Copyright protection, in the light of the special abbreviated procedure and the private prosecutor figure (Law 1826) in the Colombian Criminal Law

La protección de los derechos de autor, a la luz del procedimiento especial abreviado y la figura del acusador privado (Ley 1826) en el Derecho penal colombiano

A proteção dos direitos de autor, à luz do procedimento especial abreviado e a figura do acusador privado (Lei 1826) no Direito penal colombiano

Karen Isabel Cabrera Peña
PhD. in Law.
Professor and researcher, Universidad del Norte,
Barranquilla, Colombia.
cabrerak@uninorte.edu.co

Carlos Alberto Jiménez Cabarcas
MS in Law, with emphasis on Criminal and Criminological Sciences.
Professor and researcher, Universidad de la Costa, CUC,
Barranquilla, Colombia
cjimenez40@cuc.edu.co

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Abstract

This paper aims to analyze the impact of Law 1826/2017 –of the special abbreviated procedure and the private prosecutor figure– in the case of non-criminal complaints, using as an example the crime of violation against property rights of the author to demonstrate through the legal dogmatic, that in most cases, the use of the punitive power of the state does not accomplish its purpose of sanctioning only those conducts that are particularly detrimental to the legal assets. This circumstance can result benefiting copyright holders with power in the market, even if the affectation might be minimal. Thus, it concludes that it is necessary to exclude crimes that infringe on the author's property rights in case of processing by the special abbreviated procedure and the private prosecutor figure to accomplish the goals of the state's punitive power.

Key words

Punishable conduct, criminal complaint, private prosecutor, crime, copyright (Source: Tesauro de política criminal latinoamericana - ILANUD).

Resumen

Con este artículo se pretende analizar las repercusiones de la Ley 1826 de 2017 –del procedimiento especial abreviado y de la figura del acusador privado– cuando de delitos no querellables se trata, usando como ejemplo el delito a la violación de los derechos patrimoniales de autor para demostrar, a través de la dogmática jurídica, que el empleo del poder punitivo estatal, en muchos casos, no cumple su finalidad de sancionar solo aquellas conductas particularmente lesivas para los bienes jurídicos, situación que puede terminar beneficiando a titulares de los derechos de autor con poder en el mercado, así la afectación sea mínima. Es así como se concluye que es necesario excluir los delitos que atenten contra los derechos patrimoniales de autor de tramitarse por el procedimiento especial abreviado y del acusador privado para cumplir con los fines del poder punitivo estatal.

Palabras clave

Conducta punible, querella, acusador privado, delito. (fuente: Tesauro de política criminal latinoamericana - ILANUD). Derechos de autor.

Resumo

Com o presente artigo pretende-se analisar as repercussões da Lei 1826 de 2017 – do procedimento especial abreviado e da figura do acusador privado – quando se trata de delitos no querellables, usando como exemplo o delito à violação dos direitos patrimoniais de autor para demonstrar, por meio da dogmática jurídica, que o uso do poder punitivo estatal, em muitos casos, não cumpre sua finalidade de sancionar só aquelas condutas particularmente lesivas para os bens jurídicos, situação que pode terminar beneficiando aos titulares dos direitos autorais com poder no mercado, embora a afetação seja mínima. É assim como se conclui que é necessário excluir os delitos que atentem contra os direitos patrimoniais de autor no caso de serem tramitados pelo procedimento especial abreviado e do acusador privado para atingir os propósitos do poder punitivo estatal.

Palavras chave

Conduta punível, querela, acusador privado, delito (fonte: Tesauro de política criminal latinoamericana - ILANUD). Direitos de autor.

Introduction

The copyright, a branch of the intellectual property, protects the personal manifestations of the creator such as literary, scientific and artistic works (Rengifo, 2003, p. 9). It aims to encourage holders and/or authors to create more works, and at the same time to generating interest in the public to know and to have access to them (Erdozain, 2002, p. 21).

Based on the above statement, the copyright protection object are the productions in the literary, scientific and artistic fields –whatever maybe its mode of expression– to create balances between authors and society; and in this way to assist to innovation and creative activity which are generators of economic growth and essential sources for the society welfare (Sanchis, 2004, p. 19).

Also, the copyright protection arises from two big groups, moral and property rights. The first ones protect the author's particular interests and personality (Delgado, 2007, p. 94), which are preserved after his death. In Colombia, they have a connotation of fundamental right (Constitutional Court, C-155 of April 28 of 1995). The second ones, of an only economic content, give author the power to negotiate and commercialize his work for some time (Zea, 2009, p. 27).

These rights can be protected through different actions such as civil, penal and administrative actions. In the case of penal actions, the Criminal Code has stated three articles related to violations against copyright. They are consigned in Article 270 of violation of moral rights and in Articles 271 and 272 of the property rights.

On the other hand, with the amendment of Paragraph 2 of Article 250 of the Political Constitution that grants the victim power to develop the investigation and prosecution of the punishable conducts that affect his legal asset, but before it was a power only in the head of the state public prosecutor's office and with the issuance of Law 1826/2017, that defines a parallel process to the penal ordinary process, called special abbreviated process. Likewise, the private prosecutor figure is regulated, and it was modified the process about the way the conducts against copyright are judicially processed.

In effect, offences against copyright can be processed starting from the special abbreviated procedure, even if it is a non-criminal complaint, keeping the penalties stated on the Criminal Code. Above statement involves that the process will be more expeditious and who impetrates the action can move the allegation and investigation of the case forward.

This article aims to compare the purposes set by the Legislator with the issuance of the special abbreviated procedure and the regulation of the private prosecutor before the particular characteristics of the legal assets of the copyright to verify if the goals of the state's punitive power are accomplished.

Methodology

This investigation is qualitative because it describes, understands and interprets information, in this case a set of rules belonging to the same legal system, to show the existing inconsistency between the criminal law protection of the copyright and the Law 1826/2017, January in regard to the aim of the state's punitive power.

Because it is a work of legal nature, the dogmatic investigation technique –*Lege Data*– is implemented. Its purpose is to interpreting interpretative problems or inconsistences of the existing positive law to define appropriate solutions through the same legal system (Courtis, 2006, p. 116). As Gómez points out (2017, pp. 115-118), this methodology is aimed to the scientific reflection of a legal system to understand its purpose and structure, and in this way to build and develop dogmatic concepts, in other words, emanating concepts from the positive law.

Accordingly, it would be analyzed the impact of the Law 1826/2017 –of the special abbreviated procedure and the private prosecutor figure– and the articles of the Criminal Code about copyright and violation to related rights, emphasizing on the infringement of the property rights of the author, to demonstrate that, in many of these cases, the use of the state's punitive power does not accomplish its goal, since it can result benefiting holders of the copyright with power in the market and allowing individuals can be criminally prosecuted, even if their conduct has caused a minimal affectation to the protected legal asset.

Results

Penal protection to the copyright

The property and moral rights are protected by different legal mechanisms. In the international field, Colombia has ratified the Berna Convention, related to the literary and artistic works; the Roma Convention with regard to singers or performers artists' protection; and the WIPO-Internet Treaties, among others[1].

1 World Intellectual Property Organization (WIPO) about the copyright (TODA) and the Treaty of the WIPO about related rights (TOIEF).

Above instruments hold basic principles, so that in matters such as the content of the copyright, limitations and exceptions, and the means to exploit works (Sanchis, 2004, p. 27), minimum standards of protection are ensured when countries –like Colombia– provide their own policy about this topic.

At the regional level, it is the Andean Decision 351 of 1993 of the Andean Community of Nations, which is binding on the internal regulation, and likewise, addresses and supplies the policies and laws that are adopted or can be adopted about copyright (Palacio, 2016, p. 151). Articles: 56 and 57 are highlighted from the copyright protection actions.

Article 57 empowers national competent authorities that in an infringement trial of one or more of these rights enact appropriate reparation for the damages suffered and determine the appropriate criminal sanctions that are applied to crimes of the same magnitude (Court of Justice CAN Process 33-IP-2008). Meanwhile, Article 56 empowers the co-proprietors to enact precautionary measures, such as the cessation of the infringing activity and seizure, freezing, confiscation and preventive seizure, as a result of the number of copies produced by infringing any of the rights recognized in the decision (Court of Justice CAN Process 165-IP-2004).

The articles stated above show that the countries of the CAN, through the competent authorities –of civil, criminal, and/or administrative type–, should provide indemnifications and sanctions for compensation to the author/holder that has suffered damages to any of the copyright, and also to adopt precautionary measures to deter and prevent the infringement of these rights.

Developing the previous statement, in Colombia, the special regulation that references the protection to the copyright is Law 23/1982 and Law 44/ 1993. About Law 23, Article 238 specifies the possibility of the author/holder of the moral and/or property right[2] to ask the redress and reparation of damages through a penal process or before the civil jurisdiction, without covering the possibility of resorting to the other one.

The same law, further on Chapter XVIII –About the procedure before the civil jurisdiction–, notes that the disputes should be known by the ordinary civil jurisdiction[3], according to Article 206 of the General Code of the Process. Deserve the same attention Articles 245 and 246; they reveal the precautionary measures such as the preventive secret of the work, production, implementation, issue and number of copies produced, or the productive of the sale and the rent of it.

Following with Law 44, in civil matters, Article 57 exposes three criteria for determining the material damages of the property rights of the author. They are: commercial values of the number of copies produced or reproduced without any consent, the value that could have perceived the holder of the right if he had authorized their exploitation and the period during which the illegal exploitation was carried out. Similarly, Article 54 exposes the possibility for the Police authorities suspend infringing activities, close establishments or seize illegal to bringing to an end the infringement.

It is pertinent to mention that the previous laws have been amended by Law 1915/ 2018, which in addition to renewing the main copyright regulation dating from 1982, it regulates the commitments that Colombia has made in the Free Trade Agreement (FTA) subscribed with United States[4] in 2006 and approved through Law 1143/2007, July 4.

After a wide participation of the civil society, through work tables, public audiences, thematic meetings and more than six years of discussions[5] about the feasibility of the law and its possible consequences (Botero, 2018), this got to modify issues such as the regulation of orphan works, expansion of the exceptions and limitations of the copyright, such as parody, the regulation of Protection Technological Measures (PTM), incorporation to preset damages, as a new way of valuing the damages by infringements of the copyright and the author property rights catalogue, adding, for example, the transmission through wireless media, among others.

About the laws stated previously, regarding with the study of the criminal actions, the provisions of Law 23 and 24 about the topic have been repealed by Law 599/ 2000 issued by the Criminal Code. Particularly, this regulatory body ensures the protection to creations, that is to say, of the intangible asset –rather than physical or digital media on which the work is expressed or manifested– (Álvarez, Ceballos & Muñoz,

2 As it was pointed out, the protection to the copyright is dual: the property rights related to economic exploitation of the work and the moral rights that search to protect the identity of the creator with regard to his work (Cabrera & Palacio, 2016, p. 125), and they have been considered fundamental rights because they are inherent to the human condition (Bernal & Conde, 2017, p. 58).

3 Article 24 of the General Code of the Process grants powers to The National Direction of Copyright to know the jurisdictional processes of civil character about copyright and related rights. This power is headed by the Sub-directorate of Jurisdictional Affairs of the National Direction of Copyright.

4 Chapter 16 of TLC regulates common topics of intellectual property, which involve topics related to copyright.

5 There are different initiatives to regulate topics of copyright, in the frame of the regulation of the FTA with United Sates before the issuance of Law 1915/ 2018, such as the Draft Law 241/ 2011, the Draft Law 1520/2012 and the Draft Law 306/2013, among others.

2013, p. 98), by classifying the crimes according to the copyright that are protected, consequently there is a criminal classification for the protection of the moral rights, that are exposed in Article 270, and other two, for the protection of the property rights under Articles 271 and 272.

For example, about violations to the property rights, in a general mode, the Code classifies conducts that are linked to the fixation, illegal duplication and commercialization of one or different works without the prior and express authorization of the author and/or holder (Olarte & Rojas, 2010, p. 42). Taking into account that the patrimonial rights are not absolute and perpetual, the classification of the conduct must be developed verifying that it is not covered by the exception and limitation of the copyright, and the period of protection is still in force. It means, they are not in the public domain (Olarte & Rojas, 2010, p. 44).

About the penal protection of these rights particularly, the Constitutional Court has stated that without regarding the nature of the affected rights, the aim of the classification of these conduct is to protect the property interest of the aggrieved person in relation to the violated rights (Corte Constitucional, T-1062 de 2002).

Dwelling on the articles contained in the Criminal Code, at the moment of being issued, Article 271 sets as a crime of "Fraud of the Property Rights of Author" to the commission of certain kind of behaviors that impinge the property right of the author, and provided a criminal sanction corresponding in prison from two to five years, and a fine of between 20 to 1.000 times statutory monthly minimum wage (SMMLV).

Likewise, a reduction of sentence was set if the duplication or rent of a literary, scientific, artistic or cinematographic work, phonogram, videogram, systems software, computer programs do not have as a result a greater number than 100. Similarly, if plays or musical public performances are fixed, reproduced or commercialized without resulting in a number more than 100, the sentence is the minimum, not in two years, but in one year of prison.

With the entry into force of Law 890/2004, that adds and amends the Criminal Code, Article 14 increased the sentences of the articles in its special part. In this way, the crimes of the punishable of Defrauding of the Property Rights of the Author are in a minimum of 32 months and a maximum of 90 months, and in case the prison sentence becomes tempered to the minimum, it is reduced to 16 months.

Later, in 2006, Law 1032 was issued. It amends the Criminal Code about the provision, access or illegal use of the telecommunications services and violations to the mechanisms of protection to the copyright and related rights and other frauds. So, it modifies the text of Article 271, on the one hand, it changes the name of the crime of "violation to the property rights of the author and related rights", and on the other, it increased even more the penalties to the exposed generally on Law 890/2004.

With regard to the penalties, stated from four to eight years of prison[6] and a fine between 26,66 to 1.000 times SMMLV (statutory monthly minimum wage), starting from that moment, it was excluding the tempered circumstance of penalty stated on the previous legislation. From what has been exposed above, it can be inferred that any form of violation to the property rights of the author, even if it is minimal must receive the referred sanction.

The justification to this position is found in the explanatory statements of Law 1032/2006, when the Draft Act 30/ 2004 provides:

> "(…) the piracy is a serious crime where the material object is intangible and has very negative implications in the frustration to the production of new talents and to the investments in the Entertainment and Culture fields. So, the piracy must be prosecuted and strictly punished, with decision and drastically".

About piracy, this concept is used to refer to illegal duplications of material legally protected, through the no payment to the copyright (Trapiella & Molina, 2016, p. 146). At the beginning, the infringement was carried out through the copy of cassettes or books, but with the technological advances and the use of internet digitalizing the information turns into an easy and expedited way of accessing to it, without paying copyright and/or asking authorizations of use, which affects property rights such as reproduction, distribution and public communication (Flórez & Bernal, 2016, p. 37).

Although, these affectations to the property rights of the author become an economic and social problem, among others, they reduce the amount of taxes that States can collect and affect the markets engaged in art[7] (OECD/EUIPO, 2016), penalizing all the violations to the property rights of the author –regardless of their severity– results incompatible with the liberal tenets of the Colombian Criminal Law System, it provides as a guiding rule the demand of the

6 Highlighting the consequences of the processes that have, only in matter of origin of the measure of imposition of a preventive detention in prison, the fact that the minimum sentence to be imposed is 4 years in prison, according to the number second of Article 232 of the Code of the Criminal Procedure (Ley 906/ 2004).

7 According to the study conducted by Frontier Economics in 2017, in 2013 it was estimated that losses, due to forgery and piracy of digital means of music, software and films in the entire world were nearly 213 billion dollars, and it is projected that this amount increases from 249 to a 456 billion dollars in 2022 (Frontier Economics, 2017).

material anti-legality, not of the Criminal Code, but of the Colombian Criminal System[8].

In that regard, the reprehensible conduct in a penal way must injure or actually jeopardize, without just cause, the protected legal asset by penal law, as Article 11 of Law 599/2000 provides, in this vein, as it was written Article 271 this verification was excluded, therefore, it can violate the guiding principle[9].

In view of the above, in the case of the copyright –as legal and protected asset–, the anti-legality impedes that consistent conducts be penalized, for example, the distribution of a very limited number of copies or the download of a literary or scientific work for personal use, thus the conduct is adjusted in a literal mode to the penal type of infringement of the property rights of the author and related rights, there has not been any actual affectation to the legal property asset of the copyright with the conduct individually performed by the active subject (Velásquez, 2017, p. 464).

Following this criterion of the demand of the anti-legality, The Supreme Court of Justice has provided the exclusion of penal responsibility to subjects immerse in similar contexts to the mentioned previously.

This situation is revealed in the sentence of the Criminal Appellate Division of the Supreme Court of Justice of May, 2009, recorded number 31362. M. P.: Dr. Julio Socha Salamanca[10], when this corporation expressed:

> "(…) it does not mean that all conduct related to street sales or informal of non-authorized works must remain unpunished, but instead, according to the particular circumstances of the case, the material object of the action, analyzed in direct relation to the legal asset that number 1 of Article 271 of the Criminal Code intents to protect, it does not imply a transcendental risk for the property rights in the head of the writers and publishing houses, without detriment that can be the action of offering for the illegal duplications sale in excessive higher amounts" (underlined out of the text).

What the Court has stated finishes with the incompatibility between the last aim of Law 1032/2006 and guarantees tenets of the Criminal Law System of minimum interference, and particularly the constitutional provisions, as the contemplated in Article 16 superior, it establishes that the right to free development of one's personality (that protects the general liberty of the action[11]) only can be limited when it converges with the affectation to juridical order (infraction to a juridical regulation) and the affectation to the rights of the others (impairment of legal assets).

So, even there is a penal classification that provides the imposition of a sentence before the performance of certain behavior, this sanction must be left aside until be determined that the conduct performed is affecting in a significant mode to a legal asset protected by the criminal law, as it must happen in the protection of the property rights of the author. Where the imposition of penal sanctions to conducts that do not affect significantly legal assets, it will be in front of the abuse of the right (Gómez & Barbosa, 1998, p. 50) or a State terror (Hassemer, 2007, p. 103).

Again, with the article 36 of Law 1915/2018[12], Article 271 was amended, a second paragraph was added, it stated: "The duplication of the works through computing means included in this article will be punishable when the author does it with the aim of getting a direct or indirect economic benefit, or does it at commercial level".

About this modification, it is necessary to do three annotations. The first one is the inclusion of a subjective special element; it is defining the crime when works are reproduced through computing means "with the aim of obtaining a direct or indirect economic benefit". On the basis of this, the incorporation exonerates to those users of internet who reproduce protected contents by the copyright for personal use, for example, when it is carried out with educative and entertainment purposes.

The second one, the incorporation of a special objective element, it is about the materialization of the crime when works are reproduced through computing means at commercial scale. Although, it is not clear when the article states the commercial scale, it could be assumed that is related to the iterative illegal duplication of the work, that is to say, when it is carried out in a considerable number of times so it can be considered a commercial activity.

8 Article 13 of the Criminal Code (Law 599/ 2000).

9 The Constitutional Court has highlighted the dual conception of the principle of anti-legality, so "(…) requires the verification of an effective damage to the protected legal assets and not just the simple assessment that is judged harmful" (Constitutional Court, C-181 of 2016).

10 The factual nucleus of the sentence is: On November 26th, 2006 in Bogotá, police officers arrested to Daniel Acero, who was offering on public way two illegal duplications for selling journalistic works (Pact in the shadow, by Édgar Téllez and Jorge Lesmes, issued by Editorial Planeta S.A., and H. P.: Particular Stories of honorable parliamentarians, by Édgar Artunduaga, issued by Editorial Oveja Negra Ltda.).

11 In this way the Constitutional Court understands in providence of the sentence 16 of April 2008, recorded C-336. Reporting Judge: Dr. Clara Inés Vargas Hernández.

12 Although it is not object of the study, it is relevant to state that Law 1915/2018 modified also the Article 272, adding the quotes "who with the aim of getting a commercial advantage or an economic private income" and including new ways of violations to the mechanisms of protection to copyright and related rights, and other frauds, such as the number 10 about who manufacture, import, distribute, offer to the public, provide or in another way commercialize counterfeit documents or counterfeit packages for a computer program.

As a third annotation, it involves the use of the word in Spanish “o” (or) to connect the two special elements of the type; that is to say, to be a crime it requires, whether the economic benefit or that it be carried out iteratively.

The use of the Spanish disjunctive conjunction “o” (or) can become conflictive because, without taking into account the number of reproduced copies, if the infringer has been profited, it will become an offence. It means, if a person reproduces once the protected work by copyright through computing means, and obtains an economic benefit, the crime will be materialized and the affectation or damage to the legal asset would be null, therefore, there would not be material anti-legality.

Likewise, it is considered an infringement of the duplication of contents without measure through computing means and which are protected by copyright. In this setting, due to it only states a quantitative value, it does not matter if the lawbreaker acted with profiting purposes or not, ant it will not be verified if it causes a real affectation in the exploitation to the property rights of their holder.

Bearing in mind previous statement, it can be concluded that the protection to the property rights of the author arise from different type of actions, such as penal and civil. In the case of the penal actions, they are typified in the Articles 271 and 272 the Criminal Code.

Especially, Article 271 stipulates a condemn from four to eight years of imprisonment and a fine between 26,66 to 1.000 times SMMLV (statutory monthly minimum wage) without alleviation. To set up a crime, it must be verified that the typified conduct is actually bringing an effective danger to the property rights of the author, that is to say, it is materially anti-juridical to be considered as a criminal offense. Also it must review, in the case of the duplications through computing means that the conduct is done with profiting purposes or at commercial scale.

Law of penal abbreviated procedure and copyright

The national legislator has revealed a tireless commitment to bring to the penal arena behaviors that do not affect in a conspicuous way the assets which are legally protected. Law 1153/2007 was an example of this, it is known as the Minor Offences Act, and it states that certain conducts should be sanctioned in a criminal way with penalties that involve the privacy of liberty, with the label “criminal contraventions”.

In other words, it included conducts that represent a low affectation to the legal assets to be subjected to a summary procedure, where the charge of the investigation belongs not to the Office of the Attorney General of the Country, but to the National Police, according to Article 36 of this regulation.

Above Law was declared unenforceable by the Constitutional Court by ruling C-879 of 2008, considering that it violates the Constitution, because according to Article 250, the authority of investigating legal processes that are penal rooted only can be carried out by the Office of the Attorney General of the Country.

In 2011, due to the Legislative Act 06/2011, the constitutional document was amended, and set that the ability of the state public prosecutor’s office of investigating the facts with connotation of punishable conducts was not so private and non-delegable. In this sense, the article second of the stated legislative act laid down the amendment of the Paragraph 2 Article 250 superior, allowing the state public prosecutor’s office to assign to the victim the investigation and presentation of charges related to punishable conducts, focusing on the nature of the legal asset or the limited harmfulness, what sets up the private prosecutor figure.

With this modification to the constitutional document, and with the purpose of relieving the justice system[13], in 2015 the Draft Law 48 Senate was presented to the Congress of the Country, it was proposed:

1. The creation of a Third Book in the Colombian Criminal Code, called “About contraventions in particular”, along with the First Book –General Part– and the Second Book –Special part of the crimes in particular–, being these ones the unique punishable complaints conducts, with lower penalties to the established conducts in the Second Book of the Criminal Code.
2. The implementation of a special abbreviated process, designed exclusively to process punishable complaints conducts. It is to say, those ones provided as contraventions in the Third Book set by the same the Draft Law.
3. The figure of private prosecutor was developed, as the possibility of the state public prosecutor’s office to assign in the victim of the crime the function of investigating and presenting charges. Delimited only to the field of the

13 The statement of reasons of the Draft Act 48/2015 Senate, establishes as an aim of the proposal: “to process in a fast and expeditious way to those people who take part in criminal conducts of frequent occurrence in the community, that cause congestion in the judicial system in an evident manner” (…). The empiric justification of the frequent intention of relieving the congestion of the judicial system through the creation of a special process integrated by fast mechanisms and that lack of formalities, to allow offering a differentiated treatment to conducts of minor harmfulness, it is clearly evident.

special abbreviated procedure, in other words when penal responsibility is processed due to punishable conducts described on the Third Book of the Criminal Code.

According to the abovementioned draft regulation, highlighted contraventions are those ones threatening life and personal integrity, the inviolability of habitation or place of work; the intimacy; the reserve and interception of communications; the liberty of work and association; the religious feeling and respect to dead; the moral integrity; the family; the failure to provide maintenance; the economic property; the public trust; the economic and social order; the public security; the public administration; the effective and righteous justice administration, and the existences and security of the State.

The punishable conducts that infringe on the legal assets of the copyright are excluded, it means, for the Draft Law 48/ 2015 Senate, the offences against copyright would not be processed through a special abbreviated procedure also they would not be susceptible that the accusation could be assumed by the victim as a private prosecutor.

However, what was stated on the Draft Law 48/2015 Senate, later it enacted Law 1826/2017, through it, a special abbreviated penal procedure is set and the figure of the private prosecutor is regulated. It brought variations in relation to the Draft Law which created it, in both the substantive and procedural laws.

As strong points to highlight, Law 1826/2017 refrains of creating a group of a special punishable conducts with penalties that are proportional to their level of harmfulness, and ordered the application of the special abbreviated procedure to a set of conducts, as crime complaints, among others. Thus, it orders the amendment of the articles that in the Code of Criminal Procedure approach the figure of the punishable complaints conducts, keeping in every case the same penalties that were established in the Criminal Code.

If the legislator did not create a special category of "contraventions", ordered to amend the literature of Articles 66, 71, 72, 73 and 76 of the Code of Criminal Procedure, using the term "punishable conduct"[14] where it referred to the concept of "crime", it reveals in the abbreviated penal procedure crimes will be processed and also the contraventions, it means, punishable conducts that affect in a minimum way the legal asset that has been protected in a penal process or when the prejudiced interests or the assets in danger are lower level offences (Constitutional Court, Sentence C-301 de 1999).

About the "punishable conducts" in which result appropriate the process of the special abbreviated procedure, Article 10 of Law 1826 says, first of all the criminal complaints, according to the same Draft Law 48/2015 Senate, and then it sets a group of punishable conducts without being of the criminal complaint type, they would be processed under solemnities of the special abbreviated procedure, which are:

> "Personal damages referred on Articles 111, 112, 113, 114, 115, 116, 118 and 120 of the Criminal Code; acts of discrimination (C. P., Article 134A), harassment (C. P., Article 134B), aggravated acts of discrimination and harassment (C. P., Article 134C), failure to provide maintenance (C. P., Article 233), theft (C. P., Article 239); larceny (C. P., Article 240); aggravated theft (C. P., Article 241), numbers 1 to 10; scam (C. P., Article 246); breach of trust (C. P., Article 249); private corruption (C. P., Article 250A); unfaithful administration (C. P., Article 250B); abuse of inferior conditions (C. P., Article 251); improper use of privileged information in private individuals (C. P., Article 258); the crimes included on Title VII bis, for the protection of information and data, with exception in the cases when the conduct rests over assets or entities of the State; violation of moral rights of the author (C. P., Artículo 270); and related rights (C. P., Article 271); violation to the mechanisms of copyright (C. P., Article 272); falsehood in private document (C. P., Articles 289 and 290); usurpation of industrial property rights and plant breeders' rights (C. P., Article 306); illegal use of patents (C. P., Article 307); violation of industrial and commercial reservation (C. P., Article 308); unlawful exercise of the monopolistic activity of rental arbitrator (C. P., Article 312)" (underlined out of the text).

This clearly indicates that the legislator opted for processing through the special abbreviated process, certain type of investigable conducts of ex officio. In other words, in those conducts that: (i) their effects overcome the private orbit of the victim, (ii) are considered of such severity that are of interest to all society, (iii) do not accept withdrawal, it is to say, that the procedural step will be continued even against victim's willingness and these will be subjected to the "fast and expeditious" process of the special abbreviated procedure, allowing the use of the private prosecutor figure before this type of punishable conducts.

In consideration to the special precision that Law 1826 used to modify the terminology related to "crimes", for changing it to "punishable conducts", it is inferred that with the addition of the three articles on Title VIII of the Criminal Code, of the conducts against copyright, results totally appropriate to the

14 According to the Article 19 of the Criminal Code, the punishable conducts are divided in crimes and contraventions.

new legislation to impose penalties from 32 to 90 months in prison in the case of infringement of the moral rights of the author (Art. 270), or from four years to eight years in prison, in case of violation to the property rights of the author and to the related rights (Art. 271), or of violation to the mechanisms of protection of copyright and related rights, and other frauds (Art. 272) due to conducts that do not affect in a meaningful way the legal assets of the copyright, because before this special abbreviated procedure not only crimes are processed, but also contraventions.

In this way, in the case referred decided by the Supreme Court of Justice in the sentence of May 13, 2009, recorded 31362, under this new scheme brought to the Colombian legal system by Law 1826/2017, would bring to the judge to impose the penalty established in the penal type, rather than declaring the acquittal of the accused, where those small or null affectations to the legal asset become punishable because they are penal contraventions, that is to say they are contrary behaviors to the strict legal orders.

Punishable conducts against copyright and judicial processes congestion

Although, the main reason that promoted the adoption of a summary penal procedure and to create the private prosecutor figure was to combat the judicial processes congestion when conducting less wasteful processes and without all solemnities, because the processes take less time to reach a sentence, and also the state public prosecutor's office can aim efforts in investigation and prosecution of crimes particularly serious, leaving the victim these tasks before crimes "of small or null social transcendence", these aims in the field of crimes against copyright are not clear.

In the specific case, crimes committed against copyright at any moment have been considered –not even when Law 1826/2017 entered into force– as criminal complaints. However, this law provides that the special abbreviated procedure and the private prosecutor are suitable to this kind of punishable; it does not mean that they are considered criminal complaints.

According to the description of motives of the Draft Law 48/2015 Senate, 21% of the criminal processes that currently are active are developed as criminal complaints, so it results entirely reasonable that the punishable criminal complaints are processed by the special abbreviated procedure, and the conversion of the penal action from public to private proceeds before them.

In the case of copyright, it becomes interesting verify the number of criminal reports presented to the public prosecutor's office with regard to committing punishable conducts that infringe upon copyright, at least since 2015 when the Draft Law 48/2015 Senate was presented.

Although, there are not precise statistics that evidence the number of crime reports presented yearly by infringement of copyright and even less who were the lawbreakers and victims, the criminal reports of the Office of the Attorney General of the Country allow to determine that the punishable conducts effectively threatening copyright do not constitute a serious cause of judicial congestion processes and for that reason the Draft Law 48/2015 Senate did not included them in the list of those ones to be processed through the special abbreviated procedure and suitable for applying to the figure of private prosecutor.

This inference is the result that in the year 2015, a total of 771.300 of criminal reports were presented, only 1.210 of them were conducts that violate the copyright, it is a 0,156% of the criminal reports. In 2016, 1.126.481 criminal reports were submitted by different punishable, 683 of them belonged to conducts that infringed on the legal asset of the copyright; it is a 0,060% of the criminal reports. Finally, in 2017, 1.329.560 crimes were reported; but only 471 are with occurrence of infringement of copyright, it is to say, that they constitute only a 0,035% of the penal requirements developed in Colombia[15].

In spite of what was stated above, Law 1826/2017 orders that these conducts be processed through the special abbreviated procedure and that, subsequently, the conversion of the penal action from public to private can be requested, therefore it can be ruled out that the reason that led the legislator's decision was motivated to reducing the judicial processes congestion.

Punishable conducts against the copyright are not criminal complaints

As it was showed, starting from the entering into force of Law 1826/ 2017, the criminal processes that are developed by infringement of the copyright will be conducted –it does not matter the amount– through the special abbreviated procedure, without meaning they are criminal complaints.

The fact that a punishable conduct becomes a criminal complaint, according to the Article 73 of the Criminal Code, it means that the penal action discontinues in a term of six months following the date of the occurrence of the punishable conduct

15 Statistics published on the official website of the Office of the Attorney General of the Country, related to the criminal reports records of the Oral Accusatory System of Criminal Justice (SPOA) by alleged crimes that the Office of the Attorney General of the Country knew by the entry into force of the Law 906/2004 and the Law 1098/2006 (Office of the Attorney General of the Country, n. d.).

if the crime complaint is not presented. Previous statement means that the legitimate claimant –unique authorized to begin the penal action– counts only with this peremptory term (except for unforeseeable circumstances or acts of force majeure) to report to the competent authorities the occurrence of the facts (Supreme Court of Justice, SP7343-2017).

According to the aforesaid, the punishable conducts that violate the copyright, with the entry into force of Law 1826/2017, are subjected to the systematic proper of the special abbreviated procedure, without being affected by the discontinuance effects of the expire date of the criminal complaint, because Law 1826 did not transform them into criminal complaints.

On the other hand, in the punishable complaints conducts, the power to initiate a penal action is of the victim[16], because at the beginning there is not a state's interest in the penal persecution of these conducts (Bernal & Montealegre, 2013, p. 54). In other words, by definition it is about conducts that affect only victim's interest and in this sense admits a withdrawal (Corte Constitucional, C-591 de 2005).

Arising as a result of the above, conducts that affect the legal assets of the copyright have not been become criminal complaints, taking into account that these rights are fundamental to consolidate the development of the country, so the production of creations –works in particular– contributes to the culture, knowledge and intellect (Erdozain, 2002, p. 17). Authors like Gaviria have pointed out, that the crimes against the copyright, although cover individual assets, they are characterized because they influence common interests necessary for the economic and social development of the country[17].

Moreover, in the explanatory memorandums of the Draft Law 30/ 2004 Senate, it led to the issuance of Law 1032/2006, piracy constitutes a serious crime and a modality of organized criminality. Piracy must be assumed as one of the most serious ways of crimes against the private property and national treasury (smuggling).

In this regard, it does not result coherent that some punishable conducts that are of specific concern –and that affect in a strong way the society– be assumed through a summary process like the specific abbreviated procedure. On the contrary, these conducts must be subjected to a procedure that guarantees to the prosecuted and the victims the realization of their rights, in which they count on enough legal terms to consume an excellent investigative and judging stage, where the judge counts on the easiness of access in a direct way –in hearing– to all the elements of evidence collected, both, by the prosecutor and the advocate. Only then, the judge can deliver a sentence for giving a definitive solution to the issue subjected to his knowledge, recalling the words of Dr. Gabriel Upegui Palacio at the Universidad de Medellín, on July 30th, 1986: "the celerity is an enemy of the true, and we can fall in the procedure of 'there is no time to waste', of the satisfactory effect of 'surprise', of the blaming request" (Upegui, 1986, p. 498).

The private prosecutor and the conducts that affect the copyright. The case of crimes against property rights

Another aspect to take into account is the referred to the possibility that in the processes governed by the special abbreviated procedure, the investigation and prosecution become assumed directly by the victim of the punishable, under the figure of the private prosecutor.

On this, Law 1826 has set, in its Article 29, that has added Article 551 to the Code of Criminal Procedure, that the conversion of the public penal action into private can be requested by the same persons that in the terms of Article 71 of Law 906/2004 are understood as the legitimate claimants, it is to say, the victims.

In the same sense, the subparagraph "a)" Article 32 of Law 1826/2017, which adds Article 554 to Law 906 of 2004, orders as a causal for the non-conversion of the public penal action into private that the victim role does not be accredited, but not the role of legitimate claimant. Likewise, the second clause of Article 9, of the Resolution 2471 of July 11 of 2017, issued by the Attorney General of the Country, through it "Regulates the internal process of the Office of the Attorney General of the Country to ensure a control of the conversion and reversion of the penal action within the framework of the private prosecutor", it establishes in an explicit way that "<u>when the request of conversion is done along with the criminal report</u> or criminal complaint, the term of one (1) month shall begin to run

16 The original text of the Code of Penal Procedure (before the entry into force of the Law 1826/ 2017) sets that only can be reported by the "passive subject", that is to say, the holder of the legal assets that the legislator protects in the correspondent penal type (Reyes, 1980, p. 152), but this concept was replaced by the "victim" (person who has suffered a damage, of any nature, with occasion of the commission of the punishable conduct), expanding the subjects that have the power to initiate the prosecution of punishable criminal complaints conducts.

17 About this, the General Director of the World Trade Organization (WTO), Roberto Azevêdo (2018), in the European Conference of Researchers of Intellectual Property, held in Geneva on June 29th of this current year, pointed that the intellectual property is especially important to help to generate innovations that will be necessary to accomplish objectives of sustainable development, and that the formulation and observation of its rules have considerable effect in the global world increase and development.

following the moment that the criminal reports have been assigned" (underlined out of the text).

This means that the request of the private conversion is not exclusive of the crime complaints, so it results appropriate the request of conversion of the penal action before crimes of informal penal action, as long as they are processed through the special abbreviated process –such as punishable conducts that infringe upon the property rights of the author–, as it is set on Article 28 of Law 1826/2017 and the Article 7 and Subparagraph "a)" Article 8 of the stated Resolution 2471/2017.

With this in mind, the conducts that must be processed by the abbreviated procedure stated on the Book VIII of Law 906, with exception of those ones that impinge on the assets of the State and of processes carried out by the penal responsibility system for teenagers, it can appeal to the private prosecutor figure (Cuentas, 2018, p. 324), even in investigable conducts ex officio, as long as they must be judged by the special abbreviated procedure. Here the victim of the punishable conduct, for requesting the conversion of the public penal action to private before the corresponding prosecutor, must be represented by a lawyer or a student of a legal aid clinic of accredited universities, according to Article 549 of the Code of Criminal Procedure, that was added by the Article 27 of Law 1826/2017, and the Subparagraph "c)" Article 7 of Resolution 2471/2017.

In this aspect, and taking into account that the private prosecutor will replace to the state public prosecutor –not only in the task of prosecuting before the Preceding Judge, but also in the labor of investigating–, according to the Article 556 of the Law 906/2004, added by the Article 34 of Law 1826/2017, the victim interested in assuming directly the accusation must hire the services, not only of a licensed attorney that represents him, but also experts and investigators who provide evidentiary basis to the prosecution. From the above, it is clear that this figure is focused on serving to individuals who have the necessary economy incomes to pay those services.

Although, the victim of the punishable conduct can act as a private prosecutor through a student of a legal aid clinic, that assists these activities for free, also he must entail costs of the investigative work that involves to collect and to obtain material items of evidence, physical proofs and legal information gotten to support the prosecution, highlighting that this investigative function is not assumed by the legal aid clinics of the accredited universities, and therefore the victim must pay these services.

As a matter of fact, the Law 1826/2017 has created the necessary conditions in order to the great businesspersons, owners of big publishing houses, records houses, digital platforms and management business partnerships can use the power of the punishable power of the state at will, allowing them to handle the prosecution in a direct way.

What was stated above takes people of low incomes who occasionally resort to the books and CDs street sale, or common persons such as students, researchers and teachers who need information without profit motives come to be reduced and victims of their basic rights violation when they are object of actually disproportional penal sanctions, in contrast with the activity carried out and the patrimonial impairment that these actions individually devised cause to the big enterprises that exploit to a big scale the property rights of the author.

Conclusion

With the Law 1032/2006, Article 271 condemns from four to eight years of prison and a fine between 26,66 to 1.000 times SMMLV (statutory monthly minimum wage), without alleviation to those people who impinge on the property rights of the author. For the constitution of the crime it must be verify that the typified conduct really causes an effective danger the property rights of the author, that's to say, that is materially anti-juridical to turn into a crime.

In the case of the crimes that relapse into the reproduction through computing means, according to the new law of the copyright (Law 1915/2018), the conduct will be punishable if it is carried out with the aim of obtaining economic benefit or at commercial scale.

About this amendment, it is concluded that the use of the Spanish disjunctive conjunction, "o" (or) can be conflictive, since it allows to consider as an infringement the excessive reproduction through computing means of a protected content by copyright, even it is carried out without any compensation. Similarly, if a person only reproduces in one opportunity a protected work under the copyright through computing means, and get an economic benefit, the crime would be materialized, but in this opportunity the affectation or damage of the legal asset would be null, therefore there wouldn't be material anti-legality.

Based on the foregoing, it would be appropriate to modify the Spanish disjunctive conjunction "o" (or) by the Spanish copulative conjunction "y" (and), because this second proposition ensures that the conduct becomes materially anti-juridical and punishable, which would be in agreement to the aims of copyright, that search the balance between the protection to the

works to encourage more creations, but at the same time, to allow the use of them in pursuit of the society advances.

About the process, with the entrance into force of Law 1826/2017 the way of the development of the penal process by crimes against copyright has changed. To start, the private prosecutor figure was ruled, and according to the amendment of Article 250 of the Political Constitution, allows victims to conduct the investigation and prosecution, when it was a function of the state public prosecutor's office.

Then, it regulates the process of the special abbreviated penal procedure, what implies that although the crimes against copyright are not crime complaints, the victims can have access to an expeditious process, where the process stages are reduced. Finally, the law determines that the established penalties on the Criminal Code are preserved.

These incorporated changes have originated an inconsistence between the protection of the copyright and the aim of the punitive power of the state, because the objective of Law 1826 is to relieve law offices congestion through shorter process and with less formalities, the copyrights are not of the type of crimes that saturate the legal penal system, because, as it was noticed throughout this paper, the crime complaints about these cases do not reach the 1% of the ones reported every year in the country.

Likewise, Law 1826 –as it does not establish a difference among punishable conducts– allows that non crime complaints, as the copyright, be conducted through the special abbreviated procedure, and therefore the judge must impose the sentence set in penal type, so the affectation to the legal asset becomes minimal, due to the contravention is a modality of punishable conduct.

Respect to the referred above, it needs to be observed that the special abbreviated procedure is not the ideal to be conducted in the case of copyright, since these prerogatives –of great social importance due to the interference in the economic development of the country and its contribution to the exaltation of the culture, knowledge and intellect– they must count with a process that include enough procedure terms in order to the investigative and judging stages guarantee the rights of the prosecuted person and the victim.

Finally, in particular in the property rights of the author, this process can benefit only the holders of these rights who have power in the market, because they have the resources to carry out the prosecution and investigation of these crimes, even when the prosecuted person has incurred in the punishable conduct but the affectation to the legal protected asset is minimal, it means, that it is not materially anti-juridical.

As conclusion, to accomplish with the aims of the punishable power of the state in the case of the copyright, it is necessary to exclude the crime against prerogatives of processing them through the special abbreviated procedure and the private prosecutor.

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