes human rights depends on a deeper analysis. Those rights are susceptible of limitations and the graduated response may qualify as a legitimate limitation, if it complies with requirements appropriate for a punitive measure. First, this measure must be set forth by law. Second, it must be proportional to the respective crime and cannot extend to any person other than the criminal. Third, the graduated response must comply with the right to due process, which implies respecting: the right to a fair and public hearing; the right to a competent, independent, and impartial tribunal; and the guarantees stated in favor of those who face criminal charges, including the presumption of innocence. Each of the aforementioned requirements raises human rights concerns with respect to those countries that have implemented the graduated response as a punitive measure against copyright infringers.

Moreover, as was discussed previously, in order to determine to what extent an actual application of the graduated response could be compatible with human rights obligations, it is necessary not only to analyze the measure itself, but also its procedural implementation, particularly with regard to the online monitoring of users and

processing of personal data. In this regard, implementing the graduated response not only raises challenges to the right to privacy connected to looking for infringers through network monitoring, but also there are some issues that exceed beyond that surveillance. As was noted, implementing this measure requires keeping records of infringements, infringers, and sanctioned users, depending on the nature and scope of the specific measure under domestic law. However, the difficulties of this particular processing of personal data already have some legal precedents that provide guidelines for implementation, such as rules on criminal records, sex offenders and child molesters registry, and registration of those convicted for driving under the influence. What is certainly most challenging are the rules that would apply to monitoring Internet users in order to identify copyright infringers.

Depending on the extent of the graduated response, it can require processing personal data related to Internet users by implementing some level of monitoring of their behavior. This may be limited to certain users and services, as seems to be the case in Chile and Costa Rica, where the graduated response applies only to users of online storage who are repeat offenders. However, that monitoring could be much broader when the graduated response applies to a wide number of users of a variety of online services, such as in France and the United Kingdom. In the latter case, implementing the graduated response put in place a mass collection and processing of personal information whose extension fails the proportionality test required by human rights law. In fact, several Constitutional Courts in Europe and Latin America have nullified data retention laws that allow for such sort of monitoring, even when they are based on what

seem more appealing reasons of public interest, such as fighting more serious crime; more recently, the European Court of Justice has nullified the Data Retention Directive for infringing the rights to privacy and personal data protection.[143] A more extensive analysis on privacy, data protection, and data retention in connection with online copyright enforcement in Latin America has been conducted in Chapter Seven,[144] at this point it must be highlighted that implementing the graduated response into domestic law requires adopting specific rules about online monitoring and processing of data, which should be narrow enough to pass the proportionality test.

It may be suggested that adopting narrow provisions on monitoring and processing data when implementing the graduated response is insignificant because most of those actions are handled by private entities, mainly copyright collective societies, which have no direct obligation to human rights law. This may be true for some jurisdictions, but it is not true in Latin American countries. As aforementioned, those countries have incorporated human rights obligations into constitutional law, making them enforceable against both state and non-state actors.[145] Plus, in addition to those constitutional constraints on monitoring and processing personal data, there is a whole body of law that imposes a variety of restrictions on the matter, from comprehensive data protection laws to specific criminal law provisions dealing with crimes against

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143 Joined Cases C-293/12 and C-594/12, Request for a preliminary ruling under Article 267 TFEU from the High Court (Ireland) and the Verfassungsgerichtshof (Austria), E.C.R. (2014).

144 *See supra* Chap. VII, notes 119-133 and accompanying text.

145 *See supra* Chap. I, notes 35-45 and accompanying text.

privacy and hacking, from consumer protection laws to net neutrality obligations,[146] as well as procedural rules that exclude evidence obtained through the infringement of a defendant's fundamental rights.

In sum, although the graduated response is not an inherent infringement on human rights law, its implementation needs to address significant and multiple human rights challenges. Some of those challenges refer to the nature and scope of the measure, while others refer to the monitoring of Internet users and the processing of their personal data. In fact, implementing the graduated response in compliance with human rights law could be expensive enough to the point of discouraging its adoption by countries other than those that have committed already to its implementation. In addition to its human rights costs, in countries where the graduated response has been implemented, it has not delivered its intended outcome,[147] raising questions about its efficacy and even leading to its progressive dismantlement in France.[148] As more evidence corroborates the lack of efficacy of the graduated response, the consistency of this enforcement measure with international human rights law may become less

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146 *See supra* Chap. VIII, notes 60-63 and accompanying text (reviewing net neutrality laws in Latin American countries).

147 *See supra* notes 11-15 and accompanying text.

148 *See, e.g.,* Giblin, *supra* note 35, at 54.4-54.7 (arguing that the law will not achieve its aims because of the financial cost of enforcement, the limitations of dealing with dynamic IP allocation, the adoption by users of technologies not covered by the law, as well as the potential usage of overseas services); and, Elton, *supra* note 1, at 57 (expressing doubts about the effectiveness of the graduated response). *But see,* JORGE LEDESMA IBÁÑEZ, PIRATERÍA DIGITAL EN LA PROPIEDAD INTELECTUAL: ANÁLISIS JURÍDICO DE LA PIRATERÍA DIGITAL EN AL ÁMBITO ESPAÑOL E INTERNACIONAL 146, 156 (Bosch, 2011) (suggesting that the French enforcement of copyright online has become a model for other countries to follow and supporting its adoption in Spain).

plausible, since its inefficacy would challenge the assessment on the proportionality of the measure.

Some scholars have gone further, by making objections that confront the ethical foundations of such punitive approach and suggest different mechanisms for handling online copyright infringement.[149] The analysis of these objections exceeds the purpose of this dissertation, which focuses on the human rights challenges on the implementation on certain measures of copyright enforcement rather than proposing an alternative model of compliance. However, successful implementation of models of enforcement other than the graduated response also would diminish the consistency of the graduated response with international human rights law, since alternatives would make the measure unnecessary.

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149 *See, e.g.,* Demuijnck, *supra* note 2, at 261-283 (arguing that illegal downloading of copyrighted material, particularly music file sharing, is not immoral and unfair freeriding, because it takes advantage of an unfair system that does not deliver its expected social outcome, and users are not part of the intended market because of lacking purchasing power). *See,* Geert Demuijnck, *Is P2P Sharing of MP3 Files an Objectionable Form of Free Riding,* in INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE 141-159 (Axel Gosseries, Alain Marciano, & Alain Strowel eds., Palgrave Macmillan, 2008). Two additional reasons for infringing without moral objections include: infringement in underserved market, and infringement because of civil disobedience. *See also,* Katerina Sideri, *The Regulation of Peer-to-Peer File-Sharing Networks: Legal Convergence and Perception Divergence,* in 1 NEW DIRECTIONS IN COPYRIGHT 216-243 (Fionna Macmillan ed., Edward Elgar, 2005) (arguing, as an explanation of persistent file sharing, there is a divergence between practices and social norms, on one hand, and legislative approach, on the other, on what constitutes copyright infraction in the context of online file sharing); David Lametti, *The Virtuous P(eer): Reflections on the Ethics of File Sharing,* in NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY 284-306 (Annabelle Lever ed., Cambridge Univ. Press, 2012) (arguing that file sharing is to some extent justifiable because of based on informal copyright normativity, unlike formal normativity, that encourages sharing as a virtue); and, WILLIAM PATRY, PATRY ON COPYRIGHT § 22:223 (Thomson West, 2012) (rejecting criminal actions on cases other than piracy and arguing for repealing criminalization in other cases because of misuse by certain right holders and public expenses of law enforcement that should *"better spent protecting us from terrorism rather than from college students at computers"*).

Conclusions

This chapter includes some conclusions of this thesis on the intersection of copyright and human rights in Latin America. Additionally, it provides some recommendations on future lines of research for scholars, public policy measures for policymakers, and suggestions for local advocates and regulators in the region. After providing a review of human rights and copyright law in the region, and the challenges for the former because of the increasing regulation by the latter, it seems necessary to provide some forward-thinking and positive agenda items and, thus, the thesis makes some recommendations in order to achieve an adequate level of compliance with human rights commitments in the region when assuming, implementing, and enforcing copyright obligations.

There is a significant body of literature that formulates recommendations on copyright matters. Some scholars have advanced normative proposals with a broader scope,[1] while others have concentrated on particular countries.[2] Yet other scholars have

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1 WILLIAM F. PATRY, HOW TO FIX COPYRIGHT (Oxford Univ. Press, 2012) (exploring several measures for fixing copyright not only in the United States but worldwide, although some proposals would require changes at both the domestic and international levels).

2 *See, e.g.,* Manoel J. Pereira Dos Santos, *Principais Tópicos para uma Revisão da Lei de Direitos Autorais Brasileira*, 100 REVISTA DA ABPI 61 (2009) (proposing several modifications into Brazilian substantive copyright law in order to update it, including amendments on moral rights, limitations and exceptions, orphan works, statute of limitations, and so on); ALESSANDRA TRIDENTE, DIREITO AUTORAL: PARADOXOS E CONTRIBUIÇÕES PARA A REVISÃO DA TECNOLOGIA JURÍDICA NO SÉCULO XXI (Elsevier, 2009) (suggesting modifications to the Brazilian copyright regime in order to match regulation with the needs

proposed certain measures specifically related to the enforcement of copyright,[3] although not all of them fit the legal system of Latin American countries. Because of the increasing inclusion of enforcement measures in free trade agreements, there are specific suggestions to developing countries related to the negotiation of intellectual property issues in those agreements,[4] as well as guidance on how to implement certain obligations into domestic law.[5] There are also recommendations on the areas that require closer

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of new technologies and business models, by reestablishing formalities, reducing term of protection, and making requisites for derivative works more flexible); and, Pedro de Paranaguá, *Excepciones y Limitaciones al Derecho de Autor en Brasil: Logrando un Equilibrio entre la Protección y el Acceso al Conocimiento,* in ACCESO A LA CULTURA Y DERECHOS DE AUTOR: EXCEPCIONES Y LIMITACIONES AL DERECHO DE AUTOR 55-78 (Alberto Cerda ed., ONG Derechos Digitales, 2008) (contrasting international copyright law with domestic Brazilian law in order to identify flexibilities available in international law that could be implemented into domestic law). *See also,* MAXIMILIANO MARZETTI, PROPUESTAS PARA AMPLIAR EL ACCESO A LOS BIENES PÚBLICOS EN ARGENTINA: ESTABLECIENDO EL NECESARIO BALANCE ENTRE DERECHOS DE PROPIEDAD INTELLECTUAL Y DOMINIO PÚBLICO (CLACSO, 2013) (providing recommendation for *lege ferenda* for Argentinean copyright law based on broadening the scope of copyright exceptions, providing a legal framework for orphan works, and abrogating payment for the usage of public domain works); and, Alberto Cerda, *Copyright Convergence in the Andean Community of Nations*, 20 TEX INTELL. PROP L. J. 429 (2012) (reviewing legal framework on copyright of the Andean Community and its members in order to propose recommendations to update and upgrade common regime applicable in Bolivia, Colombia, Ecuador, and Peru).

3 Steven Gething & Brian Fitzgerald, *The Criminalisation of Copyright Law,* in THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: COMPARATIVE PERSPECTIVES FROM THE ASIA-PACIFIC REGION 224-225 (Christoph Antons ed., Wolter Kluwer, 2011) (suggesting some reforms on copyright law and policy in order to prevent overcriminalization and legal uncertainty on Internet intermediaries and consumers).

4 Pedro Roffe, *América Latina y la Propiedad Intelectual en los Tratados de Libre Comercio*, 14 (9) PUENTES: ANÁLISIS Y NOTICIAS SOBRE COMERCIO Y DESARROLLO SOSTENIBLE 22 (2013) (providing recommendations for negotiation and implementation into domestic law of free trade agreements obligations on intellectual property). *See also,* PEDRO ROFFE & LUIS MARIANO GENOVESI, IMPLEMENTACIÓN Y ADMINISTRACIÓN DE LOS CAPÍTULOS DE PROPIEDAD INTELECTUAL EN LOS ACUERDOS DE LIBRE COMERCIO CON ESTADOS UNIDOS: LA EXPERIENCIA DE CUATRO PAÍSES DE AMÉRICA LATINA (Inter-American Development Bank, 2011).

5 *See, e.g.,* Pamela Samuelson, Phil Hill, & Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, But For How Long?*, 60 J. COPYRIGHT SOC.'Y U.S.A. 529, 569-572

attention by scholars and researchers, at theoretical and pragmatic levels.[6] Compared with those, our conclusions and recommendations have a narrower scope, limited to the subject of this thesis, which has focused on the tensions between human rights and copyright enforcement through criminal law and in the online environment in Latin America.

Chapter One of this dissertation lays out the context within which the tension between human rights and copyright law occurs in Latin America. In recent decades, Latin American countries have strengthened human rights on both domestic and regional levels. Countries have incorporated human rights standards into their constitutional frameworks, made them enforceable against state and non-state actors, undertaken changes at institutional level, and provided specific constitutional remedies for achieving actual enforcement of human rights. At the same time, the Inter-American Human Rights System has become fully in force and provides another layer of mechanisms for enforcing human rights on the regional level, particularly through the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In parallel, Latin American countries have become parties to international instruments on copyright and implemented them into domestic law by adopting even

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(2013) (providing recommendations on alternative related to implementing flexibilities on civil damages).

6 NATIONAL RESEARCH COUNCIL, COPYRIGHT IN THE DIGITAL ERA: BUILDING EVIDENCE FOR POLICY 35-43 (The National Academies Press, 2013) (proposing research direction on copyright, although mainly focused on economic measurable implications in order to build evidence for public policies on the matter); and, JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 61-79 (Yale Univ. Press, 2012) (identifying several copyright's theoretical foundations with political and practical implications that require scholars' attention).

greater comprehensive protection than that required in those instruments. During the last decade, several countries have committed to additional obligations on the matter, particularly on intellectual property enforcement, by signing free trade agreements which implementation may infringe on well-settled human rights standards. In sum, the tension between human rights and copyright law is relatively significant in the region because greater requirements to respect, protect, and promote human rights could conflict with certain committed measures of copyright enforcement, depending on its actual implementation.

Beyond the most obvious tension as to access to knowledge and free speech, the friction between copyright and other human rights has attracted scant attention in Latin America. There are a few reasons that may explain this lack of consideration, such as the focus of human rights scholars and activists on more pressing issues than those resulting from intellectual property regulation, and the concentration of copyright scholars and other stakeholders on meeting international standards rather than challenging laws from a human rights perspective. In recent years, this lack of concern has started to change; although still limited, some countries are producing scholarship that raises human rights concerns facing copyright regulation, and some constitutional mechanisms have been used successfully for ending and preventing copyright excesses. Notwithstanding some recent reports on free speech that also address copyright issues, this matter has not been subject yet to any of the bodies of the Inter-American Human Rights System. In spite of lacking express decisions on copyright issues, criteria elaborated by the Commission and abundant jurisprudence by the Inter-American Court, especially in relation to the right to

due process of law, allows for a broad challenge of certain measures of enforcement before the aforementioned human rights bodies, as well as before domestic courts. As a result, there is still significant room for advancing a human rights approach on copyright in Latin America by encouraging critical scholarship, initiating strategic litigation, and feeding policy-making processes. This dissertation attempts to contribute precisely in that direction but, before doing so, it analyzes the historical development of copyright law in Latin America, and extracts some lessons from the process of implementation of international obligations into domestic law.

Chapter Two reviews Latin American copyright law from an historical viewpoint. Refuting some scholars' beliefs, Latin American countries have a long tradition of protecting copyright, whose roots can be traced back into the early days of their independence. Latin American countries not only have granted constitutional recognition to copyright, but also have provided legal frameworks on the matter. By the end of the nineteenth century, the Americas began the construction of a regional framework that provided protection beyond countries' frontiers while leaving room for implementing domestic public policies on the matter. That framework played a significant role in protecting copyright until the late 1980s. At that point, most Latin American countries entered into the international copyright regime by becoming parties to its leading instruments, including the Berne Convention, the TRIPS Agreements, and the WIPO Internet Treaties. Chapter Three analyzes the actual implementation of those international instruments by Latin American countries into their domestic law.

The history of Latin American copyright presents plenty of dilemmas. Countries in Latin America provided early copyright protection, despite the fact that most of them lacked or had limited capabilities for producing copyrighted material. Reluctant to become parties to the European copyright system, which was constituted by the Berne Convention and its successive versions, countries of the Americas instead built their own regional system via the Montevideo Treaty and subsequent instruments on the matter. Initially, the Inter-American copyright system provided a higher level of protection than the European one, but later versions of the Berne Convention increased protection, making more difficult the trade-off for American countries wishing to become parties to this convention. It seems plausible that Latin American countries avoided becoming parties to the Berne Convention, as did the United States, because it was inconvenient for countries that relied (and still do rely) heavily on importing copyrighted material. The literature about this period of Latin American copyright law, other than merely descriptive of legal sources and contextual analysis, remains limited; in fact, unlike European and North-American countries, the history of Latin American copyright in nineteenth century and the first half of twentieth century remains notably unexplored.

Chapter Three examines Latin American countries implementation into domestic law of the aforementioned international instruments on copyright. Reviewing their implementation repeatedly shows that, although countries have become in compliance with international copyright law, they have disregarded the public interest in general, and compliance with human rights commitments in particular. Systematically, Latin America has implemented rules on protection – in fact, providing broader protection than that

required by international law – but failed to take advantage of flexibilities that allow for balanced copyright regulation. Not only have legislative outcomes been unbalanced in Latin America, scholarship also has been one-sided by encouraging countries to meet international standards on protection, but omitting or minimizing the relevance of an adequate regime of flexibilities in order to satisfy public interest needs.

Latin American countries' implementation of international instruments on copyright teaches some lessons useful for anticipating problems in future implementation. For example, such experiences provide certain prospective patterns in similar processes for implementing a new set of international obligations on copyright that emphasizes criminal and online enforcement. These patterns raise concerns about copyright enforcement's consistency with human rights standards. The unbalanced copyright law existing in Latin American countries may be explained by several reasons, such as the absence of local technical expertise, the pressure of interest groups and foreign governments, and the lack of transparency, among others. In contrast, those limited recent regulatory processes that have involved broader social participation show a closer attention to public interest. This suggests that in order to stop and prevent human rights violations through the enforcement of copyright law, it is necessary to build stronger capacities in both civil society and government, as well as research critical areas, including statistical studies on the impact of regulation, the comparative cost of legal choices for copyright, the social and cultural effects of law, and critical legal analysis.

The second part of this dissertation moves into the criminal enforcement of copyright law and how it conflicts with fundamental rights granted by both international instruments on human rights and domestic constitutional law in Latin American countries. During the last two decades, countries have been immersed in judicial reform of their criminal procedures, transitioning from inquisitorial to adversarial systems in order to confront increasing rates of crime, realizing human rights standards within criminal procedures, and granting legal certainty on property rights in order to attract foreign investment. Although with uneven outcomes, judicial reform generally has led to criminal enforcement more attuned to human rights standards. However, those achievements are eclipsed by criminal enforcement of copyright in the region, which greatly exceeds international trade law requirements and infringes human rights law by overcriminalizing infringement, overpunishing infringers, and even endangering potential decriminalization with practices that deny the right to due process of law by imposing actual punitive measures through civil and administrative bodies instead of criminal courts.

Latin American countries have overcriminalized copyright infringement. Chapter Four provides a contextual analysis of these countries' domestic law. This analysis makes evident that, in general, when defining a given conduct as criminal, countries largely have exceeded the requirements of international copyright law and, at the same time, violated fundamental rights granted by both international instruments on human rights and their domestic constitutions related to substantive criminal law. The well-set principle of legality has been infringed by defining overly broad crimes that include any infringement,

violation, or fraud on copyrighted material. The presumption of innocence is infringed by omitting any request on willfulness and, as a result, impermissibly reversing the burden of proof on defendants. Finally, the principle of proportionality is contravened by punishing not only commercial-scale copyright infringement, but any infringement, disregarding exigencies on actual damages.

Rectifying excessive reliance of copyright enforcement on criminal law is an urgent concern. That urgency becomes dramatic as provisions drafted for an industrial model of production and distribution of works become applicable to digital technologies. There is still broad room for scholars to deepen the discussion on the violation of human rights standards related to criminal law when enforcing copyright and the peculiarities it assumes from one country to another, as well as for activists and advocates to challenge the application of current law based on human rights arguments. However, because of the civil law tradition of Latin American countries, more effort is needed for achieving legal reform, not only on substantive copyright law, but also on its criminal provisions. A few recommendations on the matter include: intelligibly and unambiguously defining criminal acts; making express requirements to act with willfulness, actual knowledge, commercial purposes, damaging purposes, or another subjective intent that would prevent sanctioning with criminal punishment mere unintended infringement; and, requiring a certain level of damages in order to impose criminal punishment on infringers and, therefore, leaving the enforcement against *de minimis* infringement to other less-aggressive legal mechanisms. Additionally, Latin American legislatures should review the actual need and usage of the abundant

copyright-related crimes available within domestic law and consider decriminalizing those acts unnecessarily defined as crimes, particularly if their criminalization is not required by any international obligations on the matter. This revision of criminal copyright law may not imply making those acts legal, since they still could be subject to other mechanisms of legal enforcement. This revision, however, would allow for a more rational and consistent approach with general criminal law, as well as with those fundamental rights recognized by both international human rights and constitutional law.

Latin American countries infringe human rights standards on criminal law not only by overcriminalizing copyright infringement, but also by overpunishing its infringers. Chapter Five shows that countries are using criminal sanctions in terms that are impermissible from a human rights viewpoint. In certain cases, countries are using imprisonment to punish copyright infringers for monetary debts, which violates the proscription of imprisonment for debts. This proscription has a broader recognition in the American Convention on Human Rights than in any other international instruments on human rights. Additionally, with a few exceptions, most Latin American countries are, on one hand, applying imprisonment more often and for longer terms against copyright infringers than developed countries and, on the other, applying terms of imprisonment that exceed those assigned to other similar and more serious crimes within each country. Those circumstances make evident that, even if not grossly disproportional, in Latin America, criminal punishment on copyright infringers violates the right to proportionate punishment.

Although human rights advocates and activists may challenge the excessive application of punishment in copyright enforcement case-by-case, and courts and prosecutors can soften punishment to some extent by taking advantage of the grading scale of penalties, the ultimate solution for overpunishment lays in the actions of the legislatures. On one side, the law must unambiguously exclude imprisonment for mere copyright debts, which, however, could still be subject to other criminal penalties. On the other, the law must apply proportional imprisonment, which could be determined by comparing the scale of punishment being applied within each country for similar crimes, as well as by comparing punishment applied by third countries to the same crimes. Today, Latin American countries exceed by far the requirements of international trade law on criminal enforcement of copyright and, at the same time, they infringe international human rights law by overpunishing copyright infringers. Therefore, ending overpunishment does not mean negating any international obligation, but instead simultaneously fulfills both international trade and human rights obligations.

Excessive reliance of Latin American countries on criminal law for the enforcement of copyright is not only the law on the books, but, as Chapter Six demonstrates, albeit with limited available data, an actual phenomenon. Facing that reality, it has been suggested to decriminalize copyright infringement and bring the enforcement of copyright law into civil or administrative systems of adjudication. This well-intentioned proposal, however, raises a new set of human rights concerns when civil courts and administrative agencies are empowered to apply measures punitive in nature, but omit proper consideration to the right to due process. Administrative copyright

agencies in Latin America do not meet human rights exigencies of an independent and impartial tribunal, and certain administrative measures require satisfying not only requirements for a fair hearing but also those guarantees set forth in favor of those being criminally charged. Similar objections could be raised against civil courts that apply non-compensatory damages for punitive reasons rather than indemnifying purposes. Additionally, actions by law enforcement officials seem to have displaced the relevance of criminal courts, since both police and prosecutors use their discretionary (and discriminatory) legal powers for achieving most of the copyright enforcement without proper consideration of the right to due process of law.

The responsibility for overcoming overcriminalization and overpunishment rests mainly on the legislature. Instead, the current picture of enforcement without due process of law by civil courts, administrative agencies, prosecutors, and police officers in Latin America presents a more complex and systemic problem on the enforcement of copyright in the region. Certainly, the level of infringement varies from one country to another, as well as the nature of the violation, which makes it difficult to provide general recommendations. At this point, however, it is possible to highlight the need for documenting and denouncing these excesses in order to increase public awareness. Challenging the constitutionality of law, regulation, and other enforcement measures adopted by public authorities is another mechanism for mitigating these excesses. At this point, this dissertation has pointed out how the abundant jurisprudence on the right to due process of law by the Inter-American Court of Human Rights may be useful for

providing general guidelines on the line of reasoning, which should lead to a copyright enforcement respectful of human rights.

The third part of this dissertation moves into the online enforcement of copyright law and how it conflicts with fundamental rights granted by both international instruments on human rights and domestic constitutional law in Latin American countries. This is an area with still-limited regulation within the region, but which is intensively being addressed through bilateral trade agreements that include provisions requiring certain levels of cooperation by ISPs to enforce the law. The role those ISPs play in enforcing copyright law is problematic in Latin America because of the horizontal constitutional approach to human rights, which makes those rights enforceable not only against state but also against non-state actors. As a result of that legal design, which is supported by international human rights law and domestic constitutional law, Latin American countries grant little room for private enforcement. This dissertation has paid close attention to three specific measures of copyright enforcement for online environments: the identification of online users who supposedly are copyright infringers; the implementation of procedures for notice and take down of infringing content; and, the sanction consisting in disconnecting users from the Internet.

Chapter Seven analyses the rules on identifying online users that supposedly have infringed copyright law from a human rights viewpoint, especially from the perspective of the right to control information about oneself (information privacy). Piracy should not hide behind privacy, but fighting piracy should not abrogate privacy either. The right

to privacy is not absolute and, therefore, it allows for certain limitations. Protecting copyright could become a legitimate purpose for adopting certain limitations on privacy that allow for enforcing copyright. However, in order to comply with human rights standards, any limitation on the right to privacy must satisfy certain requirements, which are extensively analyzed in Chapter Seven, including an enabling law that: has a legitimate purpose, is applied with proportionality, and includes appropriated safeguards. Among those safeguards, a court order has become a customary quintessential exigency in comparative law. This analysis may be useful for human right advocates and lawmakers in order to narrow exceptions on the right to privacy for the purpose of copyright enforcement to comply with human rights law, by limiting them to circumstances in which the exception is necessary, adequate, and proportional.

Latin America has a mixed record on the protection of personal information in relation to implementing procedures for identifying supposed copyright infringers. On one hand, Latin American personal data protection is transitioning from a system based on constitutional clauses and fragmentary regulation to a comprehensive protection based on overlapping constitutional and statutory regulations on personal data similar to those adopted by the European Union. As a result of that process, most countries provide constitutional and legal remedies for protecting the right to privacy and personal information from both state and non-state data controllers, which includes not only ISPs but also copyright holders. On the other, following the earlier European Union approach, several countries within Latin America have adopted data retention laws that require ISPs to retain certain personal data of their users for purpose of law

enforcement. These laws create an opportunity for copyright holders to access that data in order to identify supposed copyright infringers and, consequently, pose a risk to the right to privacy of personal information of Internet users in the region. In recent years, data retention laws have been challenged on constitutional grounds in some countries within the region, while the European Union has reversed its approach on the matter by nullifying common and domestic data retention laws, which, ultimately, may influence the abrogation of such laws in Latin America.

Chapter Eight of this dissertation refers to another specific measure of copyright enforcement in online environments: the adoption of procedures of notice and take down of supposed copyright infringing content. Most Latin American countries lack regulations implementing this kind of procedure, but several have committed to adopting them through bilateral free trade agreements with the United States. Because the language of those agreements reflects U.S. law, it has been suggested that the implementing law adopt a mechanism that allows copyright holders to directly request ISPs to take down supposed infringing content. Such privatization of enforcement is, however, problematic. On one side, this enforcement has been subject to extensive criticism within the United States because of the abuse of the procedure by copyright holders and, on the other, it does not fit the Latin American legal system, in which human rights are enforceable against both state and non-state actors, which, therefore, leaves little room for private enforcement. Criticism has focused on the fact that, in addition to abuses, private procedures for notice and take down conflict with the due

process of law, by denying the right to an independent and impartial tribunal, and abrogating the right to a fair hearing on the determination of legal matters.

Some Latin American countries have implemented expeditious judicial procedures for notice and take down of infringing content, in order to prevent abuse of private enforcement and to respect the right to due process granted by international instruments on human rights and their constitutional framework. This is the model that better fits the Latin American legal system. However, judicial procedures have been subject to criticism for being not efficient enough, particularly in light of massive online infringement. As a result of that critique, some countries are considering implementing administrative procedures by enabling an administrative agency to oversee the adequate functioning of the notice and take down mechanism. Although administrative enforcement is not forbidden by either international human rights law or constitutional law in Latin American countries, it raises certain concerns. First, implementing administrative procedures may infringe the right to equal protection of the law, by arbitrarily determining whether a given issue deserves a more efficient mechanism of enforcement. Secondly, no administrative enforcement in the region satisfies the exigencies of due process because, on one side, agencies lack independence and impartibility and, on the other, procedures do not comply with the exigencies of a fair hearing. In sum, while judicial procedures are *prima facie* consistent with human rights standards, countries wishing to implement administrative procedures for notice and take down of copyright infringing content must confront a series of human rights objections before jumping into administrative enforcement. Leaving aside those human rights

concerns, whether judicial or administrative processing of notice and take down request would be more efficient is, ultimately, an outcome of procedural design rather than the nature of the governmental body in charge of processing said requests.

Chapter Nine analyzes the challenges for implementing a specific measure of enforcement against infringers, the so-called *three strikes* or *graduated response*. Although a handful of countries have implemented this measure, including two in Latin America, there are significant differences from one country to another. However, some commonalities arise: the graduated response is a specific measure of copyright enforcement that allows sanctioning repeat online infringers, after a number of warnings, by reducing their bandwidth, blocking certain services, suspending their accounts, or even terminating their services. Several countries in Latin America have committed to implement such kinds of measures, which may affect several fundamental rights, including: freedom of speech, by silencing discourse and people; the right to Internet access, by expelling a user from the online environment; and, the right to privacy, by monitoring online users' behavior and processing their personal information. However, none of these rights is absolute and, therefore, they allow for certain exceptions. This Chapter maps the human rights issues that countries must confront if they opt to implement a regime of graduated response, with special attention to objections arising from the right to due process of law.

As a starting point, from a human rights viewpoint, the graduated response is more than a mere measure of enforcement: It is a punitive measure. This is a penalty that

consists in depriving or diminishing certain rights of a supposed copyright infringer. Therefore, the graduated response is a matter of legislative action and, at the same time, excludes its implementation by private mechanisms of enforcement. Additionally, as a punitive measure, the graduated response must be proportional to the criminal offence, an exigency that hardly seems met by most copyright infringements, particularly having in mind this measure is not being applied against other more serious crimes. Furthermore, imposing the graduated response on Internet users must comply with human rights standards on due process, which require an independent and impartial tribunal and a fair hearing in addition to a set of guarantees set forth in favor of those facing criminal charges, including the right to be presumed innocent. Finally, the implementation of graduated response requires monitoring the behavior of Internet users and allowing a mass processing of personal data, which raises additional concerns from the perspective of the right to privacy and the right to protection of personal information. In sum, although human rights law does not prevent implementing a measure of punishment like the graduated response, its actual implementation faces several and significant challenges from the human rights viewpoint.

Until recently, most Latin American countries have disregarded the public interest in the lawmaking process on copyright issues. This dissertation has attempted to contribute to a comprehensive view on a matter of public interest, namely the human rights implications of copyright regulation, particularly in relation to its criminal and online enforcement. Rather than closing an argument, human rights open a new perspective for discussion. Although human rights are essential for human and societal

development, those rights are limited and, therefore, they allow for certain limitations. Enforcing copyright, which are essentially private rights, may require limiting human rights to a certain extent, but in no case should that enforcement derogate human rights. Highlighting the intersection between copyright law and human rights is a key issue for Latin American countries, especially for those that have assumed international obligations on the matter, and must navigate the complexities of updating their domestic copyright law to digital technologies and the online environment.

Selected Bibliography

A selected bibliography of literature that has been useful in this research seems better for scholarly purposes than an indiscriminate list of all the used material. For facilitating its usage by other scholars, materials are classified in six sections, those are:

i) Latin American law and history in general;

ii) Latin America copyright, including its history, the Inter-American copyright system, domestic laws, and sub-regional regime;

iii) International copyright law, with reference to leading treaties on copyright;

iv) Human rights law, with special reference to the Inter-American human rights system and the constitutionalization of human rights in Latin America;

v) Intellectual property, trade, and human rights; and,

vi) Criminal copyright enforcement and human rights.

Below selected bibliography is neither exhaustive nor fully comprehensive on the topic, but it was useful for this research as a primary source of information and a reference also for in-deeper scholarship. For additional literature, you may consult footnotes in respective chapters.

I. LATIN AMERICA IN GENERAL

For *Latin American history*, there is an increasing body of literature that analyses the region, but this research relays heavily in three classic sources: THOMAS E. SKIDMORE, PETER H. SMITH, & JAMES N. GREEN, MODERN LATIN AMERICA (Oxford Univ. Press, 7th ed., 2010), that provides a regional and a country-by-country analysis that focus on social and political issues; THE CAMBRIDGE HISTORY OF LATIN AMERICA (Leslie Bethell ed., Cambridge Univ. Press, 1984), a monumental several-volumes collective work that includes articles by topics and historical periods; and, PATRICE FRANKO, THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT (Rowman & Littlefield Publishers, 3d. ed., 2007), a well-known text-book that focuses on economic history of the region.

For *Latin American law in general*, two books were specially convenient: ÁNGEL R. OQUENDO, LATIN AMERICAN LAW (Foundations Press, 2nd ed., 2011), the leading and updated text-book for regional law, in spite of focusing on law for doing businesses and omitting analysis on administrative and criminal laws; and, JOHN HENRY MERRYMAN & ROGELIO PÉREZ PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (Stanford Univ. Press, 3d. ed., 2007), a more comprehensive review of the Latin American law as a civil law system, even when it requires update on constitutional and human rights laws. A third relevant source was MATTHEW C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA (Univ. of Texas Press, 2004). An additional useful

source for Brazilian law is INTRODUCTION TO BRAZILIAN LAW (Fabiano Deffenti & Welber Barral eds., Kluwer Law Int'l, 2011). A recent source with a general critical analysis of Latin American law, in EL DERECHO EN AMÉRICA LATINA: UN MAPA PARA EL PENSAMIENTO JURÍDICO DEL SIGLO XXI (César Rodríguez Garavito ed., Siglo XXI Ed., 2011).

In some specific fields of law, in addition to innumerable academic journals, there are some works particularly useful. On *criminal law,* a heavily documented source is EUGENIO RAÚL ZAFFARONI, CÓDIGOS PENALES EN LOS PAÍSES DE AMÉRICA LATINA (Mexico, 2000), in which the author analyzes critically the evolution of criminal law since countries' independence to nowadays. On *Internet regulation*, I am thankful to HACIA UNA INTERNET LIBRE DE CENSURA: PROPUESTAS PARA AMÉRICA LATINA (Eduardo A. Bertoni ed., Universidad de Palermo, 2012), a collective work that synthetizes the state of the art in several areas of Internet regulation in Latin America, and have an English version available online under the title *Towards an Internet Free of Censorship: Proposals for Latin America*.

II. LATIN AMERICAN COPYRIGHT LAW

In spite of its long tradition on protecting authors' right, *Latin American history of copyright* is still an underdeveloped area of knowledge. For most, a fragmentary study of the topic in the region, especially in the nineteenth century pass through the history of books and printing. Three sources were particularly relevant for this dissertation: JOSÉ

TORIBIO MEDINA, LA HISTORIA DE LA IMPRENTA EN LOS ANTIGUOS DOMINIOS ESPAÑOLES DE AMÉRICA Y OCEANÍA (Fondo Histórico y Bibliográfico José Toribio Medina, 1958), which, however, only covers colonial Latin America; WILSON MARTINS, A PALAVRA ESCRITA: HISTÓRIA DO LIVRO, DA IMPRENSA E DA BIBLIOTECA: COM UM CAPÍTULA REFERENTE À PROPRIEDADE LITERÁRIA (Editora Ática, 2nd. ed., 1996), with a comprehensive history of books in Brazil; and, BERNARDO SUBERCASEAUX, HISTORIA DEL LIBRO EN CHILE: ALMA Y CUERPO (LOM Ed., 3rd. ed., 2010), with similar approach on Chile.

Some Latin American countries have scholarship with a comprehensive analysis of nineteen-century copyright. In Argentina, CARLOS BAIRES, LA PROPIEDAD LITERARIA Y ARTÍSTICA EN LA REPÚBLICA ARGENTINA (Imprenta de Juan Alsina, 1897); and, more recently, GUILLERMO VIDAURRETA, HISTORIA DEL SISTEMA ARGENTINO DE PATENTES DE INVENCIÓN: 1580-1863: PROPIEDAD INTELECTUAL EN LA CONSTITUCIÓN NACIONAL: ANTECEDENTES, FUENTES E INTERPRETACIÓN (La Ley, 2007). In Brazil, SAMUEL MARTINS, DIREITO AUTORAL (Officinas da Livraria Franceza, 1906). In Colombia, JHONNY PABÓN, DE LOS PRIVILEGIOS A LA PROPIEDAD INDUSTRIAL: LA PROTECCIÓN EN COLOMBIA A LAS OBRAS LITERARIAS, ARTÍSTICAS Y CIENTÍFICAS EN EL SIGLO XIX (Universidad Externado de Colombia, 2010). It is also recommendable José Bellido's abundant scholarship that focuses on international copyright relations of Spain with its former Latin American colonies.

For the *Inter-American copyright system,* there are five reliable sources: 1 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 633-679 (The Macmillan Co., 1938); MANUEL CANYES, PAUL A. COLBORN, & LUIS GUILLERMO PIAZZA, COPYRIGHT PROTECTION IN THE AMERICAS UNDER NATIONAL LEGISLATION AND INTER-AMERICAN TREATIES (Pan American Union, 2nd ed., 1950); WENZEL GOLDBAUM, CONVENCIÓN DE WASHINGTON SOBRE EL DERECHO DE AUTOR EN OBRAS LITERARIAS, CIENTÍFICAS Y ARTÍSTICAS: ESTUDIO SISTEMATIZADO Y COMENTARIOS (Casa Editora Liebmann, 1954); GUSTAVO FAUNDES SANHUEZA, CONVENCIONES INTERNACIONALES SOBRE DERECHO DE AUTOR, RATIFICADAS POR CHILE (BUENOS AIRES, WASHINGTON, Y UNIVERSAL) (Editorial Tipográfica Salesiana, 1962); and, LIPSZYC, VILLALBA, & UCHTENHAGEN, LA PROTECCIÓN DE LOS DERECHOS DE AUTOR EN EL SISTEMA INTERAMERICANO (Universidad Externado de Colombia and Dirección Nacional de Derechos de Autor, 1998).

Most part of comprehensive literature on *Latin America's domestic copyright laws* is from back to the 1990's and, therefore, does not include analysis of either the Internet and other new technologies nor TRIPS-plus agreements on the matter. However, some countries have such a kind of literature that could be highlighted. For Argentina, DELIA LIPSZYC & CARLOS A. VILLALBA, EL DERECHO DE AUTOR EN LA ARGENTINA (La Ley, 2nd ed., 2009). For Brazil, SÉRGIO BRANCO, DIREITOS AUTORAIS NA INTERNET E O USO DE OBRAS ALHEIAS (Editora Lumen Juris, 2007); PEDRO PARANAGUA & SÉRGIO BRANCO, DIREITOS AUTORAIS (FGV, 2009); and, ACCESS TO KNOWLEDGE IN BRAZIL (Lea Shaver ed., Bloomsbury, 2010). For Chile, ELISA WALKER ECHEÑIQUE, MANUAL

DE PROPIEDAD INTELECTUAL (Legal Publishing, 2014). For Colombia, ALFREDO VEGA JARAMILLO, MANUAL DE DERECHO DE AUTOR (Dirección Nacional de Derecho de Autor, 2010). For Costa Rica, ALEJANDRA CASTRO BONILLA, DERECHO DE AUTOR Y NUEVAS TECNOLOGÍAS (EUNED, 2006). Additionally, Kluwer's International Encyclopaedia of Laws provides some good sources in English for certain countries: GUILLERMO CABANELLAS, INTELLECTUAL PROPERTY LAW IN ARGENTINA (Kluwer, 2012); MARISTELA BASSO AND EDSON RODRIGUES, INTELLECTUAL PROPERTY LAW IN BRAZIL (Kluwer, 2009); DANIEL PEÑA & MARIA CATALINA CARMONA, INTELLECTUAL PROPERTY LAW IN COLOMBIA (Kluwer, 2011); and, ALBERTO CERDA, INTELLECTUAL PROPERTY LAW IN CHILE (Kluwer, 2015).

Relative absence of updated comprehensive literature on domestic copyright law is mitigated by Latin American university journals, most of them available online and indexed by the two main academic databases of the region: Scielo and RedALyC. Seven specialized publications are remarkably important on the topic, those are: REVISTA JURÍDICA DE PROPIEDAD INTELECTUAL (Universidad Católica de Santiago de Guayaquil de Ecuador, 2009-2011); REVISTA LA PROPIEDAD INMATERIAL (Universidad del Externado de Colombia, 2000-2015); REVISTA CHILENA DE DERECHO INFORMÁTICO (Universidad de Chile, 2002-2006), later known as REVISTA CHILENA DE DERECHO Y TECNOLOGÍA (Universidad de Chile, 2012-2016); ANUARIO ANDINO DE DERECHOS INTELECTUALES (2005-2014); REVISTA IBEROAMERICANA DE DERECHO DE AUTOR (CERLALC, 2007-2015); the newest REVISTA IBEROAMERICANA DE LA PROPIEDAD INTELECTUAL (2013-2015); and, REVISTA DA ASSOCIAÇÃO BRASILEIRA DA

PROPRIEDADE INDUSTRIAL (1992-2014). There is not digital version available online for later two of them, unfortunately. In addition to mentioned publications, the Instituto de Investigaciones Jurídicas at the Universidad Nacional Autónoma de Mexico has an extensive online collection of works on domestic intellectual property and the NAFTA, deserving being highlighted those authored by professors Manuel Becerra and David Rangel.

For the Andean Community's common regime on copyright, a regional process of copyright harmonization conducted by several South American countries and barely known overseas, you can consult: Ricardo Antequera, *Copyright and Andean Community Law*, 166 REVUE INTERNATIONALE DU DROIT D'AUTEUR 56 (1995); Ana María Pacón, *La Protección del Derecho de Autor en la Comunidad Andina, in* DERECHO COMUNITARIO ANDINO 299-324 (Allan-Randolph Brewer-Carías ed., Fondo Editorial Pontificia Universidad Católica del Perú, 2003); and, Alberto Cerda, *Copyright Convergence in the Andean Community of Nations*, 20 TEX INTELL. PROP L. J. 429 (2012).

For *domestic acts, statutes, and regulations on copyright*, in addition to some reliable local sources –such as websites of the Chilean Library of the Congress, the Mexican Congress, and the Colombian National Directorate on Copyright–, you may consult online databases on copyright of the World Intellectual Property Organization (WIPO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the Organization of American States (OAS).

Probably because of limited effects of court decisions in civil law countries, there is not reliable and comprehensive *database on copyright case law* in the region. There are some limited databases although, such as CERLALC, LexisNexis, MicroJuris, and vLex, among others. In addition to references in second sources that allowed localizing original documents, this research made the most of some official local databases, such as: the Brazilian Supreme Federal Court, the Chilean Supreme Court, the Colombian National Directorate on Copyright, and the Supreme Court of Costa Rica. A useful, but sadly outdated, compilation of case law for Mexico is FERNANDO SERRANO MIGALLÓN, NUEVA LEY FEDERAL DEL DERECHO DE AUTOR (Editorial Porrúa – UNAM, 1998). For Argentina, a comprehensive textbook with references to domestic case law in MIGUEL ÁNGEL EMERY, PROPIEDAD INTELECTUAL: LEY 11.723 COMENTADA, ANOTADA Y CONCORDADA CON LOS TRATADOS INTERNATIONALES (Astrea, 1999); and, DELIA LIPSZYC AND CARLOS A. VILLALBA, EL DERECHO DE AUTOR EN LA ARGENTINA (La Ley, 2nd ed., 2009),

III. INTERNATIONAL COPYRIGHT LAW

For *international instruments on copyright*, there is abundant literature available in English, the basic sources used in this research were the followings. For the *Berne Convention*, S. M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS (Butterworth, 1983); SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886 – 1986 (Kluwer, 1987); and, SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE

BERNE CONVENTION AND BEYOND (Oxford University Press, 2nd ed., 2006). For the *TRIPS Agreements*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) and the INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (ICTSD), RESOURCE BOOK ON TRIPS AND DEVELOPMENT (Cambridge Univ. Press, 2005); and, DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING, HISTORY AND ANALYSIS (Thomson Reuters, 3d ed., 2008). And, for the *WIPO Internet Treaties*, MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION, AND IMPLEMENTATION (Oxford Univ. Press, 2002); and, JORG REINBOTHE & SILKE VON LEWINSKI, WIPO TREATIES 1996 (Butterworths Lexis Nexis, 2002).

The Economic Commission for Latin America (ECLA) has published several studies on *Free Trade Agreements'* impacts on the region. Among them, it could be highlighted: PEDRO ROFFE & MAXIMILIANO SANTA CRUZ, LOS DERECHOS DE PROPIEDAD INTELECTUAL EN LOS ACUERDOS DE LIBRE COMERCIO CELEBRADOS POR PAÍSES DE AMERICA LATINA CON PAÍSES DESARROLLADOS (CEPAL, 2006); ALVARO DIAZ, AMÉRICA LATINA Y EL CARIBE: LA PROPIEDAD INTELECTUAL DESPUÉS DE LOS TRATADOS DE LIBRE COMERCIO (CEPAL, 2008); and, TEMAS CONTROVERSIALES EN NEGOCIACIONES COMERCIALES NORTE-SUR (Osvaldo Rosales & Sebastián Sáez ed., CEPAL, 2010).

For the *Anti-Counterfeiting Trade Agreement*, MICHAEL BLAKENEY, INTELLECTUAL PROPERTY ENFORCEMENT: A COMMENTARY ON THE ANTI-COUNTERFEITING TRADE

AGREEMENT (ACTA) (Edward Elgar, 2012); THE ACTA AND THE PLURILATERAL ENFORCEMENT AGENDA (Pedro Roffe & Xavier Seuba eds., Cambridge Univ. Press, 2015); and, a monographic issue on the topic, Intellectual Property Law Enforcement and the Anti-Counterfeiting Trade Agreement (ACTA), 26 AM. U. INT'L L. REV. (2011).

IV. HUMAN RIGHTS LAW

For a general approach on *human rights law*, its main instruments, and its international system of protection, see THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (Louis Henkin ed., Columbia Univ. Press, 1981); LATE LILLICH, HURST HANNUM, JAMES ANAYA, & DINAH SHELTON, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE (Aspen Publishers, 4th ed., 2006); and, DINAH SHELTON & PAOLO CAROZZA, REGIONAL PROTECTION OF HUMAN RIGHTS (Oxford Univ. Press, 2013).

For browsing through the *Inter-American Human Rights System*: CECILIA MEDINA, THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM (Martinus Nijhoff Publishers, 1988); THOMAS BUERGENTHAL, ROBERT E. NORRIS, & DINAH SHELTON, LA PROTECCIÓN DE LOS DERECHOS HUMANOS EN LAS AMERICAS (Ed. Civitas, 1990); THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS (Engel, 4th ed., 1995); SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (Dartmouth, 1997); DAVID J. HARRIS & STEPHEN LIVINGSTONE, THE INTER-AMERICAN SYSTEM OF

HUMAN RIGHTS (Clarendon Press, 1998); LIBER AMICORUM HÉCTOR FIX-ZAMUDIO: CORTE INTERAMERICANA DE DERECHOS HUMANOS (Secretaría de la Corte Interamericana de Derechos Humanos, 1998); CECILIA MEDINA & CLAUDIO NASH, SISTEMA INTERAMERICANO DE DERECHOS HUMANOS (Centro de Derechos Humanos, 2007); LAURENCE BURGORGUE-LARSEN, AMAYA ÚBEDA DE TORRES, & ROSALIND GREENSTEIN, THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY (Oxford Univ. Press, 2011); and, JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (Cambridge Univ. Press, 2nd ed., 2013).

There are a number of *academic journals on human rights* through Latin America. This research took special advantages from: DIÁLOGO JURISPRUDENCIAL (Instituto Interamericano de Derechos Humanos, 2006-2011); SUR – REVISTA INTERNACIONAL DE DIREITOS HUMANOS (Conectas Direitos Humanos, 2004-2015); ANUARIO DE DERECHOS HUMANOS (Universidad de Chile, 2005-2012); BOLETÍN DE JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS (Universidad de Chile, 2009-2012); and, the HUM. RTS. Q. All of them are available online.

In recent years, an increasing synergic relation takes place in Latin America between *international human rights law and domestic constitutional law*. This research benefited, among other sources, from: ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS (Cambridge Univ. Press, 2009); the aforementioned EL DERECHO EN

AMÉRICA LATINA: UN MAPA PARA EL PENSAMIENTO JURÍDICO DEL SIGLO XXI (César Rodríguez Garavito ed., Siglo XXI Ed., 2011); DIREITO CONSTITUCIONAL INTERNACIONAL DOS DIREITOS HUMANOS (Alexandre Coutinho Pagliarini & Domitri Dimoulis eds., Editora Fórum, 2012); NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES (Detlef Nolte & Almut Schlling-Vacaflor eds., Ashgate, 2012); and, ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM, 1810-2010: THE ENGINE ROOM OF THE CONSTITUTION (Oxford Univ. Press, 2013).

V. INTELLECTUAL PROPERTY, TRADE, AND HUMAN RIGHTS

During the last decade, an increasing body of literature has paid attention to the intersection between *intellectual property, trade, and human rights*. In addition to multiples references in this dissertation, I would highlight the following collective works that provide diverse viewpoints on the matter: COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION, INTELLECTUAL PROPERTY, PRIVACY (Paul L.C. Torremans ed., Kluwer Law Int'l, 2004); PROPRIEDADE INTELECTUAL: TENSÕES ENTRE O CAPITAL E A SOCIEDADE (Fábio Villares ed., Paz e Terra, 2007); INTELLECTUAL PROPERTY AND HUMAN RIGHTS: ENHANCED EDITION OF COPYRIGHT AND HUMAN RIGHTS (Paul L.C. Torremans ed., Wolters Kluwer, 2008); INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX (Willem Grosheide ed., Edward Elgar Publ'g, 2010); and, LAURENCE R. HELFER AND GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE (Cambridge Univ. Press, 2011). By the time of

editing this text, it was being released RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY (Christophe Geiger ed., Edward Elgar Publ'g, 2015).

VI. CRIMINAL COPYRIGHT ENFORCEMENT AND HUMAN RIGHTS

For a general revision of *criminal law foundations*, this research benefits from: LEO KATZ, MICHAEL MOORE, & STEPHEN MORSE, FOUNDATIONS OF CRIMINAL LAW (Oxford Univ. Press, 1999); KENNETH GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW (Cambridge Univ. Press, 2009); ANDREW STUMER, PRESUMPTION OF INNOCENCE: EVIDENTIAL AND HUMAN RIGHTS PERSPECTIVES (Hart Publ'g, 2010); DENNIS BAKER, THE RIGHT NOT TO BE CRIMINALIZED (Ashgate, 2011); and, O PRINCÍPIO DA IGUALDADE NA PERSPECTIVA PENAL (Paulo César Corrêa Borges ed., Ed. UNESP, 2007).

While most of current excessive reliance on criminal law for enforcing copyright law may seems apparent for an expert on criminal law foundations, this research is in great debt with Douglas Husak's works, particularly: DOUGLAS HUSAK, PHILOSOPHY OF CRIMINAL LAW (Rowman & Littlefield, 1987); DOUGLAS HUSAK & PETER DE MARNEFFE, THE LEGALIZATION OF DRUGS (Cambridge Univ. Press, 2005); and, DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (Oxford Univ. Press, 2008).

On the power for imposing *penalties by administrative agencies*, without prejudice of several sources consulted through this research, it relies heavily in two authors: ALEJANDRO NIETO GARCÍA, DERECHO ADMINISTRATIVO SANCIONADOR (Tecnos, 2002); and the abundant recent scholarship by my colleague Eduardo Cordero Quinzacara, who has written on the constitutional limits for administrative agencies' punitive power.

A neglected area of literature is the intersection of *human rights and criminal sentencing*. In recent years, it has attracted attention of scholars in the United Kingdom, mainly because of adopting of the 1998 Human Rights Act and, therefore, the enforcement of the European Convention on Human Rights by domestic courts. Among those scholars, Andrew Ashworth has a privileged place. This research has benefited, among other works, from: ANDREW ASHWORTH, BEN EMMERSON, & ALISON MACDONALD, HUMAN RIGHTS AND CRIMINAL JUSTICE (Sweet & Maxwell, 2nd ed., 2007); and, ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE (Cambridge Univ. Press, 5th ed., 2010).

Another notorious gap on the literature exists on *criminal copyright enforcement*, fortunately recently filled in part with some great scholarship, most of it focuses on piracy. Among those, this research benefited from: ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES (Univ. of Chicago Press, 2009); COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE (Lionel Bently, Jennifer Davis, & Jane C. Ginsburg eds., Cambridge Univ. Press, 2010); and, CRIMINAL

ENFORCEMENT OF INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH (Christophe Geiger ed., Edward Elgar Publ'g, 2012). A useful source of information that includes empirical analysis on Bolivia, Brazil, and Mexico is MEDIA PIRACY IN EMERGING ECONOMIES (Joe Karaganis ed., Social Science Research Council, 2011). Also recommendable are: COPYRIGHT ENFORCEMENT AND THE INTERNET (Irini A. Stamatouti ed., Wolter Kluwer, 2010); and, THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: COMPARATIVE PERSPECTIVES FROM THE ASIA-PACIFIC REGION (Christoph Antons ed., Wolter Kluwer, 2011).

Annex 1
Inter-American instruments on copyright and country parties

	Montevideo (1889)	Mexico (1902)	Río (1906)	Buenos Aires (1910)	Caracas (1911)	La Havana (1928)	Montevideo (1939)	Washington (1946)
Argentina	1894	-	-	-	1950	-	-	1953
Bolivia	1904	-	-	-	1914	-	-	1947
Brazil	-	-	1911	1915	-	-	-	1949
Chile	-	-	1910	1955	-	-	-	1955
Colombia	-	-	-	1936	-	-	-	1972
Costa Rica	-	1903	1908	1916	-	1933	-	1950
Cuba	-	-	-	-	-	-	-	1955
Dominican Rep.	-	1907	-	1912	-	-	-	1947
Ecuador	-	-	1909	1914	1914	1936	-	1947
El Salvador	-	1902	1910	-	-	-	-	-
Guatemala	-	1902	1909	1912	-	1932	-	1952
Haiti	-	-	-	1919	-	-	-	1953
Honduras	-	1904	1908	1914	-	-	-	1947
Mexico	-	-	-	-	-	-	-	1947
Nicaragua	-	1904	1909	1913	-	1934	-	1950
Panama	-	-	1911	1913	-	1929	-	1984
Paraguay	1889	-	-	1917	-	-	1958	1949
Peru	1889	-	-	1920	1915	-	-	-
United States	-	1908	-	1911	-	-	-	-
Uruguay	1892	-	1919	-	-	-	-	-
Venezuela	-	-	-	1914	-	-	-	-

Data Sources: Organization of American States and World Intellectual Property Organization, 2014.

Annex 2
International instruments on copyright and country parties

	Universal Convention 1952 (1)	Universal Convention 1971	Berne Convention (2)	TRIPS Agreement	WIPO Copyright Treaty (2)	WIPO Performances & Phonograms Treaty (2)
Argentina	1957	-	1967	1995	2002	2002
Bolivia	1989	-	1993	1995	-	-
Brazil	1959	1975	1922	1995	-	-
Chile	1955	-	1970	1995	2002	2002
Colombia	1976	1976	1988	1995	2002	2002
Costa Rica	1954	1979	1978	1995	2002	2002
Cuba	1957	-	1997	1995	-	-
Dominican Rep.	1983	1983	1997	1995	2006	2006
Ecuador	1957	1991	1991	1996	2002	2002
El Salvador	1978	1978	1994	1995	2002	2002
Guatemala	1964	-	1997	1995	2003	2003
Haiti	1954	-	1996	1996	-	-
Honduras	-	-	1990	1995	2002	2002
Mexico	1957	1975	1967	1995	2002	2002
Nicaragua	1961	-	2000	1995	2003	2003
Panama	1962	1980	1996	1997	2002	2002
Paraguay	1961	-	1992	1995	2002	2002
Peru	1963	1985	1988	1995	2002	2002
United States	1954	1972	1989	1995	2002	2002
Uruguay	1993	1993	1967	1995	2009	2008
Venezuela	1966	1996	1982	1995	-	-

Data Sources: Organization of American States and World Intellectual Property Organization, 2014. Notes: (1) Indicates year of acceding or adhering; (2) Indicates year of entry in force.