

# TEXAS INTELLECTUAL PROPERTY LAW JOURNAL

INTELLECTUAL PROPERTY LAW SECTION OF THE STATE BAR OF TEXAS  
THE UNIVERSITY OF TEXAS SCHOOL OF LAW

ARE INTELLECTUAL PROPERTY POLICIES SUBJECT TO COLLECTIVE BARGAINING?  
A CASE STUDY OF NEW JERSEY AND KANSAS  
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STATE BAR SECTION NEWS

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# Copyright Convergence in the Andean Community of Nations

Alberto J. Cerda Silva\*

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### I. Background

The Andean Community, initially known as the Andean Pact, is an integration process in the Americas that started in 1969 with the signing of the Cartagena Agreement by Bolivia, Colombia, Chile, Ecuador, and Peru.<sup>1</sup> In 1973, Venezuela also joined.<sup>2</sup> Through the 1970s and '80s, besides the creation of communitarian institutions, there was insignificant progress in regional economic integration within the Andean Community. In part, this was due to the pervasive dictatorships in the region and the incompatibility of domestic economic measures adopted by some countries including Chile, which dropped the initiative in 1976.<sup>3</sup>

Starting in the early '90s, once democratic governments returned to the region and overcame the economic crisis, the process of integration within the Andean Community was revitalized.<sup>4</sup> In those years, several measures contributed to the creation of a free trade area. These included reduced tariffs, the harmonization of custom procedures, and the liberalized trade in goods, transport, and telecommunications, contributed to the creation of a free trade area.<sup>5</sup> Additionally, as part of this intensification, the Andean Community adopted common regulations in areas like foreign investment, communitarian enterprises, and industrial and intellectual property.<sup>6</sup> In fact, in 1993, the Andean Community adopted *Decision 351*, which set forth the common regime on copyright and neighboring rights.<sup>7</sup>

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<sup>1</sup> Andean Subregional Integration Agreement, May 26, 1969, 8 I.L.M. 910 (as amended by TrujillProtocol, Mar. 10, 1996) [hereinafter Cartagena Agreement].

<sup>2</sup> *Id.*

<sup>3</sup> See Bernardo Vela Orbeagozo, *La Integración Regional como un Factor de Desarrollo Nacional*, in REFORMAS Y POLÍTICAS EN COLOMBIA Y AMÉRICA LATINA, 289, 297 (Universidad Externado de Colombia – CIPE, 2003); Alfredo Fuentes Fernández, *Contexto Histórico y Avances de la Integración en la Comunidad Andina*, in REVISTA OASIS 177 (Universidad Externado de Colombia, 2008).

<sup>4</sup> See Thomas Andrew O'Keefe, *How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise*, 30 INT'L LAW 811, 818 (1996) (referring to the "revival" of the Andean Pact, which by the early '90s established uniform rules encouraging free trade and attracting foreign investment, becoming one of the most innovative integration initiative in the region).

<sup>5</sup> *Id.* at 818–19.

<sup>6</sup> Fuentes, *supra* note 3, at 178.

<sup>7</sup> Andean Community, *Régimen Común sobre Derecho de Autor y Derechos Conexos [Common Regime on Copyright and Neighboring Rights Decision 351]*, Official Gazette of the Andean Community No. 145 (Dec. 21, 1993) [hereinafter *Decision 351*].

As a first step in the process of copyright convergence, *Decision 351* was a remarkable and ambitious initiative that contributed significantly to the harmonization of copyright law among the members of the Andean Community (AC members).<sup>8</sup> However, the idiosyncratic approaches of domestic law, the challenges of new technologies, and the emergence of bilateralism, among other causes, have undermined the role of *Decision 351* in building copyright convergence within the Andean Community. The lack of convergence may become a serious obstacle for the ongoing process of integration, particularly in the context of the information economy by obstructing the proper functioning of the internal market.

There is abundant literature on the Andean Community process of integration.<sup>9</sup> However, its legal harmonization of copyright law remains barely studied in the United States, where scholars have focused on the important role of the Andean Community Tribunal of Justice on intellectual property litigation and enforcement.<sup>10</sup> Meanwhile, Latin American scholars shy away from critically analyzing the common regime on copyright, providing mere descriptions of it and only occasional criticisms.<sup>11</sup> This paper briefly describes *Decision 351* of the Andean Com-

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<sup>8</sup> RICARDO ANTEQUERA PARILLI, *DERECHO DE AUTOR*, 935–36, (Dirección Nacional del Derecho de Autor, 2nd ed., 1998) (referring to the fact that *Decision 351* was “a first attempt” to harmonize copyright law among AC members, a process that needs to deepen in the future).

<sup>9</sup> See Secretaría General de la Comunidad Andina, *40 Años de Integración Andina: Avances y Perspectivas*, in 4 *REVISTA DE LA INTEGRACIÓN* (2009) (providing an evaluation of the integration of the Andean Community by its own actors); THOMAS ANDREW O’KEEFE, *LATIN AMERICAN AND CARIBBEAN TRADE AGREEMENTS: KEYS TO A PROSPEROUS COMMUNITY OF THE AMERICAS* 243–302 (Martinus Nijhoff ed., 2009) (providing an updated analysis of the Andean Community, its institutional framework, and common regimes). See also ALLAN RANDOLPH BREWER CARIAS, *DERECHO COMUNITARIO ANDINO* (Fondo Editorial Pontificia Universidad Católica del Perú, 2003) (providing the most comprehensive review of Andean Community’s common legal regimes).

<sup>10</sup> See Maria Alejandra Rodriguez Lemmo, *Study of Selected International Dispute Resolution Regimes, with an Analysis of the Decisions of the Court of Justice of the Andean Community*, 19 *ARIZ. J. INT’L & COMP. L.* 863, 902–28 (2002) (describing in details the tribunal and its main rulings); Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and Its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 *N.Y.U. J. INT’L L. & POL.* 871, 893 (2009) (describing the relations between the tribunal and both domestic courts and authorities, and finding that 97% of the cases judged by the Andean Community Tribunal of Justice are related to intellectual property); Camilo A. Rodriguez Yong, *Enhancing Legal Certainty in Colombia: the Role of the Andean Community*, 17 *MICH. ST. J. INT’L L.* 407 (2009) (analyzing the role of the Andean Community Tribunal of Justice in providing legal certainty for investment in the Andean region); Laurence R. Helfer et al., *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 *AM. J. INT’L L.* 1 (2009) (arguing that Andean Community Tribunal of Justice has contributed to creating a rule-of-law on intellectual property within the Andean Community). See also CHRISTIAN LEATHLEY, *INTERNATIONAL DISPUTE RESOLUTION IN LATIN AMERICA: AN INSTITUTIONAL OVERVIEW* 109–15 (Kluwer Law International, 2007) (describing institutional arrangement of the Andean Community, particularly the competence of its Tribunal of Justice).

<sup>11</sup> See, e.g., Ricardo Antequera Parilli, *Copyright and Andean Community Law*, 166 *REVUE INTERNATIONALE DU DROIT D’AUTEUR* 56 (1995) (Fr.); Ana María Pacón, *La Protección del Derecho de Autor en la Comunidad Andina*, in *DERECHO COMUNITARIO ANDINO* 299, 299–324 (Fondo Editorial Pontificia Universidad Católica del Perú, 2003).

munity, analyzes in detail the main limitations of the current common regime on copyright in order to identify the issues that require an urgent effort at convergence in Andean Community, and suggests some strategies to achieve that goal.

Analyzing the challenges to copyright regulation in the context of the process of regional integration may be useful for outlining future work within the Andean Community. It is true that during the last decade integration between AC members has stalled, but in recent years the Andean region has seen a more relaxed political atmosphere within the Andean region, the consolidation of democratic governments, and the growth of economies, all of which may contribute to revitalizing the process of integration. Additionally, this analysis may prove useful to other processes of regional integration within Latin America, such as the South American Community of Nations, which would unite the Andean Community, MERCOSUR, Chile, Guyana, and Suriname.<sup>12</sup>

## II. Copyright Common Regime in the Andean Community

At the end of the 1980s, the Andean Community lacked a uniform regime for protecting intellectual and artistic creations.<sup>13</sup> The differences between international commitments evidenced the significant dissimilarities in their levels of protection. Colombia, Ecuador, and Bolivia were parties to the Inter-American Convention on Copyright,<sup>14</sup> which provides a lower level of protection than the Berne Convention.<sup>15</sup> Colombia and Ecuador, along with Venezuela and Peru, were parties to the Universal Convention on Copyright,<sup>16</sup> which provided an intermediate level of protection and worked as a one-way bridge to the Berne Convention.<sup>17</sup> Colom-

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<sup>12</sup> See South American Community of Nations Constitutive Treaty, May 23, 2008, available at <http://www.comunidadandina.org/INGLES/csn/treaty.htm>.

<sup>13</sup> Antequera, *supra* note 11, at 62–65; ANTEQUERA, *supra* note 8, at 913–15 (referring to the “highly dissimilar situation” of domestic copyright laws among AC members by the time of the adoption of *Decision 351*).

<sup>14</sup> Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, June 22, 1946. UN Registration: 03/20/89 No. Vol. 24373.

<sup>15</sup> Delia Lipszyc, *Esquema de la Protección Internacional del Derecho de Autor por las Convenciones del Sistema Interamericano*, in LA PROTECCIÓN DE LOS DERECHOS DE AUTOR EN EL SISTEMA INTERAMERICANO 17, 33 (Delia Lipszyc et. Al. eds., Universidad Externado de Colombia, 1998) (describing some weaknesses of the Inter-American Convention when compare with the Berne Convention, such as the absence of a common term of protection and the waiverability of moral rights).

<sup>16</sup> Universal Copyright Convention, Sept. 6, 1952 (with Appendix Declaration relating to Article XVII and Resolution concerning Article XI).

<sup>17</sup> DELIA LIPSZYC, COPYRIGHT AND NEIGHBOURING RIGHTS 604–05, 751 (UNESCO Publishing, 1999) (referring to the UCC as a first step in the process of acceding to the Berne Convention); RICARDO ANTEQUERA PARILLI, EL NUEVO RÉGIMEN DEL DERECHO DE AUTOR EN VENEZUELA 572 (Autoralex, 1994) (referring to the UCC as a bridge to the Berne Convention).

bia, Peru and Venezuela adhered to the Berne Convention,<sup>18</sup> but the latter two still needed to incorporate it into their domestic law.<sup>19</sup>

The significant differences between the levels of protection of copyright within the Andean Community created problems for the proper functioning of the internal market. One potential solution was harmonization. In 1991, they started this process, but were interrupted because of the legislative discussion of new copyright laws in Bolivia and Venezuela;<sup>20</sup> they resumed the process in 1993.<sup>21</sup> At the end of that year, the Commission, the legislative body of the AC,<sup>22</sup> adopted *Decision 351* based on an expert committee's report.<sup>23</sup> By then, all the AC members had also ratified both the Universal and the Berne Conventions.<sup>24</sup>

*Decision 351* is communitarian and supranational law, with direct and immediate effects upon communitarian and domestic authorities.<sup>25</sup> Unlike European Union directives, communitarian decisions do not require adoption into domestic law because they have immediate binding effects and prevail over domestic law.<sup>26</sup> Communitarian decisions allow the joint existence of domestic law, as long as the latter does not conflict with the former.<sup>27</sup> As a result, AC members may need to modify their domestic law in order to avoid confusion, but not for implementation purposes. One exception is that communitarian decisions admit "complementary

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<sup>18</sup> Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

<sup>19</sup> See Table: Andean Community Nations, by international instruments on copyright to which they are parties.

<sup>20</sup> Antequera, *supra* note 11, at 56–127, 62–67; ANTEQUERA, *supra* note 8, at 913–14.

<sup>21</sup> ANTEQUERA, *supra* note 8, at 913–14; see also Pacón, *supra* note 11, at 300 (referring to the background and approval of *Decision 351*).

<sup>22</sup> Andean Community, *Codificación del Acuerdo de Cartagena* [Codification of the Cartagena Agreement Decision 236], Official Gazette of the Andean Community, No. 31 (Jul. 26, 1988) (conferring to the Commission legislative powers within the Andean Community).

<sup>23</sup> ANTEQUERA, *supra* note 8, at 915 (referring to the drafting of *Decision 351* as a task addressed by an expert committee).

<sup>24</sup> See Table: Andean Community Nations, by international instruments on copyright to which they are parties.

<sup>25</sup> Eric Tremolada Álvarez, *El Derecho Andino: Una Sistematización Jurídica para la Supervivencia de la Comunidad Andina de Naciones*, 57 Cuadernos CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL 35, 36 (2006); HILDEGARD RONDÓN DE SANSÓ, EL RÉGIMEN DE LA PROPIEDAD INDUSTRIAL, 86–87 (1995).

<sup>26</sup> Tremolada Álvarez, *supra* note 25, at 36.

<sup>27</sup> See Ana María Salones Gaité, *La Propiedad Intelectual en Bolivia: Marco Conceptual, Jurídico e Institucional* 100, 100 (2003) (complaining about the legal uncertainty the subsistence of domestic law creates and arguing for "overcoming the current legal duplicity"); RICARDO ANTEQUERA PARILLI & MARYSOL FERREYROS CASTAÑEDA, EL NUEVO DERECHO DE AUTOR EN EL PERÚ 34 (Peru Reporting, 1996) (referring to the legal uncertainty about which norms of the Peruvian domestic law are still in force and which were repealed by *Decision 351*).

regulation by domestic law,"<sup>28</sup> which, as this paper will explain, seems to be the case in several provisions of *Decision 351*.

*Decision 351* was conceived as a first step in the process of legal convergence on copyright law among the AC members, one which would require subsequent strengthening.<sup>29</sup> It provided for national protection for creators, recognized some rights, including moral rights, set forth a 50 years *post mortem auctoris* term of protection, adopted some exceptions and limitations, established protection of software and databases, and included some measures of copyright enforcement.<sup>30</sup> Because *Decision 351* prevails over domestic law of the AC members when they are inconsistent with *Decision 351*'s provisions,<sup>31</sup> it forced the adoption of a common regime on copyright issues for all AC members.

*Decision 351* allowed for additional provisions under the domestic laws of the AC members, as long as these rules were not inconsistent with the provisions of the common regime. In fact, *Decision 351* made several references to its integration into domestic law. For instance, the provisions on works-for-hire,<sup>32</sup> *droit de suite*,<sup>33</sup> computing terms of protection,<sup>34</sup> transferring and licensing,<sup>35</sup> and affiliation to collective rights management societies.<sup>36</sup> In other cases, such as rules on judicial procedures, civil measures, and criminal sanctions, *Decision 351* did not address certain regulatory issues, but rather left such space to domestic law. In some cases, the Decision only set forth a minimum legal standard, allowing the standard to be heightened by domestic law. This is the case for moral rights recognized for authors,<sup>37</sup> economic exclusive rights,<sup>38</sup> term of protection,<sup>39</sup> and exceptions and limi-

<sup>28</sup> Tremolada Álvarez, *supra* note 25, at 49.

<sup>29</sup> Antequera, *supra* note 11, at 56–127, 66–67; ANTEQUERA, *supra* note 8, at 915 (explaining that *Decision 351* was a first step through a uniform regime, and there was consciousness that in the short or medium term it will need to advance in harmonization).

<sup>30</sup> See *Decision 351*, *supra* note 7.

<sup>31</sup> See, e.g., *In re Germán Cavelier Gaviria y otro*, Andean Community Tribunal of Justice, Case 64-IP-2000, ¶¶2-5 (Sept. 6, 2000) (ruling that community law is binding for state and non-state actors in the Community and each country member, has direct effect within domestic law and prevail over any domestic regulations); *In re Claudia Blum de Barberi y otros*, Constitutional Court of Colombia, Case 155/98, ¶19 (Apr. 28, 1998) (community law is preeminent and preferentially apply to domestic law of AC members).

<sup>32</sup> *Decision 351*, *supra* note 7, art. 10 (referring to domestic law the determination of entitlements on exclusive economic rights on work-for-hire).

<sup>33</sup> *Id.* art. 16 (providing that domestic law of AC members shall regulate *droit de suite* on artistic works).

<sup>34</sup> *Id.* art. 19 (setting forth that AC members can determine, according to the Berne Convention, the rules for computing terms of protection starting the date of creation, diffusion or publication of a given work).

<sup>35</sup> *Id.* art. 30 (providing that AC members' domestic law shall regulate transferring and licensing).

<sup>36</sup> *Id.* art. 44 (setting forth that affiliation of right holders to collective rights management societies shall be voluntary, except when AC members' domestic laws provide differently).

<sup>37</sup> *Id.* art. 12 (providing that "AC members' domestic law may recognize other moral rights").



tations to copyright.<sup>40</sup> Referring to domestic law seems to have been the main mechanism used to overcome the lack of agreement around a given issue during negotiations of *Decision 351*.<sup>41</sup> Unfortunately, this legal technique, based on references to domestic law, omissions in the common regime, and the adoption of minimal standards, has undermined the achievement of an adequate level of convergence within the Andean Community, which, as we will see, has instead deteriorated over the years.

*Decision 351* was remarkable and ambitious at the time of drafting. Its provisions significantly anticipated the content of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement).<sup>42</sup> This is true of the provisions dealing with protection for software and databases.<sup>43</sup> In fact, *Decision 351* facilitated all AC members' near-immediate accession to the World Trade Organization<sup>44</sup> due to the consistency between the Decision and TRIPS.<sup>45</sup> The legal convergence produced by the common regime was impressive when compared with other processes of harmonization, such as that of the European Union, which required the implementation of several communitarian directives to regulate some of the issues solved by *Decision 351*.<sup>46</sup> However, this cautious and gradual approach

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<sup>38</sup> *Id.* art. 17 (providing that "AC members' domestic law may recognize other economic rights").

<sup>39</sup> *Id.* art. 18 (setting forth that the duration of the term of protection shall not be inferior to the life of the author plus fifty years post-mortem).

<sup>40</sup> *Id.* arts. 21–22 (allowing the adoption of exceptions and limitation, if they comply with the *Berne* three-step test).

<sup>41</sup> See ANTEQUERA, *supra* note 8, 920–23 (referring to the lack of agreement on moral rights, parallel importations, *droit de suite*, term of protection, and exceptions); Ricardo Antequera Parilli, *El Derecho de Autor y los Derechos Conexos en la Legislación Venezolana*, in LEGISLACIÓN SOBRE DERECHO DE AUTOR Y DERECHOS CONEXOS 7 (Judidica Venezolana, 1999) (referring to the lack of agreement during the negotiations of *Decision 351* around work-for-hire).

<sup>42</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement]. See also Antequera, *supra* note 11, at 56–127, 94–95 (mentioning that drafters of *Decision 351* took advantage of work done in adopting a Protocol for the *Berne* Convention).

<sup>43</sup> Compare *Decision 351*, *supra* note 7, arts. 23–27 (providing copyright protection for computer programs and databases, and adopting a set of special exceptions for them), with TRIPS Agreement, *supra* note 42, arts. 10–11 (adopting copyright protection for computer programs and databases).

<sup>44</sup> See Table: Andean Community Nations, by international instruments on copyright to which they are parties.

<sup>45</sup> XAVIER GÓMEZ VELASCO, PATENTES DE INVENCION Y DERECHO DE LA COMPETENCIA ECONOMICA 17 (Universidad Andina Simón Bolívar, 2003); MARCO RODRÍGUEZ RUIZ, LOS NUEVOS DESAFÍOS DE LOS DERECHOS DE AUTOR EN ECUADOR 48–49 (Universidad Andina Simón Bolívar, 2007).

<sup>46</sup> See Copyright Documents, EUROPEAN COMMISSION THE EU SINGLE MARKET, [http://ec.europa.eu/internal\\_market/copyright/documents/documents\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm) (last visited May 15, 2011) (listing communitarian directives on copyright and related rights adopted by the European Union).

has allowed better coordination among EU members in terms of both content and procedures,<sup>47</sup> and a more transparent process by legislative bodies.

### III. Limitations of the Common Copyright Regime

The common regime created by *Decision 351* represented significant progress in the protection of copyright and legal convergence among AC members,<sup>48</sup> but it is not free of criticism. As is discussed below, the common regime has been unable to eliminate differences in domestic laws that provide unfair competitive advantages to producers from one AC country over another, creating distortion in the internal market. Instead, it has provided advantages to third countries to the detriment of the internal market. Additionally, it has not overcome some obstacles to the free flow of copyrighted goods, and in some cases the common regime has aggravated those inconveniences, even among AC members. Moreover, several provisions of the common regime have undermined the capacity of AC members to develop public policies aimed at promoting the public interest.

Other limitations of the common regime have emerged due to negotiations of free trade agreements and technological development. On one hand, the common regime has been insufficient to allow AC members to have a common position when facing the challenges of subsequent bilateral negotiations on intellectual property.<sup>49</sup> On the other hand, the regime suffers from a relative absence of provisions on copyright and new technologies, particularly regarding the digitalization of works and increasing Internet use. Those two limitations, as is explained below, have been evident in the regulation of technological protection measures and the liability regime of online service providers.

This section addresses the limitations of the common regime in detail, including their legal contexts and effects on AC members. The analysis is illustrated with situations that make evident an improper functioning of the internal market. This is a concept extensively used in the European Union's integration law.<sup>50</sup> A common

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<sup>47</sup> See Annette Kur, *Intellectual Property*, in FROM PARIS TO NICE: FIFTY YEARS OF LEGAL INTEGRATION IN EUROPE 75, 85 (Martin van Empel ed., 2003) (referring to the "very cautious and pragmatic step-by-step" harmonization of copyright law within the European Union).

<sup>48</sup> See Pacón, *supra* note 11, at 299–324 (analyzing the effect of *Decision 351* on the copyright protection provided by AC members and concluding that the Decision raised the communitarian level of protection).

<sup>49</sup> Fabio Forero, *La Coordinación de la Política Comercial en la Comunidad Andina y su Efecto en el Proceso de Integración*, in REVISTA DE LA ASOCIACIÓN IBEROAMERICANA DE ACADEMIAS, ESCUELAS E INSTITUTOS DIPLOMÁTICOS 5, 29–30 (2010), available at <http://segib.org/colaboraciones/2010/10/05/revista-de-la-asociacion-iberoamericana-de-academias-escuelas-e-institutos-diplomaticos/> (arguing that the negotiations of free trade agreements reflect the incapacity of AC members to act in block, which, in this instance, required the adoption of flexibilities by the Andean Community in favor of third countries).

<sup>50</sup> See, e.g., SYBE ALEXANDER DE VRIES, TENSION WITHIN THE INTERNAL MARKET: THE FUNCTIONING OF THE INTERNAL MARKET AND THE DEVELOPMENT OF HORIZONTAL AND FLANKING POLICIES (Europa Law Publishing, 2006); NIAMH NIC SHUIBHNE, REGULATING THE INTERNAL MARKET (Edward

market requires the free movement of goods and services as well as people and capital.<sup>51</sup> In order to achieve a common market, it is necessary to remove artificial barriers and harmonize national policies.<sup>52</sup> One of the non-tariff barriers may be intellectual property rights. The highly territorial character of intellectual property rights may conflict with a common market when legitimate goods or services are exported to a country where those goods or services are illegal.<sup>53</sup> For example, when a publisher prints works available in public domain according to its national law and attempts to export them to foreign countries where the work is still protected under copyright protection. In fact, in the integration of the European Union, as it should be in the Andean Community, harmonizing intellectual property rights has been “vital” for the internal market because the rights may affect the “free flow of goods and the maintenance of undistorted competition.”<sup>54</sup>

Achieving a common market does not require a uniform regulation on intellectual property or on copyright. A common market requires removing those legal barriers that block the free movement of copyrighted goods and services, by distorting it, divesting commerce, and affecting fair competition.<sup>55</sup> Requirements of a common market are, to some extent, contingent because they vary depending on the progress of the building and perfecting of the market. Based on that analysis, the following section of this article supports increasing the convergence of the copyright laws in the Andean Community.

A. The Andean Community Common Regime does not Prevent Competitive Distortions Within the Internal Market: Publishing and Software.

To be able to function properly, the Andean Community’s internal market would require a higher level of harmonization between the domestic laws of its

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Elgar Publishing, 2006); DEMIAN CHALDERS ET AL., *European Union Law* 674–711 (Cambridge University Press, 2nd ed., 2010).

<sup>51</sup> *Compare* Consolidated Version of the Treaty on the Functioning of the European Union, art. 26, Mar. 30, 2010, 2008 OJ (C 115/49) (“1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”), *with* Cartagena Agreement, *supra* note 1, art. 1 (setting forth the objectives of the Andean Community, which include “looking ahead toward the gradual formation of a Latin American Common Market,” but without defining the community itself).

<sup>52</sup> Andrew Scott, *Theories of Regional Economic Integration and the Gloval Economy*, in *THE EUROPEAN UNION HANDBOOK* 103–16 (Jackie Gower ed., Fitzroy Dearborn Publishers, 2nd ed. 2002) (referring to the negative and the positive integration of the common market).

<sup>53</sup> CATHERINE COLSTON & JONATHAN GALLOWAY, *MODERN INTELLECTUAL PROPERTY LAW* 13–16 (Routledge, 3rd ed. 2010); *see also* GARETH DAVIES, *EU INTERNAL MARKET LAW* 185–95 (Cavendish Publishing, 2nd ed. 2003).

<sup>54</sup> ALINA KACZOROWSKA, *EUROPEAN UNION LAW* 489 (Routledge, 2nd ed. 2011).

<sup>55</sup> ANTEQUERA & FERREYROS, *supra* note 27, at 33; ANTEQUERA, *supra* note 8, at 70.

member countries. However, the common regime tolerates,<sup>56</sup> and even encourages,<sup>57</sup> creating differences in its members' domestic laws. This can create an inadequate functioning of the market by providing competitive advantages to competitors from one country over others. This is the case in both the publishing and software development sectors.

The common regime recognizes some economic rights as exclusive to the copyright holder,<sup>58</sup> but allows AC members to recognize additional rights.<sup>59</sup> For example, *Decision 351* recognizes that the distribution of a work may or may not be for profit,<sup>60</sup> but seems to limit the right of exclusivity only to the former.<sup>61</sup> However, because of the flexibility that *Decision 351* provides to AC members, Colombia has extended copyright to the not-for-profit lending of works.<sup>62</sup> In fact, unlike the seeming *numerus clausus* of exclusive rights recognized by *Decision 351*, Colombian law grants control to right holders over any possible use of the work.<sup>63</sup> This criterion of comprehensive scope of copyright, which some scholars see as consistent with the European tradition of "*droit d' auteur*,"<sup>64</sup> has also been accepted by

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<sup>56</sup> See *supra* notes 37–40 and accompanying text.

<sup>57</sup> See *supra* notes 32, 35–36 and accompanying text.

<sup>58</sup> *Decision 351*, *supra* note 7, art. 13 (recognizing to copyright holder the exclusive rights for reproduction, public communication, public distribution, importation, translation, adaptation and the creation of other derivative works). See also Pacón, *supra* note 11, at 316 (affirming that the list of exclusive economic rights set forth by *Decision 351* is merely "*illustrative*").

<sup>59</sup> *Decision 351*, *supra* note 7, art. 17 ("AC members' domestic law may recognize other economic rights.").

<sup>60</sup> *Id.* art. 3 ("[P]ublic distribution" as "making available to the public the original or copies of a work through its selling, renting, lending or any other manner.").

<sup>61</sup> *Id.* art. 13(c) (providing that the author or right holder has the exclusive right to authorize or prohibit the public distribution of copies of the work through selling or leasing); see also ANTEQUERA & FERREYROS, *supra* note 27, at 137 (supporting the argument that *Decision 351* limits exclusive right of distribution to for-profit transferences and excludes those for free).

<sup>62</sup> Dirección Nacional de Derecho de Autor, Legal Opinion 1-2005-4826 (March 9, 2005) (Colom.) (rejecting the existence of any exception for lending books for libraries), Legal Opinion 2-2010-4800 (Nov. 30, 2010) (rejecting the existence of any exception for lending audiovisual works for libraries).

<sup>63</sup> *In re María Resesa Garcés Lloreda*, Constitutional Court of Colombia, Judgment C-276/96 (Jun. 20, 1996) (Colom.) ("The economic rights of authors, in the civil law tradition, are as many as manners of using works, and they do not have any exception other than those set forth by law, because exceptions must be specific and restricted."); see also Dirección Nacional de Derecho de Autor, Legal Opinion 1-2006-4988 (Apr. 1, 2006) (supporting a comprehensive protection of economic right), and Legal Opinion 1-2008-8704 (Apr. 29, 2008) (reiterating that before copyright holders have a comprehensive protection for economic rights). This comprehensive protection for economic rights has been also articulated at communitarian level. See Andean Community Tribunal of Justice, Case 24-IP-98, at ¶3 (Sep. 25, 1998) (ruling in a case on copyright protection of computer programs that "[the copyright] economic right is unlimited, therefore, right holder is allowed to authorize any form of exploitation of the computer program").

<sup>64</sup> Ricardo Antequera Parilli, *El Derecho de Autor y los Derechos Conexos en el ALCA: Una Visión Panorámica de las Negociaciones*, in *Perspectivas Autorais do Direito da Propriedade Intelectual* 8, 23–24 (Helenara Braga Avancini & Milton Lucídio Leão Barcellos eds., EdiPUCRS, 2009)

other AC members.<sup>65</sup> This additional protection granted by domestic laws is also enjoyed by foreign works because of the broad national treatment adopted by the common regime.<sup>66</sup> For example, software corporations have been successful in enforcing exportation rights in Peru;<sup>67</sup> similarly, the Ecuadorian copyright authority has exercised *ex-officio* enforcement of exportation rights on foreign movies,<sup>68</sup> in spite of the fact that right holders may not have those rights in their countries of origin. On the other hand, Bolivia has recognized only limited exclusive rights.<sup>69</sup>

Publishers and writers from some AC members may enjoy a competitive advantage with respect to their colleagues from other member countries. In Colombia, for example, because of the comprehensive control by publishers and writers and the lack of exceptions for public lending, libraries and educational institutions must pay for their not-for-profit lending of books.<sup>70</sup> Peru provides comprehensive copyright protection with an exception that allows free public lending.<sup>71</sup> And Bolivia, which does not grant an exclusive right to control public lending, allows public lending of books by libraries without restriction.<sup>72</sup> In addition to creating an inappropriate function in the internal publishing market, the asymmetry seems unfair

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(supporting that adopting comprehensive economic rights and limited exceptions is a “triumph” of civil law tradition in the failed negotiations of the Free Trade Agreement of the Americas); *see also* Pacón, *supra* note 11, at 302 (stating that *Decision 351* adopted the European civil law tradition on copyright).

<sup>65</sup> In Peru, *see* ANTEQUERA & FERREYROS, *supra* note 27, at 127–28, 155, and 177 (supporting a comprehensive scope for copyright bases on articles 31 (f), 37, and 50 of the Peruvian Copyright Act). In Ecuador, *see* LEY DE PROPIEDAD INTELECTUAL [Intellectual Property Act] arts. 19, 20, and 27 (Ecuador) [hereinafter Intellectual Property Act–Ecuador] (setting forth a broad exclusive right for exploiting works). In Venezuela, former AC member, *see* Antequera, *supra* note 41, at 25–28 (supporting a comprehensive scope for copyright based on articles 23 of the Venezuelan Copyright Act and 18 of its Regulation).

<sup>66</sup> *See infra* notes 90–101 and accompanying text.

<sup>67</sup> Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual, Resolution 0121-1998-ODA (Jul. 9, 1998) (recognizing exhaustion of rights for purpose of introducing a software from one country to another for using but not for commercializing).

<sup>68</sup> *See* Juzgado Décimo de Garantías Penales de Guayas, Judgment 09260-2011-0071 (Feb. 3, 2011) (Ecuador) (rejecting constitutional action against sanction adopted *ex-officio* by the Ecuadorian copyright authority based on the fact that the infringer did not prove a legitimate origin of movies and the existence of a license for importing them into the domestic market).

<sup>69</sup> Ley de Derecho de Autor [Copyright Act], art. 15 (Bol.) [hereinafter Copyright Act–Bolivia] (granting to right holders the exclusive rights on reproduction, public communication, translation, adaptation, and any other transformation of the copyrighted work).

<sup>70</sup> *See supra* notes 62–63 and accompanying text.

<sup>71</sup> *See* Ley sobre Derechos de Autor [Copyright Act], arts. 31(f), 43(f) (Peru) [hereinafter Copyright Act–Peru] (setting forth that copyright includes any form of using the work that is not excepted by law, and that the list of rights recognized in the law is “merely illustrative and not strict” and setting forth an exception for public lending of books by not-for-profit libraries and archives).

<sup>72</sup> Copyright Act–Bolivia, *supra* note 69, art. 15 (lacking any recognition to an exclusive right on public leading of works).

because it deprives a significant portion of the population basic services that provide access to knowledge and opportunities for development.<sup>73</sup>

*Decision 351* reflects a standard of copyright protection from the early 1990s that does not account for the development of information technologies, particularly the digitalization of works and the Internet. Because of the absence of provisions about these phenomena within the common regime, AC members are free to adopt specific rules on digital works and the Internet within their domestic laws as long as they do not conflict with the common regime. As a result, the distortion of the internal market has increased because of the differences between domestic laws, which provide unfair competitive advantages in fields such as information technologies. These unfair advantages include the creation of multimedia content, the provision of online services,<sup>74</sup> and the development of computer programs.

For instance, the common regime protects computer programs and sets forth some limitations. In fact, before completion of the TRIPS Agreement,<sup>75</sup> *Decision 351* expressly recognized that computer programs—both object and source code<sup>76</sup>—are protected by copyright.<sup>77</sup> The Decision also authorized exceptions such as back-up copies, copies necessary for the functioning of the program,<sup>78</sup> and any modifications of the program for personal purposes.<sup>79</sup> These provisions of *Decision 351* have been replicated in the domestic law all AC members<sup>80</sup> except Colombia, which only has regulates the registration of computer programs.<sup>81</sup> Therefore, *Decision 351* has provided a common minimum standard for copyright protection for computer programs, but AC members are authorized to adopt additional norms if consistent with the common regime.

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<sup>73</sup> See Margaret Chon, *Copyright and Capability for Education: An Approach From Below*, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS, 218–49 (Tzen Wong & Graham Dutfield eds., Cambridge University Press, 2011) (referring to the severe shortage of textbook in developing countries and arguing in favor of public policies and legal changes to provide access to knowledge).

<sup>74</sup> See *infra* notes 233–42 and accompanying text.

<sup>75</sup> TRIPS Agreement, *supra* note 42, art. 10.1 (providing copyright protection to computer programs).

<sup>76</sup> *Id.* art. 23(1) (providing protection for both the source and the object code of computer programs).

<sup>77</sup> *Decision 351*, *supra* note 7, art. 4(1) (providing copyright protection to computer programs).

<sup>78</sup> *Id.* arts. 24–26 (setting forth specific copyright exceptions for computer programs).

<sup>79</sup> *Id.* art. 27 (providing that the adaptation of a computer program made by its user for its exclusive use does not constitute modification).

<sup>80</sup> Reglamento del Soporte Lógico o Software [Software Regulation] arts. 15 and 16 (Bolivia) [hereinafter Software Regulation–Bolivia]; Intellectual Property Act–Ecuador, *supra* note 65, art. 30; Copyright Act–Peru, *supra* note 71, arts. 73–75.

<sup>81</sup> Por el cual se reglamenta la inscripción del soporte lógico (software) en el Registro Nacional del Derecho de Autor [Regulation about Software Inscription in the National Register of Copyright] (Colombia).

Over the years, the evolution of domestic law in AC members has increased the differences in the regulation of computer programs. These differences are particularly significant with regard to the cases of works-for-hire and exceptions to use software without the authorization of the copyright holder. In the latter, neither Colombia nor Bolivia<sup>82</sup> has gone beyond the exceptions already available in the common regime, but the other AC members have. For instance, following the TRIPS Agreement,<sup>83</sup> Ecuador has recognized an exception for rentals when the program itself is not the essential object of the rental, such as when renting a car that includes a computer program in its system.<sup>84</sup> This is also the case in Peru.<sup>85</sup> However, Peru has also recognized, similar to the European Union<sup>86</sup> and the United States,<sup>87</sup> a specific exception that allows reverse engineering of computer programs in order to achieve the interoperability of independent programs.<sup>88</sup>

The recognition of an exception for the reverse engineering of computer programs provides competitive advantages to Peruvian software development companies. In fact, in other countries of the Andean Community, companies are required to apply for licenses from provider of proprietary software—such as Microsoft and Apple—to develop interoperable computer programs.<sup>89</sup> Peru allows software development companies to do so without licensing and authorizes reverse engineering by law, including decompiling the object code of a given software, distilling the source code, and developing computer programs compatible with the original source. In simple terms, software development companies in Peru are able to save the usually high licensing fees required in other countries and technically may access the programming code of given software in order to develop a compatible solution. This creates an improper function in the internal market of computer programming services because companies in one country enjoy advantages that are based on mere legal barriers. One way to overcome the improper function in the

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<sup>82</sup> Software Regulation—Bolivia, *supra* note 80.

<sup>83</sup> TRIPS Agreement, *supra* note 42, art. 11 (setting forth that the obligation to provide right holders the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works “does not apply to rentals where the [computer] program itself is not the essential object of the rental”).

<sup>84</sup> Intellectual Property Act—Ecuador, *supra* note 65, art. 31.

<sup>85</sup> Copyright Act—Peru, *supra* note 71, art. 72.

<sup>86</sup> Directive 2009/24/EC, of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs, 5.5.2009 OJ (L 111), 6.

<sup>87</sup> *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

<sup>88</sup> Copyright Act—Peru, *supra* note 71, art. 76.

<sup>89</sup> See ANTEQUERA & FERREYROS, *supra* note 27, at 234–36 (arguing that reverse engineering activities require a copyright exception in domestic law), *but see* Agustín Grijalva, *Copyright & the Internet*, in *THE INTERNET AND SOCIETY IN LATIN AMERICA AND THE CARIBBEAN* 311, 324–25 (Marcelo Bonilla & Gilles Cliché eds., International Development Research Center 2004) (assuring that reverse engineering is “compatible” with the fundamental principles of copyright and, therefore, permitted in the Andean Community).

internal market is to extend a reverse engineering exception to the entire Andean Community internal market.

B. The Andean Community Common Regime Provides Competitive Advantages to Third Countries to the Detriment of its Internal Market: National Treatment and Restoration of Rights.

The national treatment principle is essential for international trade to flourish. Through this principle, countries treat nationals of other countries no less favorably than their own nationals.<sup>90</sup> In copyright law, this principle has been expressly recognized by the Berne Convention<sup>91</sup> and the TRIPS Agreement.<sup>92</sup> Countries have committed to not discriminate in the protection that they provide copyrighted goods and services that originate in other country party to those international agreements. However, the Andean Community common regime went further by awarding one-sided protection to works of foreign origin even in cases where doing so was not required by international law.<sup>93</sup>

*Decision 351* granted national treatment to all creators, even if the country of origin of the works did not protect the nationals of the Andean Community.<sup>94</sup> This implies that by the time *Decision 351* entered in force, on December 21, 1993, AC members extended protection not only to authors whose countries of origin were party to the Berne Convention, the leading international instrument on copyright, but also to those authors from countries that were not members of that convention. As a result, authors from more than fifty countries—including Russia, Korea, and El Salvador—received protection by the Andean Community even though commu-

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<sup>90</sup> See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 187, Annex 1, art. 3 (requiring national treatment for imported goods once they have passed customs); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1896 U.N.T.S. 183, Annex 1B, art. 17 (accorded national treatment for supply of services).

<sup>91</sup> Berne Convention, *supra* note 18, art. 5.1 (“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”).

<sup>92</sup> TRIPS Agreement, *supra* note 42, art. 3 (“1. Each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property. . .”).

<sup>93</sup> César Parga, *Intellectual Property Rights*, in TOWARD FREE TRADE IN THE AMERICAS 207, 218 (Jose Manuel Salazar Xirinachs & Maryse Robert eds., Brookings Institution Press 2001) (recognizing that the Andean Community provides a broad concept of national treatment, without exceptions).

<sup>94</sup> *Decision 351*, *supra* note 7, art. 2 (providing that each AC member shall grant to nationals of other countries no less favorable protection than those provided to its own nationals). This provision has reflects on domestic law, *see, e.g.*, Intellectual Property Act—Ecuador, *supra* note 65, art. 5(2) (providing protection for all the works regardless of the country of origin of the work, nationality or domicile of the author or right holder, and wherever the work was published or disclosed).



nitarian authors were not protected in those countries.<sup>95</sup> Even today, after the massive adherence of developing countries to the Berne Convention as a result of the TRIPS Agreement,<sup>96</sup> presumably in exchange of market access for agricultural goods,<sup>97</sup> *Decision 351* can be used to protect authors from twenty countries, even though they do not protect communitarian authors. This is the case for Angola, Iran, Iraq, Mozambique, Taiwan, and others.<sup>98</sup>

Because of the lack of transparency in the process of adopting *Decision 351*,<sup>99</sup> it is unclear why protection was granted to foreign authors beyond what is required internationally. One may suggest that it is consistent with the *droit d'auteur* rationality, since creators deserve protection independent of country of origin.<sup>100</sup> It may be suggested also that drafters of *Decision 351* were scared of the competition posed by foreign authors, under the rationality that unprotected foreign works could substitute for domestic ones.<sup>101</sup> Whatever the underlying reason, there is no empirical data proving that preserving such broad protection for foreign works provides any benefit for the Andean Community internal market; on the contrary, it undermines the access to those works by AC population and reduces business opportunities for domestic publishers.

*Decision 351* protects the creations of authors from third countries even when they are not protected in their country of origin and in spite of the lack of reciprocity from those countries to communitarian authors. The most emblematic instance of this may be the reestablishment of rights, thus is, the reentry of a public domain work into the private domain.<sup>102</sup> In these cases, *Decision 351* reestablished the

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<sup>95</sup> See BERNE CONVENTION CONTRACTING PARTIES, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) (last visited May 28, 2011).

<sup>96</sup> See BERNE CONVENTION STATISTICS, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at [http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty\\_id=15&lang=en](http://www.wipo.int/treaties/en/statistics/StatsResults.jsp?treaty_id=15&lang=en) (last visited May 28, 2011).

<sup>97</sup> See Peter Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 371–79 (2006) (describing the four different narratives used to explain the origins of the TRIPS Agreement and why developing countries became parties).

<sup>98</sup> See *supra* note 95.

<sup>99</sup> Pacón, *supra* note 11, at 300 (complaining about the lack of information about the process in the expert committee that drafted *Decision 351*).

<sup>100</sup> ANTEQUERA & FERREYROS, *supra* note 27, at 61–62 (arguing that a broad national treatment was adopted by *Decision 351* because, since copyright a fundamental right, it would be unfair to leave its recognition subject to formal requirements, making the author a victim of the negligence of his country of origin).

<sup>101</sup> DELIA LIPSZYC, CONFERENCIAS DE REVISIÓN DE LAS CONVENCIONES DE BERNA Y UNIVERSAL: ENFOQUE ARGENTINO 44 (CISAC 1975) (supporting the argument that unprotected foreign works substitute domestic ones when rejecting the adoption of flexibilities for developing countries in the Berne Convention).

<sup>102</sup> ANTEQUERA, *supra* note 8, at 934, 1014 (arguing that *Decision 351* “remedies the unfairness” of leaving unprotected works because they lack registration according to the repealed law).

rights in the Andean Community for works that had entered into the public domain because of lack of compliance with formalities in a given country, such as registration.<sup>103</sup> For example, a work that never received protection in the United States due to lack of registration<sup>104</sup> may still enjoy copyright protection in the AC,<sup>105</sup> even if communitarian authors do not enjoy an analogous benefit in the United States.<sup>106</sup>

Fortunately, the effects of the reestablishment of rights granted by the Andean Community will dilute over the years as more countries adhere to the Berne Convention and the TRIPS Agreement, which reject formalities and require automatic protection for works.<sup>107</sup> However, the reestablishment of rights, in addition to the extension of the terms of protection,<sup>108</sup> has removed a significant number of works from the public domain for several decades. It is unclear why *Decision 351* adopted such a broad reestablishment of rights. It is hypothesized that there was some aversion to the public domain because of the underlying idea of the economic inefficiencies of public goods.<sup>109</sup> Whatever the explanation, the reestablishment of rights affects not only access to the works by the population in general but also the creativity of authors and prevents the advancement of cultural industries.<sup>110</sup> In cas-

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<sup>103</sup> *Decision 351*, *supra* note 7, art. 60 (reestablishing copyright on works deprived of protection because of the omission of registration required by previous domestic laws).

<sup>104</sup> The U.S. became party to the Berne Convention in 1988; before its ratification and implementation of law, the U.S. provided federal copyright protection only to works that have fulfilled all the formalities provided by law, including its registration before the Library of Congress. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

<sup>105</sup> *See also Decision 351*, *supra* note 7, art. 2 (“Each [AC] member shall grant the nationals of other countries protection non less favorable than that accorded to its own nationals in matter of copyright and neighboring rights.”).

<sup>106</sup> *See* 17 U.S.C. § 104 (2002) (adopting a narrow system of restoration of copyright limited to works of foreign authors that have not entered into public domain in their country of origin, which is an eligible country, and adopting safeguards in favor of a reliance party using a system of actual or constructive notice). In spite of being significantly narrower than the reestablishment of right adopted by the Andean Community, the system of restoration of copyright has been challenged in the U.S. on the grounds that it would affect the freedom of speech by obstructing public performances of restored musical works. *See* *Golan v. Holder*, 132 S. Ct. 873, 877 (2012).

<sup>107</sup> Berne Convention, *supra* note 18, art. 5.2 (“The enjoyment and the exercise of these rights shall not be subject to any formality.”) and TRIPS Agreement, *supra* note 42, art. 9 (referring to the Berne Convention).

<sup>108</sup> *Compare* Berne Convention, *supra* note 18, art. 7 (providing protection for life of author plus 50 years) and *Decision 351*, *supra* note 7, art. 18 (adopting a minimum term of protection equal to author’s life plus fifty years *post mortem auctoris*), with Ley 23 de 1982 sobre derechos de autor [Copyright Act], art. 21 (Colom.) [*hereinafter* Copyright Act–Colombia] (extending copyright protection up to eighty years *post mortem auctoris*); Intellectual Property Act–Ecuador, *supra* note 65, arts. 80–81 (extending the copyright protection up to seventy years *post mortem auctoris*); and Copyright Act–Peru, *supra* note 71, art. 52 (extending the copyright protection up to seventy years *post mortem auctoris*). *See also* Ley sobre el Derecho de Autor [Copyright Act], art. 25 (Venez.) (extending the copyright protection up to sixty years *post mortem auctoris*).

<sup>109</sup> World Intellectual Property Organization [WIPO], *Scoping Study on Copyright and Related Rights and the Public Domain* at 21 CDIP/7/3/INF/2 (May 7, 2010).

<sup>110</sup> *Id.* at 13–15.

es where the law freely authorized the use of the works, it is now necessary to get authorization from the copyright holder whose rights have been reestablished.

Naturally, *Decision 351* adopted a safeguard measure for those affected by the reestablishment of rights. It sets forth that the reestablishment of rights could not affect those who relied on works in the public domain before the Decision entered in force, such as those who published content or created derivative works.<sup>111</sup> The only limitation to that safeguard is that uses must refer to activities already carried out or in progress by the time *Decision 351* entered into force; thus, it does not benefit subsequent uses after rights were reestablished. Even though the safeguard adopted by *Decision 351* mitigates the effects of passing public domain works back to the private domain, it does not address the higher social and economic cost that implies the reestablishment of the intellectual property rights.<sup>112</sup>

Adopting a broad concept of national treatment by protecting works originating in countries not parties to the Berne Convention and by reestablishing the rights of works in the public domain, the Andean Community common regime provides competitive advantages to authors and right holders of other countries to the detriment of users, creators, and publishers of AC members. While users, creators, and cultural industries must accept licensing and payment of copyright fees to enjoy some works in the AC member countries, those in third world countries need not assume those costs. It may not affect the proper functioning of the internal market, but instead can affect the competitiveness of AC members in international markets and undermine the opportunities for the development of their population.

#### C. The Andean Community Common Regime Generates Obstacles for the Free Flow of Copyrighted Works: Exhaustion of Rights.

The common regime was designed as a first step in the process of legal convergence between AC members.<sup>113</sup> Therefore, it was foreseeable that the regime would not solve all the legal issues and would leave some for the AC members' domestic laws. Different domestic approaches to those issues were tolerated or underestimated by the common regime.<sup>114</sup> However, as was noted earlier, significant differences between countries in addressing those issues has raised obstacles to the free flow of copyrighted goods and services. Moreover, *Decision 351* not only left unsolved some of those issues, in certain cases it aggravated the obstacles to the free flow of copyrighted goods and services in both the internal and the international markets.

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<sup>111</sup> *Decision 351*, *supra* note 7, art. 60 (providing reestablishment of copyright, without prejudice of acquired rights by third parties before *Decision 351* came into force, if uses are completed or ongoing by that time).

<sup>112</sup> *See supra* notes 107–108 and accompanying text.

<sup>113</sup> *See supra* note 29 and accompanying text.

<sup>114</sup> *See supra* notes 32–41 and accompanying text.

Two decisions adopted by the common regime increased the obstacles to the free flow of copyrighted works: the establishment of national exhaustion of rights and the recognition of a broad exclusive right to authorize or prohibit the importation of copyrighted works.<sup>115</sup>

According to the exhaustion of rights, also known as the first sale doctrine in the U.S., once a work or copies of it have been legally distributed by the rights holder, any subsequent transfer of the ownership over that work or copy does not require either authorization or payment to the copyright holder.<sup>116</sup> The exhaustion of rights is a limitation to the exclusive right of distribution and is an exception to the monopoly for the commercialization of the work.<sup>117</sup> At the domestic level, the exhaustion of rights allows for reselling works; therefore, selling second-hand books does not require any additional authorization or payment.<sup>118</sup> At the international level, exhaustion of rights allows for so-called “parallel importations,” which occur when goods are provided simultaneously through two or more legitimate channels of distribution.<sup>119</sup> By facilitating the circulation of goods, the exhaustion of rights allows for more intense competition among providers and, eventually, more accessible prices for consumers.<sup>120</sup>

The TRIPS Agreement reserves for the domestic law of the WTO-members the handling of exhaustion of intellectual property rights.<sup>121</sup> Exhaustion can be limited to the domestic market (national), to the market of a series of countries with integrated economies (regional), or it can be extended without limitations to any other country (international). Each of the aforementioned choices implies a lower or a higher degree of freedom in the flow of goods from one country to another.

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<sup>115</sup> *Decision 351, supra* note 7, art. 13 (granting to right holder exclusive rights for “c) the distribution of copies of the work to the public by means of sale, lending, or hiring; (d) the importation into the territory of any Member of copies made without the authorization of the owner of rights”).

<sup>116</sup> See Juan David Castro García, *El Agotamiento de los Derechos de Propiedad Intelectual*, in *REVISTA LA PROPIEDAD INMATERIAL*, 253, 256–58 (2009) (Colom.) (referring to exhaustion of rights, first sale doctrine, and other related legal doctrines).

<sup>117</sup> See Alfredo Vega Jaramillo, *Manual de Derecho de Autor* 42 (Dirección Nacional de Derecho de Autor 2010) (Colom.).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (referring as the purpose of the exhaustion the free flow of works and cultural interchange).

<sup>121</sup> TRIPS Agreement, *supra* note 42, art. 6 (noting that the purpose of the exhaustion is “nothing in [the] Agreement shall be used to address the issue of the exhaustion of intellectual property rights.”); see UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) THE INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (ICTSD), *RESOURCE BOOK ON TRIPS AND DEVELOPMENT* 104–07 (Cambridge University Press, 2005) (analyzing competing interpretations of article 6, and concluding that the TRIPS Agreement does not preclude WTO members from adopting their own policies and rules on exhaustion).

There is no worldwide consensus on whether the exhaustion of rights has to be implemented in the domestic law of countries.<sup>122</sup> Some countries, including Australia,<sup>123</sup> Chile,<sup>124</sup> and New Zealand,<sup>125</sup> have opted to free the international flow of goods without any copyright limitation. Several decisions of the European Court of Justice<sup>126</sup>—based on constitutive treaties of the European Union<sup>127</sup>—support at least the regional exhaustion of rights within the Union. Consequently, intellectual property rights cannot be used to fragment the EU common market.<sup>128</sup> In the United States, the first sale doctrine seems to exhaust rights only domestically.<sup>129</sup> In fact, recently the American retail chain Costco tried unsuccessfully to appeal a federal court’s adverse decision<sup>130</sup> that restricted the importation of copyrighted goods for commercialization in the domestic market without authorization from the right

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<sup>122</sup> See *id.* at 92–117 (providing analysis about the drafting of the provision on exhaustion of right in the TRIPS Agreement, its interpretation, and its application in different domestic laws).

<sup>123</sup> ANNE FITZGERALD & BRIAN FITZGERALD, *INTELLECTUAL PROPERTY IN PRINCIPLE* 152–56 (Lawbook Co., 2004) (arguing that even when a provision on parallel importation remains the law, after several legal modifications, it does not longer apply to some of the most valuable categories of works); Thomas Dreier, *Shaping a Fair International IPR-Regime in a Globalized World: Some Parameters for Public Policy*, in *INTELLECTUAL PROPERTY, PUBLIC POLICY, AND INTERNATIONAL TRADE* 43, 56 (Inge Govaere & Hanns Ullrich eds., Peter Land 2007).

<sup>124</sup> Ley 17.336 sobre Propiedad Intelectual [Intellectual Property Act], as amended, art. 18 (Chile).

<sup>125</sup> See *Copyright Act 1994 No. 143, as at July 07, 2010, §§ 9(1)(d) and 16(1)(d)* (New Zealand).

<sup>126</sup> See Case 78/70, *Deutsche Grammophon Gesellschaft v. Metro*, 1971 E.C.R. 147 (ruling that free movement of goods within the common market is in conflict with prohibiting in one EU member the selling of copyrighted goods initially distributed within the territory of another member). *But see* Case 341/87, *EMI Electrola v Patricia*, 1989 E.C.R. 79 (ruling that EU law does not precluding the application of domestic law that allows right holders to prohibit marketing works imported from another EU member “in which they were lawfully marketed without the consent of the aforesaid owner or his licensee and in which the producer of those recordings had enjoyed protection which has in the mean time expired.”). See also Case 55/80457/80, *Musik-Vertrieb membran GmbH and K-tel International v. GEMA*, 1981 E.C.R. 147 (ruling that EU law precluding applying domestic law that empowers a copyright management society respect to recordings distributed in the national market after being put into circulation within the territory of another EU member county by or with the right holder’s consent).

<sup>127</sup> See Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 51, arts. 34–35.

<sup>128</sup> Case 78/70, *supra* note 126 (arguing that “the isolation of national markets, would be repugnant to the essential purpose of the treaty, which is to unite national markets into a single market”).

<sup>129</sup> See *Copyright Act*, 17 U.S.C. §109(a) (2006) (codifying the first sale doctrine).

<sup>130</sup> *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (Dec. 13, 2010) (issuing a split decision on whether copyrighted goods legally made abroad can be imported into the U.S. and sold without the express authorization of the right holder).

holder.<sup>131</sup> The Costco case still left open the door for a subsequent decision by the Supreme Court on the matter.<sup>132</sup>

The Andean Community imposed the most restrictive modality of exhaustion of rights for its members on copyright: the national exhaustion of rights.<sup>133</sup> Unlike the pristine terms of the common regime on industrial property,<sup>134</sup> *Decision 351*

<sup>131</sup> *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 983 (9th Cir. 2008) (ruling that copyrighted goods made abroad cannot be imported into the U.S. and sold without the express authorization of the right holder). *But see* *Quality King Distribs. Inc. v. L'anza Research Int'l.*, 523 U.S. 135, 145 (1998) (ruling that rights are exhausted when goods made in the U.S. and exported abroad by right holder are eventually re-imported into the U.S. without right holder's authorization).

<sup>132</sup> A tie-vote decision by the Supreme Court in the Costco case resolved it by "*Affirmance by an Equally Divided Court*", which left the previous decision of the lower appellate federal court standing without resolving the raised constitutional issue.

<sup>133</sup> *See* *Policy Review Body, Review by the Secretariat—Revision: Trade Policy Review—Ecuador*, ¶24, WT/TPR/S/148/Rev.1 (25 July 2005) ("While Ecuador permits parallel imports of patented or trademarked goods, among others, the same does not apply to goods protected by copyright"), and ¶209 ("a copyright holder . . . is authorized to prohibit the import of protected goods into Ecuador"); *Trade Policy Review Body, Report by the Secretariat: Trade Policy Review—Bolivia*, ¶22, ¶221, WT/TPR/S/154 (Oct. 4 2005) (explaining that parallel importations are allowed on patented products, but not copyrighted goods). *See also* *Trade Policy Review Body, Report by the Secretariat: Trade Policy Review—Colombia*, ¶23, WT/TPR/S/172 (Oct. 18, 2006) (mentioning that "Colombia allows the parallel importation of patented products", but omitting any comment on copyright). *But see* *Trade Policy Review Body, Report by the Secretariat: Trade Policy Review—Peru*, ¶230, WT/TPR/S/189 (Sep. 12, 2007) (stating that the common regime and domestic law establish specific provisions on the exhaustion of copyright and referring a case law of the Andean Court of Justice that ruled that "parallel imports of products protected by copyright are not prohibited, unless any injury could be caused to the authors"). *See also* *Dirección Nacional de Derecho de Autor, Legal Opinion 2-2005-6647* (Jul. 14, 2005) (Colom.) (concluding that "the exhaustion of rights is not recognized expressly neither in the domestic nor in the communitarian law . . . therefore, right holder has broad and general power for controlling any distribution of his work or copies of it."); *Vega, supra* note 117, at 42–43 (suggesting that the exclusive right to importation granted by *Decision 351* allows for the controlling the flow of copyrighted works from one country to another); *Instituto Ecuatoriano de la Propiedad Intelectual, Subdirección Regional IEPI—Guayaquil, Decision No. 005-2010-G-TA-DA-IEPI*, ¶ 21 (Dec. 28, 2010) (Ecuador) (stating that only the right holder has the power to authorize importation of works into the country, even if those are authorized copies in another country); *ANTEQUERA, supra* note 41, at 28–29 (referring to the consistency of an AC proposal of national exhaustion of copyright to be included in one of the drafts of the Free Trade of Americas Agreement).

<sup>134</sup> *Andean Community, Régimen Común sobre Propiedad Industrial [Common Regime on Industrial Property, Decision 486]* Official Gazette of the Andean Community No. 600, art. 54 (Sep. 19, 2000) (adopting international exhaustion for patented products) and art. 158 (adopting international exhaustion for trademarked products); *see also* Clara Isabel Cordero Álvarez, *El Agotamiento de los Derechos de Propiedad Intelectual de Patentes y Marcas en material de Salud Pública a la luz de la OMC y la UE: Especial Referencia a la Jurisprudencia del TJCE sore el Reenvasado*, in 3 SABAERES 1, 12 (Universidad Adolfo X El Sabio 2005) (Spain) (referring to the adoption of international exhaustion within the Andean Community in the context of patent and trademark); Jorge Eduardo Vásquez Santamaría, *El Agotamiento del Derecho de Marca*, in 6/12 *Opinión Jurídica* 123, 123–37 (Universidad de Medellín 2007) (Colom.) (analyzing the international exhaustion of trademark rights adopted by the Andean Community and comparing with the European Union); *Seminario de la OMPI para los Países Andinos sobre la Observancia de los Derechos de Propiedad Intelectual en Frontera*, Jul. 10–11, 2002, *Alcance y Limitaciones de los Derechos de Propiedad Industrial*, OMPI/PI/SEM/BOG/02/1, ¶¶ 44–46 (recognizing international

does not go beyond stating that the rights holder has the exclusive right to prohibit or authorize the importation of copies made without authorization into any AC member.<sup>135</sup> This clause does not grant either regional or international exhaustion. This is especially true in light of the doctrine of the comprehensive scope of copyright, which, based on provisions of *Decision 351* and domestic law, states that holders have rights over any use of the work.<sup>136</sup> As a result, in AC members there is only national exhaustion of copyright and rights holders have the exclusive right to control importation of works through the countries. This determination is not free of criticism,<sup>137</sup> particularly because it undermines the free flow of copyrighted goods and services through the Andean Community.<sup>138</sup> For instance, Ecuadorian authorities require retailers of foreign copyrighted works to prove not only the legitimate acquisition of goods they commercialize, but also that those retailers have a license for importing the goods into the domestic market.<sup>139</sup>

Still more impressive is the way the Andean Community adopted the national exhaustion of rights by granting to the copyright holders an unlimited exclusive right to authorize or prohibit the importation of works into the territory of any AC member<sup>140</sup> without any exception for the exclusive right of exportation. This implies a real *capiti diminutio* of the AC members who deprive themselves of the

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exhaustion of right on patents within the Andean Community) and ¶¶ 59–66 (recognizing international exhaustion of right on trademarks within the Andean Community).

<sup>135</sup> *Decision 351*, *supra* note 7, art. 13(d) (“[T]he author, or his successors in title where applicable have the exclusive right to carry out authorize or prohibit: (d) the importation into the territory of any Member country of copies made without authorization of the owner of rights.”).

<sup>136</sup> See *supra* notes 64–65 and accompanying text.

<sup>137</sup> See Luis Ángel Madrid, *Importaciones Paralelas (Agotamiento de los Derecho de Propiedad Intelectual)*, Centro Colombiano del Derecho de Autor, (Oct. 2005), available at [http://www.cecolda.org.co/index.php?option=com\\_content&task=view&id=42&Itemid=40](http://www.cecolda.org.co/index.php?option=com_content&task=view&id=42&Itemid=40) (last visited May 15, 2011) (supporting international exhaustion in *Decision 351* because it allows controlling importation of “copies made without right holder’s authorization,” and rejecting a contrary legal opinion of the Colombian National Directorate of Copyright on the matter). *But see* Castro García, *supra* note 116, at 276 (rejecting the just mentioned interpretation because of the principle *in dubio pro auctoris* set forth by article 257 of the Copyright Act of Colombia). See also FERNANDO CHARRIA GARCÍA, DERECHO DE AUTOR EN COLOMBIA, 41–42 (Instituto Departamental de Bellas Artes 2001) (Colom.) (complaining because of the reluctance of AC members to apply the right to importation and arguing that the author, and not the market, must be able to determine how to profit from its work and sets forth legal conditions for that exploitation); ANTEQUERA, *supra* note 8, at 920 (lamenting the lack of consensus within the Andean Community in order to include an “express” exclusive right to prohibit or authorize parallel importations); FERNANDO FUENTES, MANUAL DE LOS DERECHOS INTELECTUALES, 243 n.288 (Vadell Hermanos ed., 2006) (Venez.).

<sup>138</sup> Pacón, *supra* note 11, at 319–20 (calling the attention about the lack of agreement around exhaustion of right among the experts who drafted *Decision 351*, particularly for its effects on free flow of goods within the internal market, and arguing *Decision 351* left determination on exhaustion to domestic law, which may adopt national exhaustion as, in fact, has happened).

<sup>139</sup> See *supra* note 68.

<sup>140</sup> *Decision 351*, *supra* note 7, art. 13(d).

right to determine the degree of exhaustion of rights and transferring that decision to the copyright holders.

Unlike other countries,<sup>141</sup> the Andean Community grants copyright holders greater rights by giving not only the right to control the reproduction, communication, and distribution of a work, but also a monopoly on the importation of a work or its copies.<sup>142</sup> This implies that the mere acquisition of a work in a different market does not authorize its owner to import it, even among members of the Andean Community.<sup>143</sup> In those cases, the owner of the work or copies will also need special authorization by the copyright holder and possibly the payment of an additional fee.

The national exhaustion of rights and the exclusive right of importation create obstacles for the internal market within the Andean Community. Beyond the efficacy of the national exhaustion regime in the digital economy,<sup>144</sup> these rules raise additional restrictions to the free flow of copyrighted goods and services, fragment the internal market, and allow price discrimination towards consumers.<sup>145</sup>

D. The Andean Community Common Regime has been Unable to Serve Public Interest Needs: Public Domain and Copyright Exceptions and Limitations.

*Decision 351* is an accurate and clear reflection of copyright excesses because it focuses on providing protection to copyright holders and underestimates the public interest involved in the regulation. *Decision 351* provides rights beyond the requirements of international agreements, such as the control on the importation of works, the national exhaustion of rights<sup>146</sup> and the adoption of a broad national treatment that provides protection even for creations that lack copyright protection

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<sup>141</sup> See Berne Convention, *supra* note 18, arts. 8–9, 11–12, and 14 (setting forth the exclusive rights to translation, reproduction, public communication, adaptation, and *droit de suite*), and TRIPS Agreement, *supra* note 42, arts. 9 and 11 (referring to the Berne Convention and adopting a limited exclusive rental rights).

<sup>142</sup> *Decision 351*, *supra* note 7, art. 13(d).

<sup>143</sup> *But see* Pacón, *supra* note 11, at 320 (arguing that exportations are allowed by *Decision 351*, but later commercialization of exported goods is not); *see also* Instituto Nacional, *supra* note 67 (recognizing the exhaustion of rights for purpose of introducing a software from one country to another for use it, but not for commercializing). Rather than denying the exhaustion of rights, this interpretation is limited to introducing a work for personal. Therefore, this interpretation produces similar results, by obstructing the free flow of goods even within the internal market.

<sup>144</sup> Grijalva, *supra* note 89, at 316, 320 (stating the non-sense of importing rights in online environment, because of its borderless and “de-territorialization”).

<sup>145</sup> See UNCTAD & ICTSD, *supra* note 121, at 116–17 (referring to the social and economic impact of exhaustion of rights, and raising doubts about the copyright holders’ argument that price discrimination benefit developing countries).

<sup>146</sup> See *supra* notes 133–138 and accompanying text.



in their own countries of origin.<sup>147</sup> Additionally, *Decision 351* authorized the AC members to provide higher levels of protection through domestic law by recognizing more moral and economic rights than those available in the common regime<sup>148</sup> and by extending the term of protection beyond.<sup>149</sup> However, the Decision made limited progress in harmonizing the rules on public domain and was notoriously insufficient in adopting copyright exceptions and limitations. The following paragraphs refer to the latter issues and show how the regulation through domestic law has affected the proper functioning of the Andean Community internal market.

### 1. *Public domain regulation*

Conceptualizing the public domain may be a difficult task, but for the purposes of this paper, it is enough to say that the public domain includes all content that is not under the private domain; in other words, all content that is not controlled by the exclusive rights of a given person. Contrary to the private domain, everybody may benefit from the public domain, but nobody may claim exclusive rights over it.<sup>150</sup> As was mentioned previously, the public domain improves the access to works by removing copyright authorizations and royalties.<sup>151</sup> It also permits creators to create derivative works and provide new meanings to preexisting materials. Additionally, materials available in the public domain can lead to the creation of new businesses. Therefore, the public domain provides numerous opportunities for users, authors, and intermediaries.

The public domain, consists of three basic categories of content:<sup>152</sup> i) content that does not qualify for copyright protection; ii) copyrighted works whose terms of protection have expired; and iii) other works unprotected for idiosyncratic reasons that vary from one country to another. According to *Decision 351*, the first group includes mere ideas, the technical content of scientific works, and their commercial

<sup>147</sup> *Decision 351*, *supra* note 7, art. 2 (providing that each AC member shall grant to nationals of other countries no less favorable protection than the one provided to its own nationals).

<sup>148</sup> Compare *Decision 351*, *supra* note 7, arts. 11–12 (recognizing as moral rights the right of attribution, the right to publish, and the right to the integrity of the work, but allowing other moral rights by domestic law) with Copyright Act–Bolivia, *supra* note 69, art. 14 (recognizing the right to have a work published anonymously); Intellectual Property Act–Ecuador, *supra* note 65, art. 18 (recognizing the right to have a work published anonymously or pseudonymously, and the right for accessing to the unique copy of the work); Copyright Act–Peru, *supra* note 71, arts. 23, 27–28 (recognizing the right to have a work published anonymously or pseudonymously, the right to remove the work from the commerce, and the right for access to the unique copy of the work, respectively); and Copyright Act–Colombia, *supra* note 108, art. 30 (recognizing the right to have a work published anonymously or pseudonymously, and the right to remove the work from circulating). See also *Decision 351*, *supra* note 7, arts. 13–17 (recognizing some exclusive economic rights but allowing others by domestic law).

<sup>149</sup> *Decision 351*, *supra* note 7, arts. 18, 59.

<sup>150</sup> See LIPSZYC, *supra* note 17, at 269 (explaining public domain works as those that “may be used . . . and transformed . . . by any person but no one may acquire exclusive rights in the work”).

<sup>151</sup> But see WIPO, *supra* note 109, at 40–42 (reporting exceptional cases of paid public domain).

<sup>152</sup> *Id.* at 23–37 (providing a lightly extensive categorization of public domain contents).

or industrial exploitation.<sup>153</sup> It also includes those creations that do not satisfy the requirements for receiving copyright protection mainly because they lack originality and fixation.<sup>154</sup> Originality and fixation are required by the common regime in a work to get copyright protection,<sup>155</sup> but *Decision 351* does not specify the meaning of those requirements, leaving their precise determination to judicial criteria.

The second and significant category of content in public domain is those works with expired terms of protection. The Andean Community common regime adopted the general rule that copyright protection extends for the life of the author plus fifty years post mortem.<sup>156</sup> In spite of some disappointment,<sup>157</sup> *Decision 351* respected the progress already made by some of the AC members that had recently extended their terms in order to comply with the Berne Convention, which also requires the same term.<sup>158</sup> The Decision helped standardize the term of protection, particularly with respect to those AC members that still had shorter terms in their domestic law.<sup>159</sup> However, like the Berne Convention, *Decision 351* only sets forth a minimum term and expressly allows AC members to provide for a longer term of protection.<sup>160</sup>

The term of copyright protection varies significantly within the Andean Community, which creates another obstacle for the internal market. Currently, Bolivia is the only AC member with a term of protection of life of the author plus fifty years post-mortem.<sup>161</sup> Ecuador and Peru have extended the term to life plus seven-

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<sup>153</sup> *Decision 351*, *supra* note 7, art. 7.

<sup>154</sup> *Id.* arts. 3 and 4; *see* Andean Community Tribunal of Justice, Case 10-IP-99 at ¶3 (Jun. 11, 1999) (requiring originality in the “selection” and “arrangement” of contents for providing protection to databases), *and* Case 150-IP-2006 (Dec. 12, 2006) (referring to an originality requirement for granting protection to compilations of works).

<sup>155</sup> *But see* ANTEQUERA, *supra* note 8, at 136–37 (arguing that *Decision 351* does not make fixation a general requirement for copyrighted work, but an exceptional one).

<sup>156</sup> *Decision 351*, *supra* note 7, arts. 18–20 (adopting rules on copyright term of protection, its extension and computing).

<sup>157</sup> ANTEQUERA, *supra* note 8, at 921–22 (arguing in favor of harmonizing according to the longest term of the Colombian law, thus is, life plus eighty years post-mortem); Gineli Gómez Muci, *El Derecho de Autor y los Derechos Conexos en el Marco del “Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio, Acuerdo sobre los ADPIC*, in LEGISLACIÓN SOBRE DERECHO DE AUTOR Y DERECHOS CONEXOS, 105, 121 (Judidica Venezolana, 1999) (suggesting the adoption of longer term of protection at regional or sub regional level, because the difference among countries may create market distortions by concentrating both production and distribution of works).

<sup>158</sup> Berne Convention, *supra* note 18, art. 7.1 (“The term of protection granted by this Convention shall be the life of the author and fifty years after his death.”).

<sup>159</sup> *Decision 351*, *supra* note 7, at art. 59(1) (extending automatically ongoing term of protection provided by domestic law, if it was shorter than the one adopted by *Decision 351*); *see also* ANTEQUERA, *supra* note 8, at 922 (referring to some shorter terms then in force in the Peruvian copyright law that were extended as a result of the adoption of *Decision 351*).

<sup>160</sup> *Decision 351*, *supra* note 7, arts. 18, 59(2).

<sup>161</sup> Copyright Act–Bolivia, *supra* note 69, arts. 18–19.

ty years.<sup>162</sup> Colombia still preserves the longest term, life of the author plus eighty years.<sup>163</sup> This means that a significant number of works may be available in the public domain in some countries but may still be in the private domain in others, which obviously blocks the free flow of goods and services from one country to another. It is advisable that the Andean Community should adopt a uniform maximum term of protection in order to overcome the above-mentioned obstacle.<sup>164</sup> This should also stop any additional unilateral extensions, particularly considering possible new international agreements.<sup>165</sup>

In addition to the differences in the term of protection among the AC members' domestic laws, there are two other issues that have undermined the public domain in the Andean Community: the reestablishment of the rights for those works that failed to comply with registration and the adoption of a special term of protection for unpublished works. The first issue was analyzed previously<sup>166</sup> and the second is briefly mentioned below.

Domestic copyright law provides a special term of protection for unpublished works in order to promote making them publicly available.<sup>167</sup> This is the case in Ecuador and Peru, which have awarded exclusive rights for twenty-five and ten years, respectively, not to the author but to whoever publishes an unpublished public domain work for the first time.<sup>168</sup> Such practice affects reliance on the public domain by increasing the transactional cost of determining the legal status of a given work. In addition, this rule also increases costs in other countries where the work is in the public domain because the work cannot be exported to markets like

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<sup>162</sup> Intellectual Property Act–Ecuador, *supra* note 65, arts. 80–81; Copyright Act–Peru, *supra* note 71, arts. 52–56.

<sup>163</sup> Copyright Act–Colombia, *supra* note 108, arts. 11, 21–26, 28.

<sup>164</sup> Right holders may attempt to harmonize the copyright term based on the Colombian rules (eighty years *post mortem auctoris*), but it may be suggested to harmonize around the term of seventy years *post mortem auctoris*, because doing so is more generally accepted, has been committed in bilateral instrument by some AC members, and there is not evidence that a longer term of protection for work from both domestic and foreign origin, benefits AC members overall.

<sup>165</sup> See Trans-Pacific Partnership, *Intellectual Property Rights Chapter, Draft*, art. 4.5(b) (Feb 10, 2011) [hereinafter TPP] (proposing to increase term of protection beyond the current standard of seventy years for work which term of protection is calculated on a basis other than the life of a natural person).

<sup>166</sup> See *supra* notes 102–106 and accompanying text.

<sup>167</sup> ANTEQUERA & FERREYROS, *supra* note 27, at 427 (referring to this as a “stimulus for publishing creations that otherwise would stay unknown”).

<sup>168</sup> Intellectual Property Act–Ecuador, *supra* note 65, art. 104; Copyright Act–Peru, *supra* note 108, art. 145.

Ecuador and Peru without a previous analysis of the legal status of the work independent of the country of origin.<sup>169</sup>

The third category of works that are part of the public domain are those unprotected for idiosyncratic reasons that vary significantly from one country to another. The public domain in Ecuador includes works that are an act of government;<sup>170</sup> in Peru, works that are acts of government and folklore;<sup>171</sup> in both Bolivia and Colombia, folklore, traditional works by unknown authors, or works by authors who die without heirs or have waived their rights.<sup>172</sup> This miscellaneous list of works provides additional opportunities to add to the public domain, but the extreme peculiarities makes it difficult to state with legal certainty a particular work's legal status, thereby increasing the transactional cost for its beneficiaries, which may defeat the very purpose of the public domain.

For the internal market of the Andean Community to function properly, it is necessary to build convergence not only in private domain regulation, but also in the public domain. The common regime has been unable to provide a clear understanding of what constitutes the public domain and domestic law shows significant differences among the Andean Community countries. For example, distinctive approaches have been adopted surrounding the commercial use of public domain<sup>173</sup> and its relation with moral rights.<sup>174</sup> Additionally, it may be appropriate to introduce some limitations of liability in cases of good-faith infringements as well as enforcement measures to avoid the re-enclosing and misappropriation of public domain works, which are absolutely absent in both the common regime and the domestic law.<sup>175</sup>

## 2. Copyright exceptions and limitations

Copyright does not grant absolute rights; instead, it grants only limited ones. Limitations provided by law balance the mere private interest of the copyright holder with the public interest of the society to allow everybody to participate freely in the cultural life of the community, to enjoy the arts, and to share in scien-

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<sup>169</sup> See *Decision 351*, *supra* note 7, art. 13(d) (conferring to right holder exclusive right to control importations of works made without his authorization, which may be the case of works in public domain made overseas).

<sup>170</sup> Intellectual Property Act–Ecuador, *supra* note 65, art. 10.

<sup>171</sup> Copyright Act–Peru, *supra* note 71, arts. 9, 57.

<sup>172</sup> Copyright Act–Bolivia, *supra* note 69, arts. 58–59; Copyright Act–Colombia, *supra* note 108, arts. 187–89.

<sup>173</sup> See Copyright Act–Bolivia, *supra* note 69, arts. 60–62 (setting forth payment for commercial use of public domain works).

<sup>174</sup> See Intellectual Property Act–Ecuador, *supra* note 65, arts. 10, 82; Copyright Act–Peru, *supra* note 71, art. 29 (setting forth special rules about moral rights on public domain works).

<sup>175</sup> WIPO, *supra* note 109, at 67–73 (providing examples of positive protection of the public domain and suggesting measures for strengthening the public domain).

tific advancement and its benefits.<sup>176</sup> In this sense, copyright protection is temporary because once the term of protection expires, the work becomes part of the public domain,<sup>177</sup> and everybody may benefit from it, but nobody may claim exclusive rights over it.<sup>178</sup> However, unlike what some have suggested,<sup>179</sup> the public interest is not only supervening to copyright expiration; rather, it may coexist with copyright protection. The copyright limitations and exceptions are set forth by law, allowing the use of works without authorization or payment to the right holder. Exceptions achieve different goals, such as realizing human rights commitments, overcoming market failures, and advancing other social interests.<sup>180</sup>

*Decision 351* sets forth a list of mandatory exceptions in the internal market,<sup>181</sup> but also allows the adoption of additional exceptions in the domestic law of AC members, as long as they comply with the international standards of the so-called *three-step test*.<sup>182</sup> As a result, throughout the Andean Community, two regimes of exceptions coexist: the communitarian and the domestic.<sup>183</sup> Curiously, two situations that raise increasing public interest—cases involving people with disabilities and cases involving libraries—were not recognized as exceptions in the common regime, leaving their regulation to domestic law.<sup>184</sup> Naturally, these omissions in the common regime and the differences of domestic laws create some inconveniences and severe asymmetries within the Andean Community.<sup>185</sup>

Accessing copyrighted works is particularly challenging for people with disabilities; thus, it is usual in comparative law to adopt a legal exception in favor of people with disabilities and the institutions that provide them with access to

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<sup>176</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), art. 27.

<sup>177</sup> See *supra* note 152 and accompanying text.

<sup>178</sup> See *supra* note 150.

<sup>179</sup> ROBERT SHERWOOD, *INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT* 32 (Westview Press, 1990) (suggesting a mere supervening public interest on intellectual property).

<sup>180</sup> See LIPSZYC, *supra* note 17, at 223–25 (referring to different justifications that scholars give for adopting copyright exceptions); Carlos Villalba, *Duración de la Protección y Excepciones*, in ANAIS DO SEMINÁRIO INTERNACIONAL SOBRE DIREITOS AUTORAIS, 163, 168 (Editora da Universidade do Vale do Rio dos Sinos 1994) (Braz.) (referring to different public interest reasons to justify exceptions, such as educational, cultural and informative).

<sup>181</sup> *Decision 351*, *supra* note 7, art. 22 (setting forth a list of mandatory copyright exceptions for AC members).

<sup>182</sup> *Id.* art. 21 (exceptions shall be limited to cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of right holders); see also Berne Convention, *supra* note 18, art. 9(2); TRIPS Agreement, *supra* note 42, art. 13.

<sup>183</sup> Antequera, *supra* note 11, at 92–93.

<sup>184</sup> *Decision 351*, *supra* note 7, art. 21 (allowing the adoption of copyright exceptions and limitations by the AC members' domestic law).

<sup>185</sup> See ANTEQUERA, *supra* note 8, at 922–23 (explaining that full harmonization around exceptions and limitations in *Decision 351* was obstructed by differences in the scope of the exclusive rights).

works.<sup>186</sup> Unfortunately, neither *Decision 351* nor the domestic law of Bolivia, Colombia, and Ecuador has adopted a specific exception.<sup>187</sup> On the other hand, Peru has adopted a narrow exception by exempting payment of copyright fees for non-profit reproductions of works created for blind persons through Braille or another specific process.<sup>188</sup> However, because of the complexities and high cost of providing access to people with disabilities and the urgency of allowing some economies of scale for that purpose, a solution in the common regime, rather than in domestic law, is necessary. The proposal of a treaty to solve the problem of access for people with disabilities before the WIPO seems like an excellent starting point for the Andean Community.<sup>189</sup>

The second situation that may require a solution at the Andean Community level rather than the domestic level is the public lending of works by libraries. *Decision 351* recognizes limited exceptions for libraries,<sup>190</sup> but it does not cover the public lending of works,<sup>191</sup> which may be provided at the domestic level. As a result, Colombia has adopted a view in which copyright's exclusive rights include the right to publicly lend works with no exceptions in favor of libraries.<sup>192</sup> Ecuador seems to follow a similar approach.<sup>193</sup> Bolivia, to the contrary, has not granted an exclusive right of public lending and, therefore, libraries do not face copyright restrictions.<sup>194</sup> Peru adopted exclusive rights,<sup>195</sup> but set forth a specific exception for library public lending.<sup>196</sup>

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<sup>186</sup> See World Intellectual Property Organization [WIPO], *Study on Copyright Limitations and Exceptions for the Visually Impaired*, SCCR/15/7 (Feb. 20, 2007) (providing an extensive analysis of international and comparative copyright law on limitations and exceptions in favor of people with visual disabilities).

<sup>187</sup> See SOFÍA RODRÍGUEZ MORENO, *Era DIGITAL Y LAS EXCEPCIONES Y LIMITACIONES AL DERECHO DE AUTOR* 266–68 (Universidad Externado de Colombia 2004) (arguing in favor of an exception for people with disabilities in the Colombian copyright law).

<sup>188</sup> Copyright Act—Peru, *supra* note 71, art. 43(g) (as amended by Ley 27.861 “que exceptúa el pago de derechos de autor por la reproducción de obras para invidentes” [Law that exempts copyright royalty payment for reproducing works for blind people]).

<sup>189</sup> World Intellectual Property Organization [WIPO], *Proposal by Brazil, Ecuador and Paraguay, relating to limitations and exceptions: Treaty proposed by the World Blind Union*, WIPO Doc. SCCR/18/5 (May 25, 2009).

<sup>190</sup> *Decision 351*, *supra* note 7, art. 22(c) (allowing individual reproduction of a work for purposes of preservation and substitution by not-for-profit libraries and archives).

<sup>191</sup> ANTEQUERA, *supra* note 11, at 86–87 (reporting that public lending was not even on the negotiating table of the Andean Community).

<sup>192</sup> See *supra* notes 62–63 and accompanying text.

<sup>193</sup> Intellectual Property Act—Ecuador, *supra* note 65, arts. 19 (granting to right holders the right to exploitation of the work in any manner and benefits from it), 23 (considering as public communication any communication that exceeds the strict domestic use), 83–84 (omitting any exception for public lending by libraries).

<sup>194</sup> Copyright Act—Bolivia, *supra* note 69, art. 15 (omitting any recognition to an exclusive right on public leading of works).

<sup>195</sup> Copyright Act—Peru, *supra* note 71, art. 34 (setting forth that distribution includes selling, ex-

Just like in the public domain situation, the Andean Community has not converged enough with respect to copyright exceptions and limitations. The Andean Community is in debt to libraries and museums, educational institutions, people with disabilities, book publishers, and software developers, among others. This debt not only undermines the proper functioning of the internal market but also compromises human rights, social inclusion, and other public interest issues.

#### E. The Andean Community Common Regime Requires an Urgent Update.

*Decision 351* was influenced by most of the discussion related to the interaction between new technologies and copyright by the time of its adoption. It addressed essential issues, such as the copyright protection of software and databases,<sup>197</sup> as well as the effects of making a work available online.<sup>198</sup> To some extent, it is fair to say that *Decision 351* reflected the state of the art in the early 1990s. However, as has been revealed, the Decision did not anticipate several issues and it has become progressively outdated. The two most significant issues are the regulation of technological protection measures and the regulation of online copyright infringement.

The changes of the copyright law to address the challenges of the new technologies have been undertaken in the AC members essentially through domestic law. In practice, every country has updated its domestic law according to its international commitments.<sup>199</sup> The WIPO Internet Treaties<sup>200</sup> and bilateral free trade agreements, particularly those signed with the United States, seem to be the main driving forces. As a result of international commitments, each AC member has its own regime for protecting copyright on digital environments each with important differences which vary from one country to another. Addressing the challenge of new technology, a new common regime should reduce differences between AC members. The following pages analyze some of those challenges in the light of the negotiations of free trade agreements.

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changing or any way to transferring property, renting, public leading or any other manner of using or exploiting the work).

<sup>196</sup> *Id.* art. 43(f) (setting forth an exception for public lending of books by not-for-profit libraries and archives).

<sup>197</sup> *Decision 351*, *supra* note 7, art. 4 (providing copyright protection on computer programs and databases).

<sup>198</sup> *Id.* arts. 13(b) and 15 (providing protection on online environment through general clauses that provide a broad protection for works).

<sup>199</sup> See Table: Andean Community Nations, by international instruments on copyright to which they are parties.

<sup>200</sup> World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1997) [hereinafter WCT]; World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997) [hereinafter WPPT].

F. The Andean Community common regime has been unable to provide a common platform for negotiations with third countries: Effects of the free trade agreements.

Facing negotiations of bilateral agreements with other countries that include intellectual property issues, it was predictable that the Andean Community would work with a common agenda and that it would conduct processes in blocks. However, in 2004, *Decision 598* set forth that AC members could negotiate with other countries, prioritizing community or joint negotiations whenever possible, but individually in exceptional cases.<sup>201</sup> According to *Decision 598*, negotiating members must inform the Andean Community of their individual negotiations and preserve the common regime,<sup>202</sup> but neither the Andean Community nor country members have the right to object to those negotiations or agreements.<sup>203</sup>

*Decision 598* has facilitated the movement from multilateralism to bilateralism within the Andean Community, whose members have intensified their negotiations with third countries.<sup>204</sup> In the years subsequent to the adoption of *Decision 598*, Colombia has signed trade agreements with Chile, Canada, the European Union, and the United States;<sup>205</sup> Peru with the same countries plus China, Mexico, Singapore, and Thailand;<sup>206</sup> Ecuador only with Chile;<sup>207</sup> and Bolivia with no one.<sup>208</sup> All these agreements are comprehensive, and include several disciplines. Although some of them include intellectual property commitments, they generally refer to

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<sup>201</sup> Andean Community, *Relaciones Comerciales con Terceros Países [Trade Relations with Third Countries Decision 598]* Official Gazette of the Andean Community No. 1092, art. 1 [hereinafter *Decision 598*] (setting forth that AC members can negotiate trade agreements with third countries, by prioritizing common or joint negotiation and exceptionally individual negotiations).

<sup>202</sup> *Id.* art. 2 (adopting minimal obligations for AC members when negotiating individually).

<sup>203</sup> *Id.* art. 4 (setting forth that results of individual negotiations must be notified to the Andean Community, but they cannot be objected, excepting when AC member has failed in comply with the obligation to inform or with the obligation to consult with other AC members on any commitment on external tariff to third countries).

<sup>204</sup> See ORGANIZATION OF AMERICAN STATES, FOREIGN TRADE INFORMATION SYSTEM, *SICE: Trade Agreements in Force*, available at [http://www.sice.oas.org/agreements\\_e.asp](http://www.sice.oas.org/agreements_e.asp) 2004 (last visited May 31, 2011).

<sup>205</sup> See ORGANIZATION OF AMERICAN STATES, FOREIGN TRADE INFORMATION SYSTEM, *Information on Colombia*, available at [http://www.sice.oas.org/ctyindex/COL/COLAgreements\\_e.asp](http://www.sice.oas.org/ctyindex/COL/COLAgreements_e.asp) (last visited May 31, 2011).

<sup>206</sup> See ORGANIZATION OF AMERICAN STATES, FOREIGN TRADE INFORMATION SYSTEM, *Information on Peru*, available at [http://www.sice.oas.org/ctyindex/PER/PERAgreements\\_s.asp](http://www.sice.oas.org/ctyindex/PER/PERAgreements_s.asp) (last visited May 31, 2011).

<sup>207</sup> See ORGANIZATION OF AMERICAN STATES, FOREIGN TRADE INFORMATION SYSTEM, *Information on Ecuador*, available at [http://www.sice.oas.org/ctyindex/ECU/ECUAgreements\\_e.asp](http://www.sice.oas.org/ctyindex/ECU/ECUAgreements_e.asp) (last visited May 31, 2011).

<sup>208</sup> See ORGANIZATION OF AMERICAN STATES, FOREIGN TRADE INFORMATION SYSTEM, *Information on Bolivia*, available at [http://www.sice.oas.org/ctyindex/BOL/BOLAgreements\\_e.asp](http://www.sice.oas.org/ctyindex/BOL/BOLAgreements_e.asp) (last visited May 31, 2011).



well-set international standards.<sup>209</sup> However, from all the bilateral agreements signed by country members of the Andean Community, both the FTA U.S.-Peru and the FTA U.S.-Colombia are the agreements most relevant to understanding recent developments in the domestic law of those two AC members.<sup>210</sup>

In spite of being commenced as communitarian negotiations by the Andean Community,<sup>211</sup> in 2006, FTAs were concluded only in the case of Colombia and Peru.<sup>212</sup> Neither Ecuador nor Bolivia are parties to similar agreements; Venezuela not only did not, but also denounced the Andean Community Treaty because of the conclusion of negotiations by Peru and Colombia with the U.S.<sup>213</sup> Of those FTAs, only the Peruvian one is currently in force; the Colombian one is not in force yet because of the concerns raised by the U.S. Congress about the respect and enforcement of human and labor rights in that country.<sup>214</sup>

Through their respective FTAs, Colombia and Peru assumed several commitments that increase the protection and enforcement of intellectual property

<sup>209</sup> See *infra* notes 211–20 and accompanying text. In the case of the eight free trade agreements signed by Peru, after Decision 598, four do not include any provision on intellectual property (those signed with Canada, Chile, Singapore, and Thailand) and two include some provisions for intellectual property in general, but not for copyright (those signed with China and with Mexico). Therefore, only two free trade agreements include provisions on copyright, those signed with the European Free Trade Association and with the United States. The former basically requires parties to be in compliance with preexisting international instruments on copyright; instead, the latter adopt commitments beyond those set forth in these instruments. See also Pedro Roffe and Maximiliano Santa Cruz, *Los derechos de propiedad intelectual en los acuerdos de libre comercio celebrados por países de América Latina con países desarrollados*, (Serie Comercio Internacional, Comisión Económica para América Latina y el Caribe [CEPAL] 2006) (providing an extensive comparative analysis of free trade agreements signed by Latin American countries with developed and developing countries).

<sup>210</sup> United States-Colombia Trade Promotion Agreement, U.S.-Colom., Nov. 22, 2006, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Colombia\\_FTA/Final\\_Text/Section\\_Index.htm](http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.htm) [hereinafter FTA U.S.-Colombia]; United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html) [hereinafter FTA U.S.-Peru].

<sup>211</sup> See Juan José Taccone and Uziel Nogueira, *Andean Report 2002-2004*, 38–40 (Institute for the Integration of Latin America and the Caribbean 2005) (describing first-step negotiations between the Andean Community and the United States).

<sup>212</sup> Roffe & Santa Cruz, *supra* note 209, at 44.

<sup>213</sup> Letter from Alí Rodríguez Araque, Minister of Foreign Affairs of Venezuela, to the President and the rest of members of the Commission of the Andean Community (Apr. 22, 2006), available at <http://www.bilaterals.org/spip.php?article4523> (denouncing the Cartagena Agreement and dropping the Andean Community).

<sup>214</sup> Letter from Charles B. Rangel, Chairman of the Committee on Ways and Means, and Sander M. Levin, Chairman of the Subcommittee on Trade, both from the U.S. House of Representatives, to Susan C. Schwab, U.S. Trade Representative (May 10, 2007), available at [http://mingas.info/files/mingas/wto2007\\_2208.pdf](http://mingas.info/files/mingas/wto2007_2208.pdf) (communicating the lack of agreement on the terms of the FTA with Colombia, because of its “special problems . . . including the systemic, persistent violence against trade unionists and other human rights defenders, the related problem of impunity, and the role of the paramilitaries in perpetuating these crimes”).

rights beyond any international standard, following U.S. domestic law.<sup>215</sup> On copyright, without the purpose of being exhaustive, the FTA parties committed to providing a term of protection of at least the author's life plus seventy years *post mortem auctoris*,<sup>216</sup> granting protection for technological protection measures and digital management information beyond the WIPO Internet Treaties,<sup>217</sup> regularizing software use within the governments,<sup>218</sup> empowering custom authorities and prosecutors for purpose of intellectual property enforcement,<sup>219</sup> and adopting special measures for enforcing copyright in the digital environment.<sup>220</sup> The following describes the effects of those agreements in the domestic law of the AC members on two key issues: the regulation of technological protection measures and the liability regime of online service providers.

### 1. *Technological protection measures*

Technological protection measures, also known as effective technological measures, are technical mechanisms used by right holders in connection with the exercise of their exclusive right to restrict unauthorized acts, such as DVD regionalization systems, copy protection systems of software, and limitations on PDF files.<sup>221</sup> Neither *Decision 351* nor the TRIPS Agreement includes special provisions on technological protection measures.<sup>222</sup> The 1996 WIPO Internet Treaties required parties to provide "adequate legal protection and effective legal remedies against the circumvention" of those measures.<sup>223</sup> Except for Bolivia, all AC members are party to the 1996 WIPO Internet Treaties and have implemented the commitments into domestic law<sup>224</sup> by adopting peculiar criminal provisions against the circumvention of technological protection measures.<sup>225</sup>

<sup>215</sup> Roffe & Santa Cruz, *supra* note 209, at 10, 38 (stating that free trade agreements signed by the United States are the most significant because their commitments to intellectual property exceed any other multilateral and bilateral agreement), 41–43 (describing the different copyright issues in which free trade agreements go beyond usual international standards).

<sup>216</sup> FTA U.S.-Colombia, *supra* note 210, art. 16.6.7; FTA U.S.-Peru, *supra* note 210, art. 16.6.7.

<sup>217</sup> Compare FTA U.S.-Colombia, *supra* note 210, arts. 16.7.4, 16.7.5; and, FTA U.S.-Peru, *supra* note 210, arts. 16.7.4, 16.7.5, with WCT, *supra* note 200, arts. 11–12; WPPT, *supra* note 200, arts. 18–19.

<sup>218</sup> FTA U.S.-Colombia, *supra* note 210, art. 16.7.6; FTA U.S.-Peru, *supra* note 210, art. 16.7.6.

<sup>219</sup> FTA U.S.-Colombia, *supra* note 210, arts. 16.11.23, 16.11.27(d); FTA U.S.-Peru, *supra* note 210, arts. 16.11.23, 16.11.27(d).

<sup>220</sup> FTA U.S.-Colombia, *supra* note 210, art. 16.11.29; FTA U.S.-Peru, *supra* note 210, art. 16.11.29.

<sup>221</sup> WCT, *supra* note 200, art. 11; WPPT, *supra* note 200, art. 18.

<sup>222</sup> Roffe & Santa Cruz, *supra* note 209, at 42 (stating that provisions on technological protective measures appear just in the 1996 WIPO Internet Treaties).

<sup>223</sup> WCT, *supra* note 200, art. 11; WPPT, *supra* note 200, art. 18.

<sup>224</sup> See Table: Andean Community Nations, by international instruments on copyright to which they are parties.

<sup>225</sup> Código Penal [Criminal Code] (Colom.), art. 272 Nos (punishing both circumventing technological protective measures and trafficking devices for that purpose, without exceptions). In Ecuador,

The FTA U.S.-Peru and the FTA U.S.-Colombia also include provisions on technological protection measures<sup>226</sup> that go beyond the standards of the WIPO Internet Treaties by adopting standards of the U.S. law,<sup>227</sup> which were developed under the highly controversial Digital Millennium Copyright Act.<sup>228</sup> In FTAs, parties are required to adopt not only “adequate legal protection” but also “criminal sanctions.”<sup>229</sup> In addition, these sanctions shall apply not only in cases of circumvention of technological protection measures, but also in commercializing devices that allow users to elude the technological measures (anti-trafficking provisions).<sup>230</sup> At this point, only Peru has passed an implementing law.<sup>231</sup>

As a result of singular implementation of international commitments by AC members, the current regulation of the technological protection measures within the Andean Community is completely different from one country to another. That differentiation may be increased by the Trans-Pacific Partnership Agreement—to which Peru is a negotiating party—if its negotiations progress based on the American draft of that agreement because it would set forth criminal sanctions in its anti-circumvention and anti-trafficking provisions, even if no copyright infringement takes place.<sup>232</sup> Meanwhile, the current situation already affects competition in the Andean Community, particularly in the technological sector, and undermines consumer protection. It may be suggested that the Andean Community needs to extend the common regime to this issue in order to preserve the proper functioning of the

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see Intellectual Property Act–Ecuador, *supra* note 65, arts. 25 (granting to right holders the right to adopt technological protective measures and assimilating the trafficking with copyright violations, without exceptions) and 325 (adopting criminal sanctions against trafficking of devices that allow circumventing technological protective measures without exceptions). In Peru, see Copyright Act–Peru, *supra* note 71, art. 187 and Código Penal [Criminal Code] (Peru), art. 218 (adopting criminal sanctions against trafficking of devices that allow circumventing technological protective measures without exceptions). See Delia Lipszyc, *La Protección Jurídica de las Medidas Tecnológicas-o de Autotutela-en las Legislaciones de los Países Latinoamericanos y de los Estados Unidos de América*, I Revista Jurídica de Propiedad Intelectual 73–105 (2009) (describing the different legal approach adopted by Latin American countries when regulating technological protection measures in domestic law).

<sup>226</sup> FTA U.S.-Colombia, *supra* note 210, art. 16.7.4; FTA U.S.-Peru, *supra* note 210, art. 16.7.4.

<sup>227</sup> 17 U.S.C. §§ 1201–1205 (2006).

<sup>228</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) (codified in scattered sections of 17 U.S.C. §§ 1201–1205); Roffe & Santa Cruz, *supra* note 209, at 54–56 (summarizing main controversial issues raised by the regulation that the DMCA adopted for technological protective measures); see also Electronic Frontier Foundation, *Unintended Consequences: Twelve Years under the DMCA*, available at <http://www EFF.org/wp/unintended-consequences-under-dmca> (last visited Jun. 3, 2011) (documenting DMCA-related disputes).

<sup>229</sup> FTA U.S.-Colombia, *supra* note 210, art. 16.7.4(a); FTA U.S.-Peru, *supra* note 210, art. 16.7.4(a).

<sup>230</sup> FTA U.S.-Colombia, *supra* note 210, art. 16.7.4(a)(ii); FTA U.S.-Peru, *supra* note 210, art. 16.7.4(a)(ii).

<sup>231</sup> Copyright Act–Peru, *supra* note 71, art. 187; Código Penal [Criminal Code] (Peru), art. 218.

<sup>232</sup> TPP, *supra* note 165, art. 4.9(c).

internal market and, at the same time, get a common policy in case of future negotiations on the matter.

## 2. *Online service provider liability*

Unlike any other international instrument on intellectual property, the FTA U.S.-Peru and the FTA U.S.-Colombia have addressed the enforcement of copyright in the digital environment.<sup>233</sup> Following U.S. law,<sup>234</sup> FTAs include a detailed legal regime that regulates the liability of online service providers for copyright infringements committed online, including issuing and enforcing infringement notices, taking down infringing content, and identifying supposed infringers, among others.<sup>235</sup> In general terms, those provisions provide for a “safe harbor” for online service providers that contribute to enforcing copyright protection.<sup>236</sup> Scholars have said those provisions require providers to “police” the Internet.<sup>237</sup>

Currently, within the Andean Community there are different approaches to specific regulation about online service provider liability. Bolivia has neither committed to nor adopted any provision on the matter. Colombia has committed to an FTA that has not entered into force yet, but an extremely controversial implementing bill was recently introduced to legislative discussion.<sup>238</sup> Peru has delayed in implementing the FTA provisions on the matter.<sup>239</sup> Ecuador has adopted *motu proprio* as its regulation, which is more general and draconian than the FTAs mod-

<sup>233</sup> FTA U.S.-Colombia, *supra* note 210, art. 16.11.29; FTA U.S.-Peru, *supra* note 210, art. 16.11.29 (setting forth provisions on limitations on liability for service providers).

<sup>234</sup> See 17 U.S.C. § 512 (2010) (detailing limitations on liability for service providers).

<sup>235</sup> FTA U.S.-Colombia, *supra* note 210, art. 16.11.29; FTA U.S.-Peru, *supra* note 210, art. 16.11.29.

<sup>236</sup> It is called “safe harbor” because those ISPs that adopt the technical, organizational, and legal measures set forth by law are immunized from liability for copyright infringements committed by their users.

<sup>237</sup> See, e.g., Hong Xue, *Enforcement for Development: Why not an Agenda for the Developing World?*, in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVE 133, 144–45 (Xuan Li and Carlos Correa eds. 2009).

<sup>238</sup> See Ministerio del Interior y de Justicia de Colombia, *Proyecto de Ley por el cual se regula la responsabilidad por las infracciones al derecho de autor y los derechos conexos en Internet*, available at <http://www.senado.gov.co/az-legislativo/proyectos-de-ley?download=420%3Aderechos-de-autor-en-internet> (last visited June 6, 2011) (Even though the FTA U.S.-Colombia is not in force yet, because of the lack of approval by the U.S. Congress, the Colombian government has introduced to its Congress a bill to comply with the commitment on online service provider liability. The bill, which should be discussed in the ongoing legislative term, would set forth a regulation that applies not only to companies but to any person providing some online service, requires ISPs to shutdown content and identify users without judicial order, and authorizes disconnection of supposed infringers by court decisions adopted *in limini litis*).

<sup>239</sup> FTA U.S.-Peru, *supra* note 210, Annex 16.1 (setting forth a one-year term from its entry into force, which happened on February 1, 2009, for implementing the provisions on online service provider liability).

el.<sup>240</sup> This landscape may diversify even more if TPP negotiations progress based on the U.S. proposal, which extends the scope of the liability regime to trademark enforcement.<sup>241</sup>

The significant differences between the AC members' domestic regulations of Internet service providers (ISPs) for online copyright infringement creates a severe improper function in the internal market.<sup>242</sup> Operational costs of ISPs are higher in some countries than in others just because of their legal regime. In some cases, these costs may divest commerce by transferring services to less costly countries. This may be the case for online storage services. However, in the case of Internet access providers, the strong tie to local physical infrastructures—such as telephone and cable providers—forces them to tolerate the asymmetric functioning of the internal market.

Building an adequate liability regime for online service providers in case of copyright infringement is an extremely challenging task. It requires a delicate balancing of rights holders looking for protection for their intellectual property; users concerned with their fundamental and consumer rights; and online service providers waiting for an essential component of their business model, the legal framework. As the digital economy progresses to more complex services provided through the Internet—such as IP telephony, video on demand, cloud computing, and online conferences—the liability regulation of providers for intellectual property infringements becomes crucial. Here, a legal framework that varies from one country to another is inefficient because it raises technical, organizational, and legal transactional costs. Because the digital economy is global, it requires an international harmonization or, at the very least, a regional one, which, unfortunately, the common regime in force does not provide to the Andean Community.

#### IV. Working on Increasing Copyright Convergence within the Andean Community

As was mentioned earlier, *Decision 351* was conceived as a first step in the process of convergence within the Andean Community around the regulation of copyright and neighboring rights. This convergence was a remarkable and ambitious effort in the early 1990s that effectively contributed to some level of harmonization.<sup>243</sup> However, the effects of that first step have been undermined progressive-

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<sup>240</sup> Intellectual Property Act—Ecuador, *supra* note 65, art. 292 (setting forth joint and several liability for any person for any online intellectual property infringement, if he has reasonable knowledge of the infraction, including when right holders give him notice).

<sup>241</sup> TPP, *supra* note 165, art. 16.

<sup>242</sup> See Rosa Julià-Barceló, On-line Intermediary Liability Issues: Comparing E.U. and U.S. Legal Frameworks, in 22/3 EUROPEAN INTELLECTUAL PROPERTY REVIEW 106, 116 (2000) (criticizing negative effects on the functioning of the EU-internal market because of the differences between the domestic legal regimes on some online service providers).

<sup>243</sup> See *supra* notes 8, 29, and 42 and accompanying text.

ly as new issues, technologies, and international commitments arise. The lack of convergence on copyright law between AC members may become a serious obstacle for their integration, particularly in the context of the information economy, by obstructing the free flow of copyrighted goods and services and by creating artificial competitive advantages from one country to another based on the differences in their legal frameworks.

In the coming years, the Andean Community should increase its efforts to converge copyright law through the adoption of an updated common regime. A convergence would allow AC members to harmonize their domestic law, to advance their own agenda rather than non-members' agendas, and to overcome obstacles to future economic integration in the region, among other public policy goals. In this context, a new Decision should include at least four issues: copyright scope, limitations and exceptions, public domain framework, and copyright enforcement.

*Decision 351* made explicit the disagreement between AC members around the scope of copyright by allowing them to increase both moral and economic rights within domestic law.<sup>244</sup> As a result, important differences between countries have arisen, from Bolivia's limited scope to Colombia's comprehensive protection.<sup>245</sup> In the next step of copyright convergence, countries should agree about the scope of copyright, particularly regarding not-for-profit public lending and the exclusive right of importation into domestic markets. It seems recommendable to adjust the scope of copyright to a closed list of exclusive rights and to adopt, at the very least, regional exhaustion of rights.

Copyright limitations and exceptions require harmonization in the Andean Community. This paper has mentioned the need for at least three specific exceptions: developing software, proper functioning of libraries, and allowing people with disabilities access to works. This is by no way an exhaustive list. Several other exceptions that facilitate access to knowledge by communities and create business opportunities for countries require recognition in the common regime. Some of the exceptions are the common standard even in developed countries, such as for e-learning, orphan works, and Internet functioning.<sup>246</sup> Others are granted internationally to developing countries, like the system of compulsory licenses for translation and reproduction of works in foreign languages.<sup>247</sup> None has been

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<sup>244</sup> See *supra* notes 54–69 and accompanying text.

<sup>245</sup> *Id.*

<sup>246</sup> See DATABASE ON STUDIES AND PRESENTATIONS ON LIMITATIONS AND EXCEPTIONS, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at <http://www.wipo.int/copyright/en/limitations/studies.html> (last visited June 6, 2011) (providing several studies on international and comparative law about copyright limitations and exceptions for a variety of purposes).

<sup>247</sup> Berne Convention, *supra* note 18, Appendix: Special Provisions regarding Developing Countries (attempting to provide a solution for developing countries by authorizing them to issue non-exclusive and non-transferable compulsory licenses for translating and/or reproducing works published in printed or analogous forms for satisfying domestic educational and researching purposes,

adopted by *Decision 351*, but some AC members have adopted them into their domestic laws,<sup>248</sup> despite the fact that they may affect the internal market and the competitiveness of AC members in the global market.

The common regime contributed to harmonizing the copyright term of protection by bringing countries into compliance with minimum international standards. However, it failed to restrain the race for increasing those terms by domestic law, which has created artificial barriers to the free flow of works within the internal markets.<sup>249</sup> This has been aggravated because of the recognition by domestic law of public domain works other than those whose terms have expired.<sup>250</sup> On public domain, the common regime has several unresolved issues that should be addressed by an updated Decision. It should adopt uniform terms of protection and rules for computing them, converge on public domain composition in cases other than term expiration, and harmonize rules about commercial use, moral rights, and enforcement on public domain works. It is also highly recommendable to introduce flexibilities for good-faith infringements of public domain works, particularly to deal with the complexities of the reestablishment of rights.<sup>251</sup>

One issue that currently dominates the international agenda on intellectual property is the enforcement of copyright in both digital and analogous environments.<sup>252</sup> For analogous environments, the adoption of several provisions has been proposed, including *ex-officio* actions by custom authorities and prosecutors, broader border measures, judicial procedures, and pre-established damages.<sup>253</sup> For digital environments, the main issues remaining are the regulation of technological protection measures and the liability regime for online service providers.<sup>254</sup> Those

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under the payment of a just compensation for right holders).

<sup>248</sup> See, e.g., Copyright Act–Peru, *supra* note 71, arts. 41(c) and 43(f) (setting forth exceptions for public communication of works with educational purposes and public lending of works by libraries and archives); Copyright Act–Colombia, *supra* note 108, arts. 45–71 (setting forth a heavily regulated system of compulsory licenses for reproduction and translation of foreign works into Spanish).

<sup>249</sup> Different terms of protection raise the problem that legitimate goods available in public domain in some countries cannot enter in those markets where goods are still in private domain because of lacking right holder's authorization in the latter. Therefore, differences on term of protection pose an obstacle to the free movement of copyrighted goods as well as services.

<sup>250</sup> See *supra* note 152 and accompanying text.

<sup>251</sup> See, e.g., 17 U.S.C. § 104 (a) (2006) (adopting a procedure for restoring rights on foreign public domain works with more flexibilities and safeguards than the common regime for reliance third parties).

<sup>252</sup> Viviana Muñoz Tellez, *The Changing Global Governance of Intellectual Property Enforcement: A New Challenge for Developing Countries*, in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVE 3–13 (Xuan Li and Carlos Correa eds. 2009) (tracing the historical evolution of international intellectual property law and its recent swift to enforcement).

<sup>253</sup> See Roffe & Santa Cruz, *supra* note 209, at 43.

<sup>254</sup> *Id.*

topics have been included in bilateral agreements<sup>255</sup> and also incorporated in recent international initiatives, such as the Anti-Counterfeiting Trade Agreement<sup>256</sup> and the Trans-Pacific Partnership.<sup>257</sup> The Andean Community should adopt a more detailed common regime regarding copyright enforcement in order to define its commitments within the community and to other countries. A common legal framework on enforcement should not be limited to protecting right holders but should also protect users and intermediaries by, for example, adopting limitations to technological and contractual measures that undermine consumers' rights. Moreover, the common regime should commit to reasonable enforcement by tailoring the measures and its international commitments on copyright in general to the actual interest of the Andean Community and its population.<sup>258</sup>

In addition to the issues that should be included in an updated common regime for copyright in the Andean Community, it seems necessary to take advantage of the almost 20 years of experience with the current regime in order to define the policy of the next step.

*Decision 351* harmonized the domestic law of AC members by adopting minimum standards, but left to domestic law the option to increase those standards.<sup>259</sup> In recent years, as was noted above, AC members actually did build on the common regime by, for example, extending the terms of protection, exclusive rights, exceptions and limitations, hypothesis of public domain works, and online enforcement. As a result, after years in force, the challenges for harmonizing copyright law within the Andean Community have multiplied instead of reduced. A next step in the process of convergence on copyright law must adopt not only minimum but also maximum standards in order to avoid the fragmentation of the common regime by domestic laws. For example, it should adopt a unique regulation of copyright terms instead of allowing the range of terms currently in force in each country.

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<sup>255</sup> See, e.g., U.S. TRADE REPRESENTATIVE, Free Trade Agreements, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited June 6, 2011) (listing free trade agreements signed by the United States that include provisions on technological protective measures and liability of online service providers; these are the agreements signed with Singapore, Chile, Morocco, Australia, CAFTA and Dominican Republic, Bahrain, Oman, Peru, Colombia, Panama, and Korea).

<sup>256</sup> Anti-Counterfeiting Trade Agreement, art. 26.5, available at <http://trade.ec.europa.eu/doclib/html/147937.htm>.

<sup>257</sup> TPP, *supra* note 165.

<sup>258</sup> Xuan Li, Ten General Misconceptions about the Enforcement of Intellectual Property Rights, in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVE 14, 40–41 (Xuan Li and Carlos Correa eds. 2009) (concluding that the enforcement agenda has caused adverse effects on developing countries, which should work in maximizing pro-developing-countries policies).

<sup>259</sup> See *supra* notes 37–40 and accompanying text.



Does this mean that a new common regime has to prohibit any additional regulation on the domestic level? Currently, national legislatures are free to adopt new copyright law into the domestic law, as long as it is consistent with the common regime.<sup>260</sup> However, the common regime does not prevent the adoption of measures that, in spite of being consistent with the common regime, create or increase the obstacles to the proper functioning of the internal market. It does not suggest that the Andean Community should limit chances for domestic development—in fact, in some issues such as criminal enforcement and judicial procedure rules this is essential—but there should be a system of coordination between the domestic law making process and the common regime. This process has to introduce other factors to evaluate the convenience of a given modification of domestic law besides its consistency with the common regime, such as its economic effects in the functioning of the internal market and its political consistency with the policies of the Andean Community.

As discussed previously, the Andean Community has authorized its members to negotiate and conclude treaties with third countries in which intellectual property rules have been included.<sup>261</sup> This authorization has been a source of new commitments that goes beyond the standards adopted by *Decision 351* and may impede the adoption of a new common regime. In the future, in order to preserve its own convergence, as the European Union has been doing, AC members should negotiate jointly or, at the very least, submit their negotiation for the approval of a communitarian body so that it does neither exceed the common regime nor raise issues that may interfere the proper functioning of the internal market. It may provide some level of coordination within the Andean Community, particularly when facing negotiations with other countries.

The Andean Community should take full advantage of the flexibilities available in international law, like the above-mentioned provisions on compulsory licensing of the Berne Convention, when updating its common regime.<sup>262</sup> The aforesaid rules that provide broad national treatment and reestablishment of rights should be repealed by adopting more flexible provisions in accordance with the Berne Convention minimum standards.<sup>263</sup> It should also take advantage of more flexible mechanisms available in the domestic law of developed countries, such as the provisions on restored copyright and reverse engineering of software available in the

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<sup>260</sup> See *supra* note 27 and accompanying text.

<sup>261</sup> See *supra* notes 204–210 and accompanying text.

<sup>262</sup> See *supra* note 247.

<sup>263</sup> See Berne Convention, *supra* note 18, arts. 5.1 (setting forth national treatment for authors who are nationals of countries that are parties in the Union) and 18 (granting freedom to countries to decide possible retroactivity of copyright protection); World Intellectual Property Organization, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, 100–01 (1978).

U.S. law.<sup>264</sup> Unfortunately, *Decision 351* did not do that; instead, it embraced an ultra-protectionist view of copyright that focuses on protecting rights holders and underestimates other competing interests.

### V. Conclusions and Remarks

In the process of economic integration of the Andean Community, AC members have adopted common regimes in several fields, such as transport, foreign investment, industry,<sup>265</sup> and intellectual property. The latter was attained through *Decision 351*, which provides a common regime for copyright and neighboring rights that contributed importantly to the convergence of copyright law among the AC-members. However, through the years, the efficacy of the common regime as an instrument of convergence has been undermined because of the differences between domestic laws of AC members, the challenges of new technologies, and the emerging of bilateralism, among other causes. Those circumstances are making explicit to the Andean Community the need for updating its common regime before the lack of convergence become a serious obstacle for its members' integration.

A new common regime for the Andean Community should advance the agenda of its members rather than the agenda other countries by overcoming and anticipating obstacles to future economic integration between its members. This new common regime, unlike *Decision 351*, should not have a merely protectionist approach, and should include provisions in favor of authors, users, and intermediaries. In particular, considering the issues that raise problems for the proper functioning of the internal market, the new common regime should set forth provisions on copyright scope, limitations and exceptions, public domain, and copyright enforcement.

In addition, if the Andean Community wants to preserve and emphasize the convergence of its internal market, country members must commit to uniform standards, adopt mechanisms of coordination within the Andean Community and between its members and third countries, and take advantage of both the flexibilities provided by international instruments to developing countries and the experience of other countries providing flexibilities within their domestic law. A new

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<sup>264</sup> See *supra* note 87.

<sup>265</sup> See Andean Community, *Decisión No. 486 Régimen Común sobre Propiedad Industrial [Decision 486 Common Intellectual Property Regime]*, Official Gazette of the Andean Community No. 600 (Sep. 19, 2000) (setting forth a common regime for patents, utility models, layout-design of integrated circuits, industrial design, trademarks, collective trademarks, certification marks, trade names, labels and emblems, geographical indications, and well-known distinctive sign). See also Andean Community, *Decisión No. 345 Régimen Común de Protección a los Derechos de Obtentores de Variedades Vegetales [Decision 345 Common Provisions on the Protection of the Rights of Breeders of New Plant Varieties]*, Official Gazette of the Andean Community No. 142 (Oct. 29, 1993); *Decisión No. 391 Régimen Común sobre Acceso a Recursos Genéticos [Decision 391 Common Regime on Access to Genetic Resources]*, Official Gazette of the Andean Community No. 213 (Jul. 17, 1996).

common regime must increase the convergence of the copyright regulation within not only the Andean Community, but also with other countries.

Table: Andean Community Nations, by international instruments on copyright to which they are parties.

	Inter-American Convention (1)	Universal Convention (2)	Berne Convention (3)	TRIPS Agreement	WIPO Copyright Treaty (4)	WIPO Performances and Phonograms Treaty (5)
Bolivia	1947	1989	1993	1995	-	-
Colombia	1976	1976	1987	1995	2000	2000
Ecuador	1947	1957	1991	1996	2000	2000
Peru	-	1963	1988	1995	2001	2002
Venezuela	-	1966	1982	1995	-	-

Notes: (1) Ratification, OAS; (2) Ratification, UNESCO; (3) Accession, WIPO; (4) Ratification/Accession, WIPO; (5) Ratification/Accession, WIPO.