

EDITORIAL

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The last attempt to implement the agreements reached in the matter of Copyright between Colombia and the United States in the Trade Promotion Agreement (TPA) has resulted in the Bill 306 of 2013 by the House of Representatives. Although any reference to the controversial mechanisms for the removal of infringing material on the Internet has been eliminated, the regulations contained therein are likely to remain criticized by different sectors.

Considering the failed attempts to implement the TPA and the great national debate that was generated regarding the different regulations, the Colombian government has chosen to present the new legislative initiatives as mere transcriptions of the commitments agreed with the United States regarding Copyright. Truth be told, the bill 306 provides very few elements to the existing legislative framework in Colombia, either because it literally enshrines the agreements reached in the TPA, or because it includes definitions of international treaties that have already been ratified by Colombia.

Beyond wondering about the need for a new law –in which most of the regulations are already integrated to the domestic

law— the simple transcription of the TPA texts to a national law implies a high risk for the already existing Copyright system in Colombia, particularly, the system of limitations and exceptions. The referred bill provides in its Article 10 the following:

“Limitations and exceptions defined in regards to copyright and related rights will be limited to those special cases not infringing the normal exploitation of the works, interpretations or performances, phonograms and broadcastings or not causing unjustified prejudice to the legal interests of the owner or owners of such rights. “

Such ruling, transposed from the numeral 8° of Article 16.7 of the TPA, is none other than the renowned “*Three steps test*”, originally established in the Berne Convention and that is currently referred to in the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). Rule (or *test*) that has been constructed as an obligation for subjects of international law, in order to confine signatory countries to international treaties into limitations and exceptions to certain special cases. This is not a rule for the normative interpretation of national legal operators. It is a guideline addressed, exclusively, to the States Parties.

So that, once the TPA with the United States was ratified by the Law 1143 of 2007, there is no need to regulate an obligation whose recipients are the Colombian State and the United States of America. But, as I mentioned before, beyond getting an ineffective arrangement, the recognition of the “*Three steps test*” in the Colombian legal system, may result in the inapplicability of the provisions related to the limitations and exceptions under both the TPA and other applicable rules; and thus open the door to legal uncertainty around the copyright protection system.

Establishing the “*Three Steps Test*” in a national law not only evidences certain degree of lack of awareness of this institution, but it also opens the door to different interpretations of the circumstances by which the works’ users may omit prior permission of the author. Who is entitled to conclude that the way a work is used is a “*special case and it does not infringe the*

normal exploitation of the same”? Is it the user? A judge? An administrative authority? Is it the very one right holder?

The “*Three Steps Test*” is and has always been a tool to direct the legislative activity concerning Copyright, and its inclusion in a rule to regulate the social uses of the works leads us to ask whether the limited and restrictive position that copyright limitations and exceptions have had so far, will disappear.

As a society we could have a legitimate interest in transforming our system of limitations and exceptions into one closer to the “*fair use*” of the Anglosaxon Law, in which the limitations and exceptions correspond to the application of general principles in specific cases and that is used by each user and then, in case of conflict, controlled by a judge. But if so, the implementation of this new system must be technical and complete, not by mistake, not because of a legislative effort to demonstrate progress in the implementation of the TPA to our trading partner.