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EXPERIENCE OF THE CENTER FOR CONCILIATION AND ARBITRATION OF THE
NATIONAL DIRECTORATE OF COPYRIGHT OF COLOMBIA

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ABSTRACT

In Colombia, the National Directorate of Copyright has established the Center for Conciliation and Arbitration. Relying on its staff members that are certified mediators, this Center deals exclusively with disputes relating to copyright and related rights.

Although the implementation process has not been easy, the results after about two years show success, suggesting that in the near future, the conciliation mechanism will become the main tool of enforcement, even overtaking the judicial proceedings provided for in Colombian law.

The main challenges to be resolved by the Center for Conciliation and Arbitration include improving its structure, increasing staff strength and implementing the Memorandum of Understanding (MoU) on the provision of alternative dispute resolution services signed with the World Intellectual Property Organization (WIPO) in May 2014.

* The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO.

I. BACKGROUND

A. COPYRIGHT IN COLOMBIA

1. Colombia is a country located in the north-western tip of South America, with an area of 1,138,914 square kilometers and just over 48 million inhabitants. Together with Peru, Ecuador and Bolivia, Colombia is a member of the Andean Community of Nations. It has a strong regulatory and institutional framework for the enforcement of copyright.

2. From a regulatory standpoint, Article 61 of Colombia's Constitution provides: "The State shall protect intellectual property for the time and with the procedures established by law." Accordingly, several laws have been enacted (Law No. 23 of 1982 being the most important), together with regulatory standards, with a view to protecting copyright. Likewise, at the supranational level, in 1993 the Andean Community of Nations issued Decision 351, which applies in the four member countries, defining the common system governing copyright and related rights.

3. Furthermore, at the international level, Colombia is signatory to the relevant major international treaties (from the Berne Convention for the Protection of Literary and Artistic Works Berne Convention to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) and is in the process of ratifying the Beijing Treaty on Audiovisual Performances and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. Also, as Colombia is a member of the World Trade Organization, the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is fully applicable.

4. From the institutional standpoint, different copyright enforcement institutions exist at different levels. For example, the National Directorate of Copyright (more on this body is addressed below) is the highest administrative authority. Policy is formulated by the Intersectoral Commission on Intellectual Property (CIPI), which is composed of top-level representatives of various ministries and bodies which deal with intellectual property in one way or another. For enforcement and criminal matters, the Chief Prosecutor's Office has a specialized intellectual property unit.

B. THE NATIONAL DIRECTORATE OF COPYRIGHT (DNDA)

5. Under the Ministry of the Interior, the DNDA is an independent body with its own legal personality. Its main function is to promote the effectiveness and respect for copyright compliance through functions such as managing the registry of protected works; raising awareness among and training creators, users and the general public; monitoring, inspecting and overseeing collecting societies; recommending Colombia's accession to international treaties on copyright and related rights; formulating, managing and implementing government policies on copyright and related rights; and serving as a Center for Arbitration and Conciliation in matters relating to copyright and related rights and administering justice in this area, pursuant to the Code of General Procedure (new duties are underlined).

II. ENFORCEMENT

6. Although, as already stated, there is a specialized intellectual property unit dealing with criminal matters within the Chief Prosecutor's Office (but no judges specialized in intellectual property crime), this is not the case for civil matters. Moreover, Colombia functions under two disadvantages that are widely common in Latin American countries. The first is the lack of expertise in intellectual property law by judicial officers. The second is the huge case backlog in judicial organizations as a result of the high volume of applications filed in the various branches of law. The logical consequence is that judges do not prioritize intellectual property matters, either because they do not master the subject matter or because they have many other cases to determine.

7. Hence, in view of the increasingly significant contribution of artistic creativity to the productivity of each nation, it has become necessary to urgently implement more effective enforcement mechanisms.

8. It is noteworthy that Colombia has a National Council for Economic and Social Policy (CONPES), created by Law No.19 of 1958 as the highest national planning authority and a government advisory body on all matters related to economic and social development. In 2008, CONPES 3533 was issued, establishing the foundations for an action plan to adapt the intellectual property system to national competitiveness and productivity. The adopted strategy sought the following:

“Achieving adequate enforcement of IP regimes necessary to stimulate both domestic and foreign investment and technology transfer; and ensuring respect for the economic rights of creators and thereby stimulating creativity”.¹

9. Unsurprisingly, Colombia has also experienced phenomena such as piracy and other forms of infringement of intellectual property rights which can ultimately affect the productivity of companies and foreign investment, given that the productive apparatus of any nation requires a regulatory framework to ensure not only legal stability, but also adequate procedures for the protection of rights.

10. For all these reasons, a few years ago, in order to overcome the above drawbacks, an experiment was launched to create a specialized Center for Conciliation and Arbitration and to vest judicial powers on administrative entities. Previously, only ordinary judges had jurisdiction over copyright disputes.

11. In summary, Colombia has, in terms of copyright, adequate and modern administrative regulations and institutional structure, but still has shortcomings with regard to the enforcement system. It has begun to address these shortcomings through a variety of mechanisms, some sui generis, such as the judicial powers granted to administrative officials, and other modern and practical mechanisms, such as a Center for Conciliation and Arbitration in the National Directorate of Copyright.

A. EXISTING ENFORCEMENT MECHANISMS

12. Domestic legislation provides for two judicial mechanisms for the protection of copyright and related rights, namely:

¹ CONPES 3533 of 2008, p. 41.

a. Legal proceedings in the civil courts, under Articles 242 *et seq* of Law No. 23 of 1982, applying the procedure set out in Articles 443 and 449 of the Code of Civil Procedure, with the plaintiff being afforded a choice to bring the matter before an ordinary judge or before the DNDA which, now vested with all the powers of an ordinary judge, will determine the civil dispute by exercising its new judicial functions.

b. Legal proceedings before a criminal court, in which the following offenses are punishable:

- violation of moral rights (Article 270 of the Criminal Code);
- violation of economic rights and related rights (Article 271 of the Criminal Code); and
- violation of the protection mechanisms for copyright and related rights, and other fraud (Article 272 of the Criminal Code).

B. ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

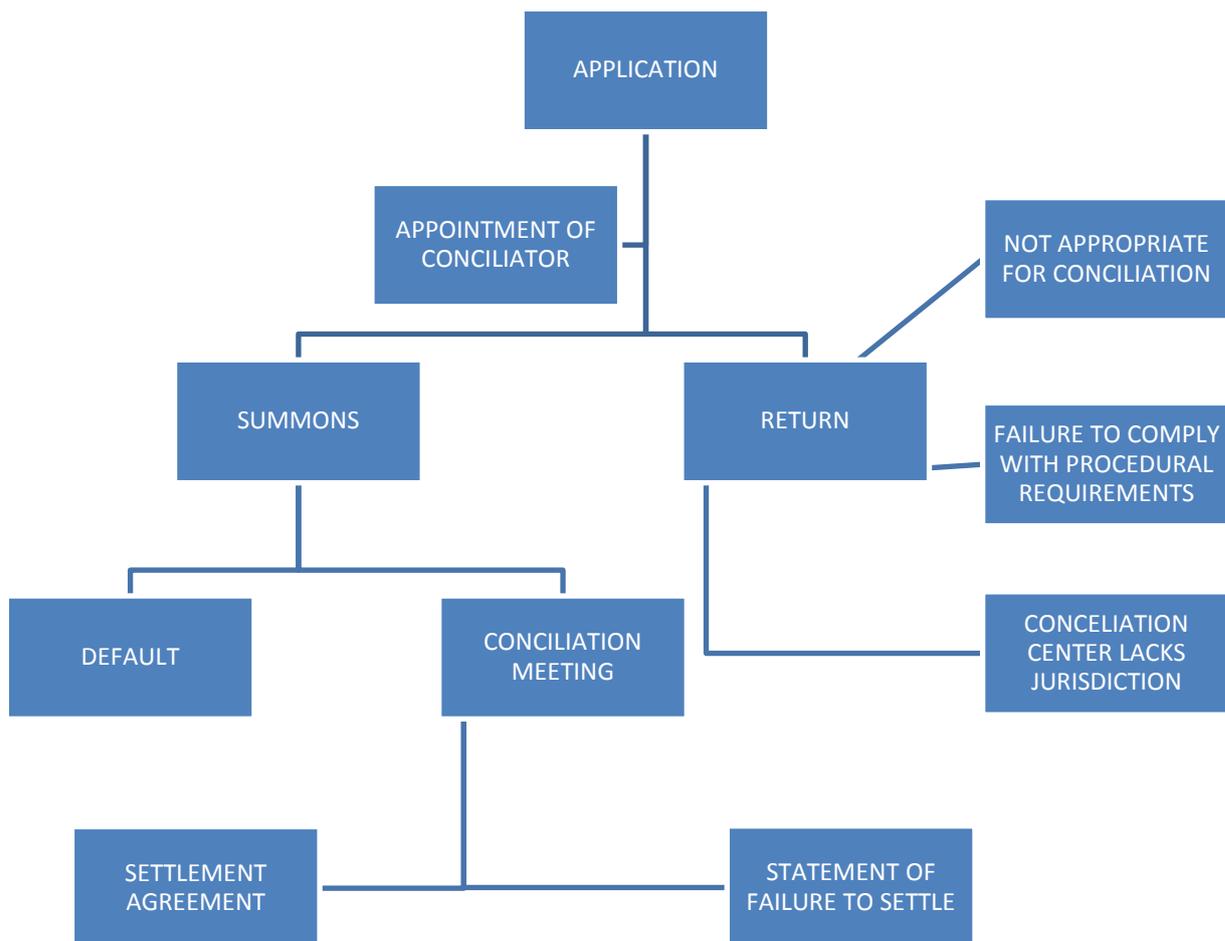
13. Alternative dispute resolution mechanisms are, as the name implies, proceedings, which are different from judicial proceedings, through which two or more persons can settle their disputes.

14. In particular, conciliation is an alternative mechanism through which two or more persons, with the help of a qualified impartial third party known as a mediator, come to an agreement to end their differences.

15. As regards matters which are susceptible to conciliation, Article 19 of Law No. 640 of 2001 provides that “any matters that lend themselves to compromise, abandonment or conciliation before the conciliators in conciliation centers may be conciliated” (emphasis added).

16. It is important to note that Article 30 of Law No. 23 of 1982 (Copyright Act) expressly provides that the moral rights acquired by an author through his or her creation are inalienable. Hence, the only matters susceptible to conciliation are disputes relating to economic rights. Moral right can only be the subject of conciliation with regard to the payment of damages for their infringement.

17. The procedure set forth in Law No. 640 of 2001, which governs mediation and requests for mediation, is as follows:



Source: Carlier Carolina and Cajavilca Gloria, Manual de Conciliación y Arbitraje en Derecho de Autor y Derechos Conexos, 2014.

III. CREATION OF THE CENTER FOR CONCILIATION AND ARBITRATION OF THE NATIONAL DIRECTORATE OF COPYRIGHT

A. LEGAL BACKGROUND

18. Pursuant to Article 51 of Andean Decision No. 351 of 1993 (Cartagena Agreement), a supranational instrument adopted within the Andean Pact, a Copyright Office may intervene by means of conciliation or arbitration in disputes arising from the enjoyment or exercise of copyright or related rights, in accordance with the domestic legislation of Member Countries.

19. Based on the above arrangement, the DNDA sought authorization to operate as the Fernando Hinestrosa Center for Conciliation and Arbitration. Authorization was granted by the Ministry of Justice and Law by Decision No. 0271 of April 20, 2012.

20. According to a decision of July 27, 2012, issued by the Department of Alternative Methods of Dispute Resolution of the Ministry of Justice and Law: “the Fernando Hinestrosa Center for Conciliation and Arbitration shall hear disputes relating to copyright and related rights in its capacity as a specialist”. Therefore, DNDA’s Center deals exclusively with matters related to copyright and related rights, without prejudice to any other conciliation center addressing the same.

21. It should be emphasized that the launch of the Center for Conciliation and Arbitration has been a gradual process and not without difficulties. The first obstacle was the lack of staff to perform new functions. Although the establishment of the unit was approved, no new staff positions were created, compelling the Center to perform its function with existing staff, who obviously had to continue with their ordinary duties (those they had before the Center was established). Secondly, Colombian law allows only accredited institutions to grant certification to mediators, after the applicant passes a challenging and expensive course lasting several weeks. The Center's lawyers have been taking this course gradually. Budget constraints have caused the certification of mediators to be extremely slow, dependent on DNDA's financial circumstances.

22. Statistics on conciliation procedures that have taken place since the creation of the DNDA Center indicate that this mechanism meets a need among creators and is becoming an essential tool not only for the settlement of disputes arising in connection with the use of works, but also for the restoration of relations within the productive chain of the creation of literary and artistic works. Such is its success that the outcome of many of the agreements reached at the Center is not only the payment of damages, but also the establishment of partnerships between the creator and the user of the works.

23. These statistical results indicate a significant increase in conciliation requests, from 31 requests in 2013 to 241 applications so far in 2015. It is also interesting to note the increasing number of settlements in comparison to failures to agree, from 11 settlements and 13 failures in 2013 to 64 settlements and 34 failures to agree in 2015. This shows that at the moment, the trend in the outcomes of the conciliations has been reversed and the number of settlements is almost double the number of failures to agree (the remaining cases are pending or were closed following a party's default).

B. CONCILIATION VS. PROCEEDINGS IN ORDINARY COURTS

24. In 2014 and up to January 2015, Colombian criminal courts dealt with nearly 1,100 cases of copyright violation. Therefore, considering that by the end of 2015 it is estimated that the Center for Conciliation and Arbitration will receive about 500 requests for conciliation, it can be said that the conciliation mechanism will resolve nearly half of the conflicts in this area. These figures illustrate the need to gradually strengthen non-judicial mechanisms such as conciliation.

C. TYPES OF CONFLICTS RESOLVED BY THE CENTER

25. The cases treated by the Center for Conciliation and Arbitration are widely diverse and include conciliation requests sought by authors of works when their moral rights are infringed, mainly for the violation of rights of paternity, integrity and modification, in addition to the violation of those of their economic rights basically derived from public communication or reproduction of the work without the prior express authorization of the owner. However, the Center has also dealt with requests for conciliation from collecting societies and derivative right holders, seeking agreement on the tariff fixed for users of the works.

26. However, given that the legislation governing conciliation is very rigorous regarding the confidentiality of matters discussed at conciliation meetings, it is not possible to discuss the details of these cases.

D. THE FUTURE

27. In view of the success of this enforcement mechanism and based on the conviction that conciliation will become the most efficient, economical and effective tool for resolving conflicts in the field of copyright and related rights, it is necessary to adopt measures so that the unit can continue to respond effectively and appropriately to all the needs of its users. Hence, there is an urgent need to strengthen the Center for Conciliation and Arbitration, which necessarily includes a restructuring of the DNDA to facilitate the hiring of additional staff that can be dedicated exclusively to handling requests for conciliation. Also, in order to decisively strengthen the Center, it will be useful to implement the Memorandum of Understanding Concerning the Provision of Alternative Dispute Resolution Services between the DNDA and WIPO of May 1, 2014.

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