

RESEÑA INTELLECTUAL PROPERTY, NEW TECHNOLOGIES, AND CONSUMER LAW. REFLECTIONS FROM MODERN PRIVATE LAW

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REVIEW

INTELLECTUAL PROPERTY, NEW TECHNOLOGIES, AND CONSUMER LAW. REFLECTIONS FROM MODERN PRIVATE LAW

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This review gives an account of the creations of human intellect in different aspects and other related topics. The first aspect is the industrial secret in Colombia: the protection of industrial property not subject to registration, due to the development of the ideas of the creators, who offer different goods and services. The second aspect is the protection of computer programs or software through industrial property. The third is the concept of plagiarism in the music industry. And the fourth is misleading advertising and its critical studies.

The industrial secret in Colombia is a fact that must be protected from third parties who seek to take ownership of the idea that an individual has created. While it is true that the industrial secrets in Colombia are part of that basket of intangible assets with legal protection and economic priority, the strategy will always be that third parties, who in many cases are not related to the product, do not know what the purpose of the product is.

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As stated by the authors, any type of information that has not been disclosed can be treated within the framework of an industrial secret, as long as it has a productive, industrial or commercial application. Colombia has been protecting industrial secret because it is one of its obligations as a member state of the World Trade Organization. That commercial value that the industrial secret has, fruit of the innovative mind of the trader, must be protected from any rival trader.

Taking into account Article 1 of Law 256 of 1996, free and fair economic competition must be guaranteed, prohibiting acts and conducts of unfair competition, for the benefit of all those who participate in the market. This rule then establishes that if a person has committed acts of unfair competition against another trader, with respect to confidential information, this author has violated the free competition that exists in the market and the possessory rights that the person has over his product.

For this reason, in order for the industrial secret to be susceptible of providing protection in Colombia, it must be made up of secret information that cannot be easily obtained by any person. This was the case of the June 18, 2014 judgement of the Superior Court of the Judicial District in the sense that the defendant had stolen information to market the same products in the oil and gas sector.

There is a tool that particularly achieves a greater optimization, not only of time, but also of economic and logistic resources that all Colombians have used, that is, software and computer programs. But what is the relationship between software and computer programs with intellectual property?

It must be based on the concept provided by the authors. Software consists of a series of sequences that tell a device, computer or hardware, how to perform certain types of functions. Based on this definition, the World Intellectual Property Organization (WIPO) seeks *sui generis* protection for software, given the particular nature of this type of work, which is reflected in the source code, composed by a certain number of algorithms.

The sole idea of a work, in terms of copyright, is not the object of protection by the legislator, but it is the expression of that idea which has the most value. According to the above, such value resides, not only in its creation, but also in its registration, since it is at that moment when the ownership of the right is presumed.

Thus, in the Case of *AS Colombia Ltda. V. Informática & Gestión S.A.* Arbitration and Conciliation Center of the Bogotá Chamber of Commerce, where Ernesto Rengifo was Arbitrator, the plaintiff alleged that the defendant hired one of the engineers he had in his company and developed a software with the same functionalities with which the plaintiff and the defendant in the arbitration process had a contract.

This particular example demonstrates the evolution that software has had in Colombia, making this tool, as a human invention, something innovative, as it is controlled by computer programs. By way of illustration, we find that cell phones, the internet, tablets, smartwatches, laptops, and drones have been inventions that provide society with a better lifestyle through the use of this type of tools.

It should be noted that these mechanisms which constitute the second aspect, would be possible without being patented. The patent, according to the authors, is the recognition that the State grants to an inventor for the product he has created with the help of his ingenuity and knowledge about it. That is why the authors state that copyright protects the developer against piracy because it rewards mainly the development that the person made on the product, and that the patent right protects him against unfair competition in the Colombian economic market.

With industrial secrets and software in mind, we must also cover the subject of music. Music, as the authors state, is the creation and composition of a melody perceptible by the senses. First of all, we must specify two terms referred to by the authors, those of author and composer. The former is the creator of the lyrics, and the latter, the creator of the melody. Musical works are protected from the moment the lyrics or melody are created.

All those Colombians who have been creators and composers of music, enjoy patrimonial and moral rights which they cannot ignore. Consequently, their musical works may have several differential factors that allow them to have something decisive. For example, there is the sound, which in turn can be differentiated by intensity, tone, timbre, and distance, depending on the actors. But sound also has another factor, the frequency with which it is measured, that is, it can be higher or lower.

Thus, in Colombia, being a Western country, moral rights, as stated by the actors, are very personal rights, through which it is sought to safeguard the link generated between the author and his work. One of the most important moral rights is the paternity to which its creators are entitled. This concept serves to claim the

authorship in favor of the author, that is to say, if a person who is not involved in the composition of the song seeks to have the ownership of the same by other means, the main author is claimed.

A clear example is a case of the song *Blurred Lines* by Pharrell Williams and Robin Thicke, about which a jury formed in the District Court of Los Angeles, California, in March 2015, considered that there had been plagiarism, since this song took fragments of the song *Got to give it up*, by the famous blues singer Marvin Gaye. Although Marvin Gaye died in 1984, the patrimonial rights over his works were transferred to his heirs, who availed themselves of the prerogatives given by copyright, and more specifically the paternity that the author had over the work.

Thus, moral rights are those that are recognized even after the assignment of economic rights since they are perpetual and inalienable. In the Colombian legislation, and more specifically in the musical sector, the authors point out that they recognize that the copyright holders have the capacity to authorize or prohibit the publicity of each of the interpretations and executions when this is made for purposes other than those authorized.

As the last point, it should be analyzed that consumer rights in the Colombian legal system have been evolving gradually due to the incursion of new forms of supply and consumption, for example, the Internet. This has been the ideal medium in recent years because the fundamental rights of consumers must be preserved. It must be taken into account that one of the discrepancies that may arise is misleading advertising.

Misleading advertising, on the other hand, causes harm to the consumer or user directly because what is claimed does not coincide or is insufficient with the reality of the product, in such a way that it induces or may induce error, deception, or confusion to the consumer. Many people today see in e-commerce the new reality that is here to stay. E-commerce such as Instagram, Facebook, even WhatsApp show a product to the consumer, no matter what it is, and it turns out that is it not what it was when it arrives at the buyer's home.

For Colombian law, this product, which is offered through electronic commerce, must be truthful and verifiable, that is to say, its data must be real and true and coincide with the product that is delivered. In addition to that, they must be adequate, sufficient, and complete so that the consumer has an absolute knowledge about

the benefits, characteristics, or risks that the product may have in the present and the future. And finally, all the information delivered to the consumer about the product must be clear and understandable in order to complete and execute the contract as required by Colombian law.

An example given by the authors, and which is very successful is that of Kellogg's, with its Choco Krispy's. They made misleading advertisement which was, according to the AAP, since they are the only ones recommended by the Nutrition Institute. Another example given by the authors is Redu Fat Fast, which according to the SIC, does not have the rigorous medical and scientific studies to prove that, as advertised, it is effective in "eliminating fat, reducing weight or reducing body measurements.

By way of conclusion, we have that the industrial secret is fundamental to achieve the success of any invention that an individual achieves in Colombian society. Based on this concept, unfair competition is one of the biggest scourges that Colombia has because people lack authenticity and creativity when creating something new. Likewise, computer programs and systems have made the use of technology more accessible in recent times, as a work tool to improve their work and personal performance.

Music composers have seen their right to recognition of their economic and moral rights violated in recent years in Colombia. Therefore, patenting their composition is the best thing composers can do because it protects their product. Apart from this, it is important to keep in mind that misleading advertising is one of the most used mechanisms nowadays to not satisfy the consumer's need for the product he/she is requesting and thus comply only with the market factors.