

WIPO Committee on Development and  
Intellectual Property (CDIP)

**Scoping Study on Promoting the  
Use of Intellectual Property in  
Creative Industries in the Digital Era  
in Chile, Indonesia, United Arab  
Emirates and Uruguay**

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## **ABBREVIATIONS AND ACRONYMS**

AI: artificial intelligence  
CISAC: International Confederation of Societies of Authors and Composers  
CMO: collective management organization  
DGIP: Directorate General of Intellectual Property  
DSM: Digital Single Market  
GDP: gross domestic product  
GII: Global Innovation Index  
IFPI: International Federation of the Phonographic Industry  
IRME: independent rights management entity  
NFT: non-fungible token  
OCSSP: online content-sharing service provider  
OISP: online intermediary service providers  
SME: small and medium-sized enterprise  
TDRA: Telecommunications and Digital Government Regulatory Authority  
URL: uniform resource locator  
URSEC: Communications Services Regulatory Unit  
WCT: WIPO Copyright Treaty  
WIPO: World Intellectual Property Organization  
WPPT: WIPO Performances and Phonograms Treaty

## I. OBJECTIVES AND METHODOLOGY OF THE SCOPING STUDY

This study is designed to cover issues that must be addressed in order to foster the use of intellectual property (IP) rights in the digital era in Chile, Indonesia, the United Arab Emirates and Uruguay.

It is a primary step in the framework of the project, Revised project proposal by Indonesia and the United Araba Emirates on promoting the use of intellectual property in developing countries for creative industries in the digital era (document CDIP/26/5), which was approved by the Committee on Development and Intellectual Property (CDIP) of the World Intellectual Property Organisation (WIPO).<sup>1</sup>

The project's main objective is to strengthen the use of IP rights by local creative business and companies (hereinafter, the creative industries) in the digital environment in the four beneficiary countries. It focuses on IP-related questions arising in specific subsectors.

Within this framework, the study aims to draft strategic recommendations to assist the four countries achieve their national objectives. It selects different issues in Chile, Indonesia, United Arab Emirates and Uruguay that should be addressed in fostering the role of IP rights in five selected subsectors.

Rather than adopting an academic approach, it prioritizes practical solutions and recommendations. Thus, the most important factor in the analysis is the country's own legal and economic reality, and its perceived concerns about the national IP rights system.

For this reason, this study has been based for the most part on the analysis of national legislation,<sup>2</sup> and the country's answers to a questionnaire (the survey responses).<sup>3</sup> Every national survey was open to public and private stakeholders. One document was received from each country, containing, at the least, the responses of governmental authorities. In some cases, there were inputs from private stakeholders. In specific cases, it was necessary to complement specific answers with publicly available sources.

Bearing in mind such practical matters, this study has focused on issues regarding copyright and related or neighboring rights, given these are the most affected when the creative and cultural industries market their products and services in the digital environment.<sup>4</sup>

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<sup>1</sup> For description of project objectives/development, see [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=537938](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=537938)

<sup>2</sup> Translations into English of national laws are not the author's own. A citation is included for each case.

<sup>3</sup> Where appropriate, direct reference is made to academic sources, particularly with aspects not answered or sufficiently addressed in survey responses.

<sup>4</sup> Proper mention is made where necessary of IP rights that might be affected in the selected subsectors, especially trademarks, industrial designs and, in specific cases, patents.

For this reason, when this study refers to intellectual property or IP rights, these should be understood in the continental or civil sense of the term;<sup>5</sup> that is, including solely copyright and related or neighboring rights. In a similar manner, intellectual and industrial property rights<sup>6</sup> describe the broad Anglo-Saxon concept of IP rights.

It is worth noting the references made to the creative industries include, exclusively, the six business areas expressly contemplated in the WIPO project that funds this study. Thus, only the problematic issues linked to the audiovisual, videogames, mobile applications, music, publishing and fashion industries will be considered.

From an IP rights perspective, there is no real reason to differentiate between the two market subsectors in the case of videogames and mobile applications, as the main problems involved are basically the same. Therefore, the videogames/mobile applications subsector is referred to jointly.<sup>7</sup>

Further, the concepts of videogames and mobile applications easily overlap from a copyright perspective. For this reason, videogames and other electronic games will describe a product based on a computer program that is designed mainly, and used, for gaming purposes, even when marketed through a mobile application. By contrast, the term mobile applications will refer to software marketed to be used in smartphones, tablets or other portable hardware dedicated to purposes other than gaming.<sup>8</sup>

Due to the objectives and the methodology, the recommendations included in this study should not be considered normative. They represent a balance between standard approaches and individual solutions, and are intended to be mere suggestions or proposals for action for national legislators.

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<sup>5</sup> In an international context, IP is a broad concept that includes two branches of rights: industrial property and copyright and related rights. The term is used in this sense in art. 2(viii) of the Convention Establishing the World Intellectual Property Organization, and annex 1C, art. 2(1) of the Marrakesh Agreement Establishing the World Trade Organization, signed in Morocco on April 15, 1994, as amended by the 2005 Protocol Amending the TRIPS Agreement.

<sup>6</sup> Industrial property usually refers to all forms of IP rights apart from copyright and related rights, such as patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition. The term is used in this sense in the Paris Convention for the Protection of Industrial Property, originally adopted in 1883.

<sup>7</sup> There are many ways to market a videogame or electronic game, from fee-based videogames distributed over the Internet, downloads of full versions for gaming consoles or PCs, and mobile games for smartphones and tablets, to free-to-play and fee-based online multiplayer games; see <https://www.statista.com/outlook/dmo/digital-media/video-games/worldwide?currency=usd>.

<sup>8</sup> A mobile application is based in a computer program that organizes the app's various elements, so at its core it can also be considered software. But copyright may be granted on images, graphics, designs and other elements of screen displays independent of the protection granted to the underlying computer program, as happens in videogames. See WIPO.

"Protecting your mobile app: Intellectual property solutions." *wipo.int*. 2021, p. 22. < [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1071.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1071.pdf) >.

Following this introductory chapter, this study will be divided into three further chapters. Chapter II discusses the economic and business landscape for creative industries in the digital environment in each of the four countries.

Chapter III describes the IP rights landscape at national level to identify whether legislation and its practical functioning can properly deal with the digital exploitation of works and other subject matter. And chapter IV includes recommendations to promote the use of IP rights in the digital environment in the five subsectors identified in the creative industries.



## II. MARKET LANDSCAPE FOR THE CREATIVE INDUSTRIES IN THE DIGITAL ENVIRONMENT IN CHILE, INDONESIA, UNITED ARAB EMIRATES AND URUGUAY

The current state of the creative industries in the four countries varies greatly, depending on national characteristics such as population,<sup>9</sup> development,<sup>10</sup> economics and human capital.<sup>11</sup> There are also multiples differences in the degree of development of each sector within countries.<sup>12</sup> However, all survey responses noted a strong and growing market for the creative industries, though the quality of data provided varies.<sup>13</sup>

In essence, the market landscape of the creative industries in a country is the consequence of multiple factors, including the structure of participating stakeholders, the situation in the subsectors, the evolution of the market as a result of the COVID-19 pandemic and the role of national policies in promoting the industries.

### 1. Market structure and contribution to national economy

All four survey responses provided information regarding the structure of the market (prevalence of small and medium-sized enterprises (SMEs) versus big and/or international companies) and its contribution to the national economy and workforce.

In Chile, more than 45,000 companies were operating in the market in 2020, involved in the exploitation of works and protected subject matter.<sup>14</sup> Seventy per cent of these were microbusinesses and some 10 per cent were SMEs with modest income revenue.<sup>15</sup> In a trend common within other countries, large

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<sup>9</sup> There are enormous market differences between a country such as Indonesia (estimated population 276 million, GDP of 1.19 trillion current US dollars, 2021) and Uruguay (population almost 3.5 million, GDP of 59.32 billion current US dollars, 2021); see

<https://data.worldbank.org/?locations=CL-ID-AE-UY>

<sup>10</sup> There are significant differences between the selected countries in the Human Development Index (HDI). According to the 2021–2022 report, the UAE ranks 26<sup>th</sup> (HDI of 0.911), Chile 42<sup>nd</sup> (HDI of 0.855), Uruguay 58<sup>th</sup> (HDI of 0.809) and Indonesia 114<sup>th</sup> (HDI of 0.705). See UNDP. “Human Development Report 2021/2022.” *hdr.undp.org*. 2022, p. 272. Web. Oct. 21, 2022.

[https://hdr.undp.org/system/files/documents/global-report-document/hdr2021-22pdf\\_1.pdf](https://hdr.undp.org/system/files/documents/global-report-document/hdr2021-22pdf_1.pdf)

<sup>11</sup> For example, the Human Capital Index (HCI), an indicator of social development, varies among the four countries a 20% (0.7 in Chile, 0.5 Indonesia, 0.7 UAE and 0.6 Uruguay). See

<https://data.worldbank.org/?locations=CL-ID-AE-UY>

<sup>12</sup> For instance, the percentage of the population with Internet access in 2020 ranges from 54% in Indonesia to 100% in the UAE, with Chile (88%) and Uruguay (86%) lying between. See

<https://data.worldbank.org/?locations=CL-ID-AE-UY>

<sup>13</sup> In almost all cases, figures provided did not differentiate among digital and nondigital environments and/or were only supplied by subsectors, without a global aggregated figure.

<sup>14</sup> CORFO. “Estudio de Caracterización de empresas MIPE creativas en Chile.” *corfo.cl*. July 2022, p. 27. <http://repositoriodigital.corfo.cl/handle/11373/716719>.

<sup>15</sup> *Ibid.*, p. 29.

business (only 0.6 per cent of the total number) represented 65 per cent of the total revenue in the creative industries, with microbusinesses and SMEs representing 23 per cent of sales.<sup>16</sup>

Creative businesses in 2020 represented 3.6 per cent of all companies in the country, but contributed only 1.3 per cent of national sales,<sup>17</sup> suggesting the creative industries produce at a lower rate than companies in other sectors.

Chilean companies are aware of the importance of digital tools and platforms for their businesses, but in many cases lack the training to access the new channels. More than 40 per cent of businesses consider streaming an important way to commercialize their content<sup>18</sup> but only 27 per cent think they have adequate personnel to deal with the legal matters associated with the new markets, including IP rights.<sup>19</sup> In 2020, only 37 per cent of companies registered their works and other subject matter to protect their assets.<sup>20</sup>

Regarding the contribution of creative industries to the national workforce, microbusinesses had a total of 13,000 employees in 2020, and SMEs almost 36,000. Medium business reported some 25,000 dependent workers, while big companies accumulated more than 57,000 employees, for a total of approximately 131,000 jobs. There were also an important number of nondependent workers in the industry, amounting to 152,000-plus in freelance-type employment.<sup>21</sup>

In Indonesia, the creative economy is an increasingly important sector, with 16 internal creative industries partially or totally within the scope of this study identified.<sup>22</sup> According to some studies, most of the companies operating in these subsectors (almost 92 per cent) are microbusinesses or SMEs.<sup>23</sup> As of 2016, 92 per cent of these companies recorded annual revenues under 20,000 United States dollars, and almost 96 per cent had fewer than four employees.<sup>24</sup>

According to the survey response, the creative economy plays a significant part in the national economy. The actual share of creative industries towards the national GDP is 7.35 per cent. However, much of this is due to traditionally nondigital industries such as fashion.<sup>25</sup>

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<sup>16</sup> *Ibid.*, p. 30.

<sup>17</sup> *Ibid.*, p. 29.

<sup>18</sup> *Ibid.*, p. 67.

<sup>19</sup> *Ibid.*, p. 75.

<sup>20</sup> *Ibid.*, p. 78.

<sup>21</sup> *Ibid.*, p. 31.

<sup>22</sup> See United Nations Conference on Trade and Development. "Creative Economy Outlook 2022." *unctad.org*. Oct. 7, 2022, p. 5. Web. Oct. 21, 2022. <https://unctad.org/webflyer/creative-economy-outlook-2022>

<sup>23</sup> "Special Survey of Creative Economy (Survei Khusus Ekonomi Kreatif)," qtd. in Lestariningsih, E., K. Maharani and T.K. Lestari. "Measuring creative economy in Indonesia: Issues and challenges in data collection." *Asia-Pacific Sustainable Development Journal*. Vol. 25, No. 2 (2019): p. 107.

<sup>24</sup> *Ibid.*, p. 108.

<sup>25</sup> The fashion industry makes a significant contribution, representing 18% of the creative economy in 2016, with three nondigital subsectors (culinary, fashion, crafts) making up some

The destiny of Indonesian creative products in a significant number of cases lies in exportation, especially in the videogames/mobile applications<sup>26</sup> sector or audiovisual industry (in digital animation in particular).<sup>27</sup>

According to government sources, the number of jobs directly linked to the audiovisual field in 2021 was more than 43,000, while the number of workers in the videogames/mobile applications sector was estimated to be more than 140,000. Other subsectors make up a significant part of Indonesia's workforce, with the music industry employing some 70,000, the publishing industry 428,000 and the fashion industry almost four million.<sup>28</sup> In regard to the latter, it is unclear whether all are involved in the fashion design industry or it includes other parts of the distribution chain.

The United Arab Emirates survey response estimated that the total value added of copyright industries amounts to more than 54 billion UAE dirham, representing 3.5 per cent of national GDP and 5 per cent of the non-oil GDP. The copyright industries encompass 36,295 establishments, employing 280,455 people, 3.7 per cent of the national workforce. The response also included information on the situation in some Emirates, such as Dubai, that show a great number of microbusinesses operating in the territory (more than 11,500). The country was among the top 10 developing economies in 2020 in exporting creative industries' content and services. Almost 10 per cent of country's total services exports were creative services.<sup>29</sup> The United Arab Emirates ranks 31 among the 132 economies in WIPO's Global Innovation Index (GII).<sup>30</sup>

The Uruguayan survey response did not provide global data regarding distribution by size of companies operating in the creative industries. But it did affirm that in some subsectors almost all the operating companies are microbusiness or SMEs, especially in the audiovisual industry or the videogames/mobile apps subsectors (where almost 100 per cent of national studios are a microbusiness or SME).

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70% of the total share. See Burhanudin, M., *et al.* "Analysis of creative industries development in Indonesia." *International Journal of Sciences: Basic and Applied Research*. Vol. 49, No. 1 (2020): p. 197.

<sup>26</sup> The domestic game market target amounts to approximately 30%, the remaining 70% targeting the overseas market.

<sup>27</sup> According to the Indonesian survey response, 67 of 150 local animations studies reported exports to overseas markets, particularly Canada, China, Japan, Malaysia, Singapore, South Korea, United Kingdom and the USA. This fast growth is impacting on higher education, which is offering students a more tailored education. Universities in Indonesia contribute more than 10,000 graduates in animation, multimedia and visual communication design to the national animation industry annually.

<sup>28</sup> Kementerian Pariwisata dan Ekonomi Kreatif. "Outlook Pariwisata & Ekonomi Kreatif di Indonesia 2020/2021." *kemenparekraf.go.id*. Web. Oct. 21, 2022. <https://www.kemenparekraf.go.id/pustaka/Buku-Outlook-Pariwisata-dan-Ekonomi-Kreatif-2021>.

<sup>29</sup> UNCTAD, *op. cit.*, pp. 38–52.

<sup>30</sup> WIPO. "Global Innovation Index 2022: United Arab Emirates." *wipo.int*. Web. Oct. 21, 2022. [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_2000\\_2022/ae.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_2000_2022/ae.pdf).

## 2. The situation in the different subsectors covered in this study

In Chile, the national survey reported that in the videogames/mobile applications sector, international companies dominate the national market, with the big platforms for electronic distribution of videogames, such as Sony (PlayStation) and Microsoft (Xbox), a big presence.

In Indonesia, the survey response did not provide a specific answer on the videogames/mobile applications sector. It is safe to assume, however, that even if the percentage of population with access to the Internet is still moderate, in absolute terms the volume of videogames and mobiles apps users is enormous. This is confirmed by the fact the penetration rate of smartphones in the country continues to grow exponentially.<sup>31</sup> According to some non-official reports, revenue in the videogames segment was projected to reach 1,069 million US dollars in 2022, with a user penetration ratio in the total population of 38.1 per cent. The biggest share of the market corresponds to mobile games, with a market volume of more than 629 million US dollars in 2022.<sup>32</sup>

In the videogames and electronic games industry, different international companies have a presence in the United Arab Emirates, including Ubisoft, Microsoft and Riot Games. The national mobile application market represents 60 per cent of the Middle East region, with Emirati developers producing products for the major digital platforms.<sup>33</sup> This mobile applications industry appears to be one of the most common entry points for local start-ups and young entrepreneurs looking to launch new business based on creative content.<sup>34</sup>

The Uruguayan survey indicated that the videogames/mobile application market is operated primarily by international companies, though there is a small cluster of functioning studios (20 to 30, and almost all national SMEs).

The audiovisual sector is also, in general terms, strong in the four countries, the landscape dominated by big international companies coupled with national stakeholders.

There are reportedly more than 4,000 SMEs operating in the sector in Chile, but the main streaming services are run by multinational companies, such as Amazon

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<sup>31</sup> Indonesia had a total rate of 125.6% of mobile connections in contrast to 73.7% of Internet users. See Calboli, I., and G. Hwang. "Report on the online music market and main business models in Asia: Overview and general trends." *wipo.int*. 2021. Web. Oct. 21, 2022. [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=540737](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=540737).

<sup>32</sup> Statista. "Video Games: Indonesia." *statista.com*. Web. Oct. 21, 2022.

<https://www.statista.com/outlook/dmo/digital-media/video-games/indonesia?currency=usdZ>.

<sup>33</sup> The UAE also specified that the software, databases and computer programs industry is one of the top three contributors to core copyright industries, with a total value added of almost 10 billion UAE dirham.

<sup>34</sup> According to the UAE survey response, the big mobile apps developers in the country include Group42, Branex LLC, Inserito Technologies, Appikr Labs and Qtech Networks.

Prime Video, Netflix, Disney and HBO. In 2020, 74 per cent of the Chilean population subscribed to at least one video on demand service.<sup>35</sup>

In Indonesia, apart from the international companies operating in the over-the-top and video on demand services, there are a number of national companies providing audiovisual services, some with an important number of subscribers.<sup>36</sup> There is also a flourishing animation industry, with multiple studios operating, particularly in Jakarta.

In the United Arab Emirates, the major international digital platforms in the audiovisual field occupy the dominant market position, though there are other national or regional companies operating successfully. These include MBC Shahid (which owns a big collection of Arabic content), Viu (a pan-regional platform) and beIN Connect (which specializes in broadcasting sports events).

Uruguay reports almost 1,000 companies producing audiovisual content, most owned and operated locally. However, as with the other selected countries, important digital services are provided by big international companies, with national industries producing content. There are some small national business and institutions offering content via digital platforms.<sup>37</sup>

In Chile 1,150 companies were reported to be operating in the musical sector. The dominant actors in the digital market are the four major record labels (EMI, Sony Music Entertainment, Universal Music Group, and Warner Music Group), but there is also a place for national labels such as Red Poncho, Quema su Cabeza and Iged. The main musical streaming services are operated by the big international providers, including Spotify, Apple Music, Deezer and Google. Much of the content is also published as musical videos on the international platforms and social media networks.

Transition to the model of music marketed as a digital service is advanced in Chile. The total revenue generated by digital music in 2021 was 82.64 million US dollars, an increase of 39.5 per cent,<sup>38</sup> implying the share of revenue for right holders from digital use is rising swiftly.<sup>39</sup>

Indonesia is a growing market for the digital music industry, to the point that Spotify has created a dedicated Indonesian music hub.<sup>40</sup> There are also regional services offering music in Bahasa Indonesian from independent local artists.<sup>41</sup>

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<sup>35</sup> CISAC. "Fair remuneration and economic growth in the audiovisual sector: A Latin America study." *cisac.org*. 2002. Web. Oct. 21, 2022. <https://www.cisac.org/es/Sala-de-prensa/articles/remuneracion-justa-y-crecimiento-economico-en-el-sector-audiovisual-un>.

<sup>36</sup> According to the Indonesian survey, the RCTI+ service had almost 20 million monthly active users, Vison+ (also Indonesian-owned) almost 12 million.

<sup>37</sup> The Uruguayan survey noted the CineUy platform offers 150-plus films for streaming. +Cinematheca offers movies, documentaries and short films within Cinematheca Uruguay, with a more limited commercial impact.

<sup>38</sup> See <https://branch.com.co/marketing-digital/estadisticas-de-la-situacion-digital-de-chile-en-el-2020-2021/>.

<sup>39</sup> For example, in 2019, revenue from digital uses declared by Society for Chilean Musical Authors and Performers was 22.7% of the total, rising to 44.7% in 2020 and 57.4% in 2021.

<sup>40</sup> Calboli and Hwang, *op. cit.*, p. 8.

<sup>41</sup> *Ibid.*, p. 9.

According to the country survey response, the projected GDP value of the music subsector in 2021 was 6.8 trillion Indonesian rupiah, with 70,755 workers.

No data was provided in the United Arab Emirates survey response on the characteristics of the companies operating in the music sector but it did report that the country has rapidly transitioned from a revenue model based on live music to one dominated by affordable digital streaming platforms, such as Anghami, Spotify or Apple Music.

The model of musical consumption has moved closer to global standards (with 62.1 per cent of revenue from streaming services). Revenue in the digital music segment in the United Arab Emirates was projected to reach 2,087 million US dollars in 2022.<sup>42</sup> According to the survey response, there has been an annual increase of 6.3 per cent in the compound annual growth rate (CAGR) in the sector.

The music sector in Uruguay encompasses some 150 companies, though this includes those with nondigital activity as live show producers. National record labels operate routinely on digital platforms such as Spotify, iTunes, Deezer or Google.

Regarding the current state of the publishing sector in the four countries, in Chile there are reportedly more than 4,900 companies currently operating. The digital market is dominated by international platforms such as Amazon providing e-books and other digital publications, though there are also some small e-book platforms, including Ebooks Patagonia. The sector is steadily transitioning to digital formats; in 2022, almost 40 per cent of titles published in Chile by the trade and educational subsectors were in digital or audio format.<sup>43</sup>

The Indonesian survey indicated that the GDP value of the domestic publishing sector in 2021 was 78.08 trillion Indonesian rupiah, and the export value 15.43 million US dollars.

The United Arab Emirates survey indicated that the press and book industry was part of its core copyright industries, with a total value added of almost 10 billion UAE dirham. Local and regional e-publishing companies operating in the country include ITP Media Group, Motivate Media Group and Al Nisr Publishing.

The transition to the digital market is also advanced, given many traditional publishers have developed electronic publishing services alongside their print titles or are now stand-alone businesses operating purely in the digital market. There is, however, a national regulatory framework for publishing industries in the country, and a Ministry of Culture and Youth license is required to both publish content electronically and on paper.

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<sup>42</sup> Statista. "Digital Music: United Arab Emirates." *statista.com*. Web. Oct. 21, 2022. <https://www.statista.com/outlook/dmo/digital-media/digital-music/united-arab-emirates>.

<sup>43</sup> WIPO. "World Intellectual Property Indicators 2021." *wipo.int*. 2021. Web. Oct. 21, 2022. [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_941\\_2021.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2021.pdf).

There is a small publishing sector (some 15 publishers) in Uruguay, and a conscious effort is being made to face the challenges of the digital environment and promote internationalization.<sup>44</sup>

Until recently the fashion industry had been largely unaffected by the digital revolution, and all four survey responses contributed little data on this subsector. However, as in other creative industries, this has changed with the explosion of the metaverse and other digital worlds. The creation of non-fungible tokens (NFTs) and e-clothing in the metaverse, or avatars in the gaming industry, is creating new challenges for the industry

Many traditional IP rights issues in fashion have transferred to the digital environment. This is especially true of digital clothes claiming trademarks and design protection.<sup>45</sup> In some cases, depending on the degree of originality, they could also claim copyright protection.

However, there are no more specific issues for the fashion industry in the digital markets than for the other four subsectors covered in this study. Comprehensive substantive trademark, design and copyright protection for the “physical” world should translate easily to digital work.

Chile indicated that only a modest 24 companies operated in the fashion industry.

In Indonesia, the retail industry is one of the main sources of creative revenue in the physical world. With the country transitioning from traditional markets to closed modern stores and malls, the shift to e-commerce has quickly overlapped, with several e-commerce markets that include retail and fashion products, such as Lazada.com and Tokopedia.com, already operating.<sup>46</sup>

According to the United Arab Emirates survey response, just one of the Emirate’s free-trade zones, Dubai Design District, is dedicated to the fashion industry and professional design.

Uruguay reported a significant number of businesses in the fashion industry, though most are microbusiness operating solely in the physical market.<sup>47</sup>

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<sup>44</sup> Uruguay, Planning Directorate, Planning and Budget Office. “Hacia una Estrategia Nacional de Desarrollo, Uruguay 2050: Vol. XIII – Las industrias creativas en el desarrollo del Uruguay del futuro.” *opp.gub.uy*. May 2019, pp. 26–27. [https://www.opp.gub.uy/sites/default/files/inline-files/15\\_%20Las%20industrias%20creativas%20en%20el%20desarrollo%20del%20Uruguay%20del%20futuro.pdf](https://www.opp.gub.uy/sites/default/files/inline-files/15_%20Las%20industrias%20creativas%20en%20el%20desarrollo%20del%20Uruguay%20del%20futuro.pdf).

<sup>45</sup> There have already been cases of trademark infringement in the metaverse; e.g., the MetaBirking bag, where designer Mason Rothschild created and sold 100 unauthorized Birkin bag NFTs for prices not too dissimilar from the original. Hermés, designer of the physical Birkin, argued this infringed its trademarks. The complaint was filed at US District Court in January 2022. See <https://www.hfgip.com/news/hermes-sues-metabirkin-trademark-infringement>.

<sup>46</sup> Global Business Guide. “Indonesia’s retail sector: E-commerce, the next growth driver.” *gbgindonesia.com*. 2016. Web. Oct. 21, 2022. [http://www.gbgindonesia.com/en/services/article/2016/indonesia\\_s\\_retail\\_sector\\_e\\_commerce\\_the\\_next\\_growth\\_driver\\_11631.php](http://www.gbgindonesia.com/en/services/article/2016/indonesia_s_retail_sector_e_commerce_the_next_growth_driver_11631.php).

<sup>47</sup> According to the Uruguay survey, of the 2,097 businesses operating in the fashion industry, 2,006 were microbusinesses, 162 SMEs, 26 medium-sized companies and three big companies (more than 250 workers).

### 3. Market evolution

All four national creative economies have grown significantly in recent years.<sup>48</sup> In Indonesia, for instance, the amount of GDP at market prices in the creative industries more than doubled during in the decade to 2020. In the United Arab Emirates, for example, the number of microbusinesses operating in the creative industries sector increased from 7,179 in 2019 to 11,580 in 2020.

Nevertheless, the evolution of digital markets in the five subsectors covered by this study varies to a high degree.

In the audiovisual (particularly animation) and videogame/mobile apps subsectors, the growth ratio has been strong.<sup>49</sup> In Chile, for example, the videogames and other electronic games industry grew 27.6 per cent between 2020 and 2021.<sup>50</sup> In Indonesia, the size of the animation sector increased by more than 25 per cent per year over the past five years up to 2022. The United Arab Emirates reported that the mobile application market is growing regularly, providing innovative products to users in the Middle East region. And in Uruguay, the number of audiovisual products in 2018 was double that of 2008.

In the fashion industry, growth has been significantly slower, and some survey responses (for instance, the United Arab Emirates) pointed out that while e-commerce is growing rapidly, traditional retail sales are slowing. A similar process is occurring, though to a lesser extent, in the publishing industry.

There are also new, emerging markets for the exploitation of works and other related rights in the digital environment, especially in the metaverse and the field of NFTs and other crypto collectibles. The United Arab Emirates reported that this market is already growing swiftly. Works and other subject matter created by artificial intelligence also appear to be a promising market, though the four countries did not report any activity as yet.

In many cases, the COVID-19 pandemic caused considerable difficulty, due to lack of sales, inadequate infrastructure to work from home, declining productivity and difficult communication among employees. It has also affected the ability to gather precise statistical information, especially in 2020 and 2021.

The pandemic negatively impacted some subsectors such as fashion, but also provided a boost for native digital subsectors like videogames/mobile applications, and accelerated the transition to digital streaming services in the music and audiovisual markets, and the publishing market, though to a lesser extent. And even as the physical fashion market was affected, the new status quo

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<sup>48</sup> The improved quality and speed of Internet services, generalized use of smartphones with flat-fee data subscriptions and increased security in electronic payment systems are accelerating the transition to digital markets

<sup>49</sup> According to the Indonesian survey, the national film, animation and video market almost tripled its size from 2010 to 2017.

<sup>50</sup> See <https://branch.com.co/marketing-digital/estadisticas-de-la-situacion-digital-de-chile-en-el-2020-2021/>.



contributed to the expansion of e-commerce marketplaces selling retail products, including fashion.

Data provided by the survey responses also show that the impact of COVID-19 in the creative industries has ended. For example, Indonesia reported that the creative economy's GDP value contracted slightly in 2020 (1.70 per cent) but significantly expanded in 2021 (4.04 per cent).

However, some responses indicated that uncertainties remain vis-à-vis the evolution of the creative industries over the coming years. Chile, for instance, noted a global recession would cause serious problems for many SMEs, probably accelerating the transition to the digital market due to its reduced costs.

#### **4. National policies to strengthen the creative industries in the digital environment**

Regarding national policies to strengthen the creative industries in the digital environment, all four countries cited one or more of the selected subsectors as strategic priorities.

For example, the Indonesian survey reported that the animation and mobile apps subsectors were considered important, while the United Arab Emirates indicated that music, publishing and videogames/mobile apps subsectors were prioritized.

In Chile, there is no national strategic policy specifically designated to enhance the use of IP rights in the digital environment. However, two programs are in place to promote development of creative industries: the National Culture Policy 2017–2022<sup>51</sup> and the 2017 National Plan for the Promotion of Creative Economy. Operated by the Ministry of Culture, Arts and Heritage,<sup>52</sup> they have established general guidelines for promoting creative industries.

Additionally, there are specific projects for areas such as exportation,<sup>53</sup> or the financing of audiovisual productions,<sup>54</sup> developed and carried out in some cases with public-private collaboration and funding.<sup>55</sup> Specific mappings of the music and entertainment industry subsectors have also been undertaken, including companies providing virtual and augmented reality services.<sup>56</sup>

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<sup>51</sup> See (in Spanish) <https://www.cultura.gob.cl/politicas-culturales/wp-content/uploads/sites/2/2018/01/politica-nacional-cultura-2017-2022.pdf>.

<sup>52</sup> See (in Spanish) <https://www.cultura.gob.cl/publicaciones/plan-nacional-de-fomento-a-la-economia-creativa/>.

<sup>53</sup> The program ProChile has been applied to the creative industries; see (in Spanish) <https://www.prochile.gob.cl/sectores-exportadores/industrias-creativas>.

<sup>54</sup> See <https://www.cntv.cl/fondo-cntv/>.

<sup>55</sup> The Chile Creativo program; see (in Spanish) <https://chilecreativo.cl/proyectos/>.

<sup>56</sup> UNCTAD, *op. cit.*, p. 26.

The public sector is strongly funding the cultural and creative industries. According to one report, more than 57 per cent of Chilean businesses in this field in 2022 depend on some degree of public funding.<sup>57</sup>

On the legislative side, Chile has made significant efforts to protect IP rights, approving two laws with important reforms on industrial property and illegal commerce in pirated goods.<sup>58</sup>

In Indonesia, there are several promising developments in public policies. Recent legislation, such as Law No. 24 of 2019 on creative economy, aims to promote the Indonesian creative industries in the digital market. Other governmental instruments share the same objective, including Government Regulation No. 24 of 2022, an implementing regulation for the creative economy law,<sup>59</sup> and Presidential Regulation No. 142 of 2018 concerning the creative economy masterplan.<sup>60</sup>

An IP Taskforce has also been established to improve coordination on IP enforcement,<sup>61</sup> and has undertaken several initiatives to address online piracy, including increased enforcement efforts and cooperation between the Ministry of Communications and Informatics (MOCI) and the Directorate General of Intellectual Property (DGIP).<sup>62</sup>

Throughout 2021, Indonesia undertook activities to develop and promote its creative industries at national, bilateral, regional and multilateral levels, via collaboration with stakeholders.<sup>63</sup> The country ranks 75<sup>th</sup> among the 132 economies featured in WIPO's Global Innovation Index (GII), significantly

<sup>57</sup> CORFO, *op. cit.*, p. 62.

<sup>58</sup> Chile, Law No. 19.039 of March 6, 2006 on industrial property, as consolidated by Decree-Law No. 4 of June 20, 2022 incorporating amendments up to Law No. 21.335 of July 5, 2021; see (in Spanish) <https://bcn.cl/299v0>. The law provided statutory damages; see art. 108. Law No. 21.335 included criminalizing trademark falsification, recognizing non-traditional marks, introducing provisional applications for patents, incorporating broader definition of trade secrets and extending the term of protection for industrial designs to 15 years. Chile later passed Law No. 21.426 of February 12, 2022 on illegal commerce; see (in Spanish) <https://bcn.cl/2xi9n>. This criminalized aiding and abetting the trade of counterfeit, pirated and other types of illicit goods and authorized more severe fines and penalties. Specifically, new art. 28 introduced a minimum prison sentence for trademark infringement and commercial counterfeiting, which was previously subject only to fines. See Office of the United States Trade Representative. "2022 Special 301 Report." *ustr.gov*. 2022, p. 42. Web. Oct. 21, 2022. <https://ustr.gov/sites/default/files/IssueAreas/IP/2022%20Special%20301%20Report.pdf>; and U.S. Chamber of Commerce. "2022 International IP Index." *uschamber.com*. 2022, pp. 132–133. Web. Oct. 21, 2022. <[https://www.uschamber.com/assets/documents/IPIndex-FullReport\\_2022.pdf](https://www.uschamber.com/assets/documents/IPIndex-FullReport_2022.pdf)>.

<sup>59</sup> Serves as the implementing regulation for Indonesia's Law No. 24 of 2019, coming into effect in one year of its enactment. Its main object is to reaffirm IP-based financing as a scheme that utilizes IP as a security to obtain financing from financial institutions; see <https://aklaw.co.id/new-government-regulation-enabling-ip-based-financing-to-support-development-of-creative-economy>.

<sup>60</sup> In Indonesia, the normative instruments for IP protection include, laws, government regulations, presidential regulations and regulations of the Minister of Law and Human Rights.

<sup>61</sup> Office of the United States Trade Representative, *op. cit.*, p. 12.

<sup>62</sup> *Ibid.*, p. 58.

<sup>63</sup> UNCTAD, *op. cit.*, p. 82.

improving its standing in 2022, particularly in innovation outputs, when compared with the preceding two years.<sup>64</sup>

The United Arab Emirates launched the National Strategy for the Cultural and Creative Industries (CCI National Strategy) in 2021. Covering a 10-year span, the policy aims to increase the creative industries' contribution to 5 per cent of GDP.<sup>65</sup> The national strategy has 40 specific initiatives to promote creativity and enhance the professional and business environments in the sector, with the goal of doubling the number of enterprises operating in the country within a decade.<sup>66</sup>

An important feature of federal and State policies<sup>67</sup> is the creation of free-trade zones to attract creative business,<sup>68</sup> with many operating in the digital environment. There has also been a great push on the educational front,<sup>69</sup> and these policies have situated the United Arab Emirates at the top of the world ranking for entrepreneurship policies and culture, according to the 2022 GII.<sup>70</sup> Further, there has been an important legislative effort in the field of industrial property, approving new trademarks<sup>71</sup> and IP rights protection laws.<sup>72</sup>

In Uruguay, two main programs publicly fund audiovisual productions, and other programs are oriented towards the videogames sector.<sup>73</sup> National policies, according to government sources, include internalization, creating quality products and services, promoting institutional coordination, and supporting professional training,<sup>74</sup> specifically around IP rights management in the digital

<sup>64</sup> WIPO. "Global Innovation Index 2022: Indonesia." *wipo.int*. Web. Oct. 21, 2022.

[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_2000\\_2022/id.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_2000_2022/id.pdf).

<sup>65</sup> See <https://u.ae/en/about-the-uae/strategies-initiatives-and-awards/federal-governments-strategies-and-plans/national-strategy-for-the-cultural-and-creative-industries#:~:text=Launched%20in%202021%2C%20the%20UAE's,the%20national%20GDP%20by%202031>.

<sup>66</sup> The UAE facilitates the obtention of visas for qualified entrepreneurs in the creative industries; see <http://wam.ae/en/details/1395302998166>.

<sup>67</sup> In Dubai, the Department of Economy and Tourism has been working to build an appropriate regulatory environment for the virtual assets space. It has collaborated to create promotional and touristic audiovisual and musical content in the Emirates and promoted videogame events in the region.

<sup>68</sup> Includes twofour54 in Abu Dhabi, and Dubai Media City (for media industry), Dubai Internet City (information technology businesses), Dubai Design District (fashion industry/professional design) and Al Quoz Creative Zone in Dubai.

<sup>69</sup> For example, the Dhahi Khalfan Intellectual Property Center provided IP academic courses and applied training, and held remote training courses for 5,300 local and international participants. See Office of the United States Trade Representative, *op. cit.*, p. 11.

<sup>70</sup> WIPO. "Global Innovation Index 2022: United Arab Emirates," *op. cit.*, p. 6.

<sup>71</sup> UAE, Federal Law No. 36 of December 20, 2021 on trademarks and geographical indications; see <https://u.ae/-/media/Documents-2022/Trademarks-law-no-36--of-2021-on-trademarks.ashx>.

<sup>72</sup> UAE, Federal Law No. 11 of May 31, 2021 on the regulation and protection of industrial property rights; see <https://wipolex.wipo.int/en/text/584451>.

<sup>73</sup> According to the Uruguay survey response, these include a public funding program for videogames, organized competitions for local talent and business incubators to help start-up companies.

<sup>74</sup> Uruguay, Planning Directorate, Planning and Budget Office, *op. cit.*, p. 40.

environment<sup>75</sup> to encourage innovation.<sup>76</sup> The focus on professional training aims to achieve a more active involvement in higher education, better management of human resources and promotion of courses directed at professionals in the creative industries.<sup>77</sup>

Uruguay also has some clusters in different subsectors (music, audiovisual, publishing, design) that serve as a connection point for public policymakers and private stakeholders,<sup>78</sup> plus a specific program with funding and tax incentives for the audiovisual industry.<sup>79</sup> Industrial property legislation has recently been partially updated.<sup>80</sup>

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<sup>75</sup> *Ibid.*, p. 45.

<sup>76</sup> Uruguay ranks 64<sup>th</sup> among the 132 economies featured in the GII 2022. At regional level, it ranks 5<sup>th</sup> among the 18 economies in Latin America and the Caribbean. See WIPO. "Global Innovation Index 2022: Uruguay." *wipo.int*. Web. Oct. 21, 2022.

<[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_2000\\_2022/uy.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_2000_2022/uy.pdf)>.

<sup>77</sup> Uruguay, Planning Directorate, Planning and Budget Office, *op. cit.*, p. 59.

<sup>78</sup> See <https://www.gub.uy/ministerio-educacion-cultura/politicas-y-gestion/sectores-industrias-creativas-culturales-icc>.

<sup>79</sup> See <https://uruguayaudiovisual.com/>.

<sup>80</sup> Uruguay, Law No. 17.164 of September 2, 1999 on patents, as amended up to Law No. 19.924 of December 18, 2020; see (in Spanish) <https://wipolex.wipo.int/en/text/583266>); and Law No. 17.011 of September 25, 1998 establishing provisions on trademarks, as amended up to Law No. 19.670 of October 15, 2018; see <https://wipolex.wipo.int/en/text/585239>.

### III. THE IP RIGHTS LANDSCAPE AND CHALLENGES FOR THE CREATIVE INDUSTRIES IN THE DIGITAL ENVIRONMENT IN CHILE, INDONESIA, UNITED ARAB EMIRATES AND URUGUAY

#### 1. Role of IP rights for the functioning of creative industries in the digital environment

As we have seen, there are substantial differences in the creative industries operating in the digital markets in the four countries. From a legal point of view, however, this matters little. Even if the constitutional framework and legal traditions differ dramatically, these variations are much less important in copyright law.

This is a part of the law that has benefited from the coming into force of different international multilateral treaties with references between them.<sup>81</sup> It has created a truly international copyright regime that is, to some degree, homogeneous. This guarantees the principles of territoriality and national treatment, a protection system with no formalities required, and a minimum level of protection for duration, moral and economic rights, exceptions and limitations, among other things. The main pillars of this international network in the case of author rights are the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),<sup>82</sup> the WIPO Copyright Treaty (WCT)<sup>83</sup>, the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh VIP Treaty)<sup>84</sup> and the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement.

To a lesser extent, this process has also occurred in related rights field, especially for the rights of performers and phonogram producers, with treaties such as the WIPO Performances and Phonograms Treaty (WPPT),<sup>85</sup> the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)<sup>86</sup> and the Beijing Treaty on Audiovisual Performances.<sup>87</sup> The TRIPS Agreement also has rules on related rights, with close connections to the Rome Convention and the WPPT.

There is also a more subtle factor that approximates the country regimes on copyright and related rights. All, to some degree, have their legal roots in the *droit*

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<sup>81</sup> See, for instance, references in art. 9(1) of the TRIPS Agreement to arts. 1–21 of the Berne Convention, with the exclusion of art. 6*bis* for moral rights.

<sup>82</sup> The Berne Convention adopted on September 9, 1886, last amended on September 28, 1979.

<sup>83</sup> WIPO Copyright Treaty adopted in Geneva on December 20, 1996.

<sup>84</sup> The Marrakesh VIP Treaty adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh on June 27, 2013; see <https://wipolex.wipo.int/en/text/301016>.

<sup>85</sup> WPPT adopted in Geneva on December 20, 1996.

<sup>86</sup> The Rome Convention accepted in Rome on October 26, 1961.

<sup>87</sup> The Beijing Treaty on Audiovisual Performances adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing on June 24, 2012; see <https://wipolex.wipo.int/en/text/295838>.

*d'auteur* tradition,<sup>88</sup> rather than in the Anglo-Saxon copyright system. All four countries regulate moral rights, and three base their legislation in the humanistic approach of the continental legal tradition, with Indonesia having a more hybrid character.

Regarding the role of IP rights in the selected countries, the four survey responses all show that copyright and related rights are a crucial part of the day-to-day operation of the creative industries in the digital markets. In fact, almost all sources of monetizing digital works and other subject matter – from classical streaming and downloading, to newer markets such as sales in social networks, or creating NFTs in the blockchain – requires the management of complex IP rights.

Common ground on the legal concerns are manifested in the survey responses, which suggest the need to correctly define the concept of work and other protected subject matter in digital formats, cover new ways to monetize content (NFTs, works created by artificial intelligence), define precisely the national exceptions and limitations to balance the *ius prohibendi* (the right to authorise or prohibit the use of the work) of right holders with other public interests, and provide a solid enforcement system that avoids infringement in the online environment.

Some concerns regarding specific areas were expressed in the survey responses. Chile, for example, indicated a problem in the digital market with the registration and traceability of copyright and related rights that negatively influences proper copyright clearance, as many transactions in the country are not always registered, or even documented in writing. This is especially true with phonograms, given many independent record labels do not keep track of their contracts with performers. The difficulty of collecting fees for musical and audiovisual providers domiciled outside Chile was also mentioned, and, in certain cases, problems related to enforcing IP rights and excessive dependence on public subsidies.

Uruguay noted that lacking knowledge of the copyright regime in audiovisual works might hinder creation in this field, specifically in the case of scripts, which do not require high amounts of financial investment.

## **2. Substantive rules for protection of IP rights in the digital environment**

It is beyond the scope of this study to describe the national copyright and related rights legislation in the selected countries. Our analysis will focus, instead, on four areas of legal protection of copyright and related rights considered crucial to guarantee adequate protection of rights in the digital environment. These include the scope of works protected by copyright, and its adaptation to new forms to express creativity in a digital form, the economic rights protected by copyright,

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<sup>88</sup> For example, Spanish and French Law have clearly influenced copyright legislation in Chile and Uruguay.

the exceptions and limitations<sup>89</sup> to economic rights, and the rules on ownership and transfer of copyright and related rights.

Two further areas concerning the practical functioning of IP rights deserving of individual attention will be dealt with separately, namely the national system of collective management and the enforcement of rights in the digital environment, including the rules for attributing liability for copyright infringement to online intermediary service providers (OISPs<sup>90</sup>) by acts committed by their users.

#### A. Legal regime, copyright subject matter and formalities

In Chile, Art. 19(25) of the Constitution recognizes and guarantees intellectual and industrial property as fundamental rights, derived from the right of property.<sup>91</sup> Law No. 17.336 on intellectual property (Copyright Act),<sup>92</sup> as amended up to Law No. 21.045,<sup>93</sup> establishes the legal framework for copyright and related rights in the country. Law No. 20.243<sup>94</sup> and Law No. 20.959<sup>95</sup> also recognize some moral and economic rights for audiovisual performers, and writers and directors of audiovisual works.

With regard to the international scenario, Chile is a contracting party of the main international treaties on copyright and related rights (Berne Convention, the WCT,<sup>96</sup> Marrakesh VIP Treaty, Beijing Treaty on Audiovisual Performances,<sup>97</sup> WPPT Treaty, Rome Convention and the TRIPS Agreement<sup>98</sup>) and has included the principle of national treatment in the Copyright Act,<sup>99</sup> guaranteeing foreign

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<sup>89</sup> This terminological difference serves to separate situations in which the right holder is totally dispossessed of the content of the economic right (exceptions) from those in which he lacks an *ius prohibendi* but can still receive some economic income, normally in the form of a right of mere remuneration (limitations).

<sup>90</sup> Those are companies providing intermediation services to Internet users, such as hosting or access to the network.

<sup>91</sup> For an English version of Chile's constitution, see [https://www.constituteproject.org/constitution/Chile\\_2021?lang=en](https://www.constituteproject.org/constitution/Chile_2021?lang=en)

<sup>92</sup> Chile, Law No. 17.336 of October 2, 1970 on intellectual property; see (in Spanish) <https://bcn.cl/299v0>.

<sup>93</sup> Chile, Law No. 21.045 of November 3, 2017 to create the Ministry of Culture, Arts and Heritage; see (in Spanish) <https://bcn.cl/2jy6q>.

<sup>94</sup> Chile, Law No. 20.243 of February 5, 2008 on moral and economic rights of performers of artistic executions fixed in audiovisual format; see (in Spanish) <https://bcn.cl/2w53b>.

<sup>95</sup> Chile, Law No. 20.959 of October 29, 2018 extending the application of Law No. 20.243; see (in Spanish) <https://bcn.cl/35vu2>.

<sup>96</sup> Chile, Decree No. 270 of November 28, 2022 promulgating the WCT; see (in Spanish) <https://bcn.cl/2puzt>.

<sup>97</sup> Chile, Decree 122 of February 3, 2022 promulgating the Beijing Treaty on Audiovisual Performances; see (in Spanish) <https://bcn.cl/3926h>.

<sup>98</sup> Chile acceded to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol) in 2022, but is not part of the Singapore Treaty on the Law of Trademarks, the Patent Law Treaty or the Hague Agreement Concerning the International Registration of Industrial Designs.

<sup>99</sup> Chile, Copyright Act, *op. cit.* art. 2.

authors treatment no less favourable than that afforded its own nationals concerning the protection of copyright and related rights.<sup>100</sup>

IP law states that a work is protected by copyright by the mere fact of its creation.<sup>101</sup> There are no other requirements such as fixation, novelty or registration.

The law includes an open list of works.<sup>102</sup> This means works not expressly mentioned on the list can still receive copyright protection, as opposed to the closed list systems present in countries following the Anglo-Saxon tradition, where protection is awarded only to the works expressly mentioned in law.<sup>103</sup>

Chilean legislators have expressly mentioned computer programs<sup>104</sup> and some works commonly used in the fashion industry, such as textile designs or models, as protected works.<sup>105</sup>

The law contemplates a voluntary registration system for works and other subject matter.<sup>106</sup> The full or partial transfer of the copyright or related rights, on any basis, can also be registered.<sup>107</sup> Registration is operated by the Intellectual Property Department of the Ministry of Culture, Arts and Heritage,<sup>108</sup> with the procedure detailed in the regulation to the intellectual property law.<sup>109</sup>

In Indonesia, Law No. 28 of 2014 on copyright (Copyright Act) is the law regulating copyright and related rights.<sup>110</sup> The country has also ratified or acceded to the Berne Convention,<sup>111</sup> WCT,<sup>112</sup> Marrakesh VIP Treaty, WPPT,<sup>113</sup> Beijing Treaty on Audiovisual Performances and the TRIPS Agreement. It is not, however, party to the Rome Convention.

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<sup>100</sup> Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979) (Authentic Text).” *WIPO Lex*. World Intellectual Property Organization. Art. 5(1). <<https://wipolex.wipo.int/en/text/283693>>.

<sup>101</sup> Chile, Copyright Act, *op. cit.*, art. 1(1).

<sup>102</sup> *Ibid.*, art. 3.

<sup>103</sup> See, for example, in the United Kingdom, the 1988 Copyright, Designs and Patents Act, art. 1.

<sup>104</sup> Chile, Copyright Act, *op. cit.*, art. 3(16).

<sup>105</sup> *Ibid.*, art. 3(18). The definition of computer program is in art. 5(t).

<sup>106</sup> *Ibid.*, arts. 72–76.

<sup>107</sup> *Ibid.*, art. 73.

<sup>108</sup> Registration can be performed digitally using the national registry platform; see (in Spanish) <https://www.propiedadintelectual.gob.cl/servicios>. Also, the national survey reported that Chilean right owners were using digital registries in the musical sector privately operated by collective management organizations or IFPI Centre of National Integrated Registers.

<sup>109</sup> Approved by Decree No. 277 of October 28, 2013 on Regulation of Law No. 17.336 on intellectual property; see (in Spanish) <https://www.bcn.cl/leychile/navegar?idNorma=1055543>. For the registration process, see arts. 7–23.

<sup>110</sup> Indonesia, Law No. 28 of 2014 on copyright, art. 106 (Copyright Act). The law entered into force on October 16, 2014. For an English version, see <https://wipolex.wipo.int/en/text/578071>

<sup>111</sup> Indonesia, Presidential Decree No. 18 of 1997, instrument of accession of June 5, 1997, entry into force on September 5, 1997.

<sup>112</sup> Indonesia, Presidential Decree No. 19 of 1997.

<sup>113</sup> Indonesia, Presidential Decree No. 74 of 2004.



Regarding copyright protected subject matter, according to the Copyright Act the term copyright “means an exclusive right of the author vested automatically on the basis of declaratory principle after Works are embodied in a tangible form without reducing by virtue of restrictions in accordance with the provisions of laws and regulations”.<sup>114</sup>

The definition of work includes not only those resulting from inspiration, ability, thought or imagination, but also those emerging from dexterity, skill or expertise. Originality is, therefore, not a *sine qua non* prerequisite for protection, and consequently skill and labor works are protected.<sup>115</sup>

The list of protected works is a closed one<sup>116</sup> but expressly includes many works directly linked to the digital environment, such as electronic databases,<sup>117</sup> computer programs<sup>118</sup> and videogames.<sup>119</sup> The law also contemplates protection for works of applied arts, such as fashion designs.<sup>120</sup>

The Copyright Act contains different provisions for registration of works and related rights subject matter, but following the Berne convention, registration is not a requirement to obtain copyright and related rights protection.<sup>121</sup>

The copyright registry is operated by the Directorate General of Intellectual Property (DGIP), and the law contemplates (that is, takes into consideration) a process to invalidate the registration.<sup>122</sup> Licenses and contracts transferring copyright and related rights can be recorded, and must be to have an effect against third parties.<sup>123</sup> There are also rules to transfer the registered rights to third parties when the substantive rights have been already transferred.<sup>124</sup>

In the United Arab Emirates, the recent Federal Decree-Law No. 38 of 2021 on copyrights and neighbouring rights (Copyright Act)<sup>125</sup> updated the rights regime, replacing the 2002 law.<sup>126</sup>

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<sup>114</sup> Indonesia, Copyright Act, *op cit.*, art. 1(1).

<sup>115</sup> *Ibid.*, art. 42. Expressly excludes some works from protection, such as laws and regulations. Art. 41 states that protection does not cover works not embodied in tangible form. Also ideas, procedure, system, method, concept, principle, findings or data, even when incorporated in a work, and tools, objects or products created solely to resolve technical problems or only serving functional needs.

<sup>116</sup> *Ibid.*, art. 40.

<sup>117</sup> *Ibid.*, art. 40(1)(p).

<sup>118</sup> *Ibid.*, arts. 1(3) and 40(1)(s).

<sup>119</sup> *Ibid.*, art. 40(1)(r).

<sup>120</sup> *Ibid.*, art. 40(1)(g).

<sup>121</sup> *Ibid.*, art. 64.

<sup>122</sup> *Ibid.*, arts. 74 and 75.

<sup>123</sup> *Ibid.*, art. 83.

<sup>124</sup> *Ibid.*, arts. 76 and 77.

<sup>125</sup> UAE, Federal Decree-Law No. 38 of 2021 on copyrights and neighbouring rights (Copyright Act). Promulgated on September 20, 2021, it entered into force on January 2, 2022. For an English version, see Ministry of Economy website at <https://www.moec.gov.ae/documents/20121/376326/copyright.pdf/1b4d5d16-8e3c-6012-afa8-56cd4eb008da?t=1645596129916>

<sup>126</sup> “United Arab Emirates Constitution” (as amended in 2011). *WIPO Lex*. World Intellectual Property Organization. Art. 121 states the federation will have exclusive legislative jurisdiction in

At international level, the United Arab Emirates has also ratified or acceded to the main international treaties<sup>127</sup> (Berne Convention, WCT, Marrakesh VIP Treaty,<sup>128</sup> Rome Convention, Beijing Treaty on Audiovisual Performances,<sup>129</sup> and TRIPS Agreement). This guarantees the principles of territoriality and national treatment are respected.

Considered as a *droit d'auteur* or civil law system under the laws of 1992 and 2002,<sup>130</sup> the 2021 Copyright Act maintains this traditional affiliation. For example, the law grants moral rights to authors<sup>131</sup> that cannot be assigned or waived,<sup>132</sup> and the list of works is a nonexclusive or open one.

The Copyright Act has implicitly opted for originality<sup>133</sup> as the distinctive criteria to gain protection,<sup>134</sup> and the list of protected works has expressly included some native digital works such as, “smart applications, computer programmes and applications, databases, and similar works determined by a decision of the minister”.<sup>135</sup> Computer programs and mobile apps (or apps used mainly in smartphones or tablets) are therefore recognized in the law as a new addition.

Original works can be registered in the United Arab Emirates but it is not a prerequisite for protection,<sup>136</sup> given the law expressly states that non-registration of the work will not result in a breach of any aspect of the protection established in the law.<sup>137</sup>

Emirati law has also provided a solution to the case of original of work being sold (manuscript, sculpture or painting). Unless otherwise agreed, the buyer acquires only the physical property of the original, not the economic rights.<sup>138</sup>

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protecting intellectual, technical and industrial property rights, copyright printing and publishing rights. For an English version, see <https://wipolex.wipo.int/en/text/568259>.

<sup>127</sup> The UAE acceded to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Trademarks (Madrid Protocol) in 2021. In 2022, it acceded to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.

<sup>128</sup> UAE, Federal Decree No. 233 of 2016 on accession to the Marrakesh VIP Treaty.

<sup>129</sup> UAE, Federal Decree No. 20 of 2017 on accession to the Beijing Treaty on Audiovisual Performances.

<sup>130</sup> Makeen, F.M. “The protection of musical works under the UAE Copyright Act.” *Journal of the Copyright Society of the USA*. Vol. 57, No. 4 (2010): p. 748.

<sup>131</sup> It seems moral rights can only be attributed to physical persons, as with other personality rights. But art. 5 of the UAE Copyright Act refers generally to “authors”, and according to the definitions in art. 1, an author can be either a physical or a legal person.

<sup>132</sup> To reaffirm its affiliation with the civil law countries, art. 16 of the UAE Copyright Act establishes some moral rights for performers.

<sup>133</sup> To be protected, a work must be an innovative production in the fields of literature, arts, or science, of whatever type, manner of expression, significance or purpose. But this same art. 1 defines innovation as “the innovative character *that bestows originality and distinction* upon the work” [emphasis added].

<sup>134</sup> That means “works” made only through skill and labor are not protected. See Makeen, *op. cit.*, p. 751.

<sup>135</sup> UAE, Copyright Act, *op. cit.*, art. 2(1).

<sup>136</sup> Berne Convention, *op. cit.*, art. 5(2).

<sup>137</sup> UAE, Copyright Act, *op. cit.*, art. 4(2).

<sup>138</sup> UAE, Copyright Act, *op. cit.*, art. 13(1).

In Uruguay, the constitution recognizes the protection of authors' and related rights and other IP rights in Article 33.<sup>139</sup> Law No. 9.739 on copyright (Copyright Act) establishes the general copyright regime.<sup>140</sup> Originally published in 1937, it was substantially updated in 2003.<sup>141</sup>

At international level, Uruguay is part of the Berne Convention, WCT, Marrakech VIP Treaty, Rome Convention, WPPT and the TRIPS Agreement. It is not, however, party to the Beijing Treaty on Audiovisual Performances. Consistent with this international regime, the Copyright Act recognizes the principle of national treatment.<sup>142</sup>

The definition of a work in Uruguay includes any literary, scientific or artistic creation. The author has also right of ownership over the "productions of his thought, science or art".<sup>143</sup> The law does not expressly require originality for a work to receive copyright protection.

The Copyright Act contains a non-exhaustive list of works that includes some native digital works, such as computer programs and databases.<sup>144</sup> It also includes some works routinely used in the fashion world, including designs or creations having artistic value as regards dress design, if they are not protected by the legislation on industrial property.

The protection of works and related rights in the Copyright Act is not subordinate to any formality or registration,<sup>145</sup> though there is a voluntary copyright registry, included in Regulation of Law No. 17.216.<sup>146</sup> Technical operation of the registry is dependent on the National Library, while the Copyright Council (the regulatory copyright body) manages the legal aspects of the registration process.<sup>147</sup> Contracts transferring right or licenses authorizing certain uses can also be registered.<sup>148</sup>

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<sup>139</sup> Previously, authors' rights were protected in the Uruguayan Civil Code of 1869. See Montaña, Bugallo B. "El autor y su protección constitucional en el Uruguay: consideraciones generales." *Revista Do Direito de Autor*. No. 35 (2021): p. 74.

<sup>140</sup> Uruguay, Law No. 9.739 of 1937 on copyright (Copyright Act); see (in Spanish) <https://www.impo.com.uy/bases/leyes/9739-1937>. The law was originally published in 1937, and is available amended as up to Law No. 19.857 of December 23, 2019, which extended the term of protection of economic rights for copyright and related right owners to 70 years; see art. 1 (in Spanish) at <https://www.impo.com.uy/bases/leyes/19857-2019/1>

<sup>141</sup> Uruguay, Law No. 17.616 of October 1, 2003 on intellectual property protection; see (in Spanish) <https://www.impo.com.uy/bases/leyes/17616-2003/1>. Also, Law No. 19.149 of October 24, 2013 on accountability and balanced budget execution for 2012; see (in Spanish) <https://wipolex.wipo.int/en/text/363856>.

<sup>142</sup> Uruguay, Copyright Act, *op. cit.*, art. 4.

<sup>143</sup> *Ibid.*, art. 1.

<sup>144</sup> *Ibid.*, sect 5. Clarifies that the list includes "any production of the domain of intelligence".

<sup>145</sup> *Ibid.*, art. 6.

<sup>146</sup> Uruguay, Decree No. 154/004 of May 3, 2004 establishing Regulation of Law No. 17.616 on copyright and related rights, arts. 2–11; see (in Spanish) <https://wipolex-res.wipo.int/edocs/lexdocs/laws/es/uy/uy036es.pdf>

<sup>147</sup> See <https://www.gub.uy/ministerio-educacion-cultura/politicas-y-gestion/consejo-derechos-autor-uruguay>

<sup>148</sup> Uruguay, Copyright Act, *op. cit.*, art. 55; and Decree No. 154/004, *op. cit.*, sect 7.

## B. Scope of protection: Economic rights

In many jurisdictions around the world, copyright follows the tradition of the Berne Convention, providing for both moral and economic rights. Some moral rights are guaranteed by the Convention,<sup>149</sup> and belong only to the author as a natural person.

Moral rights are generally inalienable, even when the economic rights have been assigned to a third party. In some cases, they can be exercised by heirs or other designated parties even after the author's death. A number of countries also recognize some moral rights of performers.

From an economic standpoint, the core power of the copyright owner is to authorize or prohibit the economic exploitation of their work. To legally articulate this power, national legislators typically state that the author has the right to authorize or prohibit certain acts of exploitation of their work (exclusive rights). The exact number and definition of the author's economic rights vary in different legislations, but for the most part they are standardized by the main international copyright conventions.

Most countries will, therefore, recognize the exclusive rights of reproduction of the work in any form, distribution of the original or copies (including its rental and lending), communication to the public in various manners (public performance, broadcasting or making available online) and translation into other languages, adaptations or other transformations.

The variety of exclusive rights recognized in national legislation is wider for neighboring rights, as the level of international harmonization achieved through the treaties and conventions is lower.

Of the selected four countries, some also include in their legislation the so-called equitable remuneration rights.<sup>150</sup> In this instance, the exclusive right does not apply. The user can utilize the protected work or other protected subject matter, paying the right holder a pecuniary remuneration fixed by law. The law often collectively manages these rights.

In general, laws in the selected countries have adapted the definitions of economic rights to encompass the technological developments of the digital era, especially after adjusting national legislation to adhere to the WCT and the WPPT. The economic rights of the different related right owners have also been correctly adapted to the digital exploitation of subject matter in national law. There are, however, differences among the countries.

In Chile, there is a general right to authorize any economic use of the work, granting the copyright holder the right to assign, in full or in part, their rights on

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<sup>149</sup> Berne Convention, *op. cit.*, art. 6*bis*. Grants the author the right of paternity and the right of integrity.

<sup>150</sup> For example, performers and/or phonogram producers in some cases of communication to the public of phonograms, following the regime of art. 12 of the Rome Convention.

the work and to authorize its use by third parties.<sup>151</sup> The law also defines the *ius prohibendi* of the copyright owner, stating that no one may make public use of a work in the private domain without having obtained the express authorization of the copyright holder.<sup>152</sup>

It includes a varied set of exclusive economic rights to authors (for instance, reproduction, or distribution), and also recognizes an untransferable right of equitable remuneration to some authors of audiovisual works (directors and screenwriters).<sup>153</sup>

The Copyright Act contemplates a broad definition of the right of reproduction that covers all digital copies, including temporary copies.<sup>154</sup> This could interfere with the legal status of transient and ancillary copies created while making the content available to the public.

For this reason, Chilean legislators included a specific provision to exempt the transient and ancillary acts of reproduction performed during Internet transmissions from the reproduction right, provided they do not have independent economic significance.<sup>155</sup> This is an appropriate means of dealing with on-screen and transient copies derived for the transmission of work performed in the framework of an act of communication to the public or making available to the public.

The law has adapted the right of communication to the public to align with Article 8 of the WCT, thus including a right to make available to the public in such a way that they may access these works from a place and at a time chosen by them.<sup>156</sup>

There are also rules on economic rights for digital works, such as computer programs, that in practice will be applicable to videogames and mobile applications.<sup>157</sup>

Chile has recognized authors' moral rights.<sup>158</sup> These rights are inalienable, and any agreement to the contrary will be null and void. The exercise and defence of moral rights is transmitted upon death to the surviving spouse and to the author's *ab intestato* successors (when a person dies without a valid will).

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<sup>151</sup> Chile, Copyright Act, *op. cit.*, art. 17. Art. 18 defines the different rights of the copyright holder, such as the right to publish or reproduce the work, the right of adaptation or translation, public performance, etc.

<sup>152</sup> Chile, Copyright Act, *op. cit.*, art. 19(1). The amount and paying mechanism for the equitable remuneration right for the next eight years was agreed by rights society ANT and the country's main broadcasting organizations in 2022; see <http://www.atn.cl/anatel-firma-historico-acuerdo-con-directores-y-guionistas-de-atn>

<sup>153</sup> Chile, Law No. 20.959, *op. cit.*, art. 1.

<sup>154</sup> Chile, Copyright Act, *op. cit.*, sect 5(u).

<sup>155</sup> *Ibid.*, art. 71(O).

<sup>156</sup> *Ibid.*, art. 5(v).

<sup>157</sup> *Ibid.*, art. 37 bis on rental right of a computer program.

<sup>158</sup> *Ibid.*, art. 1(2). Art. 14 recognizes diverse moral rights, including the right of paternity, the right of integrity and the right to authorize divulgation of the work.

National legislation recognizes disparate economic rights for musical<sup>159</sup> and audiovisual performers,<sup>160</sup> phonogram producers<sup>161</sup> and broadcasting organizations.<sup>162</sup> The law distinguishes between exclusive rights and rights of equitable remuneration for some of these right holders.<sup>163</sup> Audiovisual performers have different equitable remuneration rights attributed in the law for different acts of communication to the public, making available or rental.<sup>164</sup> Musical and audiovisual performers also have some moral rights.<sup>165</sup>

Indonesia's Copyright Act recognizes authors' economic and moral rights.<sup>166</sup> The author has a general right to gain any economic benefit from the work<sup>167</sup> and a variety of specific rights, such as reproduction, communication to the public, distribution, adaptation, arrangement or transformation.<sup>168</sup>

The reproduction right is broadly defined, and therefore, able to cover all digital copies of works and protected subject matter.<sup>169</sup> The situation regarding ancillary and ephemeral acts of reproduction carried out in the digital networks is specifically addressed in the Copyright Act. A specific exception to the reproduction right is established for temporary acts of reproduction carried out during the digital transmission or the copying of the digital works in a storage media.<sup>170</sup>

The definition of the right of communication to the public also includes the right to make available on the Internet and other digital networks, where the public have access to the work or protected subject matter from a place and at a time individually chosen by them.<sup>171</sup>

Substantial moral rights are attributed to the author.<sup>172</sup> These rights are perpetual and cannot be transferred if the author is alive, but their exercise is transferrable to the successors following the general rules of inheritance law.<sup>173</sup>

Owners of related rights (performers, phonographic producers and broadcaster organizations) have a variety of exclusive economic rights recognized by the law.<sup>174</sup> An equitable remuneration right for musical performers and phonographic

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<sup>159</sup> *Ibid.*, arts. 2 and 65–66.

<sup>160</sup> *Ibid.*, art. 5(j) includes both musical and audiovisual performers in the definition.

<sup>161</sup> *Ibid.*, arts. 67, 67bis and 68.

<sup>162</sup> *Ibid.*, art. 69.

<sup>163</sup> *Ibid.*, art. 65.

<sup>164</sup> Chile, Law No. 20.243, *op cit.*, art. 3.

<sup>165</sup> Chile, Copyright Act, *op. cit.*, art. 30. See, also, art. 2 of Law 20.223.

<sup>166</sup> Indonesia, Copyright Act, *op cit.*, art. 4.

<sup>167</sup> *Ibid.*, art. 8.

<sup>168</sup> *Ibid.*, arts. 9–15.

<sup>169</sup> *Ibid.*, art. 1(12).

<sup>170</sup> *Ibid.*, art. 49.

<sup>171</sup> *Ibid.*, art. 1(16).

<sup>172</sup> *Ibid.*, art. 5(1).

<sup>173</sup> *Ibid.*, art. 5(2).

<sup>174</sup> *Ibid.*, arts. 20 and 23–25.

producers for the public communication of phonograms is likewise recognized. Performers have also some moral rights attributed by the law.<sup>175</sup>

The Emirati legislature has recognized authors' moral and economic rights. The 2021 Copyright Act established a general economic right for the author to authorize use of their work in any manner, complemented by examples of exclusive economic rights (reproduction, broadcasting, public performance, distribution, translation, and other things).<sup>176</sup>

For the digital environment, it is especially relevant that the right holder authorizes electronic reproductions, including downloading, or permanent or temporary electronic storage, regardless of the method or device used.

The law also contains a limitation to exempt the act of reproduction from rights holders' consent when it is made as an incidental and integral part of the process of transmitting a work between parties over a medium or network (for example, the Internet), or as part of a process that involves enabling access to a legal copy of a digitally stored work (for example, accessing downloaded content on a computer, smartphone or tablet).<sup>177</sup>

The Copyright Act specifically drafted a right to make available works and other subject matter protected by neighboring rights through computers, data or communication networks, or by any other means.<sup>178</sup>

The Emirati legislature has recognized different moral rights to authors as well, including the right of paternity (right to be properly identified as author or performer of a work), the right of integrity and the right of divulgation (right to decide whether and how the work is disclosed for the first time). Moral rights are perpetual and cannot prescribe or be assigned.<sup>179</sup>

On related rights, the Copyright Act provides several economic rights to musical and audiovisual performers,<sup>180</sup> phonogram producers<sup>181</sup> and broadcasting organizations.<sup>182</sup> Performers also have different moral rights recognized by the law.<sup>183</sup>

In Uruguay, the Copyright Act grants authors different economic rights in a rather unsystematic way.<sup>184</sup> It also contains a *domaine public payant* regime for works

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<sup>175</sup> *Ibid.*, arts. 21 and 22. These moral rights cannot be eliminated or removed for any reason even though their economic rights have been transferred.

<sup>176</sup> UAE, Copyright Act, *op cit.*, art. 7.

<sup>177</sup> *Ibid.*, art. 22(9). Art. 20(11) also contemplates the reproduction that takes place in the context of steps that are incidental and inevitable in order to accomplish a lawful action and in a manner that ensures the copy is automatically erased without being able to be retrieved for purposes other than those mentioned in paragraphs 9 and 10.

<sup>178</sup> *Ibid.*, art. 7. See art. 1 for definition of public communication.

<sup>179</sup> *Ibid.*, art. 5.

<sup>180</sup> *Ibid.*, art. 17.

<sup>181</sup> *Ibid.*, art. 18.

<sup>182</sup> *Ibid.*, art. 19.

<sup>183</sup> *Ibid.*, art. 16.

<sup>184</sup> Uruguay, Copyright Act, *op cit.*, arts. 1(1) and 2.

that have already entered the public domain (a fee is charged for use of these works).<sup>185</sup>

The law contemplates the main digital uses of the work in the definition of the economic rights of authors and related rights owners. The right to reproduce works is defined broadly, including electronic storage, whether permanent or temporary.<sup>186</sup> However, national legislation lacks a provision to adequately deal with the transient and ancillary acts of reproduction performed during the act of making available the work on communication networks. In some cases of digital exploitation of the works, this may cause legal uncertainty.

The definition of the right of communication to the public is, however, adapted to the WCT, as it includes the right of making available works in such a way that members of the public may access these works from a place and at a time individually chosen by them.<sup>187</sup>

The law also recognizes a right of equitable remuneration to musical composers, directors and screenwriters in the case of the communication to the public of the audiovisual work.<sup>188</sup>

The Copyright Act grants a wide variety of moral rights to authors. Moral rights cannot be transferred.<sup>189</sup>

Regarding related rights, the Copyright Act contemplates different exclusive rights<sup>190</sup> for musical performers<sup>191</sup>, phonogram producers<sup>192</sup> and broadcasting organizations,<sup>193</sup> including some specific forms of distribution rights, such as rental. The definition of the exclusive right authorizing communication to the public belonging to musical performers and phonogram producers is adapted to the WPPT,<sup>194</sup> consequently including the right of making available on the Internet.

Performers and phonogram producers also have the right to equitable remuneration for communicating phonograms to the public.<sup>195</sup> The law also contemplates a moral right of integrity for musical performers.<sup>196</sup>

The Uruguay Copyright Act does not attribute exclusive rights to audiovisual performers. However, it provides an equitable remuneration right in the cases of

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<sup>185</sup> *Ibid.*, art. 42.

<sup>186</sup> *Ibid.*, art. 2(2).

<sup>187</sup> *Ibid.*, art. 2.

<sup>188</sup> *Ibid.*, art. 29(4). These rights are non-transferable.

<sup>189</sup> *Ibid.*, arts. 11, 12 and 13.

<sup>190</sup> *Ibid.*, arts. 7(D), 18 and 39(D).

<sup>191</sup> *Ibid.*, art. 39(A).

<sup>192</sup> *Ibid.*, art. 39(B).

<sup>193</sup> *Ibid.*, art. 39(C).

<sup>194</sup> For the phonogram producer, see art. 27 of the Regulation of Law No. 17.616. The regulation mentions the downloading of musical files in such a way that the public can access them at a place/time of their choosing, but the right of communication to the public covers the uploading of such files to make them available to the public. The downloading will be subject to the reproduction right.

<sup>195</sup> Uruguay, Copyright Act, *op cit.*, art. 39(D).

<sup>196</sup> *Ibid.*, arts. 37 and 38.



performers of literary works when their performance is transmitted or re-transmitted by television, or recorded or fixed in a record, film, tape, wire or any other material substance or medium suitable for sound or visual reproduction.<sup>197</sup>

### C. Exceptions and limitations to copyright and related rights

The WCT does not contain a list of exceptions and limitations to update the Berne Convention to the digital era. Instead, it simply includes the so-called three-step test,<sup>198</sup> whereby the national legislature may provide for limitations or exceptions to the rights granted to authors in certain cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.<sup>199</sup> A similar provision is found in the WPPT,<sup>200</sup> the Berne Convention, though only for exceptions to the reproduction right,<sup>201</sup> and the TRIPS Agreement.<sup>202</sup>

Legislators in the four selected countries have included in their laws a diverse set of exceptions and limitations to copyright and related rights that, in general terms, have not accounted for new digital uses of works and protected subject matter.

In Chile, Law No. 20.435 introduced into the Copyright Act a wide variety of exceptions and limitations. As in most of the *droit d'auteur* countries, exceptions are only permitted uses under certain circumstances defined previously by the law.<sup>203</sup> The country does not, therefore, recognize an open clause of uses covered by the fair use or fair dealing doctrines.<sup>204</sup> Exceptions and limitations are applicable to both copyrights and related rights.<sup>205</sup>

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<sup>197</sup> *Ibid.*, art. 36. The CMO managing the rights of audiovisual performers in Uruguay claims art. 36 implicates a mere remuneration right for audiovisual performers. In practice, cinemas owners and broadcasting entities such as radio and television are judicially refusing to pay the equitable remuneration. See <https://sugai.org.uy/institucional/>.

<sup>198</sup> Berne Convention, art. 9(2), states: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in (1) certain special cases, (2) provided that such reproduction does not conflict with a normal exploitation of the work and (3) does not unreasonably prejudice the legitimate interests of the author."

<sup>199</sup> WIPO. "WIPO Copyright Treaty (WCT)." *wipo.int*. 1996.

<https://www.wipo.int/treaties/en/ip/wct/>. See art. 10(1) for rights covered in the treaty, and art. 10(2) for Berne rights.

<sup>200</sup> WIPO. "WIPO Performances and Phonograms Treaty (WPPT)." *wipo.int*. 1996, art. 16(2). <<https://www.wipo.int/treaties/en/ip/wppt/>>.

<sup>201</sup> Berne Convention, *op cit.*, art. 9(2).

<sup>202</sup> "World Trade Organization (WTO): Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994)." *WIPO Lex*. World International Property Organization. Art. 13. <<https://wipolex.wipo.int/en/treaties/details/231>>.

<sup>203</sup> Some scholars indicate that art. 71(Q) of the Copyright Act could be an open exception, close to a fair use clause; see Araya Paz, C. "Hacia una excepción abierta a los derechos de autor en Chile: Una propuesta normativa a la luz de los usos justos." *Revista Chilena de Derecho y Tecnología*. Vol. 6, No. 1 (2017): p. 49. However, the language in art. 71(Q) does not point in this direction, being more a traditional free use under certain conditions set out by the law.

<sup>204</sup> Chile, Copyright Act, *op. cit.*, arts. 71(A)–71(S).

<sup>205</sup> *Ibid.*, art. 71(A).

In all cases, the law has established purely free uses (that is, without pecuniary compensation to the owner) and not a limitation followed by nonvoluntary or compulsory license (that is, a use authorized by the law accompanied by a right of equitable remuneration for the author or related right owner/s).

Expressly digital uses have not been included in the national list of exceptions and limitations, except for nonprofit libraries or archives being able to offer to electronically reproduce works in their collection for free and allow simultaneous consultation by a reasonable number of users in the computer terminal networks of the institution if they are unable to make electronic copies.<sup>206</sup> There are also specific limitations for computer programs.<sup>207</sup>

Copyright law in Indonesia has a diverse blend of copyright exceptions and limitations to economic rights.<sup>208</sup> It also has limitations drafted specifically for digital works such as computer programs.<sup>209</sup>

Even if Indonesia cannot be considered as a pure *droit d'auteur* jurisdiction,<sup>210</sup> the Copyright Act follows the continental tradition of drafting specific acts exempt from the authorization of the copyright or related right owner, rather than a fair use or fair dealing general clause.<sup>211</sup>

Most of the exceptions and limitations contemplated in the law are free uses, but there is a compulsory license authorizing the government to make acts of publication, distribution or communication of works through radio, television and/or other means (including online) for national interest, with equitable remuneration for the copyright holder.<sup>212</sup>

The Copyright Act also contemplates a compulsory license scheme to carry out translation and/or reproduction of scientific and literary works for the purposes of education and/or science, and research and development activities.<sup>213</sup> There is reasonable remuneration for the author in most cases, except for the compulsory translation made by the copyright holder and/or reproduction acts mandated by the minister.<sup>214</sup>

In the United Arab Emirates, the Copyright Act takes into consideration a set of exceptions and limitations to the economic rights<sup>215</sup> of authors and related rights

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<sup>206</sup> *Ibid.*, art. 71(K).

<sup>207</sup> *Ibid.*, art. 71(N).

<sup>208</sup> Indonesia, Copyright Act, *op. cit.*, arts. 43–51.

<sup>209</sup> *Ibid.*, art. 45.

<sup>210</sup> The traditional Dutch influence is still felt but the law has also incorporated elements of the Anglo-Saxon tradition, and its own endogenous peculiarities; see Antons, C. “Copyright in Indonesia: From a Hybrid to an endogenous system?” In *Copyright, Property and the Social Contract*, J. Gilchrist and B. Fitzgerald, eds (Springer, 2018).

<sup>211</sup> Apart from the provisions of the law, there is also Government Regulation No. 27 of 2019 on facilitating access to works for persons with reading disabilities and users of Braille, audiobooks and other means; see (in Bahasa Indonesian) <https://wipolex.wipo.int/en/text/578072>

<sup>212</sup> Indonesia, Copyright Act, *op. cit.*, art. 51(1).

<sup>213</sup> *Ibid.*, arts. 84–86.

<sup>214</sup> *Ibid.*, arts. 86(1)(a) and 86(5).

<sup>215</sup> UAE, Copyright Act, *op. cit.*, arts. 22–25.

owners.<sup>216</sup> The three-step test is incorporated as an interpretation rule for national judicial or administrative authorities, and it is expressly stated that exceptions can be applied only to published or divulged works.<sup>217</sup>

In almost all cases, the law contemplates free uses, without remuneration for right holders, though there is a compulsory license for acts of reproduction and translation for education purposes or when required by public libraries and archives, as stipulated in the implementing regulation of the Copyright Act.<sup>218</sup> These acts can be made only under certain conditions, which include fair compensation for the author.<sup>219</sup> The reproduction or translation must be performed in a way that ensures no unjustified prejudice will be caused to the legitimate interests of the author or their successor, or to the normal use of the work.

The law has adapted some of the limitations for digital works, such as the prohibition of private copying of computer programs, mobile applications and electronic databases, or the possibility of making a backup copy of those works.<sup>220</sup>

Uruguay has not adapted its regimen of exceptions and limitations to authors' economic rights to the digital environment, despite the wording of this part of the law was partially modified by Law No. 19.149 of 2013. For this reason, the Copyright Act contemplates only a few free exemptions without the permission of authors and related right owners,<sup>221</sup> ignoring digital uses or specific limitations for digital works, such as computer programs or databases.

#### D. Ownership and transfer of rights

All four selected countries have rules to assign initial copyright ownership, or presumptions of transfer of rights for certain works. Some are of particular interest to this study, such as audiovisual works or computer programs created for employees in the course of their work. This rule can often be applied to videogames and other electronic games and mobile applications.

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<sup>216</sup> *Ibid.*, art. 25. Provides that the restrictions applicable to the economic rights of the author shall apply to the holders of neighboring rights.

<sup>217</sup> UAE, Copyright Act, *op cit.*, art. 22.

<sup>218</sup> UAE, Cabinet Decision No. 47/2022 On the Implementing Regulation of Federal Decree-Law No. 38/2021 on Copyrights and Neighbouring Rights; see [https://www.lexismiddleeast.com/law/UnitedArabEmirates/CabinetDecision\\_47\\_2022](https://www.lexismiddleeast.com/law/UnitedArabEmirates/CabinetDecision_47_2022); art. 21.

<sup>219</sup> For example, in the case of translations, it can only be done three years after the publishing of such work.

<sup>220</sup> UAE, Copyright Act, *op cit.*, arts. 22.1(c) and 22(2).

<sup>221</sup> See art. 44(B)(1<sup>o</sup>) for performances of the work in domestic circles or public performance, under certain conditions, in educational institutions, whether public or private, and in places intended for religious ceremonies provided they do not have gainful intent. See art. 45 for other exceptions and limitations under the law.

In Chile, the IP law states that the copyright on cinematographic work is vested in its producer,<sup>222</sup> the natural person or legal entity who/which takes the initiative and has responsibility for producing the work.<sup>223</sup> The contract between the author/s of the cinematographic work and the producer will entail assigning – for the producer’s benefit – all the rights in the work.<sup>224</sup>

There is no general rule for works made for hire in Chile; they belong, in principle, to their creators, even if they are employees producing the work in performance of their duties of employment.

However, in the case of computer programs, the copyright in the work is presumed to belong to the natural person or legal entities whose employees (in the performance of their duties) have produced them, unless otherwise stipulated in writing.<sup>225</sup> There is also a rule for software produced under commission from a third party, the law providing that copyright is transferred to the third party, unless otherwise stipulated in writing.<sup>226</sup>

There are also specific rules establishing presumptions of transfer of rights of works created by employees and freelancers in a newspaper company,<sup>227</sup> and for photographers in the case of commissioned works.<sup>228</sup>

In Indonesia, there is no particular provision in the Copyright Act to establish ownership of copyright for cinematographic and other audiovisual works. But if a legal entity exploits a work, without citing any person as the author, the one who will be regarded as the author is the legal entity, unless proven otherwise.<sup>229</sup>

The Copyright Act has rules for attributing rights in the case of employees creating original content during work time. Unless agreed otherwise, the author and copyright holder of the works produced is the party producing them.<sup>230</sup> Thus, for the employer to acquire the right from the employee, a provision is needed in the employment contract.<sup>231</sup> The same rule applies for works commissioned by independent contractors.

However, if one person designs the work, and the other merely executes it under their direction and supervision, the copyright is vested in the designer.<sup>232</sup>

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<sup>222</sup> Chile, Copyright Act, *op cit.*, art. 25. Art. 26 defines the producer as the natural person or legal entity who/which takes the initiative and has responsibility for producing the work.

<sup>223</sup> *Ibid.*, art. 26.

<sup>224</sup> *Ibid.*, art. 29.

<sup>225</sup> *Ibid.*, art. 8(2).

<sup>226</sup> *Ibid.*, art. 8(3).

<sup>227</sup> *Ibid.*, arts. 24(1) and 24(2).

<sup>228</sup> *Ibid.*, art. 34.

<sup>229</sup> Indonesia, Copyright Act, *op cit.*, art. 37.

<sup>230</sup> *Ibid.*, art. 36.

<sup>231</sup> *Ibid.*, arts. 35(1) and 35(2). If the author is under civil service employment in a government agency, the copyright belongs to the agency, but there is a remuneration right in favour of the author if the work is commercially used.

<sup>232</sup> *Ibid.*, art. 34.

In the United Arab Emirates, under the Copyright Act, the producer is not considered the author or the original copyright owner.<sup>233</sup> But it is presumed, unless otherwise agreed, that the producer is representative of the author/s on the use of such work, throughout the period of use agreed in the production contract. The law also states the producer will be deemed the publisher of the audiovisual work and will be entitled to the publisher's economic rights within the purposes of financial use.<sup>234</sup>

Further, the law contemplates a presumption of transfer of exclusive economic rights from the audiovisual performer to the audiovisual producer when the performer agrees to the audiovisual fixation of their performance, unless otherwise agreed in writing by the performer and producer.<sup>235</sup>

In addition, the Copyright Act provides that if the author created the work for the benefit of another person, the copyright belongs to the person in whose favour it was made.<sup>236</sup> Also, if an employee or worker, during their work, creates a work related to the activities of their work instructed by the employer, or using the employer's means, the copyright will belong to the employer.<sup>237</sup>

In Uruguay, the producer of the audiovisual work is not considered by the Copyright Act to be the original copyright owner.<sup>238</sup> Unless otherwise agreed, it is presumed that the author/s of the audiovisual work have transferred their exclusive economic rights to the producer.<sup>239</sup> The producer is also invested with the right to modify or alter the audiovisual work, and decide on its divulgation.

The law has a special ownership rule when an employee creates the computer program, whether public or private. In this case, it is presumed the author has authorized – unlimited and exclusively – the employer to exercise the patrimonial rights and moral rights, unless otherwise agreed.<sup>240</sup> The same presumption applies to freelance authors creating a computer program for a third party, again unless otherwise agreed.<sup>241</sup>

Additionally, the law contains different presumptions of copyright ownership for specific cases, such as employees of periodicals, magazines and other social communication media.<sup>242</sup> There is not, however, a general work made for hire rule for other types of works, and these situations must be managed on a case-by-case basis through contractual agreements.

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<sup>233</sup> UAE, Copyright Act, *op. cit.*, art. 29(1), establishes a list of coauthors of the audiovisual works.

<sup>234</sup> *Ibid.*, art. 29(5).

<sup>235</sup> *Ibid.*, art. 29(6).

<sup>236</sup> *Ibid.*, art. 28(1).

<sup>237</sup> *Ibid.*, art. 28(3).

<sup>238</sup> Uruguay, Copyright Act, *op. cit.*, art. 29(2), establishes a list of coauthors.

<sup>239</sup> *Ibid.*, art. 29(3).

<sup>240</sup> *Ibid.*, art. 29.

<sup>241</sup> *Ibid.*, art. 29(9). The rights of authors by virtue of the employment contract will be presumed assigned to the employer. This also implies the authorization to decide on their disclosure and to exercise the moral rights. However, freelance authors only transfer the right to publish the work, unless agreed to the contrary.

<sup>242</sup> *Ibid.*, art. 22(2).

Ownership and the transfer of copyright and related rights are intimately united, given that in most cases the author or performer will assign or license their economic rights to a third party best able to professionally exploit them in the market.

In Chile, the Copyright Act established, in a somewhat unsystematic way, a number of rules on assigning and licensing copyright and related rights to third parties. Copyright can be assigned or flat sold (transferred in its entirety) to a third party, provided the transfer is made by public deed or through a private instrument authorized before the notary.<sup>243</sup>

The Chilean legislature has also regulated two typical contracts used by authors to transfer their rights; the publishing contract<sup>244</sup> and the contract to authorize the public performance of a work.<sup>245</sup> The rules can be applied in a way analogous to other contracts assigning copyrights.

The IP law sought to establish a rule to guarantee adequate compensation to right holders, stating that the agreed remuneration will in no case be less than the percentage indicated in the regulation of the law.<sup>246</sup> In practice, however, the Regulation of Law No. 17.336 did not introduce a general rule of proportional remuneration.<sup>247</sup> Instead, it repeated the specific rules already established for the publishing contract,<sup>248</sup> for the public performance of a work in the cases of live performances,<sup>249</sup> and for the broadcasting of a work.<sup>250</sup>

Regarding the rules governing the licensing to end users, the authorization to use the works or other subject matter is defined as a license granted by the copyright holder, in any contractual form, to use the work in any of the formats and by any of the means provided for by the law.<sup>251</sup> It also contains rules on the minimum content of that license.<sup>252</sup> A license will be nonexclusive by default, unless otherwise agreed.<sup>253</sup>

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<sup>243</sup> Chile, Copyright Act, *op cit.*, art. 73.

<sup>244</sup> *Ibid.*, arts. 48–55.

<sup>245</sup> *Ibid.*, arts. 56–64.

<sup>246</sup> *Ibid.*, art. 20.

<sup>247</sup> See art. 2 of the regulation.

<sup>248</sup> Chile, Copyright Act, *op cit.*, arts. 50 and 53. If the remuneration has been set pro rata, this should be at least 10% of the price of sale of each copy.

<sup>249</sup> *Ibid.*, art. 61. If the royalty has not been contractually fixed as a higher percentage, it should amount to a total of 10% of the overall value of the receipts for each performance, and 15% for the premiere.

<sup>250</sup> *Ibid.*, art. 62. The author will be entitled to receive a minimum of 5% of the amount charged by the broadcaster for the advertising shown during the program or, failing any such advertising, 10% of what the promoter receives as compensation for broadcasting the performance.

<sup>251</sup> *Ibid.*, art. 20(1).

<sup>252</sup> *Ibid.*, art. 20(2). The authorization shall contain, in any case, the rights granted to the authorized person, specifying the term, remuneration and form of payment, the minimum or maximum number of performances or copies authorized, or, if this number is unlimited, the field of application and any other restrictive clauses imposed by the copyright holder.

<sup>253</sup> *Ibid.*, art. 22.

Indonesian law has a limited number of rules for transferring economic rights from the author to third parties.<sup>254</sup> In principle, transfers must be made in writing, with or without a notarial deed.<sup>255</sup>

Copyright cannot be licensed or transferred in bulk, eliminating or taking over all the rights of authors to their works,<sup>256</sup> as the law limits flat sold agreements or transfers without a time limit to a maximum of 25 years. The rules designed to transfer the author's right are also applicable, *mutandis mutandis* (with the necessary changes having been made), to the transfer of economic rights on protected subject matter.<sup>257</sup>

There are also specific rules in Indonesia's Copyright Act to license content for end users.<sup>258</sup> The license must be a written agreement and for a limited period. It must contemplate the royalties agreed in the license, which must be based on prevailing best practices and serve the equitable principle.<sup>259</sup>

Emirati law has specific rules for the transfer of the author's economic rights,<sup>260</sup> including some to protect the author as the weaker party of the contract. First, the transfer is only valid if made in writing and it specifies the transferred rights, object of the transfer, duration and place of use.<sup>261</sup> The rights that have not been explicitly assigned remain the property of the author,<sup>262</sup> and any transfer of the totality of future works will be deemed null and void.<sup>263</sup> There is, however, the possibility of contracting on a maximum of 10 future works.<sup>264</sup>

The remuneration can be agreed based on a lump sum, but the author or their successors can seek a judicial review if the agreement appears unfair or becomes unfair due to circumstances following its conclusion (that is, the work has been a big commercial success<sup>265</sup>).

The most customary contracts involving authors are not regulated, however. In some cases, the law expressly declares that the contractual rules are also applicable to the transfer of related rights; for example, to establish the judicial review of unequitable contracts.<sup>266</sup>

Regarding licenses, the Copyright Act provides that the author or their successor in title has the power to license the use of the work in any manner whatsoever,

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<sup>254</sup> Indonesia, Copyright Act, *op cit.*, arts. 16–19.

<sup>255</sup> *Ibid.*, art. 16, and the annexed Elucidation.

<sup>256</sup> *Ibid.*, art. 82(3).

<sup>257</sup> *Ibid.*, art. 29.

<sup>258</sup> *Ibid.*, arts. 80 and 81.

<sup>259</sup> *Ibid.*, arts. 80(4) and 80(5).

<sup>260</sup> UAE, Copyright Act, *op. cit.*, arts. 9–12 and 15.

<sup>261</sup> *Ibid.*, art. 9.1.

<sup>262</sup> *Ibid.*, art. 9.2.

<sup>263</sup> *Ibid.*, art. 15(1).

<sup>264</sup> *Ibid.*, art. 15(2) and art. 18 of the Implementing Regulation.

<sup>265</sup> UAE, Copyright Act, *op. cit.*, art. 11.

<sup>266</sup> *Ibid.*, art. 11.

including its digital reproduction or making it available to the public in communication networks.<sup>267</sup>

The Uruguayan Copyright Act regulates the transfer of rights in an unsystematic way. The law establishes the general principle that economic rights are transmissible, provided the transfer is done in writing. For an author's rights, the primary rule is that the acquirer "in any mode" of the work replaces the author in all their obligations and rights, except for those that, due to their nature, are personal, such as moral rights.<sup>268</sup>

There is also an unusual rule stating that the right to economic exploitation by the acquirer will belong to them for 15 years following the death of the author, and will be transmitted, on the expiry of such period, to the author's heirs, who have the usufruct (the legal right of using and enjoying the fruits or profits of something belonging to another) until the end of the term of protection of the work.<sup>269</sup> An author's rights cannot consequently be sold indefinitely but the economic result is very similar.

The law also adds specific rules for some contracts<sup>270</sup> but does not have a general regime for contracts transferring the economic rights of authors and related right owners.

### 3. The collective rights management landscape

The efficiency of IP protection in the selected countries does not rely solely on the law. Another key element of the practical functioning of IP rights, especially in the digital market, is the regular operation of CMOs and other rights management entities.

The ecosystem of collective management bodies depends heavily on the legal tradition and also the economic and social characteristics of a country. Therefore, the landscape varies significantly between the four countries.

In Chile, to be able to operate, every CMO must be authorized by the Ministry of Culture, Arts and Heritage.<sup>271</sup> In certain cases, that authorization might be revoked.<sup>272</sup> CMOs must also adopt the form of a nonprofit private corporation dealing exclusively with the managing and defence of copyright and related rights, thus preventing a commercial company being recognized as a CMO.<sup>273</sup>

The law contains several governance and transparency rules that regulate, for instance, voting and the rules for distributing collected revenue, which must be proportional and include the percentage for administration expenses<sup>274</sup> (it may

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<sup>267</sup> *Ibid.*, art. 7.

<sup>268</sup> Uruguay, Copyright Act, *op. cit.*, arts. 9–13 and 19. See also art. 31.

<sup>269</sup> *Ibid.*, art. 33.

<sup>270</sup> *Ibid.*, art. 32, for example.

<sup>271</sup> Chile, Copyright Act, *op. cit.*, arts. 91 and 94.

<sup>272</sup> *Ibid.*, art. 96.

<sup>273</sup> *Ibid.*, art. 92.

<sup>274</sup> *Ibid.*, art. 98.



not exceed 30 per cent<sup>275</sup>). CMOs must prepare annual general balance sheets, and a report on the activities of the previous financial year. Both documents should be submitted to external auditors for approval.<sup>276</sup>

They must accept the administration of the copyright and related rights that have been entrusted to them in accordance with their goals or aims,<sup>277</sup> and are also obliged to sign contracts for the granting of nonexclusive authorizations in accordance with general tariffs.<sup>278</sup>

Chilean CMOs can legally represent their national and international members and clients in any administrative or judicial proceedings merely by presenting authorized copies of the public document containing their statutes and the decision approving their functioning.<sup>279</sup> This avoids having to present individual proof for every contract subscribed with the members of the entity, or international CMOs in the framework of mutual representation agreements.

In Chile, there are eight CMOs managing rights, namely the Chilean Society of Musical Authors and Interpreters (SCD), Society of Producers of Phonograms and Musical Videograms (PROVOFI), Literary Rights Society (SADEL), Collective Management Entity for the Rights of Audiovisual Producers (EGEDA Chile), Still Image Creators Management Society (CREAIMAGEN), Corporation of Actors of Chile (CHILEACTORES), Society of Audiovisual Directors, Scriptwriters and Dramatists (ATN) and Audiovisual Directors and Scriptwriters Corporation (DYGA).

In Indonesia, according to the Copyright Act, CMOs are nonprofit legal entities authorized by the author, copyright holder, and/or related rights owner to manage their economic rights in the form of collecting and distributing royalties.<sup>280</sup> In Indonesia a CMO is traditionally referred to as a collective management institution (LMK).<sup>281</sup>

To legally operate in the country, a CMO must be authorized by the Ministry of Law and Human Rights.<sup>282</sup> To be granted an operational permit, it must fulfil some legal requirements, including being able to collect and distribute royalties to right holders.<sup>283</sup>

The Indonesian Copyright Act has provided a limited number of governance and transparency rules for CMOs. They are obligated to conduct financial audits by public accountants at least once a year and make the results public.<sup>284</sup>

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<sup>275</sup> *Ibid.*, art. 94.

<sup>276</sup> *Ibid.*, art. 99.

<sup>277</sup> *Ibid.*, art. 97.

<sup>278</sup> *Ibid.*, arts. 67 and 100.

<sup>279</sup> *Ibid.*, art. 102.

<sup>280</sup> Indonesia, Copyright Act, *op. cit.*, art. 1(22).

<sup>281</sup> Mahfuzzah, Z. "Duties and authorities of the Collective Management Institute (LMK) as the royalty management institution for song and music included digital music services." *IPR-Review*. Vol. 3, No. 2 (2020): p. 252.

<sup>282</sup> Indonesia, Copyright Act, *op. cit.*, art. 88(1).

<sup>283</sup> *Ibid.*, art. 88(2).

<sup>284</sup> *Ibid.*, art. 90.

The percentage of operational funds is limited to 20 per cent from the total amount collected annually (30 per cent in the first five years after the CMO is established<sup>285</sup>). The minister will evaluate, at least once a year, the CMOs operating in the country. A negative evaluation results in the operational permit being revoked.<sup>286</sup> Some equitable remuneration rights have been subject to mandatory collective managing.<sup>287</sup>

The Copyright Act itself established two governmental CMOs for songs and/or music. The first represents authors' interests, and the second the interests of related rights owners.<sup>288</sup> The law considers they have the authority to collect and distribute royalties for the use of copyrighted songs and music from commercial users at a rate determined and ratified by ministerial decree.<sup>289</sup> Thus, there is no need for a representation contract with right holders.

Both CMOs must act together to determine the amount of royalties that correspond to each in accordance with prevailing best practice.<sup>290</sup> To do so, they are required to establish guidelines that must be endorsed by the minister.<sup>291</sup>

In practice, the National Collective Management Institute (NCMI) is a single organization consisting of two sections (National Collective Management Institute for Authors and National Collective Management Institute for Related Rights), each led by separate commissioners with duties and an organizational structure controlled by a ministerial regulation.<sup>292</sup> The regulation takes into consideration additional transparency rules for both CMOs, such as the formulation of an ethics code and the obligation to elaborate a collecting and distributing mechanism for musical royalties.<sup>293</sup>

Additionally, there are 11 privately operated bodies authorized to operate on behalf of authors, performers and sound recording producers, under the umbrella of the NCMI.<sup>294</sup>

Contrary to the governmental CMOs, which only operate in the musical field, private CMOs can manage all kinds of rights.<sup>295</sup> For instance, the Indonesian

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<sup>285</sup> *Ibid.*, art. 91.

<sup>286</sup> *Ibid.*, art. 92(2).

<sup>287</sup> *Ibid.*, art. 87(2). For instance, right holders must become members of a CMO to collect reasonable remuneration from uses of works and other protected subject matter in non-commercial public service.

<sup>288</sup> *Ibid.*, art. 89(1).

<sup>289</sup> *Ibid.*, art. 89(2). For the decree detailing the royalty rate, see <https://www.lmkn.id/media/2021/04/SK-Menteri-Tarif-Royalti-Musik-Lagu-untuk-Pengguna-1.pdf>.

<sup>290</sup> *Ibid.*, art. 89(3).

<sup>291</sup> *Ibid.*

<sup>292</sup> Indonesia, Regulation of the Minister of Law and Human Rights No. 29 of 2014 concerning the procedure for application and issuance of operational license, and the evaluation of the collective management organization.

<sup>293</sup> Sardjono, A., *et al.* "The effectiveness of national collective management organization regulation." *Indonesia Law Review*. No. 3 (2016): p. 326.

<sup>294</sup> See <https://dgip.go.id/artikel/detail-artikel/kantongi-izin-operasional-prisindo-siap-sejahterakan-pelaku-pertunjukan?kategori=Berita%20Resmi%20Desain%20Industri>

<sup>295</sup> Sardjono, *op. cit.*, p. 330.

Reproduction Rights Organization<sup>296</sup> manages the reproduction rights of literary authors and publishers. Other CMOs operating include Karia Cipta Indonesia (musical composers), Asosiasi Industri Rekaman Indonesia (phonographic producers) and the Performers' Rights Society of Indonesia.

That the NCMI can delegate their authority to private CMOs is explicitly contemplated by the regulation. This includes the authority to withdraw, collect and distribute royalties in the field of songs and/or music from commercial users.<sup>297</sup>

Recently, the Indonesian Government published a regulation regarding both governmental CMOs,<sup>298</sup> establishing 13 open-to-the-public venues that must pay royalties, including restaurants, cinemas, cafes, radio broadcasting institutions and hotels, and a mechanism to collect and distribute the royalties.<sup>299</sup> The regulation was later developed by Decree of the Minister of Law and Human Rights.

Emirati law takes few rules into consideration regarding rights management organizations, given the main legal status of CMOs was delegated to the governmental implementing regulation of the Copyright Act.

There is general provision in the Copyright Act allowing rights holders to delegate rights management to specialized professional associations or entrust other bodies with the exercise of these rights. Contracts so concluded are construed as civil contracts.<sup>300</sup>

Thus, CMOs can take the form of specialized professional associations or other bodies, though in both cases will be listed under the denomination of collective management organizations.<sup>301</sup> CMOs must be authorized by the Ministry of Economy<sup>302</sup> at federal level and the competent authority at the State level.<sup>303</sup> Authorization includes a fee, and it is renewed annually after the yearly payment.<sup>304</sup>

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<sup>296</sup> Authorised by Decree of the Ministry of Law and Human Rights of August 19, 2016. See <http://www.prci.or.id/perkumpulan-reproduksi-cipta-indonesia-prci-2>.

<sup>297</sup> See <https://www.lmkn.id/faq/>.

<sup>298</sup> Indonesia, Government Regulation No. 56 of 2021 on song and/or music copyrights royalties management (GR 56/2021); see (in Bahasa Indonesian) <https://www.lmkn.id/media/2021/04/Salinan-PP-Nomor-56-Tahun-2021.pdf>. Art. 14 states collected royalties should be distributed to creators, copyright holders and related rights owners, but also used for operational and reserve funds. Royalties are distributed based on reported use of songs and/or music included in the SILM database. The right holders must register in the NCMI to receive royalties. Unclaimed royalties will be kept for two years and then distributed to members. See <https://setkab.go.id/en/govt-issues-regulation-on-songs-music-copyright-royalties-management>

<sup>299</sup> See <https://setkab.go.id/en/govt-issues-regulation-on-songs-music-copyright-royalties-management>

<sup>300</sup> UAE, Copyright Act, *op. cit.*, art. 32.

<sup>301</sup> UAE, Implementing Regulation, *op. cit.*, art. 1.

<sup>302</sup> UAE, Copyright Act, *op. cit.*, art. 34(1); and UAE, Implementing Regulation, *op. cit.*, art. 15.

<sup>303</sup> UAE, Implementing Regulation, *op. cit.*, art. 15.

<sup>304</sup> UAE, Implementing Regulation, *op. cit.*, art. 15(6).

The implementing regulation requires any candidate to obtain the governmental permit, a variety of documents that includes proof of contracts concluded with the entity, the distribution mechanism for financial revenue to members, and the association's memorandum and statute.<sup>305</sup>

The law also establishes the general principle of nondiscrimination between applicants requesting to conclude agreements for the use of works and other protected subject matter.<sup>306</sup>

Under the implementing regulation, authorized CMOs have different obligations to ensure adequate governance rules and transparency. These include an annual transparency report, an obligation to retain all relevant contract documentation, and to present annual accounts to members and inform them of the distributing method for collected revenue, and periodical reports on the use of different works and other protected subject matter by users. CMOs also have the obligation to not discriminate between their associates or members.<sup>307</sup>

In the United Arab Emirates, there is currently just one CMO. The Emirates Reprographic Rights Management Association (ERRA) acts as a collecting society handling reprographic rights in the publishing industry for authors (writers and visual artists) and publishers of printed and digital literary works.<sup>308</sup>

Under the Uruguayan Copyright Act, all CMOs need previous government authorization to operate in the country, and must adopt the form of a private nonprofit association.<sup>309</sup> The denomination of the association must include the term collective management.

The law also contemplates the possibility of acting jointly as a one-stop shop, or to create a legal person to represent various CMOs against users.<sup>310</sup> CMOs are obliged to negotiate in good faith with all users.<sup>311</sup>

In 2003, Law No. 17.616 to protect intellectual property added several rules on the licensing activities of Uruguayan CMOs and their legitimation to act in court procedures. The CMOs are obliged to set fair and equitable tariffs and make them publicly available.<sup>312</sup>

CMOs are entitled, according to their own statutes, to exercise the rights under their management and assert them in administrative and judicial procedures.<sup>313</sup>

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<sup>305</sup> UAE, Implementing Regulation, *op. cit.*, art. 15(3).

<sup>306</sup> UAE, Copyright Act, *op. cit.*, art. 33.

<sup>307</sup> UAE, Implementing Regulation, *op. cit.*, art. 15(5).

<sup>308</sup> The organization ESMAA also currently operates in the musical sector. Owned by a private company, it licenses repertoire in the UAE, and also the Gulf Region. ESMAA is a client rights management entity, and as such is not a CISAC member. Unlike with traditional CMOs, the CISAC Secretariat verifies only that some formal criteria are met by these organizations, and there is no qualitative evaluation of their practical operation. Client rights management entities are also excluded from CISAC's governance and voting. See <https://www.cisac.org/client-rmes>.

<sup>309</sup> Uruguay, Copyright Act, *op. cit.*, art. 58.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*

<sup>312</sup> Uruguay, Law No. 17.616, *op. cit.*, art. 21(5).

<sup>313</sup> *Ibid.*, art. 24.

To present proof of the rights administered, CMOs will be required to certify in writing the representation contract. This is without prejudice of the possibility for the right holder to exercise directly the rights recognized by the law.<sup>314</sup>

Law No. 17.616 also added new rules on governance and transparency for national CMOs. The law requires, among other things, distribution of the remuneration collected based on its distribution rules, with the sole deduction of the administrative expenses and funds dedicated to activities of social service.

The administrative discount percentages must be approved by the Copyright Council, and the CMO must present members with the balance sheet and auditors' report. This information must also be sent to foreign entities with mutual representations in the national territory.<sup>315</sup>

The law requires CMOs to have a default rule to resolve a situation of royalties collected but not distributed. They must also distribute the royalties to right holders based on the principles of equitable distribution and proportionality.<sup>316</sup> The Regulation of Law No. 17.616 added several additional rules to the functioning of CMOs.<sup>317</sup>

In Uruguay, there are five CMOs.<sup>318,319</sup> The General Association of Authors of Uruguay (AGADU) represents literary, audiovisual, visual, musical and other authors. It serves as one-stop shop in the musical sector. For related rights, the Uruguayan Society of Artist and Performers (SUDEI) represents performers of literary and musical works, the Uruguayan Management Society of Actors Performers (SUGAI) collectively manages the rights of audiovisual performers,<sup>320</sup> the Uruguayan Phonograms and Videograms Chamber (CUD) manages the related rights of phonogram producers and the collective management entity EGEDA Uruguay acts on behalf of audiovisual producers.

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<sup>314</sup> *Ibid.* art. 24.

<sup>315</sup> *Ibid.*, art. 21.

<sup>316</sup> *Ibid.*, art. 22.

<sup>317</sup> Uruguay, Regulation of Law 17.616, *op. cit.*, art. 12. CMOs must provide members with detailed information on the respective uses of their works/protected subject matter. Distribution periods should not be greater than one year, and deductions for administrative expenses and social services should be consistent with the amount spent and international standards.

<sup>318</sup> The CMO Asociación Uruguaya para la Tutela Organizada de los Derechos Reprográficos (AUTOR) was authorized to manage reprographic rights in 2005 but is not currently operating; see <https://derechoalacultura.org/2013/10/12/panorama-de-las-sociedades-de-gestion-colectiva-en-uruguay>

<sup>319</sup> Ríos Pinzón, Y.A., *et al.* "Panorama de la gestión colectiva del derecho de autor y derechos conexos en Iberoamérica." *cerlalc.org*. 2018, p. 90. Web. Oct. 21, 2022. <<https://cerlalc.org/wp-content/uploads/2019/01/Panorama-de-la-gestio%CC%81n-colectiva-final-1.pdf>>.

<sup>320</sup> Uruguayan law does not attribute exclusive rights to audiovisual performers but they claim to have an equitable remuneration right under art. 36 of the Copyright Act. The CMO has signed mutual representation agreements with eight foreign CMOs to collect the royalties of Uruguayan actors generated outside the country. See <https://sugai.org.uy/institucional/>

## 4. Enforcement of IP rights in the digital environment

### A. Current challenges in digital copyright enforcement

The generalization of the exploitation of works in digital format has increased levels of piracy in many jurisdictions. Unauthorized use is a serious concern for native digital works, such as computer programs, videogames and other electronic games and mobile applications. This explains, for instance, the barring of a private copying exception (which permits individuals to copy works protected by copyright from one device to another) in these cases.

But with the broadening of digital exploitation of literary, musical and audiovisual works, digital piracy, particularly online piracy, is a significant problem for all the selected subsectors included in this study. Additionally, traditional physical piracy and counterfeiting is still a grave issue in some of the selected countries, especially in the fashion industry.

The four survey responses all underlined that, despite the multitude of efforts by law enforcement authorities, levels of infringement remain high, in the online environment in particular. Chile, Indonesia and the United Arab Emirates were included in the 2022 International IP Index,<sup>321</sup> which benchmarks the IP framework in global economies across 50 indicators, and ranked relatively low when compared with the 54 other economies surveyed.<sup>322</sup>

Chile was also included on the United States' Special 301 Report Priority Watch List in 2022. Reported concerns included the high levels of online piracy and lack of effective enforcement,<sup>323</sup> especially for remedies or penalties for wilfully receiving or further distributing illegally decoded encrypted program-carrying satellite signals.<sup>324</sup> High levels of piracy through illicit streaming services and Internet Protocol television (IPTV) apps were also noted.<sup>325</sup> Software piracy appears to be high, and there are doubts regarding the efficiency of the injunction mechanism provided in the Copyright Act to disable access to content infringing by OISPs.<sup>326</sup>

Indonesia is also on the 2022 Priority Watch List. According to the report, concerns by United States stakeholders include widespread piracy and counterfeiting,<sup>327</sup> especially through piracy devices and applications. Work to fight unlicensed software is still required,<sup>328</sup> and with respect to the illicit circumvention

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<sup>321</sup> U.S. Chamber of Commerce, *op. cit.*

<sup>322</sup> Indonesia ranked 29<sup>th</sup> in the copyright category, UAE 42<sup>nd</sup> and Chile 43<sup>rd</sup>, all with a score below 50%. See U.S. Chamber of Commerce, *op. cit.*, p. 17.

<sup>323</sup> Office of the United States Trade Representative, *op. cit.*, p. 18.

<sup>324</sup> *Ibid.*, p. 42.

<sup>325</sup> *Ibid.*, p. 58. According to the report, "concerns regarding IP enforcement remain, including with respect to the lack of deterrent-level penalties for IP infringement in physical markets and online".

<sup>326</sup> U.S. Chamber of Commerce, *op. cit.*, p. 131.

<sup>327</sup> Office of the United States Trade Representative, *op. cit.*, p. 58.

<sup>328</sup> *Ibid.*, p. 34.

of technological protection measures.<sup>329</sup> Significant levels of piracy through the illicit streaming services and illicit IPTV apps were noted in the country,<sup>330</sup> along with piracy of literary works.<sup>331</sup>

The United Arab Emirates was removed from the Priority Watch List in 2021. And according to the 2022 edition of the Special 301 Report, IP enforcement authorities are increasing investigations into online and offline infringing activities as a result of improved judicial reviews of cases.<sup>332</sup> There are still concerns, however, about the lack of a specific legal framework for online copyright infringement, and on the enforcement capacity of Emirati OISPs when right holders report infringing activities online.<sup>333</sup>

In their efforts to promote rights enforcement, all four countries are part of the WCT. It contains a clause binding contracting parties to ensure procedures are available under their law to allow copyright owners to take effective action against any infringement of rights covered by the treaty (infringement through unauthorized making available, in particular).<sup>334</sup> The WCT also obliges national legislators to include expeditious remedies that constitute a deterrent to further infringement.<sup>335</sup> A similar provision regarding the enforcement of rights is included in the WPPT for the related rights covered by that treaty.<sup>336</sup>

The four countries are also contracting parties of the TRIPS Agreement, which has extensive provisions to promote enforcement of the IP rights,<sup>337</sup> including copyright and related rights<sup>338</sup> that it covers.

Typically, enforcement has been through giving right holders access to provisional measures<sup>339</sup> and civil remedies,<sup>340</sup> imposing administrative or criminal sanctions on infringers, and providing remedies and/or sanctions in cases of circumvention of technological protection measures and rights management information.<sup>341</sup>

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<sup>329</sup> *Ibid.*, p. 58.

<sup>330</sup> *Ibid.*

<sup>331</sup> Noerhadi, C.C. "The important role of collective management organization in the field of literary works in Indonesia." *Multicultural Education*. Vol. 7, issue 12 (2021).

<sup>332</sup> Office of the United States Trade Representative, *op cit.*, p. 18.

<sup>333</sup> U.S. Chamber of Commerce, *op. cit.*, p. 383.

<sup>334</sup> WIPO, WCT. *op. cit.*, art. 9.

<sup>335</sup> *Ibid.*, art. 14(2).

<sup>336</sup> WIPO, WPPT, *op. cit.*, art. 23(2).

<sup>337</sup> TRIPS Agreement, *op cit*, arts. 41–61

<sup>338</sup> *Ibid.*, arts. 9–14.

<sup>339</sup> Provisional civil measures normally include temporary and final injunctions on terms the judge deems reasonable to prevent or restrain copyright infringement. In many cases, the injunction includes impounding and disposal of the infringing articles.

<sup>340</sup> Habitually includes an action to claim damages. In some countries, only a claim of actual damages and any profits is permitted. Other countries also include the possibility of claiming statutory damages. In many cases, the law allows the recovery of costs and attorney fees from the infringer.

<sup>341</sup> WIPO. "Understanding Copyright and Related Rights." *wipo.int*. 2016, p. 24.

<[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_909\\_2016.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf)>. It is important in practice to

## B. Copyright and related rights enforcement mechanisms

Chilean legislation has a variety of actions the civil court can pursue at the plaintiff's request against infringement of copyright and related rights.

The right holder can activate a number of injunctions to temporarily halt infringement or to prevent further damage. The judge can order, among other measures, the immediate suspension of the alleged infringing work, and attachment (seizure) of the allegedly infringing copies and the materials used to produce them.<sup>342</sup>

The requirements for these provisional measures include providing reasonable proof of the existence of the right claimed (*fumus boni iuris*), the danger of an imminent infringement (*periculum in mora*) and a sufficient deposit.<sup>343</sup>

The right holder can begin an action for the definitive cessation of the infringer's unlawful activity<sup>344</sup> and the publication of an extract of the verdict, at the defendant's cost.<sup>345</sup>

According to the Copyright Act, damages claims are available to copyright and related rights owners.<sup>346</sup> The law defines the criteria to calculate the damages suffered by the right holder. This includes, as a principal factor, the legitimate sales value of the goods to which the infringement relates. The courts may further sentence the infringer to pay the earnings that may be attributed to the infringement, if these were not considered already when calculating actual damages.<sup>347</sup> In the case of protected goods with no legitimate retail value, the judge will determine the amount of the damage suffered.<sup>348</sup>

The right holder may also request that the compensation for the economic and moral damage suffered be replaced by a lump sum, which will be determined by the court in relation to the seriousness of the infringement, and not for more than 2,000 monthly tax units per infringement (approximately 112,000 US dollars based on October 2022 exchange rates).<sup>349</sup>

The existence of statutory damages can be considered a positive step in enforcing copyright in the digital environment, given that quantitative methods for calculating damages and loss of profit for infringement online can be problematic.

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establish custom controls in the physical world to prevent the illegal transit of goods, but given this is not directly related to the digital environment, it will not be referred to in this study.

<sup>342</sup> Chile, Copyright Act, *op. cit.*, art. 85(D).

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*, art. 85(B)(c).

<sup>345</sup> *Ibid.*, art. 85(B)(a).

<sup>346</sup> *Ibid.*, art. 85(B)(b).

<sup>347</sup> *Ibid.*, art. 85(E).

<sup>348</sup> *Ibid.*, art. 85(A).

<sup>349</sup> *Ibid.*, art. 85(K). Currently, one Chilean tax unit is equivalent to approximately 56 US dollars.



The law contemplates criminal sanctions for different copyright violations.<sup>350</sup> Some provisions protect indirectly the moral right of paternity, sanctioning those who delete or alter the name of the author of the work.<sup>351</sup> The Copyright Act also includes rules of the civil infringement proceedings.<sup>352</sup>

The competent court to resolve civil copyright and related rights issues is the regular civil court. There is also a specialized jurisdiction for claims dealing with industrial property rights.<sup>353</sup> Legislation does not contemplate an administrative body to enforce IP rights.<sup>354</sup>

Regarding alternative dispute resolution (ADR) mechanisms, Chilean law contemplates a compulsory mediation procedure when associations with legal personality representing users of copyright or related rights have not reached an agreement with a CMO as to a fee. The result of the mediation is binding on both parties. The mediator is not a governmental agency or department, but from a public registry.<sup>355</sup>

If the compulsory mediation is not successful, the dispute may be submitted to arbitration, at the request of any of the parties. The judgment by the arbitration court will be regarded as final and include an alternative tariff schedule that may be used by any user who so desires. The fee adopted via this procedure may not be modified by the CMO or resubmitted for mediation or arbitration until three years have passed.<sup>356</sup>

In tariff cases not involving CMOs and user associations, the dispute can be submitted directly to court by either party.

In Indonesia, the Copyright Act allows right holders to seek an interlocutory injunction before a commercial court to request the seizure of the infringing works or related rights products and/or the tools used to produce them, and the cessation of the infringing activity.<sup>357</sup>

Right holders are also entitled to damages in both civil and criminal proceedings.<sup>358</sup> If requested in the framework of a criminal action, damages are specified simultaneously in the court decision.<sup>359</sup>

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<sup>350</sup> *Ibid.*, arts. 78–83.

<sup>351</sup> *Ibid.*, art. 79*bis*.

<sup>352</sup> *Ibid.*, arts. 85(1) and 85.

<sup>353</sup> The Industrial Property Court specializes in disputes involving trademarks, patents, designs and other forms of IP. It resolves the appeals against administrative decisions by the National Industrial Property Institute, especially derived from registration issues. See <https://www.inapi.cl/>.

<sup>354</sup> Chile, Copyright Act, *op. cit.*, art. 90. The Intellectual Property Department (of the Ministry of Culture, Arts and Heritage) is the competent governmental body for copyright and related rights issues, though it does not have administrative enforcement powers.

<sup>355</sup> *Ibid.*, art. 100.

<sup>356</sup> *Ibid.*

<sup>357</sup> Indonesia, Copyright Act, *op. cit.*, art. 99(4).

<sup>358</sup> *Ibid.*, art. 96(2).

<sup>359</sup> *Ibid.*

Criminal charges are reserved for those who infringe copyright on a commercial scale. The penalties include a fine ranging from 100 million Indonesian rupiah to 4 billion Indonesian rupiah (approximately 65,000 US dollars to 258,000 US dollars, on October 2022 exchange rates) or one to 10 years' imprisonment.<sup>360</sup>

For criminal offences other than piracy, before proceeding with penal charges, the parties must pursue a settlement through mediation, insofar as all parties are in the territory of Indonesia.<sup>361</sup>

The competent court to resolve copyright disputes is the Commercial Court, which has exclusive jurisdiction in these claims.<sup>362</sup> There is not a specialized judicial authority to resolve copyright and related rights disputes. In practice, according to the Indonesian survey response, disputes are usually settled amicably without proceeding to the courts.<sup>363</sup> This is confirmed by statistical data from the Directorate General of Intellectual Property (DGPI).<sup>364</sup>

The national regulatory body, in the Ministry of Law and Human Rights, the DGIP also handles industrial property matters and can settle cases via mediation (that is, disputes on distribution royalties in the musical sector<sup>365</sup>).

Copyright disputes can also be settled by arbitration or mediation agencies such as the Indonesian National Arbitration Agency or the Intellectual Property Rights Mediation Agency.

Emirati law provides several remedies and defences against copyright infringement. The Copyright Act regulates a range of civil cease and desist precautionary measures, which must be issued by the Magistrate of Summary Justice of the competent civil court.<sup>366</sup>

The injunctive measures include stopping the infringing act, effecting provisional seizure of the infringing materials or resulting revenue, and preventing public

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<sup>360</sup> *Ibid.*, arts. 112 and 113.

<sup>361</sup> *Ibid.*, art. 95(4).

<sup>362</sup> *Ibid.*, arts. 95(2) and (3).

<sup>363</sup> The DGIP, for instance, has reported severe constraints on its personnel in the field, including lack of offices in all regions and safety risks for officers. See [https://ipkey.eu/sites/default/files/ipkey-docs/2021/IPKey-SEA\\_May2021\\_Musa-Nababan\\_Measures-Undertaken-to-Address-Counterfeiting-and-Piracy-by-Indonesia.ppt.pdf](https://ipkey.eu/sites/default/files/ipkey-docs/2021/IPKey-SEA_May2021_Musa-Nababan_Measures-Undertaken-to-Address-Counterfeiting-and-Piracy-by-Indonesia.ppt.pdf).

<sup>364</sup> According to the DGIP, in 2020 30 IP cases (only six dealing with copyright or related rights issues) went to court in the country. The year before, with no statistical influence from the COVID-19 pandemic, the number of cases was only 47 (five cases dealing with copyright). See [https://ipkey.eu/sites/default/files/ipkey-docs/2021/IPKey-SEA\\_May2021\\_Musa-Nababan\\_Measures-Undertaken-to-Address-Counterfeiting-and-Piracy-by-Indonesia.ppt.pdf](https://ipkey.eu/sites/default/files/ipkey-docs/2021/IPKey-SEA_May2021_Musa-Nababan_Measures-Undertaken-to-Address-Counterfeiting-and-Piracy-by-Indonesia.ppt.pdf).

<sup>365</sup> Indonesia, Government Regulation No. 56 of 2021 on copyright royalty management of song and/or music. This states that in the event of a dispute related to the mismatch in the distribution of the royalty amount, the creator, copyright holder or related rights owner can propose settlement of the case through mediation by the Directorate General of the DGIP. See <https://setkab.go.id/en/govt-issues-regulation-on-songs-music-copyright-royalties-management>.

<sup>366</sup> UAE, Copyright Act, *op. cit.*, art. 35.

performance of the works.<sup>367</sup> A decision can be appealed to the president of the civil court in which the order was issued.<sup>368</sup>

The law also provides grounds for action for authors or right holders to claim pecuniary damages in cases of infringement of moral or economic rights. Compensation will be granted in accordance with general civil rules<sup>369</sup> before the competent civil courts. There is no court specializing in IP disputes.

First, there is a set of criminal provisions in the recent Copyright Act, increasing the penalties for those infringing the economic and/or moral rights of the different protected right holders. Penalties include fines and/or imprisonment, that can be increased in cases of recurrence to imprisonment for a period not less than six months and a fine of between 100,000 UAE dirham and 500,000 UAE dirham (approximately 27,000 US dollars to 136,000 US dollars, based on October 2022 exchange rates<sup>370</sup>).

The law specifically contemplates as a crime the illegal downloading or storing on a computer any copy of a computer program, mobile application or electronic database. Penalties of imprisonment for a period not less than six months can be imposed, and fines of between 100,000 UAE dirham and 700,000 UAE dirham (approximately 27,000 US dollars to 190,500 US dollars, on October 2022 exchange rates<sup>371</sup>). Penalties are aggravated in cases of recidivism.<sup>372</sup>

There is a separate penalty for the unauthorized use of a computer program, mobile application or electronic database. A custodial sentence is not imposed, but the fine ranges from 30,000 UAE dirham to 100,000 UAE dirham (approximately 8,200 US dollars to 27,000 US dollars, on October 2022 exchange rates) for each program, application or database illegally used, increasing in cases of recidivism.<sup>373</sup>

The Copyright Act does not designate a specialized judicial body to deal with copyright and related rights disputes. The ordinary competent courts decide civil and criminal cases deriving from infringement of copyright and related rights.<sup>374</sup>

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<sup>367</sup> *Ibid.*, art. 35.

<sup>368</sup> *Ibid.*, art. 36.

<sup>369</sup> *Ibid.*, art. 43.

<sup>370</sup> *Ibid.*, art. 39.

<sup>371</sup> *Ibid.*, art. 40(1)(c).

<sup>372</sup> *Ibid.*, art. 40(2).

<sup>373</sup> *Ibid.*, art. 41.

<sup>374</sup> The competent civil court might be the federal or the local Court of First Instance; see UAE, Copyright Act, *op. cit.*, art. 1. This is because the UAE civil judicial system operates on two levels. The Emirates of Sharjah, Ajman, Fujairah and Umm Al Quwain follow the federal judicial system, but Abu Dhabi, Dubai and Ras Al Khaimah maintain independent departments, with jurisdiction in matters not assigned to the Federal Judiciary in accordance with the constitution; see United Arab Emirates Constitution, *op. cit.*, art. 104. In each system, the first two steps of civil justice are the Court of First Instance and the Court of Appeal. At federal level, the highest court is the Federal Supreme Court, which is also the highest judicial authority in the UAE. But at local level, the Court of Cassation is the highest judicial authority of the Emirate, with the power to consider challenges filed against judgments rendered in the Court of Appeal. See <https://u.ae/en/about-the-uae/the-uae-government/the-federal-judiciary>.

There is, however, a hybrid procedure for resolution in some cases, whereby the decisions of the Ministry of Economy in applying the law (for example, registration of works, compulsory licenses for reproducing and/or translating works, or authorization of rights management entities) can be taken before the Federal Court of Appeal.

However, any lawsuit will not be accepted except after a grievance has been filed with the Grievances Committee for Copyrights and Neighbouring Rights, a governmental body.<sup>375</sup> It is, therefore, the administrative resolution of the Grievances Committee that might be later appealed.<sup>376</sup>

It is also important to note that under the Copyright Act, the Ministry of Economy has a general power to supervise and control implementation of the act, and crimes and violations that occur in violation of its provisions.<sup>377</sup> This means the decision of the Ministry on any crime or civil violation of copyright or related rights will be subject to the prior determination of the Grievances Committee before it can be appealed in court.<sup>378</sup>

The law does not establish any specific mediation or arbitration system for copyright infringement. However, the general arbitration system for civil cases regulated by Federal Law No. 6 of 2018 on arbitration<sup>379</sup> can be applied to copyright/related rights infringement. There are different arbitral institutions in the country, especially for cases including a foreign party. These include the Dubai International Arbitration Centre,<sup>380</sup> which has assumed some of the cases previously managed by the DIFC-London Court of International Arbitration.<sup>381</sup>

In Uruguay, the law has limited measures against copyright infringement, though it includes the most important ones. It contemplates precautionary measures to avoid future infringement, or that a violation already committed subsists or is repeated. These include the immediate suspension of the infringing activities, confiscation of illicit or equipment copies used for the infringing activity, and

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<sup>375</sup> UAE, Copyright Act, *op. cit.*, art. 37(1) provides that the Grievances Committee is established at the Ministry of Economy under the chairmanship of a specialized judge nominated by the Minister of Justice, with two specialists chosen by the Minister of Economy.

<sup>376</sup> *Ibid.*, art. 37(3).

<sup>377</sup> *Ibid.*, art. 47. The federal government can, however, delegate all or some of these powers to the competent local authorities.

<sup>378</sup> *Ibid.*, art. 48. It is also provided in the Copyright Act that federal employees, local administrative authorities (if they are designated by federal government) or the head of the local judiciary authority will have the capacity of law enforcement officers in proving violations of the law.

<sup>379</sup> For an English version, see <https://u.ae/en/information-and-services/justice-safety-and-the-law/litigation-procedures/alternative-methods-to-settle-disputes-/uae-federal-law-on-arbitration>.

<sup>380</sup> See <http://www.diac.ae/idias/>.

<sup>381</sup> The Dubai International Arbitration Centre (DIAC) and the London Court of International Arbitration (LCIA) agreed terms in accordance with Government of Dubai, Decree No. (34) of 2021 by which LCIA will administer all existing DIFC-LCIA cases (those commenced and registered under a designated case number on or before March 20, 2022). All arbitrations, mediations and other alternative dispute resolution proceedings commenced on or after March 21, 2022 will be registered by DIAC and administered directly by its administrative body; see <https://www.lcia.org/News/update-difc-lcia.aspx>.

seizure of profits obtained from the illicit activity or the amount unpaid to the right holder.<sup>382</sup>

The injured party, author or their successor is also entitled to file a civil action to definitively prevent infringement or to recover damages. Statutory damages can be awarded to the right holder, with a fine of up to 10 times as great as the value of the infringing product.<sup>383</sup>

Regarding the rights of broadcasting organizations, a provision in the 2020–2024 National Budget Law established an administrative fine punishing unauthorized acts of dissemination for commercial purposes of pay-per-view television services through the Internet or similar network.<sup>384</sup>

The law contemplates penalties for different criminal offences. In some cases, the penalty includes imprisonment from three months up to three years.<sup>385</sup> In cases of infringement without gainful intent or without the intent to cause unjustified damage, the fines range from 10 to 1,500 adjustable units (approximately 365 US dollars to 55,000 US dollars).<sup>386</sup> The judge will also order the seizure and destruction of the infringing copies, as well as all the devices or equipment used in their production.<sup>387</sup>

Uruguay lacks specialized civil judicial bodies to resolve copyright and related right matters, with proceedings addressed by the general competent civil court. Appeals go before the Civil Appeal Court. Criminal proceedings dealing with infringement of copyright and related rights are heard by the regular competent criminal courts.

The Copyright Council is the national regulatory body.<sup>388</sup> It acts within the administrative structure of the Ministry of Education and Culture<sup>389</sup> and performs mainly arbitrary and mediation<sup>390</sup> duties and represents the State in copyright-related matters.<sup>391</sup> Some of these competences are developed by the Regulation of Law No. 17.616.<sup>392</sup> The National Directorate of Industrial Property deals with industrial property rights.

From a procedural point of view, Uruguay has both judicial and extrajudicial mediation mechanisms, and a general arbitration system for civil cases that can be applied to infringement of copyright and related rights.

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<sup>382</sup> Uruguay, Copyright Act, *op cit.*, art. 48.

<sup>383</sup> *Ibid.*, art. 51.

<sup>384</sup> Uruguay, Law No. 19.924 of December 30, 2020 of national budget law, salaries, expenses and investments for the fiscal year 2020–2024, art. 712; see (in Spanish) <https://www.impo.com.uy/bases/leyes/19924-2020/712>.

<sup>385</sup> Uruguay, Copyright Act, *op cit.*, art. 46(A).

<sup>386</sup> *Ibid.*, art. 46(E). An adjustable unit was worth 1,494,32 Uruguayan pesos (approximately 36,5 US dollars) in October 2022; see <https://www.ine.gub.uy/unidad-reajustable>.

<sup>387</sup> *Ibid.*, art. 46(C).

<sup>388</sup> *Ibid.*, art. 56.

<sup>389</sup> Uruguay, Decree No. 154/004 on Regulation of Law No. 17.616, *op cit.*, art. 21

<sup>390</sup> *Ibid.*, art. 24.

<sup>391</sup> Uruguay, Copyright Act, *op cit.*, art. 61.

<sup>392</sup> Uruguay, Decree No. 154/004 on Regulation of Law No. 17.616, *op cit.*, arts. 20–24.

The Copyright Act also established that when users and CMOs do not reach an agreement, they can, by mutual consent, initiate an arbitration procedure in the Copyright Council. The council will constitute the Arbitral Tribunal within 20 days of the initial petition. The tribunal must render an award within the peremptory period of 45 business days from its initiation.<sup>393</sup>

The Regulation of Law No. 17.616 also grants the Copyright Council the general competence to mediate when required between the different CMOs operating in the country, and between CMOs and other trade associations.<sup>394</sup>

### C. Technological protection measures and rights management information

The Chilean Copyright Act contains a provision to deal with the unauthorized removal of rights management information, as a result of the WCT and WPPT treaties.

The law provides a civil claim for damages for those contributing to the deletion or alteration of such information, irrespective of whether the deleted information was in electronic form or not. The law also provides a fine, ranging from 25 to 150 monthly tax units.<sup>395</sup>

With this regime, the Chilean legislators go even further than articles 12(1) of the WCT and 19(1) of the WPPT; the treaties require only legislative action against those interfering with electronic rights management information. As the treaties are establishing a minimum international standard of protection, Chile's law is compatible with both.

The Copyright Act defines the term rights management information without including mention of electronic information, strictly following in this instance Articles 14(2) of the WCT and 19(2) of the WPPT.

Regarding the illegal circumvention of technological digital measures, the WCT was published in the Chilean Official Diary,<sup>396</sup> and is therefore part of internal law, though there is not yet an express provision in the Copyright Act to develop the relevant provisions of the Treaty.

The Indonesian Copyright Act has specific provisions to protect technological protection measures used to safeguard the work or related rights subject matter, following the WCT and WPPT lead.

It is illegal to damage, destroy, eliminate or disable the function of technological protection measures. However, the technological protection may be circumvented for State defence, security reasons or other grounds provided by

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<sup>393</sup> Uruguay, Copyright Act, *op cit.*, sect 58. Until the controversy is settled, authorization for broadcasting the repertoire will be taken as granted, provided the previous rate continues to be paid and without prejudice to the obligation to pay for the differences that may result from the arbitration procedure.

<sup>394</sup> Uruguay, Decree No. 154/004 on Regulation of Law No. 17.616, *op cit.*, art. 24.

<sup>395</sup> Chile, Copyright Act, *op cit.*, art. 84.

<sup>396</sup> Chile, Decree No. 270, *op cit.*

the law or regulations.<sup>397</sup> The definition of technological protection measure is not in the Copyright Act but in its annexed elucidation.<sup>398</sup>

In cases of unlawful infringement for commercial use, the penalty is imprisonment for up to two years and/or a fine of up to three hundred million Indonesian rupiah.<sup>399</sup> Individual acts of circumvention, not made for commercial use, are not penalized.

The law provides separate protection against the unauthorized removal, change or damage of copyright management information and/or copyright electronic information used by the author to protect their moral rights.<sup>400</sup> However, in practice, if those technological means of protection are used, they will also indirectly protect the author's economic rights.

The definitions of copyright management information and copyright electronic information supplied in the Copyright Act<sup>401</sup> are not consistent with the definition of rights management information of Article 12(2) of the WCT.

The UAE Copyright Act includes imposing criminal liability on those who illegally manufacture or import, for the purpose of sale, rental or circulation, any counterfeit work or copies thereof, or any apparatus, equipment, devices or materials specially designed or prepared for defrauding the protection or technology used by the right holder. Such protection or technology must be used by the right holder for "transmitting, putting into circulation, regulating or managing such rights, or preserving a specific standard of purity of the copies".<sup>402</sup>

A similar provision covers the disruption or impairing of any technical protection or electronic data aiming at regulating and managing the rights prescribed in the Copyright Act.<sup>403</sup>

In both instances, the law imposes penalties of imprisonment for a period not less than six months and a fine of between 100,000 UAE dirham and 700,000 UAE dirham (approximately 27,000 US dollars to 190,500 US dollars, based on October 2022 exchange rates<sup>404</sup>). Those penalties are increased in cases of recidivism.<sup>405</sup>

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<sup>397</sup> Indonesia, Copyright Act, *op. cit.*, art. 52. Also, art. 53(1) provides that the protection of works or protected subject matter using information technology-based and/or high technology-based means of production and/or data storage must satisfy the licensing regulations and production requirements established by relevant authorities.

<sup>398</sup> *Ibid.*, art. 52. See comment defining the term technological protection measures as any technology, device or component designed to prevent or restrict unauthorized acts by the author, copyright holder, related rights owners and/or those prohibited by laws and regulations.

<sup>399</sup> *Ibid.*, art. 112.

<sup>400</sup> *Ibid.*, arts. 6 and 7(3).

<sup>401</sup> *Ibid.*, arts. 7(1) and 7(2).

<sup>402</sup> UAE, Copyright Act, *op. cit.*, art. 40(1)(a).

<sup>403</sup> *Ibid.*, art. 40(1)(b).

<sup>404</sup> *Ibid.*, art. 40(1).

<sup>405</sup> *Ibid.*, art. 40(2).

Additionally, under Federal Decree-Law No. 34 of 2021 on combating rumours and cybercrimes,<sup>406</sup> websites are considered to be providing “illegal content” if they “provide information, tools and methods aiming to infringing intellectual property rights and penetrating the protection means used for protecting such rights, such as decoding movies and coded TV channels, and operation of copied magnetic diskettes and copied electronic programs and games, and deactivation of protection systems designed exclusively for combating piracy”.<sup>407</sup>

In Uruguay, the Copyright Act contains a provision to guarantee adequate protection of technological digital measures utilized to protect copyright or related rights in terms close to those used in the relevant WCT and WPPT provisions.<sup>408</sup>

Individual acts of circumvention are not penalized. The law only sanctions facilitating or preparatory activities, such as marketing products and/or services with the intention to deceive, suppress, neutralize or evade the technical mechanisms that the holders have implemented in order to protect their respective rights. The penalty imposed in these cases is identical to the one assigned to the infraction of substantive rights (a fine and imprisonment from three months to three years).

The act also provides a provision to penalize unauthorized individual alteration or removal of electronic right management information, with no fines but imprisonment penalties from three months to three years. The same will be applied to unauthorized acts of distribution, importation, broadcasting or communication to the public of copies of works or musical performances or phonograms, knowing that the electronic information placed by the right holders has been removed or altered without authorization.<sup>409</sup>

## 5. Copyright infringement and online intermediary service providers

Establishing the role of OISPs has proved tricky in many legal systems. It is, however, extremely important to enforce copyright in the digital environment. The infringing user is usually difficult to find or does not have the economic resources for the damage caused to respond.<sup>410</sup>

It is, therefore, imperative, to have a set of rules that correctly define the secondary liability of Internet companies providing services to end users if they do not meet certain standards of conduct.

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<sup>406</sup> UAE, Federal Decree-Law No. 34 of 2021 on combating rumours and cybercrimes; see (in Arabic) <https://laws.uaecabinet.ae/ar/group/1011>.

<sup>407</sup> See <https://tdra.gov.ae/en/About/tdra-sectors/information-and-digital-government/policy-and-programs-department/internet-guidelines#prohibited-content-categories>.

<sup>408</sup> Uruguay, Copyright Act, *op cit.*, art. 46(B).

<sup>409</sup> *Ibid.*, art. 46(B).

<sup>410</sup> In many countries the user will not be directly sued for infringement in the case of online infringement. Instead, the laws establish a “graduated response” or “three strike” mechanism that allows an administrative authority to issue warnings to the user and/or a suspension of the Internet access account of the user before a civil or criminal complaint is initiated. See France. Code de la Propriété Intellectuelle, art. L(331)(20).



These rules are normally designed to limit the liability of certain online service providers performing intermediary activities. Therefore, the limitation of liability (the so-called safe harbor) will never apply to online services acting as direct infringers, such as a website storing and/or offering infringing content to the public.

The role of OISPs is also critical with regard to injunctive relief (also known as an injunction) for online infringement of copyright and related rights. Right holders must have the opportunity to seek the removal of infringing content or to prevent, in a decisive manner, access to it by Internet users.

The position of online intermediary service providers in cases of copyright infringement varies greatly in the four countries. Only Chile has in the Copyright Act a complete system covering both limitations on liability of OISPs and a blocking mechanism for content that infringes copyright and related rights.

#### A. Chile

The Copyright Act establishes a safe harbor for Chilean OISPs.<sup>411</sup> This regime has been strongly influenced by the Free Trade Agreement between Chile and the United States of America.<sup>412</sup>

The starting point in Chilean legislation is that there is no general obligation for OISPs to monitor the material exchanged by the users of their services.<sup>413</sup> This includes the absence of any obligation to conduct active searches for facts or circumstances that might indicate online copyright infringement.

The law creates specific rules on limitation of liability<sup>414</sup> for four types of Internet services, namely transmission/access services,<sup>415</sup> system caching services,<sup>416</sup> hosting services<sup>417</sup> and referral services. Thus, when an OISP meets some general requirements stipulated in the law,<sup>418</sup> and complies with the specific conditions required in each case, it will not be required to pay pecuniary relief for damages derived from copyright infringement caused by their users.

The group of common conditions applicable to all types of OISPs requires they publish the general conditions that apply to the service contracts with their end users, specifying how these contracts are to be terminated for repeat infringers. The OISPs are required not to interfere in the use of effective technological protection measures and rights management information. The OISP must also

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<sup>411</sup> To regulate this, Law No. 20.435 of May 4, 2010, amends Law No. 17.336 on intellectual property. See (in Spanish) <https://bcn.cl/2ey9w>.

<sup>412</sup> Chile, Copyright Act, arts. 85(L)–85(U).

<sup>413</sup> *Ibid.*, art. 85(P).

<sup>414</sup> *Ibid.*, art. 85(I).

<sup>415</sup> *Ibid.*, art. 85(M).

<sup>416</sup> *Ibid.*, art. 85(N).

<sup>417</sup> *Ibid.*, art. 85(Ñ).

<sup>418</sup> *Ibid.*, art. 85(O).

be a genuine neutral intermediary, so must neither generate content, nor select the recipients.

The law also established the specific conditions that must be fulfilled in each case for exemptions from liability for providers of access/transmission services,<sup>419</sup> system caching services,<sup>420</sup> hosting services and referral services.<sup>421</sup>

In any case, OISPs can request precautionary measures for temporarily stopping infringement while the case is pending, withdrawing infringing content in their system or blocking access to that content if it cannot be eliminated.

To do so, the Copyright Act establishes a complex notification procedure.<sup>422</sup> For this to be valid, judicial intervention is required, and the fulfilment of certain requirements (clear identification of allegedly infringed rights, proper identification of right holder and detailed description of the infringing material<sup>423</sup>).

Once this plea has been entered, the court must immediately order the disablement or elimination of the allegedly infringing content. The end user is entitled to request the order be set aside, pleading all facts or circumstances deemed fit in the counter-notification. The judge will consider the allegations and make a second decision, which can be appealed. The procedure will be processed briefly and in a summary manner.

If the safe harbor conditions are met and a precautionary measure is not issued, OISPs are still subject to a final injunction to end the infringement definitively. Transmission/access service providers, therefore, have to undertake reasonable measures to block access to infringing content, as far as it does not imply the blocking of non-infringing content.<sup>424</sup>

In a similar way, the right holder can seek a final injunction against system caching service providers, hosting service providers and referral service providers that satisfied safe harbor conditions. The judge might order the removal

<sup>419</sup> The safe harbor exception will apply if the transmission/access service provider complies with different conditions of neutrality (i.e., not selecting or modifying the information contained in the transmission, not initiating the transmission, and not selecting the receiver of the transmission).

<sup>420</sup> System caching service providers offers alternative “cached” copies of websites to accelerate the transmission of information on the Internet. These OISPs are required by law to comply with conditions on access to the information and rules regarding the updating of the information specified by the original website provider, to not interfere with the lawful use of technology used by the website provider to obtain information about the online use of the stored content, and to not modify the information. They also must act expeditiously to remove or disable access to the material where it has been deleted from the website of origin, provided that a proper notification was sent under the notice and take down system of art. 85(Q).

<sup>421</sup> To benefit from safe harbor, the OISPs must have no actual knowledge of the illegal nature of the data, receive no financial benefit directly attributable to the infringing activity, and publicly designate a representative tasked with receiving the judicial notifications that declare the content illegal. Finally, after acquiring actual knowledge of the infringing character of the content, the online intermediary service provider must expeditiously remove or disable access to the infringing material.

<sup>422</sup> Chile, Copyright Act, *op cit.*, art. 85(Q)

<sup>423</sup> The interim injunction may be adopted even *inaudita parte* if there are pressing reasons that render this advisable, on condition the claimant lodge the necessary security.

<sup>424</sup> Chile, Copyright Act, *op cit.*, art. 85(R).

or disabling of access to the infringing material and close the accounts of repeat infringers.<sup>425</sup>

There is also an obligation for any party who wilfully furnishes false information about alleged rights infringements to pay damages.<sup>426</sup> The Copyright Act provides a subpoena for the civil court to order OISPs to hand over the personal data required to identify the infringer.<sup>427</sup>

## B. Indonesia

In Indonesia, the Copyright Act does not contain provisions establishing safe harbor for any kind of online service provider. However, it does establish a procedure to block content or make the services of an electronic system inaccessible if copyright and related rights are infringed.<sup>428</sup>

The blocking mechanism is actionable in cases of copyright/related rights infringement for commercial use, committed through “electronic systems”. The Copyright Act, therefore, does not differentiate between the different roles or activities of online service providers (transmission or access, system caching, hosting, referral services).

In practice, removal measures are typically directed at infringing websites,<sup>429</sup> whereas making a service inaccessible is directed at access providers.

The Copyright Act does not obligate OISPs to monitor copyright infringing content in their systems. Instead, it authorizes the Government to supervise the production and dissemination of such content using media based on information technology to prevent infringement.

Governmental authorities can also supervise the recording of works and related rights subject matter using any media in performance venues, often a first step in illegal uploading to the Internet.<sup>430</sup>

The Act also allows any person (including right holders) to report to the Directorate General of Intellectual Property (DGIP) if they become aware of an infringement for commercial use committed through electronic systems.<sup>431</sup>

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<sup>425</sup> *Ibid.*, art. 85(R).

<sup>426</sup> *Ibid.*, art. 85(T).

<sup>427</sup> *Ibid.*, art. 85(S).

<sup>428</sup> According to art. 10, managers of business premises are prohibited from allowing the sale and/or reproduction of infringing goods in the location under their management. The rule clearly regulates only physical shops though there have been attempts to apply it to Internet service providers, especially hosting providers. See Simanjuntak, I.K. “Legal protection of Internet intermediary to copyright infringement by users (comparative study on Indonesia, USA and European Union).” *International Journal of Research and Review*. Vol. 5, Issue 4 (2018): p. 57.

<sup>429</sup> Indonesia, Copyright Act, *op. cit.* art. 55(4) refers specifically to “blocking of Internet sites”.

<sup>430</sup> *Ibid.*, art. 54.

<sup>431</sup> *Ibid.*, art. 55(1).

The DGIP must verify such reports<sup>432</sup> and, at a complainant's behest, will recommend the Ministry of Communications and Informatics (MOCI) block, in part or whole, the content if there is sufficient evidence of infringement. The DGIP might also recommend making the services of the electronic system inaccessible to Indonesian end users.<sup>433</sup>

The MOCI may follow this recommendation, blocking the content or preventing user access to the electronic system, rendering it inaccessible.<sup>434</sup> If the website is entirely blocked, the DGIP is obliged to request a court provision within 14 days.<sup>435</sup>

It is for the courts, therefore, to confirm or reverse the administrative decision to block the infringing website, though preventing access to the site, or partially blocking it, can be carried out by the administrative authority. In practice, the number of websites blocked by the MOCI for infringing activities appears to be moderate.<sup>436</sup>

Regarding further regulation of this mechanism, the Copyright Act defers to a joint regulation of the Minister of Justice and Human Rights and Minister of Communication and Informatics published in 2015. The regulation includes a mechanism to reopen blocked sites under certain conditions.<sup>437</sup>

In practice, these specific provisions overlap with a complex network of administrative regulations dealing with liability for disseminating infringing content by Internet services, especially e-commerce platforms.

The MOCI issued a circular<sup>438</sup> creating a safe harbor policy for e-commerce platforms in 2016 that stated an online platform would be held responsible only if it was unable to demonstrate force majeure, error and/or negligence of its users.<sup>439</sup> So, to avoid liability, the platform must prove a user was responsible for uploading the content. The policy also had a notice and take down procedure but apparently it has not been efficient against repeat or large-scale infringers.<sup>440</sup>

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<sup>432</sup> *Ibid.*, art. 55(2).

<sup>433</sup> *Ibid.*, art. 55(3).

<sup>434</sup> *Ibid.*, art. 56(1).

<sup>435</sup> *Ibid.*, art. 55(4).

<sup>436</sup> According to data provided by the DGIP, the number of sites shut down for violating IP rights (not only copyright and related rights) in Indonesia rose from 47 in 2019, to 176 in 2020 and 209 in 2021. See [https://ipkey.eu/sites/default/files/ipkey-docs/2021/IPKey-SEA\\_May2021\\_Musa-Nababan\\_Measures-Undertaken-to-Address-Counterfeiting-and-Piracy-by-Indonesia.ppt.pdf](https://ipkey.eu/sites/default/files/ipkey-docs/2021/IPKey-SEA_May2021_Musa-Nababan_Measures-Undertaken-to-Address-Counterfeiting-and-Piracy-by-Indonesia.ppt.pdf)

<sup>437</sup> Indonesia, Joint Regulation No. 14/1985/No. 26 of 2015 on the implementation of closure of content and/or user rights of copyright infringement and/or related rights in electronic systems. See Simanjuntak, *op. cit.*, p. 61.

<sup>438</sup> Indonesia, Circular of the Minister of Communication and Information of the Republic of Indonesia No. 5 of 2016 on limitations and responsibilities of platform providers and merchant trading through electronic commerce system which is user generated content. See Simanjuntak, *op. cit.*, p. 6.

<sup>439</sup> *Ibid.*

<sup>440</sup> Zultan, R. "Indonesia's ongoing struggle against IP infringement offline and online." *tilleke.com*. May 30, 2022. Web. Oct. 21, 2022. [https://www.tilleke.com/print-insight/?post\\_id=61386&print=1](https://www.tilleke.com/print-insight/?post_id=61386&print=1)

Government Regulation No. 80 of 2019 concerning trading through electronic systems later updated the safe harbor policy, affirming that e-commerce platforms (electronic system operators) will not be liable if they remove links and illegal electronic information immediately after obtaining actual knowledge or awareness of its existence.<sup>441</sup>

### C. United Arab Emirates

The United Arab Emirates Copyright Act does not contain a provision for secondary liability of OISPs in cases of copyright infringement, nor does it have a system to remove infringing content or block access to it.

Instead, the United Arab Emirates has chosen a so-called horizontal approach, with the Telecommunications and Digital Government Regulatory Authority (TDRA) having the authority to block infringing websites to Emirati users.

Among the 17 categories of prohibited content<sup>442</sup> that may trigger the blocking of a website is the one pertaining to the diffusion of copyright and related rights infringing content, such as “providing and publishing movies, photos, drawings, books, electronic programs and games, encrypted TV and radio channels and other intellectual property rights in electronic form”.<sup>443</sup>

To block access to the infringing content, the TDRA will notify Emirati access providers under the rules of the Internet Access Management Regulatory Policy. The policy allows such providers to automatically identify and filter prohibited content. They can also prohibit access after a report issued by a member of the public.<sup>444</sup>

The TDRA has “the sole and absolute discretion to notify the management of any website in the event content exists that fall under a prohibited content category”, informing them the website will be blocked or has been blocked according to the policy.<sup>445</sup> The blocking will not affect content that is not prohibited, where possible.<sup>446</sup> It remains permanent until the prohibited content is removed.

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<sup>441</sup> Ali, A.H., *et al.* “Responsibilities of e-commerce platforms providers against copyright infringement in Indonesia: Comparison with Singapore.” *Advances in Social Science, Education and Humanities Research*. Vol. 642 (2021): p. 2.

<sup>442</sup> The definition of prohibited content in TDRA’s Internet Access Management Regulatory Policy (IAM Regulatory Policy) is broad and includes “content that is unacceptable and contrary to the public interest, public morality, public order, public and national security, Islamic morality or any prohibited matter according to any laws, regulations, procedures or requirements applicable in the UAE, as described more specifically in each category of Prohibited Content Categories”. See TDRA. “Internet Access Management: Regulatory Policy” *tdra.gov.ae*. April 19, 2017, arts. 3–1. Web. Oct. 21, 2022. <<https://tdra.gov.ae/en/About/tdra-sectors/telecommunication/regulatory-affairs-department/regulations-and-ruling#regulations>>.

<sup>443</sup> *Ibid.*, annex.

<sup>444</sup> *Ibid.* art. 3(3).

<sup>445</sup> *Ibid.*

<sup>446</sup> *Ibid.*, art. 4(1)(1).

Also, according to Federal Decree-Law No. 34 of 2021, uploading prohibited content and refraining from removing it is considered a punishable offence.<sup>447</sup>

#### D. Uruguay

In Uruguay, there is neither horizontal legislation establishing the role of Internet intermediaries in case of their users uploading infringing content, nor a special regime for copyright infringing content. In this scenario, liability rules and the general civil and criminal law will apply.

Two mechanisms are available, however, to oblige OISPs to prevent access to TV broadcasting signals in cases of illegal online retransmission.

The first was established by Law No. 19.924<sup>448</sup> ordering OISPs to block access to unlawful content in the case of unauthorized online dissemination for commercial purposes of pay-per-view television services. The law empowered the Communications Services Regulatory Unit (URSEC) to prevent Uruguayan users accessing the retransmission under certain circumstances.

The law establishes a notice and take down system initiated by the right holder, who must file a complaint based on a sworn statement before the URSEC, including the supporting technical and legal provisions.<sup>449</sup>

The URSEC may take temporary measures by blocking the infringing signal only as necessary to prevent access from the national territory, with prior notification to the reported infringers.<sup>450</sup>

If the dissemination is carried out via an independent online intermediary service or platform, the service provider will be apprised of all the relevant information about the alleged infringement, such as the identified URLs (uniform resource locator) or IP addresses. In this event, the service provider must, within its technical capabilities, act expeditiously to block the identified URLs or IP address on a temporary and revocable basis for a period not exceeding 30 days. The order to block access to the infringing signal is subject to judicial review.

Finally, there is a rule when illegal retransmission is through a website or platform not acting as an independent OISP but whose main purpose is the retransmission of programming, television and/or series (that is, sites designed and operated to retransmit unauthorized content).

Then URSEC may directly order the website or platform to immediately block the infringing content. It may also require Internet access providers to prevent access from the national territory to the IP addresses and/or URLs being used. The

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<sup>447</sup> See <https://u.ae/en/information-and-services/justice-safety-and-the-law/cyber-safety-and-digital-security>

<sup>448</sup> Uruguay, Law No. 19.924, *op. cit.*, art. 712.

<sup>449</sup> *Ibid.*, para. 3.

<sup>450</sup> *Ibid.*, para. 4.

URSEC is granted this authority on a temporary basis. It is revocable and for a period not exceeding 30 days.

A second special administrative online blocking regime was passed in Law No. 20.075, of October 20, 2022, on rendering of accounts and budget execution balance for the year 2021.<sup>451</sup> It gives the URSEC power to block, in real time, the illegal online retransmission of sporting events by ordering Internet access providers to block access to these contents to Uruguayan users.<sup>452</sup>

To benefit from this mechanism, the right holders (mainly broadcasting organizations) must register with the URSEC, proving their ownership of the transmission rights.<sup>453</sup>

After a complaint has been submitted, the URSEC may issue precautionary measures providing that access is disabled for the duration of the event in question. This is regardless of the domain name or IP address used by the infringer and without a new order needing to be issued (in case of the infringer changing to a mirror site). The OISP must be notified of these measures.

The law also establishes a private notification process in real time, without the URSEC intervening. Right holders may report the illicit retransmission directly to Internet access providers. Within 30 minutes of receiving a notification, they disable access or remove the illegal broadcasts. The OISP must then inform the URSEC of the measures taken within a maximum of five business days.

The access provider must not prevent access to webpages or websites hosting legal contents and services. The blocking must affect only access to illegal retransmissions of live online sporting events. Right holders who promote blocking without proper grounds, or without complying with the law may be subject to administrative fines.

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<sup>451</sup> Uruguay, Law No. 20.075, of October 20, 2022, of rendering of accounts and budget execution balance for the year 2021; see (in Spanish) <https://www.gub.uy/ministerio-economia-finanzas/comunicacion/publicaciones/ley-20075>

<sup>452</sup> *Ibid.*, art. 233.

<sup>453</sup> Procedure starts with a complaint from right holder based on a sworn statement before the URSEC that must include the technical and legal provisions that support it. The URSEC may take temporary measures to prevent the dissemination of the infringing signal by blocking it only as strictly necessary to prevent access from the national territory, with prior notification to those reported as infringers.

## IV. RECOMMENDATIONS TO PROMOTE THE USE OF IP RIGHTS IN THE DIGITAL ENVIRONMENT IN CHILE, INDONESIA, UNITED ARAB EMIRATES AND URUGUAY

### 1. Adapting national copyright legislation to the digital environment

The four selected countries have a solid legal basis in their legislation to protect IP rights in the digital era. There is no need, therefore, for radical change. However, it is recommended they consider small amendments to their national copyright acts to enhance legal certainty and the protection provided to author and related rights for the digital use of works or other subject matter.

#### A. Recommended actions on copyright subject matter and registration systems

In the United Arab Emirates, small systematic changes would improve the Emirati Copyright Act; for example, separating more clearly the rules for copyright from those regulating related rights. Creating specific sections in the Copyright Act for enforcement and the regime for the collective managing of rights would be also helpful.

Uruguay would greatly benefit from updating its Copyright Act to incorporate technological developments. Originally published in 1937, the law was substantially updated in 2003. However, it would be helpful to revamp national legislation to cope with the new reality, which is dominated by online exploitation of works and protected subject matter.

The definition of work in the legislation is adequate in the four countries but it would be helpful to expressly include that only original works are protected.

Even if it is possible to interpret the laws of Chile, the United Arab Emirates and Uruguay<sup>454</sup> as implicitly including this condition, incorporating originality as an explicit requirement would improve legal certainty. It would afford any creation not expressly named in the law protection, provided it is original.

The ideal place for this is in the definition of “work”, or in the list of protected works if there is no such definition in the national legislation, such as in Uruguay. Making originality the criterion for the work to be protected by the law under an open list system is probably the best way to deal with technological evolution.

This is especially useful in protecting new works in digital format, such as videogames and other electronic games or mobile applications. In some countries, such as the United Arab Emirates, the law specifically mentions smart applications or applications (but no videogames), but given Chile, United Arab Emirates and Uruguay expressly follow an open list system, every original

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<sup>454</sup> For example, art. 1 of the UAE Copyright Act defines the work as “innovative” production, and art. 5 of Uruguay’s act protects “any production of the domain of intelligence”.



videogame or mobile app can easily be included as a protected work, even if the law does not expressly mention these creations.

Therefore, explicit mentions in the list of protected works of videogames and other electronic games and mobile applications in countries such as Chile or Uruguay is not imperative but could be useful when legislation is updated. Express mention of computer programs in both national laws reinforces adequate protection. The same applies for videogames in the United Arab Emirates. According to the Copyright Act, this could easily be included in the list of works with a minister's decision.

Indonesia has neither a clearly open list system of works protected by copyright, nor does it use originality as a criterion of protection, as the law also protects skill and labor works. However, the existing list of protected works expressly mentions videogames as a protected work, guaranteeing full protection in this case.<sup>455</sup>

The inclusion of mobile applications is more problematic, but these works can gain indirect protection in Indonesia through applying existing rules to videogames and computer programs.

In any case, the adoption of an open list system, coupled with originality as an express criterion of protection, is the best solution for protecting categories of works emerging from future technology. Skill and labor products could always be protected with a *sui generis* right, as happens for some aspects of database protection in European Union member states.

Originality and an open list mechanism is also the best solution to consider as protected works fashion designs or models. Indeed, those are expressly named as protected subject matter in Chile and in Indonesia, but their inclusion as protected works is not as clear in Uruguay<sup>456</sup> or the United Arab Emirates.<sup>457</sup> With original fashion designs, the principle of cumulative protection by both copyright and industrial design rights is the best safeguard for creators.<sup>458</sup>

It is also recommended – as happens in Chile<sup>459</sup> and the United Arab Emirates<sup>460</sup> – that the relationship between ownership of copyright on the work (*corpus mysticum*) and that of the material object containing the original copy (*corpus mechanicum*) is clearly defined.

This implies declaring in the law that the purchaser of the physical property (the physical “support”) in which the work has been incorporated will not have, unless otherwise agreed, any economic right of exploitation over the incorporated works.

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<sup>455</sup> Indonesia, Copyright Act, *op. cit.*, art. 40.

<sup>456</sup> The law protects designs or creations having artistic value as regards dress design, but only if they are not protected by the legislation on industrial property, as often happens.

<sup>457</sup> Fashion designs could be considered under art. 2(8) of the UAE Copyright Act as “works of drawing with lines of colours”.

<sup>458</sup> Uruguay, Law No. 17.164, *op. cit.*, art. 87.

<sup>459</sup> Chile, Copyright Act, *op. cit.*, art. 37.

<sup>460</sup> UAE, Copyright Act, *op. cit.*, art. 13.

However, to adequately take into account the purchaser's property rights, the law should also establish that with works of visual art (drawings, paintings, pictures, sculptures, among others), it is presumed that the owner of the physical support has the right of public exhibition, unless otherwise agreed.

Regarding registration, the four countries have a public system to register works and other protected subject matter. In some cases (Chile, Indonesia and United Arab Emirates) the process can be accomplished through a public website or electronic platform, so these can already be considered operational digital registries. Uruguay, however, does not have an operational digital registry for copyright and related rights; the inscription must be made in person at the registry office.<sup>461</sup>

It is advisable to fully transition to a public digital copyright registry, perhaps complemented by privately operated registries. Of course, digital registers, like traditional paper-based ones, should continue to be nonmandatory, as is currently the situation in the selected countries.

The transition of copyright registries to a digital format allows every type of work (literary, audiovisual, musical, software, videogames, mobile apps, among others) to be quickly registered from any place in the world, generating a unique digital fingerprint that automatically creates proof of ownership and a date of creation that could be used in judicial proceedings. It also allows the registration of different versions of the same work, with a unique certificate for each. This helps the exploitation of digital works, especially when confronted with nonconventional markets, such as NFTs based on copyrighted works or other subject matter.<sup>462</sup>

It is important to distinguish accessible electronic copyright registries from automatic registration. Even if registration can be completed online, human intervention is required. The process should be performed without opposition but the human copyright officer must decide about any application, and deny the inscription of non-protectable content and works, or subject matter already registered or clearly not belonging to the petitioner.

## B. Recommended actions on economic rights

In some countries, small amendments to the definition of economic rights would help clarify the law, thus enhancing legal certainty. As a starting point, it is better to establish a general economic right to exploit the work in any way or form, as happens in Chile, Indonesia and United Arab Emirates.<sup>463</sup>

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<sup>461</sup> See <https://www.gub.uy/tramites/registro-derechos-autor>

<sup>462</sup> The Indonesian survey indicated the ideal situation would be a clear gateway to register multiregional IP rights with affordable cost, especially for new business actors at the development stage.

<sup>463</sup> Chile, Copyright Act, *op. cit.*, art. 17.

It is also preferable to enumerate four fundamental rights made up of different modalities of exploitation of the work rather than simply accumulating different examples of how to exploit a work in the national Copyright Act.<sup>464</sup>

The national law could then recognize the right to authorize the reproduction of the work in any form, the distribution of original or copies of the work (including its rental and lending, which are better considered as subspecies of distribution for a limited time, with/without profit intent), the communication to the public of the work in any form (citing different examples in the framework of an open list), and the translation, adaptation or other transformation of the work.

The concepts of reproduction, distribution, communication to the public and transformation should be carefully defined in the national copyright act, as occurs in Chile<sup>465</sup> and, with less accuracy, in Indonesia,<sup>466</sup> United Arab Emirates<sup>467</sup> and Uruguay.<sup>468</sup> It would be beneficial to include an express clause to extend, *mutatis mutandis*, definitions of rights of reproduction, distribution and communication to related rights.

In some cases, the national legislation would be improved by minor changes in the definition of economic right. In Uruguay, it is recommended the Copyright Act includes a specific provision on the transient and ancillary acts of reproduction performed during the act of making available the work on communication networks. This could be achieved by creating a specific exception on limitation, as happens in the other selected countries.

Regarding related rights, the four countries recognize exclusive economic rights for musical performers, producers of sound recordings/phonograms and broadcasting organizations. It is recommended that Indonesia accede to the Rome Convention. The country is part of the WPPT and the TRIPS Agreement, but rights, though similar, are not equal in the three treaties, particularly broadcasting organizations' rights and the principle of national treatment.

Of the four countries, only Uruguay does not recognize the exclusive rights of audiovisual performers. It is recommended, therefore, that the country sticks to the international consensus and recognizes the exclusive rights of audiovisual performers represented by the Beijing Treaty on Audiovisual Performances.

For live or unfixed performances, this implies the performer should have the exclusive right to authorize the fixation of their performance, and the right to

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<sup>464</sup> This is especially important regarding the right of communication to the public, that typically has many manifestations, like public live performances, public display audiovisual works, broadcasting by wireless means, broadcasting via satellite, transmission by wire, cable, or optical fiber, retransmission, public exhibition of works of art, or making available online.

<sup>465</sup> Chile, Copyright Act, *op. cit.*, art. 5.

<sup>466</sup> Indonesia, Copyright Act, *op. cit.*, art. 1 does not define the rights but the concepts of reproduction, communication to the public and distribution.

<sup>467</sup> UAE, Copyright Act, *op. cit.*, art. 1 does not define the rights but the concepts of reproduction and public communication.

<sup>468</sup> Uruguay, Copyright Act, *op. cit.*, art. 2 describes the act to reproduce, to distribute, to translate and to communicate to the public but the definitions are not as general as in Chilean law.

authorize the (live) communication to the public of their performance, including its broadcasting.

Regarding fixed performances, the national legislature should grant the right of reproduction, the right of distribution (including the right of rental) and the right of making available in online communication networks, in such a way that the public may access the fixed performance from a place and at a time of their choosing.<sup>469</sup>

With broadcast and other forms of communication to the public of (already) fixed performances, the national legislature should opt for either an exclusive right or a right to equitable remuneration. The law could establish an exclusive or equitable remuneration right only for certain cases (that is, broadcasting), or simply deny the existence of a right for the audiovisual performer in those cases. All such possibilities are permitted under the Beijing Treaty.<sup>470</sup>

The treaty also recognizes some moral rights to audiovisual performers,<sup>471</sup> and these should be included if/when adapting national law.<sup>472</sup>

Finally, the selected countries do not recognize a related right for the producer of the first fixations of films and other audiovisual works and/or performances. This right exists in European Union member states<sup>473</sup> but is not covered by an international multilateral treaty; in many countries, cinematographic or audiovisual producers are considered the original copyright owner of the audiovisual work, while in others, they merely benefit from a contractual presumption of transfer of rights from authors.

The selected countries are advised to adopt this related right, which enhances legal certainty and gives audiovisual producers control over copies of first fixations of cinematographic or other audiovisual works. This is typically done by granting the audiovisual producer an exclusive right to authorize or prohibit the reproduction, distribution and communication to the public of the first fixation and copies of it.

### C. Recommended actions on exceptions and limitations

The uses of works and protected subject matter in the list of exceptions and limitations authorized by law is closely linked to national legislation, but naturally this varies in the four selected countries.

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<sup>469</sup> Beijing Treaty, *op cit.*, arts. 7–10.

<sup>470</sup> *Ibid.*, art. 11.

<sup>471</sup> *Ibid.*, art. 5.

<sup>472</sup> The integrity right recognized under Uruguayan law for musical performers could be complemented by the right to have their name recognized on the fixation of the performances, except when omission is dictated by the way they are used (e.g., performance used in a TV commercial).

<sup>473</sup> European Union, Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive), arts. 2(d) and 3(d).

It is possible, within the framework of multilateral international treaties, to enunciate some recommendations (as interpreted by the national legislature according to constitutional rules) that might achieve a balance in protecting intellectual property and other fundamental rights and interests.

First, it would be advisable to incorporate the three-step test as an interpretation rule for the national judicial or administrative authorities in Chile, Indonesia and Uruguay.

To do so, it is essential that it be converted to a two-step test, as in the United Arab Emirates. The first step (“the certain special cases”) must be implemented by the national legislature, with a list of exceptions and limitations drafted in a detailed manner and only for specific and not indiscriminate uses of works and protected subject matter.

This could be achieved by establishing in law that existing national exceptions and limitations should not be interpreted in a way that conflicts with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author.

In particular, it is recommended that Uruguay update the list of exceptions and limitations in the Copyright Act to adapt it to evolving technology and the new needs of society.

Specifically, it is advised that a limitation be included allowing the reproduction (including digital reproductions) of works made without profit and carried out for research or conservation purposes, if they are made by museums, libraries, cultural and scientific institutions, archives or similar institutions. Such copies are reportedly done in practice but without sufficient legal support.<sup>474</sup>

Besides the exception already established for the visually impaired in compliance with the Marrakesh VIP Treaty, it would also be advisable to include in Uruguayan legislation a more general limitation for acts of reproduction and communication to the public made for the benefit of people with a disability, for noncommercial uses and under certain conditions, such as requiring it be directly related to the disability and to the extent required by the disability.<sup>475</sup>

A further provision is recommended to allow the reproduction and communication of works and other subject matter for illustration for teaching or scientific research, to the extent they are justified by their noncommercial purpose and as long as the source and author’s name are indicated.<sup>476</sup> This exception has been adopted in many jurisdictions around the world, which in many cases have drafted specific conditions for the limitation to be admissible and/or an equitable remuneration

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<sup>474</sup> Parada, D.R. “El derecho de autor en el entorno web: prácticas y servicios bibliotecarios bajo las limitaciones y excepciones de la ley, el caso uruguayo.” *Informatio*. Vol. 25, No. 1 (2020): p. 148.

<sup>475</sup> European Union, Directive 2001/29/EC (Information Society Directive), *op. cit.*, art. 5(3)(b).

<sup>476</sup> *Ibid.*, art. 5(3).

right for authors and related rights owners paid by educational institutions or public administrations.<sup>477</sup>

Finally, it is suggested that Uruguay's legislation includes specific limitations tailored to computer programs and databases.

Regarding the national list of exceptions and limitations already present in the selected countries, in the context of this study the limitations linked to the Marrakesh VIP Treaty are particularly important.

Chile, Indonesia and Uruguay have ratified the treaty, and the United Arab Emirates has acceded to it.<sup>478</sup> It includes exceptions and limitations for the national and cross-border utilization of certain published works in formats accessible to blind or visually impaired people. In some cases, this cover uses in digital formats.<sup>479</sup>

It also contains a guarantee for contracting parties to ensure that when they provide adequate legal protection and remedies against the circumvention of effective technological measures, this does not prevent beneficiary persons from enjoying the limitations and exceptions provided by the treaty.<sup>480</sup>

The United Arab Emirates has adapted its national law to the treaty,<sup>481</sup> regulating accessible format copies, and providing certain conditions for the beneficiary person and accredited entities to have access to them.<sup>482</sup> The implementing regulation of the Copyright Act establishes certain additional conditions.<sup>483</sup>

In Uruguay, the Marrakesh VIP Treaty has been expressly implemented by a decree developing Article 45(12) of the Copyright Act.<sup>484</sup>

However, the content of the treaty has not been fully adopted in the remaining two countries, and it is recommended that they adapt national legislation to accommodate its provisions.

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<sup>477</sup> Spain, Royal Legislative Decree 1/1999, of April 12, 1997, on Law of intellectual property, art. 34(4); see (in Spanish) <https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930>

<sup>478</sup> The Marrakesh VIP Treaty was ratified by Chile on May 10, 2016, entering into force on September 30, 2016, by Indonesia on January 28, 2020, entering into force on April 28, 2020, and by Uruguay on December 1, 2014, entering into force on September 30, 2016. The UAE acceded to the treaty on October 15, 2014, and it entered into force on September 30, 2016. See [https://wipolex.wipo.int/en/treaties/ShowResults?search\\_what=C&treaty\\_id=843](https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=843)

<sup>479</sup> Marrakesh VIP Treaty, *op cit.*, art. 4(1)(a).

<sup>480</sup> *Ibid.*, art. 7.

<sup>481</sup> UAE, Copyright Act, *op. cit.*, art. 23.

<sup>482</sup> *Ibid.* art. 23(3) states, "for the purposes of preparing accessible format copies, the Implementing Regulation of this Decree-Law shall specify the conditions and controls that shall be met by the Approved Bodies".

<sup>483</sup> UAE, Implementing Regulation, *op. cit.*, art. 16

<sup>484</sup> Uruguay, Law No. 19.262 of August 29, 2014 on approval of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled; see (in Spanish) <https://wipolex.wipo.int/en/text/457964>, and Decree No. 295/017 of October 24, 2017; see (in Spanish) <https://www.impo.com.uy/bases/decretos/295-2017>

Chile, even after incorporating the text of the treaty into its national law, did not modify the law, which still contains a pre-Marrakesh rule. It must be developed and implemented by the national legislature to be effective.<sup>485</sup>

In Indonesia, government regulations approved the detailed implementation mechanism to adapt national law to the main provisions of the treaty, including digital uses of published works, but its Copyright Act, too, contains a pre-Marrakesh provision.<sup>486</sup>

Other national exceptions and limitations linked with digital uses are, in general, consistent with the standards set in international copyright treaties, and specifically the three-step test.

In fact, many of the national exceptions and limitations present in the selected countries are inspired by the Berne Convention, including those referring to quotations or press summaries,<sup>487</sup> illustration for teaching purposes,<sup>488</sup> and compulsory licenses concerning broadcasting and secondary communication by loudspeakers or analogous instruments.<sup>489</sup>

Nevertheless, there is a free use exception in Article 43(d) of Indonesia's Copyright Act that excludes "the production and distribution of the copyrighted content through information technology and communication media that are not commercial and/or lucrative for the author or related parties, or the Author expresses no objection to the manufacture and dissemination in question" from infringement considerations.

This could be problematic as it allows indiscriminate dissemination of works and other subject matter in digital networks only under the condition that there is no commercial and/or lucrative intent, in apparent contradiction of Article 9(2) of the Berne Convention (for the reproduction right), Article 13 of the TRIPS Agreement, Articles 10(1) and (2) of the WCT, and Article 16(2) of the WPPT.

Under the three-step test, a limitation for noncommercial uses is admissible only if it is provided in the national law "for certain special cases" (that is, private copying,<sup>490</sup> and reproduction for archives, libraries and other educational or cultural institutions, among other things).

However, the language of Article 43(d) establishes an indiscriminate limitation to reproduce and communicate to the public any work or protected subject matter on the sole condition that the use is noncommercial. Further, this probably unreasonably prejudices the legitimate interests of authors; if the work is made available online by a third party for free, but without permission of the right holder,

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<sup>485</sup> Chile, Copyright Act, *op. cit.*, art. 71(C). Chile incorporated the Marrakech VIP Treaty in national law by Decree No. 155 on February 14, 2017; see (in Spanish) <https://www.bcn.cl/leychile/navegar?idNorma=1100198>

<sup>486</sup> Indonesia, Copyright Act, *op. cit.*, art. 44(2).

<sup>487</sup> Berne Convention, *op. cit.*, art. 10(1).

<sup>488</sup> *Ibid.*, art. 10(2).

<sup>489</sup> *Ibid.*, art. 11 *bis*(2).

<sup>490</sup> Indonesia, Copyright Act, *op. cit.*, art. 46 sets a specific provision for the reproduction for personal use of works compatible with the three-step test of international conventions.

the user will not have any incentive to acquire the content when/if it is made available by the copyright owner.

For a similar reason, it is probably not compatible with the three-step test present in international conventions; the exclusion of copyright infringement in the case of the author not expressing objection to the manufacture or dissemination of copyrighted content through information technology and communication media, even for commercial uses.

This probably affects the normal exploitation of the work because the author's exclusive rights are preventive in nature, in the sense that any reproduction or communication to the public of a work by a third party requires the prior consent of the author.<sup>491</sup> Any use of a work by a third party without such consent must be regarded, in principle, as infringing the author's rights.

By contrast, the practical consequence of section 42(d) is that the *ius prohibendi* of the right holder is excluded in the digital networks. The right holder can only actively react a posteriori, making objection to specific unauthorized commercial uses, instead of simply passively excluding others from those non-authorized uses due to the preventive nature of their exclusive economic rights.

An alternative solution might be to limit the scope of the exception to certain minor, noncommercial uses of the work. This might include digital uses (in cases of user-generated content). But the use must be truly minor to be compatible with the international standard of the three-step test as established in the WCT, Berne Convention, WPPT and TRIPS Agreement.

#### D. Recommended actions on ownership and transfer of rights

Legislation in the four selected countries differs on the rule to attribute ownership in the event of a work created for an employer within the course of employment (works made for hire). The more balanced solution would be to presume that economic rights on the work are exclusively transferred to the employer, unless otherwise agreed, and without prejudice to the moral rights of the employee. A similar solution in the case of works commissioned to the author by another natural or legal person would also be adequate (for example, to be integrated in a collective work).

This legal presumption of transfer of economic rights to the person in whose favour the work was made, or to the employer, is especially useful when dealing with works in the digital environment, including computer programs, videogames and mobile apps.

Rules applying to contracts transferring copyright and related rights are almost out of the scope of the main multilateral conventions. Even when strong regional ties exist, such as in the European Union, contracts or licenses transferring right

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<sup>491</sup> European Court of Justice, Judgment of the Court (Third Chamber), *Soulier and Doke*, Case C-301/15, November 16, 2016, para. 33.



or authorizing uses are, for the most part, missing from the harmonized subject matter.

This is in part because national legislators are naturally reluctant to compromise at international or regional level on contracting rules, but also because there is a different approach internationally to how the law should discipline copyright and related rights contracts.

Countries of the *droit d'auteur* tradition tend to establish mandatory rules to protect the author, who is considered the weaker part of the contract. In specific cases, these rules are also applied partially to performers. Countries of the Anglo-Saxon copyright tradition, however, are typically less protective of authors and/or performers, allowing the principle of freedom of contract to develop.

Therefore, in many legal systems, economic rights can be fully assigned by the author as a transfer of property to a third party that will, in turn, acquire the right to authorize or prohibit future acts of exploitation of the work as the new copyright owner.<sup>492</sup>

In such cases, the author can no longer exercise control over how the third party uses the rights, though many legal systems include a termination right in the law. This is an inalienable right that allows the author to revoke or terminate the transfer within a certain time. All rights would then revert to the author.

However, in most of the *droit d'auteur* countries, economic rights cannot be fully transferred or sold, though the copyright owner can license or partially transfer their rights to third parties to carry out certain acts of exploitation of the work, in an exclusive or nonexclusive way.<sup>493</sup> The copyright owner maintains ownership of the rights.

In practice, many jurisdictions permit both alternatives. The national law allows the original copyright or related rights owner to completely assign or “sell” their rights to a third party (for example, a publisher or producer). They will, in turn, transfer the rights again or simply license the content to third parties. But the law also allows the copyright owner to conclude agreements or licenses with end users to authorize the exercise of some of their rights, in an exclusive or nonexclusive way.

Due mainly to the absence of international consensus, this study will not make specific recommendations regarding existing national rules on transfer and/or licensing of copyright and related rights for the selected countries.

However, there are a set of general principles or mandatory statutory rules that it may be beneficial to include in national law if the legislature wishes to establish a more complete set of provisions to deal with copyright and related rights contracts.<sup>494</sup> This might be adequate for countries such as Uruguay, where the

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<sup>492</sup> WIPO, “Understanding Copyright and Related Rights,” *op. cit.*, p. 20.

<sup>493</sup> *Ibid.*

<sup>494</sup> Some practical application of principles and mandatory statutory rules can be found in the legislation of European Union member states. See France, Code de la Propriété Intellectuelle, *op cit.*, arts. 130(1)–131(9), see

existing regulation is probably insufficient to solve the complex issues associated with the transfer of rights from authors and/or performers to publishers, producers and other successors in title, particularly in the digital environment.

The starting point is that the principle of freedom of contract should govern IP transactions. It is, therefore, for the national legislature of the selected countries to decide if this principle requires adapting to protect authors, and if the existing mandatory rules should be modified or expanded.

It must also decide if these rules should apply only for authors transferring their copyright, or if all of them, or some of them, should apply *mutatis mutandis* to performers (as Indonesia and the United Arab Emirates have already established).

Typically, many jurisdictions will establish a set of general rules, applying to all transfer of copyrights, and then define several mandatory and/or by default rules for the most important contracts, such as those for publishing, the public representation of the work, the audiovisual production or the contract to authorize the use of computer programs.

One of the most important decisions is whether the economic rights of authors can be assigned, fully transferred or flat sold to a third party, as happens in Chile.

Obviously, if the rights can be definitively assigned, sold or fully transferred to third parties for the duration of the right (that has the same economic effect), the mandatory rules protecting the author under the Copyright Act would not apply. It seems preferable, therefore, not to authorize the rights to be flat sold, as currently happens in Indonesia, but temporarily transferred respecting certain mandatory rules.

Similarly, the agreement with the author to transfer the rights in all his future works should be null and void, as currently happens in Indonesia and the United Arab Emirates. The law could also specify a maximum number of future works to be transferred, as happens in the United Arab Emirates, but this should be moderate.

Also, to protect authors and respect their fundamental freedom to create, the provision obliging them to create no more works in the future should be considered null and void, the current situation in the United Arab Emirates.

Other mandatory rules are already present in parts of the domestic laws of all four countries but the language could be modified or completed in specific cases, or adopted where there is no specific provision in a national copyright act. For example, the four countries already have a rule declaring that the transfer of copyright is only valid if made in writing. However, some oral transfers might benefit the author if they can be proved, so oral contracts should be declared voidable only by the author.

Some countries, such as Chile, state that a license will be considered exclusive by default unless otherwise agreed, which is clearly preferable to protect right holders.

Regarding the content of the contract, some countries, including the United Arab Emirates, correctly provide that it should expressly declare the rights transferred, the duration and place of use. But if the economic rights have not been enumerated, the contract should not be null and void (as in some cases this may prejudice the author, not their counterpart), though the scope of rights transferred may be limited by the principle of strict interpretation.

Therefore, the contract should be interpreted as transferring only the rights necessary to achieve its economic purpose; for example, in the publishing contract, if the work is to be published only on paper, the interpretation rule should be that, by default, only the publisher will acquire the rights of reproduction and distribution, but not the right of making available the book on the Internet.

It is also advisable that national legislation provides that all rights not explicitly assigned remain the property of the author, such as in the United Arab Emirates, and restricts the interpretation of the contract only to uses of the work already known, prohibiting the author from granting rights for uses of their works unknown at the moment the contract was concluded.<sup>495</sup>

In some of the selected countries, including Chile,<sup>496</sup> the law stipulates, in the case of exclusive transfer of licenses, some exploitation obligations, with the possibility of reversing the exclusive transfer if the licensee does not comply.<sup>497</sup>

Regarding author remuneration, the four countries all have rules to guarantee the principle of proportionate remuneration. In some cases, this is only provided in specific contracts (Chile). In others, it is included as a general principle for all contracts (Indonesia and the United Arab Emirates). The rule should be especially applicable when remuneration is based exclusively on a lump sum.

One possible option when establishing the principle of proportionate remuneration can be found in Article 18 of the European Union's Digital Single Market Directive (DSM Directive).<sup>498</sup> It sets out that states "shall ensure that where authors and performers license or transfer their exclusive rights for the

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<sup>495</sup> Some countries, including Germany, allow such contracts, but the author is entitled to separate equitable remuneration where the other contracting party commences a new type of use that was unknown at the time the contract was concluded. See Germany, Act on Copyright and Related Rights, *op. cit.*, para. 31(a)(1) and 32(c)(1).

<sup>496</sup> Chile, Copyright Act, *op. cit.*, art. 51(a).

<sup>497</sup> For instance, the author may dissolve the contract wholly or in part if the other party does not sufficiently exploit the copyright to the work within a reasonable period after concluding the contract, unless this is attributable to the author. The Netherlands, Act of 23 September 1912, containing a new regulation of the law on copyright, art. 25(e)(1); see (in Dutch) <https://wetten.overheid.nl/BWBR0001886/2022-10-01>

<sup>498</sup> European Union, Directive (EU) 2019/790 of the European Parliament and of the Council of April 17, 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive).

exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration”.

Therefore, if the agreed remuneration is not deemed appropriate and proportionate (that is, not equitable by objective standards), the author may require the other party to consent to modifying the agreement so the author is granted equitable remuneration.

A contract might typically be considered as non-equitable for the author when there is a manifest disproportion between the remuneration initially agreed and the subsequent income derived from the exploitation of the works for the contractual counterpart.<sup>499</sup> To determine if a contract is unfair, all the circumstances must be weighed. Relevant factors will typically include a reference to what is customary and fair in business relations,<sup>500</sup> and the duration, frequency and intensity of the use.

To guarantee the principle of appropriate and proportionate remuneration it is essential the author had access to data on the revenue generated by the exploitation of their work. In such cases, it is advisable to include a rule establishing transparency obligations for the author’s contractual counterpart. That information should be provided regularly and be up to date, covering all sources of revenue relevant to the contract and all modes of exploitation included in it.<sup>501</sup>

#### E. Recommended (in)action on new digital issues

New questions on protecting IP rights in the digital environment might create uncertainties. In most cases, a solution can be found by national judges simply by applying existing national and international rules. It seems, therefore, premature to initiate legislative action at national level to specifically tackle the new realities.

For example, in all four countries, as in most of the world, the situation regarding works created by artificial intelligence (AI) engines is uncertain. However, this does not represent a pressing regulatory need. National laws of the selected countries are equipped to deal with this by applying the general rules of authorship. Further, a solution taken at national level could vary significantly depending on the legal copyright tradition.

In Chile and Uruguay, for example, it is logical to follow the anthropocentric approach to authorship used by many civil countries. The general principle is that only human creations can be original and therefore receive copyright protection. The work must reflect the author’s personality to be protected by copyright, and even if the originality threshold has been lowered to attribute copyright protection

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<sup>499</sup> Spain, Law of intellectual property, *op. cit.*, art. 47.1.

<sup>500</sup> Germany, Act on Copyright and Related Rights, *op. cit.*, art. 32(1).

<sup>501</sup> European Union, DSM Directive, *op. cit.*, recital 75.

to works such as computer programs or databases, it still requires free creative choices that seem incompatible with artificial intelligence-generated content.

That does not mean, however, that AI creations should not receive any protection in the law. A *sui generis* related right can be created if the national legislature considers it necessary.<sup>502</sup> This right should not protect the expression of the work based on its originality, but the investment made by the company in the AI used to create the content.<sup>503</sup>

However, other countries could attribute authorship and copyright protection for AI-created content simply by considering it a computer-generated work. This normally implies attributing authorship to the natural or legal person with whom the arrangements necessary for the creation of the work are undertaken.

A solution that does not seem compatible with the principles set out in the most important international copyright treaties, such as the Berne Convention and WCT, is to create an electronic authorship that would consider the AI the author of the work. This electronic authorship<sup>504</sup> needs to attribute rights to an entity that does not possess legal personality, impairing essential principles of the law. And considering AI a legal person would not solve the matter, but rather, complicate it considerably.

There is also uncertainty in all four countries regarding the legal regime of virtual assets based on copyright and related rights, and, specifically, on the legal status of NFTs based on copyright and other protected subject matters.<sup>505</sup> However, the legal status of NFTs could be remedied by applying the general copyright rules, so it seems there is no need for immediate action to deal with this in the Copyright Act.

The picture is less clear with user-generated content. In some situations, the user generating the content does not employ content from third parties. Obviously, this requires no action, as the user is not infringing any rights, and can claim the rights on the generated content that follows the general rules.

In other cases, the user simply copies or makes a work based on protected works (derivative works) or other subject matter without an explicit license or the authorization of the right holder. In these situations, the national legislature may decide to draft an exception or limitation tailored to such uses, though to be compatible with international conventions, the use should be defined by the law in a manner that does not conflict with the normal use of the work or other protected subject matter and does not cause unjustified damage to the legitimate interests of right holders. That requires, among other things, that the use be

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<sup>502</sup> Palmela Fidalgo, V. and D. Antunes. "Copyright protection of works generated by artificial intelligence in the European Copyright Act: Between indirect and tailored protection." *Actas de Derecho Industrial y Derecho de Autor*. Vol. 41 (2021): pp. 184–185.

<sup>503</sup> *Ibid.*, p. 190.

<sup>504</sup> *Ibid.*, pp. 186–187.

<sup>505</sup> The UAE noted in its survey response that a cohesive approach to protecting the IP rights of NFTs would be beneficial in promoting innovation in the sector.

strictly for nonprofit and nonprofessional purposes and only in cases of minor economic importance.

## **2. Recommendations on the collective management rights ecosystem**

Building a functional CMOs ecosystem is vital to the practical operating of the creative industries in the digital market. It allows the complex issues of IP rights among rights owners and users to be managed more efficiently and in a cost-friendly manner.

Digital technology has multiplied the unauthorized uses of works and protected subject matter, but it also offers the opportunity to license content directly, with little transactional cost to end users. The combination of digital contracts, technological protection measures and electronic rights management information makes licensing every use possible, especially in the online environment.

This means it is increasingly possible to manage rights through online contracts, and many right holders are electing to do this. This is especially true of multinational companies with sufficient resources and IP know-how, particularly for phonographic or audiovisual productions and broadcasting organizations.

The same goes for copyright owners of native digital works, including computer programs, databases, videogames and other electronic games and mobile applications, who typically rely heavily on direct control and individual licensing of their works to avoid indiscriminate copying.

However, many individual right owners, microbusiness and SMEs such as independent labels or studios still depend almost exclusively on CMOs to license their content.

The legal regime for collective management in the selected countries is diverse, so one-size-fits-all recommendations are difficult. However, there are some internationally accepted good practices that if adopted in national legislation could improve the efficiency of domestic collective management ecosystems.

It is worth noting that some of the following recommendations are already in place, although the precise formulation in the law might vary. Thus, not all the suggested *de lege ferenda* actions or proposals to establish rules are equally applicable to the four countries.

### **A. Establishing an adequate national structure of collective management entities**

The existence of a robust, operational network of collective management entities is indispensable to efficiently market works and protected matter. An inadequate system damages the functioning of the IP rights chain, particularly in digital markets.

There is no unique or ideal way to build collective management infrastructure. As explained in chapter III, the characteristics of the CMOs operating in the four

selected countries vary, and the practical functioning of national ecosystems depend heavily on local considerations.<sup>506</sup>

Some countries, such as Chile or Uruguay, have several organizations specializing in different categories of right holders (authors, performers, producers, for instance). Others, including Indonesia, have a hybrid structure of publicly and privately operated CMOs, resulting in multiple organizations operating in the country. The United Arab Emirates has one CMO specializing in reprographic rights.

Once a national network of CMOs, and eventually IRMEs, has been established and is fully operational, as in Chile, Indonesia and Uruguay, changing it radically is not recommended, and potentially impossible in practice.

For countries such as the United Arab Emirates, where legislation has not yet determined the national infrastructure, there is no need to rigidly define it in advance. It is possible, though, to decide that similar categories of rights should be gathered, creating, for instance, one CMO for authors and another for related rights owners.

In practice, due to practical differences in the rights managed and the peculiarities of the different markets, it would seem preferable to have different CMOs for separate categories of right holders.

Also, due to disparities in national and international legislation on author's rights and related rights, in principle it is advisable to avoid authors, performers and producers being jointly represented in the same CMO. This would also ease the conclusion of mutual representation agreements with international sister societies.

However, having authors and related rights owners together in a CMO is not always problematic, especially when it unifies the rights management of authors and performers in one subsector of the market, as happens in Chile with musical authors and musical performers. Also, in some European Union member states such as France and Spain, musical composers and musical publishers are represented by the same national CMO.

Some of the selected countries, like Indonesia, have specialized reprographics rights societies representing both authors and publishers of literary works. In some cases, visual art authors are also part of these societies, such as in the United Arab Emirates. Indeed, for practical reasons it is advisable to include authors of literary works and visual arts and publishers of printed and digital literary works in the same reprographic society.

It is open for discussion whether all types of author (composers, audiovisual and dramatic authors, literary authors and visual arts authors) are better represented by the same author society (as in Uruguay) or it is preferable to have multiple

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<sup>506</sup> In Indonesia, for instance, the survey noted a lack of awareness among many end users and right holders on the mechanism to collect musical royalties and the difficulties faced by CMOs in operating outside big cities in a vast archipelago.

societies, typically differentiating between composers, audiovisual authors and visual arts authors (as in countries such as Chile).

Any decision depends largely on the characteristics of the country (overall number of authors and users, and size of the different subsectors, and other things). Generally, in small markets, to take advantage of economies of scale, it is advisable to start with one authorial society. This unique society can later be split if market conditions dictate.

In countries such as Chile and Indonesia, there are various CMOs for the same categories of authors (for instance, composers, directors or screenwriters). This is not, of course, intrinsically bad, but an excessive proliferation of societies for the same category of right holders will create multiple repertoires. And that might be challenging for end users without a strong infrastructure of unified databases.

It is important, then, to guarantee that the different CMOs work together when licensing and collecting rights in a sector, as happens in Indonesia and Uruguay. This might include establishing a legal person to collect and distribute revenue among CMOs. The law should also allow CMOs to conclude representation agreements with other CMOs in the country. This would simplify procedures for granting licenses to users by creating one-stop shops, especially for digital uses.<sup>507</sup>

Regarding related rights societies, due to the different characteristics of sound recording and audiovisual productions, it would be beneficial to establish separate CMOs for phonographic and audiovisual producers, as is currently the case in Chile and Uruguay. Musical and audiovisual performers have a similar legal regime in three of the selected countries. In practice, however, the market tends to create separate CMOs in these cases.

Additionally, field experience suggests it is not advisable to establish specific CMOs for the digital environment, given this would create artificial segmentation of the market, without any prejudice to the internal specialization of national CMOs for digital and online markets.

## B. Authorization

To simplify the system and avoid a proliferation of CMOs, it is advisable to make the creation of traditional CMOs (and, eventually, IRMEs) subject to the authorization of the national regulatory body. This is what currently happens in the four selected countries.

Authorization can normally be revoked in certain cases previously defined by the law, but a less extreme solution might also be adequate. For example, it is

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<sup>507</sup> For instance, in the musical sector, CMOs representing musical authors, musical performers and phonogram producers should coordinate on certain acts of communication to the public/making available to the public. The same is true in the audiovisual sector, where digital international platforms must find a way to simplify the clearance of rights in a certain territory.



possible to provide in law a regime of administrative responsibility for the infractions a CMO might commit in the exercise of their functions.

Sanctions could vary from lump sum fines to those based on the total percentage of revenue collected in the year prior to the date of the fine. Ultimately, instead of the operational permit being revoked, an alternative solution might be disqualification from operating in the country for a determined period.

Legislation in the selected countries – correctly – does not require CMOs to adopt a specific legal form to be authorized to operate in the country. Chile, Uruguay and Indonesia require CMOs to be nonprofit organizations that can then adopt various forms, such as civil associations, cooperatives or foundations.

The United Arab Emirates, however, delegates rights administration to specialized professional associations or “other bodies”. A broad term, this might include limited liability companies controlled or owned by holders of copyright and related rights, or by entities representing such right holders. There is no impediment to a CMO taking such legal form, as long as the legal regime and administrative control is the same as that provided for CMOs constituted as nonprofit organizations.

Many countries allow collective rights management to be developed not only by classic CMOs, but also by IRMEs, as transpires in the United Arab Emirates. IRMEs are organizations authorized by law or contractual arrangements to manage copyright and/or related rights on behalf of right holders for the collective benefit of those right holders. Unlike CMOs, IRMEs are not owned or controlled by right holders, but by third parties. They are organized on a for-profit basis.

The general recommendation on the admission of IRMEs is that due to the principle of freedom of contract, the right holders should be free to trust them to manage their rights.

Proper functioning in the market of a combination of CMOs and IRMEs depends heavily on domestic conditions, in particular, the level of real control that can be executed on the internal governance and transparency rules of IRMEs. It is, therefore, for the lawmakers to decide whether the specific legal and market situation in the country makes authorizing them advisable.

If permitted, the IRME’s obligations should be similar to those applying to a CMO. Specifically, the transparency requirements applied to CMOs should also be applicable, *mutatis mutandis*, to IRMEs.<sup>508</sup>

It is for the national legislature to develop the rules for the proper functioning of CMOs in fields such as membership and member rights, transparency and licensing. Equally important is that the national regulatory body ensures practical

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<sup>508</sup> The legal regime of right management organizations can be regulated in many ways but for a good model, see European Union, Directive 2014/26/EU of the European Parliament and of the Council of February 26, 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Directive on Collective Management).

compliance with the obligations imposed on CMOs, with the power to carry out inspections and control activities as it deems appropriate.<sup>509</sup>

A few, clear rules established in national law might be sufficient to guarantee a healthy environment for CMOs – if such rules are consistently enforced by the administrative authorities. That means giving the regulatory body the power to impose administrative sanctions or fines when mandatory rules are not respected.

### C. Membership and transparency rules

It is advisable for a CMO to provide potential right holders with all the relevant information before joining. This might include the content and consequences of the representation agreement, cases of mandatory collective administration, membership withdrawal conditions, whether rights will be granted on an exclusive or nonexclusive basis, how the governing bodies are structured and how to participate in them as a member.<sup>510</sup>

Membership should be open to all individual right holders, predicated on published, objective and nondiscriminatory criteria.<sup>511</sup> Refusal should be exclusively based on criteria predetermined by the law or CMO statute.<sup>512</sup>

The relationship between right holders and CMOs must respect the principle of freedom of contract. This means that right holders must voluntarily sign a civil representation contract with the CMO. This mandate will define the scope of the CMO's authority to license rights and/or represent the right holders.

Right holders should be free to grant only nonexclusive mandates or licenses, retaining the right to license uses individually, except when mandatory collective management is ordered by the law. They should be able to terminate the mandate and entrust their rights to another organization or manage them individually.<sup>513</sup> If there are various CMOs for the same categories of right holders, they should be free to authorize their chosen one to represent them.

As we have seen, the general rule is that a CMO can only represent rights holders who have given, expressly and voluntarily, their authorization. In practice, and particularly in the digital markets, there are uses that involve a massive number of right holders, works or other subject matter, and users. That makes the transactional costs of individual rights clearance prohibitively high.<sup>514</sup>

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<sup>509</sup> Some survey responses (e.g., Chile) noted legislative reform enhancing the control capabilities of the Ministry of Culture, Arts and Heritage on CMOs would improve their transparency and accountability.

<sup>510</sup> WIPO. "WIPO Good Practice Toolkit for Collective Management Organizations (The Toolkit)." *wipo.int*. 2021, pp. 24 and 27–28.  
<<https://www.wipo.int/publications/en/details.jsp?id=4561>>.

<sup>511</sup> *Ibid.*, p. 28.

<sup>512</sup> European Union, Collective Management Directive, *op. cit.*, art. 5(2).

<sup>513</sup> *Ibid.*, p. 37.

<sup>514</sup> European Union, DSM Directive, *op. cit.*, Recital 45.

For this reason, mandatory collective management is indicated in some cases if expressly provided by the law or a governmental mandate. For end users, this facilitates acquiring all the rights they need to develop their activity, as already happens in Chile or Indonesia.<sup>515</sup>

Regarding right holders as members of a CMO, the law should establish the basic principle of nondiscrimination, which is what currently happens in the UAE. In practice, this means treating all members in an equitable and fair manner.

With governance rules, the law should establish that the entity is governed independently and transparently. The CMO must have an appropriate organic structure defined according to the law and its statute. This requires adequate controls to avoid one category of rights holders being sidelined or underrepresented, including an equal share of the categories of right holders associated with the CMO.

Regarding voting rules, it is advisable to implement a system, as in Chile, based on weighting criteria dependent on the rights generated that places reasonable limits on plural voting.

To guarantee the collective management system functions properly, it is essential the law ensures CMOs are collecting and distributing the remuneration paid by users in a transparent way.

Without the guarantee of internal transparency (for members) and external transparency (for licensees), a CMO would not be an adequate instrument to manage IP rights, especially in the increasingly complex digital environment.

The selected countries have different transparency rules. In many cases, they contain a set of obligations for CMOs, though their exact number and content, and the degree of enforcement, varies greatly.

For example, the four countries have already included in national law the obligation to distribute the collected remuneration to members, with a deduction for management expenses and/or social service activities.

The same applies to the obligation for the CMO to have an internal distribution regulation, publicly available and with clear and predetermined rules based on the principle of proportionality regarding the use of the works or other protected subject matter.

Domestic law in the four countries likewise varies regarding the obligation to periodically inform right holders of the organization's economic and governance situation. This includes approval of annual audited accounts by a CMO's general assembly, and an annual transparency report.<sup>516</sup>

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<sup>515</sup> Chile, Copyright Act, *op. cit.*, art. 21.

<sup>516</sup> The transparency report could have a minimum content required by law that includes the CMO's financial situation (balance sheet, income statement, expenses report, details of remuneration distributed/not distributed, etc.). It should include main activities conducted, and description of the entity, including the percentage of remuneration designated for administrative costs and managers' salaries. If the CMO manages/controls other entities, detailed information

In some instances, national legislatures could benefit from including internationally accepted good practices regarding transparency. For example, it is recommended that national CMOs be obliged to publicly disclose (preferably on their website) their standard licensing contracts and applicable tariffs, including discounts.

Information posted online should also include the CMO's statute, membership terms and terms of termination of authorization to manage rights, list of people managing the organization and of representation agreements with other national/foreign CMOs, benefits paid to members, and complaint and dispute resolution procedures available for members and users.<sup>517</sup>

It is also recommended that CMOs be obliged to answer punctually requests from the public, users or other stakeholders on their repertoire, rights managed or territories covered by licenses.<sup>518</sup>

The law should contain a default rule for unclaimed payments. Those should be distributed to associated right holders or dedicated to other destinations established by the law or in the CMO's statute. The CMO should make its existing policy on the use of non-distributable amounts publicly available.<sup>519</sup>

#### D. Licensing

The concession of authorizations and licenses by CMOs depends, in principle, on the scope of the representation contract signed between the right holder and the CMO.

However, extended collective licensing mechanisms make it possible to conclude agreements in digital markets where collective licensing based solely on a previous individual authorization by right holders does not provide a comprehensive solution for covering all works or other subject matter to be used. It should be restricted, therefore, only to well-defined areas of the law, where obtaining authorization from right holders on an individual basis is overly onerous or impractical.<sup>520</sup>

The mechanisms allow the CMO to offer licenses on behalf of all right holders pertaining to a category of rights (that is, musical performers), irrespective of whether they have authorized the organization to do so.

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should also be included. See European Union, Directive on Collective Management, *op. cit.*, art. 22 and annex.

<sup>517</sup> WIPO, Good Practice Toolkit, *op. cit.*, pp. 23–24; and European Union, Directive on Collective Management, *op. cit.*, art. 21.

<sup>518</sup> European Union, Directive on Collective Management, *op. cit.*, art. 20.

<sup>519</sup> *Ibid.*

<sup>520</sup> European Union, DSM Directive, *op. cit.*, art. 12.2.

In practice, this could be done by establishing in the law that licenses concluded by the CMO can be extended to apply to the rights of right holders who have not authorized the CMO to represent them.<sup>521</sup>

In other cases, this is done by a legal mandate, including in Indonesia where the two governmental CMOs are entitled by law to represent musical authors or performers without issuing an express representation contract.<sup>522</sup>

Finally, in countries such as Chile, the law simply creates a presumption of representation, establishing that CMOs are legally presumed to represent all rights holders, including those who have not authorized the organization accordingly.

This creates a rebuttable presumption that facilitates the functioning of the licensing market and judicial procedures; the CMO does not have to show exact proof in court of all contracts with its members, as happens in countries such as Uruguay. This presumption can always be rebutted in a concrete case if it is disputed that legitimate representation exists regarding some specific right holder(s).

In any case, the law should ensure that right holders who are not members of the CMO licensing the content have access to all the relevant information on the agreement. To ensure that right holders can regain control of their works, it is also essential they are given an effective opportunity to exclude such mechanisms being applied, both before the conclusion of a license and during its term.<sup>523</sup>

The most important rules concerning licensing by CMOs are recognized in the four selected countries, but in some cases the exact wording of the law could be completed or updated.

For example, the law must establish as a basic principle that when a sole CMO is the only viable option for acquiring certain rights, it is obliged to agree a contract with potential copyright users with reasonable conditions.

CMOs must be legally obliged to establish fair and equitable tariffs for all users for the utilization of their repertoire, under equal, nondiscriminatory and transparent conditions.

Finally, the national copyright act should clearly establish a set of competences for the national regulatory body, including the ability to decide by arbitration, prior voluntary submission of the parties and disputes between collecting societies and

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<sup>521</sup>European Union, DSM Directive, *op. cit.*, art. 12.1 a).

<sup>522</sup> Sardjono, *op. cit.*, p. 335. The Indonesian survey indicated that the Decision of the Minister of Law and Human Rights No. M.HH-01.KI.01.08 of 2019 gave both governmental CMOs a legal mandate to represent right holders who have not authorized the organization accordingly. The minister's decision relates to the appointment of commissioners for the National Collective Management Agency for Creators/Actors and the National Collective Management Agency for Rights Relating to Songs and/or Music Sectors.

<sup>523</sup> European Union, DSM Directive, *op. cit.*, recital 48.

users, and to establish supplementary or substitutive tariffs in the absence of agreement.

#### E. Maintaining databases for the digital markets

The existence of complete, compatible and interconnected databases in a country is indispensable for the practical functioning of IP rights in the digital market. Databases are a guarantee of accuracy and transparency, and a pivotal instrument for performing rights clearance in a cost-effective manner and reasonable time.

According to its survey response, there are various operational databases controlled by CMOs in Chile, although they are not always able to license digital content. In Indonesia, a musical rights database is in place, and the country is working to coordinate a new national database with a recently installed mechanism to collect and distribute musical royalties.<sup>524</sup>

Databases can be proprietary (privately owned) or based on open-access standards, but the public should be able to consult their data. Complete and accurate data guarantees the existence of proper repertoire information for digital uses, including all details of the work or other protected subject matter,<sup>525</sup> description of the right holder and specification as to whether the CMO is allowed to license the content or individual authorization is required in any specific case.

They must define what digital uses are covered by a licensing scheme, and the territorial and time extension of the license. Further, they should be based on each CMO or IRME's repertoire, though it is crucial they are connected with other entities operating in the country.

For databases to be useful in the digital age, they must also be based on an international repertoire, which can only be built with a strong network of mutual representation agreements. Therefore, it is imperative local databases are compatible with international standards and with the tools used by other national organizations and federations, such as CISAC and the Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique (BIEM), among others.

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<sup>524</sup> Indonesia, Government Regulation 56/2021, mandated the Ministry of Law and Human Rights to establish, within two years, a music/song database that will serve as a basis for royalty distribution for the commercial use of the songs. It will be updated every three months to automatically include any song and/or music previously registered at the ministry, and will be a key part of the so-called Song and/or Music Information System. See <https://setkab.go.id/en/govt-issues-regulation-on-songs-music-copyright-royalties-management>.

<sup>525</sup> For identification purposes, international standards such as the ISBN (International Standard Book Number), International Standard Audiovisual Number (ISAN) and International Standard Recording Code (ISRC) are particularly useful.

### 3. Promoting enforcement of IP rights in the digital environment

As explained in chapter III, practical enforcement of rights, especially in the online world, remains a concern in the four selected countries. Establishing and applying adequate enforcement of copyright and related rights is therefore essential to guarantee complete protection of right holders in the digital environment.

Judicial, administrative and law enforcement authorities must be agile and efficient in reacting to the massive and apparently anonymous infringement on the Internet. Judges, public prosecutors, inspectors and other civil servants require the necessary human, technological and economic resources to effectively perform their duties. Without a judicial and administrative system that is able to resolve infringement claims in a reasonable manner and time, it is highly unlikely IP rights will be respected.

There are also some minor modifications at legislative level regarding legal remedies, criminal sanctions and the safeguarding of technological protection measures and information rights management that might help promote the practical enforcement of IP rights in the selected countries.

#### A. Minor legal modifications

The review of national rules described in chapter III shows there is no need for substantial changes in domestic legislation to guarantee the enforcement of IP rights in the digital environment. This impression was confirmed by the national survey responses, which did not detect pressing problems in provisional measures and civil remedies, or with criminal offences,<sup>526</sup> pointing instead to the practical enforcement of these rules.

Criminal policy, particularly, is conditioned by national peculiarities influenced by legal and cultural traditions. Legislators in the four countries might differ in what is considered appropriate or proportional punishment for IP infringement.

This study has checked that rules imposing criminal liability do exist, cover acts of infringement of copyright and related rights, and are defined in the law. The partial exception is the United Arab Emirates Copyright Act, which fixes a minimum period of imprisonment, not a maximum one.<sup>527</sup>

Thus, it is not for this study to make any additional recommendations on the national legal regime of criminal offences for IP rights infringement.

With civil provisional measures and remedies, it would be advisable in some cases to modify the rules establishing the calculation system for damages. It is, therefore, recommended that those countries that do not expressly have in their copyright act a provision establishing statutory damages (the United Arab

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<sup>526</sup> Chilean survey responses, for instance, reported that in general terms, the existing IP rights enforcement system can be considered effective, especially if the infringement is brought before the courts.

<sup>527</sup> UAE, Copyright Act, *op. cit.*, art. 39.

Emirates and Indonesia) should establish one. This would ease the process of calculating damages in complex digital scenarios.

A typical measure to determine statutory damages is to establish that the right holder will have, without the need for proof, the right to receive a small percentage of the turnover made by the infringer as compensation. But the right holder can always demand greater compensation if they prove, according to general rules, that the violation of the right caused greater damages or losses. To control the actual turnover of the infringer, the judge must be allowed under the law to demand their internal documents.

The law should also expressly state that compensation for moral damages is available for authors or performers who are entitled to these rights under national law. With nonpecuniary damage, compensation should proceed even if economic damage has not been proven.

It is also advisable to establish in national legislation that the right holder requests the infringer desist from the infringement before instituting civil proceedings, and gives them the opportunity to reconcile. This procedure can sometimes be useful to avoid trial, settling for an agreed penalty, or even a cease and desist order.

With technological protection measures and rights management information, Chile is advised to implement a specific provision to prevent the illegal circumvention of technological protection measures in its national law, according to the wording of Section 11 of the WCT and Section 18 of the WPPT.

It is recommended that Indonesia include the definition of technological protection measure in its Copyright Act, not in the annexed elucidation. Specific protection for “rights management information”, used to protect works in a manner consistent with Section 12 of the WCT, is also advised, at any rate for the economic rights of authors mentioned in the treaty.

In the United Arab Emirates, it is recommended that the obligations protecting rights management information are implemented in a language closer to the wording of Section 12 of the WCT and Section 19 of the WPPT, specifically including in the law a definition of rights management information. Similarly, it is recommended that protection is provided for “rights management information” linked to protected subject matter in a manner consistent with Section 19 of the WPPT, at least for the economic rights of musical performers and phonographic producers mentioned in the treaty.

Regarding judicial authorities, in countries such as Chile there is some judicial specialization for certain disputes regarding industrial rights (normally arising during the registration process of the right) but not for copyright and related rights disputes. However, copyright and related rights infringement is a delicate matter, and often poses intricate legal questions, especially in the digital environment. Specialized civil or commercial courts are therefore recommended.<sup>528</sup>

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<sup>528</sup> The UAE, in their survey response, indicated this is a main emphasis in their IP reform agenda.



Such courts should hear all copyright and related rights claims in a predetermined territory, and also deal with industrial property disputes, as in some cases the boundaries between rights are blurred.

The four survey responses all reported having generalist mediation or arbitration bodies with the ability to solve IP disputes as a complement to the specific IP arbitral procedures existing at international level, at WIPO in particular.

But all four considered the adoption of an IP-specific online dispute resolution system a good mechanism to improve the protection of IP rights in the digital environment, especially for microbusiness and SMEs that typically do not have the resources to litigate or conduct traditional arbitration procedures.

This would increase flexibility for all parties involved, allowing faster resolution when compared with offline mediation. Online mediation could also be useful for preliminary consultations before proceeding to the more complex offline arbitration or mediation mechanism, and would almost always mean reduced times and costs, particularly if parties are based in different territories, as is often the case in contractual disputes in the digital market.

Establishing, in domestic law, a mechanism for online mediation and arbitration should be seriously considered. The online arbitration system could be organized and maintained by the national regulatory body dealing with copyright and related rights. It could also be delegated to private national institutions.

## B. Online administrative enforcement

Enforcing copyright and related rights in the online environment requires prompt action that does not fit well with the nature of traditional civil and/or criminal courts. This aggravates the risk of potential losses for right holders, as indicated in the Indonesian survey response. In many cases, alternative dispute resolution mechanisms are not an option, because the infringer has no desire to comply with the law, its “business model” based on online infringement through websites or other online tools.

In this scenario, establishing an administrative mechanism to control and sanction online copyright infringement is a particularly effective procedure to guarantee rights are adequately enforced.

As seen in chapter III, countries such as the United Arab Emirates already have an administrative enforcement agency to sanction those uploading prohibited content, a wide category that also includes material infringing copyright and related rights. But it would seem preferable to have a procedure in copyright law designed specifically for online copyright and related rights infringement. Online infringement is massive in nature and has legal peculiarities that require a specialized administrative body.

In any event, this mechanism should be drafted in law to guarantee proper respect for the fundamental rights of freedom of expression and freedom of

information.<sup>529</sup> The administrative procedure has also to balance the principles of speed and the effective protection of the right holder with those of proportionality and the right of defence of the content provider, who, in any case, must have the opportunity to be heard.

Different models of administrative online enforcement exist that could be followed, such as those present in France<sup>530</sup> or Spain.<sup>531</sup>

Typically, the national regulatory body would target various online content providers, such as infringing websites, blogs or similar services, if they offer a publicly accessible service in the national territory that makes available a significant number of works or protected matter. This includes not only websites that provide illicit downloading or streaming, but also but also websites that actively provide links to infringing content and IPTV service providers and their mirror sites that specialize in providing illicit access to broadcasting services. This will normally be for commercial purposes.

National legislators would normally require the appearance of infringement and a previous notification to the owner of the infringing site or service requiring the removal of the content.

If the regulatory body determines that the content offered infringes copyright or related rights, it might directly order the content provider to remove it from its system. To avoid the content resurfacing, the service provider might also be obliged to include technical measures and specific diligence duties. In some cases, it may be possible to order the closure of the website or service, normally up to a maximum period fixed by law.

If the content provider does not voluntarily remove the content, the national regulatory body may need to collaborate with online intermediary service providers, demanding they suspend the corresponding service. It is up to the national legislator to decide whether the service provider blocks access to all users directly after the administrative order, or that the order is previously confirmed by a judicial authority, as happens in many European Union member states, to guarantee freedom of expression and information.<sup>532</sup>

The decision of the regulatory body should, at any rate, be eligible for review by a judicial body. The regulatory body would normally impose a fine on the content provider, but in some of the countries that have legislation on this issue this is only possible in cases of recidivism. This administrative sanction should always be compatible with criminal or civil remedies requested by the right holder.

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<sup>529</sup> The UAE survey reported that creating a specialized administrative body dedicated to the enforcement of IP rights, specifically infringements occurring on the Internet, is one aspect of the ongoing work being done for the forthcoming IP reform.

<sup>530</sup> Online copyright enforcement is guaranteed by the Autorité de régulation de la communication audiovisuelle et numérique (Arcom); see <https://www.arcom.fr/larcom>.

<sup>531</sup> In Spain, online copyright enforcement is carried out by the Sección Segunda de la Comisión de Propiedad Intelectual. Spain, Law on intellectual property, op. cit., art. 195.

<sup>532</sup> Spain, Law on intellectual property, op. cit. art. 195(6).

#### 4. Regulating the role of online intermediary service providers in copyright infringement

A crucial part of practical enforcement to protect right holders against online infringement is to regulate the role of OISPs. For some sectors such as fashion, OISPs are also crucial to enforcing trademarks and design rights on the metaverse.

The solutions adopted in the four selected countries to regulate the liability of OISPs varies greatly, from a horizontal mechanism to control prohibited content to provisions for online illicit retransmission of broadcasting signals.

Chile, for example, in the Copyright Act, has opted to create a classic safe harbor regime for OISPs, based on a notice and take down system.

In Indonesia, the Copyright Act includes a procedure to block content through the intervention of administrative authorities, and there are regulations establishing safe harbor provision and mechanisms blocking illegal content under varying conditions.

There are no limitations on liability for OISPs in the Emirati Copyright Act, but the country has adopted a mechanism to block access to different categories of prohibited content, included that infringing copyright and related rights. Federal Decree-Law No. 34 of 2021 also provides that uploading prohibited content and refraining from removing it is a punishable offence.<sup>533</sup>

Uruguay's Copyright Act does not regulate limitations on liability for OISPs. However, general legislation has established a blocking mechanism to prevent access to TV broadcasting signals in cases of illegal online retransmission. There is a similar system to block in real time the online retransmission of sporting events.

##### A. Updating or creating new national rules

In Chile, the safe harbor regime provided in the Copyright Act is compatible with international standards in this field. However, there are doubts regarding the practical efficiency of the notice and take down system. Stakeholders have argued that the system requires judicial intervention and is in many cases too slow to allow proper enforcement of rights.<sup>534</sup>

That actual knowledge is only acquired when there is a judicial decision ordering the content be removed or blocked, and the service provider has ignored or

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<sup>533</sup> See <https://u.ae/en/information-and-services/justice-safety-and-the-law/cyber-safety-and-digital-security>.

<sup>534</sup> Chile's survey reported that the system should be substituted by one that is fast and non-judicial. The Special 301 Report also urged Chile to improve its Internet service provider liability framework to permit effective and expeditious action against online piracy; see Office of the United States Trade Representative, *op. cit.*, p. 42.

disobeyed that decision, is also problematic for hosting service providers and referral service providers.

Private notification by right holders according to the standard procedure provided by the law is, therefore, not sufficient to create actual knowledge on the service provider and oblige it to act expeditiously to remove the infringing content or make access to it impossible.

It is, then, safe to assume Chile would benefit from adapting its safe harbor provisions to new technological circumstances. The legislation of 2010 was inspired by the United States Code, Title 17, Section 512, that was published in the last century.

The online environment has changed dramatically since the Chilean legislation was first enacted, and many hybrid situations have arisen between the classic role of access provider and that of hosting provider. Users now exchange protected content on social networks, online markets and digital platforms, and many other services that did not exist when the safe harbor regime was designed. It is consequently recommended that Chile's national rules on the liability of OISPs over copyright infringement are updated to address these concerns.

Indonesia, United Arab Emirates and Uruguay are advised to update their copyright law to regulate the liability of OISPs in the event of copyright/related rights infringement, taking into consideration the following factors.

#### B. Defining the best model to regulate the role of online intermediary service providers in copyright infringement

It is obvious that drafting adequate legislation on OISP liability for copyright infringement in Indonesia, United Arab Emirates and Uruguay has implications in other areas of the law that goes beyond the scope of this study. For this reason, only general *de lege ferenda* recommendations will be made to address the role of OISPs in national copyright legislation.

First, any national policy should seek to accommodate two main goals. On the one hand, it must effectively protect the rights of copyright owners and other right holders against online infringement. On the other hand, the law must secure legal certainty for OISPs, allowing them to operate under reasonable safe conditions in the event of illegal activities committed by their users.

So, not having a liability regime in cases of copyright infringement does not seem an advisable policy option, as general rules of civil or criminal joint liability will not properly take into account the specific role of OISPs in the infringing activity.

To regulate this, the national legislature must decide between a vertical or horizontal approach. The first involves drafting specific legislation on OISPs' liability regarding acts of infringement committed by users. A primary example of this model is Section 512 of U.S. Code Title 17.

The second, the horizontal approach, by contrast applies the safe harbor exceptions to all manner of infringing activities committed by end users, including

copyright and related rights but also industrial property rights, privacy, defamation and image rights, among others.

This approach is characterized in the European Union's Directive on electronic commerce of 2000.<sup>535</sup> It is also that taken by the European Union in the 2022 Digital Services Act.<sup>536</sup> However, the European Union partially changed its approach with the DSM Directive, which established an exemption liability in cases of copyright and related rights infringement for online content-sharing service providers (OCSSPs), creating a special regime that will still subsist after the entry into force of the Digital Services Act.<sup>537</sup>

Both approaches have strengths and weaknesses. The vertical approach adequately considers the special characteristics of rampant online infringement of copyright and related rights, but it may create inconsistencies if other IP rights (specially, trademarks, and designs) are infringed simultaneously. The horizontal approach, meanwhile, creates a more homogeneous liability system but does not consider the massive nature and specialities of online copyright and related rights infringement.

From the *de lege ferenda* point of view, it is probably advisable to select a vertical approach, specifically drafting legislation to establish the role of OISPs in cases of copyright and related rights infringement. The online copyright infringement has enough particularities to justify an *ad hoc* regime.

There are also different starting points for building the liability regime for OISPs in cases of copyright infringement. Under the first model, the law provides the OISP with limitations on liability or safe harbors if they meet certain conditions. The second model operates inversely, attributing liability, in principle, to the OISP for the infringing acts carried out by its users, which can be evaded *a posteriori* if certain conditions are met.

The first option is probably preferable for classic OISPs performing acts of mere intermediation, such as transmission/access service providers, system caching service providers, hosting service providers and referral service providers, the latter for OCSSPs.

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<sup>535</sup> European Union, Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce). Arts. 12–15 establish different liability limitations for transmission/access providers, system caching providers and hosting providers.

<sup>536</sup> European Union, Regulation (EU) 2022/2065 of the European Parliament and of the Council of October 19, 2022 on a Single Market For digital services and amending Directive 2000/31/EC (Digital Services Act).

<sup>537</sup> European Union, Digital Services Act, *op. cit.*, recital 11.

### C. Liability of providers of online intermediary services for copyright infringement

The general model for establishing the liability of online intermediary service providers for copyright infringement is well established in many jurisdictions. With multiple national sub-versions, at its core it is based on several general principles.

The pivotal idea of establishing a safe harbor regime for OISPs in this case is that these providers perform only intermediation activities, and do not have the technical means to monitor and/or filter the infringing content in their systems. This means that online intermediary service providers are exempt from claims for damages or other monetary relief sought by copyright holders, or for criminal liability that may be imposed according to national law.

However, precautionary or interim measures and injunctions are outside the scope of this regime, as they are essentially instruments for right holders to stop and prevent online infringement

To draft a liability mechanism for online intermediary service providers in national copyright legislation, Indonesia, United Arab Emirates and Uruguay should establish in law that OISPs do not have affirmative duty to generally monitor content in their services or to investigate circumstances that indicate illegal activities. However, the law should provide that these providers will not lose the safe harbor exceptions solely because they carry out in good faith voluntary investigations aimed at detecting and removing or disabling access to illegal content.<sup>538</sup>

It is also advisable that the law establishes common conditions that OISPs should fulfil to qualify for a liability exemption. Those conditions would include the online intermediary having a repeat infringer<sup>539</sup> policy that provides for the termination of the user's services contract in cases of repeated copyright infringement.

Some jurisdictions require the OISP not to interfere with the standardized technological measures used by right holders to protect copyright content or electronic information to identify it in the online environment.<sup>540</sup> The Digital Services Act obliges providers of online intermediary services to make publicly available reports on any content moderation they engage in.<sup>541</sup>

It is also important to identify the eligible activities of OISPs that should be included under the special liability rules, and the conditions associated in each case to be covered by safe harbor. Those conditions typically are based on two key elements: the intermediary's knowledge of the infringing activity conducted

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<sup>538</sup> *Ibid.*, art. 7.

<sup>539</sup> The concept of repeat infringer should be clearly defined by law and require proof of infringing activities previously conducted by the user (i.e., if there is a notice and take down system in law that has been used repeatedly to eliminate content uploaded by the user).

<sup>540</sup> United States, 17 U.S. Code Section 512, Limitations on liability relating to material online, arts. (i)(1)(B) and (i)(2); European Union, Directive on electronic commerce, *op. cit.*, art. 13 only establishes this for system caching services.

<sup>541</sup> European Union, Digital Services Act, *op. cit.*, art. 15.

by the user, and its right and ability to control the infringer and prevent future infringement.

The categories of OISP eligible to enjoy safe harbor should be based on the effective role of the service provider, given one company can potentially perform different roles at the same time. Typically, this regime is applied to transmission/access service providers, system caching service providers, hosting service providers and referral service providers.

The transmission/access service providers are those providing access for third parties to online services, or serving as a mere conduit of the automatic online transmission of information. The specific conditions to enjoy the safe harbor exception normally require the OISP to maintain its neutrality (that is, not selecting or modifying the information contained in the transmission, not initiating the transmission, and not selecting the receiver of the transmission).

Traditionally, legislation has also regulated the activity of system caching service providers. System caching is an automatic, intermediate and temporary storage of information performed for the sole purpose of making more efficient the information's onward transmission to other users on their request.

A close analysis of the problems of liability relating to system caching activities reveals that they are practically nonexistent in practice. However, the exemption of liability for those providers should be included in the legislation as a precautionary measure.

The conditions to have access to the safe harbor exception should not differ significantly from those existing in most legislation.<sup>542</sup> They should also include the obligation of acting expeditiously to remove or disable access to the infringing content on obtaining actual knowledge that the information at the initial source (website) has been removed to avoid maintaining the illicit content in an old cached version of the site.

The hosting service provider<sup>543</sup> is the provider of online intermediary services that merely stores content in its system or network at the direction of the user. The specific conditions to benefit from the safe harbor exception in this case normally include that the OISP does not have actual knowledge of infringement and is not aware of the facts or circumstances whereby the infringement is apparent or obvious to a reasonable observer (red flag knowledge).

Many jurisdictions also establish that the safe harbor exception will not apply in respect of liability relating to information supplied not by the recipient of the service, but by the online intermediary service provider itself, including where the

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<sup>542</sup> Normally this requires that the OISP does not modify the information, complies with conditions on access to the information, complies with standardized industry rules regarding the updating of the information and does not interfere with the lawful use of standardized technology to obtain data on the use of the information. See European Union, Directive on electronic commerce, *op. cit.*, art. 13.

<sup>543</sup> That is, the online intermediary service provider merely stores content in its system or network at the direction of a user; see United States, 17 U.S. Code Section 512, *op. cit.*, art. (c).

information has been developed under the editorial direction of that provider.<sup>544</sup> Some jurisdictions, such as the United States of America, also require the hosting provider receives no financial benefit directly attributable to the infringing activity.

In the event of an OISP acquiring knowledge or awareness of the infringing content, under the principle of diligent reaction, it must act expeditiously to remove or disable access to the infringing content. This underlines that it is the failure to comply with such duty that creates liability for the online intermediary service provider, thus making it directly liable.

It is debatable whether a Web 2.0 intermediary or digital platform should be eligible for the hosting service provider's limitation of liability. To be so eligible, it should clearly perform a merely neutral or passive role, as opposed as an active role in promoting the infringing activity.

As this may prove difficult to define, the European Union's Digital Services Act considered it necessary to distinguish, within the broader category of providers of hosting services (for instance, cloud computing or web-hosting services), the subcategory of online platforms. These are, for example, social networks or online platforms allowing consumers to conclude distance contracts with traders (online marketplaces).<sup>545</sup> The act drafted specific rules and duties in this case.<sup>546</sup>

Referral providers are typically defined as providers referring users to an online location containing infringing material or using information location tools, including a directory, index or links.<sup>547</sup>

The conditions exempted from liability here should be the same in essence as those traditionally applied to hosting providers, though logically, the illegality refers to the linked content, not the content stored by the hosting provider.<sup>548</sup>

Also, the exemption of liability should not apply if the link provider is subordinated or supervised by the operator of the linking website, or when the linking website presents the third-party information as its own, given it is not acting as an online intermediary but as a content provider.

In cases of providers of caching, hosting and referral services, many jurisdictions have defined a specific notice and take down mechanism to make OISPs aware that infringing content exists in their systems. This means that receipt of a valid notification from the right holders triggers the obligation to act expeditiously to remove the content or disable access to it.

In many jurisdictions, however, the notice and take down system is applied only to notifications of judicial or administrative authorities.<sup>549</sup> A private notification by

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<sup>544</sup> European Union, Digital Services Act, *op. cit.*, recital 18.

<sup>545</sup> *Ibid.*, recital 13.

<sup>546</sup> *Ibid.*, arts. 19–28.

<sup>547</sup> United States, 17 U.S. Code Section 512, *op. cit.*, art. (d).

<sup>548</sup> A model for this regulation can be found in Spain's Law No. 34/2002 of July 11 on information society services and electronic commerce, art. 17; and Austria's Federal Act governing certain legal aspects of electronic commercial and legal transactions (E-Commerce Act – ECG), art. 17.

<sup>549</sup> European Union, Digital Services Act, *op. cit.*, art. 9.



the right holder is not, then, in principle, sufficient for the OISP to gain actual knowledge and oblige it to remove the content or disable the access to it to avoid liability.

Finally, in other cases the private notification only generates knowledge for hosting providers (including online platforms) and obliges them to assume certain duties besides removing the content (notice and action mechanisms), such as providing the user with a statement of reasons for their decision and reporting suspicious activities to the authorities.<sup>550</sup> It is up to the national legislature to decide which option better suits its own constitutional and legal characteristics.

To be effective, the takedown notice must meet certain formal and substantive statutory requirements that should be detailed in law, such as proper identification of the right holder and the work or other subject matter affected, and a description and exact location of the infringing material.

If the online intermediary service provider removes access to the infringing material, it must immediately notify the user. The user may then submit a counter notice requesting the content is restored if they believe it is non-infringing. If the counter notice clearly shows the legality of the content, the OISP should reverse its decision and restore the content or enable access to it.

The legislature could also establish an online alternative dispute resolution system, provided all parties agree to the extrajudicial solution.<sup>551</sup> This would avoid a direct claim by the right holder against the user when the right holder disagrees with the OISP's decision vis-à-vis restoring content.

It is also recommended that national law includes liability for senders of abusive notices or counter notices in cases of actual knowledge, knowing misrepresentation or falsity. Mere negligent misrepresentation should not, however, result in liability for the sender of an inaccurate notice.<sup>552</sup>

In any case, domestic legislation should provide a subpoena to identify the infringer to impose on them adequate criminal, administrative or civil liability.<sup>553</sup>

#### D. Beyond liability: Injunctive relief against online intermediary service providers in case of copyright infringement

Even if they may benefit from a safe harbor exception, OISPs should always be susceptible to injunctive relief through a temporary or permanent injunction, with the aim of terminating infringement, and/or preventing its restart.

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<sup>550</sup> *Ibid.*, art. 16–18.

<sup>551</sup> United States, 17 U.S. Code Section 512, *op. cit.*, arts. (c) and (g)(2)(c).

<sup>552</sup> United States Copyright Office. "Section 512 of Title 17: A report of the Register of Copyrights." *copyright.gov*. May 2020, p. 5.  
<<https://www.copyright.gov/policy/section512/section-512-full-report.pdf>>.

<sup>553</sup> United States, 17 U.S. Code Section 512, *op. cit.*, art. (h); and European Union, Digital Services Act, *op. cit.*, art. 10.

The injunction typically consists of an order restraining the service provider from providing access to infringing material residing at a specific online site. It is also possible for the judge to issue an order restraining it from providing access to a subscriber or account holder repeatedly engaging in infringing activity. The OISP must then terminate the account of the subscriber named in the order.

Temporary injunctions should be granted by the judge or administrative authority weighing the customary factors in these cases, namely, proportionality, the magnitude of harm likely to be suffered by the right holder if the infringement is not prevented or restrained, technical feasibility, effectiveness of the injunction, possibility of a less burdensome measure with comparable effects<sup>554</sup> and, eventually, providing a security to cover future damages

In fact, empirical experience has shown that injunctive-style relief, focusing only on disabling access to infringing content, has resulted in a real decrease in online piracy in many countries.<sup>555</sup>

This solution consists of giving the right holder the option to seek a so-called dynamic blocking injunction,<sup>556</sup> either in court or through an administrative authority. These injunctions can be issued in cases where an identical website (mirror) “becomes available immediately after issuing the injunction with a different IP address or URL”.<sup>557</sup>

The injunction is drafted in a flexible way that makes it possible to cover the new IP address or URL without the need for a new judicial procedure.<sup>558</sup> The injunction can then be periodically updated with the different locations of infringing content uploaded from one or various infringers, so content can be kept online more easily.

A modality of dynamic blocking injunctions is the live blocking orders, such as those recently implemented in Uruguayan law. They allow the repeated blocking of a site every time a live broadcast (typically, sporting events) is in place.<sup>559</sup> The orders allow new servers to be identified by the right holder and reported to access providers for blocking, avoiding users to switch to another server to watch the event.

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<sup>554</sup> United States, 17 U.S. Code Section 512, *op. cit.*, art. (j)(2).

<sup>555</sup> This includes some Latin American jurisdictions, such as Colombia, Ecuador and Peru, where national copyright or IP offices are ordering local access service providers to disable access to infringing content. In Sweden, the number of respondents reportedly accessing copyright-infringing content fell from 21% to 14% following the use of dynamic injunctions. See U.S. Chamber of Commerce, *op. cit.* p. 12.

<sup>556</sup> *Ibid.*, p. 46. According to the index, this solution is currently being used in several European Union member states, India, Russian Federation, Singapore and United Kingdom.

<sup>557</sup> European Union, Intellectual Property Office. “Study on Dynamic Blocking Injunctions in the European Union.” *euipo.europa.eu*. March 2021, pp. 16–17 <[https://euipo.europa.eu/tunnel-web/secure/webdav/quest/document\\_library/observatory/documents/reports/2021\\_Dynamic\\_Blocking\\_Injunctions/2021\\_Study\\_on\\_Dynamic\\_Blocking\\_Injunctions\\_in\\_the\\_European\\_Union\\_Full\\_R\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/quest/document_library/observatory/documents/reports/2021_Dynamic_Blocking_Injunctions/2021_Study_on_Dynamic_Blocking_Injunctions_in_the_European_Union_Full_R_en.pdf)>.

<sup>558</sup> *Ibid.*

<sup>559</sup> *Ibid.*, p. 17.

### E. The case of online content-sharing service providers

The existence of a notice and take down mechanism to regulate liability for hosting and referral providers can be seriously questioned in light of the actual technology. For many big OISPs and right holders, sending and processing notices and counter notices on infringing content is largely an automated process done on a mass scale that requires significant time and resources from both sides.

Additionally, the evolution of “spider” algorithms allows the automatic patrol of the copyright infringing content in a more precise and refined manner. These automated systems, with the cooperation of right holders, can filter the infringing content to properly identify it. In fact, based on a combination of licensing, identification and filtering content systems, some of the largest digital platforms in the world, working with big right holders, have already drafted bespoke mechanisms to manage content in their systems.<sup>560</sup>

This technological development goes hand in hand with online content-sharing services providing access to large amounts of copyright-protected content uploaded by their users. It broadens access to works and other subject matter, and offers great opportunities for the creative industries to elaborate new business models.

But online platforms are also often used to upload copyright-protected content without prior authorization from right holders.<sup>561</sup> Therefore, a liability regime for the OCSSP in national law could be considered in the four selected countries as an option to balance all involved interests, including those of small and medium-sized right holders and OISPs.

The exact drafting of this legislation could consider different options, given the model for this regulation is still under development. The options taken by European Union member states when implementing Section 17 of the DSM Directive reveal that national legislators want to exercise their discretionary power when balancing fundamental rights.

As none of the alternatives have yet been tested in practice, it is probably preferable not to recommend a one-size-fits-all model; national policy considerations and constitutional peculiarities are too varied in the four countries to do so.

The main practical consequence of adopting such legislation is that this model inverts the classic system of safe harbor exceptions, substituting it with an *ab initio* (meaning from the beginning) attribution of liability to the OCSSP for acts of communication to the public made by users of its services.<sup>562</sup> This means it will

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<sup>560</sup> United States Copyright Office, “Section 512 of title 17,” *op. cit.*, p. 10.

<sup>561</sup> European Union, DSM Directive. *op. cit.*, recital 61.

<sup>562</sup> This requires specifying that online content-sharing service providers perform an act of communication to the public, or making available to the public, works or other subject matter

not benefit from the safe harbor provided for hosting providers, as it is performing a direct act of exploitation.<sup>563</sup>

This means, in turn, an authorization or license agreement with right holders is necessary to make such an act of communication to the public.<sup>564</sup> However, to respect contractual freedom, neither right holders nor OCSSPs should be obliged to conclude such licensing agreements or authorizations.<sup>565</sup> Exclusive rights are drafted as preventive in nature by international copyright treaties. Only right holders themselves can grant such authorization, which cannot be derived from a nonvoluntary license imposed by a national legislator.<sup>566</sup>

This special liability regime for copyright infringement should be subject-specific, and only applicable to content-sharing service providers. The exact definition of online content-sharing service provider thus becomes crucial.<sup>567</sup>

The regime should cover only services that, de facto (true in fact, but not officially sanctioned), are competing in the online market with licensed services, especially in the cases of audio and video streaming services. The services should be designed to facilitate public access to content uploaded by other users, as well as to a large amount of content protected by copyright or related rights. Precise identification of these service providers should be done, then, on a case-by-case basis.<sup>568</sup>

It is also advisable to include specific cases excluded from this special liability system in law<sup>569</sup> and clarify that the safe harbor provided under certain conditions to these providers will not be applicable to platforms using a business model clearly oriented to facilitate infringing content (that is, service providers themselves funnelling illegal content into the system to attract users).<sup>570</sup>

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when they give the public access to that content. See European Union, DSM Directive. *op. cit.*, art. 17(1)(i) and recital 64.

<sup>563</sup> *Ibid.*, art. 17(3) and recital 65.

<sup>564</sup> *Ibid.*, art. 17(1)(ii) and recital 64.

<sup>565</sup> *Ibid.*, recital 61.

<sup>566</sup> ALAI (Association littéraire et artistique internationale). "Draft Opinion on certain aspects of the implementation of Article 17 of Directive (EU) 2019/790 of 17 April, 2019 on copyright and related rights in the digital single market." *alai.org*. March 30, 2020, p. 3. Web. Oct. 21, 2022. <[https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019\\_790-en.pdf](https://www.alai.org/en/assets/files/resolutions/200330-opinion-article-17-directive-2019_790-en.pdf)>.

<sup>567</sup> European Union, DSM Directive. *op. cit.*, art. 17. Art. 2(6) states "online content-sharing service provider" means a provider of an information society service where the main/one of the main purposes is to store/give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes.

<sup>568</sup> *Ibid.*, recital 63.

<sup>569</sup> *Ibid.*, recital 62. In the case of art. 2(6)(ii), excluded services include not-for-profit online encyclopaedias, not-for-profit educational and scientific repositories, open-source software-developing and sharing platforms, providers of electronic communications services (e.g., email providers), online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use.

<sup>570</sup> European Union, DSM Directive. *op. cit.*, recital 62.

The safe harbor exception would apply only in cases of copyright infringement, as liability emanating from the uploading of other illicit content should be resolved by the applicable national rules.

The conditions the OCSSP must meet to benefit from the exception of liability should be carefully drafted in national legislation. The European Union decided that this would include the service provider demonstrating it has made best efforts to obtain an authorization and to ensure specific works or related subject matter properly identified by right holders are unavailable.<sup>571</sup>

This means, in most cases, establishing filtering mechanisms to avoid the presence of infringing content in the system, which requires active cooperation between the OCSSP and the right holders. Both must have simultaneous access to databases that are updated continuously to have complete and accurate information regarding content that should be filtered.

The obligations on the service provider to ensure infringing content is not available should be interpreted in light of the principle of proportionality, considering especially the technical availability of the filtering mechanisms and whether they are cost-effective for the service provider and economically sustainable over a long time.<sup>572</sup>

The type of works or other subject matter uploaded by users of the service are also relevant in determining whether the OCSSP has done enough to keep the protected content out of their system.<sup>573</sup> For instance, if the content-sharing service allows its users to upload works that are particularly susceptible to illegal copying, such as computer programs, videogames or mobile applications, the filtering system should be extremely robust, as a single uploaded copy could significantly damage the normal exploitation of the work after massive replication in the content-sharing service.

In some cases, it is possible that no filtering system will be adequate for a specific OCSSP. In that event, the availability of unauthorized content could be avoided only by notifying the right holders individually.<sup>574</sup>

The national legislature should also take into account that automated filtering mechanisms are expensive to develop and maintain, and can act as barrier to the online content-sharing market for many startup companies. For this reason, it would be advisable not to require these conditions in the case of new actors in the market with a small turnover and audience.<sup>575</sup>

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<sup>571</sup> *Ibid.*, art. 17(4)(b).

<sup>572</sup> *Ibid.*, art. 17.5 and recital 66.

<sup>573</sup> *Ibid.*

<sup>574</sup> *Ibid.*, recital 66. For this reason, the national legislature should always include a notice and take down system, allowing online content-sharing service providers to avoid liability when they act expeditiously to disable access, or remove protected content from their systems on receiving a complete and substantiated infringing notice from right holders; see art. 17(4)(c).

<sup>575</sup> *Ibid.*, recital 67.

Instead, it would seem better to require only compliance with the usual notice and take down procedure,<sup>576</sup> given the volume of infringing content should not be relevant. The national legislature should draft carefully, however, with regard to ascertaining whether a specific online content-sharing provider is genuinely “new”.<sup>577</sup>

The European Union further determined that the service provider, in some cases, should demonstrate it has made its best efforts to prevent the future uploading of specific unauthorized works previously reported by right holders.<sup>578</sup> This means in practice instituting a notice and stay down system, and, indirectly, a duty for the content-sharing provider to actively monitor its systems for previously reported infringing content.

Automated filtering mechanisms immediately raise concerns about the possibility of unduly restricting the user’s freedom of expression. National law must therefore establish appropriate guarantees to avoid the filtering of non-infringing content.<sup>579</sup>

In particular, the law must guarantee that the user can exercise national exceptions and limitations to copyright and related rights, especially those closer to freedom of expression, such as quotation, criticism, review or parody.<sup>580</sup>

To do so, it should provide a counter notice mechanism for complaint and redress for users who disagree about the disabling of access or removal of protected content. The determination of a content being legal is an intricate question that is not well resolved by an automated filtering mechanism. For this reason, when the user submits counter notices and disputes the disabling or removal of the content, the complaints should be subject to nonautomated (human) review.<sup>581</sup>

Establishing an extrajudicial redress mechanism is strongly advised for the impartial settlement of disputes.<sup>582</sup> The user must also have access to a judicial authority to defend themselves against undue removal or disabling of access.

This complex mechanism seeks to strike a balance between the rights of service providers and their users and those of right holders. And if these precautionary measures are established, filtering might be a valid instrument in determining the balance between intellectual property and other rights.<sup>583</sup>

Finally, under every scenario, the liability rules applicable in national law to content-sharing providers should be without any prejudice to the possibility of national courts issuing injunctions against OCSSPs.<sup>584</sup>

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<sup>576</sup> *Ibid.*, art. 17(6).

<sup>577</sup> *Ibid.*, arts. 17(6)(i) and (ii).

<sup>578</sup> *Ibid.*

<sup>579</sup> *Ibid.*, art. 17(7).

<sup>580</sup> *Ibid.*, art. 15(7).

<sup>581</sup> *Ibid.*, art. 17(9).

<sup>582</sup> *Ibid.*, recital 70.

<sup>583</sup> Court of Justice of the European Union (CJEU), Judgment of the Court (Grand Chamber), *Republic of Poland v. European Parliament and Council of the European Union*, Case C-401/19, April 26, 2022, para. 98.

<sup>584</sup> European Union, DSM Directive, op. cit., recital 66.

## 5. Educational measures

All the survey responses emphasized the importance of adopting educational measures for the different categories of stakeholders involved in the digital exploitation of works and other subject matter, including users, enforcement authorities, right holders and rights management entities.<sup>585</sup>

A general recommendation is that all formative and educational activities, even when classroom based, should also be transmitted online and retained as educational material and posted permanently. Distance-learning techniques guarantee educational resources are accessible, regardless of geographic conditions or time availability.

For the purposes of this study, the recommended educational measures are divided into those targeting the public and users of protected content, those targeting right holders and those directed at law enforcement and judicial authorities.

Public awareness on the importance of respecting copyright and related rights is considered low according to the survey responses, particularly in the digital environment. The United Arab Emirates and Chile expressly said publishing educational IP rights guidelines would be of interest (specifically for using social media) to explain the legal regime of user-generated content. Chile also noted it would be convenient to educate students even in primary school.

The survey responses reported that the public is not aware of the consequences of copyright infringement, even when serious penalties are attached (such as in criminal cases). The United Arab Emirates survey response referred to campaigns that raise public awareness on the increasing risk facing infringers, at commercial level, in particular. According to Chile's survey response, one of the main challenges in the digital environment is creating a culture of general respect for IP rights.

This could be done via public authorities promoting and funding advertising campaigns focusing on the serious consequences of copyright infringement, specifically in the online environment. Such campaigns could also include evidence on how illegally downloading or making available to the public protected content harms creators and the national digital economy, causing job losses and impairing the development of young creators.

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<sup>585</sup> Chile, for instance, stressed that many public institutions, CMOs and other stakeholders receive specific training on how to correctly use IP rights in the process of protecting creative products and/or services in the digital environment, but that there is still work to be done on this front. The Indonesian survey indicated substantial efforts carried out by governmental authorities and the private sector with local business, but it also noted the difficulties these business face in finding legal personnel with IP rights expertise outside the cities. The UEA survey response underlined the importance of educational aspects of the IP value chain to protect against unauthorized infringement and for right holders to learn how to commercialize their rights.

More broadly, educational measures targeting right holders should focus on closing the knowledge gap already existing in all four countries, with stakeholders not completely understanding IP rights that subsist in works and other protected subject matter when marketing their own products or services.

These measures should focus on effectively performing a copyright clearance of rights to obtain authorization or licenses from the appropriate right holder when marketing a product or service that requires such authorizations.

The four countries all noted a lack of knowledge among right holders on what rights are applicable to their content and how to effectively market their works and other protected subject matter to prevent third-party infringements.

Indonesia's survey response noted that many creators are still unaware of the importance of registering their works and other protected subject matter as a preliminary protection measure, and that they see investing resources in protecting their rights as a burden.

To tackle these issues, it is recommended that private and public stakeholders invest substantially in providing proper legal knowledge for companies exploiting creative products and/or services in the digital environment. In-house education on IP issues should be a priority for the selected countries.

Indonesia reported that the right holder community is starting to receive internal IP rights training, and these efforts should be continued and encouraged.

Chile stated that educational measures and permanent legal training should also include CMO personnel, who play a critical role in the functioning of the IP rights chain. There is little doubt that this should be a recommended course of action.

Training for a CMO legal team should cover all key areas in the digital environment, such as the proper drafting of licenses and agreements with copyright users, detecting Internet infringement on behalf of their members and establishing legal advice services for right holders to defend their interests against online infringement.

The four survey responses all underlined the importance of building an efficient network of right holder organizations at national, regional and international level to facilitate the transfer of information and cooperation in promoting the use of IP rights in the digital environment.

These networks already exist in some countries,<sup>586</sup> and belonging to and actively collaborating with international associations such as the International Federation of the Phonographic Industry (IFPI),<sup>587</sup> and federations of collective management societies, including CISAC,<sup>588</sup> the Societies' Council for the Collective

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<sup>586</sup> Chile, in its survey response, pointed to the Network of Chilean Music Associations.

<sup>587</sup> IFPI and its national group network represent some 8,000 sound recording companies across the world; see <https://www.ifpi.org/members/our-members/>

<sup>588</sup> With 228 member societies in 119 countries, CISAC represents more than 4 million creators from different artistic repertoires, including music, audiovisual, drama, literature and visual sectors; see <https://www.cisac.org/es>



Management of Performers' Rights (SCAPR),<sup>589</sup> and the International Federation of Reproduction Rights Organisations (IFRRO), is a well established practice to foster the use of IP rights.

Further, the network should be built at national level, gathering all existing CMOs in the country in a formal federation or association. Including national right holders in regional or international associations should also be promoted via information campaigns by public powers.<sup>590</sup>

According to the survey responses, a significant push has been made to improve the legal training of law enforcement and judicial authorities to deal with IP rights, both in the digital environment and the traditional physical world.<sup>591</sup> Efforts include workshops, courses, specialization training and other tools, at national level and with the cooperation of international organizations, including WIPO.

There is still work to do in the different jurisdictions, and in the four countries the consensus is that the training of civil servants, and law enforcement and judicial authorities remains, in general terms, insufficient.

It is recommended that efforts be continued to properly educate judges dealing with IP disputes. Creating judicial bodies specialized in IP disputes, as recommended by this study, is an educational measure in itself, as dealing with such disputes generally enhances the judge's ability to properly resolve future cases.

Formal education for national judges is still essential even in this instance, and specific training to solve disputes in the digital environment should be considered imperative. The emphasis should be on training for life, as technological evolution requires that the skills of judicial bodies are regularly updated and improved.

This is especially important to correctly deal with copyright infringement in digital markets, given that in many cases understanding the technological ramifications of the case is essential to correctly resolving the legal issues. Refresher training should be scheduled regularly, as the pace of technological change increases.

It is also advisable to implement measures to train civil servants and other governmental personnel, as they play a key role in the effective protection of IP rights. This would greatly benefit the daily activities of public prosecutors, customs agents and ministry inspectors, among others.

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<sup>589</sup> SCAPR is the international organization for developing practical cooperation between performers and CMOs, and represents 56 CMOs from 41 countries; see <https://www.scapr.org/about-us>

<sup>590</sup> For example, according to the IFPI website, no record labels in the UAE and Uruguay were part of the association. In Indonesia, only three labels are reported to be involved. In Chile, three of the national branches of the major companies are integrated into the organization. See <https://www.ifpi.org/members/our-members/>

<sup>591</sup> Indonesia's survey noted there is a corporate university, under the supervision of the Ministry of Law and Human Rights, which provides IP legal training for DGIP civil servants.

## 6. Adopting new policies for promoting the use of IP rights in the digital era

National policies on promoting the use of IP rights in the digital environment have different objectives and are essentially country specific. This makes it difficult – undesirable, even – to give the same advice to the four selected countries. However, there is some common ground.

The main recommendation would be to have a specific national policy to promote IP rights in the digital markets. The selected countries have different policies, but the digital economy presents challenges that make a policy tailored to the exploitation of works and other subject matter advisable.

It might also be advisable to make institutional changes. According to the survey responses, all four countries have in their legal system a specialized administrative directorate general or agency with different functions regarding copyright and related rights protection.<sup>592</sup>

The form and cast of functions attributed to the national regulatory body differ in the legislation of the four countries. In Indonesia and the United Arab Emirates it is a ministerial department covering all forms of intellectual and industrial property. In Chile and Uruguay there is a specific division in the ministry for cultural matters dealing with copyright and related rights.

However, the practical functioning of copyright and related rights has sufficient peculiarities and differences with other IP rights (lack of registration to obtain protection, duration, collective management, online enforcement or liability of OISPs) to justify the creation of an independent copyright office as a governmental agency, separated from the industrial property office.

This formal structure would allow different aspects of copyright protection to be centralized, thereby improving efficiency in, for example, registration, supervision of CMOs, mediation and arbitration functions, and online administrative enforcement. It would also serve as the advisory body for copyright policies, or educational measures to promote copyright protection.

On the institutional side, it would be advisable to enhance collaboration between the different ministerial departments, governmental agencies and law enforcement authorities to stop online piracy. A national taskforce devoted to the massive infringement on the Internet is therefore recommended.

It would be also wise to contemplate the existence of a permanent national forum to discuss priorities and policies, considering inputs from different sources, such as companies operating in the digital environment, government, academia and civil society.<sup>593</sup>

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<sup>592</sup> The Ministry of Economy in the UAE, Copyright Council in Uruguay, DGIP in Indonesia and Intellectual Rights Department in Chile

<sup>593</sup> Indonesia's survey response pointed to the importance of adequate coordination between public and private stakeholders. Chile refers to the existence of a public-private governance body of the creative industries established to design and implement adequate policies.

The practical composition of this national IP forum will naturally vary from country to country, but it could act as an advisory body for public institutions, and even as a think tank to promote new and creative approaches to enhancing creative industries in the digital environment.

It must be noted that what is recommended is not a traditional advisory body composed of ministerial authorities and representatives or right holders, but rather, a permanent forum that is flexible in its composition and activities, and would function as an agora where all stakeholders, private and public, could discuss and exchange ideas, propose policy solutions and find common regulatory grounds.

Chile and the United Arab Emirates, indicated in their responses that there are mechanisms of State funding, tax incentives, fee discounts and cultural patronage or sponsorship programs in specific sectors (audiovisual, in particular), but that they are not normally oriented to the digital market.<sup>594</sup>

It is recommended that these financial aids mechanisms are utilized to target creative products and/or services for the digital environment.<sup>595</sup> This would entail extending traditional financing schemes, tax incentives or patronage to those sectors more oriented to the digital exploitation of works, including videogames, software and/or mobile applications.

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<sup>594</sup> The UAE reported that to become the leading jurisdiction in the virtual asset space, Dubai has established the Dubai Virtual Assets Regulatory Authority, which plans to attract investment on cryptocurrencies and NFTs by providing fee reductions, expansion support or tax exemptions.

<sup>595</sup> The Indonesian survey indicated that the Proud of made in Indonesian Products stimulus program is being conducted by the government to increase transactions in national creative product purchases on digital platforms for the fashion, crafts and culinary sectors.