

The Tension between Copyright Protection and Freedom of Expression in Latin America

Por: Ernesto Rengifo García^{1 2 3}

I. Introduction

This article aims to provide an overview and mapping of the current state of copyright law in Latin America, with particular emphasis on Mexico, Chile, Argentina, and the Andean Community⁴ — especially Peru and Colombia, with a special focus on the latter.

The reuse of preexisting works is not a recent phenomenon. Throughout history, artists have repeatedly drawn upon the works of others, whether consciously or unconsciously, in the creation of new artistic expressions. Famous examples can be found in music history, including the works of Johann Sebastian Bach, who frequently reused both his own compositions⁵ and those of other composers.⁶ One notable example is Bach's *Partita No. 3 in E Major*, BWV 1006, composed around 1720, whose celebrated Prelude was later reworked as the opening sinfonia of the cantata *Wir danken dir, Gott, wir danken dir*, BWV 29 (1731).⁷

However, in the context of modern copyright systems, particularly those built upon structured regimes of

limitations and exceptions, the reuse of protected works raises increasingly complex legal questions. Contemporary forms of artistic creation, digital dissemination, remix culture, sampling, parody, appropriation art, and fan-generated content require a reassessment of the boundaries between copyright protection and lawful reuse. In this context, it becomes necessary to determine under which circumstances such uses may constitute copyright infringement, and under which others they may fall within the scope of copyright limitations and exceptions, particularly in light of the fundamental right to freedom of expression and the inevitable and continuous evolution of society, technology, and contemporary forms of artistic creation.

II. The System of Copyright Limitations and Exceptions in Latin America

Although Latin America cannot be treated as a fully uniform legal system, given that each country maintains its own independent copyright framework, certain regional trends may nevertheless be identified. One of the most significant characteristics of Latin American copyright systems is the predominance of relatively strict or closed

¹ Docente investigador del Departamento de Derecho Civil de la Universidad Externado de Colombia. Las opiniones expresadas en el texto son del autor y no pretenden reflejar ninguna posición institucional.

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³ Este texto corresponde a la ponencia presentada en el congreso de la Asociación Literaria y Artística Internacional –ALAI– celebrado en La Haya en junio de 2026.

⁴ The Andean Community (CAN) is an international organization for economic and social integration composed of Bolivia, Colombia, Ecuador, and Peru, which has developed a supranational legal framework commonly referred to as Andean law. In the field of intellectual property, the Member States share a largely unified legislative regime. The Court of Justice of the Andean Community

(Tribunal de Justicia de la Comunidad Andina or TJCA) is the highest judicial authority for the interpretation of Andean law and is responsible for ensuring its uniform application throughout the Member States.

⁵ W. Breig, 'Composition as Arrangement and Adaptation', in J. Butt (Ed.), *The Cambridge Companion to Bach*, Cambridge, Cambridge University Press, 1997, p. 154.

⁶ N. Carrell, *Bach the Borrower*, London, Faber & Faber, 1967, p. 13.

⁷ R. López-Cano, *Música Dispersa: Apropiación, Influencias, Robos y Remix en la Era de la Escucha Digital*, Barcelona, Musikeon Books, 2018, p. 267: 'Repetition, appropriation, and recycling are three constants of the musical sphere that [...] have been assessed through inconsistent discourses throughout history. At a certain historical moment, within a specific culture, the reuse of fragments of one piece for the creation of others may constitute a practice imbued with aesthetic value in and of itself. At another moment, it may be regarded as a crime and, during many long periods, it may simply remain hidden, without any public discourse detecting or valuing it' [author's translation].

models of copyright limitations and exceptions, generally structured around exhaustive statutory lists and strongly influenced by the three-step test.

Colombia⁸, Peru, Mexico, Chile, and Argentina⁹ all adopt closed and exhaustive systems of copyright limitations and exceptions, based on expressly codified statutory provisions rather than open-ended doctrines such as fair use. These jurisdictions generally follow the logic of the three-step test, under which exceptions must be specifically established by law, interpreted restrictively, and applied only in limited circumstances that do not interfere with the normal exploitation of the protected work or cause unreasonable prejudice to the legitimate interests of the author or right holder.

It is particularly noteworthy that, despite the geographic proximity and strong economic influence of the United States, a jurisdiction traditionally associated with the broader and more flexible doctrine of fair use, Latin American jurisdictions have generally refrained from adopting similar open-ended systems of copyright exceptions. Instead, the region has generally adhered to a framework more closely aligned with the continental European tradition, favoring closed and expressly codified limitations and exceptions rather than flexible judicial balancing doctrines.¹⁰

This divergence may be explained, at least in part, by the historical foundations of Latin American copyright traditions, which have tended to adopt a more author-centered and protectionist conception of copyright law. Consequently, although U.S. influence over Latin American intellectual property systems has been substantial — particularly through international agreements and trade policy — such influence has focused predominantly on strengthening enforcement

mechanisms and protection standards, rather than promoting the transplantation of fair use itself.

III. The Relationship Between Copyright and Fundamental Rights: Freedom of Expression as a Constitutional Value

Among Latin American jurisdictions, Colombia stands out for having expressly recognized authors' moral rights as fundamental rights. By contrast, while countries such as Argentina, Chile, Mexico, and Peru afford constitutional protection to copyright and intellectual property, they have not developed a constitutional doctrine that accords moral rights the same fundamental status.

Colombian constitutional jurisprudence has been particularly emphatic in recognizing the constitutional dimension of authors' rights, especially moral rights. In Decision C-155 of 1998¹¹, the Constitutional Court of Colombia held that moral rights constitute fundamental rights. The Court reasoned that human creativity, artistic expression, invention, and all manifestations of the human spirit constitute inherent attributes of human dignity and individual freedom. Accordingly, the Court concluded that moral rights deserve constitutional protection because they derive directly from the human condition itself. At the same time, the Court clarified that, although economic rights do not possess fundamental status, they nevertheless enjoy constitutional protection under the Colombian Constitution,¹² which expressly mandates state protection of intellectual property rights.

The Constitutional Court has also recognized that copyright protection serves broader public interests and, in certain circumstances, may even operate as an extension of other constitutional guarantees, including the free development of personality, freedom of expression,

⁸ Art. 21 of Decision 351 of 1993. Within the Andean Community, Member States may establish copyright limitations and exceptions only insofar as such measures do not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the right holder.

⁹ Law 23 of 1982 and Law 1915 of 2018 (Colombia); Legislative Decree 822 (Peru); Art. 148 of the Federal Copyright Law (Mexico); Title III of Law 17.336 on Intellectual Property (Chile); and Law 11.723 on Intellectual Property (Argentina).

¹⁰ This tendency is especially striking considering the considerable influence that the United States has historically exercised over the region through international policy, trade agreements, and

intellectual property harmonization efforts. Numerous free trade agreements executed between the United States and Latin American countries contain identical or substantially similar intellectual property provisions, contributing to the standardization of copyright enforcement mechanisms across the region. Nevertheless, the United States did not significantly promote the transplantation of the fair use doctrine into Latin American legal systems. There is no single definitive explanation for this phenomenon.

¹¹ Judgment C-155/98 of 28 April 1998, Constitutional Court of Colombia, constitutional challenge against Law 397 of 1997 (in its entirety, on procedural grounds) and Articles 33 and 34 thereof.

¹² Art. 61 of the Colombian Constitution.

and the right to recognition for individual work and creativity.¹³

Accordingly, copyright and freedom of expression are not necessarily opposing values within constitutional systems. On the contrary, both rights often originate from the same underlying principle: the protection of human creativity and intellectual expression. Nevertheless, this relationship also raises a fundamental question: what occurs when these rights — which in principle should coexist harmoniously — come into direct conflict?

IV. Tensions Between Copyright and Fundamental Rights

The only decision issued by the Supreme Court of Justice of Colombia that has comprehensively addressed the interpretation of copyright limitations and exceptions was rendered in 2024.¹⁴ The case concerned a dispute between a collective management organization and a pay television operator regarding the retransmission of free-to-air television channels under Colombia's must-carry obligation.

Under this legal framework, pay television operators must guarantee their subscribers access to certain open television channels without additional cost. Although the retransmission was authorized by the broadcasters themselves, the collective management organization argued that the operator was still required to pay royalties for the communication to the public of copyrighted works contained in the broadcast signal.

The dispute thus placed copyright protection in direct tension with the fundamental right to information, as well as with a statutory regime designed to ensure pluralism and public access to free television content. Nevertheless, the Court adopted a particularly restrictive approach toward copyright limitations and exceptions, holding that they cannot be interpreted broadly or impliedly, but must instead be applied strictly in accordance with the three-step test.¹⁵

With respect to the first step of the test, the Court held that limitations and exceptions must be expressed, exhaustive, specific, and clearly defined by a legal source. According to the Court, exceptions cannot be inferred from constitutional principles, public policy objectives, or the non-commercial nature of a given activity. Rather, the legislature must expressly identify both the existence of the exception and the specific copyright entitlement to which it applies.

Consequently, the Court concluded that the fact that the retransmission pursued constitutionally significant objectives, namely guaranteeing the public's right to information and ensuring compliance with the must-carry obligation, did not displace copyright protection or create an implied exception exempting the operator from the obligation to pay royalties.

This precedent suggests that, unless a limitation or exception is expressly and specifically recognized by legislation, any unauthorized use of protected works will likely be regarded as infringing, regardless of the expressive, artistic, or informational interests involved. As a result, the decision reflects a predominantly restrictive and author-centered approach, one that tends to prioritize copyright protection over competing constitutional values such as freedom of expression.

However, this holding sits in evident tension with the position previously adopted by the Constitutional Court of Colombia in Judgment C-654 of 2003¹⁶. In that case, the Court reviewed the constitutionality of Article 11 of Law 680 of 2001, the provision that introduced the must-carry obligation. The claimant argued that this obligation imposed an unjustified and disproportionate burden on subscription television operators, interfered with freedom of enterprise and economic initiative, and effectively favored free-to-air broadcasters. The Constitutional Court acknowledged that the measure could restrict the operators' economic freedom but framed the issue as one requiring a balance between that freedom and the constitutional rights to information, opinion, and culture.

¹³ *Corrupción en Colombia: Enfoques Sectoriales sobre Corrupción*, Part IV 'Corrupción, Propiedad Intelectual, Investigación Científica y Nuevas Tecnologías', Bogotá, Universidad Externado de Colombia, citing Judgment C-053/01, Constitutional Court of Colombia, p. 339.

¹⁴ Civil Chamber of the Supreme Court of Justice of Colombia, Judgment SC424 of 9 April 2024. *Egeda v. Telmex Colombia S.A.*

¹⁵ As derived from Art. 9(2) of the Berne Convention for the Protection of Literary and Artistic Works, Art. 13 of the TRIPS Agreement, and Art. 21 of Decision 351 of 1993.

¹⁶ Constitutional Court of Colombia, Judgment C-654 of 2003, Reporting Justice Clara Inés Vargas Hernández.

The Court ultimately held that the restriction was reasonable and proportionate because the burden imposed on operators was not greater than the public benefit pursued: guaranteeing citizens access to free and impartial information. Significantly, the Court further observed that the measure could even entail economic benefits for subscription television operators, since they were able to transmit the programming of Colombian free-to-air channels to their subscribers without having to pay rights for such retransmission. Accordingly, the Court concluded that the *must-carry* obligation was a legitimate statutory limitation imposed on the public interest rather than an unconstitutional interference with economic freedom. The contradiction between this constitutional line of reasoning and the Supreme Court's later, strictly author-centered interpretation is therefore apparent.

It is also worth noting a recent decision of the Constitutional Court which further illustrates this Court's position, as well as the primacy of the Constitution over other areas of law, such as copyright. In Judgment T-256 of 2025,¹⁷ issued in the context of content moderation by digital platforms, the Constitutional Court held that platforms must respect freedom of expression and ensure transparency and due process before removing content, even where such content is protected by copyright. The Court further held that the matter before it, a *tutela* action brought by an individual user - a constitutional remedy under Colombian law for the protection of fundamental rights -, did not raise a question of private law, but rather a constitutional one, implicating the fundamental rights to freedom of expression and due process, insofar as the platform had been unable to establish whether the content had been removed autonomously by an artificial intelligence system or through a human-supervised process.

These two lines of jurisprudence, issued by the two highest courts within the same legal system, reveal markedly divergent approaches to the same underlying tension: the Supreme Court adopts a more protectionist, author-centered stance, whereas the Constitutional Court has shown greater openness to balancing copyright

against competing fundamental rights, extending this balancing exercise even into the digital spaces where freedom of expression is increasingly exercised today.

- The Most Common Exceptions

In today's digital environment, creative works are more accessible than ever before. Music, visual art, films, literary works, and other forms of expression are now available instantly and globally, often only a single click away. As a result, the reuse of preexisting works has become an increasingly common feature of modern artistic creation. Against this backdrop, and in light of the legal principles discussed above, the following sections will analyze three case studies, drawn respectively from the fields of visual art, music, and literature, in order to evaluate how these theoretical tensions materialize in practice.

The first case concerns artistic appropriation. Dutch artist Peter Bastiaanssen recreated famous paintings — by artists such as Picasso, Hopper, and Matisse — with exacting fidelity, and inserted a black dog into each composition, styled as an investigative figure probing the relationship between painter and model. Bastiaanssen developed the project in the wake of the #MeToo movement, during which museums faced public pressure over works perceived to objectify the female body, such as Balthus's *Thérèse Dreaming* at the Metropolitan Museum of Art (which the museum declined to remove) and another Balthus painting briefly withdrawn before being reinstated after public backlash; in his view, this pressure poses a threat to the exhibition and preservation of certain classical artworks. This case may be understood as an example of artistic appropriation, namely the intentional use and recontextualization of preexisting visual material within a new creative proposal.¹⁸

The right of quotation,¹⁹ which operates in a relatively homogeneous manner throughout Latin America, could be considered as a possible avenue. Quotation rights allow authors to incorporate excerpts or portions of published works into new works, provided that the source and author are identified, the use complies with fair practices, and the

¹⁷ Constitutional Court of Colombia, Judgment T-256 of 2025, Reporting Justice Natalia Ángel Cabo. *Esperanza Gómez Silva v. Meta Platforms, Inc.*

¹⁸ D. Guzmán, 'El Derecho de Cita y la Apropiación Artística', *Blog del Departamento de Propiedad Intelectual, Universidad Externado de Colombia*, 1 December 2014. Available at:

<https://propintel.uexternado.edu.co/el-derecho-de-cita-y-la-apropiacion-artistica/> (accessed 19 May 2026).

¹⁹ Regulated in the Andean Community under Art. 22(a) of Decision 351 of 1993; Art. 148 of the Federal Copyright Law of Mexico; and Art. 71B of Chilean Law 17.336.

quotation is justified by the purpose pursued. Importantly, in some Latin American countries, such as Colombia and Chile,²⁰ quotation rights are not expressly limited to literary works. As a result, at least in principle, they may also extend to visual or pictorial works, particularly in situations where preexisting artwork is incorporated into a new artistic expression, as frequently occurs in appropriation art.

However, the practical application of quotation rights to artistic appropriation presents considerable difficulties. The Colombian Copyright Office,²¹ when analyzing the possibility of quoting photographic works, concluded that quotation rights are generally incompatible with photography because, on the one hand, their use typically requires the complete reproduction of the photograph, while, on the other hand, any partial reproduction would likely constitute a mutilation of the work in violation of the author's moral rights.²² Although this reasoning was developed specifically in relation to photographic works, it could easily be extended to paintings and other visual artworks, thereby illustrating the inherent tension involved in attempting to apply quotation rights to artistic appropriation practices.

An even more restrictive approach is adopted in countries such as Mexico and Argentina. Mexican legal doctrine and jurisprudential criteria²³ have established that quotation rights are essentially limited to textual works and only permit the use of another author's work insofar as the portion taken cannot be regarded as a substantial or simulated reproduction of the original work. Consequently, the complete reproduction of an artwork would likely exceed the permissible scope of quotation and therefore fall outside the protection of the exception.²⁴

Argentinean law²⁵ excludes the application of quotation rights to visual, plastic, musical, graphic, and audiovisual works. Moreover, Argentina is arguably one of the few jurisdictions in the world that quantitatively rates quotation rights by establishing specific numerical limits. Nevertheless, Argentine jurisprudence has clarified that the decisive factor is not merely the length of the quotation, but whether the use appropriates a substantial part of the protected work.²⁶

Another potentially relevant defense could be parody,²⁷ the underlying justification for which is closely connected to freedom of expression.²⁸ In many Latin American jurisdictions, parody operates as an exception to the economic right of transformation and may apply where the purpose of the reuse is expressive, critical, humorous, or satirical, provided that there is no risk of confusion between the original work and the new creation.

The regional landscape, however, is far from uniform. Argentina²⁹ constitutes a notable exception, as it does not recognize parody as a copyright limitation or exception. Instead, parody is regulated as a derivative work, meaning that, in principle, its creation requires the prior authorization of the copyright holder. Peru³⁰ adopts a particularly distinctive approach. Although it permits the creation of parodies without prior authorization, it does not treat them as a gratuitous exception but rather as a compulsory license subject to the payment of equitable remuneration to the author of the original work. By contrast, both Chile³¹ and Colombia³² recognize parody as a copyright exception, albeit under different requirements. In Chile³³, parody is closely associated with satire, requiring the new work to criticize, ridicule, or mock the object of its commentary. In Colombia parody is

²⁰ Chile, *Law No. 20,435 Introducing Exceptions and Limitations to Copyright and Related Rights*, Art. 71 B, Official Gazette, 4 May 2010.

²¹ National Copyright Directorate (DNDA).

²² DNDA, Concept 1-58027-2012.

²³ Art. 148(I) of the Mexican Federal Copyright Law limits quotation rights to textual works, preventing its extension to other categories of protected works.

²⁴ Tesis I.6o.A.9 A (10a.), Registro Digital 2021860, *Semanario Judicial de la Federación*, Décima Época, Libro 77, August 2020, Vol. VI, p. 6010. Available at: <https://sjf2.scjn.gob.mx/detalle/tesis/2021860> (accessed 19 May 2026).

²⁵ Art. 10 Law 11.723.

²⁶ *Response of the Argentine Delegation to the ALAI Congress 2026 Questionnaire*, citing *Danenza, E.R.*, National Criminal and

Correctional Court of Appeals, Chamber II, judgment of 25 August 1978.

²⁷ Decision 351 of 1993, Arts. 2 and 22; in Colombia, Art. 16(d) of Law 1915 of 2018; in Chile, Art. 71P of Law 17.336; in Peru, Art. 49 of Legislative Decree 822 of 1996 establishes parody as a compulsory license subject to remuneration of the original author.

²⁸ S. Schuster Vergara, *Estudios sobre las Excepciones al Derecho de Autor y los Derechos Conexos: Análisis Comparado en Chile, Colombia, México y Perú*, Valencia, Tirant lo Blanch, 2026, p. 246.

²⁹ Art. 25 Law 11.723.

³⁰ Art. 49 Legislative Decree No. 822 (1996).

³¹ Art. 71P Chile's Copyright Act (Law No. 17,336).

³² Art. 16(d) Law 1915 of 2018.

³³ Under Chilean law, parody is associated with satire, which inherently carries a negative connotation. The Royal Spanish Academy defines satire as a 'composición en verso o prosa cuyo objeto es censurar o ridiculizar a alguien o algo'.

understood as a transformative work that must maintain sufficient distance from the original to avoid any likelihood of confusion between the two works.

Legal doctrine has explained that parody serves as a means of commentary, criticism, or expression, whether directed toward the original work itself, its author, or even broader social and political issues unrelated to the original creation. A parody may therefore function either as tribute or as critique; however, it must maintain sufficient distance from the original work so that audiences can clearly recognize it as a transformative work rather than as the original itself.³⁴

In the present case, however, the concept of parody does not appear to align fully with the artist's objective in incorporating the black dog into the paintings. The apparent purpose was not to mock or criticize the original artworks themselves, but rather to express criticism toward an independent feminist movement that bears no direct relationship to the transformed works. Consequently, the applicability of parody as a copyright exception in this context remains legally uncertain.

The second case concerns musical sampling. Nas, an American rapper, released "N.Y. State of Mind" in 1994, produced by DJ Premier, layering at least five source elements: instrumental samples from Joe Chambers's "Mind Rain" and Donald Byrd's "Flight Time," a drum break from Kool & the Gang's "N.T.," a vocal sample honoring pioneering duo Eric B. & Rakim, and a sample of Nas's own earlier guest verse on Main Source's "Live at the Barbeque." The track illustrates how a single sampled work can implicate multiple independent rights holders and may be understood as an example of musical appropriation in which preexisting sound recordings are recontextualized within a new composition.

Musical sampling generally consists of extracting fragments from one of the material supports of a musical work and incorporating those fragments into a new

composition or production.³⁵ From a copyright perspective, sampling potentially generates a dual infringement: first, against the copyright in the musical composition itself, and second, against the neighboring rights held by the phonogram producer in the sound recording.

Unlike the United States, Colombian copyright law does not recognize a general *de minimis* doctrine or a broad fair use defense capable of justifying the unauthorized use of brief fragments of protected works.³⁶ Moreover, the Colombian legal framework does not contain a specific exception expressly applicable to musical sampling, and the existing exceptions do not necessarily provide effective legal protection for such conduct. The two exceptions most commonly invoked in this context are quotation rights and parody.

The quotation exception would likely constitute the first line of defense for proponents of musical sampling. However, this argument encounters significant obstacles from the outset. As discussed previously, neither Mexico nor Argentina recognizes the quotation exception as applicable to musical works. Colombia adopts a different approach: national law³⁷ expressly permits the quotation of brief fragments of performances, phonograms, or broadcasts, provided that such quotations comply with fair practices and are justified by informational purposes. However, the informational nature required by the provision significantly narrows its potential applicability to modern musical sampling practices.

Quotation rights could theoretically justify the use of fragments of musical works. However, their applicability encounters significant difficulties, particularly regarding compliance with the formal requirements traditionally associated with quotation, including the identification of the source, title, and author of the quoted work.³⁸ Furthermore, under the restrictive interpretation imposed by the three-step test, the application of quotation rights to musical sampling could still be considered harmful to the legitimate interests of the right holder, especially where the

³⁴ G. Melo Sarmiento, 'La Parodia: Reflexión y Elementos Propuestos para su Interpretación en Colombia', *La Propiedad Inmaterial*, No. 29, 2020, pp. 215-239.

³⁵ C.M. Gutiérrez Bayona, 'La Obra Derivada: Un Análisis de la Alteración del Arreglo Musical y los Elementos Esenciales de la Obra Musical', *La Propiedad Inmaterial*, No. 40, July-December 2025, pp. 225-244. DOI: <https://doi.org/10.18601/16571959.n40.09>

³⁶ C.M. Gutiérrez Bayona, 'La Obra Derivada: Un Análisis de la Alteración del Arreglo Musical y los Elementos Esenciales de la Obra

Musical', *La Propiedad Inmaterial*, No. 40, July-December 2025, pp. 225-244. DOI: <https://doi.org/10.18601/16571959.n40.09>

³⁷ Art. 178 of Law 23 of 1982.

³⁸ The Tribunal of Justice of the Andean Community has stated that identifying the source and the author 'is of utmost importance since, on the one hand, it respects the author's moral right of paternity and, on the other, clearly distinguishes the citer's opinions from those of the cited author, thereby ensuring transparency'. Process 104-IP-2021, 25 August 2021.

sampled fragment contributes to the commercial value of the new musical production.

In a 2025 decision, the Superior Tribunal of Bogotá³⁹ held that although the defendant had used only brief fragments of protected audiovisual works (Colombia national football team matches) and had clearly identified the right holder, those circumstances were insufficient to justify the unauthorized use. The Court reasoned that the use was neither merely incidental nor informational, but rather commercial and competitive in nature, serving purposes of economic exploitation. The Tribunal emphasized that permitting such conduct would effectively allow competitors to commercially exploit portions of another party's production without authorization or compensation. This reasoning could easily be extrapolated to the music industry and to the unauthorized use of sampled phonograms.

Although Andean law does not formally recognize a *de minimis* doctrine, the Andean Tribunal has employed *de minimis*-type reasoning when assessing whether a copyright infringement had occurred.⁴⁰ This interpretation was later adopted domestically by the Superior Tribunal of Bogotá,⁴¹ which held that authorization was unnecessary for the fleeting appearance of paintings within an audiovisual production, given that the artworks appeared only briefly, were not the central focus of the scenes, lacked narrative significance, and merely formed part of the surrounding set design.

Such reasoning could potentially be extended to musical sampling disputes, particularly in cases involving very small or barely perceptible phonographic fragments that may not even be readily identifiable by ordinary listeners.

Parody could also potentially operate as a relevant exception. However, in Latin American copyright systems, parody generally applies only where the transformation introduces elements of criticism, humor, satire, or

commentary directed toward the original work itself. Thus, while parody may justify certain musical arrangements, reinterpretations, or transformative remixes that alter melody, lyrics, or rhythm for critical or humorous purposes, it would not ordinarily encompass sampling practices where neither the parodic or critical function of the borrowed material nor the identity of the works allegedly being parodied is sufficiently perceptible.

As mentioned above, under Colombian law, the parody must be sufficiently distinguishable from the original work so that the public can clearly perceive it as a transformation and avoid confusion with the original. In Nas's work, two difficulties arise. First, it is not clear that the sampled material is used with the purpose of parodying, criticizing, or commenting on the original works. Second, the sampled fragments are not readily identifiable, making it difficult for an ordinary listener to recognize which works are supposedly being parodied. Taking together, these elements weaken the argument that the use could fall within the parody exception, even if a parodic or critical intent were asserted.

Finally, the third case concerns fan fiction. *Harry Potter and the Methods of Rationality*, written by Eliezer Yudkowsky and published online (later adapted as a podcast), reimagines J.K. Rowling's Harry Potter and the Philosopher's Stone across 122 chapters and over 600,000 words, with the stated aim of promoting rational and scientific thinking. As an unauthorized derivative work sharing substantial similarities in characters and plot with its source, while diverging in tone, theme, and audience, it may be understood as an instance of literary appropriation through transformative recontextualization of preexisting narrative material.

In Mexico, Argentina, and Colombia, fictitious characters may receive copyright protection when they are sufficiently individualized and embodied in an original form of expression. Mexican⁴² jurisprudence expressly recognizes

³⁹ Superior Tribunal of Bogotá, Fourth Civil Decision Chamber, Judgment of 21 January 2025, Case No. 2015-00929. *Caracol v. Telmex Colombia S.A.*

⁴⁰ Tribunal of Justice of the Andean Community, Process 135-IP-2020. When interpreting Article 15(g) of Decision 351 of 1993, the Tribunal explained that public communication occurs whenever a plurality of people gain access to a protected work without prior distribution of individual copies, including, in particular, the public display of artistic works such as paintings. However, the Tribunal also clarified that where a protected work appears only incidentally, fleetingly, or minimally, merely as part of the background

environment and without independent relevance, such use may fall outside the scope of infringing public communication.

⁴¹ Superior Tribunal of Bogotá, Civil Decision Chamber, Judgment of 14 May 2024, Case No. 2018-37921, *Carlos Alberto Massó Vasco v. Caracol Televisión*.

⁴² Tesis I.10.A.33 A (10a.), Registro Digital 2005085, 'Personajes ficticios. Se encuentran protegidos en México sin necesidad de registro ante el Instituto Nacional del Derecho de Autor, si forman parte de una obra'. Available at: <https://cerlalc.org/wp-content/uploads/dar/jurisprudencia/2591.pdf> (accessed 19 May 2026).

their protection from the moment of creation, without the need for registration, where the character forms part of the narrative structure of the work. In Argentina⁴³ and Colombia,⁴⁴ although copyright legislation does not expressly identify fictional characters as autonomous objects of protection, the applicable legal framework and jurisprudential or administrative interpretation allow protection where the character's defining elements constitute original expression rather than mere abstract ideas.

Although the legal treatment of fan fiction differs across jurisdictions, it is likely that similar conclusions would ultimately be reached in practice. Fan fiction works generally do not merely borrow the abstract concept of a character, but rather incorporate concrete expressive elements taken from the original work, including textual descriptions, narrative structures, settings, relationships, and recognizable storylines. To the extent that such elements form part of the protected expression of the original work, their incorporation into a new creation may constitute a transformation and therefore give rise to a derivative work whose exploitation requires the prior authorization of the original copyright holder.

From that perspective, it could be argued that certain fan fiction works may attempt to rely on traditional copyright exceptions such as quotation or parody. However, the applicability of those exceptions appears limited in practice. Quotation traditionally permits the incorporation of excerpts or fragments of a published work into a new creation, provided that the use complies with fair practices and is justified by the purpose pursued. Fan fiction, however, is not usually based on the inclusion of isolated excerpts, but rather on the broader reuse of the original narrative universe itself, making it difficult to distinguish

clearly between the protected elements of the original work and the author's new contribution.

A similar conclusion may be reached regarding parody. As explained above, parody generally requires a critical, humorous, or mocking engagement with the original work. Yet fan fiction is rarely intended to ridicule or criticize the source material. Instead, it commonly emerges from the desire to explore hypothetical scenarios, continue stories beyond their official ending, or rewrite plotlines with which audiences disagree. Consequently, although isolated cases may potentially fall within the scope of quotation or parody exceptions, fan fiction as a general phenomenon appears difficult to reconcile with those traditional copyright limitations and exceptions.

V. Final Considerations

Both closed and open systems of copyright limitations and exceptions have been subject to criticism. At the core of this debate lies a tension that has accompanied copyright law since its origins: the balance between the rights of authors and right holders, on the one hand, and the freedom of creation, expression, and cultural development, on the other. For this reason, any assessment concerning the lawful reuse of protected works must be conducted on a case-by-case basis, taking into consideration the particular characteristics, purposes, and effects of each use.

Excessive protection may hinder creativity, artistic dialogue, and cultural evolution, just as unlimited freedom to reuse protected works may undermine the legitimate interests of authors and the economic incentives that copyright systems seek to preserve. The real challenge therefore lies not in adopting absolute positions, but in finding an appropriate and dynamic balance between these competing interests. A balance capable of adapting

⁴³ See the emblematic case: *Ribak Marcos v. Zicolillo Jorge Ignacio*, *Cámara Nacional de Apelaciones en lo Civil, Sala D*, 14 November 2008. Available at: <https://cerlalc.org/wp-content/uploads/dar/jurisprudencia/2128.pdf> (accessed 19 May 2026). Marcos Ribak, writing under the pseudonym Andrés Rivera, sued Jorge Ignacio Zicolillo for plagiarism after Zicolillo incorporated into his own work three fictional characters originally created by Ribak in the novel *La Revolución es un sueño eterno*. Although both works revolved around the historical figure Juan José Castelli, the disputed characters - Mulata Belén, Dr. Cufre, and Irene Orellano - were not historical figures, but fictional creations independently developed by Ribak.

The defendant attempted to justify the use of the characters by including an acknowledgment thanking the author for the "loan" of

the characters. However, the Court held that such acknowledgment neither constituted authorization nor exempted the defendant from liability. The appellate court affirmed the finding of plagiarism, emphasizing that the mere fact that two literary works share a historical figure does not authorize the appropriation of fictional characters that form part of another author's literary style and narrative construction. The Court further stressed that the unauthorized characters were not tangential or insignificant elements, but rather recognizable and relevant components of the original work.

⁴⁴ See, *inter alia*: DNDA, Concepto 2-48004-2010; DNDA, Concepto 1-22258-2014; DNDA, Concepto 1-20991-2016.

to technological developments and to the constantly evolving forms of artistic creation and communication.

Both the European Union and the United States appear to be moving toward broader and more flexible approaches to copyright limitations and exceptions, particularly in response to digital culture, transformative uses, user-generated content, and new creative practices. However, it remains too early to determine with certainty the long-term positive or negative consequences of these evolving models. It is entirely possible that, over time, even jurisdictions currently embracing broader systems may reconsider the value of more restrictive or closed approaches.

For the time being, Latin America continues to operate predominantly under closed systems of copyright limitations and exceptions, systems that often prioritize the protection of authors and right holders and that may at times clash with contemporary forms of artistic creation. Nevertheless, this does not mean that Latin American copyright systems are static or incapable of evolution. Although such transformations may occur at a slower pace, the region continues to evolve in response to technological change, globalization, and comparative legal developments.

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