

Conception of copyrights related to music: analysis from its foundation

Concepción de los derechos de autor relativos a la música: análisis desde su fundamentación

A concepção do direito de autor na música: uma análise da sua fundamentação

DOI: <https://doi.org/10.21803/penamer.17.34.723>

María Fernanda Jaimes Melgarejo

<https://orcid.org/0000-0002-9991-3883>

Abogada y estudiante de la especialización en Derecho Constitucional, Miembro de la asociación Colombiana de Derecho Procesal Constitucional y del Instituto Colombiano de Derecho Procesal y de la Subdirección de Equidad y Género. mariaf-jaimesm@unilibre.edu.co

Johan Sebastian Lozano Parra

<https://orcid.org/0000-0002-3414-9984>

Magister y especialista en Derecho Administrativo, Docente de la Universidad Libre seccional Socorro. Miembro del Instituto Colombiano de Derecho Procesal y de la Subdirección de Equidad y Género. johans-Lozanop@Unilibre.edu.co

Sergio Andrés Caballero Palomino

<https://orcid.org/0000-0003-4715-8537>

Doctorando en Derecho en la Universidad Autónoma de Barcelona. Magister en Derecho del Estado, Profesor investigador y director del grupo GISOJ de Uniciencia sede Bogotá. sergioa.caballerop@uniciencia.edu.co

Carlos Fernando Morantes Franco

<https://orcid.org/0000-0002-3076-2538>

Doctorando en Derecho en la Universidad Libre Bogotá, Magister en derecho laboral y seguridad social de la Universidad Externado de Colombia. carlosf.morantesf@unilibre.edu.co

¿Cómo citar este artículo?

Caballero; S., Jaimes; M., Lozano; J. y Morantes; C.(2024). Concepción de los derechos de autor relativos a la música: análisis desde su fundamentación, e#723. 17(34), DOI: <https://doi.org/10.21803/penamer.17.34.723>

Abstract

Introduction: This research article addresses the issue of copyright in the music industry through the conceptualisation of various notions that make up the spectrums of intellectual property rights. **Objective:** to analyse the doctrinal and legal role of copyright and related rights in the production of a musical work. **Methodology:** descriptive and explanatory, with an essentially qualitative basis for the way in which the information was collected and analysed. **Results:** This study made it possible to identify as a result a series of parameters that music as an artistic element has within the field not only of copyright, but also from a purely criminal perspective, in which it is identified as from the creation of a harmony or even a rhythm, the phenomenon of plagiarism can exist or be detected. **Conclusion:** It was identified that music as a product of human thought, the same as any other activity of the person, has a series of rights ranging from the patrimonial, to the moral, which are subject to legal protection.

Keywords: Health expenditures; Economic development; Welfare; Mexican economy

Resumen

Introducción: El presente artículo de investigación aborda la temática de los derechos de autor en la industria musical por medio de la conceptualización de diversas nociones que componen los espectros de los derechos de propiedad intelectual. **Objetivo:** analizar a nivel doctrinal y jurídico el papel que tienen los derechos de autor y los derechos conexos dentro de la producción de una obra musical. **Metodología:** de tipo descriptivo y explicativo, cuya base es esencialmente cualitativa para lo referente a la forma de recolección y análisis de la información. **Resultados:** Tal estudio, permitió identificar como resultado una serie de parámetros que la música como elemento artístico tiene dentro del campo no solo de los derechos de autor, sino también desde una perspectiva meramente penal, en la que se identifica como a partir de la creación de una armonía o incluso un ritmo puede existir o detectarse el fenómeno del plagio. **Conclusión:** Se identificó que la música como producto del pensamiento humano, la misma al igual que cualquier otra actividad de la persona, posee una serie de derechos que van desde lo patrimonial, hasta lo moral por lo que están sujetos a protección jurídica.

Palabras clave: Artista; Autor; Derechos de autor; Moral profesional; Música¹

Resumo

Introdução: O presente artigo de investigação aborda a questão dos direitos de autor na indústria musical através da conceitualização de várias noções que compõem o espectro dos direitos de propriedade intelectual. **Objetivo:** analisar o papel doutrinário e legal dos direitos de autor e direitos conexos na produção de uma obra musical. **Metodologia:** descritiva e explicativa, com uma base essencialmente qualitativa na forma como a informação foi recolhida e analisada. **Resultados:** Este estudo permitiu identificar como resultado uma série de parâmetros que a música enquanto elemento artístico tem no âmbito não só dos direitos de autor, mas também numa perspectiva puramente criminal, em que se identifica como a partir da criação de uma harmonia ou mesmo de um ritmo, o fenómeno do plágio pode existir ou ser detectado. **Conclusão:** Identificou-se que a música como produto do pensamento humano, tal como qualquer outra atividade da pessoa, tem uma série de direitos que vão desde os patrimoniais, aos morais, que são objeto de proteção jurídica.

Palavras-chave: Artista; Autor; Direito autoral; Moral profissional; Música

¹ Los términos clave han sido recuperados a partir del Tesauro UNESCO (Ciencias Sociales y humanidades).



INTRODUCTION

From the point of view of the music industry, copyrights are the main guarantee that the creator of musical works has to ensure the intellectual property of his invention. Within the Colombian law such prerogative is located in article 61 of the Political Constitution, which regulates the protection of intellectual property. Delegating its regulation regarding formalities and time to the Law.

Accordingly, the National Directorate of Copyright - hereinafter referred to as DNDA - has defined intellectual property as the normative discipline whose purpose is to protect intellectual creations resulting from human effort, work and skill. Likewise, it mentions that intellectual property comprises two important components, namely: i) copyright and ii) related rights. For the specific case, it is important to deconstruct the conceptual and doctrinal approach to the first component, i.e., copyright; however, this does not exclude special mention of related rights.

In the music industry, a controversial issue has arisen in relation to copyright infringement. It is through plagiarism that copyrights are exposed to danger, to the extent that a direct violation of the moral aspects of a work is configured.

At a certain moment the creators of musical works - be it music or lyrics - turn to another work in order to be inspired by it, however, sometimes they end up using a certain sequence of chords or lyrics that end up constituting plagiarism by recreating a substantial copy of another work considering it as their own. This situation is called self-authorship and becomes immersed in the punishable conduct of plagiarism, regulated by article 270 of the Colombian Criminal Code. However, such situation does not expressly address the direct violation of the so-called moral rights of authorship.

From the legal point of view, the conception of plagiarism must be analyzed within the conceptual and doctrinal aspect of copyright, focused mainly on those very personal rights that the creator seeks to have protected based on the link between him and his work. Therefore, it is not only about economic rights but also about that intrinsic and personal factor that links him to his creation, translated into the moral right of paternity of the author.

In this sense, it is transcendental to determine the concept of plagiarism in the music industry, especially focused as a phenomenon that violates the moral rights of the creators of musical content. Therefore, the structure to address each of the topics to be mentioned in this article will be developed under a deductive methodology, that is to say, the aspects related to the notions are addressed in a general way and applied to a particular case, which for the research is the legal conception of plagiarism within the context of copyright in music.

Thus, in order to understand the conceptual and doctrinal notions of the legal conception of plagiarism, it is necessary to first address a conceptual development of the notion of music in its broadest sense of the theoretical scope, in order to determine its denomination as an intellectual product. Subsequently, the definition of the elements comprising the related rights in the musical artistic creation and its correlation with copyright is established. Finally, we seek to

define the concept of plagiarism within the Colombian industry and establish its incidence with the intellectual production of copyrights.

METHODOLOGY

The methodology used for the development of the article is descriptive and analytical with a qualitative approach. Regarding the former, it allowed the characterization and identification of the conceptual and doctrinal elements of music as an intellectual product of the human being and how this becomes a legal nuance at the moment of constituting the copyright on a musical work, it is explanatory to the extent that it was possible to identify the causes and effects existing in the dynamics of plagiarism and the rights related to the artistic creation of music. Finally, it is qualitative insofar as the bibliographic search and the analysis of the value judgments that the general authors make on the different topics addressed throughout the paper were used.

RESULTS

1. Music as a creation and intellectual product

Next, it will be developed how music is understood in its general sense, in order to understand the elements that constitute and compose its definition. Subsequently, music is mentioned as an intellectual product resulting from the creation of the human mind, which allows its development as a right within the framework of intellectual property. Finally, clarity is provided on the subjects involved in the Colombian music industry and the law that guarantees its protection.

1.1. Theoretical conception of music

The exact definition of the concept of music turns out to be an arduous task to give, since thinkers, philosophers, artists and even scientists have tried to generate the most approximate notion that for them is appropriate based on their experiences. For this reason, music can be defined as the art of manipulating vocal and instrumental sounds to create aesthetic sounds pleasing to the listener; also as the art of manipulating sound to transmit a pleasant feeling and a moving interpretation to express that which is not possible to externalize.

For, Guevara (2010) in his work *Teoría de la música* defines this term as "the art of combining sounds pleasantly according to the laws that govern it". On the other hand, in "silent music", The journal of aesthetics and art criticism by Kania (2010), defines music as an intentional event which is produced or organized in order to be heard, pointing to sound as the first element that integrates it and the intentional character as the second of these.

To understand the two elements mentioned by Kania (2010), it is important to recognize that not all sound is music, since the chirping of a bird or the sound of water in a stream is not what is commonly called music; they are sounds that are reproduced by vibrations, but do not have an intentional reason.



to be produced. On the other hand, thinking about the use of these sounds, such as birdsong with the object of being heard changes the perspective, as occurs with Olivier Messiaen's *El catálogo de los pájaros*, where its understanding is rooted in an intentionality of the author (González, 2015).

In this sense, following Kania (2010), sound is an element that integrates the conception of music, it is the intentionality that complements it. Music corresponds then to that set of sounds that are transmitted when there is the intention of making music, that is, it mediates the will of wanting to reproduce it.

As mentioned, music is conditioned within the perspective of art, as Guevara mentions, it is considered in this way because the artist, through music, communicates the external world with the internal world, by transmitting in it the personal vision of his experiences and the environment that surrounds him. In this sense, music is more than a voluntary reproduction of sound, because it is also intrinsically linked to the feelings of the author, the composer and even the interpreter.

Hence the words of Antequera (2000), who explains that the musical work itself by its very nature has a legitimate vocation in which the author in his desire to express an emotion or that his thought be known, exposes it through a unique and unrepeatable characterization in which a particular rhythm is produced that in accordance with other aspects of the music allows him to have rights over it, as well as economic benefits.

The above is vividly expressed with the exemplification of the communication of the external world with the internal world, transforming the work of an artist from the perspective of his personal vision. Thus, the interpretation that an artist gives to his work is different from that of another person, even if it is the same piece, and it is here where the deepest meaning of musical creation materializes. Guevara (2010) points out that, although it is possible to understand and teach the theory, the interpretation given to the work will change the sonorous result of it; it is not the same to listen to Beethoven's pathetic sonata played by a classical composer as it is to listen to it by Rudolf Serkin. The composer's feeling will always be different from the one who reinterprets it, and that is what marks the main essence of the author's moral right of paternity.

Similarly, Flórez et al. (2017) express that "(...) although two artists play the same work, such as a Chopin piano concerto, their perception of the world will make that sonically each one has a particular feature, making each interpretation unique (...)" (p.133). In attention to the main element that constitutes the conception of music, sound is defined, as mentioned by Guevara, as the sensation produced in the ear by the reaction to the vibration of sound bodies; which is differentiated from noise through the measurement of its properties. For, while sound can be measured by all the elements, the opposite happens with noise.

1.2. *Music as an intellectual product in law*

The DNDA defines intellectual property as a regulatory discipline that seeks to protect intellectual creations resulting from human effort, work and even skill, which in themselves are legally recognized. Likewise, as mentioned at the beginning, intellectual property comprises two main aspects to be highlighted i) copyright and ii) related rights.



The Royal Academy of the Spanish language defines intellectual property as the set of rights that correspond to the owners and authors of a work, with respect to it and the benefits resulting from its creation. Accordingly, article 61 of the Constitution states that intellectual property is a right held by the State, since its regulation and regulation is delegated by legislation.

The Constitutional Court in sentence C-276 of 1996 with judge Julio Cesar Ortiz Gutiérrez as rapporteur, defined intellectual property as those creations product of the intellect, as well as those related to its dissemination and diffusion. It pointed out that intellectual property is held by the person who created the work - literary, artistic, scientific, musical, among others.

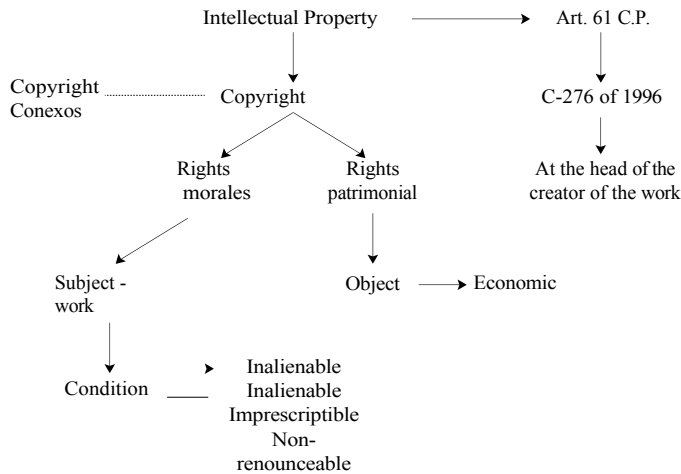
In this sense, it is understood that the Corporation does not only refer to the expectations of economic exploitation, understood as economic rights considered as the most complex rights within industrial property, as they consist of exploitation and compensation rights, but it also refers to the moral or personal rights of the author of the work, which recognize the author's status as the author of a work and are characterized by being inalienable, imprescriptible and unrenounceable.

Regarding the author's very personal moral rights and in view of the conceptualization of the notion of music, it must be understood that, from the moment of the creation of the work, the author acquires a link with his creation, to such an extent that the interpretation given and the way in which the sound is produced may vary when it is reproduced by someone other than the original author or performer, even if he tries to recreate it in a timely manner.

Moral rights seek to safeguard the link generated between the author and his work by constituting directly the expression of his personality, in the sense that through the work the author can connect the external world with the internal world of his being, which is intrinsic to his own personality. It is for this reason that moral rights are the ones that in a more integral and deep-rooted way are intertwined with the feeling of the creator for his work, contrary to the moral rights that aim at a more pecuniary object.

There is no doubt that music is a product of intellectual property, since, as mentioned by Schimtz (2005), intellectual property has to do with the set of temporary, exclusive and excluding rights that are primarily intended to prevent unauthorized copies or counterfeits of creations - material or non-material - product of the human intellect. The World Trade Organization (2019) defines intellectual property as those rights conferred to individuals with respect to the creations of their mind; these grant exclusive rights to the creator for the use of his work in a determined period of time.

In this sense, music arises thanks to human invention, since the mere fact that a sound is produced does not mean that music coexists, it is necessary that man has the will to produce the sound, and, therefore, the intellect to create it. Therefore, it is understood that the right over a musical work is a right by the mere fact of being an invention product of the creation of the human mind. In this order of ideas, since music is a creation of the intellectual product itself, it is subject to be protected by intellectual property and its understanding by copyright allows to make effective such guarantee of protection.

Figure 1.*Relationship of intellectual property with music.*

1.3. Subjects of law in the music industry

It is transcendental to determine the subjects that enjoy copyright within the recognition of the right to intellectual property of a musical work. Within the music industry, as mentioned by Álvarez (2014), it is dynamic with a variety of agents governed by contractual relationships due to provide legal certainty, thus protecting artists and owners from any undue exploitation of their works by third parties external to it (Álvarez, 2014).

In Colombia, Law 23 of 1982, which regulates copyrights, protects musical compositions with or without lyrics, as well as dramatic-musical creations. In this sense, it can be extracted that the Colombian legislation through copyright protection protects all those musical compositions, even if they are not complemented with lyrics or script, the mere invention of the music or melody is enough.

From the above it is understood that it is not a single subject that copyright protects, but that both the author of the musical work and the one in charge of the lyrics have the legal recognition within the framework of the moral rights of paternity.

For a better understanding, Monroy et al. (2012) state that the author in a musical work is the person who creates the lyrics; on the other hand, the composer is the one who creates the melody. However, sometimes the same person may be the holder of the moral right of paternity as author and composer, having created by himself the lyrics and the melody of a musical work. Both subjects, within the Colombian legislation, enjoy special protection with respect to their moral rights arising from the copyright for the intellectual creation of a work.

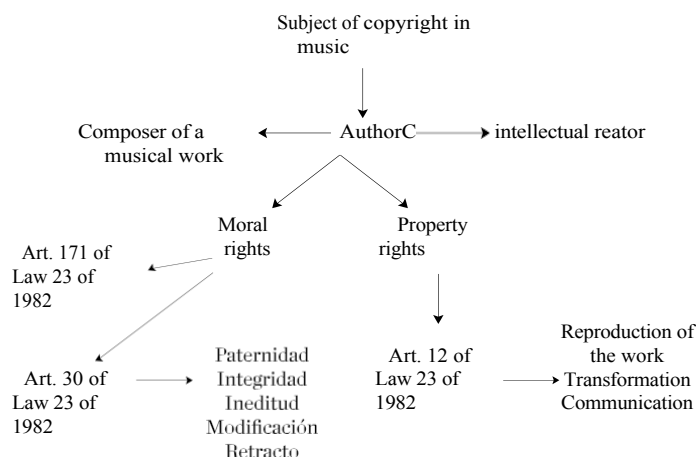
In accordance with the Berne Convention (1886) for the Protection of Literary and Artistic Works of 1886, no formalities are required to make effective the protection of the copyrights that these subjects have for their work, since only the complete creation of the work, be it the lyrics or the melody, is sufficient for its recognition.

The DNDA defines the author as the individual or natural person who makes the intellectual creation of a work, whether literary or artistic. In this sense, it points out that an author is the person to whom the

The law recognizes the original title of moral and patrimonial rights. At the same time, it points out that in order to understand the concept of author or co-author it is required to have participated in the mental process that led to conceive the musical creation, therefore, there may be co-authors when it is several natural persons who participated during the intellectual process of the same. On the other hand, it is understood that the person who lends ideas that influence as antecedent for the creation of the work is not attributed the connotation of author and therefore is not subject of the moral right of authorship.

Figure 2.

List of subjects involved in copyrights



It is important to bear in mind that, in order to constitute an element of proof of the musical creation of a work, it is necessary to make a registration, which, although it does not constitute rights by itself, is an essential element of proof when a conflict arises due to an apparent situation of plagiarism. Hence, it is necessary to follow Acevedo and Vargas (2023) when referring to the fact that what is really relevant in these matters is to understand that behind the author there is an intellectual creation that translates into the composition of a musical or artistic work.

Therefore, in all aspects there is a turning point between the creation of the human intellect and the way in which a certain work of musical art is created, designed and structured. That said, this ends up being the essential aspect by which a certain right is granted on a musical composition, which is the one that ends up generating a cultural, economic or social impact, depending on the author's approach to it (Acevedo & Vargas, 2023).

1.3.1. Rights of the author and/or composer of a musical work

As mentioned above, the author is the person who writes the lyrics, while the composer is the one who creates the melody. Both have a series of rights that guarantee the copyright on their creations, which fall into two different categories: i) moral rights and ii) economic rights.

In the first place, the moral rights subject to mention from the beginning of this article correspond, according to Flórez et al. (2017), to rights that are always recognized, even when the economic rights have been assigned. The foregoing is clarified in accordance with what is mentioned by Hurtado (2017) who

emphasizes that moral rights, being characterized as non-transferable, unrenounceable and imprescriptible subjective rights, cannot be waived or assigned, i.e., they are not found in the market - as is the case with economic rights - therefore, their recognition is imprescriptible (Hurtado, 2017).

Article 171 of Law 23 of 1982 expressly recognizes the moral rights of artists, interpreters or performers, as the case may be, and enshrines them in Article 30 of the same law as follows:

i) Paternity: Understood as the right to claim at all times the paternity of his work and to be recognized as the author of the same at any time that any of the acts mentioned in Article 12 of the aforementioned Law are performed.

ii) Integrity: This corresponds to the right to prevent any deformation, modification, alteration or even attempt against the integrity of the work, when the interpretation of the work is violated or its interests or reputation are affected.

iii) Ineditability: This is the right to preserve a work in an unpublished or anonymous form until the time of the owner's death or even after his death, if so established under a will.

iv) Of modification: Right to modify a work before or after its publication

(vi) Right of withdrawal: The right to withdraw the work from circulation or to suspend any form of use of the work (art. 171).

On the other hand, with respect to economic rights, the DNDA defines them as those exclusive prerogatives of an economic-economic nature, which allow the holder to have control over the different acts of exploitation of which the work may be the object. Similarly, as mentioned by Monroy et al. (2017) in *El derecho de autor y los derechos conexos en la industria de la música*, economic rights refer to the different ways in which a musical work is used or exploited economically, which, unlike moral rights, are transferable, waivable and can even be disposed of as to how and when they are assigned or licensed.

Article 72 of Law 23 of 1982 mentions economic rights as those that are caused from the moment in which the work or production, which is susceptible of economic estimation, is disclosed to the public by any form. Likewise, Article 12 of the aforementioned Law states that some of the economic rights are:

i) The reproduction of the work, related to the making of copies of the work or production for its reproduction.

ii) Transformation, referring to the possibility of making or authorizing transformations, translations or adaptations of the work.

iii) Communication, which consists of the disclosure of the work to the public by means of performance, broadcasting or any other means (art. 72).

2. RIGHTS RELATED TO MUSICAL CREATION

The DNDA defines related rights as the set of rights enjoyed by artists, performers, phonogram producers and broadcasting organizations with respect to their performances, phonograms and broadcasts, respectively.

The World Intellectual Property Organization - hereinafter referred to as WIPO - states that the main purpose of related rights is to protect the legal interests of certain persons and legal entities that make their works available to the public by virtue of the copyrights recognized in each country. In this sense, with respect to the regulations on related rights, it is assumed that the works resulting from activities related to such subjects deserve to be protected when they are related to works covered by copyright. It should be clarified that some legislations directly stipulate that related rights should not affect in any way the protection of copyright.

It is due to the importance that these individuals have within the process of propagation of works that the law has decided to grant them a set of rights similar to those of the author. Velasquez (2004) mentions that these related rights are similar to those of authors; however, they differ in that the former are granted to holders who are in the category of intermediaries in the production, recording or dissemination of works.

Likewise, the author points out, related rights are similar to copyrights, since they assist authors in the disclosure and dissemination of their works, although they do not play a role in the creation, they are indispensable for their disclosure to the public. For this reason, related rights enjoy moral rights, as it happens with copyright, so it is understood that in accordance with article 30 of Law 23 of 1982, performers, producers of phonograms and broadcasting programs are recognized the rights of paternity, integrity, ineditability, modification, retraction and withdrawal. Regarding the last mentioned, Flórez et al. (2017) mentions that the performer must recognize the respective indemnities for third parties who have been victims of any damage.

In this order of ideas, it is understood that there are three main subjects that fall under the recognition of related rights: performers, producers of phonograms and broadcasting organizations.

2.1. *Performers' related rights*

Regarding the former, Law 23 of 1982 states that performers are the actor, speaker, narrator, declaimer, singer, dancer, musician or any other person who interprets a literary or artistic work. Thus, although the performers do not participate in the mental process for the creation of a work, they do collaborate harmoniously in the dissemination of it, which is so important for them to be subject of related rights.

By means of the same Law, it is established that interpreters and performers enjoy protection of their rights during their lifetime and for a period of eighty years counted from the time of death of the owner.

Similarly, Decision 351 of 1993 on the Common Provisions on Copyright and Related Rights mentions that performers may not oppose the communication to the public of their performance, especially when it constitutes in itself a broadcast performance or is made by a previously authorized fixation. But they may have the right to authorize or prohibit the communication to the public when their performances have not been fixed, additionally, they have the right to determine the fixation and reproduction of their performances (Art. 34).

Finally, it is important to clarify that performers, like authors, enjoy moral rights - perpetual, inalienable and unwaivable - whose purpose, as mentioned by Velásquez (2004) is essentially aimed at protecting the owner against the deformation or mutilation of his performance during its use and against the omission or change of the artist's name.

2.2. *Related rights of phonogram producers*

The Colombian Copyright Center - hereinafter also referred to by the acronym CECOLDA - by means of the Convention for the Protection of Producers of Phonograms Against Unauthorized Reproduction of Their Phonograms (1971), defines phonogram as any exclusively sonorous fixation of the sounds of a performance or other sounds.

Based on the above, a phonogram producer is understood as the natural or legal person under whose initiative, responsibility and coordination fixes for the first time the sounds of a performance or other sounds (DNDA, 1993).

Pursuant to Article 37 of the 1993 Andean Decision, producers of phonograms enjoy the following rights:

- i) To authorize or prohibit the direct and indirect reproduction of their phonograms.
- ii) That of preventing the importation of copies of the phonogram, made without the prior authorization of the owner.
- iii) The right to receive remuneration for each use of the phonogram or copies thereof for commercial purposes. This may be shared with the performers as provided by the domestic law of each country.

Finally, it is important to mention that, as it happens with performers, when the producers of phonograms are natural or legal persons, Law 23 of 1982 states that they enjoy a special protection of rights enshrined in the law, where in the case of natural persons it covers the life of the producer and eighty years counted from the death of the owner (art.29). According to Law 44 of 1993, which modified the provision that establishes it, when they correspond to legal persons, the term is fifty years counted from the last day of the year in which the first publication of the phonogram took place, or, if it was not published, its first fixation (art.2).

2.3. *Related rights of broadcasting organizations*

In accordance with the concept given by the National Directorate of Copyright and Law 23 of 1982,



Broadcasting organizations are radio or television companies that transmit programs to the public.

Article 39 of Andean Decision 351 of 1993 states that such organizations to which related rights are recognized have an exclusive right to authorize or prohibit:

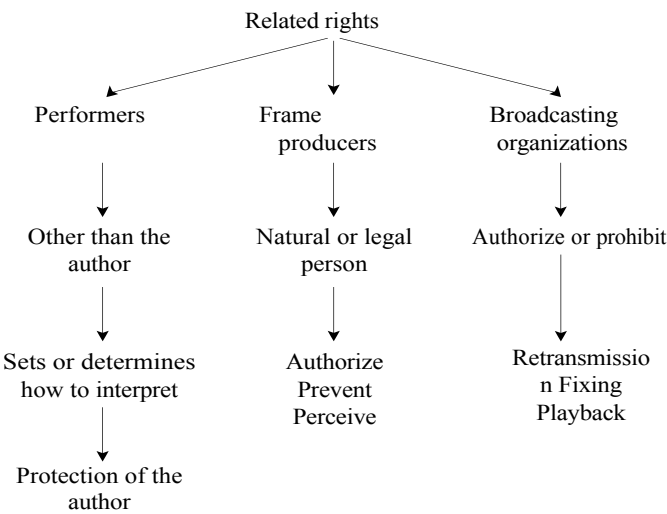
- i) The retransmission of its broadcasts by any form or means used.
- ii) Fixing its emissions on a material basis.
- iii) Reproduction of a fixation of your emissions.

In addition, the aforementioned regulation states that, with respect to the broadcasting mentioned in the immediately preceding article, it includes the production of program-carrying signals destined to a broadcasting or telecommunication satellite. Likewise, it includes the broadcasting to the public by an entity that broadcasts or disseminates the broadcasts of others received by any of said satellites (Article 40).

Additionally, in accordance with what has been mentioned for the previous cases, the protection of rights also applies to broadcasting organizations for a term established by law. In the case of a legal entity, the term for the protection of rights shall be fifty years, counted from the moment in which the broadcasting took place.

Finally, it is necessary to clarify that copyright, unlike related rights, is considered to be of social interest, and for this reason it takes precedence over the rights of performers, phonogram producers and broadcasting organizations. Therefore, when there is a conflict between copyright and related rights, the former will always prevail over the latter.

Figure 3.
Related rights and legal interest.



4. DISCUSSION

4.1. *Plagiarism case in the music industry*

After having made an approach to the conception of music as an intellectual product, the subjects of protection within copyright and related rights, and emphasizing at all times the presence of moral rights of the author, it is appropriate to analyze the aspects related to plagiarism.

In order to determine the incidence of plagiarism in the music industry, it is important to first mention the concept of plagiarism, in order to deconstruct its relevance both in the civil sphere of intellectual property and in the criminal sphere for violation of the moral rights of authors.

Plagiarism, as defined by the Royal Spanish Academy, is understood as the action and effect of plagiarizing, that is to say, of taking someone else's things. Likewise, it mentions that plagiarism comes from the Latin *plagium* which literally means kidnapping, derived from the term "action of stealing slaves" or "action of buying or selling slaves to free people".

On the other hand, the World Intellectual Property Organization defines plagiarism as the act of presenting or offering as one's own, partially or totally, a work of another person, in a more or less altered form or content. According to Flórez et al. (2017), plagiarism is one of the major forms of copyright infringement, since this practice disregards the author's right to be claimed as the creator of a work, causing the violation of the author's right of paternity.

For Sanabria (2014) plagiarism is at its inception a theft characterized by two situations:

- i) The total or partial copying of another's work that the original author has not authorized.
- ii) The presentation of another's work as one's own, with the purpose of impersonating the true author.

It is important to mention that in Colombia the concept of plagiarism, although it is addressed at the doctrinal level, is not expressly defined in the legal sphere. In order to determine plagiarism within the criminal law, the notion of moral rights must be taken into account, since the criminal law does not include the word "plagiarism" categorically within its regulations.

Although plagiarism implies the simultaneous infringement of different moral and economic rights, it is important to focus on the former, in order to delve into the moral right of paternity with respect to authors and composers of musical works. In this sense, the moral rights - a concept that has been addressed at different times in this article - concern the link generated between the author and his work. Such rights correspond to the author's very personal rights, and therefore seek to safeguard the legal bond that was constituted as an expression of his personality.

Article 30 of Law 23 of 1982 mentions that moral rights, as mentioned above, are characterized for being perpetual, inalienable and unrenounceable. In addition, the Berne Convention of 1886 states that moral rights are - independently of the economic rights assigned by the author in view of their non-transferable and unrenounceable nature - the right of paternity of the work, the right to oppose any deformation, mutilation or any other modification, and the right to oppose any attack on the work.



This may cause damage to the honor and reputation of the work, and in general to its integrity.

Depending on the domestic legislation of each country, moral rights and economic rights may not be balanced. In accordance with the provisions of Bernal and Conde (2017) the common law, seeks to protect the use of the work once the ideas are materialized. Therefore, the rights acquired under this family of law focus on the recognition of economic rights, leaving moral rights in the background.

The opposite happens in Colombia, since the Colombian legislation recognizes economic and moral rights explicitly, and likewise, they are regulated by Decision 351 of 1993 and Law 23 of 1982. Likewise, the National Directorate of Copyrights is recognized as the entity in charge of protecting the rights of authors in the modalities provided, providing a level of importance without distinction between moral or economic character.

Likewise, Article 270 of the Colombian Criminal Code regulates in a special manner the violation of the moral rights of authors, imposing a penalty of thirty-two (32) to ninety (90) months and a fine of twenty-six points sixty-six (26.66) to three hundred (300) legal monthly minimum wages in force, to whoever incurs in the following:

- i) Whoever publishes, in whole or in part, without prior authorization from the owner, an unpublished work of a literary, artistic, scientific, cinematographic, audiovisual or phonogram nature, computer program or software.
- ii) Whoever registers in the register of authorship a work under the name of a person other than the true author, or with a modified or suppressed title, or with the text altered, distorted, modified or mutilated, or who falsely mentions the name of the publisher or producer of a work of the character of those mentioned in the first paragraph.
- iii) Whoever, by any means or process, compiles, mutilates or transforms, without prior authorization of the owner, a work of any kind mentioned in the first numeral.

It is understood that, although plagiarism is not explicitly enshrined in Colombian legislation, the violation of moral rights is, in a general sense, constituted through the doctrinal conception of plagiarism.

Nowadays, both for moral reasons and because of globalization and the massification of technological and communication media, plagiarism has become a controversial issue that is usually debated all over the world.

In the music industry there have been several cases in which well-known artists have been involved in scandals for plagiarizing songs from other authors. Example of this case and bringing up a regional case, the Colombian artist Juan Luis Londoño, known by his stage name as Maluma, was accused of plagiarizing a song of a Korean origin group Got7 in 2018. After Maluma released his song Marinero, Got7 fans started a massive public denunciation through various technological and communication platforms, accusing the Colombian artist of plagiarizing the song Thank You by the South Korean group. The reason for the accusations was manifested by the use of chords



The song is similar to the melody of the Korean artists' song, however, none of the artists made any statement on the matter.

On the other hand, in 2019, Colombian artists Carlos Vives and Shakira were accused of plagiarism for their song *La bicicleta*. However, in judgment 172 of 2019, the commercial court number 12 of Madrid dismissed the lawsuit filed by the plaintiff. The plaintiff claimed that the phrase "que te sueño y que te quiero tanto" had been plagiarized with a song of her authorship in violation of her intellectual property rights. However, for the court the phrases were not similar in both songs and at the same time it did not find coincidences in the melody, speed, rhythm or harmony, so it decided to dismiss the lawsuit.

In this order of ideas, plagiarism is a phenomenon difficult to distinguish for those who learn about it, because, according to Flórez et al. (2017), in some situations it is easy to determine plagiarism in musical works, since the similarity of the works makes it evident. However, there are also occasions where plagiarism goes unnoticed, since an exhaustive study - either of the melodies or of the lyrics - must be used to determine that plagiarism is present. Therefore, it is important to draw a line between the elements that constitute plagiarism and mere creative coincidence.

4.2. *Case of the use of ia in the music industry*

Taking into account that works of art essentially have an element of creation of the human intellect, since they arise from the action of thought and free will, either totally consciously or unconsciously, it is possible to affirm that this creates an important connection to be able to grant rights over a certain work and, with this, establish a series of repercussions and guarantees over musical works (Acevedo & Vargas, 2024). However, in recent years, multiple debates have arisen about copyright, artificial intelligence (AI) and the element of originality that should exist in this context.

Acevedo and Vargas (2024) explain in this regard that, in order to consider today the existence of a creation, there must be a margin or a seal that identifies such work, this being a unique and independent characteristic that allows differentiating the works of one author from those of another. Hence, this factor is essential for a work to be considered as something creative or that, at an artistic level, has a factor that makes it totally different from another, allowing to start the process of characterization of a work and give it a place in the legal life.

That said, a central problem arises from the use of AI to generate music that imitates almost identically the voices of certain artists, generating a unique conflict not only with the originality factor, but also with the elements that make up a musical work, such as the uniqueness of the voice and the protection that exists over the chords and other aspects that make a song belong to a certain person.

Thus, the use of AI has generated multiple debates about its application, because it allows doing a work from two perspectives: i) imitating the voice of an artist, thereby violating the margin of originality, since it is not the real artist who is singing the song, and ii) the complete creation of music with AI (Pérez, 2023). In both cases there is a debate about the application of AI in music, since in the first case there is a greater conflict, since an element such as the voice is used to

The first case involves creating new songs or imitating other artists' songs, while the second case uses AI to completely create a musical work.

In both cases, the first one is the one that generates more debate, since it suppresses most of the elements that make up a musical work, even generating a violation of originality and all the elements that grant copyright to a musical work or directly to the characteristics of an artist. While, in the second case, the AI is used as a tool that ends up creating a chord, melody, lyrics or even rhythms, in such a way that it turns out to be an extension of an external person.

According to Pérez (2023), another controversy arises when a musical work is created entirely from scratch, but the voice of an artist is used by making small adjustments and vocal changes, creating a possible imitation without necessarily being so. This is when the debate about the use of AI in the musical scenario arises with greater presence. In other words, imitating a voice enters the world not only of copyright protection, but also a field that is rarely integrated within the scope of originality and copyright, which is the protection of an artist's voice, which should be the axis of all the new dynamics arising from AI within the musical field.

5. CONCLUSIONS

As a colophon, it can be indicated that music can be understood as an art arisen by the combination of voluntary sounds, where man has the intentionality of producing them with the objective of creating a pleasant harmony for the listener. In the same way, music in the framework of interpretation is based on the display of the inner world - of feelings - with the world where it is externalized what words cannot express. It is for this reason that in music there is authenticity and originality, because there will never be two artists capable of expressing the same feeling, even if the same work is interpreted, everyone has a different perspective in the understanding of art and feelings, so that intrinsic value in the interpretation of a musical work and even in its creation is rooted in the feeling of the person becoming part of his personality.

Since music is a creation product of human thought, which involves an intellectual process arising from the effort and creativity of man to be created, it is appropriate to include it within the field of intellectual property. At the same time, it is necessary that such creativity be recognized and protected, so that the author's rights or copyrights become a fundamental point within the protection of the intellectual property of those who create or perform a musical work.

In this sense, taking up again the subjective aspect of man with respect to the conception of music in relation to the personal element, it is important to point out that, as the moral rights are of a highly personal nature, the need to safeguard the rights of the artist is indisputable, since the link that he maintains with his work is exposed as a characteristic of his personality, this being an important element to protect the moral right of the persons. Intellectual property should not be all about an economic right in view of receiving remuneration, but also about that subjective character resulting from the integrity of the author, in its most internal and subjective sense.



Thus, the moral rights of authors, especially the right of paternity, is the one that maintains the guarantee of the link between the author and his work, which goes beyond the patrimonial character and intrudes into the privacy of the artist. For this reason, any violation of the moral rights of the author or performer may have direct repercussions on the very personal rights of a person, be it the moral integrity, intimacy and honor, and even the privacy of the person entitled to the right.

In addition to the above, plagiarism is the phenomenon that causes the violation of the moral rights of the artist, that which endangers the very personal rights of the copyright holder. However, with respect to plagiarism there is a problem regarding its recognition, because, although sometimes determining it is a matter without too much complexity, at other times, when it is almost invisible, it is necessary to carry out a thorough study that allows determining through various elements whether it is indeed a matter of plagiarism.

In the music industry, plagiarism is becoming more and more relevant every day, as more and more people copy and less and less innovate. By giving greater importance to the pecuniary aspect, the subjective aspects regarding the feeling of the author who creates or interprets a work are left in the background, which generates that not only the author's rights are violated, but also in the field of the moral and personal rights of the artist the breach is endangered.

Conflicts of interest

The authors indicate that there is no conflict of interest in what has been written, nor is there any possibility of possible author issues with respect to the subject matter outlined.



References

- Acevedo Caicedo, F. J. & Vargas Chaves, I. (2024) De las obras de arte aplicado a los diseños industriales: una hoja de ruta hacia el reconocimiento de los derechos morales del diseñador industrial. *El Ágora USB*. 24 (1), 326-346. <https://doi.org/10.21500/16578031.6814>
- Antequera Parilli, R. (2000). La protección internacional del derecho de autor y su papel en la promoción de la actividad creativa literaria/musical y artística. *Iuris Dictio*, 1(2).
- Bernal, D. & Conde, C. (2017) Los derechos morales de autor como derechos fundamentales en Colombia. *Revista la propiedad inmaterial*. 24 (1). 53 – 66.
- Convenio de Berna. (1886, 9 de septiembre). *Sobre la Protección de las Obras literarias y Artísticas*. https://www.oas.org/juridico/spanish/cyb-uru_Conv_Berna.pdf
- Flórez Acero, G. D., Salazar, S. & Durán, M. A. (2017). El concepto de plagio en la industria musical. En Flórez Acero, G. D. Salazar, S., Durán, M. A., Rodríguez Flórez J. C. & Sierra Marulanda. Ó. R. (Comp.). *Propiedad intelectual, nuevas tecnologías y derecho del consumo: reflexiones desde el moderno derecho privado* (pp. 67-93). Bogotá: Universidad Católica de Colombia. <https://hdl.handle.net/10983/18302>
- González, J. C. (2015) Los pájaros de Olivier Messiaen. *Mito Revista Cultural*. 26(1). 1-9.
- Guevara, J. S. (2010). *Teoría de la música. Una guía seria para toda aquella persona que quiera afianzar sus estudios de música*. https://www.academia.edu/16382118/Teor%C3%ADa_de_la_m%C3%BAsica
- Hurtado, F. R. (2017) *Derechos de autor en medios audiovisuales en Colombia, un estudio comparado con España*. [Trabajo de Grado, Universidad Católica de Colombia]. <http://hdl.handle.net/10983/15081>
- Kania, A. (2010) Silent music. *The journal of aesthetics and art criticism*, 68(4). 343-353.
- Ley 23 de 1982. (1928, 28 de enero) Congreso de la República de Colombia. DO: 35.949. <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=3431>
- Ley 44 de 1993. (1993, 5 de febrero de). Congreso de la República de Colombia. DO: 40.740. http://www.secretariassenado.gov.co/senado/basedoc/ley_0044_1993.html
- Monroy Rodríguez, J. C., Rojas Murcia, X., Sáenz Ardila, J. Y Arias Ospina, C. (2012) *El derecho de autor y los derechos conexos en la industria de la musical*. 1. Bogotá: Dirección Nacional de Derechos de Autor.
- Organización mundial de la propiedad intelectual. (1971). *Convenio para la protección de los productores de fonogramas contra la reproducción no autorizada de sus fonogramas*. <https://www.unesco.org/es/legal-affairs/convention-protection-producers-phonograms-against-unauthorized-duplication-their-phonograms>
- Organización Mundial del Comercio. (2019) ADPIC: *Aspectos de los derechos de propiedad intelectual relacionados con el comercio*. https://www.wto.org/spanish/tratop_s/trips_s/trips_s.htm
- Pérez Aguilera, J. S. (2023, 26 de febrero). *MusicLM el modelo de inteligencia artificial que desafía los derechos de autor*. [En línea]. Universidad Externado de Colombia. <https://propintel.uexternado.edu.co/musiclm-el-modelo-de-inteligencia-artificial-que-desafia-los-derechos-de-autor/>
- Régimen Común sobre Derecho de Autor y Derechos Conexos. (1993, 17 de diciembre). *Decisión 357 Cartagena*. <https://cdr.com.co/wp-content/uploads/2016/03/decisin-andina-351-de-1993.pdf>
- Sanabria, L. E. (2014) Conceptualización jurídica del plagio en Colombia. *Revista Colombiana Cir*. 29 (1). 88-97.
- Schimtz Vaccaro, C. (2005). *Propiedad intelectual a la luz de los tratados de libre comercio*. Editorial Lexis Nexis.



Sentencia C-276 de 1996 (1996, 20 de noviembre) Corte Constitucional Sala plena. [M.P. Julio Cesar Ortiz Gutiérrez]. <https://www.corteconstitucional.gov.co/relatoria/1996/c-276-96.htm>

Velásquez. J. D. (2004) *¿Qué son los derechos de autor y los derechos conexos?* [Trabajo de Grado, Universidad de los Andes]. <https://repositorio.uniandes.edu.co/server/api/core/bitstreams/8b3e2ed5-1941-4f0d-b96d-a078cae53c40/content>

