CONTEMPORARY ART CHALLENGES COPYRIGHT LAW: THE PROBLEM OF THE ORIGINALITY AND THE MATERIALITY REQUIREMENTS

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ABSTRACT

Postmodernism shocked the art world when utilitarian objects began occupying walls and pedestals formerly designed for beautiful, handcrafted works. It also shocked the laws. The problem with Duchamp's Fountain, for both the arts and the law, "*wasn't the style of its physical form –the nature of the curves, or even the lustre of the ceramic— but its manufactured provenance*" (Boden, 2006). Artistic creativity took a different turn. Like Duchamp, since the early twentieth century art has defied its own meaning, thus stretching the copyright canvas of protection. Although Colombian copyright laws pose to be neutral as to the artistic merit of artworks, inflexible legal requirements for copyright to attach result in the discrimination of these new forms of contemporary art. While exploring appropriation art, this paper uncovers how Colombian copyright laws fail to protect these artists and their possibility to copyright their works, and explores how to mitigate such disparity.

Keywords: art, appropriation, originality, copyrights, moral rights.

1. INTRODUCTION

Two great forces are tearing apart the current structure of the law for the arts. The first one comes from contemporary creators. Artists are pushing the boundaries of what the art world and the law define "art" is, farther than ever. In an interview in 1966, Marcel Duchamp was asked about his ready-mades and his view of traditional arts to which he responded that "*choice is the crucial factor in a work of art. Paintings, colours, forms, even ideas are an expression of the artist's choice. So you can take this even further if you want, by saying: why go to the trouble of using your hands at all? So the idea of making something that is not physically created by the artist, that simply stems from choices he has made, that is, something already created like the ready-mades, was valid –personally speaking, at any rate*" (Duchamp, 1966). This statement continues to be true in today's art world when artists create works of art by making several choices, including borrowing from existing works, but with few personal involvement in the manufacturing process and, sometimes, with little or no transformation of such works.

The second force comes from the art market. The new globalization of the artworld, immerse in a broader globalization of culture, gives contemporary artists a wide repertoire of ideas and expressions –larger now than ever— to inspire from into creating new works of art. The technological development and the advancement of copying technologies of the second half of the twentieth century have also enabled the obtaining of exact reproductions of such repertoire, thus artists are now able to include exact reproductions of existing works into their new creations with little or no transformation or modification thereof.

It has been said that works of art are "*vested in a unique material form*" and that *"an artwork (even after Andy Warhol) typically exists in a unique material*" (Tielmann, 2005), and that because of that, to the eyes of art experts reproductions fail to reveal the particularities of time, place and history which make a work original or of genuine quality. Walter Benjamin described this as the aura of the work of art and its "*unique existence in the place where it is at this moment*" (Benjamin, 1989). But these assertions seem to only be true from an aesthetic or philosophical perspective, rather than a legal one. From a legal standpoint the fact that a work of art may be reproduced –regardless of the quality of the copy— is fundamental since copyright laws are founded on the basis that the author needs to be protected against others taking his work and exploiting it.

This is the case of the Colombian legal system which recognizes property rights not only of physical goods but also of incorporeal ones. Specifically, the Colombian Civil Code (1887) establishes that "*the products of talent and genius are owned by their authors. This type of property shall be governed by special laws*" (Civil Code, articles 669 to 671). Along those lines, the Colombian congress enacted laws granting legal protection to intellectual property by adhering to the Berne Convention and, finally, in 1991 the constituents elevated the concern for intellectual property to constitutional level.

However, Colombian laws have fallen behind to respond to the concerns of those appropriation artists who borrow from and use existing objects and artworks without first asking their creators or right holders for prior permission. By focusing on appropriation art, this paper intends to (i) establish what the purposes for copyright protection are within the Colombian legal system; (ii) provide an overview of how Colombian current intellectual property laws face the contradictory pressure between artists' appropriative creativity and the art market, specifically focusing on the originality requirement for copyright protection; (iii) analyze whether or not the Colombian copyright purposes are achieved in the case of appropriation art; and (iv) propose how the current copyright law should be modified in order to fulfill the expectations of these contemporary artists.

Please note that Colombian artists' rights laws are twofold since they protect both moral and economic rights. This paper refers to both such legal regimes generally as "copyright laws", unless otherwise specified in this document.

2. WHAT COLOMBIAN COPYRIGHT LAWS PROTECT

Since the adoption of Colombia's Civil Code in 1887, its legal system has recognized that "*products of talent or of wit are property of their authors*" (Civil Code, art. 670). Over a century after that, the 1991 Colombian Constitution established the duty of the State to "*protect intellectual property for as long and with the formalities determined by the law*". The Constitutional Court –the highest entity in the judicial branch in charge of protecting the supremacy of the constitution and the constitutionality of laws— has made clear that the main purpose of this constitutional protection is to "*harbor the creativity produced by human talent, work and effort*" (Constitutional Court, C 1023 of 2012) both in connection with industrial property and with scientific, literary and artistic creations. Particularly in connection with the latter, the legal protection was "*important to promote national creativity and talent to the extent that it guarantees that the creative work of the artist or the scientist shall not be unlawfully appropriated or taken advantage of by third parties*" (Constitutional Court, C 924 of 2000).

Within this constitutional framework, Colombia recognizes a twofold protection to authors and their works. On one side, there is the protection of moral rights as a way of recognizing artists', writers', scientists' and, generally, creators', "*creative power, the possibility to express ideas and feelings in particular ways, their capacity to invent, their genius and, in general, all the ways in which the human spirit expresses, all of which are prerogatives inherent to the rational nature of human beings and their freedom*" (Constitutional Court, C 155 of 1998). This moral angle is a consequence of men's and women's possibility to think and create because of the human condition (Constitutional Court, C 155 of 1998).

On the other, there is the protection of economic rights which aims at guaranteeing authors' (or titleholders') "*right to receive a profit from their works and receive economic benefits*" from the exploitation of such works (Constitutional Court, C 1083 of 2008). Unlike common law legal systems where the economic rationale of copyrights is to promote progress, encourage creation, and impede the market's failure to provide "*works and thereby avoid the underproduction that might otherwise result*" (Wu, 2004), the natural law theory behind Colombia's economic authors' rights considers them to be the effect of the right of ownership over intangible goods

that the Civil Code recognized since 1887 (articles 669 to 671) –much along the lines of the labor theory of value of John Locke in which private "*property right also attaches to the product of labor*" (Damstedt, 2003)—.

Ultimately, although Colombian copyright laws do aim at encouraging creativity, they do so only to the extent that such goal is achieved as a consequence of authors' exercise of their right to own what they create and to receive profits thereof, rather than as a recognition of the need to incentivize the supply of culture and creativity in the market.

3. A VIEW OF ART THROUGH THE LENS OF COLOMBIAN COPYRIGHT LAWS

As many other legal systems, the Colombian one does not nor intends to determine what art is and what it is not. This question is a matter for other fields of study such as art history, aesthetics or philosophy of art. Interestingly, how easy a work may be labeled as a *work of art* by applying traditional definitions of *art* (rather than contemporary definitions thereof) seems to be directly and proportionally related with how assertive one can be in considering such work to be protected by Colombian copyrights laws; this is so because while Colombian copyrights laws explicitly protect several types of traditional art practices and expressions, they make no express reference to any contemporary styles or forms of art[1].

Nonetheless, Colombian copyright laws do capitalize on the constant development of the arts so they provide language and broad criteria that enables the protection of not only traditional works of art but of works created in the post-modern era such as those which "*are not medium specific (as ideas around fine art tended to be) or particularly restrictive about the nature of aesthetic value*" (Newall, Pooke, 2008): Certainly, Law 23 protects "*all creations of the spirit in the (...) artistic fields, whichever their manner or form of expression is and regardless of their destination (...) and, generally, any production of the (...) artistic domain[s] that may be reproduced or defined by any means of printing or reproducing, by phonograph, radiotelephony or any other means known or to be known*" (Law 23 of 1982, article 2). In this same line, Decision 351 of the Andean Community of Nations protects authors of "*works of wit in the (...) artistic (...) field, whatever their genre or form of expression and regardless of their (...) artistic merit or destination*", as long as such works are "*original*" and may be "*reproduced or divulged in any form or by any media known or to be known*" (Decision 351, articles 1, 2 and 4).

Within this context, the Constitutional Court has sustained that no creation or manifestation of the human wit or genius is unworthy of protection and that "*the prerogatives derived from authors' rights apply to all creations of the human spirit (...)*" (Constitutional Court, C 1023 of 2012), but only to the extent that such creations are original (DNDA, 2009).

4. THE ORIGINALITY REQUIREMENT IN COLOMBIA

Most copyright-related judicial precedents do not meticulously analyze the question for the originality requirement but Colombian High Courts, through *obiter dicta,* coincide in that a work of art needs to be an original creation of the intellect or spirit of its author in order for him or her to be granted copyright protection (Constitutional Court, C 1023 of 2012).

1 This is the case of Law 23 of 1982, enacted in preparation for the Colombia's adherence to the Berne Convention (of 1886), which occurred later in 1987. Law 23 established the legal protection of both authors' moral and economic rights of artistic works such as drawings, paintings (in oil, watercolor and pastel), sculptures, statues, photographs, works of applied art, works produced by cutting any sort of materials, engravings, lithographs, illustrations, and pantomime. Decision 351 of 1993 of the Andean Community of Nations (of immediate application and insertion into the Colombian legal system) also recognized moral and economic rights for authors of two different types of works of art: (i) works of applied art (artistic creations with utilitarian functions or incorporated in a useful article, whether works of handicraft or one produced on an industrial scale) and (ii) works of fine art (artistic creations intended to appeal to the aesthetic sense of the person perceiving it, such as paintings, drawings, engravings or lithographs).

The Colombian Constitutional Court assimilates a work that "*has originality*" with a work that has "*sufficient individuality*" (Constitutional Court, C 1023 of 2012). The Supreme Court explains that it is the author's individuality "*imprinted into the work what allows it to be distinguished from another work of the same genre*" (CSJ, 2010). It is precisely the "*work's singularity or individuality with which its creator's print is revealed*" what constitutes the basis for the legal possibility to take underlying ideas and concepts to reuse them and imprint on them new and different individualities (CSJ, 2010).

From the standpoint of the artwork, this definition of "originality" complements the notion of "creativeness" which is defined as the "*palpable intellectual effort in the production of the work in which the author has imprinted his personal seal*" (CSJ, 2010). It would appear that originality and creativity are two sides of the same coin since there cannot be originality without any creative talent, wit and intellectual ability of its author and, conversely, no real talent, intellectual ability and wit would result in something other than an original creation. The Andean Court of Justice, exercising its pre-judicial powers of legal interpretation agrees with this latter interpretation by saying that under Decision 351, "*because of its form of expression,* [a work of art] *requires originality features*" (ACJ, 2012). Originality, to the Andean Court, means that the "*work really belongs to the author; that it is the result of his work and not a copy of someone else's work*" (ACJ, 2012).

With this in mind, in order for a work of art to be one step closer to copyright protection, it needs to comply with these two facts of originality: first, it needs to be the result from the author's creativity (and not someone else's as would occur in some cases of appropriation art and, generally, in cases of authorized or unauthorized reproductions) and, second, it needs to evidence sufficient individuality.

5. APPROPRIATION ART

There is nothing new in using what is in the outer world, including other people's ideas and works, to create new works. Artists have always used others' creations to inspire from or build upon them (Lessig, 2008). But when Duchamp's mixed media installations, converting previously functional objects into works of art and making "*both hand and eye, as well as aesthetics, irrelevant to the definition of art*" (Danto, 2013), challenged the preceding traditional ideas of what art was, he made a statement that "*art could be about concepts and ideas (whether playful or ironic), rather than mimetic or formalist concerns*" (Newall, Pooke, 2008) and that borrowing from previously existing works and utilitarian objects was a perfectly valid way of making art.

Thereafter, many post-modern manifestations of art have proclaimed that same belief to the point that in the 1970s and 1980s the term "appropriation art" came into existence (Danto, 2013) to designate an artistic formula or a manner of expressing artistic meaning that artists could use to produce new works. Works that consisted in being "*representations of existing representations*", or in taking other artists' creations "*without asking*" to make them pass off as their own (Harris, 2006). Appropriationism, "*which defines the end-of-art condition, is pretty much the defining principle in our moment, putting, as it does, everything and every combination of things at the service of art*" (Danto, 1997).

From a philosophical standpoint, what seems to differentiate appropriation art from the mere unauthorized use or reproduction of art works is the existence of an artistic purpose for using and incorporating preexisting pieces of art into the appropriation artists' new work. Certainly, for many appropriation artists, once the viewer "*is aware that she has "lifted" an earlier representation, her own art takes on a conceptual or theoretical dimension that contrasts with usual accounts of modern art's intrinsic and authentic meaning and value, seen as directly expressive of its creators' personalities*" (Harris, 2006). Moreover, when the appropriation in a work is fairly evident, appropriation art intertwines with conceptual art, because "*the idea becomes a machine that makes the art*" (Sol LeWitt, 1967) and, thus, the concept overcomes the form of the artistic creation.

From a legal standpoint, the appropriation artist's aesthetic or philosophical purposes for creating a certain appropriation work of art does not deplete the fact that creations by previous artists –that are generally protected under copyright laws— are being used or reproduced, without authorization. In many appropriation artworks the borrowing is evident; but in many others the original work is appropriated in such ways that it is almost impossible to recognize the borrowed artist's work from the appropriation artist's intervention or creativity. When this occurs, as this paper describes below, the appropriation artwork fails to meet the originality requirement for copyright to

attach and, thus, the author results unprotected against the unauthorized reproduction of the work, refrained from obtaining a monetary profits from third parties' use of it and, even worse, defenseless against the breach of his or her moral rights in connection with the appropriation work.

Colombian artists are no exception to this reality. Bernardo Salcedo is known to be the first appropriation artist in the country because of his famous installation ***Hectárea de Heno*** (Coltejer Art Biennale, Medellin, Colombia, 1970) in which he used 500 bags of wheat harvest, piled them all together, and with this he argued about private ownership of land. Fernando Botero, one of the –if not the— most important Colombian artist of the twentieth century, is also famous for his appropriations of Da Vinci's Mona Lisa and of Velazquez' ballerinas. When producing his versions of these paintings, he imprinted in them his distinctive style exaggerating the objects' curves and inflating their body figures. Another known example of appropriation art is Nadin Ospina's use of Disney's characters to create pre-Columbian styled sculptures based on them. His intention for making these appropriation statues was to represent the conundrums of culture globalization and its effects in peripheral countries. When Ospina created these works he was approached by Disney and was told that the use of Disney's copyrighted property would trigger the initiation of law suits against him for copyright infringement.

6. A LEGAL LOOK AT APPROPRIATION ART: WHETHER OR NOT COLOMBIAN COPYRIGHT LAWS PROTECT APPROPRIATION ART

As mentioned before, Colombian copyright laws do not specifically refer to appropriation art as a type of artistic creation protected under copyrights laws. But in this ever-changing artistic context, an analysis of whether or not appropriation art is protected under copyright laws is necessary to effectively manage such works of art in a business or cultural environment. The analysis is also an essential step to design legal arguments to defend *appropriationism* against copyright infringement law suits.

Firstly, Colombian copyright laws establish the sole right of the author of a work (or its copyright holder) to make reproductions of it. A reproduction consists in the "*fixation of the work into a tangible media allowing its communication or the production of copies of all or part of it, by any media or procedure*" (Decision 351, article 14)[2]. Since this includes the power to authorize third parties to make reproductions of the rights holder's work, an appropriation artist cannot use the work of another without obtaining his or her authorization first.

This right, however, is not absolute since Colombian copyright laws establish legal specific limitations and exceptions to authors' economic rights that would render legal an unauthorized use of previous works. In the case of an appropriation artist, however, the only plausible exception that would serve as defense would be right of citation (Law 23, article 31; Decision 351, article 22.a) defined as the "*power of people to reproduce or use short fragments of works by other authors without compensation [and without authorization], if and as long as certain requirements are fulfilled*" (CJS, 2010). The Supreme Court of Colombia agrees with the National Direction of Authors' Rights in that, in spite the fact that the wording of the right of citation refers only to literary works, it applies to any kind of literary, scientific and artistic works. The Court has also assessed that the right of citation applies to both published and unpublished works (CSJ, 2010).

2 In order to be protected under copyright laws, a work of art needs to be manifested in a perceptible form in the outer world, as opposed to the mere existence of ideas or thoughts of what the work is or will be (Constitutional Court, C 276 of 1996). This possibility of being perceived means –on a case by case basis— that the work needs to be "*susceptible of divulgation or reproduction in any way*" (Decision 351, articles 3 and 4) as an actual possibility.

Based on both Law 23 and Decision 351, in order for an existing artistic work to be lawfully cited into another author's creation, the latter needs to (i) expressly mention the name of the author and title of the primary work; (ii) use portions of the primary work in a way that they are not so long (or so large in size) nor so sequential that their use may be considered as a simulated or substantial reproduction, (iii) use the primary work in a measure that is justified by the purpose and character of the use, (iv) make the citation in accordance with the honorable use principle, and (v) not cause damage to the primary work's author. Colombian citation exception is rather strict because if one or more of these prongs is missing then the use of the original work of art will not be legally authorized under the citation exception.

The principle or doctrine of "honorable uses" was incorporated into the Colombian legal system by Decision 351 and is defined as "*those uses that do not interfere with the normal exploitation of the work nor cause unreasonable damage to the legitimate interests of the author*" (Decision 351, article 3). The doctrine refers to a three step test to be used in order to establish whether or not the use of a protected work (under authors' rights laws) is honorable. The test's prongs are that the use by the second author: (i) responds to a legally recognized limitation or exception to authors' rights; (ii) does not strike against the normal exploitation of the work by the original author, and (iii) does not cause unjustified damage to the interests of the original author (CSJ, 2010). This test is, generally, very similar to the common law *fair use* doctrine except for the fact that in Colombia the use by the second author needs to be expressly listed in the authors' rights laws as a limitation or exception to the application of the authors' rights laws protection.

Appropriation artists consistently fail to give express credit to the original authors of the pieces they use or borrow from. Though appropriation art many times is evident as to the appropriated work, it is unusual for an artist to include the name and title of the original artist into his own work possibly because "*appropriation differs from tradition al art historical notion of influence in an important respect: though it retains the sense that artistic elements may have been either "borrowed" or "stolen" from earlier sources (...) they can easily be said to belong to their current owner*" (Harris, 2006). Additionally, on a case by case basis, the appropriation artist would need to find a justification for using large or sequential portions of existing works and to also demonstrate that the size of the reproduced work was just about the necessary to convey his creative and artistic idea. Finally, the artist would have to demonstrate that his use of someone else's work is not causing damage to the appropriated work or the original author (including moral rights), and that the fact of having created a piece based on or borrowing from the original work does not compete with or injures the market for such work.

In 2010 the Supreme Court of Justice of Colombia analyzed the case of the unauthorized incorporation and use of unquoted portions of a graduation thesis of a student opting for a postgraduate degree at a Colombian university into a 12 pages length article authored by a professor of the same university and published as hers in a literature magazine (CSJ, 2010). In it, the Court found that the professor's published article incorporated entire paragraphs that were identical to the student's thesis, and that such use "*exceeded the simple appropriation of general ideas and concepts to enter into the criminal realm of plagiarism*". The Court ruled that copyrights laws expressly prohibit the "*copying of entire fragments*" of someone else's work without the proper citation, even if the appropriation artist tries to "*hide this fact with simple unsubstantial changes of words because, in such a case, we will not be before an original creation of an individual but before an evident case of appropriation*".

Consequently, if all or part of a previous artistic work is incorporated into a new work without mediating the previous artist's authorization or without fulfilling the requirements of the citation exception, such work will be infringing someone else's economic (and even moral) rights and therefore would not be protected under Colombian copyright laws.

Secondly, Colombian authors' rights laws also establish the protection of the author's or the right holder's possibility to translate, adapt, arrange or transform in any way their works and to authorize the same to third parties. This includes the option to transform a work from one form of expression to another (Arbitration Decision, 2003). If an authorized transformation results in the creation of an autonomous work that complies with the originality and expression requirements in itself, such work will be considered to be a "derivative work" and as such will be protected under Colombian copyright laws. Colombian arbitration tribunals agree in that in transformative works the originality requirement needs to be analyzed on a case-by-case basis since its originality "*depends on the form of expression in which the derivative work is done*" (Arbitration Decision, 2003).

Similarly to what occurs with the reproduction right, in spite the fact that many appropriation artists create works that are original enough to be differentiated from the original works of art they borrowed from, they rarely obtain authorization by the authors or right holders of such works. Moreover, unlike the right of reproduction, there is no legal limitation or exception for the right of transformation that could be alleged as a defense if an appropriation artist makes his new creation based on the transformation of a previously existing copyrighted work. But for the genuinely original parts of the new work, the appropriation art work will not be worthy of copyright protection as a derivative work.

Finally, appropriation art often deals with more than just economic rights. It also often oversteps the moral rights of the artists which works they borrowed from. Certainly, Colombian laws protect the paternity right and the right to maintain his work's integrity. The first one consists in that the author shall always be identified as the author of the work, while the second one consists in the power to impede any deformation, mutilation, alteration or any other type of transformation of the work unless the appropriation artist has obtained first the express authorization of the right holder –including those uses that may demerit the work or that may affect the honor and reputation of the author (CSJ, 2010)—.

Particularly in connection with the paternity right, in the case of the unauthorized copying of the student's thesis described above the Court referred to how the Colombian doctrine recognizes two modalities of plagiarism which constitute, both, breaches to the moral rights of the original author: the first one occurs when an author calls as his own the work of another person by either reproducing it identically or by changing the name of the original author for his; the second modality occurs when an author calls as his own a work authored by someone else, but either introducing changes to the existing work or extracting or deleting important parts of such work to incorporate them into his plagiary work to the extent that such changes result in an imitation of the existing work "*essential extremes*" (CSJ, 2010). Accordingly, in order to determine if work is or not plagiarism and, therefore, whether or not it is in violation of an author's moral rights, a thorough analysis on how the new work was done and of how and to which extent the original work was used is necessary.

In the case of a work of appropriation art, should this analysis result in that one of the abovementioned forms of plagiarism occurred, it is highly likely that a Colombian court would find not only that the original artist's moral rights were infringed with the appropriation art work, but also that there was either an unauthorized reproduction or an unauthorized transformation of the original work.

7. WHETHER OR NOT CURRENT COPYRIGHT LAWS SHOULD BE MODIFIED IN ORDER TO FULFILL THE NEEDS OF APPROPRIATION ARTISTS, AND HOW

Based on the abovementioned laws and precedents, in Colombia's legal context Nadin Ospina's transformative use of the Disney's images will most likely be considered as a substantial reproduction of the original creation or an unauthorized transformation thereof, thus infringing Disney's economic rights. Possibly, should the author of the Disney's characters be granted moral rights, Ospina would be infringing them, too, for not including the name of the original author in Ospina's new works. Ospina's pre-Columbian statues' failure to pass the originality requirement results in that any person is entitled to copy them without Ospina's authorization and without mentioning his name. Moreover, his borrowing from an existing work is so evident that he could have a hard time defending his work by alleging that he only used underlying ideas rather than concrete forms of expression, or that he complied with all legal requirements for the citation exception.

In Colombia, Ospina's right to own the produce of his appropriative creativity applies only to his more traditional art works and excludes his appropriational work, thus, harming the natural market for copyrights on the appropriation artwork and impeding him from getting a profit therefrom.

The strong emphasis of Colombian copyright laws on the originality requirement, its limited scope, and the strict conditions of the citation legal exception render Colombian copyright laws inapplicable to the creations of appropriation artists, therefore failing to achieve the purposes of copyright laws to "*promote* [this type of] *creativity and national talent*" and to *"guarantee that the creative work of the artist (...) will not be appropriated nor unlawfully used by third parties*" (Constitutional Court, C 1023 of 2012).

The challenge for lawyers and public policy makers, then, consists in finding a middle ground between the appropriation artists' interests and the copyrights already recognized on the appropriated works. A careless decision on how to solve the problem, as would be a proposal for abolishing the originality requirement completely without modifying the remaining copyright system, would result in a world in which everybody would be an artist and anything would be a work of art, –even the most basic form of expression—, and artists would have the sole right to impede the use of their creation for as long as their copyrights would last. Common phrases and names are but examples of this vast array of "creations" that would be monopolized until copyright protection expired.

One way of accommodating appropriation art into the copyright umbrella, without impairing the free flow of ideas and concepts, would be to ease the originality requirement exclusively for certain creations to be chosen after performing an economic and behavioral analysis of the arts in general and, particularly, of that specific piece of art. The analysis would need to provide enough information so as to determine whether or not a particular appropriation art work –even if it contains identical reproductions of pre-existing creations— competes or not in the same market as the appropriated work, and if it incites the same senses and reactions as the original work. If it does not, then the reasonable approach would be to judge the appropriation art work based on a less rigorous notion of originality that takes into consideration the general interests of the appropriation artist and the market's reception of the work.

Furthermore, the citation limitation (which serves only as a defense against copyright infringement allegations) should be transformed into a right pursuant to which any person would be legally protected when using previously existing work in an artistic way. Once construed as a right rather than as an exception, the requirements to make a citation should be simplified based on how known the cited work is within a specific context. In this hypothetical scenario, if a court finds that the cited work's author is generally known within the artwork's specific market, or if it concludes that the author's name is not necessary because the fact of appropriation is so evident, then the court should be able to apply a mild originality requirement to justify copyright protection of the appropriated work.

CONCLUSIONS

In order to protect appropriation art as the valid form of art that it is, Colombian copyright laws need to be modified in two aspects in: (i) the originality requirement needs to be reviewed to allow exact reproductions whenever both creations do not compete for the same market or effect, and (ii) the citation limitation needs to be turned into a right.

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