

STORIES OF A SOCIAL MEDIA INFLUENCER: ANALYSIS OF THE IMPLICATIONS OF USES OF CREATIVE WORKS ON INSTAGRAM *STORIES* IN LIGHT OF COLOMBIAN COPYRIGHT LAW

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ABSTRACT

This work makes an analysis of the Copyright implications of the use of protected works in Instagram “*Stories*” as part of endorsement activities by Social Media Influencers (SMI’s) in light of Colombian Law. Social media has brought an economic revolution where SMI’s have found a way to make a living by producing advertisement content in their social media accounts. Some of the key pieces of interaction used by these influencers come in the form of “*Stories*” used in the popular Social Media Platform “Instagram”: photo and video posts, which make constant use of owned and third party Copyright works. These activities are analysed in light of Colombian Copyright regime, including provisions of the recently introduced Law 1915 of 2018.

As an overall outcome it is concluded that Colombian Copyright Regime matches the standard of protection set up by international treaties in regards of digital uses of Copyright works, like those made in Instagram *Stories*. However, the vagueness of some of the provisions of the laws might bring interpretation problems respecting such uses.

Keywords: Copyright, Social Media, Social Media Influencers, Colombia, Publicity, Instagram, Internet.

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HISTORIAS DE UN INFLUENCIADOR DIGITAL: ANÁLISIS
DE LAS IMPLICACIONES DE LOS USOS DE TRABAJOS CREATIVOS EN HISTORIAS
DE INSTAGRAM A LA LUZ DEL DERECHO DE AUTOR COLOMBIANO

RESUMEN

Este trabajo hace un análisis de las implicaciones legales del uso de obras protegidas en las “historias” de Instagram como parte de las actividades publicitarias desarrolladas por los influenciadores digitales a la luz del Régimen de Derechos de Autor y Conexos colombiano. Las redes sociales han propiciado una revolución económica en la que los influenciadores digitales han encontrado una manera de ganarse la vida mediante la producción de contenido publicitario en sus redes sociales. Algunas de las formas clave de interacción utilizadas por estos influenciadores son las “historias” de la popular red social Instagram: publicaciones de foto y video, que hacen uso constante de obras protegidas propias y de terceros. Estas actividades se analizan a la luz del régimen colombiano de derecho de autor, incluyendo las provisiones de la recientemente promulgada Ley 1915 de 2018.

Como conclusión, se afirma que el Régimen de Derechos de Autor colombiano coincide con el estándar de protección establecido por los tratados internacionales con respecto a los usos digitales de las obras protegidas, como los hechos en las “historias” de Instagram. Sin embargo, la vaguedad y la ambigüedad de algunas de las disposiciones que las leyes ofrecen pueden traer problemas de interpretación con respecto a tales usos.

Palabras clave: derechos de autor, redes sociales, influenciadores digitales, Colombia, publicidad, Instagram, Internet.

INTRODUCTION

Creative industries have been the most affected by the massive growth of Internet and Social Media: on-demand consumption of contents and the continuous growth of social media platforms has had a heavy impact in the way in which the public consumes creative works, turning streaming and social networks into the most important entertainment distribution channels. At the same time, social media platforms' evolution has put in users' hands several tools for the edition of User Generated Content, which bring the possibility of creating new content, or adding third party protected works in several formats (images, video, music, text) to users' Internet publications. This evolution has facilitated the regular commission of hundreds of Copyright Infringements by users of social media every second.

Within this context, a new and successful market, which relies heavily in the effects that Internet and Social Media has had in creative industries, is growing: the Social Media Influencer (from now on SMI) market. Several people have found

a way to make a living by producing digital creative content in their social media accounts. Due to their popularity, the so-called *Social Media Influencers*, have become target partners of commercial actors seeking for a window to advertise their products.

The involvement of Social Media Influencer content posting, and the use of Copyright protected works has been particularly strong in the photo and video sharing platform Instagram, due to its appeal for entertainment content creators and consumers. Some of the key forms of interaction used by these influencers come in the form of “*Stories*”, short photo and video posts, which can be edited with text, images and sound, that allow the sharing of quick insight of daily activities. In many cases, these posts involve the use of third party protected works.

In the present work, the Copyright implications of the use made of creative works in *Stories* posts are analysed in light of Colombian regulation, starting from the basis of an analysis on the relevance that the Social Media Influencer market has for Copyright holders in Colombia. The objective is to make an evaluation of the way in which Colombian copyright regime regulates such uses and to point out the areas in which the law has weaknesses. This analysis is especially pertinent, considering that a new Copyright law, which has introduced several provisions in regards of digital consumption of works, has entered into force.

In order to achieve the proposed objective this work starts by providing a background description about the Social Media Influencers market, Instagram *Stories* and its relationship with Copyright works in Colombian context. Then, a summary of Colombian Domestic Law on Copyright is made, pointing the structure and content of its rules. Next, an analysis of the way in which Copyright Law is applied to the most frequent uses of works in Instagram *Stories* is made by making a quick summary of the subject matter protected, the right holders affected, the rights involved in such uses, the applicable limitations and exceptions, and the risks regarding infringement claims; finally, some conclusions are proposed.

It must be stressed that the analysis made in this work will focus only on Instagram *Stories* and not in Instagram *Live* streams. Although the way in which these two kinds of posts are presented is very similar, *Live* posts have some differences with high relevance in terms of Copyright exploitation that would require many more paragraphs of legal analysis, condition that cannot be met in this occasion.

As an overall outcome it is concluded that (i) the Social Media Influencer market deserves the attention of Colombian Copyright holders as a possible source of revenues, due to the continuous use that these influencers make of protected works in their endorsement activities, and that (ii) the recent amendments and additions level Colombian Copyright law to the standards set up by international treaties for the regulation of digital uses of protected works, however there are still some provisions that, due to their ambiguity and vagueness, might bring interpretation problems respecting *Stories*, Copyright and the use of both of them made by SMI's.

BACKGROUND: SOCIAL MEDIA INFLUENCERS AND INSTAGRAM *STORIES*

This section makes a brief explanation about Social Media Influencers, the growth of their market and their endorsement activities, the use of Instagram *Stories* for such purposes and the involvement that protected works have in those. The aim is to provide arguments that support the idea that Social Media Influencers should be, at least, taken into account by Colombian Copyright holders as a possible source of revenues, due to the growth of their market and the involvement that protected works have in their activities, particularly in Instagram *Stories*.

SOCIAL MEDIA AND INFLUENCERS GLOBALLY

One of the most interesting revolutions powered by social media platforms is the appearance of a new market, by which people dedicate most of their time to produce digital content in order to obtain revenues from engaging in advertisement activities in favour of commercial actors: the economy of the Social Media Influencers. A SMI, for the purposes of this text, will be understood as a person who, through the uploading of User Generated Content through social media accounts of its own, engages in paid advertisement activities in favour of commercial actors, taking advantage of the number of followers and/or subscribers that such accounts have.

The SMIs' social media accounts gain considerable amounts of followers due to the contents that they post regularly, photos and videos created by them, using both original and third party creative works (music, video, images, gifs, etc.). The posts deal with any kind of topic: personal anecdotes, commercial product reviews, tips and tutorials, politics and humour, between others. With time, the audience of these characters grows, accumulating hundreds of thousands and, in the most successful cases, millions of followers. As a result, the SMIs become target partners for brands and companies in order to promote their products and services. This partnership allows many of these SMIs to turn their content posting activities into their main job and source of income¹. The mass spreading of social media and its involvement in the existing entertainment industry has led to industry built celebrities (pop stars, sports personalities and models, between others) to become advertising SMIs themselves.

Many of the most successful SMIs are YouTube celebrities. According to FORBES, after surpassing the line of 7 million followers, a *YouTuber* may charge up to \$300,000 US dollars per video partnership². In Facebook and Instagram, the

1 On the topic: HALZAC, SARAH. Behind that pretty photo in your Instagram feed: Layers and layers of strategy [Online]. In: Washington Post Blogs. 2, November, 2016 [reviewed 14 May of 2018]. Available through: http://wapo.st/2ff7ugg?tid=ss_tw&utm_term=.f406d203718e

2 O'CONNOR CLARE. Earning Power: Here's How Much Top Influencers Can Make on Instagram and YouTube. [Online]. In FORBES. 10, April, 2017 [reviewed 14 May 2018] Available through: <https://www.forbes.com/sites/clareoconnor/2017/04/10/earning-power-heres-how-much-top-influencers-can-make-on-instagram-and-youtube/#b4d98b224db4>

prices drop to around \$160,000 US Dollars for the same number of followers³. Similarly, some industry built celebrities obtain extraordinary numbers of revenue from endorsement activities through their social media accounts, like the case of Portuguese football star Cristiano Ronaldo who, according to press reports, earns the equivalent of £301,000 GBP per sponsored Instagram picture⁴.

The revenues of the most successful SMI's may not be very impressive since these people, due to their massive crowd, are clearly valuable for any kind of advertisement purposes. What is worth of attention is the fact that smaller influencers, who are not massively known, are able to obtain substantial amounts of revenue: an Instagram account with 100,000 Followers may be charging up to \$5,000 US Dollars for a content partnership, again, according to FORBES⁵.

SMI's are particularly valuable not only because of the good numbers of reaching audience that they offer for advertisement, but for the specific market sector that they can reach. For example, a SMI that posts content related with sports will be a good partner for sports equipment brands; likewise, a travelling and lifestyle SMI will be beneficial for a tourism company or an airline. This allows big and small companies choose a SMI that suits their budget, and the target audience that they need.

SOCIAL MEDIA, INSTAGRAM AND SMI'S IN COLOMBIA

Social media has had a major impact in Colombia through SMI's on YouTube, Instagram and Facebook. The impact of YouTubers has been particularly strong in younger audiences, with crowds that surpass the line of millions of subscribers and that, in some cases, have broken the limits of the Internet, to the point of being able to fill scenarios with thousands of fans for public performances and autograph sessions⁶. In the specific field of Instagram, several influencers with crowds between 100,000 and above 1 million followers have taken the spotlight in the last years⁷. The most popular Instagram SMI's are actresses and models, however humour pages (posting memes and video sketches) have managed to build legions of millions of followers. Finally, there are some successful influencers posting content in other specific areas (sports, food, fitness), which have audience numbers of between 100,000 and 500,000 followers.

3 Ibid.

4 SHERLOCK, HARRY. Ronaldo earns a staggering £308,000 per Instagram photo. [Online] In GOAL.COM. 30, November, 2017 [reviewed 14 May 2018] Available through: <http://www.goal.com/en-gb/news/ronaldo-earns-staggering-308000-per-instagram-photo/1g8es-qwcwoet41xyw3j7xzooqf>

5 O' CONNOR, Op. cit. 2.

6 YouTubers' Protagonistas Polémicos de la Feria del Libro. [Online]. In Revista Dinero. 5, May, 2016 [reviewed 16 May 2018] <https://www.dinero.com/economia/articulo/youtubers-protagonistas-polemicos-de-la-feria-del-libro/223310>

7 LOMBARDO, MARU. ¿Qué hay detrás de las estrellas más famosas de internet? [Online] In Diario *El Tiempo*. 8, March, 2018 [reviewed 16 March 2018] Available through: <http://www.eltiempo.com/cultura/gente/ganancias-del-lucrativo-negocio-de-los-influencers-189422>

Most of these people have turned their accounts into business tools engaging actively in endorsement for big and small brands, with fees that start from around the equivalent of \$170 US Dollars per post in the case of small SMI's⁸ to the considerable numbers made by YouTubers like Sebastian Villalobos, who, according press reports, charges around \$10.000 US Dollars per Instagram post⁹. Accordingly, the appearing of successful cases of people turning into full time SMI's has made this activity to become a trend in the last couple of years¹⁰.

Although the economic revolution of digital influencers has been a somewhat sudden phenomenon, it is a logical outcome of the high use of social media in a populated country like Colombia (with almost 50 million people). According to the Colombian Ministry of Information Technologies and Communications most recent survey on Information Technology Habits¹¹, around 90% of the representative sample of 8.330 people surveyed has an account on Facebook and WhatsApp, and between them more than the 80% make daily use of those two social network platforms. Additionally, 58% of the surveyed asserted using social media for accessing contents posted by others and posting comments. Instagram is very popular between young people: according to the data, from the 23% of the people surveyed whose age is between 16 and 24 years, 54% have and account on Instagram and 78% of those said to make use of it on a daily basis.

The increasing interest of Colombian entrepreneurs for using social media in order to enhance their activities is also portrayed by the mentioned survey. From 3.011 surveyed enterprises, 41% said to make presence in social media. Between those that have a social media page, 94% indicated to have a Facebook account, and 34%, to have an Instagram account. It is also interesting to note that 60% of the companies that asserted to have presence in social media were Medium and Big enterprises. Those kinds of enterprises are the ones, which most frequently engage in advertising partnerships with SMI's.

Data from the publicity industry also provides explanation to the appearance of more and more SMI's. According reports of the Interactive Advertisement Bureau Colombia, during the first trimester of 2017, investment in digital influencer advertisement in Colombia amounted to an estimated equivalent of \$400.000

8 LOMBARDO, Op. cit. 7.

9 VEGA, CAMILO. Los negocios en auge entre los "millennials". [Online]. In VICE Colombia. 27, January, 2018 [reviewed 12 August 2018] https://www.vice.com/es_co/article/kznmmz/negocios-auge-millennials-webcam-bitcoin-influenciadores

10 VELÁSQUEZ, ANA MARÍA. Ser influenciador no es solo tomarse fotos. [Online]. In Diario *El Tiempo* 28, May of 2018 [reviewed 12 August 2018] Available through: <http://www.eltiempo.com/tecnosfera/novedades-tecnologia/como-es-el-trabajo-de-los-influenciadores-youtubers-y-blogueros-221248>

11 Ministerio de Tecnologías de la Información y de las Comunicaciones. Primera Gran Encuesta TIC/2017, Estudio de accesos usos y retos de las TIC en Colombia [Online], [reviewed 12 August 2018]. Available through: <http://colombiatic.mintic.gov.co/602/w3-article-57508.html>

US Dollars, which doubled the investment made during the same period of the year 2016¹².

As it can be seen, the SMI market and their endorsement activities are a young and growing branch of the publicity industry with economic relevance. In the next section, the way in which SMI's use of Instagram *Stories* relies heavily on the use of own and third party Copyright protected works.

SOCIAL MEDIA “STORIES”, AND CREATIVE CONTENT AS RAW MATERIAL FOR THEM

It is pertinent to make a detailed description of the specific object of study of this work: the particular use of protected works made by SMI's in Instagram “*Stories*”. This specific type of post has relevant differences in purposes, ways of being used and characteristics with Instagram's permanent posts and Instagram *Live* streaming. In the next section, a brief description of the legally relevant features of Instagram “*Stories*” will be made.

As its main functionality, Instagram allows sharing pictures and video content. The primary and most common posts are the permanent posts, by which the user uploads a picture or video permanently to their public profile. These posts are the ones by which SMI's fill their public profiles with their main content. Apart from the profile posts, *Stories* and Instagram *Live* are the other available form of picture and video posts on Instagram. *Stories* were first implemented by the social media platform Snapchat in 2013 and have been copied by some of the most popular social media platforms, like Instagram, Facebook and WhatsApp¹³.

Instagram *Stories* are publications of picture and video, which are shown in the *Stories* section at the top of the newsfeed (they are usually presented as a highlighted circle with the profile picture of the account). Once posted on the main profile, when the following user clicks or taps in the post, the picture or video is played. The image posts are shown for no more than 6 seconds, and videos last for maximum 15 seconds. The viewer can stop the time limit of the picture or stop the video by holding the screen. Several short posts can be published one next to the other.

Stories are publications of temporary availability in principle; after the first publication, they are available to the account's followers to be played again, only during the first 24 hours after being posted for the first time. The publication of a *Story* implies the creation of a permanent copy of such post; this because Instagram saves a copy of the post for the user to access it through his “Archives”

12 IAB Colombia. Reporte sobre la inversion total en publicidad digital en Colombia (...) resultados para el Primer Trimestre de 2017, [Online], [reviewed 20 may 2018]. Available through: <http://www.iabcolombia.com/wp-content/uploads/report-ejecutivo-inversion-publicidad-digital-en-colombia-1q-2017.pdf>

13 Wiltshire, Emma. The Rise of the Story Format. [Online]. In: Social Media Today, February 2 of 2018 [reviewed 23 May of 2018] Available through: <https://www.socialmediatoday.com/news/the-rise-of-the-story-format-infographic/516143/>

section in the profile page. Also, the user can choose to grant permanent access to a particular post by adding it to the “*Story Highlights*” section, where the specific post will be permanently posted at the top of the profile page of an account, unless the user removes it.

Stories are attractive for users because they allow to make quick and improvised posts in order to give insight of their daily activities. For SMI’s, these posts have become crucial since they allow to establish a permanent connection with their fan base on their content, their lifestyle and their endorsement activities.

Instagram provides users with a great space for the edition of *Stories* through the image edition functionality that appears once the video or picture that will be posted as a *Story* has been taken or imported. In particular, the picture editor allows the user to add text in different colours, adding images like, pictures, stickers and GIF format animations and free painting with different brush tools.

In regards of Copyright law, *Stories*, and the use of them made by SMI’s are relevant for several reasons:

– *Creation of original content*: Instagram users, can create new content through the camera functionality of the app, and edit it with the edition tools.

– *Posting of copies of third party Copyright works and subsequent creation of derivative works*: *Stories* may involve the use of copies of third party creative works. This since Instagram allows posting images and videos previously saved on the user’s device. This can give place to the creation of new derivative works when the Instagram user edits the copy of the existing work with the edition functionality.

– *Incidental fixation and/or reproduction of third party works*: Similarly, posts made by the user using the camera functionality of the Instagram application may involve incidental uses of third party works. This scenario is especially frequent between SMI’s: posts of themselves dancing to radio hit songs; pictures and videos of protected works of art when reporting visits to specific places like museums; videos featuring footage of broadcasts, etc.

– *Permanent reproduction and availability of Stories posts*. Although *Stories* have temporary availability at first, the permanent reproduction made of the post in the “Archives” section of the Instagram account, and the possibility of granting permanent access to a certain post through the “*Story Highlights*” functionality raises the potential harm that one of these can imply for a third party work involved in such publication.

In addition, the audience of a SMI can create permanent copies of a post even against its temporary availability. Most smartphones give the possibility of taking screen captures of images. Regarding video, many websites and mobile applications allow downloading permanent copies of *Stories* posted on an Instagram account. This opens a window for the creation of several copies of infringing content that can be spread over the Internet, which is considerably harmful for right holders in terms of commercial strategy and value of the content.

– *Massive access to Stories posts by audiences:* SMI's subscription numbers can be massive, in many cases reaching amounts of hundreds of thousands and millions of followers. This fact enhances the relevance of *Stories* for Copyright holders, since it makes unauthorized fixation, reproduction and publication of protected content more harmful in terms of commercial strategy and value of works.

SMI's with audiences of 100.000, 500.000 or 1 million followers recording video posts with incidental inclusions of images of a non-released piece of art, video game or film, or using several excerpts of a song as background in successive *Stories* posts for an announcement to their audience, are scenarios that may become more and more common due to the growth of SMIs' influence.

– *Hyperlinking through Stories:* Instagram allows adding hyperlinks to *Stories* posts. Although the full address of the hyperlink will not be shown textually, a dialog box with a descriptor and a small arrow will appear at the bottom of the screen. The viewing user can click or swipe up the screen to obtain access to the page of the hyperlink configured by the owner of the account.

All of the facts described allow to conclude that SMI's use of *Stories* is highly relevant for Copyright due to the crucial role that protected works play in them, the considerable amounts of audience that they involve, and the fact that such use takes place in the middle of the growth of a very strong and profitable branch of the publicity industry.

COPYRIGHT DOMESTIC LAW IN COLOMBIA

This section intends to make a brief review of the Domestic Copyright Law of Colombian jurisdiction. Since Colombia is a member state of the most relevant International Instruments on Copyright, domestic law of the country contains most of the minimum standards of protection dictated by treaties like the Berne Convention (1886), the Rome Convention (1961) the TRIPS Agreement, the WIPO Copyright Treaty (1996) and the WIPO Performances and Phonograms Treaty (1996).

The Laws 23 of 1982 (with amendments up to 2017¹⁴) Law 44 of 1993, and the Andean Decision 351 of 1993 and have been the main sources of Copyright domestic legislation in Colombia until 2018. On July of that year a new Copyright Law entered into force: the Law 1915 of 12 July 2018. This new source modifies certain provisions of Law 23 of 1982 and creates new stand-alone provisions.

In this section the sources to be reviewed will be the Law 23 of 1982 with amendments, including those made by the new Law 1915 of 2018, the relevant stand-alone provisions of the latter source, and the Andean Decision 351 of 1993. Law 44 of 1993 will not be mentioned since its stand-alone provisions do not affect

¹⁴ Law 44 of 1993, Law 719 of 2001, Law 1403 of 2010, Law 1680 of 2013 and Law 1835 of 2017.

rights, uses, right holders or limitations and exceptions, which, for the purposes of the topic of this article, are the most relevant.

LAW 23 OF 1982 ON COPYRIGHT AND RELATED RIGHTS,
AS AMENDED BY LAW 1915 OF 2018

The most relevant provisions related with the SMI's endorsement activities are briefly mentioned.

Appearance of rights, Subject Matter, Rights and Right Holders

According to Article 4(A) and Article 9 of Law 23 of 1982, the appearance of ownership of copyrights in Colombian regime, is given by the act of creation of a work. Registration of works in the copyright national office “Dirección Nacional del Derecho de Autor” is not a requisite for protection, however, article 183 provides that acts of total or partial transference of rights must be registered in such entity. This is partially similar to the United States jurisdiction, where registration is not mandatory for copyright protection¹⁵. However, law makes registration a requirement for civil infringement actions¹⁶, which is not the Colombian case.

Regarding subject matter, the act follows the Civil Law tradition of providing flexible definitions and open lists of protectable works, making almost every kind of authorial expression protectable, without mattering the specific form of expression¹⁷. This is different from countries like the United Kingdom, where it is necessary for a work to fall into one of the categories of Copyright works to be protected.

Law 23 does not conceive phonograms as authorial works even though they grant protection to Phonogram Producers in respect of their phonograms as Neighbouring Rights holders. This is another big difference with Common Law countries. Lipszyc¹⁸ points out that, in Civil Law systems, Copyright law only covers intellectual creations expressed in works that feature originality and individuality. Meanwhile, Anglo-Saxon regimes allow non-creative products (like sound recordings) to be considered Copyright subject matter.

In terms of Author's rights, the act provides two sets of rights, moral and economic. The Moral Rights protect the relationship between the author and its work as a reflexion of its own being¹⁹. These rights cannot be licensed or assigned, reason

15 17 U.S.C § 408.

16 17 U.S.C § 411.

17 LIPSYC, DELIA. *Derecho de autor y derechos conexos* (Buenos Aires: UNESCO, CERLALC, Zavalía, 2006), 39.

18 *Ibid.*, p. 41.

19 ZAPATA, FERNANDO. *Estructura y contenido del derecho de autor*. Ciudad de Guatemala, 2000, p. 6. Documento preparado para el “II Seminario Centroamericano sobre Propiedad Intelectual para Catedráticos Universitarios”.

why the quality of author stays with the creator of the work until the extinction of the rights, even if he/she assigns or licenses the economic rights²⁰. Article 30 of the act grants the moral rights of Paternity, Integrity, Anonymity, Modification and Withdrawal. Moral Rights are relevant within Colombian jurisdiction since they have been elevated to the category of fundamental rights by Colombian Constitutional Court²¹. In practical terms, this consideration gives substantial and procedural priority to the defence of Moral Rights of author and legitimates the use of the “Acción de Tutela”, which is the Colombian equivalent to what in other Latin American jurisdictions is known as “Acción de Amparo”.

The Author’s Economic Rights are rights that allow exploitation by assignment or licence. These rights have been heavily affected by the introduction of the Law 1915 of 2018. Originally, Article 12 of Law 23 only provided three exclusive rights: Reproduction, Translation/Adaptation and Communication to the Public (without Making Available to the Public). For a long time before the issuing of the Law 1915 of 2018, Colombia has been part of International Treaties that raised the standard of protection for authors, by creating new rights that were never implemented in the country’s legislation. Examples of this are the TRIPS Agreement (1994), which, since the decade of the 90’s, created the Rental Right for software and films²², and the WIPO Copyright Treaty (WCT)²³, which created the rights of Making Available to the Public and Distribution.

The article 3 of Law 1915 levels Colombian legislation to the Author’s standard of protection set up by the international treaties, by replacing the original Article 12 of Law 23 of 1982 offering now six exclusive rights for authors: Reproduction, Communication to the Public (including Making Available to the Public), Distribution, Right to Authorize the Import of Copies, Rental and Transformation.

Regarding Neighbouring Rights, the original Article 166 of Law 23 only listed the rights of Fixation, Communication to the Public/Broadcasting of fixed performances and Reproduction of fixation for performers. Article 7 of Law 1915 levels the national law to the standard set by the WIPO Performances and Phonograms Treaty (WPPT) by amending Article 166, which now concedes the rights of Distribution, Rental and stand-alone Making Available to the Public.

Phonogram producers have been the most benefited rights holders by the promulgation of the new Law 1915 of 2018. Previous to the amendment, Article 172 of Law 23 only provided the exclusive right of Reproduction. The new law, in its article 8, added to the right of Reproduction, the rights of Distribution, Importing, Rental and a stand-alone right of Making Available to the Public. This also follows what the WPPT provided in regards of phonogram producers.

20 ROGEL, CARLOS. *Derecho de autor* (Barcelona: Cálamo, 2002), 29.

21 Corte Constitucional de Colombia, Sentencia C-734 de 2000, Magistrado Ponente Vladimiro Naranjo Mesa.

22 LIPSZYC, DELIA. *Nuevos temas de derecho de autor y derechos conexos* (París: UNESCO, 2004), 50.

23 *Ibíd.*, p. 127, 138.

Broadcasting Organisations rights have not been modified by Law 1915. Article 177 of Law 23 provides the rights of Rebroadcasting, Fixation and Reproduction of a fixated broadcast.

Regarding litigation in cases of infringement, Colombian regime provides civil and punitive actions. Through the civil remedies, copyright owners may seek for the payment of damages, following to the rules of the Civil Code²⁴; the criminal action allow to seek for punitive damages and prison sanctions²⁵. Colombian law does not provide the option of recovering statutory damages instead of actual damages, differentiating from regimes like United States²⁶.

Limitations and exceptions

Having summarized the rights, it is pertinent to mention the relevant and applicable limitations and exceptions provided by Colombian Copyright legislation. The summary does not make mention of limitations and exceptions which are not necessarily relevant for uses made of works in the context of Social Media.

Law 23 of 1982 provides separate sets of limitations and exceptions to Authors' Rights (Listed in Chapter III of the act) and Neighbouring Rights (listed in Article 178). For Author's Rights there are four provisions relevant for Social Media uses of works: Quotation (Article 31) which covers the common act of making brief mentions of a previously (and legally) published works into a new work in order to make more intelligible the opinions expressed in a work²⁷. Use of works about current news disseminated by the press (Article 33), which is the use made of headlines, pictures, illustrations and commentaries published by press provided that such use was not expressly prohibited and uses of works permanently placed in public spaces²⁸ (Article 39). From the side of the Neighbouring Rights one relevant provision can be mentioned: uses of small portions of protected subject matter for purposes of reporting current news [Article 178(B)].

Article 16 of the Law 1915 of 2018 adds a set of new limitations and exceptions, in which the most relevant provision for uses of content in Social Media is the parody and caricaturing exception [Article 16 (D)], which allows the transformation of published literary and photographic works provided that such use is made with parody and caricature objectives and does not imply risk of confusion with the originary work. The amendment does not provide any precise definition of what should be considered a parody or an act of caricaturing, which might leave some empty spaces in regards of application of the law to certain acts, as will be seen in Section "Colombian copyright regulation applied to instagram stories and smi's endorsement activities".

²⁴ Article 29, Law 195 of 2018 and Articles 2341 and 1614 of Colombian Civil Code.

²⁵ Articles 270 to 272 of Colombian Criminal Code.

²⁶ 17 U.S.C §504(c).

²⁷ Lypszyc, Op. cit. 17, p.41.

²⁸ In regards of architectural works, the exception only applies in respect of their exterior.

Addition of stand-alone provisions for the protection of Technological Protection Measures (TPM's) and Rights Management Information (RMI)

Articles 12 and 33 of Law 1915 of 2018 has fixed some of the main weaknesses of Colombian Copyright legislation in respect of standards set up by the WIPO Treaties of 1996. One of the most important additions is that of protection for TPM's and RMI's. Article 12(A) creates civil responsibility to whom *“Without authorization circumvents the effective technological measures placed to control the access to work, performance or execution or phonogram protected, or that protect any copyright or any neighbouring right in respect of unauthorized uses”* (Own Translation).

Article 12(B) places civil responsibility for the manufacturing, importing, distribution, offering to public and overall commercialization of devices, products or components, which (i) are promoted with the purpose to circumvent a TPM, (ii) have a limited commercial purpose different to such circumvention or (iii) are designed, produced or executed mainly with the goal of allowing or facilitating the circumvention.

Article 12(C) creates responsibility for who (i) removes or modifies Rights Management Information of works (ii) distributes such information or (iii) distributes, imports, broadcasts, communicates or makes available copies of works with such alterations. Paragraph II of the article defines RMI as information attached by any means to the work that identifies the work being used, the rights holders and the terms and conditions of exploitation of the work.

Article 33 of Law 1915 modifies the Article 272 of Colombian Criminal Code, to add punitive sanctions for the elusion of TPM's, the commercialization of TPM circumventing elements and copies of works with altered RMI.

The provisions on TPM's and RMI match the standard set up by the WCT treaty, which does not create a specific drafting model of the provisions. However, the article shows all the legal elements that lobbying rights holders' organisations like the International Federation of the Phonographic Industry (IFPI) recommend including in sample implementing legislations, to provide what they consider “an adequate level of protection”²⁹. In regards of TPM's, such recommended elements are (i) protection to access and copy control mechanisms, (ii) prohibition of infringing acts of circumvention, (iii) protection against circumvention devices but also mention to products and components³⁰, (iv) protection against the manufacturing of circumventing devices, and (v) effective remedies. The provision on RMI also follows many of the recommendations made by the IFPI for the drafting of RMI regulation³¹: it includes (i) definition of the concept of RMI, (ii) protection

29 International Federation of the Phonographic Industry IFPI. The WIPO Treaties: Technological Measures, [Online]. 2003 [reviewed 7 March of 2019]. Available through: <https://www.ifpi.org/content/library/wipo-treaties-technical-measures.pdf>

30 According to IFPI, this mention expands the scope of protection to include small components, circumventing software and access codes.

31 International Federation of the Phonographic Industry IFPI. The WIPO Treaties: Pro-

against manipulation of RMI and (iii) prohibition of dissemination of copies with altered RMI.

The inclusion of these “Rights Holders-friendly” elements in the drafting of Law 1915 has relevance in regards of SMI’s and *Stories* on Instagram because such rules match the interests of a group of economic actors (recording companies in this case) that have been heavily affected by digital infringements during the last 20 years. Such elements have an influence in the way in which law is applied to digital uses of works, like Instagram *Stories*, and could give signals of the way that, in the near future, those right holders will start interacting with SMI’s over copyright licencing and controversies.

ANDEAN DECISION 351 OF 1993 PROMULGATED
BY THE COMMISSION OF THE CARTAGENA AGREEMENT

Colombia, as part of the Andean Community of Nations³² is obligated by the decisions issued by the Commission of the Cartagena Agreement. The Andean Decision 351 of 1993, promulgated by such entity, is part of the category of derivative or secondary law norms within the legal framework of the Andean Community.

The decision is a comprehensive regulation of Copyright and Neighboring Rights, which mostly replicates the existing rights and provisions of Colombian legislation and International Instruments, but adds relevant provisions in regards of Collective Management Organizations and institutional organization of member states in regards of copyright management. The Andean Decision 351 is an regulatory instrument of direct application that has prevalence of application in case of contradiction with national law³³.

COLOMBIAN COPYRIGHT REGULATION APPLIED TO
INSTAGRAM *STORIES* AND SMI’S ENDORSEMENT ACTIVITIES

Having summarized Colombian domestic Copyright Law, this section will make a summary of the specific works, uses and rights recognized in current Colombian Copyright regulation, which are involved in the acts that SMI’s perform through Instagram *Stories*.

tection of Rights Management Information, [Online]. 2003 [reviewed 7 March of 2019]. Available through: <https://www.ifpi.org/content/library/wipo-treaties-technical-measures.pdf>

32 Which could be understood as a similar (and considerably less influential) countries integration body to the European Union.

33 PLATA, LUIS CARLOS y YEPES, DONNA. Naturaleza de las normas comunitarias andinas. [Online] In Scielo (Página web) Number 39; pp. 196-223. [Reviewed 29 April of 2019]. Available through: http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0121-86972009000100008

PROTECTABLE WORKS, POSSIBLE USES, RIGHT HOLDERS
AND RIGHTS INVOLVED, LIMITATIONS AND INFRINGEMENT
CLAIMS RELATED TO INSTAGRAM *STORIES*

Instagram *Stories* involve the creation or use of expressions that can be considered photographic works, film works, literary works, musical works, sound recordings and broadcasts according to Colombian Copyright Law. A brief description of the way in which these works are involved in Instagram *Stories* is made:

Photographic and Artistic Works

Subject Matter definition

Although article 8 (A) of Law 23 of 1982 provides an open list definition of “*Artistic Works*”³⁴, where photography works, like pictures used on *Stories* by SMI’s, are included as protectable expressions, these subject matter concept and definition contradict the ones for “*Artistic Works*” set up by article 3 of the Andean Decision 351 of 1993. That article expressly excludes photographic works from the definition of *Artistic Works*. As it has been said before, the Andean Decision has prevalence of application in case of contradiction with domestic legislation. The “*Artistic Works*” category may be applied to *Stories*, when such posts involve the indirect reproduction of *Artistic Works*, as it will be seen.

Article 3 of the Andean Decision does not provide an specific definition of what Photography is, however, article 4(i) indicates that “*Photographic works*” and those expressed by analogous mechanisms are protected works.

Possible uses of Photographic and Artistic works

– *Photographic works as main content of a post*: Primarily, *Stories* posts consist of instantly taken pictures (using the device’s camera) or imported copies of images. The importation of copies of image files to be posted is an act of direct reproduction of the works, while the posting of an instantly taken picture where a complete photographic (a printed photograph) or artistic work (a painted picture) is captured can be considered an act of indirect reproduction.

– *Photographic and Artistic works as superposed images*: The editor provides the next options for placing superposed images, over the main post: (i) stickers pro-

³⁴ According to Guzmán, Copyright legislations avoid providing an objective definition of “*Artistic Work*” due to the incompatibilities that such conceptualisations might have with certain forms of art, like contemporary art. For this reason, the use of open list definitions, which is the case of Colombian Domestic Law, is more favourable to the inclusion of new forms of artistic expression. GUZMÁN DELGADO, DIEGO FERNANDO. *Derecho Del Arte: El derecho de autor en arte contemporaneo y el mercado del arte*. Bogotá: Universidad Externado De Colombia, 2018, p. 36.

vided by Instagram's library, (ii) hand drawn images (using the brush tools), and (iii) instantly shot pictures (using the device camera). As it has been said, instantly shot images may involve the indirect reproduction of a third party photographic or artistic work.

Right holders, rights involved and infringement claims

– *Author*: In the case of main pictures taken with the device camera, the author will be the person who takes the picture, unless the picture consists of a complete or substantial reproduction of a third party Photographic/Artistic work, where the rights holder will be the owner of such work being reproduced. In the case of the superposed images, the person who takes the camera-shot superposed picture, or makes a drawing with the drawing brush tools, will be the author. In most of the cases of device camera shot pictures, the owner of the Instagram account is the one who takes the photography, which is the case of several SMI's.

The consideration of first ownership by the mentioned subjects takes into account the fact that on Instagram's Terms of Use, the provider of the service does not reserve ownership of the content posted by its users³⁵. Finally, in respect of images available on the Instagram's library of stickers, the person who first created the illustration would be the author of such image.

The rights that the author and initial rights holder could enforce by cause of the use of an image of its authorship on a *Story* are:

- Moral Rights: Paternity, Integrity, Anonymity, Modification, and Withdrawal.
- Economic Rights: Reproduction, Communication to the Public (including Making Available to the Public), Transformation and Synchronization.

The relevance of the addition of the right of Making Available to the public by Law 1915 of 2018 is a point where debate could arise in relation with Instagram *Stories*. Initially, it could be said that *Stories* incorporate an element of interactivity that allows the public to access the work from the time and place that they want, giving place to an act of Making Available to the Public: the posts can be played several times and paused during presentation by the viewers (by pressing and holding the screen) during the initial 24 hours of availability, or permanently if the post is added to the *Story Highlights* section.

In contrary, it could be argued that, on Instagram *Stories*, the element of interactivity which generates the Making Available Right is not present, since the user does not have any knowledge or control of what content is going to be played before pressing the “play” button of the post; it could be a picture or a video, but

³⁵ See Instagram's terms of service, under subtitle “Permissions You Give to Us” in Instagram INC. Terms of Use. [Online]. In: Instagram Help Centre, 19, April, 2018 [reviewed March 8 of 2019] Available through: https://help.instagram.com/581066165581870?helpref=faq_content accessed 5 August 2018.

it depends only on the choice of the person posting the *Story*. A similar situation to webcasting services, where the user interaction is limited to starting and stopping the “on the air” transmission, without having a choice on skipping the actual work being played, forwarding or rewinding it.

Rights holders organisations like the IFPI favour a strict interpretation of the interactivity element, in which the right of making available is generated where any element of interaction is present, even if the user does not get to choose the work that he/she is accessing³⁶. In other jurisdictions, web-casting services have traditionally opposed to such interpretation of the right, questioning the interactivity of the access to the works³⁷.

In the opinion of the author of the present essay, it must be stated that the Making Available Right of Law 1915 of 2018 should be applied to Instagram Stories, mostly due to the element of permanence that the posts bear. Even though, initially, the followers of the account do not have knowledge or control of the content that they will have access to, the fact that the posts can be accessed repeatedly during the first 24 hours after the first publication, and that they can be made available permanently when added to the *Story Highlights* section of the account owner’s profile, makes stories posting interactive enough to be considered an act of making available to the public. In addition, the controls of pausing and skipping and/or going to previous posts, are considerably more interactive than case scenarios like webcasting services, where the user only has control over starting and stopping of a non-controlled transmission.

– *Assignee and/or licensee*: Article 182 of Law 23 provides that right holders can assign their Economic Rights totally or partially. Article 12 provides that the exclusive Economic Rights of the authors allow doing and authorizing any of the protected actions. Finally, paragraph 1 of Article 30 provides that Moral rights cannot be assigned or waived. These sources are the legal foundation by which Author’s rights can be assigned or licensed by contract. The effect of such contracts allows the receiving party to perform and prohibit the uses covered by the Economic Rights transferred or licensed.

In regards of Instagram *Stories* and Photographic works, images taken, drawn and edited by any user (which includes SMi’s) are subject to an automatic license in favour of Instagram, Inc., which comes from the service’s Terms of Use:

(...) We do not claim ownership of your content that you post on or through the Service. Instead, when you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby

36 International Federation of the Phonographic Industry IFPI. The WIPO Treaties: ‘Making Available’ Right, [Online], 2003 [reviewed 7 March of 2019]. Available through: <https://www.ifpi.org/content/library/wipo-treaties-making-available-right.pdf>

37 On this topic, please refer to HARDMAN, TYLER. Webcasting and Interactivity: Problems and Solutions. In *Boston University Journal of Science and Technology Law*, 17, (2011): 290.

grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (...).³⁸

Adjusting the wording of the license clause to the rights available in Colombian regime, it can be said that the rights licensed to Instagram, Inc. are the Economic Rights of Reproduction, Distribution, Communication to the Public (including the Making Available to the Public) and Transformation.

Away from the automatic license in favour of Instagram by users, licenses are heavily involved in endorsement activities of SMI's. In the cases of bigger influencers (mostly entertainment and sports celebrities and in some cases internet celebrities) the sponsors will usually provide all the licenced content to the SMI for him/her to upload it as a *Story*. Such provision of the licensed content may be part of the contract in a sub-license where the rights of Reproduction and Communication to the Public (Including the Right of Making Available to the Public), will be included, allowing the influencer to make a very specific use of the content.

The direct reproduction and posting of images in *Stories* provided and licensed by sponsors is not the usual custom in endorsement activities by medium and small SMI's through Instagram *Stories*. What is more common for them is to make spontaneous posts using instantly shot pictures edited with the tools provided by Instagram, where they include the products being endorsed. In these cases, no license takes place since the SMI's are the actual authors and right holders of such image.

In some occasions SMI's may make reference to artists that they endorse by taking a picture of an artistic work or reproducing directly a file with the picture owned by the earlier. This scenario is very frequent between models, fashion and art influencers, who usually mention the Instagram username of the photographer who took the specific photograph or the artist who created the artistic pieces that they upload. In these cases, it can be said that non-written licenses take place between the authors of such Photographic works and the SMI's, who in this scenarios turn into licensees of the rights of Reproduction, (act that takes place by taking a copy of the picture), Communication and Making available to the Public (by posting the picture on a service which enables access to the picture in terms compatible with the Making Available right), and, in some cases Transformation (by adding edition elements to the picture).

Finally, mention must be made of licenses that, apparently, take place in regards of the built-in stickers offered by Instagram to the users. Instagram website makes mention of the artists that create particular sets of stickers offered by the application in special dates of the year³⁹. The statements made in these blogs by

38 Op. cit., 34.

39 Instagram INC. Meet the Artists behind the Kindness Stickers in Instagram Stories, [Online] In: Instagram Info Center, 26, September of 2017 [reviewed 5 August 2018]. Available through: <https://instagram-press.com/blog/2017/09/26/meet-the-artists-behind-the-kindness-stickers-in-instagram-stories/> accessed 5 august of 2018.

the service operators allow presuming that the stickers added to the Instagram library are usually object of an assignment or license transaction from such authors in favour of Instagram, Inc.

– *Infringement claims*: In contrast of the friendly scenario of the mentioned non-written licenses, sometimes the direct reproduction of pictures taken by third parties and its posting by SMI's trigger the appearance of copyright claims by the rights holders of such works. Colombia has not been yet scenario of such cases, but the US social media environment presents several lawsuits filed by first party owners of pictures against famous SMI's and brands, for posting paparazzi taken pictures in their Instagram accounts. Examples are the supermodel Gigi Hadid⁴⁰, TV celebrity Khloe Kardashian⁴¹, singer Jessica Simpson⁴², and the brand Versace⁴³. Many of these cases end up being settled by the parties.

One of such cases ended up in a US District Court ruling against the publisher of the famous Magazine *Esquire*, not exactly for posting a picture on its Instagram account, but rather for using a third party picture obtained from an Instagram account, taken by a person different than the account owner, for one of its articles⁴⁴.

Limitations and exceptions applicable to the use of Photographic works

The limitations to the rights of Authors and Rights Holders of Photographic works, which may be applied to the uses made of images on Stories are those of quotation (Article 31), use of works of current news disseminated by the press (Article 33), use of works permanently placed on public spaces (Article 39), and the recently added parody and caricaturing exception [Article 16 (D) Law 1915].

The *quotation exception*, in its specific wording, may be used as a defence by an SMI when using photographic/artistic works as superposed images captured with the device camera on a post, since such uses comply with the objective require-

40 Gigi Hadid is Being Sued - Again - For Posting a Copyright-Protected Image of Herself on Instagram [Online] In The Fashion Law [Online]. 28, January, 2019 [reviewed 24 April 2019] Available through: <http://www.thefashionlaw.com/home/gigi-hadid-is-being-sued-again-for-posting-copyright-protected-image-of-herself-on-her-instagram-account>

41 McLaughlin, Kelly. Exclusive: Photo agency that sued Khloe Kardashian for more than \$175,000 after she shared THIS photo on Instagram agrees to dismiss its case. [Online] In: Daily Mail. 22, February, 2018 [reviewed 24 April 2019] Available through: <https://www.hollywoodreporter.com/thr-esq/khloe-kardashian-sued-posting-a-photo-khloe-kardashian-instagram-997650>

42 Cullins, Ashley. Jessica Simpson Sued for Posting Paparazzo's Picture of Herself on Instagram [Online]. In The Hollywood Reporter [Online]. 26, April, 2017 [reviewed 24 April 2019] Available through: <https://www.hollywoodreporter.com/thr-esq/khloe-kardashian-sued-posting-a-photo-khloe-kardashian-instagram-997650>

43 Versace is Being Sued for Posting J. Lo Photos on Instagram. In: The Hollywood Reporter [Online]. 24, April, 2019 [reviewed 25 April 2019] Available through: <http://www.thefashionlaw.com/home/versace-is-being-sued-for-posting-jlo-photos-on-instagram>

44 Case n.º "1:17-cv-4712-GHW" Otto v. Hearst Communications, Inc. December 12 of 2018. U.S Southern District Court, District of New York.

ments of the exception to apply: (i) using portions of a work and (ii) not being enough in quantity to consider it a hidden reproduction. The SMI who uses the image would have to fulfil the subjective requirement of referencing of the name of the work or the author. If, for example, an SMI takes a phone picture of a portion of an artistic drawing placed on a shirt, and superposes it to a *selfie* to decorate a *Story*, making reference to the name of the work and to the author, he/she will not require the permission of the owner of the work to reproduce it partially and communicate it to the public.

The mentioned scenario is not very common in *Stories*. As it was said in section “Right holders, rights involved and infringement claims”, the exercise of referencing the author of the picture involves full reproduction and posting of its work and, in many of the occasions such reproduction and referencing is supported by a non-written license granted by the author, who agrees verbally with the SMI to let him/her post the work in a *Story*.

The literal wording of the article does not allow applying the quotation exception to the full reproduction of photographic/artistic works (either by taking a copy of the picture or taking a photo of it and posting it as main content) made on Instagram *Stories* by SMI's.

The exception of uses of works permanently placed in public places is very related to Instagram *Stories* and SMI's content posting activities. Most SMI's report visits to touristic places of interest: between models, travel and lifestyle SMI's, pictures of famous sculptures, buildings street art pictures and other works permanently placed in public spaces are very popular.

A special case in regards of exceptions is that one of the uses made of Memes by SMI's on Instagram *Stories*. The *parody and caricaturing exception* can become crucial for SMI's since it may cover the use made of protected images for Memes, which are very frequently used for them in *Stories*. This is not certain due to the lack of a specific definition of parody in the new Law 1915.

In other jurisdictions, like the EU communitarian law, the parody has been defined through jurisprudence, establishing that it has two constituting elements: “*The alleged parody must first be ‘noticeably different’ from the evoked existing work and, secondly, it must ‘constitute an expression of humour or mockery*”⁴⁵” This definition cannot cover uses made of works in memes, since, although the humour or mockery expression is present, the noticeable difference with the original work is not the rule in terms of Memes posting. Usually, the Photographic works used as background of a meme are full and unedited reproductions of original works, in which the only addition is the humour caption of the meme.

In the US, parody may appear as a limitation to Copyright claims in presence of the first principle of the “*fair use*” doctrine, which takes into account the

45 Bonetto, Giacomo. Internet memes as derivative works: copyright issues under EU law, [Online], In: Journal of Intellectual Property Law & Practice, 13, n.º 12, (2018): 989-997, Available through: <https://doi-org.ezproxy.library.qmul.ac.uk/10.1093/jiplp/jpy086>

purpose and nature of the new work: “The more ‘transformative’ the new work the less would be the significance of other factors”⁴⁶. Although parodies have a presumptively transformative value, the analytic nature of the “fair use” doctrine brings the need to frame it with the other principles in order to determine if a limitation to Copyright takes place in each case.

Colombian doctrine has interpreted the definition of parody according to the definition provided by the “*Real Academia de la Lengua Española*” in its dictionary: “*burlesque imitation*” (Own Translation)⁴⁷. Before the introduction of Law 1915 of 2018, parodies were recognized by Law 23 of 1982 as derivative works without covering them with limitations and exceptions. This made necessary to obtain a licence in order to create a derivative parody work⁴⁸. With the new amendments, considering the lack of a legislative definition, an interpretation of the concept of parody provided by Colombian doctrine would cover Internet memes, like those used by SMI’s in Instagram *Stories*.

Finally, the rights of transformation and synchronisation have special relevance in the acts of edition and in the inclusion of superposed images as stickers.

Film works

Subject Matter definition

Article 8 (S) of the Law 23 of 1982 defines film works as the fixation in a material embodiment of sounds synchronized with images, or images with no sound.

Colombian domestic law does not distinguish between film works and mere audio-visual recordings, as other Civil Law Copyright regimes do⁴⁹. This means that, any audio-visual recording can be considered a film work covered by authorial rights, even if it is a recording lacking artistic or symbolic intentions or characteristics. This matches the nature of many of the videos recorded by SMI’s on Instagram *Stories* like visits to public places or videos of daily endorsement activities.

Possible uses of the works

– *Film works as main content of a post*: A video may be the primary content of a *Stories* post. It could be either (i) an instantly shot video (using the device camera),

⁴⁶ Case & Statute Comment. Copyright-Fair Use-Parody. In *Massachusetts Law Review*, 79, n.º 3 (1994): 127-130.

⁴⁷ GUZMÁN, Op. cit., 33, p. 198.

⁴⁸ Ibid., p. 200.

⁴⁹ In Spain’s domestic law, Copyright law places originality as the determinant characteristic to differentiate “Audiovisual Work” from mere “Audiovisual Recording”, and concedes authorial rights to the authors of the earlier, and neighbouring rights to the producers of the latter. Saiz García, Concepción. *Obras Audiovisuales y derechos de autor* (Navarra: Aranzadi, 2002), 33.

which, eventually, could involve incidental inclusion of third party film works or (ii) a copy of a video previously saved in the user's device.

Right holders, rights involved and infringement claims

– *Author*: Article 95 of Law 23 provides that the authors of a Film Work are (i) the director, (ii) the author of the script, (iii) the soundtrack composer and the drawer or drawers when the film is an animation. By virtue of Article 99, the director is the owner of the Moral Rights of Article 30 over the film as a whole, and the other contributing authors own such rights in regard of their contributions.

Authors of a Film Work have also a not waivable (not assignable or licensable) right of equitable remuneration for the communication to the public (including the making available) and rental of the film. This remuneration right is a fairly recent addition made by article 1 of the Law 1835 of 2017. Likewise, by effect of this amended article, the authors of a film work will only hold the Economic rights (Reproduction, Communication to the Public including Making Available to the Public, Transformation and Synchronization) of the work by virtue of a contractual provision.

In regards of *Stories* the author of an instantly shot video will be the person who records it, which, in the majority of cases it's the owner of the account. When the video is an imported file saved on the user's device, the author can be either the account owner (if he/she recorded, directed, wrote the script for, composed music for or drawn the animations of the imported video) or a third party (if instead its person who performed any of the mentioned acts).

As in the case of images, the rights of Making Available, Transformation and Synchronisation have a special relevance in regards of, respectively, the Interactive access that followers have to the posts, the addition of superposed animations and text, and the possibility of incidental inclusion of footage through an instantly shot video.

It must be stressed that, SMI's who record videos for their *Stories* will not obtain any initial Neighbouring Rights as "film and/or video producers" or any similar role, since Colombian law does not recognize such specific actors as Neighbouring Rights holders.

– *Performers*: Article 4(B) of Law 23 recognizes Performers as Rights Holders in regards of their performances. Article 8 (K) defines a performer as the person who performs or executes an artistic or literary work.

The performers in the context of films may be actors, voice actors, singers and dancers between others. The exclusive rights of Fixation, Communication to the Public of fixed performances and Reproduction of Fixation may be affected by Instagram *Stories*.

SMI's activities through *Stories* might affect the Performers' rights in relation to a Film when copies of previously made videos are reproduced directly from the device of the account owner or when videos of footage in which the performance

is fixed are recorded with the device's camera. The best examples of this are *Stories* where the video posted contains footage of the trailer of a movie, where an SMI promotes such film. In these more formal cases, what is most common is that the rights of performers over their performances have been licensed or assigned either by a written or unwritten contract in favour of the producer of the film. This reduces the possibilities of seeing any kind of claim for an act infringing performers' rights.

– *Producers as assignees*: It has been already said that Law 23 of 1982 contains provisions that allow Authors and Neighbouring Right holders to assign or license their Exclusive Economic Rights to third parties. Therefore, the assignee or licensee can exercise such rights when the relevant Film work is used in a *Stories* post.

Producers appear as possible assignees since the article 98 of Law 23 (amended by the Law 1.835 of 2017) creates a legal presumption of assignment of the exclusive Economic Rights from Authors in favour of the producer. This assignment only operates when no contrary clause has been provided in contract. Then, producers who are assignees of film works can be rights holders of videos used by SMIs in their Instagram *Stories*. Even the SMI's could be assignee producers in respect of a film work, when they finance and make production tasks in the creation of the video that they are posting.

– *Assignees and/or licensees*: SMI's could be assignees or licensees of the rights over a film work when developing endorsement activities. The licensing in respect of use of videos by SMI's in *Stories* posts is very frequent in regards of music video clips, TV series, realities and movie trailers, where the influencer may post footage of the content which has been directly provided by the sponsor to promote it with its audience, as part of an endorsement contract.

– *Infringement claims*: Nor Colombian or International social media environment shows famous judicial controversies regarding uses of video content on Instagram posts; however, the same reasoning that supports the appearance of infringement claims against SMI's for using third party images in their posts (including *Stories*) may be applied to the posting of videos.

Limitations and Exceptions applicable to the use of film works on Instagram Stories

The most relevant limitations applicable to the uses of Film Works on Instagram Stories are: use of works of current news disseminated by the press (Article 33) use of works permanently placed on public spaces (Article 39) and parody exception [Article 16 (D) Law 1915].

The parody exception considerations made in section “Limitations and exceptions applicable to the use of Photographic works” are applicable to film works in regards of SMI's who post videos with humour sketches. It is very usual to see the use of fragments of TV shows, movies, and music videos to create video memes, and parodies of such works, which then are shared through *Stories*.

The exception of use of works of current news disseminated by the press acquires more value in regards of film works in the context of sports content SMI's since, *prima facie*, it would allow them to use footage of the highlights of particular sporting events in their *Stories* (provided that the Copyright owner does not prohibit such uses expressly). Same case for the exception of use of works permanently placed on public spaces, which is relevant in the posting of video *Stories* reporting visits to touristic places of interest.

Literary Works

Subject matter definition

Article 8 does not provide an exact definition of what Literary works are, however, Article 2 establishes in its open definition that any kind of literary creations are protectable, which makes text written or pictured in a Story protectable by Copyright.

Possible uses of the works

– *Text copying*: The application allows adding text lines without limit of characters. Direct copying of pieces of text in a single post is not a major infringement risk for rights holders of literary works, considering that the size of the screen limits the amount of words that can be actually read after posted. However, Stories have copying risk due to the fact that several *Stories* can be posted one next to the other. This would allow for the progressive addition of small excerpts of a literary work, to the point of completing the reproduction of a substantial part of a work, which could amount to an infringement.

– *Reproduction by taking or importing a picture with portions of text*: An instant picture or an imported image of pieces of a literary work (pages of a book for example) posted on a Story could be considered an act of partial (and possibly non-substantial) reproduction. As said, the risk of substantial reproduction appears considering that several posts can be published one next to the other, eventually allowing the accumulation of substantial portions of the work.

Right holders, rights involved and infringement claims

– *Author*: The writer of the text is the author and first rights holder by virtue of Article 4(A) and Article 9, and can exercise all the Economic Rights of Article 12 and Moral Rights of article 20.

– *Assignee and/or Licensee*: By virtue of the aforementioned Articles 12, 30 and 182 the Author of a Literary Work can assign or license its Economic Rights but not the Moral Rights.

– *Infringement claims*: Although it is considerably improbable to have complete reproductions of long books through Instagram *Stories*, there is a heavy risk for SMI's of attracting controversies through the posting of important sections of literary works, which could be considered substantial. Publication of spoilers of unreleased books, excerpts with important information, or even portions of academic works, may trigger controversies.

Limitations and exceptions applicable to the use of literary works

The exceptions of *quotation* (Article 31) and *uses of works about current news disseminated by the press* (Article 33) are fully applicable to the use of text in *Stories* posts. The application of these exceptions to uses made by SMI's can cover all sorts of content. The most notorious could be the posting of photos of specific pages of books made as a way to recommend audience a specific novel, which is frequently made by art, books and lifestyle influencers, provided that, when performing such acts, they make reference to the name of the book and the author (which could do by tagging the author's Instagram account on the post, for example). Sports SMI's who post *Stories* with pictures of pages of newspapers or screen captures of web news articles can also find the latter exception useful.

Musical works and sound recordings

Subject Matter Definition

Musical works are mentioned as part of the definition of Artistic and Literary Works in Article 8 (A). Meanwhile, article 8(M) provides that a phonogram is the fixation in material embodiment of sounds of a performance or of other sounds.

Possible uses of the works

– *Incidental fixation and reproduction of a musical work and a sound recording through video*: When shooting an instant video post, a musical work embodied in a sound recording may be fixated as part of the post. The successive posting of several portions of the work may amount to a substantial reproduction. This is very usual in the activities of SMI's: during the last couple of years it has become very common to see instant video Posts (in the form of *Stories* and permanent posts), with parodies of radio hits created by humour SMI's, and the posting of dancing videos with popular songs in the background (not added by video edition but rather recording the sound coming out of a sound speaker) as a form of participation in internet "challenges" like the popular "Shiggy Challenge"⁵⁰.

50 On the topic: ADU, ALETHA. Do the shiggy: What is the Kiki Challenge, how did the Shiggy trend start and what are the lyrics to Drake's In My Feelings? [Online] In

– *Direct reproduction of a synchronized musical work and a sound recording in a video:* The posting of a previously saved video including synchronized background music implies an act of direct reproduction of a portion of a musical work embodied in a sound recording. Similarly, the successive posting of several portions of the work may amount to a substantial reproduction. The direct reproduction of music synchronized in video occurs frequently when SMI's announce a new YouTube video clip to their fan base, seeking to endorse their content, or content of a third party.

In 2018, Instagram added the functionality "Instagram Music" by which users can add music to their Stories posts, from a built-in library of licenced songs⁵¹. Unfortunately for Colombian users and SMI's, this functionality is not available in the country yet.

Right holders, rights involved and infringement claims

– *Author of the musical work:* Article 2 of Law 23 provides that musical compositions with or without lyrics are protectable works. By virtue of article 4(A), the composer of a musical work will be the first rights holder and will be entitled to exercise all the previously mentioned Moral and Economic Rights of Author.

– *Producer of the phonogram:* Phonogram producers are acknowledged as rights holders in Article 4(C), however they are not considered as Authors, which means that the Economic and Moral Rights of Author provided in Articles 30 and 12 do not cover them. Instead, the Phonogram Producers' rights are part of the Neighbouring Rights. The specific exclusive rights with relevance for the use of sound recordings in Stories are the rights of Reproduction and the right of Making Available to the Public due to the permanent reproduction and the interactive access that Stories provide to the involved sections of phonograms.

– *Phonogram performers:* Article 4 (B) provides that performers are rights holders in regards of their performance. Like in the case of phonogram producers, performers' rights are part of the category of Neighbouring Rights. Performers' new stand-alone right of Making Available to the Public may be involved in a Story post. Like in the case of films, the most common scenario is that the performers' rights have been assigned to the producer of the phonogram as part of the recording process, reason why it might not be probable to see claims over such rights.

– *Assignee and/or Licensee.* Assignees and Licensees of Phonogram Producers rights appear as possible rights holders by virtue of Article 182 for which they can exercise the economic Rights of Reproduction and Making Available to the Public in relation of the use of a Sound Recording involved in a *Stories* post.

The Sun 7, August, 2018 [reviewed 9 August of 2018]. Available through: <https://www.thesun.co.uk/fabulous/6890550/kiki-challenge-shiggy-trend-drake-in-my-feelings-lyrics/>

51 Introducing Music in Stories [Online] In: Instagram Info Center. 28, June, 2018 [reviewed 29 April 2019] Available through: <https://instagram-press.com/blog/2018/06/28/introducing-music-in-stories/>

– *Infringement claims*: Considering that the licensed music addition tool for *Stories* called Instagram Music has not been launched in Colombian territory, SMI's share the risks of attracting copyright legal controversies in the same way that they have in regards of videos posts.

Limitations and exceptions applicable to the use of Sound Recordings

The parody exception (with the considerations made in section “Limitations and exceptions applicable to the use of Photographic works” is essential in regards of SMI's who post humour content like comedy sketches and music video parodies since it allows him/her to use both the musical work and the sound recording as source material. The exception of uses of small portions of protected subject matter for purposes of reporting current news [Article 178(B)] might be applicable to *Stories* in relation to phonograms, for example, when using portions of podcasts in their *stories posts*.

Broadcasts

Subject Matter Definition

Article 8(N) defines a Broadcast as “the dissemination through radio-electric waves, of sound or of sounds synchronized with images”.

Possible uses of the works

Before starting this section, it must be remembered that the acts of live streaming which can be performed through the “*Live*” streaming functionality of Instagram are not being considered in this work.

– *Fixation of a broadcast in a video Story*: It is very usual that SMI's make video reports of themselves listening to the radio or watching the broadcast of a particular event: a football match, a beauty contest, a TV show. The recording on video of a broadcast can be considered an act of Fixation according to the definition provided by Article 8(T), which considers as such the incorporation of images and/or sounds on a material support sufficiently permanent or stable to allow its perception or communication.

– *Reproduction of the fixation of the Broadcast*: As Instagram saves a copy of the Story post at the user's *Stories Archive* it can be stated that an act of reproduction takes place when a fixation of a performance is posted.

Right holders, rights involved and infringement claims

– *Broadcasting organisations*: From the rights that article 177 of Law 23 provides in favour of Broadcasting Organisations, Instagram Stories may involve the rights of Fixation of a Broadcast (Literal B) and Reproduction (Literal C).

– *Infringement claims*: The same considerations for video and music content apply in regards of Broadcasts.

Limitations and exceptions applicable to the use of Broadcasts

The exception of *uses of small portions of protected subject matter for purposes of reporting current news* [Article 178(B)] acquires high relevance for SMI's. It could be interpreted that they are allowed to directly or indirectly fixate and reproduce portions of broadcasts to use them in their *Stories*. The indirect fixation and reproduction of portions of broadcasts is very frequent in the activities of SMI's and this can be seen in the posting of instantly recorded video *Stories* with portions of broadcasts of sporting events, beauty contests and award ceremonies as updates on their daily activities.

SPECIAL CONSIDERATION: HYPERLINKING THROUGH INSTAGRAM STORIES:

It has been said that Instagram allows accounts to provide hyperlinks through *Stories* posts, by which followers can access to external websites where they may get access to protected works. Current Colombian regulation does not provide a specific definition of what can be understood as an act of Communication to the Public, yet it states that it can take place “*through any medium or procedure, either by wire or wireless means*”⁵². Regarding the right of Making Available to the Public, the law states that there is a making available right when the public can choose the place and time for access of the works.

The provision of hyperlinks for the access of works through Instagram *Stories* does not seem to suit a straightforward application the mentioned rights. Several characteristics of the particular way in which hyperlinks work can bring up interpretation questions: for example, the nature of hyperlinking which, due to its technical characteristics, could be understood either as an effective act of Communication or as mere referencing act⁵³. Similarly, the form in which the work is presented once the user clicks the hyperlink may raise questions about the existence

⁵² Law 23 of 1982, Article 12 as amended by Article 3 of Law 1915 of 2018.

⁵³ On this point, please refer to Colby, Joshua. It's the end of the (online) world as we know it? The dangers of hyperlinking. *Entertainment Law Review*, 161 n.º 28 (2017): 5.

or not of an act of Making Available to the Public⁵⁴ due to the debatable presence of an interactive element in the access of content⁵⁵.

Hyperlinks provided through Instagram *Stories* could also be qualified as means of circumventing TPM's and RMI's: granting access to infringing copies of works, or to legal copies through the circumvention of pay walls, and/or the provision of codes to unlock access to software, are some examples of such acts. In order to provide legal certainty to SMI's and rights holders, Colombian Copyright Law needs to start producing case law in regards of the nature of Hyperlinking and the rights of Communication to the Public and/or Making Available to the Public.

CONCLUSIONS

The analysis made in this work allows proposing the next conclusions:

- The SMI market must be considered as a possible source of royalties, and a potential commercial ally for the development of creative industries in Colombia since their endorsement activities in favour of big, medium and small brands, which rely heavily on the use of Copyright protected works, create a lot of value and, apparently, will keep doing so in the next years.

- The great room for edition of content by users, the high numbers of audience that a SMI can reach, the possibility of permanent reproduction by users and the interactivity feature that Instagram *Stories* involve, can make these kinds of posts a heavy threat for the commercial strategy behind a creative work. This enhances the need for the Colombian Creative Sector to be aware of the way in which their protected works are used in Instagram *Stories*.

- The amendments and additions made by the recent Law 1915 of 2018 have levelled Colombian Copyright regime with the standards set by International Law instruments in regards of the protection of Copyright works in digital environments. In particular, the addition of the Right of Making Available to the Public for Authors, Performers and Phonogram Producers make Colombian system comprehensive enough to cover many of the uses made of creative works in Instagram *Stories*.

- Due to the instant nature of Internet traffic of content, many of the uses of protected works made by SMI's are covered by non-contractual licenses. The audience reach that these people can provide can be beneficial for the right holder of

⁵⁴ Which could make a big difference in regards of Neighbouring Rights, considering that for those right holders, Making Available is a stand-alone right and Communication to the Public is only a remuneration right.

⁵⁵ On this particular point, the ALAI provides a good explanation of some of the legal implications of forms of hyperlinking and sets out its position: Association Litteraire et Artistique Internationale. Report and opinion on the making available and communication to the public in the internet environment: focus on linking techniques on the internet. In *E.I.P.R.*, 36, n.º 3 (2014): 149.

a work, reason for which in many cases they grant non-written licenses to an SMI to reproduce and make available an own work through a Stories post.

– In the most formal cases, SMI's endorsement content posting through *Stories* is made in the framework of a sub-license, granted by the brand that hires them. The brand will provide the finished content to the SMI for him/her to post it in its account. The protected works (music, images, video, etc.) used for the creation of such content are directly licensed by the hiring brand with the owners of such works, and then, as part of the endorsement contract, can be sub-licensed to the SMI.

– The bigger the audience of an SMI the bigger the risk of attracting copyright infringement claims due to the uses made of third parties' works in *Stories*.

– The addition of a Parody exception by Law 1915 of 2018 is very important to protect content creation by SMI's, especially those whose activities are related with humour videos and pictures. However, the ambiguity and vagueness of the way in which the definition of Parody is made in the law might bring interpretation problems, in particular in regards of SMI's use of parody content in *Stories*.

– The addition of provisions in regards of TPM's and RMI's are crucial since, through Instagram *Stories* hyperlinking functions, several circumventing acts can be performed. Case law will be required in the near future to provide a precise interpretation of the circumstances in which hyperlinking on Instagram *Stories* can be considered a circumventing mechanism.

The listing of the proposed conclusions allows finishing the analysis proposed in the present work. The near future will show the way in which SMI's growth, their activities and their interaction with creative works will affect Copyright in Colombia.

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