Washington International Law Journal

Volume 22 | Number 1

1-1-2013

Punishing the Pen with the Sword?: Colombia's New, Extreme, and Ineffective Punishment for Plagiarism

David Cromwell

PUNISHING THE PEN WITH THE SWORD?: COLOMBIA'S NEW, EXTREME, AND INEFFECTIVE PUNISHMENT FOR PLAGIARISM

David Cromwell †

Abstract: The Colombian Supreme Court of Justice recently sentenced a professor to two years in prison for plagiarizing a student's thesis, an extreme punishment by both comparative and Colombian standards. Despite its severity and global ramifications, the decision has received little attention within the English-speaking legal community. This comment provides an overdue analysis of the case and clarifies the current state of Colombian copyright law, both on the books and on the ground. The comment argues that while the case has clarified that plagiarism is a crime in Colombia, addressing academic plagiarism through criminal punishment will likely do little to deter the behavior. The conclusion identifies major issues the case has left unresolved.

I. INTRODUCTION

In January of 1997, a recent graduate from a prestigious Colombian university opened up a literary journal to find portions of her thesis reprinted.[1] As she never submitted the work, one can imagine her confusion, particularly given that the author, a professor at her university, never cited the thesis.[2]

This discovery led to a criminal trial (the "*Giraldo* case") that culminated in May 2010 with a two year prison sentence and fines for the professor.[3] The official crime: the professor violated the student's moral right[4] to publish or not to publish an "unpublished" work.[5]

The problem with this holding is that the student's thesis was—according to the applicable statute's definition—published, sitting in her

† Juris Doctor expected in 2013, University of Washington School of Law. The author would like to thank Señor Castellanos for his help in this project. He would also like to thank his family, Lindsay, and Profesora Gómez: os quiero.

[1] Juzgado de Circuito [Juzg. Cir.] [Circuit Court], febrero 5, 2008, M.P: M. Nossa Bernal, 050-2004-0165-00, 1 (Colom.) [hereinafter *Trial Court*] *available at* http://www.derechodeautor.gov.co/htm/legal/jurisprudencia/Juzgados%20Penales/Juzgado%2050%20Penal.pdf.

[2] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Pen. mayo 28, 2010, M.P: S. Espinosa Pérez, Casación, (No. 31.403, p. 1) (Colom.) [hereinafter *Giraldo*], *available at* http://190.24.134.121/webcsj/Documentos/Comunicorte/Decisiones/FALLO%20DERECHOS%20DE%20AUTOR%2031403%20(28-05-2010)[1].pdf.

[3] *See id.* at 101-02.

[4] *See infra* Part II.A.

[5] *See Giraldo*, *supra* note 2, at 87-90.

university's library.[6] This ostensible inconsistency only scratches the surface of the decision's controversy. For instance, in affirming the sentence, the Supreme Court of Justice—Colombia's highest court of criminal appeals[7]—also acted as a pseudo-legislator, rewriting the criminal statute.[8] As a result, there is now a consensus within Colombia that plagiarism is a crime.[9] At the same time, there is also heated division amongst Colombians and confusion within the legal community over both the ruling's correctness and ramifications.[10]

Outside of Colombia, despite the Supreme Court of Justice not hearing any copyright cases since the professor's conviction, the case has produced little discussion within the English-language legal community. In order to fill this gap in scholarship and address the case's potentially global consequences, this comment provides a detailed analysis of the opinion, thus clarifying the current state of Colombia's copyright law.[11]

This comment proceeds as follows. First, it explains the importance of the case. Second, it provides an analysis of the case replete with the first English translation of the opinion. Third, it discusses the ramifications of the decision, arguing that the opinion clarifies that plagiarism is now a crime

---

[6] *Id.* at 86. For comparison, whether the work was "published," as the U.S. copyright statute defines the term, is another story. *See* Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir. 1987) (analyzing whether letters were "published" when given to a library).

[7] Antonio Ramírez & Hernando Otero, *UPDATE: An Introduction to Colombian Governmental Institutions and Primary Legal Sources*, GLOBALEX (Aug. 2011), http://www.nyulawglobal.org/globalex/colombia1.htm#judicialbranch.

[8] *Giraldo*, *supra* note 2, at 78-79; *see also* Carlos Castellanos Rubio, *Columbia's Poetic World of Authors' Moral Rights: Considerations on Imprisoning a Professor For Plagiarism,* 22 PAC. RIM L. & POL'Y J. 139 (David Cromwell, trans, 2012).

[9] Since the ruling, the Colombian National Copyright Directorate (DNDA), the entity responsible for copyright compliance, has published a user guide to copyright, in which the organization says that plagiarism violates an author's right to recognition. ALFREDO VEGA JARAMILLO, MANUAL DE DERECHO DE AUTOR, Dirección Nacional de Derecho de Autor (2010), *available at* http://derechodeautor.gov.co/htm/Publicaciones/Cartilla%20derecho%20de%20autor%20(Alfredo%20Vega).pdf; *see also* Ernesto Rengifo García, *¿Es el plagio una conducta reprimida por el derecho penal?*, 14 REVISTA DE LA PROPIEDAD INMATERIAL 303, 304 (2010) (concluding that plagiarism is now a crime); Carolina Ayala, *El paraíso del copie y pegue*, EL ESPECTADOR (Jan. 5, 2012), http://www.elespectador.com/entretenimiento/arteygente/articulo-319658-el-paraiso-del-copie-y-pegue (discussing the "crime" of plagiarism).

[10] *See, e.g.*, Jotamario Arbeláez, *Por unas comillas*, EL TIEMPO (June 2, 2010), http://www.eltiempo.com/archivo/documento/MAM-3993244 (criticizing the sentence); García, *supra* note 9 (criticizing the sentence).

[11] One note on this comment's usage of "copyright": In Colombia, the legal community most often uses the term "derecho de autor" to describe the country's protection of authors' rights. *See, e.g.*, *Definition*, DIRECCIÓN DE DERECHO DE AUTOR (Apr. 4, 2012), http://derechodeautor.gov.co/htm/quienes/definition.htm. This term translates as "author's right," "author's rights," or "authors' rights." In the United States, the French equivalent "droit d'auteur" may be more familiar. Because "copyright" is a more familiar term to English-speakers and the Colombian National Copyright Directorate translates "derecho de autor" as "copyright," *id.*, this article translates "derecho de autor" as "copyright" as well.

in Colombia, yet criminal punishment will likely do little to deter academic plagiarism. The comment concludes by addressing questions that the decision leaves unanswered.

II. WHY THE *GIRALDO* CASE DESERVES ATTENTION

As discussed above, the *Giraldo* case has received almost no discussion within the English-speaking legal community. This may not be surprising for a variety of reasons, including skepticism about the validity of the Court's rulings.[12] Still, the case deserves attention, both for its severity and—with Colombia's recent free trade agreements[13]—increased global ramifications.

A. The Punishment Is Severe By Both Comparative and Colombian Standards

To put the punishment's severity in context, it is helpful to compare the ruling with similar ones in the United States,[14] a country notorious for stringent copyright protection.[15] A preliminary point here is that the United States (nor Colombia before this case for that matter) does not punish

---

[12] *See, e.g.*, *Andean FTA Analysis: Intellectual Property Rights* (2004), WIKILEAKS (Aug. 8, 2011) http://wikileaks.org/cable/2004/04/04BOGOTA4328.html ("Though enforcement actions have redoubled in the past year, prosecution is weak and judicial action, often by judges unfamiliar with [IP], can take years."); *Intellectual Property Rights Toolkit Colombia*, UNITED STATES DEPARTMENT OF COMMERCE (June 2011), http://export.gov/colombia/static/IPR_Toolkit_Colombia%20Wash%20DC%20Final%2006-09-11_Latest_eg_co_036223.pdf ("[P]rosecutors and judges often lack specific subject matter knowledge."); García, *supra* note 9, at 314-17 (discussing inconsistent rulings).

[13] For a full list of recent Colombian free trade agreements, see *Colombia: Laws*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/wipolex/en/profile.jsp?code=CO (last visited Sept. 16, 2012).

[14] For a European comparison, see the recent plagiarism case involving German cabinet minister Karl-Theodor zu Guttenberg. Michael Kimmelman, *In Germany, Uproar Over a Doctoral Thesis*, N.Y. TIMES, Mar. 14, 2011, http://www.nytimes.com/2011/03/15/books/merkels-possible-successor-resigns-in-plagiarism-scandal.html?pagewanted=all. In that case, the court convicted Guttenberg of plagiarism, but did not hand down a criminal sanction. *See* Vanessa Fuhrmans, *Germany Drops Criminal Probe of zu Guttenberg*, WALL ST. J., Nov. 24, 2011, http://online.wsj.com/article/SB10001424052970204630904577058002872268724.html ("[zu Guttenberg] was ordered to pay €20,000 ($27,000) to a children's cancer charity, and the case was closed").

[15] *See, e.g.*, Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 409 (2009) ("The United States has among the strongest intellectual property laws in the world.") (citing Maria Nelson et al., *Counterfeit Pharmaceuticals: A Worldwide Problem*, 96 TRADEMARK REP. 1068, 1074 (2006)); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009) ("United States is an outlier in the global copyright community in giving plaintiffs in copyright cases the ability to elect . . . to receive an award of statutory damages.").

"plagiarism,"[16] the act of "steal[ing] and pass[ing] off (the ideas or words of another) as one's own."[17] In the United States, therefore, plagiarism may or may not violate copyright law. To illustrate, a person who reproduces another's work without claiming authorship of the reproduction might violate copyright law, but he has not plagiarized. On the other hand, if an artist passes off *Moby Dick*—a work whose copyright protection has expired—as his own, he has plagiarized, but he has not violated copyright law.[18]

Having established this preliminary point, the question becomes what liability—if any—the professor might have faced for the professor's act, if committed in the United States.[19] Extremely few U.S. cases of academic plagiarism reach the courtroom; institutions and professional organizations resolve most instances.[20] Still, assuming a trial occurred and the court found that the professor copied the student's original expressions—not, *inter alia*, ideas, or facts,[21] or expressions already in the public domain[22]—the professor still would not have faced criminal liability under U.S. law.[23] She did not publish for "private financial gain,"[24] as the U.S. copyright statute defines it[25]—a prerequisite to criminal punishment.

---

[16] Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions In Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 199-201 (2002).

[17] *Plagiarize*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/plagiarizing?show=0&t=1327016687 (last visited Sept. 16, 2012). This definition is consistent with the Latin root of the word, "which, at Roman law, referred to the stealing of a slave or child." Green, *supra* note 16, at 170 (citing O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 32-35 (1995)).

[18] *See* Green, *supra* note 16, at 200 ("[T]here is no infringement when copying involves work that has an expired copyright, is in the public domain, or was written by a U.S. government employee.") (citing 17 U.S.C. §§ 103, 105, 203 (1996)).

[19] Again, the United States is used because it is known as a country with strong copyright sanctions. *See supra* note 15.

[20] Green, *supra* note 16, at 199.

[21] For a discussion of the United States' idea/expression dichotomy, see ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE, 395-405 (4th ed. 2006). For a discussion of how Colombia will apply the doctrine in light of the *Giraldo* case. see Rubio, *supra* note 8.

[22] For a discussion of United States' copyright originality requirement, see MERGES, *supra* note 21, at 376-86.

[23] Note that, unlike with the Colombian case, criminal liability does not apply to violating authors' moral rights in the United States. 17 U.S.C. § 506(f) (2012). For a discussion of moral rights, see *infra* Part II.A.

[24] 17 U.S.C. § 506(a)(1)(A) (2012). The professor was not paid to publish her article. Arbeláez, *supra* note 10.

[25] While an academic journal could lead to a professor's private financial gain through reputation gain, etc., Congress intended this part of the statute to punish commercial transactions or barters. H.R. REP. NO. 105-339, at 4-5, 7 (1997). Non-commercial acts are punished only if they involve distributing goods with a value over $1,000. *Id.*; *see also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (discussing criminal liability).

Moving on to potential civil liability, proving actual damages or lost profits for copying a student thesis would likely be difficult under U.S. law as well.[26] However, U.S. copyright statutory damages are another story. These damages can range from $200 to $150,000,[27] and at least one court has reached the upper boundary in a case involving literary copyright infringement.[28]

Still, even the heaviest possible sentence the professor would have faced under U.S. law would not have involved jail time. While a U.S. court may have handed down higher civil sanctions, the Colombian Court did fine the professor[29] and also suspended some of her civic rights, such as the right to vote.[30]

More important than the case's comparative context, however, is understanding how the case fits into Colombian norms: this is the first criminal moral rights prosecution on record in the country.[31] Accordingly, the sentence's severity has caused a great deal of controversy there.[32] The media has heavily supported Professor Giraldo,[33] while academics have criticized the court's legal reasoning and consistency.[34]

Yet, since the professor's case, Colombian legislators have increased criminal sanctions for intellectual property rights violations.[35] The amended

---

[26] *See* McRoberts Software, Inc. v. Media 100, Inc., 329 F.3d 557, 566 (7th Cir. 2003) ("Actual damages are usually determined by the loss in the fair market value of the copyright, measured by the profits lost due to the infringement or by the value of the use of the copyrighted work to the infringer."). It does not appear, from newspaper articles, the trial court opinion, or the Supreme Court of Justice opinion, that the student planned on publishing her thesis for profit. Even if she did intend to do so, it seems unlikely—given that the professor, a leader in the field, published without direct payment—that the student would be able to.

[27] 17 U.S.C. § 504(c) (2012).

[28] *See* Macklin v. Mueck, No. 00-14092-CIV-MOORE/LYNCH, 2005 U.S. Dist. LEXIS 18026 (S.D. Fla. Jan. 28, 2005) (awarding maximum damages of $150,000 per poem published without authorization on website).

[29] *Trial Court*, *supra* note 1, at 17. The Court sentenced the professor to a fine of five months of the country's minimum wage. In 2010, that number was 515,000 pesos per month. *$515.000 Salario mínimo legal para 2010*, DINERO.COM (Dec. 31, 2009), http://www.dinero.com/actualidad/economia/articulo/515000-salario-minimo-legal-para-2010/89083. At the 2010 exchange rate of 1,869 pesos per dollar, that figure would amount to about 275.55 U.S. dollars. *Colombia*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/co.html (last updated Sept. 11, 2012). Colombia's 2010 GDP per capita was 9,900 U.S. dollars. *Id.*

[30] *Trial Court*, *supra* note 1, at 17.

[31] Nelson Fredy Padilla, *El fantasma de los escritores*, EL ESPECTADOR (Mar. 28, 2008) http://www.elespectador.com/impreso/arteygente/cultura/articuloimpreso-el-fantasma-de-los-escritores (noting that Colombian National Copyright Directorate has no record of other criminal plagiarism cases (or "any other" case, if you're talking about one)).

[32] *See* Arbeláez, *supra* note 10.

[33] *Id.*

[34] *See, e.g.*, García, *supra* note 9; Rubio, supra note 8.

[35] *See* L. 890/2004, julio 7, 2004, DIARIO OFICIAL [D.O.] art. 14 (Colom.), *available at* http://www.secretariasenado.gov.co/senado/basedoc/ley/2004/ley_0890_2004.html.

plagiarism statute now punishes violators with a minimum of thirty-two months in jail and maximum of ninety.[36] With the stakes now higher, the need to understand Colombian copyright law is greater than ever.

B. Colombia's Recent Free Trade Agreements Increase the Case's Global Ramifications

The importance of Colombia's copyright law has even broader consequences in the wake of Colombia's recent free trade agreements,[37] particularly with the U.S. That agreement sat in the U.S. Congress for years, partly because of trepidations over Colombia's intellectual property ("IP") protections, or lack thereof.[38] As such, Colombia has pledged to more aggressively enforce its IP laws.[39]

This pledge, in tandem with the free trade agreements, will subject more people to Colombian copyright law. As this comment will show, this heightened trade increases the risk that someone—Colombian or not—failing to adequately cite, for example, Gabriel García Marquez's *Love in the Time of Cholera* could face prison time.[40] No one understands the global reach of Colombian law better than Professor Giraldo, as she actually published her article in a Mexican literary journal.[41] In sum, the free trade agreements have not changed the court's ruling,[42] but instead made the case's ramifications global in scope.

II. BACKGROUND: COLOMBIAN MORAL RIGHTS AND GIRALDO'S TRIAL COURT CONVICTION

---

[36] Código Penal (Criminal Code) art. 270, *available at* http://www.secretariasenado.gov.co/senado/basedoc/ley/2000/ley_0599_2000_pr010.html#270.

[37] *See Colombia: Laws*, *supra* note 13.

[38] *See* UNITED STATES DEPARTMENT OF COMMERCE, INTELLECTUAL PROPERTY RIGHTS TOOLKIT COLOMBIA (2011), *available at* http://export.gov/colombia/static/IPR_Toolkit_Colombia%20Wash%20DC%20Final%2006-09-11_Latest_eg_co_036223.pdf (discussing work to strengthen IP over last decade).

[39] *See* THE EXECUTIVE OFFICE OF THE PRESIDENT, 2011 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR ANNUAL REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT, 36-37 (2012), *available at* http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_mar2012.pdf (explaining that U.S.-Colombia Free Trade Agreement contains "strong provisions to ensure that intellectual property rights are efficiently and effectively protected.").

[40] *See infra* Part III.A.

[41] *Trial Court*, *supra* note 1, at 11. Though the journal is Mexican, it also prints in Colombia. *Giraldo*, *supra* note 2, at 2.

[42] The statute the Court interpreted has not changed since the ruling. *See* Código Penal (Criminal Code) art. 270, nor has the legislature overturned the case.

Before analyzing the Supreme Court of Justice's decision, some background on Colombia's copyright regime will help set the stage. Specifically, because the Court convicted Professor Giraldo under the country's "moral rights" regime, a basic understanding of these rights will help in analyzing the case. With this context established, one can then comprehend why Colombians were confused about whether plagiarism was a crime prior to the *Giraldo* case.[43]

A. Understanding the Giraldo Case Requires an Introduction to Colombia's Moral Rights Regime

Authors' moral rights are a widely accepted concept around the world.[44] In many countries,[45] authors have both economic rights (the crux of U.S. copyright protection)[46] and also moral rights (inalienable, noneconomic interests)[47] in their work. Economic rights are authors' rights to exploit their work for profit, including the rights to publish and distribute the work.[48] Instead of publishing the work themselves, however, authors often decide to sell or license these rights to someone else—a publishing company, for instance.[49]

Moral rights, however, may not be transferred.[50] Most often associated with the work of Georg Wilhelm Friedrich Hegel,[51] scholars usually justify these rights on the idea that authors' works are an extension of themselves, and they therefore maintain a relationship with the work, even after selling the economic rights.[52] This philosophy is often called the personhood theory of copyright.[53]

Colombia offers statutory protection for the four seminal moral rights[54]—attribution, integrity, disclosure, and withdrawal—as well as the

---

[43] *See* García, *supra* note 9, at 303-04 (discussing the ruling's clarification of whether plagiarism is a crime).

[44] *See* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353 (2006).

[45] *Id.* at 353.

[46] *See id.* at 404-12 (discussing "exceptionally small group of works" the receive moral rights protection in the United States).

[47] *Id.*

[48] *See* MERGES, *supra* note 21, at 416-17.

[49] Bird, *supra* note 15, at 410.

[50] *Id.*

[51] Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 288-89 (1988).

[52] Rigamonti, *supra* note 44, at 355-56; for an extensive discussion of the philosophical justifications for IP, see Hughes, *supra* note 51.

[53] Hughes, *supra* note 51, at 330.

[54] *See* Rigamonti, *supra* note 44, at 359 (stating that France, Germany, and Italy protect the moral rights of disclosure, attribution, integrity, and withdrawal).

right to modify works.[55] The right of attribution allows an author "to demand that his name or pseudonym be mentioned."[56] The right of integrity gives the author the ability "to object to, and to seek relief in connection with, any distortion, mutilation or other modification of the work, where such action would be or is prejudicial to his honor."[57] The right of disclosure means an author may "keep his work unpublished or anonymous until his death, or after it."[58] The right of withdrawal permits an author to "withdraw [his work] from circulation or suspend any form of use."[59] Similarly, the right to modify allows an author "to alter [his work] either before or after its publication."[60]

As for sanctions, Colombia provides both civil[61] and criminal punishment[62] for violating these rights. The victim has the option of pursuing the civil action concurrent with the criminal prosecution, or in a separate suit.[63] The Office of the Prosecutor General brings those criminal prosecutions.[64]

Having established the basic workings of the country's moral rights system, one important contextual note for the case is that before *Giraldo*, there was widespread confusion in Colombia about whether plagiarism was a crime.[65] Prior to the case, the legal field was unsure which moral rights were protected by criminal sanctions.[66] The statute on point criminalizes the behavior of anyone who:

> 1) Publishes, completely or partially, without the previous and express permission of the right-holder, an unpublished work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.

---

[55] L. 23/82, enero 28, 1982, DIARIO OFICIAL [D.O.], art. 30 (Colom.), *translation available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126023.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] L. 23/82, enero 28, 1982, DIARIO OFICIAL [D.O.], art. 238 (Colom.), *translation available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126023.

[62] CÓDIGO PENAL (Criminal Code) (C. PEN), art. 270.

[63] L. 23/82, enero 28, 1982, DIARIO OFICIAL [D.O.], art. 238 (Colom.), *translation available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126023.

[64] *See* Michael R. Pahl, *Wanted: Criminal Justice—Colombia's Adoption of a Prosecutorial System of Criminal Procedure*, 16 FORDHAM INT'L L.J. 608, 629 (1992) ("The *Fiscalía's* general prosecutorial duties include acting, either on its own initiative or in response to a complaint or a formal charge, to investigate offenses, and to charge alleged offenders before the appropriate tribunal.").

[65] *Giraldo*, *supra* note 2, at 71.

[66] *Id.*

> 2) Enters into the national registry with the name of anyone other than the true author, or with the title altered or removed, or with the text altered, defaced, modified or mutilated, or the editor or producer's name falsely stated, a work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.
>
> 3) By any means or procedure, condenses, mutilates or transforms, without the previous and express permission of the right-holder, a work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.[67]

Specifically, for the purposes of plagiarism, the first paragraph's focus on "unpublished" works has led many commentators to believe that the statute protected an author's right to publish, not his right to recognition.[68] As such, before the case, the debate was whether Colombia criminally punished plagiarism of already published works.[69]

B. Procedural Posture: The Trial Court Convicting Giraldo for a Different Crime than the Prosecutor Originally Charged Prompted the Supreme Court Appeal

My analysis of the Supreme Court of Justice's opinion will address the substantive arguments on both sides of the case. In order to set up that discussion, knowing the procedural posture of the case is helpful. The *Giraldo* case begins with "El Mundo Poético de Giovanni Quessep," a student's senior thesis at la Pontificia Universidad Javeriana.[70] A professor at the same institution and eventual defendant in the case, Luz Mary Giraldo, was well known around the world for her literary critiques.[71] Her scholarship focused on the subject of Londoño's thesis, Colombian poet Giovanni Quessep.[72]

Nine months after the student completed her thesis, Professor Giraldo published an article titled "Giovanni Quessep: el encanto de la poesía"[73] in

---

[67] CÓDIGO PENAL (Criminal Code) (C. PEN), art. 270 (Colom.).

[68] *Giraldo*, *supra* note 2, at 71.

[69] García, *supra* note 9, at 305.

[70] *Trial Court*, *supra* note 1, at 1.

[71] Jotamario Arbeláez, *Por unas comillas*, EL TIEMPO (June 2, 2010), http://www.eltiempo.com/archivo/documento/MAM-3993244.

[72] *Trial Court*, *supra* note 1, at 11. Giovanni Quessep is a famous Colombian poet and professor, whose work has been published around the world. *Biografia: Giovanni Quessep*, UNIVERSIDAD DE ANTIOQUIA, http://caribe.udea.edu.co/~hlopera/La_Palabra_Viva/gq.html (last visited Sept. 16, 2012).

[73] Luz M. Geraldo, *Giovanni Quessep: el encanto de la poesía*, 2 LA CASA GRANDE 33 (1996), http://lacasagrandeonline.com/images/pdf/Lacasagrande/la%20casa%20grande002.pdf.

an academic journal.[74] The journal did not pay her for the article, which—at seven pages—was much shorter than the student's 100-plus page work.[75] The parties dispute how long Giraldo viewed the thesis, but she admits to at least looking at it.[76]

Comparing the two articles at the sentence level, even without speaking Spanish, one can see similarities. The following is an abbreviated comparison the Supreme Court of Justice made in its opinion:[77]

Giraldo	**Student Thesis**
"A partir de este libro, Giovanni Quessep se distancia del tono sentencioso y aprovecha la potencialidad de la metafórica para establecer nuevas relaciones y multiplicidad de significados."	"A partir de este libro Canto del Extranjero, Quessep deja a un lado el tono sentencioso que permaneció anteriormente, aparece la sentencia ahora muy pocas veces, porque el sendero que elige el poeta es la exaltación de la metáfora; a través de ella, logra establecer nuevas relaciones que propician la multiplicidad de significados."

Keeping in mind that the work on the left (the professor's) was significantly shorter, the similarities are striking. For instance, a translation of the professor's opening phrase above reads, "[a]fter this book, Giovanni Quessep distanced himself from the sententious tone." While the student's states, "[a]fter this book, *Canto del Extranjero*, Quessep left behind the sententious tone."

To the student, at least, the works were similar enough for her to bring plagiarism allegations to the attention of the university. When the university's investigation cleared Professor Giraldo of any wrongdoing,[78] the student filed a complaint[79] with the Office of the Prosecutor General

[74] *Trial Court*, *supra* note 1, at 2.
[75] *Giraldo*, *supra* note 2, at 84.
[76] *Trial Court*, *supra* note 1, at 17.
[77] *Giraldo*, *supra* note 2, at 97 (emphasis added). The Court continued the side-by-side analysis for seven more paragraphs. *Id.* at 97-99.
[78] *Trial Court*, *supra* note 1, at 11.
[79] *Id.* at 23.

("Fiscalía").[80] The Prosecutor General eventually decided to charge the professor under the moral rights regime.[81] Because the professor made slight changes in the student's thesis, the prosecutor charged her with violating the author's right to integrity through "condensing, mutilating or transforming" the work.[82]

In a controversial move,[83] however, the trial court convicted Giraldo, but for a different crime. Instead, the court said the professor "published" the student's "unpublished" work.[84] The opinion states that such a change "certainly" did not violate any of the author's fundamental rights, because the punishment was for the same action—plagiarizing—and under the same moral rights statute, just a different paragraph.[85] Because Professor Giraldo had no prior convictions, the court sentenced her to the statutory minimum of two years in jail and a fine. The Court also suspended the professor's public "rights and functions"—such as her right to vote—during jail time.[86] A detail much of the Colombian press overlooked,[87] however, is that the Court suspended the sentence, finding the professor's behavior was not "recurrent" or "repetitive."[88]

III. AN IN-DEPTH ANALYSIS OF THE SUPREME COURT OF JUSTICE'S CONTROVERSIAL DECISION

The Supreme Court of Justice's decision has produced much controversy in Colombia,[89] yet has received almost no discussion in the English-speaking legal community.[90] Because of this void and to present the

---

[80] *See* Pahl, *supra* note 64, at 619 ("The *Fiscalía's* general prosecutorial duties include acting, either on its own initiative or in response to a complaint or a formal charge, to investigate offenses, and to charge alleged offenders before the appropriate tribunal.").

[81] *Trial Court*, *supra* note 1, at 15-17.

[82] *Id.*

[83] For a discussion of the case's controversy, *see* Arbeláez, *supra* note 10.

[84] *Id.* at 24.

[85] *Trial Court*, *supra* note 1, at 24.

[86] *Id.* at 27-28. As her university is private, however, this did not prevent Professor Giraldo from continuing to teach. This is a moot point, however, as Giraldo retired in 2009. *Condenan a catedrática por plagio*, VIVE.IN (May 31, 2010), http://bogota.vive.in/libros/articulos/mayo2010/ARTICULO-WEB-NOTA_INTERIOR_VIVEIN-7733605.html.

[87] *El caso de Luz Mary Giraldo: consideraciones extemporáneas*, EL MALPENSANTE, http://www.elmalpensante.com/index.php?doc=display_contenido&id=1659 (last visited Sept. 16, 2012).

[88] *Trial Court*, *supra* note 1, at 28. While a "suspended" sentence may take some of the severity away from the case, the fact that Colombia has since doubled the punishment casts doubt on whether courts will continue to suspend sentences. Further, even if courts did suspend sentences, this would create a variety of other concerns. *See infra* Part IV.C.

[89] *See* Arbeláez, *supra* note 10.

[90] My research has uncovered no law review articles. Similarly, a Google search of "Giraldo Colombia plagiarism" and other similar searches uncovered very few English articles addressing the case. *See Google Search Results*, GOOGLE, https://www.google.com/search?q=giraldo+colombia+plagiarism&rlz

case to an English-speaking audience, the following section will not only analyze the Court's decision but also provide abundant translations of the original text.

A. The Supreme Court Spent the Bulk of Its Opinion Clarifying the State of Colombian Copyright Law

On appeal, the question that reached the Supreme Court of Justice was whether the trial court, by convicting the professor of a different crime than the prosecutor charged, violated her fundamental rights as a defendant.[91] Interestingly, the Court spent scant time on this issue,[92] upholding the conviction because the trial court punished the same conduct originally alleged (plagiarizing the thesis), both crimes had the same punishment, and both crimes were moral rights violations.[93]

The Court instead spent the bulk of its decision clarifying the state of moral rights law in Colombia. The opinion begins by establishing that these rights are "fundamental" human rights in Colombia, basing this assertion on the country's statutory regime,[94] international agreements,[95] previous court decisions,[96] and a constitutional guarantee of IP protection.[97]

In what appears to be a response to Professor Giraldo's defenses, the Court then clarified the scope of copyright protection in Colombia.[98] Professor Giraldo had argued that her scholarship provided the basis for the student's thesis.[99] The Court explained that ideas themselves do not receive protection in Colombia, only the expression of ideas.[100] Further, these

---

=1C1SKPC_enES362US393&sugexp=chrome,mod=16&sourceid=chrome&ie=UTF-8 (last visited Sept. 16, 2012).

[91] *Giraldo*, *supra* note 2, at 4-8.

[92] Though the Court's opinion is over 100 pages long, it spends only two pages on this issue. *See id.* at 89-91.

[93] *Id.* at 89-90.

[94] *Id.* at 13-16, 19.

[95] *Id.* at 13, 20-21 (citing Andean Community Decisions); *id.* at 15 (citing the Berne Convention); *id.* at 18 (citing the 1948 UN Human Rights Charter); *id.* at 22 (citing the Rome Agreement of 1961**)**. Colombia is a party to the Andean convention and therefore subject to that court's judicial decisions. *See* Camilo A. Rodriguez Yong, *Enhancing Legal Certainty in Colombia: The Role of the Andean Community*, 17 MICH. ST. J. INT'L L. 407, 430 (2008).

[96] *Giraldo*, *supra* note 2, at 17-18, 20.

[97] *Id.* at 20 (citing art. 61). The Colombian Constitution guarantees that "[t]he state will protect intellectual property for the relevant period using the means established by law." CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 61, *translation available at* http://confinder.richmond.edu/admin/docs/colombia_const2.pdf.

[98] *Giraldo*, *supra* note 2, at 92-99.

[99] *Id.*

[100] *Id.* at 23-29.

expressions must be original,[101] in which case they receive protection from the moment of their creation[102]—no formal registration is required; courts will uphold the protection without valuing the work.[103]

Having clarified the basic requirements for protecting moral rights, the Court then discussed exceptions to these general rules. First, all authors have the right to cite others' work, as long as the citations do not interfere with the author's exploitation of the original work or harm the author.[104] In making this determination, courts analyze the extent to which the use is justified to achieve a particular end.[105] That is, the use should be to develop a particular idea.[106]

The opinion then discusses other exceptions to the prohibition on Professor Giraldo's actions.[107] Teachers have a right to use works for teaching purposes if the use is not for profit, is justified to achieve a particular end, and cites the original author.[108] Other exceptions to the law are personal use,[109] reproduction for news purposes,[110] library reproduction for archives,[111] judicial use,[112] government publication reproduction,[113] reproduction in public spaces,[114] and rights created by public employees that

---

[101] *Id.* at 29-31.

[102] *Id.* at 32-33 (clarifying that registering the work with the copyright office is not required to receive protection).

[103] *Id.* at 31-32.

[104] *Id.* at 34-41. Interestingly, the judges also discussed the United States doctrine of "fair use," saying that the doctrine achieves the same end. *Id.* at 38-39.

[105] *Id.* at 39-41.

[106] *Id.* at 39 (citing "Oficio No. 2-2006-4924, Consultar en www.derechodeautor.gov.co").

[107] *Id.* at 39-55.

[108] *Id.* at 41-42.

[109] L. 23/82, enero 28, 1982, DIARIO OFICIAL [D.O.], art. 37 (Colom.), *translation in* WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/wipolex/en/text.jsp?file_id=126023 ("It shall be lawful to reproduce, by any means, a literary or scientific work, such reproduction having been arranged or effected by the party concerned in one copy for his private use and without gainful intent.").

[110] *Id.* at art. 33 ("Any title, photograph, illustration and commentary on a current event, published by the press or broadcast by radio or television, may be reproduced in so far as this has not been expressly prohibited.").

[111] *Id.* at art. 38 ("Public libraries may produce, for the exclusive use of their readers and where such reproduction is necessary for conservation or for exchange services with other libraries, likewise public, one copy of protected works deposited in their collections or archives and which are out of print on the local market. Such copies may also be produced singly by the library that receives them, should that be necessary for conservation, and solely for the use of readers.").

[112] *Id.* at art. 42 ("The reproduction of protected works or of fragments of such works shall be permitted, in so far as it is considered necessary by the competent authority, for use in the course of judicial proceedings or by the legislative or administrative bodies of the State.").

[113] *Id.* at art. 41 ("Any person shall be allowed to reproduce the Constitution, laws, decrees, ordinances, orders, regulations and other administrative texts and judicial decisions, subject to the obligation to abide strictly by the official edition, and provided that such reproduction is not prohibited.").

[114] *Id.* at art. 39 ("It shall be permissible to reproduce, by painting, drawing, photography or cinematography, works that are permanently located on public highways, streets or squares, and to

belong to the government.[115] Finally, the Court concluded this discussion by clarifying who has rights in works created at universities.[116] The general rule is that a student holds all rights in the works unless her thesis advisor actually helped write the work, in which case the two would be co-authors.[117]

B. A "Constitutional Interpretation of the Statute": The Court's Personhood Theory Provided the Basis for Rewriting the Criminal Code in Order to Convict Professor Giraldo

While the Court's clarifications of Colombian moral rights law are helpful, they do not answer how the professor could be convicted of publishing an "unpublished work," when a copy of the thesis was sitting in the library. The Court's definitions of the terms "publish" ("to disseminate by means of printing or any other procedure")[118] and "unpublished work" ("a work that has not been disclosed to the public")[119] seem to make the conviction even more egregious. Indeed, the Court initially concluded that "a literal interpretation of the provision" would allow anyone to publish "in whole or in part an already disclosed work, falsely attributing authorship of that work" without incurring criminal liability.[120]

The Court concluded that the problem with this interpretation is that such limited IP protection would violate Colombia's IP treaty obligations and Constitutional guarantee of IP protection.[121] That is, if Professor Giraldo's acts were not covered by the statute, then the Court believed that Colombia would not protect an author's right to attribution as required by the country's treaties and constitution.[122]

Yet moral rights are not fundamental to the Court just because of their international recognition. As Colombian scholar Carlos Castellanos points out, the Court analyzed moral rights through a broad conception of the

---

distribute such reproductions or works and communicate them to the public. With regard to works of architecture, this provision shall be applicable solely to outward views.").

[115] *Id.* at art. 91 ("The copyright in works created by public employees or officials in the exercise of the constitutional and legal obligations incumbent on them shall be the property of the public body concerned. This provision shall not apply to lectures or talks given by professors.").

[116] *Giraldo*, *supra* note 2, at 53-61.

[117] *Id.* at 54-55.

[118] *Id.* at 67 (citing Real Academia Español Dictionary's definition).

[119] *Id.* at 66 (citing Art. 8(g)).

[120] *Id.* at 71.

[121] *Id.* at 71-72. The Constitution states that "The state will protect intellectual property for the relevant period using the means established by law." CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.], art. 61, *translated in* CONSTITUTION FINDER, http://confinder.richmond.edu/admin/docs/colombia_const2.pdf (last visited Oct. 1, 2012).

[122] *See id.*

personhood philosophy.[123] This theory holds, as noted earlier, that authors maintain a personal connection with their works, and they therefore have inalienable rights in them.[124] Though this is the most common rationale for moral rights, there are certainly alternative philosophical justifications for them.[125] The Court, however, did not acknowledge any alternatives; instead it bluntly stated that "*the author is his work*."[126] The following excerpt exemplifies the expansive nature of the Court's interpretation:

> A failure to recognize a man's right of authorship to the fruits of his creativity, the exclusive manifestation of either his spirit or ingenuity, *is a failure to recognize a man's condition as an individual who thinks and creates, and by his very nature expresses this rationality and creativity*. For this reason, authors' moral rights *should be protected as rights that emanate from the human condition*.[127]

This excerpt clarifies that the Court did not just base its holding on Colombia's international obligations, but also its own robust interpretation of the personhood theory.[128]

These philosophical underpinnings help explain why the Court took the drastic step of reinterpreting the criminal statute to cover Professor Giraldo's actions. After concluding that a "literal" reading of the statute would violate Colombian treaty obligations, the Court decided to use the *pro homine* principle to ensure that the statute punished the professor.[129] The *pro homine* principle is a "standard for interpreting human rights law, according to which, internationally recognized human rights . . . are to be interpreted as broadly as possible."[130] Interestingly, the Court did not address the alternative interpretive canon that changing a criminal statute to punish conduct not previously punished may violate a person's constitutional rights, including one's right to due process.[131]

Counterarguments aside, the Court then—in perhaps the opinion's most controversial turn—rewrote the criminal statute. Giving "notice,"[132]

---

[123] Rubio, supra note 8..
[124] *See supra* Part II.A.
[125] *See* Hughes, *supra* note 51.
[126] *Giraldo*, *supra* note 2, at 73 (emphasis in original).
[127] *Id.* at 74 (emphasis in original) (citing Corte Constitucional [C.C.] [Constitutional Court], abril 28, 1998, M.P: V. Naranjo Mesa, Sentencia C-155/98, Gaceta de la Corte Constitucional [G.C.C.] (vol. 3, p 240) (Colom.)).
[128] Rubio, supra note 8.
[129] *Giraldo*, *supra* note 2, at 77-78.
[130] García, *supra* note 9, at 304 (internal citations removed).
[131] *See id.* at 313.
[132] *Giraldo*, *supra* note 2, at 78.

the Court stated that Colombian courts need to interpret the moral rights statute as prohibiting not just publication of unpublished works, but also the following acts:

> 1) Those that, through other forms of disclosure, entail the public diffusion of the unpublished work, without the previous and express permission of the right-holder;
> 2) Those that entail the violation of the right of authorship or recognition, in accordance with the following contingencies:
> (A) When, without the previous and express authorization of the right-holder, someone discloses in whole or in part, in the name of someone other than the right-holder, an unpublished work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.
> (B) When, without the previous and express authorization of the right-holder, someone discloses totally or partially, in the name of another, an already disclosed work of literature, art, science, film, audiovisual or phonographic nature, computer program or software.[133]

Further, the Court called on the Ministry of Interior and Justice, the Congress, and the National Copyright Directorate to change the law, in order "to avoid ambiguities or misunderstandings that can call into question the profound protection that moral rights—we reiterate—fundamentally deserve."[134]

Having clarified that the statute—despite its plain language—actually punishes anyone who discloses an already published work, upholding Professor Giraldo's conviction seemed a foregone conclusion. Accordingly, the Court spent the rest of the opinion rejecting Professor Giraldo's defenses.[135]

IV. CLARIFYING THE CURRENT STATE OF COLOMBIA'S COPYRIGHT REGIME: THE LAW ON THE BOOKS VERSUS THE LAW ON THE GROUND

[133] *Id.* at 78-79; *compare* to original statute, *supra* Part II.A.
[134] *Id*. at 83.
[135] *Id.* at 90 (dismissing defense that professor's actions did not constitute "publishing"); *id.* at 90-92, 100-102 (dismissing defense that convicting for different crime than indictment violated professor's rights); *id.* at 92-99 (clarifying that even if professor gave idea for the thesis, copyright does not protect ideas).

A. On the Books, Plagiarism is Now a Crime, With Relatively Clear Definitions of Sanctioned Acts

Having examined the opinion in detail, the question then becomes "What does the decision mean for Colombian copyright law?" The Supreme Court of Justice did make one consequence clear: plagiarism is now a crime.[136] What is more, the decision offers clear definitions of behavior that will constitute plagiarism. The Court also provided fairly clear definitions of the behaviors this new rule punishes.

The Court defined plagiarism as the "appropriation of original and novel expressions, understood as the result of the activity of the spirit, and evidencing individuality and creation."[137] This one vague passage aside, under the Court's new formulation of the statute, a person will incur criminal liability whenever he "discloses in whole or in part" a work that falsely attributes authorship.[138]

Disclosure is "much broader than publication, as it involves any means or process for making the work available to an indeterminate number of people."[139] Further, the Court also clarified that any work in a "library accessible to the public" is disclosed.[140] As far as the "indeterminate number of people" necessary for disclosure, the Court also stated that an author discloses his work when it "is disseminated beyond the author's circle of family and friends."[141] When applied to the academic context, this articulation seems to clarify that students who plagiarize could incur criminal liability, as long as more than one person outside that circle sees the work.

B. Despite Increased Prosecution Rates, the Decision Will Not Likely Affect Academic Plagiarism Rates

With the extent of criminal liability for plagiarism relatively clear, the conversation then turns to how effective this new criminal punishment will be for future cases like Professor Giraldo's. Colombia criminalizes conduct

---

[136] *See* García, *supra* note 9, at 304 (concluding that plagiarism is now a crime).

[137] *Giraldo*, *supra* note 2, at 12 (citing MIGUEL A. EMERY, PROPIEDAD INTELECTUAL 284 (Astrea 1999)).

[138] *Id.* at 79.

[139] *Id.* (citing DIRECCION NACIONAL DE DERECHO DE AUTOR [NATIONAL COPYRIGHT DIRECTORATE], www.derechodeautor.gov.co.).

[140] *Id.* at 59 (citing DIRECCION NACIONAL DE DERECHO DE AUTOR [NATIONAL COPYRIGHT DIRECTORATE], www.derechodeautor.gov.co).

[141] *Id.* at 58, n.62 (citing DELIA LIPSZYC, DERECHO DE AUTOR Y DERECHOS CONEXOS 161 (UNESCO 1993)).

largely to deter such behavior.[142] Most would agree that prosecution rates play a large part in deterring crime. For example, according to basic law and economics calculations, no matter how extreme the sanction, a law will not deter conduct if criminals do not expect to be prosecuted.[143] Thus, regardless of what the Court says, if Colombia does not enforce the new plagiarism law, plagiarism will not decrease.

This issue of prosecution rates is particularly relevant, given that one of the U.S.'s major complaints in the lead-up to signing the free trade agreement was that Colombia did not adequately prosecute IP violations.[144] Yet prosecution rates have increased in the last few years,[145] and there are at least two reasons to think that the trend will continue. First, Colombia signed the free trade agreement with the U.S., which includes monitoring mechanisms to ensure that Colombia continues to enforce IP rights.[146] Second, funding the prosecutions—a major reason for the previous low rates—should be less of an issue in the coming years. Not only does the trade agreement require Colombia to fund the prosecutions, but the country should have the money; economists currently predict that the economy will continue to grow in 2012.[147] Even if these positive forecasts do not come true, with the free trade agreement so important to Colombia's economy, funding prosecutions is still in the country's best interest.

Still, increased prosecution rates and Colombia's new criminal punishment for plagiarism will likely not affect Colombia's well-documented high rates of academic plagiarism.[148] There are three primary explanations for this conclusion: 1) the role of academic institutions in bringing charges; 2) the lack of civil incentives to bring criminal charges;

---

[142] CÓDIGO PENAL (Criminal Code) (C. PEN), art. 40, *available at* http://www.secretariasenado.gov.co/senado/basedoc/ley/2000/ley_0599_2000.html#*4* (stating that purpose of criminal law is to offer general deterrence, retribution, and specific deterrence).

[143] *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 471-531 (2004).

[144] *See Intellectual Property Rights Toolkit Colombia*, *supra* note 38.

[145] *Id.* at 5 ("Despite Colombia's improving legal framework for IPR protection, enforcement continues to be weak.").

[146] Office of the United States Trade Representative, *Overview of U.S.-Colombia Free Trade Agreement*, USTR.GOV, http://www.ustr.gov/uscolombiatpa/facts (last visited Sept. 16, 2012).

[147] *See Get Cracking*, THE ECONOMIST (Oct. 15, 2011), http://www.economist.com/blogs/americasview/2011/10/colombia-united-states-free-trade-agreement?page=1#sort-comments (noting positive effect of free trade agreement on economic forecasts); *Economic Outlook: Colombia*, BBVA RESEARCH (2011), http://www.bbvaresearch.com/KETD/fbin/mult/1108_ColombiaOutlook_3Q11_tcm348-265401.pdf?ts=2812012 (predicting 5.4% growth rate in 2012); Dan Molinski, *Colombia Targets Inflation as Economy Booms*, WALL ST. J., Jan. 20, 2012, http://online.wsj.com/article/SB10001424052970204616504577173112901940388.html?mod=googlenews_wsj (analyzing economic "boom").

[148] *See, e.g.*, Carolina Ayala, *El paraíso del copie y pegue*, EL ESPECTADOR (Jan. 5, 2012), http://www.elespectador.com/entretenimiento/arteygente/articulo-319658-el-paraiso-del-copie-y-pegue (quoting professor's concern that students do not even realize they are committing a crime).

and 3) the general perception that criminal punishment for plagiarism is too severe. First, like in the U.S.,[149] Colombian universities continue to handle most plagiarism cases internally.[150] Despite the prevalence of plagiarism in universities, it appears that no court has criminally convicted a student or teacher of plagiarism since the *Giraldo* case.[151] Indeed, the university's investigation of the professor found her innocent of any wrongdoing.[152] It was only after the student took the extra step of filing criminal charges that the prosecutor intervened.[153] A prosecutor has discretion to institute his or her own prosecution without receiving a complaint from the university,[154] but the office is unlikely to hear of the crime if the university never reports it.

Second, there is no incentive for a person to bring a civil suit.[155] While the moral rights statute levies fines on the student, these fines are paid to the State, not the victim.[156] In Professor Giraldo's case, for instance, the student demanded restitution, but the trial court responded that she had not proven any pecuniary harm.[157] Then—sarcastically, it appears—the court suggested that the student pursue damages in civil court,[158] implying that the pecuniary harm she suffered was relatively little if any.[159]

Third, as a whole, Colombians seem to view the professor's punishment as severe. This observation is based on: 1) the case being the first time on record a person received criminal punishment for a moral rights

---

[149] *See* Green, *supra* note 16, at 199-201.

[150] Ayala, *supra* note 148 (blaming prevalent plagiarism on lax disciplinarian policies of universities).

[151] Searches conducted in *El Espectador* and *El Tiempo*.

[152] *Trial Court*, *supra* note 1, at 11.

[153] Green, *supra* note 16, at 199-201.

[154] L. 23/82, enero 28, 1982, DIARIO OFICIAL [D.O.], art. 239 (Colom.), *translation available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126023 ("Criminal action resulting from infringements of this Law shall be public in all cases and shall be instituted ex officio.").

[155] In the event of a moral rights violation, the victim may pursue civil remedies either during or independent of the criminal procedure. *Trial Court*, *supra* note 1, at 26-27; *see also* L. 23/82, enero 28, 1982, DIARIO OFICIAL [D.O.], art. 238-39 (Colom.), *translation available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126023 ("Civil action for redress of damages or prejudice caused by violation of this Law may be exercised within the criminal process or separately, before the competent civil jurisdiction, at the option of the injured party."); *see also* Pahl, *supra* note 64, at 619 ("The Fiscalía's general prosecutorial duties include acting, either on its own initiative or in response to a complaint or a formal charge, to investigate offenses, and to charge alleged offenders before the appropriate tribunal.").

[156] *See Trial Court*, *supra* note 1, at 29 (requiring Professor Giraldo to pay her fine to the State).

[157] *Id.* at 26.

[158] *Id*.

[159] In fact, some commentators believe that the trial court suspended the professor's jail time because the student demanded so much in damages. *See, e.g.*, *El caso de Luz Mary Giraldo: consideraciones extemporáneas*, EL MALPENSANTE, http://www.elmalpensante.com/index.php?doc=display_contenido&id=1659 (last visited Sept. 16, 2012).

violation;[160] 2) the overwhelmingly negative reaction in the newspapers;[161] and 3) the continued high rates of plagiarism.[162] Of course, journalists may have a vested interest in reporting on the case: they do not want to be subject to criminal sentences themselves. Even if newspapers do not represent the sentiment of the public (which seems unlikely given the high plagiarism rates), the bad press people would likely face for pressing criminal charges would also discourage them from doing so.[163]

This is not to say that criminal plagiarism trials will never occur. On the contrary, there has been at least one well-documented case of criminal charges brought against people plagiarizing on the civil worker entrance exam.[164] Rather, the point is that, at least in the academic realm, universities hold the key to lowering plagiarism rates. Absent some shift in universities' policies—for example, reporting plagiarism to prosecutors, or cultural attitudes towards plagiarism—the new criminal punishment of plagiarism will not likely decrease plagiarism rates.

C. The Effects Remain Unclear Outside of Academic Plagiarism, and the Court or Legislature Should Clarify Defendants' Procedural Safeguards

Outside of academia, Congress or the courts will need to provide further guidance on the scope of moral rights protections. The Court and Prosecutor General seem to have concluded that a person may only be charged with one of the three moral rights statutes. For instance, the Court was very clear that the professor—though she changed the sentences in the original—"disclosed" and/or "published" the thesis, but did not "mutilate" it.[165] To the Court, mutilation only occurs when the defendant changes the work, but still recognizes the work as that of the true author.[166]

Still, it is not written into the statute that a person may only be charged with violating one moral right.[167] If she violates two, will she be charged with two violations? Can someone violate an author's moral and

---

[160] *See* Padilla, *supra* note 31.

[161] *See* Arbeláez, *supra* note 10; *see also* García, *supra* note 9.

[162] *See, e.g.,* Ayala, *supra* note 148.

[163] For a discussion of the effectiveness of social humiliation on deterring behavior, *see* SHAVELL, *supra* note 143, at 513-14 ("For example, individuals who especially value their reputations might be significantly deterred by humiliation.").

[164] *Procurador judicial, en escándalo de notarios*, EL TIEMPO (Aug. 25, 2011), http://www.eltiempo.com/archivo/documento/MAM-4777113.

[165] *See* Giraldo, *supra* note 2, at 88-89.

[166] *Id*.

[167] CÓDIGO PENAL (Criminal Code) (C. PEN), art. 270.

economic rights? If so, can she be charged with both crimes? Would the sentences run concurrently?

Again, based on the prosecutor's decision to only bring one charge[168] and the Court's[169] careful delineation of the statutes, it does not appear that the courts will go in this heavier-handed direction. Still, as it stands now, there is no preventing the prosecutor from levying multiple criminal charges, nor the courts from convicting on these charges.[170]

Imagine, for instance, that someone sells a pirated copy of a movie, but without the opening credits. Based on the Court's interpretation of "mutilation,"[171] it does not appear that this action violates that right, but that is not certain. Assuming the prosecutor only charged one moral rights violation however, is it possible that the defendant also "reproduced" the work, in violation of the economic rights statute?[172] Again, this would not be a major concern if either prosecutors could only convict under one statute or the sentences ran concurrently, but there is no overt guarantee that this is the case.[173] This lack of clarity leaves artists unaware of whether their conduct is lawful, and may chill artistic creation for fear of potential criminal sanction.[174]

V. CONCLUSION

A close reading of the Colombian Supreme Court of Justice's opinion in the *Giraldo* case reveals that plagiarism is now a crime in Colombia, punishable with up to ninety months in prison.[175] This decision's severity and global ramifications deserve attention. In analyzing the opinion, the Court provided relatively explicit definitions of this new crime within the academic realm, yet the decision will likely not have a large impact on Colombia's high rates of academic plagiarism. Though certain questions remain outside of academia, Colombians and the world are now on notice that violating an author's moral rights can have serious criminal consequences.

---

[168] *See Giraldo*, *supra* note 2, at 90 ("The Act of 'publication' . . . was amply [] debated during the investigation.").

[169] *See, e,g.*, *id*. at 87-88 (analyzing the difference between "condensing" a work but recognizing the true author and "condensing" a work but not recognizing the true author).

[170] CÓDIGO PENAL (Criminal Code) (C. PEN), arts. 270-71.

[171] *See Giraldo*, *supra* note 2, at 87-88.

[172] CÓDIGO PENAL (Criminal Code) (C. PEN), art. 271.

[173] *Id.* at arts. 270-71.

[174] For a discussion of this situation from a social welfare perspective, see Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information about Whether Acts Are Subject to Sanctions*, 6 J.L. ECON. & ORG. 93, 117-18 (1990) (concluding that this uncertainty is sub-optimal).

[175] CÓDIGO PENAL (Criminal Code) (C. PEN), art. 270.