

# COPYRIGHT

Colombia

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Gómez-Pinzón

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## Which works are protected by copyright?

The work is the object of copyright protection. In general terms, it refers to any creation product of human creativity that has the personal seal of its creator and that may be susceptible to being disclosed in any form.

Works have different natures or fields such as:



1. Literary work: a written text such as novels, poems, essays, short stories, and the source codes of Software's.



2. Musical work: consists of a musical composition, such as a song, symphony, or musical form.



3. Works of visual arts: refer to paintings, sculptures, photographs, drawings, series, films, and video games.



4. Scientific work: refers to research work such as articles, and research among others.

## It is protected from the creation of the work

Works are protected from the very moment of their creation, without any formality or registration being required for them to be considered protected.

Although works may be registered before the Copyright Office, the registration certificate only has probatory effects with the purpose of establishing who is the author and on whom the economic rights are vested.





## Author's quality

According to Decision 351 of 2000, an author can only be a natural person, since he/she is the only individual with the capacity to think, create, and reproduce. Consequently, legal persons, such as corporations, cannot be considered as authors.

## Types of work

The work is the object of copyright protection. In general terms, it refers to any creation product of human creativity that has the personal seal of its creator and that may be susceptible to being disclosed in any form.

Works have different natures or fields such as:

Type	Description
 <b>Original</b>	It is a work in whose realization no adaptations or modifications of other existing works were made.
 <b>Derivative</b>	These are works that are the result of the modification of a pre-existing work, in which the author adds other intellectual elements. The main derivative works are: i) translations, ii) adaptations, and iii) compilations.
 <b>Collaborative</b>	They are those in which two or more persons produce the work at their own initiative and risk. It is understood then that each author is the owner of the work as a whole and any intended use of the work requires the prior and express authorization of each of its authors.
 <b>Collective</b>	They are those made by several authors, under the initiative and guidance of a natural or juridical person who coordinates, discloses, and publishes them under his name. This person will be the one who has the economic rights generated by the work.



## Protection term

In Colombia, economic rights are not unlimited in time, i.e. the holder of the rights has a term of protection during which he/she can exclusively exploit its rights and obtain an economic benefit for the use of his works.

When the work is within the term of protection, it is understood that the work is in the private domain, which means that the prior and express authorization of the owner must be obtained in case he wishes to use his work. Once the term of protection has passed, the work enters the public domain, and it is not necessary to have the authorization of the owner in case he/she wishes to use the work.

### Person type

### Protection term



Natural

The life of the author plus eighty (80) years after his death (Article 21 of Law 23 of 1982).



Legal

70 years, counted from the end of the calendar year of the first authorized publication of the work.

## Copyright and Related Rights

### ✓ Copyright

By Colombian legislation, copyright protects a series of moral and economic/patrimonial rights, which are primarily held by the original author or creator.

**Moral rights:** through which the author's interests in the work are protected. These rights cannot be sold or waived and are perpetual. The types of Moral rights are:

- **Paternity:** this faculty allows the author to demand that third parties recognize him as the creator of his work.
- **Integrity:** the author's right to oppose the distortion or mutilation of his work that is detrimental to the author's decorum or reputation.
- **Disclosure:** the author has the right to make his work known to the public.
- **Modification:** the faculty that allows the author to make changes to his work before or after its publication.
- **Retract:** the faculty that allows the author to withdraw or suspend the use of the work even if it had been previously authorized.

**Economic rights:** through these rights, the author or owner may authorize or prohibit third parties from exploiting his work. They can be sold, or renounced, they are rights that last in time and are independent. The types of Economic rights are:

- **Reproduction:** consists of either fixing the work or obtaining copies of it.
- **Public communication:** act by which a group of people gathered have access to the work without prior distribution of copies.
- **Distribution:** the act of making the work available to the public through tangible copies of the work.
- **Public transformation:** is the act of adaptation, arrangement, or any other transformation of the work.



## ✓ Related Rights

Performers, phonogram producers, and broadcasting organizations are granted rights in performances, phonograms, and broadcasts, respectively.

The aforementioned persons assist in the use, exploitation, and dissemination of copyrighted works.

Having understood the above, we will now mention the rights granted to performers, phonogram producers, and broadcasting organizations:

**Interpreter artists or performers:** authorize or prohibit the public communication of their live performances; authorize or prohibit the recording of their performances; obtain remuneration for the public communication of their interpretation.

### Phonographic producers

authorize or prohibit the reproduction of their discs; authorize or prohibit the distribution of your records; and receive remuneration for the use of disks

### Broadcasters

authorize or prohibit the retransmission of its broadcasts; authorize or prohibit the fixation of its broadcasts on a tangible support; authorize or prohibit its broadcasts in any form.

## ✓ Before which authority can a lawsuit for copyright and related rights infringement be filed?

The Copyright Infringement action follows a verbal process, which means that the plaintiff files a lawsuit to have the competent authority declare that their copyright or related rights have been violated. Once such a declaration is made, the defendant may be condemned to compensate for the damages resulting from the infringement.

Under Colombian law, there are two options for filing a Copyright Infringement action:

- Before the National Copyright Office (hereinafter the "DNDA").
- Before the Civil Judges of the Circuit or Municipal Judges depending on the amount involved in the case.

It is essential to note that filing the lawsuit before one of these authorities excludes the jurisdiction of the other. Also, since it's a verbal process, there is an opportunity to appeal the first-instance decision. In this case, the appeal will be heard by the Civil Chamber of the Superior Court of the Judicial District where the initial lawsuit was filed.

### ✔ Who has the right to sue?

The right or legitimacy to file a Copyright Infringement action and seek recognition and compensation for damages will depend on the type of Copyright infringement committed by the defendant. It's important to note that Copyright Law is divided into two types of rights: moral rights and economic rights.

From the very moment of the creation of the work, the author of a work holds both, moral and economic rights. Moral rights are non-transferable and always remain with the author, while economic rights can be wholly or partially transferred to a third party. In this regard, if the lawsuit concerns an infringement of moral rights, only the author of the work is entitled to sue. The author must prove his status in the legal process, especially if their name is not associated with the work or if the work has not been registered before the DNDA.

In addition to the above, Decision 351 of 1993 establishes two legal presumptions, first, there is the one established in Article 8, which states that the person whose name or pseudonym appears in the work shall be presumed to be the author of the work. The second presumption, outlined in Article 53, states that all the information included in the registration certificate of the work issued by the DNDA is presumed to be true, including the person listed as the author of the work in that registration.

On the other hand, in claims for Copyright Infringement that deals with economic rights, such as reproduction, public communication, or distribution of the work, the author or the third party holder of the economic rights, will be entitled to sue.

In any case, if the economic right holder wants to sue for the Copyright Infringement, they must prove their status as the holder of the economic rights of the work.

## ✓ Proof of Ownership

As mentioned in the previous section, the proof of ownership will depend on the type of Copyright infringement that serves as the basis for the claim. In the case of infringement of moral rights, there are three legal presumptions:

- According to Article 1 of Law 1915 of 2018: The person under whose name, pseudonym, or equivalent the work has been disclosed shall be presumed to be the author of the work.
- According to Article 8 of Decision 351 of 1993: The person whose name, pseudonym, or other identifying sign appears on the work shall be presumed to be the author.
- According to Article 53 of Decision 351 of 1993: The person whose name appears as the author in the work's registration before the DNDA is presumed to be the author.

In this context, the person filing the claim as the author of the work must fall under one of these three presumptions. It is the responsibility of the defendant to challenge these presumptions by proving that the plaintiff is not the author of the work.

On the other hand, in case of a lawsuit for infringement of economic or related rights, the right holder can file the lawsuit by providing the following documents:





- Economic rights assignment agreement: the agreement should be in writing and does not require any formalities; however, it is recommended to register the contract before the DNDA for publicity and opposability purposes.
- In the event that the work has been created by a worker or contractor of the company in the performance of his duties, it is presumed that the Author of the work has assigned the economic rights of the work to the employer or contractor. It is recommended to provide the service contract or employment contract in order to prove the ownership of the person in relation to the economic rights of the work.

Regarding phonograms of the work, such as recordings of songs or the format of its reproduction, such as vinyl, CDs, or MP3 files, according to the paragraph of Article 175 of Law 23 of 1982, the person who has disclosed the interpretation or performance of the phonogram will be presumed to be owner of the related rights of the phonogram.

### ✔ **What acts can be prohibited Actions by the Copyright Holders.**

In accordance with Article 13 of Decisión 351 of 1993, Copyright and related rights holders can prohibit unauthorized third parties from engaging in the following acts from the very moment the author created the work or when their economic and related rights were assigned to a third party:

- The acts of reproduction of his work regardless of the form or procedure in which the reproduction was made, i.e. the owner of the work may prohibit his work from being fixed in any medium that allows its communication or obtaining copies, whether in whole or in part.
- Acts of public communication of your work, i.e., the author or the economic rights holder can prohibit any act that implies that the work can be known by a plurality of people when its owner has not given his authorization.
- The sale, lease or rental of copies or copies of the protected work.

- The importation and distribution of copies of the work in other countries without the authorization of the owner of the protected work.
- Translations, adaptations, arrangements or transformations of the work without the authorization of its owner.

## ✔ **Several liability**

As indicated throughout this Guide, anyone, whether a natural person or a company, who intends to use a work protected by Copyright and Related Rights must obtain proper authorization from the rights holder, either the author or a third party holding economic rights, otherwise, unauthorized use or exploitation of the work will constitute a direct violation of Copyright, leading to liability for caused damages.

However, in the case of Copyright infringement, there is not only individual liability for the person who makes use of the work without the authorization of its owner, since Article 54 of Decision 351 of 1993 establishes Several Liability for the public entity or natural or legal person who authorizes the use or supports the use of a work, performance, phonographic production or radio broadcasting without the due authorization from the right's holder.

In the context of a Copyright Infringement action, where both, the person or the company who uses the work without authorization and the person or the company who supports or authorizes the use of the work without having the proper authorization from the rights holder, are declared responsible for the copyright infringement, the right holder can demand the full compensation for damages from any of the infringing parties.

## ✔ **Evidence that may be requested in the process**

As a starting point, it should be noted that Copyright and related rights infringement actions are carried out through the oral proceedings established in Article 368 of the CGP, therefore, whoever initiates the action or the defendant may make use of all the means of proof enshrined in the Law by virtue of the Principle of Freedom of Evidence.

In this sense, the evidence that may be requested and provided in the process will depend on the type of infringement that is claimed. Thus, by way of example, in cases in which a use of a work without the express authorization of its owner is claimed, the lack of authorization would have to be proved, which could be by means of e-mails or communications between the parties where it can be seen that the owner did not grant such authorization. Additionally, all evidence should be provided to verify that the work was indeed used by the defendant and that he did not have authorization to do so.

Now, in cases where it is claimed that a third party has copied, transformed or reproduced a protected work without the authorization of its owner, the owner may request or submit an expert opinion, in order to prove that the work that has been disclosed, marketed or used by the defendant, is a copy or a transformation of the plaintiff's work.

In addition to the above, it is possible to request or provide all documentary evidence, mostly technical, in order to prove that there are similarities between the original work and the work being used to such a degree that it can be considered a copy or a transformation, such as musical scores in musical works or technical and user manuals in the case of software.

### ✔ What can be requested with the Copyright infringement action?

Before filing the lawsuit or at the time of filing the Copyright Infringement action, the Judge, in this case, the Circuit Judge or the DNDA, may be requested to adopt preliminary injunctions in order to protect the infringed copyright. As an example, in this request for precautionary measures, the judge could be asked to:

- To order the defendant to cease all acts that infringe the plaintiff's copyright, such as the suspension of the commercialization, use, or dissemination by any means to protect the work.
- To order the immediate withdrawal from the market of all copies, transformations or modifications of the work.
- In general, the Judge may order all the necessary and reasonable measures in order to ensure the protection of the infringed copyright.

For this purpose, in the preliminary injunction request, it must be briefly proven the appearance of good right, which means that it must be proved that the work to be protected is considered as a work subject to copyright protection and that the plaintiff is the Author of the work or the economic rights holder and; that the third party, in this case the defendant, is infringing that right by making use of the work without authorization or that it is marketing copies, transformations or modifications of the work without authorization.

Likewise, in a Copyright Infringement action, the first thing that must be requested in the complaint is that the Judge declares that the defendant did indeed incur in a violation of the plaintiff's copyrights. Based on such declaration, it is possible to request, as indicated in previous points, the prohibition of the distribution, reproduction, or communication of unauthorized copies of the work made by the defendant; it may request the immediate destruction of the unauthorized copies, and even the destruction of all the material copied or derived from the protected work and of all the materials and implements that have been used to produce the infringing goods.

In addition, and as will be explored in the following section, the owner of the work may request compensation for the damages suffered as a result of the infringing acts carried out by the defendant. In this sense, in order to assess such damages, it is necessary to prove the economic value of the protected work; the money that the owner of the work did not receive due to the infringing acts, and; the time during which the protected work was reproduced, communicated, copied and commercialized without the due authorization of the owner.



## ✓ Indemnización perjuicios e indemnización preestablecida

Regarding phonograms of the work, such as recordings of songs or the format of its reproduction, such as vinyl, CDs, or MP3 files, according to the paragraph of Article 175 of Law 23 of 1982, the person who has disclosed the interpretation or performance of the phonogram will be presumed to be owner of the related rights of the phonogram.

- Preset compensation:

In Colombia, due to the Free Trade Agreement signed between Colombia and the United States and Article 32 of Law 1915 of 2018, it was established that, in the cases of compensation for damages caused by Copyright Infringement, it may be subject to the preset compensation system, however, as the date of this Guide, the National Government has not issued the Regulatory Decree establishing the preset compensation system for Copyright Infringement.

However, the fact that the Decree has not been issued establishing the preset compensation system does not mean that the author of the work or the holder of the economic rights cannot demand compensation for damages for the infringement of his rights.

In this regard, the Constitutional Court in judgment C-345 of 2019 declared that Article 31 of Law 1915 of 2018 that established the pre-established compensation in the field of Copyright was constitutional, to the extent that, although it declared that the Government had not issued the corresponding Decree, it indicated that after having analyzed other systems of pre-established compensation in other jurisdictions such as those established in the area of trademark infringements, It is understood that these systems correspond to an assessment prior to the occurrence of the damage and, therefore, the valuation of the damage caused does not have to be proved, but the damage must be proved.

- Compensation for Damages:

As the Regulatory Decree that establishes the preset compensation system hasn't been issued by the National Government, whoever wishes to request the compensation of damages for the Copyright Infringement must prove the occurrence of the damage and subsequently assess the damages.

For this purpose, Article 57 of Law 44 of 1993 establishes that, in the process, it must be proven the commercial value of the works that were produced, copied or reproduced without authorization; the loss of profit, that is, the value that the right holder would have received if he had given his authorization for the exploitation of his work and; the period of time in which the exploitation of his work was carried out without his authorization.



## ✔ Summary of the process

**Response to the complaint:** the defendant shall have a term of twenty (20) business days to answer the complaint, stating the facts and outlining its defense arguments. This term may also be used to present and request evidence.

**Amendment of the complaint (optional):** before the issuance of the writ setting date and time for the initial hearing, the plaintiff may amend the complaint and include new facts, claims, and evidence or have other parties on the defendant's side.

**Initial Hearing:** At this hearing, the DNDA will rule on the preliminary objections proposed by the defendant. It will also conduct a conciliation stage. If the conciliation fails, it will rule on the evidence to be practiced and the facts in dispute. At this stage, the parties' statements are made.

**Filing of the complaint:** The Authority analyzes compliance with the formal requirements of the claim.

**Admission of the complaint:** if all the formal requirements are met, the claim will be admitted. In this case, the defendant may file a request for reconsideration against the admission writ within (3) business days following its service. Within the same term, the defendant may object to the estimation oath and propose preliminary objections.

**Service on the defendant:** per the provisions in force, this may be done electronically.

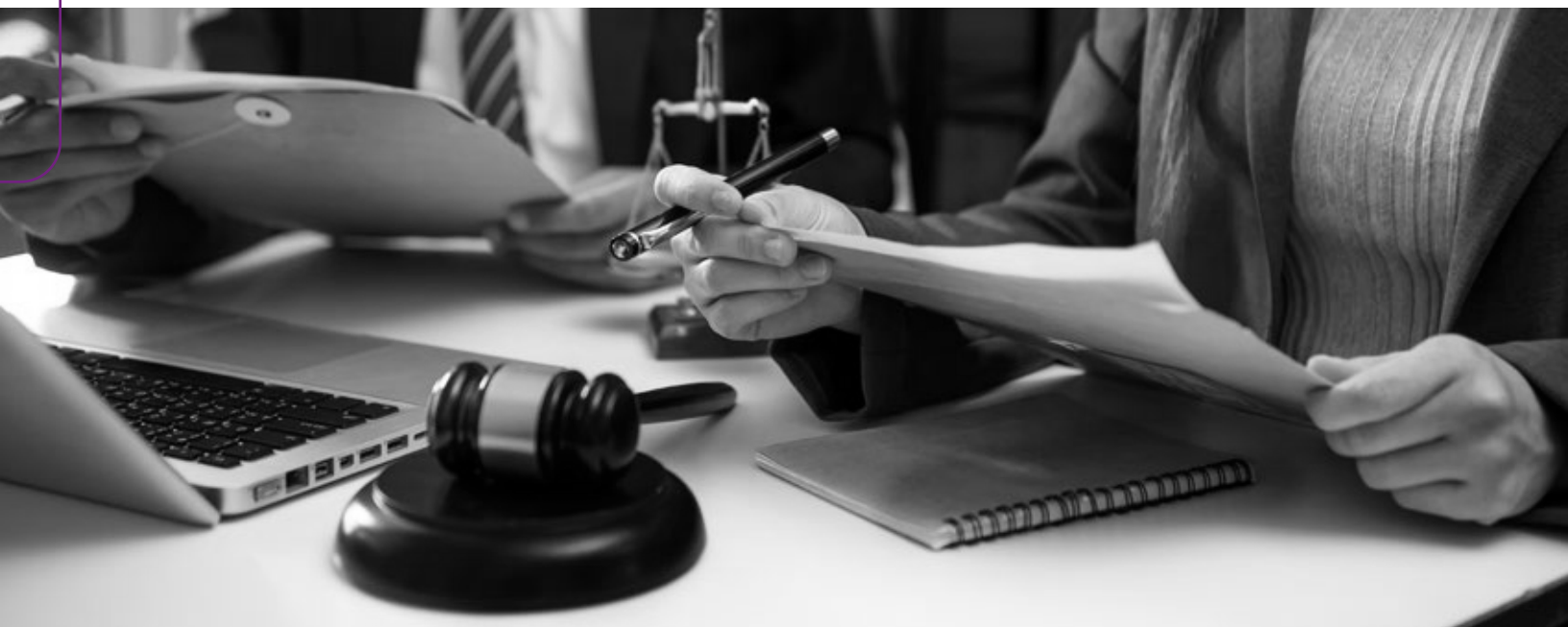
**Hearing of evidence and closing arguments:** in this hearing, the DNDA will hear the missing evidence and the parties' closing arguments. The hearing is divided into two phases.

## End of procedure

**Second instance ruling:** the second instance decision will be rendered by the Superior Court of Bogotá once the arguments of both parties have been heard. Before issuing the decision, the Judge must request a Prejudicial Interpretation from the Court of Justice of the Andean Community (CAN).

**First instance ruling:** the DNDA will issue a first instance decision, and the losing party may file an appeal orally at the same hearing, with three (3) business days to submit additional supporting documents.

In our experience, claims of this type are usually ruled on within two years in the first instance.







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