

Chapter 13:

IP in Decisions of Constitutional Courts of Latin American Countries

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“You'd be surprised. They're all individual countries”

Ronald Reagan, December 4, 1982

This article does not purport to collect and analyze all Constitutional provisions and decisions of the Latin American countries. Much to the contrary, by gathering a few significant normative and court contributions from the region, we will just try to sketch the relation between Intellectual Property and fundamental laws as it takes its peculiar character from the South of Rio Grande to the deeps of Patagonia.

In most Latin American jurisdictions, the Constitution includes at least one Intellectual Property-related clause; and many of those inclusions date from XIX Century. This is markedly distinct of the situation in the countries belonging to the European Union or the Council of Europe, where specific Intellectual Property provisions are not frequently found.

On the other hand, some Supreme or Constitutional Courts of the area have a meaningful stream of decisions on IP issues¹, but others only rarely, if ever, take notice of the matter.

Therefore, even though it is not possible to identify a strong and coherent regional construction of legal principles and solutions, and even less of clear convergences, the geographical focus of this study deserves such attention.

Human, fundamental or simply constitutional rights

This book is supposed to address to the issues of Human Rights and Intellectual Property².

¹ Particularly the Constitutional Court of Colombia. The IP interests were confronted with the constitution in the Decisions C-519 of 1999, C-509 of 2004; C-833 of 2007; C-282 of 1997; C-1118 of 2005; C-334 of 1993; C-1490 de 2000; C-262 of 1996; C-053 of 2001; T-975 of 2002; C-533 of 1993; C-924 of 2000; C-975 of 2002; C-509 of 2004; SU-913 of 2009; C-155 of 1998; C-1183 of 2000; C-424 of 2005; C-792 of 2002, MP; C-975 of 2002, MP; C-523 of 2009; Decision C-1051/12; and C-262 de 1996.

² It seems fair to note that this author is nor especially fond of all aspects of the Human Rights doctrine, in particular its universal or anti-diversity character. See Borges Barbosa, Denis, *Universalism as Oppression* (2003). Available at SSRN: <http://ssrn.com/abstract=1031676> or <http://dx.doi.org/10.2139/ssrn.1031676>. On the diverging aspects of the interrelation between Human Rights and IP see especially CULLET, Philippe. Human

This article, however, shall take into account the specific character of Latin American jurisdictions, where most Constitutions provide for specific protection of IP rights, and human rights considerations are raised as a background to the domestic provision, or given application through the Constitutional filters.

For our purposes, it is necessary to distinguish the notions of (a) Human Rights, here taken as the *domestic effect of international instruments* dealing with the matter³; (b) fundamental rights, that is, those provisions that have a special Constitutional status⁴ as compared to other norms of the same text (for example, they are immune from Constitutional amendments); and (c) those provisions residing in the Constitutional text but not enjoying *fundamental* status.

Some regional Constitutions took a fundamentalist approach by conferring Human Rights a supra constitutional status⁵. On the other hand, other national

Rights And Intellectual Property Rights: Need For A New Perspective. Found: <http://www.ielrc.org/content/w0404.pdf> and www.ielrc.org Visited: 05/07/2013; CULLET, Philippe. Human Rights and Intellectual Property Protection in the TRIPS Era. Found: http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/human_rights_quarterly/v029/29.2culet.html. Visited: 04/07/2013 HELFER, Laurence R. Human Rights and Intellectual Property: Conflict or Coexistence? Found: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=459120, Visited: 04/07/2013; YU, Peter K. Reconceptualizing Intellectual Property Interests in a Human Rights Framework. Found: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927335 and Visited: 04/07/2013. DREYFUSS, Rochelle Cooper. New York University School Of Law. Patents and Human Rights: Where is the Paradox?. Found: <http://ssrn.com/abstract=929498>. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929498 Visited: 04/07/2013; FITZGERALD, Brian and ATKINSON, Benedict, Queensland University of Technology. Copyright Future Copyright Freedom. Found: http://eprints.qut.edu.au/41716/1/CopyrightFuture_TEXT.pdf. Visited: 04/07/2013

³ Specially Art. 55 of the United Nations Charter, the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and, regionally, the 1969 American Convention on Human Rights.

⁴ For instance, the series of cases of the Colombian Court where *moral rights* were held to be fundamental rights, but not the economic rights, which would be simply Constitutional rights: "Sin embargo, en atención a que la jurisprudencia ha reconocido carácter fundamental únicamente a los derechos morales de autor, se produce la incorporación de la citada decisión comunitaria al bloque de constitucionalidad, únicamente en lo relativo a los mencionados derechos, dado que su naturaleza, a la luz del artículo 93 de la Carta así lo impone". Colombian Constitutional Court, full sitting, Sentencia C-339/06, Referencia: expediente D-5992 Demanda de inconstitucionalidad contra los artículos 226 de la Ley 23 de 1982, y 21, inciso 3º, de la Ley 44 de 1993. Actor: Jorge Alonso Garrido Abad. May 3, 2006.. A footnote to that decision details the other cases where the distinction between fundamental rights and non-fundamental Constitutional rights is restated. In Brazil, the status of Human Rights treaties incorporated was clarified by Supreme Court Habeas Corpus 87585 / TO – Tocantins, Min. Marco Aurélio, 03/12/2008.

⁵ Guatemala and Honduras would arguably enter in this list, according to Allan R. Brewer-Carí, La interrelación entre los tribunales constitucionales de america latina y la Corte Interamericana De Derechos Humanos, y la cuestión de la inejecutabilidad de sus decisiones en Venezuela, in Armin von Bogdandy, Flavia Piovesan y Mariela Morales Antonorzi (ed.), Direitos Humanos, Democracia e Integração Jurídica na América do Sul , Lumen Juris Editora. Rio de Janeiro, 2010 . pp. 661-70, found at <http://www.allanbrewercarias.com>, visited July 2, 2013. This paper covers the complex relation between Human Rights and Constitutional norms and Courts in the region. See also from the same autor, Nuevas reflexiones sobre el papel de los tribunales constitucionales en la consolidación del Estado democrático de derecho: defensa de la Constitución, control del poder y protección de los derechos

Courts have assigned *fundamental* status to those Human Rights treaties that are incorporated into the domestic legal system⁶. In certain cases, such International instruments would compose the country's *constitutional block* (or enlarged Bill of Rights⁷), a legal notion developed by the French Constitutional Court in 1971⁸.

A germane and relevant question is whether internationally protected IP rights are assimilated by the constitutional block. The Colombian Court in at least two cases declared that the *moral rights* provisions of some copyright treaties⁹ were received within the constitutional block¹⁰. The economic rights, according the decisions, were not given the same treatment.

A third issue is whether Human Rights International treaties when internalized – but not admitted to the constitutional block - are even so incorporated in the domestic legal system on a higher status than ordinary statutes. Some countries of the region provide for such enhanced status for *all* treaties (Human Rights or not)¹¹ and in certain cases IP treaties were deemed to revoke all prior legislation¹²;

humanos”, Anuario de Derecho Constitucional Latinoamericano 13er año, Tomo I, Programa Estado de Derecho para Latinoamérica. Konrad Adenauer. Montevideo, 2007, found at <http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/2007.1/pr/pr5.pdf>, visited July 3, 2013..

⁶ On the Colombian Court decisions about the “constitutional block” composed by domestic bills of rights added to Human Rights treaties, see Undurraga, Veronica and Cook, Rebecca J., Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006. Constituting Equality: Gender Equality And Comparative Constitutional Law. Constituting Equality: Gender Equal, pp. 215-247, S. H. Williams, ed., Cambridge: Cambridge University Press, 2009 . Available at SSRN: <http://ssrn.com/abstract=1573798>. Also: Reina García, Oscar M., Las Cláusulas De Apertura O Reenvío Hacia Fuentes Externas Previstas En La Constitución Colombiana, Como Criterio Para Delimitar El Contenido Del Bloque De Constitucionalidad (The Opening Clauses or Forwarding to External Sources Provided in the Colombian Constitution, as a Criterion to Define the Content of the Constitutional Block) (December 17, 2012). Revista Derecho del Estado No. 29, 2012. Available at SSRN: <http://ssrn.com/abstract=2190433>. The Brazilian Supreme Court also refers to the notion of “Constitutional block” in a series of cases, starting with the Adin 595 of February 22, 2002. On the importance of the notion in Brazilian Law, see Vitor Tadeu Carramão Mello, O bloco de constitucionalidade como parâmetro de proteção dos direitos fundamentais, found at http://www.ugf.br/editora/pdf/voxxuris_2/artigo4.pdf, visited July 3, 2013.

⁷ The Constitutional Courts of Brazil, Argentina, Bolivia, Colombia, Costa Rica, Chili, Peru, Guatemala, El Salvador, and Equator have incorporated the concept. Se NOGUEIRA ALCALÁ, Humberto., El bloque constitucional de derechos fundamentales y su aplicación en Chile y América Latina. In: VON BOGDANDY, Armin; PIOVESAN, Flávia; MORALES ANTONIAZZI, Mariela (orgs.). Direitos Humanos, democracia e integração jurídica na América do Sul. Rio de Janeiro: Lumen Juris, 2010.

⁸ Constitutional Council , decision 71-44DC. For the notion of “Constitutional block”, see Parance, Béatrice , The Contribution of the Question Prioritaire de Constitutionnalité to Private Law (January 1, 2011). The Financial Crisis Of 2008: French And American Responses - Proceedings Of The 2010 Franco-American Legal Seminar, p. 67 Martin A. Rogoff, Michael Dixon & Eric Bither, eds, 2011. Available at SSRN: <http://ssrn.com/abstract=2012790>

⁹ The Berne Convention and the 1996 WIPO treaty on neighboring rights.

¹⁰ Decisions C-1490 de 2000 and C-1118 de 2005.

¹¹ Argentina, Uruguay and Paraguay changed their constitutions for allowing such status on account of Mercosur rules. But the Brazilian Congress rejected the respective proposal.

this higher status does not necessarily lend such international treaties constitutional hierarchy¹³.

Taking into account the enticing distinction proposed by the Colombian Court, it is arguable that - although supported by the applicable Human Rights¹⁴ - IP Rights are not by itself the mandatory expression of such rights.

There would be possibly no doubt that IP exclusive rights are *supported* by UHRD Art. 27.1 or ICESCR Art. 15¹⁵, but at the International level there is no *requirement* that the right to the protection of the moral and material interests of creators should necessarily be covered with an exclusive right, and by any other means.

In this article, therefore, we shall address the protection of IP interests as fundamental or simply constitutional rights in Latin America, setting aside the germane issue of IP International norms having special, but not constitutional status in the domestic legal system, or any direct effects of Human Rights treaties.

An Early start

Intellectual property was soon recognized as a proper subject for the Constitutional laws in Latin America. The first Brazilian Constitution of 1824, for instance, included in the recital of its civil and political rights the citizen's entitlement to *patents*:

¹² For instance, TRIPs was held to revoke all prior IP laws in the Decision of Supreme Court of Argentina Dictamen n° P. 282. XXXVI de Corte Suprema de Justicia de la Nación, 15 de Marzo de 2001, found at <http://ar.vlex.com/vid/-40029883>, visited July 3, 2013.

¹³ In Brazil, Human Rights Treaties are given *fundamental* status, where the Congress has incorporated the instrument with a majority equivalent to the Constitutional amendments shall be so deemed: "Art. 5, § 3 The international treaties and conventions on human rights that are approved in each House of Congress, in two votes, by three fifths of the votes of its members shall be equivalent to constitutional amendments". According to relevant case law and commentators, the Human Rights treaties not so voted are to be given a status superior to ordinary statutes, but not incorporated in constitutional block.

¹⁴ Again, in the sense of the domestic effect of International instruments dealing with the matter.

¹⁵ UHRD Article 27. (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. ICESCR Article 15 1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Art. 179. The inviolability of the Civil and Political Rights of the Brazilian Citizens, which has as its basis the Freedom, the individual security, and the property, is guaranteed by the Constitution of the Empire as follows: (...)

XXVI. The inventors will have ownership of their discoveries, or of their productions. The Law shall assure to them an exclusive temporary privilege or shall pay to them the compensation of the loss, which they may suffer by the communization¹⁶.

This is not, however, the first Latin American Constitutional text dealing with the subject. The 1819 Constitution of the United Provinces (Argentina) has already assured by its art. 44 that the authors or inventors of useful establishments would be entitled to exclusive privileges by a certain time, and a similar wording was included in the next Argentinian Constitution of 1826.

Vidaurreta¹⁷, in an extensive analysis of the various South American constitutions and constitutional laws and essays, demonstrates that, in most such fledgling republics, their first Constitutional fathers received some impact of the so-called Patent and Copyright clause of the U.S. Constitution and most certainly a textual influence of the Brazilian precedent¹⁸. Many of such early texts incorporate direct protection of *patent* interests in the constitutional menu.

Many, even though not all, of those texts create an entitlement, or a *subjective right*, to the profit of inventors; in certain cases (as the Brazilian provision) explicitly as a portion of their Bill of Rights.

In this context, they do not directly subscribe to the tradition of U.S. clause, which was an extraneous antecedent to the Bill of Rights, and essentially directed to the empowerment of Congress to legislate on monopolies¹⁹. Fact is that those

¹⁶ “Art. 179. A inviolabilidade dos Direitos Cívicos, e Políticos dos Cidadãos Brasileiros, que tem por base a liberdade, a segurança individual, e a propriedade, é garantida pela Constituição do Império, pela maneira seguinte (...) XXVI. Os inventores terão a propriedade das suas descobertas, ou das suas produções. A Lei lhes assegurará um privilegio exclusivo temporario, ou lhes remunerará em resarcimento da perda, que hajam de soffrer pela vulgarização”. The Portuguese Constitution granted (by the very same Emperor of Brazil who was eventually King of Portugal) in 1826 repeats exactly the same wording. A very near translation of such provision can be found in the Chilean Constitution of 1833, the Argentinean one of 1853, and 1826 Constitution of Bolivia. The “communization” notion is better expressed by those other texts as “in case of publication”.

¹⁷ Guillermo E. Vidaurreta "Historia del Sistema Argentino de Patentes de Invención (1580-1863)", Facultad de Derecho UBA - La Ley, 2007, p. 65 and 77, 105-126.

¹⁸ Art I, s 8, cl 8 of the United States Constitution: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". See Reynolds, Glenn Harlan and Merges, Robert P., "The Proper Scope of the Copyright and Patent Power". Harvard Journal on Legislation, Vol. 37, p. 45, 2000 Available at SSRN: {<http://ssrn.com/abstract=987742>}.

¹⁹ Edward C. Walterscheid, To Promote the Progress of Science and the Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution, 2 J. Intell. Prop. L. 1, 37-38 (1994) and from the same author, The nature of the Intellectual Property Clause: a study in historical perspective. Buffalo: Hein &

subjective rights are also an exception to the general refusal of exclusive privileges so frequent in the early Constitutional discourse of the Latin American countries²⁰.

We are here drawing a basic distinction between Constitutional provisions that enable the Government to act in connection with Intellectual Property interests of some nature, and those other provisions that empower someone to obtain or exercise such interests. Although there is a necessary logical linkage between the two situations, the conspicuous absence of one of those two possible clauses tends to emphasize the constitutional discourse in two differing paths.

The presence of a provision recognizing to the inventor a *right to a patent* – especially if included in a Bill of Rights listing – prevents the State from outright denying such *subjective* legal situation. It may arguably create some resistance to the assertion of a public policy instance where the subjective interest should be constrained²¹.

This may be particularly true when the Constitutional wording or the pertinent legal construction seem to source the authority of this subjective right in *human, natural* or any other body of law prior or foreign to the political will that embodies the constitutional text²².

If such explicit language is absent and some other provision assures the State the power to create patents, public policy concerns may be more apparent and easier to enforce. Should the U.S. Constitution include any language recognizing that *inventors will have ownership of their discoveries, or of their productions* – as the first Brazilian Constitution -, it would be rather improbable that Thomas Jefferson ever send Ian McPherson the letter frequently quoted by the U.S. Supreme Court:

Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done,

CO, 2002. As we shall see below, the Brazilian Constitution in force has a wording purposefully taken from the U.S. model. For a comparison of the Brazilian and US IP clauses, see BARBOSA, Denis Borges; BARBOSA, Ana Beatriz Nunes; KARIN Grau-Kuntz. *A Propriedade Intelectual na Construção dos Tribunais Constitucionais*. Rio de Janeiro: Lumen Juris, 2009.

²⁰ As to the South America, see Vidaurreta, cit., p. 27 on.

²¹ As to the significance of this distinction, see Vidaurreta, cit., p. 168.

²² “Because of its vagueness, natural law very easily provides the possibility for misuse and manipulation in favour of the opinion which one would like to uphold. This can be best illustrated by the debate on intellectual property during the 19th century. While some authors with reference to natural law wanted to protect the “holiest, most legitimate, most unassailable and most personal of all Property Rights“, others argued that it was contrary to the laws of nature to grant property in an intangible asset”. Cristopher Geiger: “Constitutionalising” Intellectual Property Law? *The Influence of Fundamental Rights on Intellectual Property in the European Union IIC 2006 Heft 4*, 371.

according to the will and convenience of the society, without claim or complaint from any body²³.

A historic pattern followed

Most present Latin American Constitutions follow the initial Brazilian standard: Intellectual Property interests (no more just *patents*) are recognized as *constitutional* rights and attributed subjectively. None of such texts, however, come close to assert an absolute or untrammelled power to the beneficiaries of such rights. Specific Intellectual Property rights tend to be clearly conditioned to a “social function” or public interest filter.

An interesting example of this submission of Intellectual Property Rights to its social function is an old decision of the Mexican Supreme Court:

Article 28 of the Constitution guarantees to the inventors the exclusive use of the inventions that have been patented, but they are not authorized to prevent the domestic industry to exploit the patent that, after some time, the holders are not using it; in other words, [the Constitution] ensures the exclusive use of a patent, does not assures the non-use of it. There is no right granted to the holder of the patent for his inventions exclusively use when he fails to use and prevents another to use it²⁴.

Or a more recent decision of the Brazilian Federal IP Court, on a Constitutional issue:

Thus, the intellectual rights, even though protected by the Constitution, must be functionalized to promote the dignity of the human person, one of the foundations of the democratic rule of law, and its exercise is not an end in itself, but a means to promote social values, whose vertex is the human person. Thus, social aspects should prevail over the economic reasons for a patent, and this characterizes its social function. One of these aspects is shown when there is a massive technological gap between the developed and the underdeveloped countries. Increase too much the patent term will mean a loss for Society, that will be prevented from working a technology already obsolete to make new developments, or simply forced to use a product of outdated technology”²⁵.

²³ Letter to Isaac McPherson, dated Monticello, August 13, 1813., found at <http://www.red-bean.com/kfogel/jefferson-macpherson-letter.html>, visited June 29, 2013.

²⁴ "El artículo 28 constitucional garantiza a los inventores, el uso exclusivo de los inventos que han patentado; pero no las autoriza para impedir a la industria nacional, la explotación de patente que, después de cierto tiempo, no usen los titulares; en otros términos, se garantiza el uso exclusivo de una patente, pero no el no uso de ella. El derecho otorgado al titular de la patente, para usar exclusivamente su invento, no existe cuando se abstiene de usarla e impide a otro que la use". Supreme Court of Argentina, TOMO XXXIV, Pág. 2239.- General Electric, S. A.- 13 de abril de 1932.- Unanimidad de 5 votos.- Poniente: Daniel V. Valencia.

²⁵ “Assim, o direito intelectual, mesmo sendo garantia constitucional, deve ser funcionalizado a fim de promover a dignidade da pessoa humana, um dos fundamentos do Estado Democrático de Direito, e o seu exercício não é um fim em si mesmo, mas antes um meio de promover os valores sociais, cujo vértice encontra-se na própria pessoa humana. Assim, aspectos sociais devem prevalecer sobre as razões econômicas de um direito de patente, o que caracteriza a sua função social. Um desses aspectos se mostra quando se verifica a imensa diferença tecnológica existente entre os países desenvolvidos e os subdesenvolvidos. Aumentar em demasia o período de vigência da patente significará um prejuízo para toda a sociedade que não poderá utilizar uma tecnologia já

An exception to the freedom of the market

These historical underpinnings stress that - in this region - the Intellectual Property issue was frequently discussed as an exception to the freedom to exercise a trade or profession. The Brazilian 1824 text granting an exclusive privilege on behalf of the inventors plays in counterpoint with other two provisions within the same Bill of Rights, one of which voids any privilege whatsoever, and the other extinguishes all guilds²⁶.

This perceived tension was certainly not limited to Brazil or Latin America²⁷, but has taken a significant role in the development of the Constitutional Law of Intellectual Property in Latin America²⁸.

The affirmation of a fundamental right to exert trade or profession is a standard device in the Constitutions of the region²⁹. As stated by the Mexican Supreme Court:

In our legal system, free competition is constitutionally guaranteed by articles 5 and 28 of our Constitution, and in accordance with those provisions no one can be prevented from engaging in the profession, industry or commerce that suits him, should it be lawful, and when not violating the rights of third parties or offending the rights of society; monopolies are prohibited, except those made by their nature belong to the State, and those privileges granted by the copyright laws and inventions and trademarks³⁰

obsoleta para realizar novos desenvolvimentos ou simplesmente utilizar um produto de tecnologia ultrapassada". Tribunal Regional Federal da 2ª Região, 1ª Turma Especializada, AMS 2006.51.01.524783-1, JC Márcia Helena Nunes, DJ 12.12.2008.

²⁶ They were already abolished in Brazil and Uruguay by the Royal Order of April 1, 1808, issued by D. John VI, prince regent of Portugal, who has moved his Court to Rio de Janeiro fleeing from the Napoleonic Invasions. For the impact of such early abolition of privileges, as well as the issuance of the Brazilian Patent Order of April 28, 1809, as the fourth oldest statute of its kind, see MALAVOTA, Leandro Miranda, *A Construção do Sistema de Patentes no Brasil*, Lumen Juris, 2011 and CARVALHO, Nuno Pires de, *200 Anos do Sistema Brasileiro de Patentes*, Lumen Juris, 2009.

²⁷ See Fritz Machlup & Edith Tilton Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1 (1950).

²⁸ Vidaurreta notes that the freedom from privileges and guilds was a crucial aspect of the pre-constitutional elaborations in Argentine (cit., p p. 27-39) and was conspicuously present in art. 146 of the 1838 Uruguayan Constitution, art. 220 of the 1811 Venezuelan Constitution, etc.

²⁹ For instance, Peru, Art. 58; Brazil, Art. 1st, IV and 170; Venezuela, art. 122.

³⁰ "En nuestro sistema jurídico, la libre competencia está constitucionalmente garantizada por los artículos 5o. y 28 de nuestra Carta Magna, y conforme a dichos preceptos a nadie puede impedirse que se dedique a la profesión, industria o comercio que le acomode, siendo lícito y cuando no se ataquen los derechos de terceros ni se ofendan los derechos de la sociedad; se prohíben los monopolios, a excepción hecha de aquéllos que por su naturaleza corresponden al Estado y de los privilegios que conceden las leyes sobre derechos de autor y de invenciones y marcas." Tercer Tribunal Colegiado En Materia Administrativa Del Primer Circuito. Amparo en revisión 3043/90. Kenworth Mexicana, S.A. de C.V. 30 de enero de 1991. Unanimidad de votos. Ponente: Genaro David Góngora Pimentel. Secretaria: Guadalupe Robles Denetro.

Some peculiar aspects of Latin American IP constitutionalism

In a prior work, we essayed to demonstrate that the comparative Constitutional construction of IP interests is factually convergent: there are much more points in common in the various national texts and specially in the judicial construction of such texts than divergences³¹. Progressive harmonization and the impact of International treaties seem to be evolving in an international *acquis*. On the other hand, the constitutional background has to deal, possibly, with some limited starting points to deal with the issue.

In this section, however, we shall try another perspective. The Intellectual Property (and related) interests as enshrined at the Constitutional level sometimes receive a peculiar flavor when reflected in the practice of Latin American courts. This section shall focus in such issues.

Status of Intellectual Property among constitutional rights

The issue here is the *Constitutional* qualification of Intellectual Property rights. In a case dealing with the power of the federal states to legislate on the exercise of trademarks, the Brazilian Supreme Court stated that the *right to use* a trademark could not be curtailed by state-level statutes as the right of property belongs to Federal jurisdiction³². The Justices, however, stopped short from equating trademark and Civil Code property by noting that trademarks are governed by those legal rules pertaining to competitive environments – they would be examples of *competitive property*.

The Brazilian Constitution has no standard *name* to describe the specific Intellectual Property rights: it employs the term “exclusive privilege” for patents, *property* for trademarks and *exclusive right* for the author’s rights. In no place, however, the text addresses those interests as being *monopolies*³³. It is, therefore, noticeable that, in its most recent decision on the subject, the Brazilian Supreme

³¹ BARBOSA, BARBOSA, GRAU-KUNTZ, cit. The book collects some IP constitutional decisions from the U.S., Australian and Brazilian Supreme Court, and the German, Colombian, and Italian Constitutional courts.

³² Brazilian Supreme Court, case Rp1397, May, 11, 1988. Another theme of Federal and state or local prescriptive jurisdiction is which political entity is entitled to create and grant Intellectual Property Rights. The Brazilian Council of State decided in three cases (in 1843 and 1844) that provinces were not allowed to legislate on patents, as the subject was reserved to Imperial, not provincial, jurisdiction; in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) the U.S. Supreme Court used a quite similar reasoning

³³ In an unrelated decision, *Action of Constitutionality 2.847-2*, decided August 5, 2004, the Brazilian Supreme Court distinguish between *exclusive privileges* and *monopolies* noting that the former although exclusive are not *market* exclusivities.

Court has noted in *obiter dicta* that industrial property rights *are* private monopolies granted by the State to the purpose of inducing investments³⁴.

This does not conduct necessarily to legal results extraneous to the current antitrust discourse. As indicated by the High Court of the Brazilian State of Minas Gerais:

"Despite the prerogatives available to the inventor, as the exclusive economic exploitation of the product creation, industrial property could never be equated to a monopoly, intensely refused by our legal system, on account of the fact that such exclusivity does not fall on the market itself, but only on the manner by which the exploitation is carried out, without any damage to third parties or any other impediments to new techniques, different from that previously protected."³⁵

However, the holding of a patent as a Constitutional monopoly may have significant legal consequences, as can be seen in a decision of the Brazilian Federal Appellate IP Court curiously reminiscent of the opinion of the court in the 1964 U.S. Supreme Court case of *Sears, Roebuck*³⁶ :

"That is my opinion that the procedures leading to the grant of a monopoly are strictly observed, not allowing for broad interpretation of its terms."³⁷

Interestingly, the Mexican Constitution declares outright that Intellectual Property rights are *not* monopolies³⁸.

³⁴ "2. Os monopólios legais dividem-se em duas espécies. (I) os que visam a impelir o agente econômico ao investimento --- a propriedade industrial, monopólio privado; e (II) os que instrumentam a atuação do Estado na economia." Supremo Tribunal Federal, ADI 3.366-2; DF; Tribunal Pleno; Rel. Min. Eros Grau; Julg. 16/03/2005; DJU 16/03/2007; Pág. 18). Colombian Decision. T-624/09 also characterizes IP rights as monopolies.

³⁵ "nada obstante as prerrogativas disponibilizadas ao inventor, como a de exclusividade na exploração empresarial do produto da criação, a Propriedade Industrial jamais poderia ser equiparada a um monopólio, amplamente combatido em nosso ordenamento jurídico, eis que tal exclusividade não recai sobre o mercado em si, mas tão-somente sobre o modo de como se dará a sua respectiva exploração, sem quaisquer prejuízos a terceiros ou impedimentos a eventuais outras novas técnicas, diversas daquela anteriormente protegida". Tribunal de Justiça do Estado de Minas Gerais, 11ª Câmara Cível, Des. Marcelo Rodrigues, AC 1.0079.02.005256-3, DJ 20.01.2007

³⁶ "The grant of a patent is the grant of a statutory monopoly; indeed, the grant of patents in England was an explicit exception to the statute of James I prohibiting monopolies. Patents are not given as favors, as was the case of monopolies given by the Tudor monarchs, but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention. During that period of time no one may make, use, or sell the patented product without the patentee's authority. But in rewarding useful invention, the 'rights and welfare of the community must be fairly dealt with and effectually guarded. To that end the prerequisites to obtaining a patent are strictly observed, and when the patent has issued the limitations on its exercise are equally strictly enforced." *Sears, Roebuck & Co. V. Stiffel Co.*, 376 U.S. 225 (1964)

³⁷ "Tenho para mim que os procedimentos que conferem monopólio são estritamente vinculados, não comportando interpretação extensiva de seus termos." Segunda Turma Especializada do Tribunal Regional Federal da Segunda Região, voto de Messod Azulay Neto, 28 de agosto de 2007.

³⁸ Mexican Constitution, Art. 28, par. 9: "tampoco constituyen monopolios los privilegios que por determinado tiempo se concedan a los autores y artistas para la producción de sus obras y los que para el uso exclusivo de sus inventos se otorguen a los inventores y perfeccionadores de alguna mejora". This constitution has a rather

On the other hand, particularly in those countries where the Constitution does not refer directly to IP interests³⁹, but not only there, IP rights are frequently subjected the Constitutional (but not necessarily Civil Code) standard of property.

In one case, the Constitutional Court of Venezuela assessed the compared weight of Intellectual Property rights when the conventional right to physical property is brought to confrontation; the owner of an imported good may be prevented from exerting his property right on account of the assertion of immaterial interests⁴⁰. The *property* content of physical goods is brought into confrontation the *property* attribute of intellectual items, and contextually trumps the tangible counterpart.

Constitutional status of International IP Agreements

We have noted above the issue of controversial Human Rights status of IP interests; it was also indicated that some Latin American jurisdictions assure International Treaties a higher status than ordinary statutes.

extensive treatment of Intellectual Property subjects, included in art. 28, par. 9; art. 89, XV; art. 5o., par. 1, in fine; art. 6o.; art. 7o.; art. 73, X, XXIX-F and XXX; art. 25, par.3 and 8; art. 27, par. 3; and art. 133.

³⁹ For instance, Bolivia: "Artículo 7 Toda persona tiene los siguientes derechos fundamentales, conforme a las leyes que reglamenten su ejercicio: e. A recibir instrucción y adquirir cultura; i. A la propiedad privada, individual o colectivamente, siempre que cumpla una función social; j. A una remuneración justa por su trabajo que le asegure para sí y su familia una existencia digna del ser humano; Artículo 22 1. Se garantiza la propiedad privada siempre que el uso que se haga de ella no sea perjudicial al interés colectivo."

⁴⁰ "Con base a las normas anteriormente expuestas, se observa que si bien la propiedad es un derecho sujeto a determinadas limitaciones que deben encontrarse acorde con ciertos fines, tales como la función social, la utilidad pública y el interés general, tales limitaciones deben ser establecidas con fundamento en un texto legal, o en su defecto reglamentario que encuentre remisión en una Ley, no pudiendo, en caso alguno, establecerse restricciones de tal magnitud que menoscaben en forma absoluta tal derecho de propiedad." "De lo anteriormente expuesto, se colige que el derecho de propiedad reconocido constitucionalmente puede ser restringido por el Estado por medio de una ley, con fines de utilidad pública o de interés general, pero sin menoscabar el contenido esencial de tal derecho. En ese sentido, esta Sala observa que, en el caso concreto, la norma contenida en el artículo 87 de la Ley Orgánica de Aduanas no constituye una amenaza inminente de violación del derecho de propiedad de los accionantes, ya que la prohibición del desaduanamiento de bienes importados tiene su razón de ser, en la salvaguarda de derechos de propiedad intelectual previamente obtenidos en el país o derivados de acuerdos internacionales en los que la República es parte" Venezuela, Sala Constitucional, Sentencia Nro. 952 del 09/08/2000". This thesis is echoed by a decision of the Mexican Supreme Court: "Ahora bien, el párrafo noveno del artículo 28 constitucional establece que no constituyen monopolios los privilegios que por determinado tiempo se concedan a los autores y artistas para la producción de sus obras y los que para el uso exclusivo de sus inventos se otorguen a los inventores y perfeccionadores de alguna mejora y, por otra parte, la fracción XXX del artículo 73 de la Constitución General de la República prevé que el Congreso de la Unión tiene facultades para expedir todas las leyes necesarias para hacer efectivas las facultades previstas en el propio precepto y las demás concedidas por la Norma Fundamental a los Poderes de la Unión, es decir, las no conferidas expresamente a las legislaturas locales." Primera Sala, Amparo directo en revisión 1917/2008. Cinemas de la República, S.A. de C.V. y otra. 4 de marzo de 2009. Cinco votos. Ponente: Sergio A. Valls Hernández. Secretarios: José Álvaro Vargas Ornelas y Juan Carlos de la Barrera Vite.

Another important aspect of the Constitutional protection of IP rights is the related authority of International agreements in the face of each country's basic law. This confrontation may be drawn either in consideration with *constitutional provisions* or *constitutional principles*.

A treaty may, therefore, be rejected as incompatible with the Constitutional system of a country, either before a specific provision or, in certain jurisdictions, a fundamental principle⁴¹. In this context, the Colombian Constitutional Court rejected the incorporation of UPOV 1991 treaty on account of lack of prior consultation of some interested parties, which was held as being a general principle:

In terms of laws ratifying international treaties, the Court recalled that given the complex nature of the process and with the purpose that a true intercultural dialogue should be advanced, case law has determined that the consultation of indigenous and tribal peoples - whenever the treaty directly affects them - must take place either before submission of the international instrument by the President to the Congress or during the negotiation- for instance, through workshops, case in which indigenous communities can provide input to the discussion of the articles of the international instrument or voice their concerns regarding certain issues that affect them; or when there is a text approved by the States, that is, after the signing of the treaty, in which case the query could lead to the need to renegotiate the treaty. This does not mean, of course, that indigenous communities cannot make use of the spaces that are open during the parliamentary debates, in order to illustrate to Congress on the advisability of the international instrument.

In the case of the "International Convention for the Protection of New Varieties of Plants", approved by Act 1518 of 2012, the Court found that, as argued by most of the participants of this [Constitutional Court] process, it was necessary to perform prior consultation with indigenous and Afro-Colombian communities, since this Agreement directly regulates substantive aspects concerning these communities, such as the criteria for recognizing the breeder, how the right is granted, periodicity, conditions of protection, economic regulation and utility that reports the improvement and expansion of plant varieties, which largely belong to ancestral knowledge of indigenous peoples. In the Court's view, the imposition of restrictions of a patent on new plant varieties as enshrined in the UPOV 91 could be limiting the natural development of biodiversity product of the conditions of ethnic, cultural and own ecosystems they inhabit these peoples⁴².

⁴¹ What not necessarily would exempt the country from liability under International Law, under the doctrine of Alabama Claims (1872) "the government of Her Britannic Majesty can not justify itself for a failure in due diligence on the insufficiency of the legal means of action which it possessed."

⁴² Decision C-1051/12 of % December, 2012. The 1978 version of UPOV was held constitutional by Decision C-262 de 1996. "En materia de leyes aprobatorias de tratados internacionales, la Corte recordó que dado el carácter complejo de su trámite y con el propósito de que se pueda realmente adelantar un verdadero diálogo intercultural, la jurisprudencia ha determinado que la consulta a los pueblos indígenas y tribales –cuando quiera que el tratado los afecte directamente- debe llevarse a cabo antes del sometimiento del instrumento internacional, por parte del Presidente de la República, al Congreso de la República, bien durante la negociación –vgr. mediante mesas de trabajo- caso en el cual, las comunidades indígenas podrán aportar insumos a la discusión del articulado del instrumento internacional o manifestar sus preocupaciones frente a determinados temas que los afectan; o bien, cuando se cuente con un texto aprobado por las Estados, es decir, luego de la firma del tratado, caso en el cual, la

A similar Constitutional Claim was raised at the Constitutional Court of Chili, indicating the ILO Convention 169 as the compelling reason to submit UPOV 1991 to the consultation of Indian collectivities⁴³. The Court however rejected the claim on June 25, 2011, with the minority dissent vote closely following the Colombian rationale.

On the other hand, an interesting decision of the Costa Rican Constitutional Court deals with the curious perceptions by which two WIPO treaties were *less protective* than the domestic Constitution, and therefore unconstitutional:

Furthermore, it should be noted that the rules under study (whereby it is authorized a possible future disengagement of the provisions, in turn, on the precepts 12 of the Rome Convention, and 15, paragraph 1 of WIPO Performances and Phonograms Treaty (WPPT) outlined above), just sought as rightly points out in its report the Attorney-General's Office, to provide a space or room for maneuver to those States parties [to the Treaties) to carry out in the future their public policy and establish regulations on the particular subject, which is what is called the "national discretion".

It also should be noted that this power of disengagement was granted in order to achieve a balance between the various interests involved, i.e., the public and private. The States Parties, by accepting such optional or discretionary clauses to disengage the above rules, tried to make a balance between the interests of artists, musicians and producers of phonograms, performers and record companies, the broadcasting companies, as well as the public and the general population. This, if it is assumed that in this matter converge not only copyright and related rights (protected and enshrined in the ordinal 47 of the

consulta podría llevar a la necesidad de renegociar el tratado. Lo anterior no significa, por supuesto, que las comunidades indígenas no puedan servirse de los espacios que suelen abrirse durante los debates parlamentarios, con el propósito de ilustrar a los congresistas acerca de la conveniencia del instrumento internacional. En el caso concreto del “Convenio Internacional para la Protección de Obtenciones Vegetales”, aprobado mediante la Ley 1518 de 2012, la Corte encontró que como lo conceptúa la mayoría de los intervinientes este proceso, ha debido realizarse la consulta previa a las comunidades indígenas y afrocolombianas, toda vez que este Convenio regula directamente aspectos sustanciales que conciernen a estas comunidades, en calidad de obtentores de las especies vegetales cuya propiedad intelectual se protege, tales como los criterios para reconocer la calidad de obtentor, concesión del derecho, periodicidad, condiciones de protección, reglamentación económica y utilidad que reporta la mejora y ampliación de variedades vegetales, los cuales en buena parte, forman parte de conocimientos ancestrales de estos pueblos. A su juicio, la imposición de restricciones propias de una patente sobre nuevas variedades vegetales como la que consagra la UPV 91, podría estar limitando el desarrollo natural de la biodiversidad producto de las condiciones étnicas, culturales y ecosistemas propios en donde habitan dichos pueblos.” The complete decision was not published by the Court by July 2013. For an official abstract, see <http://www.corteconstitucional.gov.co/comunicados/No.%2050%20comunicado%2005%20y%2006%20de%20diciembre%20de%202012.php>, visited July 3, 2013. A comment of the decision may be found in <http://www.grain.org/article/entries/4641-la-corte-constitucional-de-colombia-declaro-inexequible-la-ley-1518-de-2012-que-aprueba-upov-1991>, visited July 3, 2013.

⁴³ Chilean Constitutional Court, Decision June 24, 2011. According to ILO, "Convention No.169 is a legally binding international instrument open to ratification, which deals specifically with the rights of indigenous and tribal peoples. Today, it has been ratified by 20 countries. Once it ratifies the Convention, a country has one year to align legislation, policies and programs to the Convention before it becomes legally binding. Countries that have ratified the Convention are subject to supervision with regards to its implementation". Found at <http://www accuradio.com/finder/accuradio/search/?k=bluegrass>, visited 1/7/2013. Bolivia and Paraguay are members; Chili is not.

Constitution), but also the freedoms of speech and thought (protected in section 29 of the Constitution)⁴⁴.

The Constitutional requirements and limitations for IP rights

In a series of decisions, the U.S. Supreme Court has indicated the Constitutional roots of specific requirements of IP protection, as novelty, non-obviousness or originality⁴⁵. In a like vein, the novelty for patents has some broad recognition as a Constitutional requisite in *obiter dicta* by Latin America Courts, even though what is “novelty” for such purposes is not always stated.

In a decision of a Brazilian Federal Appellate Court, the Constitutional nature of this requirement (and utility) is noted:

As this privilege imposes a restriction on the activity of trade and industry for the benefit of the inventor, to the detriment also of the interests of the community, it is clear that this right may not have encompass things belonging to the public or common domain, under penalty of creating unjust monopolies, incompatible with the freedom of work; nor [it may cover] things that do not constitute invention, which would be contrary to the motives that justify the inventor receiving his right, as well as their origin and foundation.

Similarly, as patent law has as its purpose not only to recognize the right of the inventor, but also to promote the progress of industries and develop the spirit of invention, these objectives would be frustrated if the privileges were granted for things that do not offer advantages or usefulness to the industry. For these reasons, the laws of all countries require, as a condition for granting the patent, that the invention is new and which is of industrial character."⁴⁶

⁴⁴ Costa Rican Supreme Court, Exp: 10-004488-0007-CO, August 8, 2012. Res. N° 2012010568 : “De otra parte, debe observarse que las normas bajo estudio (por las cuales se autoriza la desaplicación futura y eventual de lo dispuesto, a su vez, en los preceptos 12 de la Convención sobre la Protección de los Artistas Intérpretes o Ejecutantes y 15, párrafo 1°, del Tratado de la Organización Mundial de la Propiedad Intelectual sobre Interpretación o Ejecución y Fonogramas arriba señalados), buscaron simplemente -como bien lo señala en su informe la Procuraduría General de la República-, brindar un espacio o margen de maniobra a los Estados parte para diseñar, a futuro, una política pública y establecer regulaciones sobre la materia en particular, que es lo que se denomina el "margen de apreciación nacional". Asimismo, debe de tomarse en cuenta que dicha potestad de desaplicación se otorgó con el fin que se lograra un equilibrio entre los diversos intereses involucrados , sea, los públicos y privados. Nótese, que los Estados parte, a través de la suscripción de dichas cláusulas facultativas o discrecionales para desaplicar las normas citadas, pretendieron realizar un equilibrio o balance entre los intereses de los artistas, músicos y productores de fonogramas, los intérpretes y casas disqueras, las empresas de radiodifusión, así como también del público y de la población en general. Esto, si se parte que en dicha materia confluyen no sólo los derechos de autor y derechos conexos (protegidos y consagrados en el ordinal 47 de la Constitución Política), sino, también, las libertades de expresión y pensamiento (protegidas en el numeral 29 de la Carta Magna).” Found at <http://sitios.poder-judicial.go.cr/salaconstitucional/Constitucion%20Politica/Sentencias/2012/12-010568.pdf>, visited July 3, 2013.

⁴⁵ For instance, the cited *Sears, Roebuck & Co. V. Stiffel Co.*, 376 U.S. 225 (1964), and *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

⁴⁶ Importando esse privilégio restrição à atividade do comércio e da indústria, em benefício do inventor, com detrimento, ainda, dos interesses da coletividade, é evidente que esse direito não pode ter por objeto coisas pertencentes ao domínio público ou comum, sob pena de se criarem monopólios injustos, incompatíveis com a liberdade de trabalho; nem coisas que não constituam invenção, o que seria contrário à motivação do direito do

And the author's right requirement of originality is likewise recognized Constitutional status, in this Brazilian State Court decision that cites the related U.S. Supreme Court case:

2. The minimum contribute, which is the minimum level necessary for a creative work be protected by copyright, also has the status of constitutional law, due to its quality of being an element existing in the core of the balance - between the exclusive copyright and the access to culture - that justifies Copyright. Moreover, the minimum contribute stems from fundamentally constitutional norms, in view of the constitutional fundamentality dealing of copyright and the right of access to culture. (...)

(...) In the United States, the minimum contribution requirement has a constitutional nature, since the trial of the case Feist.⁴⁷

The right to a patent or an author's right is frequently limited directly by the Constitutional text to a time to be determined by law⁴⁸. As indicated by the Constitutional Court of Colombia⁴⁹:

(...) an essential element of the institution of intellectual property is the limitation in time of the rights deriving therefrom. Generally, intellectual property rights are not perpetual but temporary rights, subject to the duration that the legislator determined in each case. The reason for this feature of intellectual property is the need to ensure that the resulting works of individual creativity can be enjoyed by all mankind. The subjugation of all the rights related to intellectual property to a temporary term seeks to harmonize the individual right of whoever carries out activities that promote the progress of science and culture, with the collective right of access to the benefits of artistic, scientific and technology. This measure harmonizes the right to free development of personality (individual management) and the right of everyone to access the benefits of culture and science (collective management)⁵⁰.

inventor e à sua origem e fundamento. - Do mesmo modo, tendo a lei de patentes, como fim não só reconhecer o direito do inventor, mas, também, promover o progresso das indústrias e desenvolver o espírito de invenção, estes objetivos seriam frustrados se os privilégios fossem concedidos para coisas que não ofereçam vantagens ou utilidade para a indústria. Por esses motivos, as leis de todos os países exigem, como condição para concessão da patente, que a invenção seja nova e que se revista de caráter industrial. " TRF4, AC 2000.72.05.006066-7, Terceira Turma, Relator Carlos Eduardo Thompson Flores Lenz, DJ 13/09/2006

⁴⁷ "2. O contributo mínimo, que consiste no mínimo grau criativo necessário para que uma obra seja protegida por direito de autor, tem também status de norma constitucional, devido sua qualidade de elemento presente no cerne do balanceamento - entre o exclusivo autoral e o acesso à cultura - justificador do direito do autor. Além disso, o contributo mínimo decorre de normas fundamentalmente constitucionais, tendo em vista a fundamentalidade das normas constitucionais que tratam do direito do autor e do direito de acesso à cultura. (...)

(...) nos Estados Unidos o contributo mínimo é um requisito de índole constitucional, desde o julgamento do caso Feist". TJRS, AC 70045823044, Sexta Câmara Cível do Tribunal de Justiça do Estado, Des. Luís Augusto Coelho Braga, 08 de novembro de 2012.

⁴⁸ Chile, art. 25; Argentina, art. 17; Ecuador, art. 30. Colombia, art. 61. Brazil, art. 5o., XVII (author's right) and XXIX (patents).

⁴⁹ The pertinent text is: "Art. 61. El Estado protegerá la propiedad intelectual por el tiempo y mediante las formalidades que establezca la ley."

⁵⁰ "Por último, en cuanto a las limitaciones consagradas en el artículo 8, es importante señalar que tal y como lo establece el artículo 61 de la Constitución, un elemento esencial de la institución de la propiedad intelectual, es la temporalidad de los derechos que de ésta se deriven. En suma, los derechos de propiedad intelectual no son

When IP rights yield to other Constitutional interests

The conciliation of multiple contrasting Constitutional interests is an expected function of a legal system, but what may be of interest in this point is to what interests IP yields and what IP trumps, according to Latin American courts.

The Colombian Court appreciated a first impression case on exception - existing in a significant number of jurisdictions in or outside Latin America - on the moral rights of architects⁵¹. Creators of architectural works are subject in Colombia to changes in their buildings that may please their owners. Applying to moral rights the three step rule, the Court stated:

In connection with the normal exploitation of the work, the Court notes that given the nature of architectural creation is common that its exploitation by the author is exhausted once he has projected, designed and built the property. Indeed, the creation of architect work is not intended create ownership over the building. Therefore, in principle, the normal exploitation of the architectural work is limited in which it regards to the architect to the labor as creator of a two-dimensional or three-dimensional work, and to the holder of title the exploitation of economic rights, including the transformation.

It is precisely this unique nature of the architectural work that gives sense to the limitation introduced by the legislator. We understand that this protects the architect as the author of the work and simultaneously guarantees the right of property of the recipient of the construction.

Consequently, the application of the limitation does not affect the normal exploitation of the work, as the changes the owner of the property intends to make are not properly related to the economic expectations generated by the architect through the development of the project and the correlative construction.⁵²

derechos perpetuos sino temporales, sometidos al término de duración que el Legislador determine en cada caso. La razón de ser de esta característica de la propiedad intelectual radica en la necesidad de garantizar que las obras resultantes de la creatividad individual puedan ser disfrutadas por toda la humanidad. El sometimiento de los derechos anejos a la propiedad intelectual a un término temporal, busca armonizar el derecho individual de quien desarrolla actividades que estimulan el progreso de la ciencia y de la cultura, con el derecho colectivo de acceder a los beneficios del progreso artístico, científico y tecnológico. En esta medida se armonizan el derecho al libre desarrollo de la personalidad (gestión individual) y el derecho de toda persona a acceder a los bienes de la cultura y la ciencia (gestión colectiva)." Corte Constitucional de Colombia – Decision C-262/96.

⁵¹ <http://www.corteconstitucional.gov.co/relatoria/2010/C-871-10.htm>, visited December 27, 2012. See RUIZ, Wilson Rafael Ríos, La obra de arquitectura y los proyectos arquitectónicos y su protección en la legislación sobre derecho de autor comentarios a la sentencia de constitucionalidad c - 871-10, sobre la exequibilidad del artículo 43 de la ley 23 de 1982, Revista La Propiedad Inmaterial no. 15, Nov. 2011, p. 143-168.

⁵² “En relación con la normal explotación de la obra, la Corte advierte que dada la naturaleza de la creación arquitectónica es corriente que su explotación por parte del autor se agote una vez proyectado, diseñado y construido el bien inmueble. En efecto, la labor de creación del arquitecto no tiene vocación de propiedad sobre la construcción. Por lo tanto, en principio, la explotación normal de la obra arquitectónica se circunscribe por parte del arquitecto al trabajo como creador de una obra bidimensional o tridimensional y por parte del titular a la explotación de los derechos patrimoniales, incluido el de transformación.

Es precisamente, esa naturaleza especial de la obra arquitectónica donde cobra sentido la limitación propuesta por el legislador. Esto, entendiendo que se protege al arquitecto en tanto autor de la obra y de forma simultánea se garantiza el ejercicio del derecho de propiedad del destinatario de la construcción.

The Court then addresses the confronting Constitutional interest before which the moral rights should yield:

Then, when Article 43 of Law 23 of 1982 recognizes the possibility of causing harm to honor or reputation of the author with the modification of architectural work, that [harm] can not be unjustified. In this case, the justification for the Court is, as outlined in the previous section, the protection of property rights (Art. 58 of the Constitution), as well as guaranteeing the right to housing (Article 51 of the Constitution), respect for the public interest (Art. 58 of the Constitution), among others.

In conclusion, with the application that the Court has made the "rule of three steps" to the limitation in the provision under analysis, it was possible to define that this limitation is legal exhaustive, does not imperils the normal exploitation that may expect the architect in the exercise of their rights, and the damage it causes is justified in protecting constitutionally recognized interests.⁵³

Other obvious overwhelming interest would be health and life. Reviewing the legal and Constitutional environment to defer the petition of a private party to have her HIV affection fully supported by the Peruvian State, the country's Constitutional Court so noted:

"39 While the issue is not derived directly from the plea under scrutiny, the Court considers appropriate to comment on aspects of intellectual property rights recognized in international commitments as well as the exceptions established and formally recognized in various international in the framework of the World Trade Organization (WTO), of which Peru is a member since 1995.

In fact, when it is noted any difficulty in meeting national objectives relating to public health, with consequent impairment of the right itself and life of citizens, specifically in cases related diseases such as HIV / AIDS, tuberculosis, malaria and other epidemics, it has been established by the Doha Ministerial Declaration of 14 November 2001 concerning the Agreement on Intellectual Property and Public Health (Doha Declaration on the TRIPS Agreement and Public Health), that while protecting the Intellectual property is necessary for the development of new medicines, it is not possible to set aside those concerns about their effect on prices, so that the agreements on intellectual property protection will *not* mean an obstruction to member countries to take steps to protect public health and, in particular, the promotion of medicines for all.

En consecuencia, la aplicación de la limitación no afecta la normal explotación de la obra, por cuanto las modificaciones que pretende introducir el propietario del bien, no son propias de la expectativa económica que generó en el arquitecto la elaboración del proyecto y su correlativa construcción."

⁵³ Entonces, cuando el artículo 43 de la Ley 23 de 1982 reconoce la posibilidad de ocasionar un perjuicio al honor o reputación del autor con la modificación de la obra arquitectónica, aquel no puede ser injustificado. En este caso la justificación para la Corte se encuentra, como se esbozó en el numeral anterior, en la protección del derecho de propiedad (Art. 58 de la C.P.), así como en la garantía del derecho a la vivienda (Art. 51 de la C.P.), al respeto del interés general (Art. 58 de la C.P.), entre otros.

En conclusión, con la aplicación que la Corte ha hecho de la llamada "regla de los tres pasos" a la limitación establecida en el precepto demandado se pudo definir que esta es legal y taxativa, no atenta contra la normal explotación que en ejercicio de sus derechos puede hacer el arquitecto respecto de su obra y el perjuicio que se le causa está justificado en la protección de intereses reconocidos constitucionalmente.

40. In this regard, given the difficulties in the provision of essential medicines for the treatment of diseases such as HIV / AIDS, it is recommended that the Peruvian State, in its health policy concerning the prevention and protection against AIDS, and as a subject rights and duties as a member of the WTO, the maximum use of provisions and measures by a flexible interpretation of the treaty on intellectual property protection, of course, within the limits set out in the Doha agreement, which will allow compliance of the objectives outlined in its health policy. ⁵⁴

The Brazilian Federal IP Appellate Court addressed the same considerations when appreciating the Public Prosecutor Office as a third party in a patent nullity case:

"It must be emphasized that the Constitution guarantees the inventor of patents temporary monopoly for its use, in view of the interests of society and of the technological and economic development of the country (Article 5, XXIX), but the same Higher Law also determines that the property must meet its social function (Article 5, paragraph XXIII). On the other hand, it also must be noted that the right of access to health, constitutionally guaranteed under Article 196 - since it is the social right, under Article 6 of the Constitution - should also be observed in this case. Considering that the medicine, which through the original suit [the plaintiff] wants to prevent the patenting, is intended to treat cancer, the alleged erroneous grant of the patent could cause serious damage to health and public economy, especially on account that the monopoly of its manufacture would allow abusive increasing of prices, what is sufficient public interest, and of paramount importance, in order to justify the entry of the federal prosecutors in the dispute, as a delayed joint party. ⁵⁵

⁵⁴ "39. Si bien el tema no se deriva directamente del petitorio de la demanda, este Tribunal considera conveniente pronunciarse sobre los aspectos relativos a los derechos de propiedad intelectual reconocidos en compromisos internacionales; así como sobre las excepciones establecidas y reconocidas formalmente en diversos documentos internacionales en el marco de la Organización Mundial de Comercio (OMC), de la cual el Perú es país miembro desde 1995.

En efecto, cuando se advierta alguna dificultad en el cumplimiento de objetivos nacionales referidos a la salud pública, con la consiguiente afectación del derecho mismo y de la vida de los ciudadanos -específicamente en los casos relacionados con enfermedades como VIH/SIDA, tuberculosis, paludismo y otras epidemias-, se ha establecido, mediante la Declaración Ministerial de DOHA del 14 de noviembre del 2001 relativa al acuerdo sobre propiedad intelectual y la salud pública (DOHA Declaration on the TRIPS Agreement and Public Health), que si bien la protección de la propiedad intelectual es importante para el desarrollo de nuevas medicinas, no puede dejarse de lado la preocupación respecto a su efecto en los precios; de modo que los acuerdos sobre protección de propiedad intelectual no significarán una obstrucción a los países miembros para tomar las medidas necesarias para proteger la salud pública y, particularmente, la promoción de medicinas para todos.

40. En tal sentido, dadas las dificultades para la provisión de medicinas esenciales para el tratamiento de enfermedades como el VIH/SIDA, es recomendable que el Estado peruano, dentro de su política de salud concerniente a la prevención y protección contra el SIDA, y como sujeto de derechos y deberes como país miembro de la OMC, utilice el máximo de provisiones y medidas mediante una interpretación flexible del tratado sobre protección a la propiedad intelectual, claro está, dentro de los márgenes establecidos en el acuerdo del DOHA, que le permitan el cumplimiento de los objetivos trazados en su política de salud." Constitutional Court of Peru, EXP. N.º 2016-2004-AA/TC, of October 5, 2004.

⁵⁵ "Há que se ressaltar que a Constituição Federal assegura ao inventor de patentes monopólio temporário para a sua utilização, tendo em vista o interesse social e o desenvolvimento tecnológico e econômico do País (artigo 5º, XXIX), mas a mesma Lei Magna também determina que a propriedade deve atender à sua função social (artigo 5º, inciso XXIII). Ocorre que o direito ao acesso à saúde, constitucionalmente garantido, nos termos do artigo 196 - já que se trata de direito social, previsto no artigo 6º da Carta Magna -, deve ser igualmente observado no presente

In the same jurisdiction, other Constitutional interests are similarly considered whenever applying IP rights.

In this context, it is certainly worth to note a 2011 decision of the Brazilian Higher Federal Court⁵⁶:

I - Controversy surrounding the collectability of copyright from a religious entity for carrying out musical performances and sound renditions in school, at opening the Vocation Year, a religious event, on a non-profit and free admission.

II - The need for systematic and teleological interpretation of the normative statement of art. 46 of Law No.9610/98 [the Copyright Law] in the light of the limitations established by such specific law itself, ensuring the protection of fundamental rights and constitutional principles in collision with the rights of the author, as the intimacy, privacy, culture, education and religion.

III - The extent that effective protection of authorial property rights (art. 5, XXVII, Constitution) arises only after consideration of the restrictions and limitations opposite to it, and should be considered as such, the resulting list of examples of statements extracted Articles 46, 47 and 48 of Law 9.610/98, interpreted and applied in accordance with fundamental rights.

III – Utilization as a criterion for the identification of constraints and limitations of the 'three step test', governed by the Berne Convention and the WTO / TRIPS.

IV - Recognition in the present case, in accordance with international conventions, that limiting the incidence of copyright "does not conflict with the commercial use normal work" and "not unreasonably prejudice the interests of the author.

(...) Then, if the limitations mentioned in articles 46, 47 and 48 of Law 9.610/98 represent the pondering by the ordinary legislature of [some] basic rights and warranties as confronted to the rights to the copyright owner – which is also a fundamental right (art. 5, XXVII of the Constitution) -, as said limitations the arts. 46, 47 and 48 are the result of the weighting of values in certain situations, it is not possible that [those provisions] encompass all possible limitations."⁵⁷

caso. Considerando que o medicamento que, por meio da ação originária, se pretende impedir seja patenteado, destina-se ao tratamento do câncer, a alegada errônea concessão da patente pode vir a causar graves danos à saúde e à economia pública, especialmente pelo fato de que o monopólio de sua fabricação possibilitaria o aumento abusivo de seus preços, com o que se encontra presente o interesse público, de suma relevância, a justificar o ingresso do Ministério Público Federal na lide, na condição de litisconsorte ativo ulterior." ACP 200351015135845, 1ª Turma Especializada Tribunal Regional Federal - 2a região.

⁵⁶ This case that is the leading precedent for the judicial doctrine according which the copyright limitations listed in law are not exhaustive, and should be extended by judicial appreciation in those specific cases where the Intellectual Property interests are put in confrontation with other Constitutional values.

⁵⁷ "Necessidade de interpretação sistemática e teleológica do enunciado normativo do art. 46 da Lei n. 9610.98 a luz das limitações estabelecidas pela própria lei especial, assegurando a tutela de direitos fundamentais e princípios constitucionais em colisão com os direitos do autor, como a intimidade, a vida privada, a cultura, a educação e a religião. III - O âmbito efetivo de proteção do direito a propriedade autoral (art. 5o, XXVII, da CF) surge somente após a consideração das restrições e limitações a ele opostas, devendo ser consideradas, como tais, as resultantes do rol exemplificativo extraído dos enunciados dos artigos 46, 47 e 48 da Lei 9.610.98, interpretadas e aplicadas de acordo com os direitos fundamentais. III - Utilização, como critério para a identificação das restrições e limitações, da regra do teste dos três passos ('three step test'), disciplinada pela Convenção de Berna e pelo Acordo OMC/TRIPS. (...) Ora, se as limitações de que tratam os arts. 46, 47 e 48 da Lei 9.610/98 representam a valorização, pelo legislador ordinário, de direitos e garantias fundamentais frente ao direito à

Collecting societies and popular repulse

If there is a single IP issue that attracts popular diffidence all over the region, it is certainly the role of copyright collecting societies. Exerting its activities sometimes with the help of (non-judicial) local authorities, such entities are the target of a considerable number of Constitutional challenges.

In an interesting case, the Costa Rican Court was obliged to stress that there would not be any Constitutional violations in the fact that public authorities lend a help in the collection, by prohibiting events where copyright was not paid in advance⁵⁸. In other Constitutional jurisdictions, the payment exacted was challenged as unauthorized taxation.

One issue repeatedly raised is the alleged violation of the right of free association: collecting societies are felt to be press-ganging the authors, even though – as the Colombian Court decided⁵⁹, that is not the case. In the same issue, the Brazilian Supreme Court decided:

"Two are, therefore, the constitutional principles which, in this case, seem to oppose themselves: on one side the freedom of association - which the law in question did not fail to recognize when it allows the authors by themselves to defend their rights (paragraph of art. 98), the other the guarantee of individual participation in collective works and the [correlative] right to audit the economic exploitation of the works that they create or participate, [which right] is only effectively feasible through a centralized management of copyright. (...)

In the case under consideration, between freedom of association and protection of copyright, it seems indisputable that we should give more weight and importance to the second, so far as the immediate interest of the holders of the rights contemplated.

propriedade autoral, também um direito fundamental (art. 5º, XXVII, da CF), constituindo elas - as limitações dos arts. 46, 47 e 48 - o resultado da ponderação destes valores em determinadas situações, não se pode considerá-las a totalidade das limitações existentes. " STJ, Resp 964.404 - ES (2007.0144450-5), Terceira Turma do Superior Tribunal de Justiça, por unanimidade, Ministro Paulo de Tarso Sanseverino, 15 de março de 2011

⁵⁸ Supreme Court of Costa Rica, No. 02-003198-0007-CO: "Como se desprende con meridiana claridad, el régimen de autorización previa que se impugna resulta ajustado al derecho de la Constitución. Existe una obligación constitucional de proteger los derechos del autor de la obra que se pretende utilizar para garantizar su propiedad sobre la creación. En este sentido, la exigencia no hace más que resguardar su derecho como mandato de tutela efectiva. No existe por parte de la entidad, el poder tributario que se impugna, pues la organización de gestión colectiva no hace más que velar por los intereses de los autores y compositores musicales, poseyendo derechos de administración sobre su obra. A mayor abundamiento, nótese que las normas impugnadas no disponen requisito alguno, pues lo único que hacen es hacer efectivo el derecho patrimonial del creador de la obra musical utilizada. Tampoco, existe la suplantación de potestades públicas que cuestiona el interesado, pues la autorización de uso de repertorio garantiza el cumplimiento de las exigencias infra y supra constitucionales relacionadas con los derechos del titular de la obra."

⁵⁹ Colombia, Decision C-833 de 2007: Collecting Societies do not violate the fundamental right of equality. Decision C-509 de 2004: as authors are not mandated to utilize the Collecting Society, there is no violation of the fundamental right to associate (or to refuse to associate).

These principles, which also derive from the due process clause included in the Brazilian Constitution, mean that, in the balance between two constitutional requirements - property protection and the social interest – we shall apply the principle of proportionality. That is, the collective interest shall prevail up the exact proportion, and no more, than necessary to satisfy this interest⁶⁰.

As a rule, the societies stand the Constitutional claims. However a Peruvian decision found that Collecting Societies violate the due process of law clause whenever they were granted in civil procedure cases a relative presumption of being holders of copyright, as they are thus granted unequal advantage⁶¹.

The relations among holders of IP rights

The Colombian Court, in other intriguing decision, passed judgment on the alleged unconstitutionality of a statute that shared the income of phonograms in equal portions between producer and the performers. The performers alleged that they were many, and the producer only one; therefore, the Constitutional right of equality was not satisfied. The Court so decided:

It is not a measure prohibited by the Constitution, much to the contrary the regulation of neighboring rights is feasible in implementation of Article 61 of Constitution, and furthermore the legislature has ample leeway to set the protection of intellectual property or of the creations of the human intellect and its neighboring rights, especially when it is prone, as in the present case, to adapt [the statute] to the constant changes that occur in the market and technological developments, namely new markets and methods of use and dissemination of works in the field which is the specific issue that governs the provision at stake.

The mean used is appropriate to achieve the intended purpose, as it is part of a framework of rights essential to recognize the performers and producers of phonograms, fair pay respect to one specific situation: its contribution to the dissemination phonogram, but not to the creation of artistic works. To the extent that the activities of both are essential the dissemination and marketing of the phonogram, it makes no sense that the interest of one party would prevail over the interest of the other. If there were no interpretation there

⁶⁰ "Dois, portanto, os princípios constitucionais que, no presente caso, parece oporem-se: de um lado o da liberdade de associação - que a lei em causa não deixou de ressaltar, ao reconhecer a faculdade de os próprios autores defenderem seus direitos (parágrafo único do art. 98), do outro o da garantia das participações individuais em obras coletivas e do direito de fiscalização do aproveitamento econômico das obras que criarem ou de que participarem, somente praticável, com eficácia, por via da gestão centralizada dos direitos autorais. (...) No caso sob exame, entre a liberdade de associação e a proteção dos direitos autorais, parece indiscutível que se deva atribuir maior peso e importância ao segundo, pelo que toca ao interesse imediato dos respectivos titulares dos direitos contemplados. Tais princípios, que também decorrem da cláusula do devido processo legal incluída na Constituição Brasileira, levam a que, no equilíbrio entre dois requisitos constitucionais – a proteção da propriedade e o do interesse social – aplique-se o princípio da proporcionalidade. Ou seja, só se faça prevalecer o interesse coletivo até a proporção exata, e não mais além, necessária para satisfazer tal interesse." Ação Direta De Inconstitucionalidade (Medida Liminar) N° 2.054-4 - DF, Tribunal Pleno (DJ, 10.03.2000)

⁶¹ Peruvian Constitutional Court, Decision STC 06135-2006-PA/TC, published on October 24, 2007.

would not be any phonogram, without phonogram would be no mass distribution, or the marketing of such an interpretation⁶².

Collective Intellectual property

Probably the most striking aspect of the present Latin American Constitutional texture related to Intellectual Property is the recent emergence of a concept of *collective*, not only *individual*, property interests on immaterial goods.

An example of this peculiar Constitutional category may be found at the Ecuadorian Basic Law:

Article 84 - The State shall recognize and guarantee to indigenous peoples, in accordance with this Constitution and the law, respect public order and human rights, the following collective rights:

1. Maintain, develop and strengthen their identity and traditions in the spiritual, cultural, linguistic, social, political and economic [fields].
2. Preserve and promote their management practices of biodiversity and its natural environment.
3. Preserve and develop their traditional ways of living and social organization of generation and exercise of authority.
9. A collective intellectual ownership of their ancestral knowledge; to the appreciation, use and development in accordance with the law.
10. Maintain, develop and manage their cultural and historical heritage.
12. To their systems, knowledge and practices of traditional medicine, including the right to the protection of ritual and sacred places, plants, animals, minerals and ecosystems of vital interest from the point of view of that.
15. To use symbols and emblems that identify them. ⁶³

⁶² “No se trata de una medida prohibida por la Constitución, por el contrario, la regulación de los derechos conexos es factible en desarrollo del artículo 61 Superior, aspecto sobre el cual además, el legislador goza de un amplio margen de configuración para la protección de la propiedad intelectual o de las creaciones del intelecto humano y de sus derechos conexos, máxime cuando se trata principalmente, como ocurre en el presente caso, de adaptarse a los las constantes transformaciones que se producen en el mercado y a la evolución de las tecnologías, concretamente los nuevos mercados y métodos de utilización y divulgación de las obras, ámbito dentro de la cual se encuentra el asunto específico que regula la norma demandada.

El medio empleado es adecuado para alcanzar el fin propuesto porque se inscribe dentro de un marco de derechos esenciales que permite reconocer a los artistas intérpretes o ejecutantes y a los productores de fonogramas, una remuneración equitativa respecto de una misma situación específica: su contribución a la divulgación del fonograma, más no a la creación de obras artísticas. En la medida en que las actividades de unos y otros son indispensables para que se pueda hacer efectiva la difusión y comercialización del fonograma, tiene sentido que la norma no haga prevalecer la una sobre la otra. Sin interpretación no hay fonograma, y sin fonograma no hay divulgación masiva, ni comercialización de tal interpretación”. Constitutional Court of Venezuela, Decision T-47712, June 25, 2012.

⁶³ “De los derechos colectivos/ De los pueblos indígenas y negros o afroecuatorianos. Art. 84.- El Estado reconocerá y garantizará a los pueblos indígenas, de conformidad con esta Constitución y la ley, el respeto al orden público y a los derechos humanos, los siguientes derechos colectivos: 1. Mantener, desarrollar y fortalecer su identidad y tradiciones en lo espiritual, cultural, lingüístico, social, político y económico. 6. Conservar y

In such roll, there are matters that would be, if *new creations*, covered by copyright, patents, and trademarks. On this issue, we have the occasion of noting⁶⁴:

It must be noticed that the by-laws of structured collaborative works relates essentially to authorship but must necessarily govern ownership, on a positive, negative or neutral manner. Some other IP rights may be using a structured open ownership.

Ascensão ⁶⁵ indicates that under Portuguese law (and, probably, also in Brazilian Law) geographic indications (GIs) are *owned* by a plurality of persons, and the ownership is open to entry without actual sharing of title: whomever in the assigned geographical limits may be entitled to sue the indication as intellectual property, provided that the entrant follows the specific by-laws.

Some geographic indications presume following of a complex set of technical rules, what arguably would preclude authorship; but other GIs are recognized simply on account of the well-known properties of the geographical set⁶⁶, and fame is to the same extent result of a deliberate, continuous creation by the interested parties⁶⁷.

Creation of fame is an essential element of trademark law ⁶⁸ and especially of publicity rights⁶⁹. Creation of a consumable myth, fame is a fictional creation if recognized as

promover sus prácticas de manejo de la biodiversidad y de su entorno natural. 7. Conservar y desarrollar sus formas tradicionales de convivencia y organización social, de generación y ejercicio de la autoridad. 9. A la propiedad intelectual colectiva de sus conocimientos ancestrales; a su valoración, uso y desarrollo conforme a la ley. 10. Mantener, desarrollar y administrar su patrimonio cultural e histórico. 12. A sus sistemas, conocimientos y prácticas de medicina tradicional, incluido el derecho a la protección de los lugares rituales y sagrados, plantas, animales, minerales y ecosistemas de interés vital desde el punto de vista de aquella. 15. Usar símbolos y emblemas que los identifiquen". Analogous provisions may be found at Bolivia, art. 171 and Venezuela, art. 119-126. Venezuelan Constitution, art. 124 is particularly interesting: "Artículo 124. Se garantiza y protege la propiedad intelectual colectiva de los conocimientos, tecnologías e innovaciones de los pueblos indígenas. Toda actividad relacionada con los recursos genéticos y los conocimientos asociados a los mismos perseguirán beneficios colectivos. Se prohíbe el registro de patentes sobre estos recursos y conocimientos ancestrales." By the way, Art. 11 of the Kenyan Constitution sounds the same trumpet: (3) Parliament shall enact legislation to— (a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and (b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya".

⁶⁴ BARBOSA, Denis Borges, The Demise of Geniality. WIPO Journal, v. 4, p. 04, 2012

⁶⁵ ASCENSÃO, José Oliveira, Questões problemáticas em sede de indicações geográficas e de denominações de origem, in RFDL, XLVI, n.º 1, 2005, 253-269; and in Estudos em Homenagem ao Professor Doutor André Gonçalves Pereira, FDL, Coimbra Editora, 2006, 1009-1025

⁶⁶ The recognition of a "Indicação de Procedência" in Brazilian law does not require submission to any technical standards, but only evidence that the general public knows that the geographic area is the source of the products or services protected by the relevant IPR.

⁶⁷ For the deliberate, continuous, creation of fame in publicity rights as being analogous to authorial creation, see BARBOSA, Denis Borges, Do direito de propriedade intelectual das celebridades, found at http://www.denisbarbosa.addr.com/arquivos/200/propriedade/pi_celebridades.pdf, visited Oct. 8, 2012.

⁶⁸ KOZINSKI, Alex. Judge, United States Court of Appeals for the Ninth Circuit, Trademarks Unplugged, New York University Law Review, October 1993, 68 N.Y.U.L. Rev. 960. "The originator of a trademark or logo cannot simply assert, "It's mine, I own it, and you have to pay for it any time you use it." Words and images do not worm their way into our discourse by accident; they're generally thrust there by well-orchestrated campaigns intended to burn them into our collective consciousness. Having embarked on that endeavor, the originator of the symbol necessarily - and justly - must give up some measure of control. The originator must understand that the mark or symbol or image is no longer entirely its own, and that in some sense it also belongs to all those other minds who have received and integrated it. This does not imply a total loss of control, however, only that the public's right to make use of the word or image must be considered in the balance as we decide

deliberate, continuous effort from recognized or recognizable persons⁷⁰. Therefore, GIs creation in these specific cases might be deemed as both collaborative authorship *and* ownership.

Collective ownership of expressive or technical creations could also be discerned in the new and presumably forthcoming protection of traditional knowledge. Some relevant comparison may be drawn here with GIs, although this analysis might be held as politically incorrect⁷¹. Here, the incantations of geniality creation seem to be inefficient, and a cultural approach more adequate.

It was within this enticing context that a singular decision of the Supreme Court of Colombia, issued in 2012, tackled the difficult issue of the conflict of an unappropriated trademark and an existing body of traditional knowledge and tradition belonging to a collectivity.

what rights the owner is entitled to assert". On the other hand, see BOSLAND, Jason. *The Culture of Trade Marks: An Alternative Cultural Theory Perspective*, Intellectual Property. Research Institute of Australia The University of Melbourne Intellectual Property Research Institute of Australia. Working Paper No. 13/05.: "Stephen Wilf suggests that by associating a symbol with an object, the public contributes to the authorship of trade marks. Because the meaning of a mark results not from the efforts of an individual trader but the interpretive acts of the public, Wilf argues that the public should be attributed ownership. Trade mark law, on the contrary, is said to incorrectly formalise the trade mark originator as the arbiter of meaning by recognising only the efforts of the originator in generating the meaning and interpretation of a trade mark". Also BARBOSA, Denis Borges, *Developing New Technologies: A Changing Intellectual Property System. Policy Options For Latin America*, SELA (1987): Some authors have remarked that the building up of a trademark by means of massive advertisement has much in common with the construction of a character in a novel; in both cases only sometimes the result is a "roman a clef" bearing any resemblance to reality."

69 COOMBE, Rosemary J.. *Authorizing the celebrity: publicity rights, postmodern Politics, and unauthorized genders*, in WOODMANSEE, Martha; PETER, Jaszi Editors. *The Construction of Authorship - Textual Appropriation In Law And Literature*. United States of America: Duke University Press, 1994, p.101-122: "Star images must be made, and, like other cultural products, their creation occurs in social contexts and draws upon other resources, institutions, and technologies. Star images are authored by studios, the mass media, public relations agencies, fan clubs, gossip columnists, photographers, hairdressers, body-building coaches, athletic trainers, teachers, screenwriters, ghostwriters, directors, lawyers, and doctors. Even if we only consider the production and dissemination of the star image, and see its value as solely the result of human labor, this value cannot be entirely attributed to the efforts of a single author. Moreover, as Richard Dyer shows, the star image is authored by its consumers as well as its producers; the audience makes the celebrity image the unique phenomenon that it is [See Richard Dyer. *Heavenly bodies: film stars and society* (1986); Richard Dyer. *Stars* (1979)]. Selecting from the complexities of the images and texts they encounter they produce new values for the celebrity and find in stars sources of significance that speak to their own experience. These new meanings of the star's image are freely mined by media producers to further enhance its market value. As Marilyn Monroe said in her last recorded words in public, "I want to say that the people-if I am a star-the people made me a star, no studio, no person, but the people did." [Dean MacCannell, *Marilyn Monroe Was Not a Man*, 17 *DIACRITICS* 114, 115 (1987)].

70 "Barthes defines a myth as "the complex system of images and beliefs which a society constructs in order to sustain and authenticate its own sense of being" Myths are carved out of signs, although will provide the symbol with new meaning beyond that of the original sign. As Barthes argues, the associative total of the pre-existing sign equals the signifier, or 'form' of the myth. This, in conjunction with its signified, or 'concept' forms the signification". LONDESBOROUGH, Samuel. "Should Colours be protected by trade mark law? What problems may arise in protecting them? Available at www.kent.ac.uk/law/ip/resources/ip_dissertations/2004-05/Samuel_Londesborough_IP_Dissertation.doc, visited in Oct. 6, 2012.

71 "There are three broad ways in which the protection of GIs appears to offer the possibility of providing legal mechanisms to protect traditional knowledge. These are the collective nature of the protection, the indefinite availability of GIs and the connection that GI owners associate between their products and their land. Those seeking protection of traditional knowledge also seek a collective and an indefinite interest and frequently the relationship between their knowledge and the land is important for indigenous peoples. Yet these similarities are superficial. GIs protect names and are used by western farmers and sometimes rural communities to promote their products." Frankel, Susy R., *The Mismatch of Geographical Indications and Innovative Traditional Knowledge* (October 3, 2011). Prometheus, Forthcoming; Victoria University of Wellington Legal Research Paper No. 35. Available at SSRN: <http://ssrn.com/abstract=1953033>

Against the filing of a trademark, which would be recognized by the public as “Indian coca” or “sacred coca”, the Indian collectivity opposed their immemorial attachment to coca leaves. The Court so decided, evoking the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage⁷²:

Order the Superintendent of Industry and Commerce so that in the framework of its powers, execute such actions to prevent a trademark registration where indigenous traditional knowledge is incorporated, manifested, for example, in its symbolism, myths, costumes, songs, in the marketing of products related to the coca leaf by people outside that social group, pursuant to paragraph 13.5.1 of this decision, and to develop the agency skills to bear in mind that it is not just subject to the regulations of the Andean Community related aspects of intellectual property regime, but also are subject to the constitutional principles and international treaties that are part of the constitutional block, which consider the right to cultural identity as fundamental for indigenous communities.⁷³

⁷² Found at <http://www.unesco.org/culture/ich/en/convention>, visited July 5, 2013.

⁷³ “Tercero: Requerir a la Superintendencia de Industria y Comercio a fin de que en el marco de sus competencias, ejecute las acciones tendientes a evitar que en un registro marcario se usen los conocimientos tradicionales indígenas, manifestados por ejemplo en su simbología, mitos, vestimentas, cantos, en la comercialización de productos relacionados con la hoja de coca por personas ajenas a dicho colectivo social, conforme con el numeral 13.5.1 de esta providencia; y para que al desarrollar sus competencias tengan presente que no sólo están sujetas a la normatividad de la Comunidad Andina en los aspectos relacionados con el régimen de propiedad intelectual, sino que también están sujetas a los principios constitucionales y a los tratados internacionales que hacen parte del bloque de constitucionalidad y que consideran el derecho a la identidad cultural de carácter fundamental para las comunidades indígenas.” Corte Constitucional of Colombia, Decision T-47712, June 25, 2012.