

STUDY ON THE AUDIOVISUAL LEGAL FRAMEWORK IN LATIN AMERICA

PART 2: THE LEGAL FRAMEWORK OF THE AUDIOVISUAL SECTOR IN THE DIGITAL ENVIRONMENT

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Disclaimer

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¹ Studies available at : https://dacatalogue.wipo.int/projects/DA_1_3_4_10_11_16_25_35_01

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1. INTRODUCTION

The aim and scope of this study is to provide information on the current state of the market and on the national and supranational legal framework applicable to the online exploitation of audiovisual content in Argentina, Brazil, Costa Rica, Ecuador, Peru and Uruguay.

As will be shown, these countries have different market realities and heterogeneous markets for audiovisual exploitation and production, audiovisual productions frequently encountering problems in gaining access to digital distribution channels on equal footing with content produced elsewhere, in particular large foreign productions.

This analysis seeks to determine the legal treatment of copyright and related rights in the digital environment and the licensing systems applied, as well as the ambiguities, challenges and opportunities for the multi-territorial dissemination of content in Latin America, by considering the legal situation in Argentina, Brazil, Costa Rica, Ecuador, Peru and Uruguay in particular.

Audiovisual production in Latin America has increased significantly in recent years and is generating growing interest in other territories. At the same time, demand for audiovisual content in all formats has risen substantially. However, although the online exploitation of audiovisual content, through digital platforms, mobile devices, the Internet, social networks and other means, clearly seems to be the primary mode of dissemination, it still poses major challenges for the dissemination of content produced in the region and elsewhere. Moreover, the expansion of this form of dissemination is changing how the production and financing of this content is organized, both in relation to the creation of new dynamics and processes and in relation to its very structure and, of course, to the consumer.

It is an established fact that the barriers to the distribution and exhibition of national productions, especially films, extend to the absence of a regional Latin American market with the advantage of Spanish as the common language of all the countries, except for Brazil.² Moreover, while there are organizations that contribute to the regional coordination of content distribution, they are likewise inadequate.

In addition to the lack of a regional Latin American market, intellectual property (IP) rules and various regulations applicable to audiovisual content distribution are inconsistent, which similarly affects content from other countries.

The development and implementation of online dissemination platforms (or like systems) in these markets allows (or should allow) access to content that would otherwise be more difficult to locate, in particular for the audience seeking Latin American audiovisual content, which would otherwise have to (or does) resort to unlawful published content.

2. AUDIOVISUAL CONTENT

2.1 THE VARIOUS TYPES OF AUDIOVISUAL CONTENT AVAILABLE ON THE INTERNET

In 2021, there is as much audiovisual content available on the Internet as there are authors, producers, performers and creators. When it comes to creating audiovisual content, the possibilities offered by digital technology are only comparable to those provided by the Internet

² For example, see *Derecho de Autor en el Ámbito Audiovisual y su Aplicación al Entorno Digital en Seis Países de América Latina*, published in August 2015 by the Ministry of Culture of Colombia as part of a project on a regional coordination platform for audiovisual distribution and coordinated by Viana Rodríguez Escobar.

for their dissemination. Until quite recently, the production of audiovisual content (of any type) was (a) very expensive, (b) very complex and (c) very slow.

Today, with just a mobile phone and a mobile phone application and without any special training, money, costly materials or large teams of qualified technicians, any of us can write, perform, direct and produce a fairly decent audiovisual work—the point is that it can be done successfully. Furthermore, thanks to the Internet, we can disseminate our creation worldwide. Not long ago, this was simply impossible.

Audiovisual content on the Internet covers very diverse types of content, which could be divided by origin into two large groups: professional audiovisual works and recordings and those produced outside of the established professional structures, often called “user-generated content”.

Both “professional” content and user-generated content encompass a large number of types of audiovisual works: from feature films to series, miniseries, television films, documentaries and other content protected as audiovisual works under IP laws. Examples include “professional” video clips and video clips created by Internet users; audiovisual clips, many of them parodical; and “series” having chapters lasting one or two minutes, more similar in concept to comic strips published in newspapers than to conventional television series.

In addition to audiovisual works, there are other types of audiovisual content not considered “works” under applicable IP laws. In fact, all television station productions are audiovisual content: entertainment programs, competitions, reality shows, news programs, magazine programs and, of course, sports programs. The audiovisual exploitation of football should be highlighted, since it constitutes a legal and economic universe in itself. All these forms of content are also protected by IP as audiovisual recordings and, where applicable, as broadcasting signals.

In short, there are many different types of audiovisual content that could be exploited in very different ways and through platforms with different business models. However, despite the diversity of existing content, this study will focus on only some of them, as will be shown below.

2.1.1 Definition of audiovisual content for the purposes of the study

In general, an audiovisual work is understood as a creation based on a series of associated images, with or without sound, which are intended to be communicated to the public by screening or by any other means of communicating image and/or sound to the public, such as television, video on demand (VOD) and the Internet, regardless of the physical medium into which they are incorporated.

Audiovisual content not regarded as a “work” from the perspective of IP law is protected as an audiovisual recording. This include all content produced for television, from magazine programs to news programs, reports or sports programs.

As will be shown, the definitions of “audiovisual work” and “audiovisual recording” in the laws of the studied countries vary to a greater or lesser degree.

For the purposes of this study, the primary focus will be on professionally created audiovisual works.

Audiovisual works

Audiovisual works may be full-length, medium-length or short, although this categorization is not part of IP law. It should be noted that, within the very different types of audiovisual works that exist, the market and audiovisual regulations normally differentiate the following types in particular:

- **Cinematographic:** For this study, cinematographic works are understood as those which are mainly or primarily, but not exclusively, intended to be exploited in movie theaters.³ Depending on the content, one can speak of fictional, documentary and animated cinematographic works, and depending on their length, of full-length, medium-length and short works. These distinctions are relevant with respect to the various national regulations on public aid, and for determining the average costs, possible funding routes and potential market for each type of work.
- **Series:** Within serial audiovisual works, a distinction can also be made between fictional, documentary and animated works, with a huge variety of typologies and formats. In fact, as mentioned above, there are, for example, mini-series having a few chapters of more than an hour, series having hundreds of chapters of less than ten minutes and series by “season” having 13 or 26 chapters of 30 minutes or an hour.
- **Fictional/documentary:** As noted above, fictional audiovisual works can have different formats, full-length works, shorts and series being the most typical, whether with “real” or animated characters. Documentary audiovisual works, as the name suggests, are based on real persons or events (not invented, unlike with fictional works) and usually contain at least statements of persons (for example, interviews) and visual and sound documentation (journalistic or photographic archive material or material of any other type). Like fictional works, they can be in different formats, such as full-length works, shorts and series.

3. STAKEHOLDERS

A detailed description of the audiovisual market, and in particular of over-the-top (OTT) platforms operating in Latin America is provided in Part 1 of the study published jointly with this document. As shown in that study, the audiovisual market in its current form is, to say the least, very heterogenous, as the boundaries between producers, broadcasting organizations, distributors, cable operators, OTT services, telecommunication services and platforms are blurred, the services offered by some frequently coinciding with those offered by others, which makes it difficult to identify the stakeholders only by one activity.

Without seeking to provide an exhaustive description, this section aims to identify the different stakeholders in the chain of title of audiovisual content:

A) AUTHORS

Any discussion about the stakeholders in the digital audiovisual exploitation market must begin with the authors of audiovisual content, as they are the creative axis about which the very existence, production, exploitation and consumption of such content revolve. In short, who the authors are, as holders of IP rights (IPRs) over their creations, must first be identified.

The complexity of audiovisual content, consisting of the (various) contributions of (various) persons, demands a minimum effort of systematization to try to trace a comprehensive map of the persons who may hold IPRs over said content. The producer must acquire these rights from all of them to be able to exploit the content.

³ In recent years, there has been much discussion about the scope (or even the purpose) of this distinction, bearing in mind the cross-cutting nature of consumption and the importance of direct production for television or online systems today.

Authors of pre-existing works

Audiovisual works are often based on other creations protected under IP laws, such as literary works (novels or comics, for example) or other audiovisual works (such as prequels, sequels, remakes or spin-offs).

Audiovisual works are also normally based on real events, which are not protected by IP, but their use may be protected by other laws, notably those concerning the protection of reputation, privacy and image. Although the holders of these very personal rights, which are normally constitutional, are not “authors”, they must be taken into account as stakeholders in such productions.

In addition to the pre-existing works *on which the audiovisual work is based*, audiovisual work can include other existing works. Musical works are a key example, as will be shown below.

In some countries, the exclusivity of the licenses granted to transform these pre-existing works into audiovisual works is limited by law to a maximum duration.

Authors of audiovisual works

Whether “originals” or based on real events or on pre-existing creations, there is no question that (1) audiovisual works are protected by IP laws as original works, whether they are specifically regulated or not, and (2) the audiovisual works are made using the creative input of various persons.

In general, every audiovisual work can be said to have at least one creator whose contribution is understood as indispensable and inseparable from the work: the director.

But in the making of an audiovisual work, the creative contribution of the screenwriter, the composer of the original soundtrack, the creator of the drawings and designs in animated works, the artwork and costume designers, the photography directors, the performers and others is also fundamental.

The creations of screenwriters, original soundtrack composers and graphic, artwork and costume designers can also be considered to be as much part of the audiovisual work as they are independent of it. For example, in the case of a screenwriter for a feature film, the screenplay is simultaneously a literary work and the very structure of the feature film; a dramatized text and the dialogues performed by the actors. Thus, screenwriters are regarded as co-authors of the audiovisual work, as well as authors of an independent literary text.

Similarly, the original music of an audiovisual work is as much an essential part of the audiovisual work as it is a composition that can be performed and communicated independently of it. The same is true for the drawings on which an animated film or series is based. Also, although they are not separately exploitable creative works, the contributions of the photography directors and the producers are creatively very relevant.

However, the IP laws in force in the countries in this study (and in most countries around the world) do not regard the same persons as “authors” of the audiovisual work. Part 3 of this study assesses these differences from a practical point of view.

Considering a creator to be an author (or co-author) of an audiovisual work has important legal implications, since the creator will be granted a series of economic and moral rights over the work that affect its dissemination and exploitation and which will be analyzed later. Moreover, depending on the applicable copyright system, a single creator may or may not be considered an author of the audiovisual work, which is reflected in the contractual practices in the sector.

Authors of other works incorporated into audiovisual works: authors of songs, choreographies and other works

In addition to the authors indicated above, audiovisual works incorporate other protected creations, the authors of which are not considered co-authors of the audiovisual work, but whose authorization is (a) indispensable to be able to exploit the audiovisual work, and (b) not presumed granted by law, as happens with other types of contributions. This does not mean each and every one of the many protected works usually incorporated into or portrayed in audiovisual work, such as photographs, paintings, posters or any other type of graphic work that can form part of a set; choreographies performed by dancers; and excerpts from audiovisual works (often videogames) that are inserted into a sequence.

Pre-existing musical works stand out among all pre-existing works. Audiovisual works very commonly incorporate songs, often well-known songs, for the use of which the relevant authorizations must be obtained from the authors of the musical works (or, where applicable, of the music publishers) and from the record companies that own the recordings of those musical works that are to be used in the audiovisual work (the phonogram producers).

For the online exploitation of audiovisual works including such works and/or recordings, the producer must seek the express permission of the authors, publishers and phonogram producers, both to include the concerned work or recording in the audiovisual work and to exploit the latter.

Any of these works (or any of the mentioned uses) could possibly be administered by a collective rights management organization (CMO). Each case must be analyzed individually to determine whose authorization should be sought and the scope of same, taking into consideration the country in which the audiovisual work is produced and where the work and/or recording incorporated into the audiovisual work is used. For more information on the experience of a producer in pre-existing rights management, see case study 2 on rights clearance, published with this study.

B) PERFORMERS

All fictional audiovisual content includes actors who give life to the characters and dialogue created by screenwriters and shaped according to the director's instructions and vision. However, they are not the only ones; the dubbers, dancers and musicians involved in the recordings of musical works that are part of the original soundtracks of audiovisual works should also be mentioned.

In accordance with the legislation of each country, performers have a series of ("related") economic rights over their performances. Producers, like authors of audiovisual works, must acquire all the rights over such performances to be able to exploit them.⁴

In addition, as in the case of authors of audiovisual works, performers have recognized moral rights, in particular, the rights to demand respect for the integrity and ownership of the performances, in relation to which dubbing has special relevance in the online exploitation of audiovisual works.

When exploiting audiovisual content, it is essential to ensure respect for such moral rights, especially in cases where the performance may be altered or the performer's name omitted from the credits (as happens, for example, with dubbing performed by an actor other than the original performer, or when the dubbing actor is not included in the credits of the audiovisual work).

⁴ In some cases, especially in relation to the online exploitation of audiovisual works, obtaining the rights over the performances may involve one or more CMOs and/or entitle the actors to simple remuneration.

Actors

Actors hold IPRs over their performances included in the audiovisual work. As with authors, such rights are economic and actors are accorded certain moral rights over their performances in many countries,⁵ especially the rights to demand respect for the integrity and ownership of the performances, in relation to which dubbing has special relevance in the online exploitation of audiovisual works. Like authors, in order to exploit the audiovisual work, the performers need to transfer their rights to the producer.

As with the authors of audiovisual works, remuneration is another relevant issue, two key aspects of which should be mentioned: firstly, the possible involvement of professional associations or unions in establishing minimum salaries, or even the legal requirement for employment contracts;⁶ and secondly, the existence or absence in different countries of remuneration rights administered by CMOs.

Dubbers

Dubbers play an important role, both for the transnational exploitation of audiovisual content in the Latin American market, in view of the mentioned linguistic reasons (dubbed audiovisual works are commonly distributed), and because of the growing animation market. Occasionally, regulations for the benefit of persons with disabilities (such as visual disability) can also require the availability of versions in the local language.

As actors, dubbers possess the same rights over their performances as any other actor, and the above observations therefore apply. Of course, this includes moral rights. In particular, in relation to the dissemination of audiovisual content online, dubbing actors, whether dubbing animated content or foreign works, have the moral right to have their name appear in the credits of that content. Moreover, depending on the legislation of each country, as will be shown later, and on the internal rules of the CMOs, any use of their dubbing may be subject to a simple remuneration right.

Dancers and musicians

To the extent that they participate in audiovisual works as performers (for example, “musicals” with dance sequences or works featuring a live orchestra), dancers and musicians will have the legal standing of performers, with identical legal effect, and their authorization will also be necessary in order to exploit the audiovisual work. Performances of pre-existing works fixed in audiovisual or sound recordings incorporated into the audiovisual work merit the same consideration.

C) PRODUCERS

The audiovisual producer is responsible for financing the production of the audiovisual work and assumes the financial risk entailed. Once the audiovisual work has been created, it is the producer who handles its dissemination and exploitation. He or she therefore needs to have obtained all the IPRs from all the above-mentioned holders: the authors of the audiovisual works,

⁵ Moral rights are also recognized in the WIPO-administered Beijing Treaty on Audiovisual Performances.

⁶ Although carried out some years ago, for an analysis of the contractual situation of actors, see Sand, Katherine. *WIPO Review of Contractual Considerations in the Audiovisual Sector*. WIPO. 2013. Available at <https://www.wipo.int/publications/en/details.jsp?id=366&plang=EN>.

the authors of the pre-existing works incorporated into those works (which may be many and very different), the actors, the composers, the musicians, the dancers, the designers and generally anyone who has made a creative contribution to the audiovisual work.

Once in possession of all the rights over the audiovisual work, the producer determines the best way to exploit it, naturally considering the need to recover the financial investment made and the best possibilities for the greatest dissemination of the work. For this purpose, the producer can exploit the audiovisual work by licensing it in different ways: by territory, by time or by format, and usually through a combination of the three. These are known as “exploitation windows”, wherein the work is exploited in a particular territory using successive formats for a set time, exclusively: first in movie theaters for a number of months, then VOD and so on successively.

From a legal point of view, audiovisual content production companies, whatever their nature, hold IPRs over the audiovisual recordings, although, as will be shown, there is no international instrument granting them such rights consistently in the region or internationally. Therefore, the legislation of each country must be followed.

There are various models for producing audiovisual content, which essentially consist of the following:

- in-house production using the resources and teams of the broadcasting organization, cable operator or OTT platform;
- co-development and co-production between independent producers and the above organizations;
- independent development and acquisition of all the rights over the content by buying out (a system often applied in the production of fictional series); and
- licensing of exploitation rights to different users in different territories, for which different periods of exclusivity are established.

Shifting consumption preferences and the transnational nature of the online digital exploitation of audiovisual content have changed content financing models, which were previously based on the exploitation window system.

D) COLLECTIVE RIGHTS MANAGEMENT ORGANIZATIONS⁷

CMOs are called on to play an important role in the distribution of audiovisual content online in Latin America, especially where there is mass use of protected works or performances, given the difficulty of controlling their use individually.⁸ They can help rightholders to control their works and performances, and, as they group together all or a large part of the repertoires (national and foreign) available in each territory for each group of rightholders, they help to make it simpler for the different users (broadcasting organizations, OTTs, movie theaters, etc.) to obtain the multiple authorizations needed.⁹

⁷ On the regulation of CMOs in Latin America, see the recent study *Panorama de la gestión colectiva del derecho de autor y derechos conexos en Latinoamérica*, Regional Center for Book Development in Latin America and the Caribbean, under the auspices of UNESCO. July 2018. Available at <https://cerlalc.org/wp-content/uploads/2019/01/Panorama-de-la-gestión-colectiva-final-1.pdf>.

⁸ See, for example, Ficsor, Mihály. *Collective Management of Copyright and Related Rights*. WIPO. 2005.

⁹ There are also international and regional organizations that support the CMO system. At the international level, the International Confederation of Societies of Authors and Composers and the Societies' Council for the Collective Management of Performers' Rights should be mentioned. The principal aim of both organizations is to defend the rights of creators and artists and to promote cooperation between CMOs on a practical level by, for example, standardizing tools for identifying repertoires. Regionally in Latin America, the Ibero-American Federation of Performers and Latin Artis play a key role. Both essentially bring together associations and CMOs concerned with performers' rights, the former in works and music recordings, and the latter, a newer organization, in works and audiovisual recordings.

Aside from the main functions of licensing the repertoires that they represent, establishing rates for their use and collecting and distributing the remuneration to the creators, artists and, where applicable, producers of the content (audiovisual or otherwise) according to those rates, the collective management system also allows the pooling of “*the economic and political interests of the members, meaning that collective management enables union defense of copyright and related rights before the State authorities, the legislator, consumers of works and producers, among others.*”¹⁰ They also have the function of promoting the activities of their members and collectives. In relation to the audiovisual market at the regional level, the involvement (institutional and/or economic) of CMOs in film and audiovisual content markets and festivals is noteworthy.¹¹

E) BROADCASTING ORGANIZATIONS

The role of broadcasting organizations, especially television broadcasters, in the development of a Latin American audiovisual market has been and is, undoubtedly, highly relevant to the production and dissemination of audiovisual content. They have an essential role in the creation and production of both television and film content.

Technological progress has significantly changed traditional television and broadcasting, in general terms, as well as habits in audiovisual content consumption. Broadcasting organizations have adapted to these advances, offering consumers new television modalities, among which first cable television and more recently Internet Protocol television (IPTV) stand out. At the same time, many broadcasting organizations are migrating toward becoming OTT digital platforms: broadcasters (and cable operators) are also operating in the online market, offering content on VOD and IPTV systems and other paid television modalities, with multiple channels alongside OTT services, which have grown exponentially in recent years.

Notwithstanding the changes in television technology and telecommunications, and the consequent impact on consumption habits, traditional broadcasters remain highly relevant, in particular because they maintain an essentially local dimension.

F) DIGITAL PLATFORMS AND OVER-THE-TOP SERVICES

Various services with different characteristics are grouped under the shared name “digital platforms”, which are superposed on and/or coexist with traditional television and frequently form part of combined services including online services and content, offered by broadcasters, and OTT platforms and services give access to the content of television channels. In turn, the online consumption of audiovisual content offers different business models. All this is legally protected under a single “legal” exploitation modality: the making available of content online.

Consequently, the terminology used to refer to these different services and business models varies widely and is constantly evolving. The meaning of the most frequently used terms should therefore be clarified for the purposes of this study.¹²

On one hand, there are definitions of systems or means through which audiovisual content is disseminated on the Internet:

¹⁰ *Panorama de la gestión colectiva*, op. cit., p. 14 *in fine*.

¹¹ CMOs, which are usually set up as private non-profit associations (with the notable exception of Costa Rica), also often perform mutual and social functions (also known as “welfare functions”), enabling or allowing their members to be covered by health insurance, pay part of their remuneration into pension plans and take advantage of similar benefits of undeniable value for the respective groups that they represent.

¹² See, for example, the report by the Spanish Securities Market Commission, which defines the different OTT services quite clearly: https://blog.cnmc.es/wp-content/uploads/2015/01/DOC_OTT_1_12.pdf.

- OTT service: The dissemination of content via the Internet without the involvement of cable or satellite operator services or of telecommunication services. OTT services can offer different types of content (such as audiovisual content and music) and other services (such as application stores or storage). It is similar to the concept of “digital platform”.
- IPTV: This is the dissemination of content through broadband Internet over Internet Protocol, which is organized and controlled by a cable or satellite operator and/or (mainly) a telecommunications operator. It is usually defined in contrast to OTT services. IPTV operators usually offer free-to-air content from over-the-air television channels, as well as other channels that can typically be found on cable or satellite services. Generally, it requires a decoder or an application to enable the content to be seen on screen.

It is a subscription television service, usually paid monthly, which also frequently offers the rental and/or downloading of content.

- M3U (software), M3U8, W3U: The file extension name given to user-made content selection lists used to access IPTV content and OTT content in general. These lists include Internet Protocol addresses for access to the IPTV broadcasts of thousands of channels. The content accessed is very often unlawful, as happens when browsing the Internet. Various devices are sold that connect to the television or computer to organize the content of the lists for the consumer’s convenience.

On the other hand, there are terms that define how the audiovisual content is exploited in one or more of the described systems:

- VOD: A system for exploiting audiovisual content, in which consumers can access the content from wherever and whenever they wish. It offers different exploitation models, very often combined together on digital platforms and/or in OTT services. The VOD concept encompasses practically all the business models described here.
- Classic VOD: These are paid services, payment usually taking one of two forms on which different models of audiovisual exploitation are based: one-off payment to view the particular content (once, or allowing an unlimited number of viewings in a short period of time, typically 24 or 48 hours).
- Subscription VOD: A system based on the payment of a regular subscription fee, generally monthly, in exchange for which the consumer has free access to various content offered by the platform or service, for unlimited viewing.
- Transactional VOD: A system in which the consumer makes a one-off payment to access specific content, without needing to pay a subscription, whether to view the content for a specific period of time (which OTTs generally call “rental”) and/or to download a copy of the content with unlimited access (electronic sell-through), which is normally more expensive than rental. It is also called the pay-per-view system.
- Advertisement VOD: Content is made available online to the consumer for free but disseminated with advertising at the beginning or embedded (as on YouTube). The advertising generates income for the platform or service, a percentage of which usually reverts to the licensing producer of the content.
- Free VOD: Audiovisual content is made available to the consumer for free. The platform or service earns income through advertisements shown via the platform (not with or over the content itself), and exploitation does not usually generate income for the producer.
- Near VOD: A hybrid system of VOD and traditional television programming. The service or platform programs the transmission of a single item of content at different times (very

close together), such that consumers can access it from their chosen place at the most convenient broadcast time.

In recent years, digital platforms and OTT services have grown dramatically in the region. According to a report by BB Visión, almost 260 OTT services,¹³ belonging to broadcasting organizations, cable operators and OTT service companies, were operating in Latin America in 2018.

Although the various studies and analyses mentioned above show a clear growth trend in OTT services in the region, and specifically in the countries studied, the lack of uniform regulation clearly limits the development of a multi-territorial audiovisual content market, for all the reasons noted previously.

On top of this, uneven broadband penetration into homes in the region makes it difficult to develop a regional audiovisual market, for obvious technological reasons. According to data published by the United Nations Economic Commission for Latin America and the Caribbean (ECLAC),¹⁴ the progress in Internet implementation is evident, although there are problems related to both Internet quality and access, especially in rural areas.

However, there are public OTT initiatives, such as the online distribution portal Retina Latina, a free film platform offering productions from Bolivia, Colombia, Ecuador, Mexico, Peru and Uruguay, which was created by these countries to create a new exploitation window for national productions in Latin America, or Spcine in Brazil.

In parallel, with respect to content production, OTT services, especially international ones, are starting to do significant production work, similar to that being carried out by television networks.

G) CONTENT AGGREGATORS

A new figure that is (and will) play an important role in developing a Latin American audiovisual content market is the digital audiovisual content aggregator. These new players in the audiovisual industry facilitate audiovisual content transfer through the different exploitation models for VOD platforms and OTT services. Specifically, their function is to intermediate between these (multiple) platforms, which generally obtain licenses for the non-exclusive exploitation of such content, and the holders of rights over the content (especially small producers or distributors that lack the necessary infrastructure for such negotiations and contracting).

Normally, contracts are established by which the rightholder licenses the aggregator to exploit the content in VOD systems for a limited time and for specific territories, and the aggregator usually provides a plan for marketing or positioning the content on the different platforms where it may be placed. The aggregator is therefore a hybrid of distributor, international sales agent and rightholder.

There has been considerable growth in the number of productions, both by professionals and by individual users, such as YouTubers, or by independent groups (such as web series) that have applied different funding formulas (for example, crowdfunding) and distribution formulas on the fringes of the industry (for example, on YouTube, through social networks or by email). At the same time, platforms offering audiovisual content have proliferated. In this complex mix of supply and demand, the audiovisual content aggregator is becoming increasingly important in the

¹³ BB Visión. "Multiplataformas y contenidos digitales en Latinoamérica". *Guía OTT 2018* (PRODU), p.39 *et seq.* Available at https://issuu.com/producom/docs/gui_a_ott_2018.

¹⁴ *State of broadband in Latin America and the Caribbean 2017*, April 2018, https://www.cepal.org/sites/default/files/publication/files/43670/S1800532_en.pdf

dissemination of audiovisual content over the Internet, not only internationally but also within Latin America.

Examples of aggregators in the countries studied include Under the Milky Way (Brazil), Promovere (Argentina) and developing content aggregators, such as WePlot and Sensecontents. The case study published with this paper discusses the experience of the aggregator Sofá Digital in the Latin American market.

H) MARKETS, FESTIVALS AND EVENTS

Events, festivals and, above all, audiovisual markets, play a vital role in bringing together the various stakeholders in the audiovisual industry. As a meeting point, their importance is reinforced by the proliferation of different models for the production, financing and dissemination of audiovisual content, especially in terms of exploitation on digital platforms.

Film festivals and various events for analyzing the state of the sector and approaching content owners, distributors, platforms, television stations and others are also usually held as part of the markets. In the region, these include the Guadalajara International Film Festival,¹⁵ the Ventana Sur film market,¹⁶ the Bogota Audiovisual Market,¹⁷ the Rio Creative Conference of Rio de Janeiro¹⁸ and the Central America and Caribbean Audiovisual Market.¹⁹

In addition, although to a lesser extent, film festivals serve as a meeting point for various industry players and have been used for some time now to negotiate the production and distribution of audiovisual content, focusing on digital content. Latin America is home to several of the most important festivals in the world, some of which, such as the Guadalajara International film Festival, are held during the markets. They include the Havana Film Festival, the Mar del Plata International Film Festival, the Buenos Aires International Festival of Independent Cinema, the Cartagena de Indias International Film Festival, the Lima Film Festival, the Morelia International Film Festival, the Rio de Janeiro International Film Festival and the Guayaquil International Film Festival. There are many different festivals, which, along with the markets, are essential, above all for short, more independent productions.

I) NATIONAL AUTHORITIES

The important role played by the authorities in the market for the online dissemination of audiovisual content should also be highlighted. IP and copyright regulators, telecommunications regulators, labor authorities, film and audiovisual institutes and others all contribute to defining limits for the production, exploitation and dissemination of audiovisual content in each country.

As directly concerns the aim of this study, suffice it to say that the public IP and copyright agencies and authorities define the legal framework and margins used by the audiovisual industry and all the players operating in the sector, including CMOs, to create and exploit audiovisual content, grant licenses, conclude agreements and carry out contracts.

4. THE LEGAL FRAMEWORK

¹⁵ <https://ficg.mx/en/home>

¹⁶ <https://ventana-sur.com/en/>

¹⁷ <https://www.bogotamarket.com/>

¹⁸ <https://www.rio2c.com/en/>

¹⁹ <http://www.maucc.net/eng/>

4.1 INTRODUCTION

The world of audiovisual content production and marketing encompasses different types of works and recordings involving very different players. As previously shown, films have special characteristics in comparison with, for example, television series. The latter includes independent television series, miniseries and soap operas, which may or may not be fictional works.

These differences fundamentally affect how they are financed and produced. However, they are all audiovisual works containing performances, both audiovisual²⁰ and musical, and are incorporated into audiovisual recordings and much other content. Both the works and the performances, audiovisual recordings and other mentioned content are protected by IP, a system that grants a series of economic and moral rights to particular beneficiaries under the national legal framework. The commercialization of audiovisual content is based on the existence of these rights. In some cases, other beneficiaries may have rights over the broadcast signals carrying that content.

This legal system determines who the holders of the exclusive and moral rights over the content are (and, where applicable, the right to simple remuneration for its use); the term of protection; the limitations and exceptions to those rights that allow particular uses without the need for authorization; how to transfer those rights to third parties to license them for commercialization; and the means of defense against the infringement of those rights and the existing remedies. The system also regulates matters such as the function performed by CMOs, works in the public domain and how “orphan works” may be used.

Therefore, the legal framework applicable to online audiovisual content distribution is essentially based on IP law. In section 3 above, the various players involved in the creation and distribution of audiovisual content online were analyzed. This section seeks to provide an overview of those players’ rights and obligations deriving from IP law applicable in the country studied.

4.1.1 The legal framework applicable to audiovisual works and the rights of creators

It is essential to define the legal framework applicable to audiovisual content, the subject of this study, as it defines the starting point of the “chain of title”, namely, who must be considered authors of the works. Under the laws of Latin American countries and, specifically, those studied here, audiovisual works are legally treated as collaborative works, not collective works.²¹ This implies that an audiovisual work necessarily has several co-authors, from whose creative contributions it is formed. All of them jointly hold exclusive rights to the exploitation of the audiovisual work created and, sometimes, rights to simple remuneration, although it is usually the producer who holds all the exclusive exploitation rights (whether by presumed or express transfer) to commercialize the content.

Granting the status of author of an audiovisual work to a particular person has the automatic consequence that the individual will hold both moral and economic rights over that work.

This implies that the disclosure and exploitation of the audiovisual work will require the person’s prior consent for each of the uses to be carried out, as happens with performers. Such consent is usually established through contracts signed between the authors and the producers, which are analyzed in greater detail in Part 4 of this study on contractual practices in the audiovisual sector. However, a contract is not always essential: various copyright laws establish certain legal presumptions on the authorization of use, including on the exclusive transfer of particular rights to the producer. These presumptions complement, and often supplement, the specific agreements between creators and producers, contained in contracts.

²⁰ Mainly fictional works, but also documentaries.

²¹ This does not happen in other countries, with the immediate legal consequence of giving the production companies *original* ownership of IPRs over the audiovisual work (and even the status of author, certain conditions being fulfilled).

At the same time, it is necessary to take into consideration the existence of various CMOs that administer the repertoires of different rightholders in Latin American countries because they play a growing role in the online content distribution market in the region.

a) *Economic and moral rights of the co-authors of audiovisual work*

As will be shown, the legislation of the studied countries is relatively consistent on this point, considering the audiovisual work to be a collaborative work having co-authors who are physical persons. Each co-author is granted economic rights over the audiovisual work, held jointly and severally. In other words, their consent is vital to be able to exploit the audiovisual work through the different existing means and formats, expressly including exploitation in digital format. They are also granted moral rights which, as a minimum, include the right to demand the integrity of the work and recognition of authorship (or paternity of the work).

Regarding moral rights, any infringement of the integrity of the claimable work usually requires damage to the author's interests or reputation, a question that must necessarily be determined case by case and in accordance with the law of the country in which the violation occurs.²² There are well-known legal cases on this matter, notably the case on *The Asphalt Jungle* and the decision taken by the French Court of Cassation (Supreme Court).²³

The right of attribution or paternity, that is, the right to be recognized as co-author of the work, has two aspects: a positive aspect (the right that the author's name appears in the credits and promotional and advertising material, where applicable), and a negative aspect (the right to the contrary, namely, that the author's name *does not* appear anywhere. The latter is particularly important in cases where the definitive version of the audiovisual work is not established by the co-authors, who, once they see the work, may not wish to "take responsibility" for it.)

The director and scriptwriter, at least, are recognized as co-authors of the audiovisual work, and others, including the composer of the original soundtrack or the producer, may also be recognized. For more detail, see the attached tables.

The figure of the main director or directors is especially relevant because they may be required (by law) to be involved to some degree in determining the definitive version of the audiovisual, as will be shown. The establishment of the definitive version of the audiovisual work is critical from a legal perspective, since it is over that definitive version that the rights of the co-authors are generated.

b) *The role of CMOs*

Considering the legal complexity of audiovisual content and the multiple holders of rights over that content (or part of it), collective management is a reasonable and practical solution for the management of certain rights. In contrast, it is argued that licensing through CMOs could compromise audiovisual producers' exclusive rights over the content, which would potentially affect the income they earn from the commercialization of the content, as well as the funding for

²² When exploiting audiovisual works in the online audiovisual market, advertising insertions, such as those on platforms like YouTube, could conceivably constitute an infringement of the moral right to integrity of the co-authors of the work, although this type of conduct is not normally regulated in the contracts with the production companies. However, the commercialization of audiovisual works through VOD platforms does not pose a specific problem, since the works are made available to the public without any alteration.

²³ In this case, Anjelica Houston filed a lawsuit against Turner Entertainment for infringing the right to the integrity of the work of her father, John Houston, by colorizing the film *The Asphalt Jungle* without his consent (the director had already died when it was done). The plaintiff considered that, in view of the protests made by John Houston against the colorization of black-and-white films, the French Court of Cassation deemed the acts of Turner Entertainment to have damaged the interests and reputation of the author and ruled in favor of the plaintiff.

it, ultimately impoverishing the quality and promotion of the productions. This would negatively affect audiovisual markets, especially online markets, where the level playing field generates particularly aggressive competition among the various items of content.

However, the fact remains that the laws of many countries, and specifically several of those studied here, grant IP rights to the creators and performers of audiovisual works, the producers of audiovisual recordings and the authors and editors of musical works. These rights are sometimes accompanied by simple remuneration rights, which often require mandatory collective management.

To clarify, without going into detailed analysis, economic IPRs are usually categorized as either “exclusive” rights or rights to “simple remuneration” (or “equitable” or “compensatory” remuneration, which are equivalent terms). Exclusive rights give the holders a time-limited monopoly to authorize or prohibit certain uses of their works (or performances, recordings, etc.). These rights may be transferred to third parties (including to CMOs for licensing and administration).

However, simple remuneration rights do not give the holder any power over the exploitation of the work (or performance, etc.). They are in the form of a credit right (a right to payment) wherein, usually, the one obliged to pay is the end user of the work (television operators, platforms, film theaters, etc.). This type of right has a dual purpose: firstly, the successive increase in the value of the work, of which the author or performer does not usually get a share, since they usually agree on lump-sum remuneration when the financial success of the work is uncertain (their individual negotiating position is almost always the weakest); and secondly, the real impossibility of ensuring a proportional share in the profits from the works and performances for authors and performers at the individual level.

Simple remuneration rights are usually (although not always) non-transferable and non-waivable, and CMOs are normally legally mandated to manage them, hence the term “mandatory collective management”. Given the nature of simple remuneration rights, mandatory collective management does not involve licensing of the work or performance.

Since these collectives hold rights (exclusive or simple remuneration rights, with or without mandatory collective management) and, as will be shown, the administration and/or management of such rights is entrusted to CMOs to a certain extent, it seems clear that the collective licensing of audiovisual content offers some undeniable practical advantages, both for rightholders and for repertoire users.

The CMOs in the countries studied include, but are not limited to, the Uruguayan Society for the Management of Actors²⁴, the Union of Audiovisual Artists of Ecuador²⁵ and Inter Artis Peru.²⁶ In Brazil, in addition to Inter Artis Brazil (created in 2005), two new CMOs for collecting royalties for screenwriters and directors of audiovisual works (Brazilian Film and Audiovisual Directors, and Scriptwriters’ Rights Management) were authorized in December 2019. In Argentina, the Argentine Society for the Management of Actors has existed since 2006, and the association Argentine Film Directors was authorized to operate as a CMO in 2009. Inter Artis Argentina was created to promote the management of the rights of foreign artists, and Inter Artis Costa Rica has requested authorization to operate as a CMO in the territory.

All these societies and associations are members of one or more international or regional organizations, such as the International Confederation of Societies of Authors and Composers²⁷,

²⁴ Created in 2008 at the request of the Uruguayan Society of Actors: <https://sugai.org.uy/institucional/>.

²⁵ Authorized in 2015.

²⁶ Authorized by the Peru National Institute for the Defense of Competition and Intellectual Property Protection in 2011, at almost the same time as the National Society of Music Performers.

²⁷ <https://www.cisac.org/>

the Societies' Council for the Collective Management of Performers' Rights²⁸, the Ibero-American Federation of Performers²⁹ or Latin Artis.³⁰

It should be highlighted that the services provided by subsidiaries of some Spanish CMOs also contribute to the development of the audiovisual market in the region. The Organization for the Management of the Rights of Audiovisual Producers, with main offices in Ecuador, Peru and Uruguay,³¹ manages certain rights of communication to the public for audiovisual producers as part of a mainly *voluntary* collective management system. It also provides other types of services, such as the one-off licensing of clips of audiovisual works and recordings or their digitization.

Collective management on behalf of the owners of works incorporated into audiovisual works should not be forgotten. A great example in this case is the collective management of music and phonograms incorporated into an audiovisual work for the exploitation of the work. Depending on the national legal framework, collective management in relation to the audiovisual sector also involves societies representing music authors, music performers and/or phonogram producers.

The tendency to operate through CMOs can be said to have strengthened in the region over the past few years for the above reasons, especially in relation to the audiovisual sector. In fact, recently and with the firm support of the mentioned regional organizations, various CMOs have been created in several Latin American countries to represent repertoires of holders of rights over audiovisual content, to support the joint defense and promotion of their rights.³²

All these CMOs, and the international and regional organizations mentioned, promote the development and legal enforcement of creators' and artists' rights by supporting the passing of laws and the establishment of new societies in different territories. Making it simpler for users to acquire the necessary licenses to exploit audiovisual content online for large repertoires should contribute to the development of the online market.

c) Challenges of the collective management system

As previously stated, the users (primarily) argue that the audiovisual content licensing system for online markets would make online content unnecessarily more expensive, while the producers maintain that it would limit the exercise of their exclusive rights over the content, ultimately jeopardizing the basic means for financing productions (under the window system, which, moreover, is somewhat antiquated in the light of new platforms operating around the world and which offer this content to the public for simultaneous and immediate consumption online).

In any case, the fact is that CMOs are operating in the market, and although there is apparently a clear trend toward the strengthening and development of the collective management system, it still has many shortcomings. Undoubtedly, the most important is the lack of legal uniformity in the countries of the region, especially in terms of the rights that the various rightholders specifically have over audiovisual works, performances and recordings, as well as over other

²⁸ <https://www.scapr.org/>

²⁹ <http://www.filaie.com/>

³⁰ <http://www.latinartis.org/>

³¹ The organization also has a presence in Argentina, although it has not achieved CMO status.

³² Latin Artis expresses this idea very precisely on its website when explaining the motivation behind its creation in 2010: "*The inevitable globalization of the production and exploitation of audiovisual content, the low standards of protection enjoyed by actors and dancers in most Latin American countries and the exponential impact of the Internet on the business model for audiovisual content are three of the main reasons for creating a platform with a broad technical and political spectrum to help to unite and focus efforts to meet these current challenges.*

Latin Artis is a platform for collaboration and cooperation among organizations for the defense and promotion of artists' rights, which contributes to their legal recognition, both internationally and nationally; encourages and facilitates the cross-border exchange of the royalties collected in each national territory; and provides technical assistance in the development and consolidation of Ibero-American organizations that administer performers' rights."

content incorporated into such works and recordings. In the following section, the current regulations in each of the studied countries will be analyzed in depth.

This inconsistency makes the licensing of audiovisual content at the international or regional level a very complex challenge. On one hand, IPRs are territorial, which means that simple remuneration rights have to be paid in each country where the work is exploited online. Furthermore, in almost all cases, there is the significant absence of a “single-counter” system to facilitate the collection of royalties from the various users of a single item of content. This system tends to be used all over the world and is even legally mandated in some countries. The creation of a single-counter system in Brazil, the Central Bureau for Collection and Distribution, is therefore worth mentioning in that regard.

On the other hand, where the content is licensed (by the CMOs exercising *exclusive* economic rights), two situations arise: firstly, CMOs representing equivalent rights do not always exist in every country, and therefore licensing through reciprocal representation agreements sometimes becomes impossible; and secondly, there is no regional law protecting this type of license granted by CMOs.

Therefore, to commercialize audiovisual content in online markets in the region, the producer must grant authorization (normally through a contract licensing online exploitation) to one or more platforms, exclusively or non-exclusively, and the user must be granted authorization by each CMO operating in each specific country for those exclusive rights (or just the payment of simple remuneration rights) over the audiovisual repertoires or other type of repertoire that they represent. This creates considerable complexity when acquiring the necessary rights for multi-territorial online distribution in the region. Added to this effect is the lack of information about the works in a single source or through identification used consistently around the world. In relation to this challenge, Part 5 of this study addresses the matter of audiovisual content identification.

Without a regional law that establishes consistent rights among the various holders and validates a supranational territorial scope for the licenses granted by the CMOs, this problem is difficult to solve. However, at least for the music market, there are regulatory precedents being considered in the region, specifically, the European Union and its 2014 Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.³³

Moreover, CMOs can contribute to rightholder identification, which is very complicated in many cases, and even to the use of audiovisual content, especially catalogues including older content. CMOs could also participate in the management of rights in the public domain (the paying public domain, in this case) and of orphan works, which could help to increase their dissemination.

4.1.2 Legal implications of the use of audiovisual works in online environments

Without making an exhaustive analysis of the rights *generally* involved in the production and commercialization of audiovisual content, the special characteristics affecting the dissemination of digital audiovisual content online should be mentioned. Briefly,³⁴ dissemination necessarily involves a series of acts requiring the prior authorization of the holders of rights over such content:

³³ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 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. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0026>.

³⁴ There is an abundance of literature providing a detailed analysis of economic IPRs over the digital exploitation of content. See, for example, De Freitas Straumann, Eduardo. “Los derechos patrimoniales en el entorno digital”. *Anuario Andino de Derechos Intelectuales*. Year III, no. 3. Lima, 2007. Available at: <http://www.anuarioandino.com/Anuarios/Anuario03/Art07/ANUARIO%20ANDINO%20ART07.pdf>.

(1) The reproduction of the content, both to digitize it if that is not its original format, and to make copies of it. At least two essential acts of reproduction occur in the online dissemination process (whether lawful or unlawful).

One is the act of uploading, for example, to a VOD or IPTV platform (or to a peer-to-peer system) through which the work is made available to the public. Depending on the type of system, the content may be reproduced on the platform itself, or it may be hosted on a hosting server and the platform provides a link to the reproduced content. In either case, there is an act of reproduction that requires the prior authorization of the corresponding rightholders. This is notwithstanding the recent discussion in some countries around the world about extending the exception to private copying in certain cases of reproduction in digital format.

The second is the act of downloading onto a computer (or digital television, mobile phone, etc.), in which case it is a complete reproduction, or of viewing (streaming), which usually requires temporary reproduction in the cache memory of the computer (or digital television, mobile phone, etc.). In either case, there is an act of reproduction that requires the prior authorization of the corresponding rightholders, although temporary reproduction is normally allowed or not legally considered an act of reproduction.

(2) The making available of the content to the public, such that all members of the public can access the audiovisual works whenever and from where ever they choose.

In other words, offering audiovisual content to the public through platforms, IPTV systems, websites, social networks or any other means legally involves an act of making available to the public which, again, requires the prior authorization of the holders of this exclusive right.

In the countries studied, the regulation of these two rights, and more specifically the possibility of carrying out reproductions (temporary or not) and of making the content available to the public, is not entirely consistent. Specifically, as will be shown, sometimes one or both of these acts require the authorization of CMOs; for example, for pre-existing music incorporated into audiovisual content. In addition, simple remuneration rights for certain rightholders (creators or performers) sometimes arise for such acts of online dissemination of audiovisual content, obliging the users (for example, the platforms) to pay the amounts set by the holders, generally also through CMOs.

Authors' and performers' moral rights, fundamentally those of integrity and paternity, are likewise significantly affected when the works or performances are modified (for example, when translating or dubbing dialogue), or when the authors or performers are not adequately identified in the credits, either because they are cut out or because they were not included in the first place.

Furthermore, consideration should also be given to the applicable limitations and exceptions, which, as the case may be, allow one or more of the mentioned uses to be carried out without needing to request authorization; for example, whether the production of "technologically neutral" temporary copies is allowed, or whether consent has been given for reproductions for other purposes (such as education, research or private use).

In addition, given the technology involved in the online digital dissemination of content (audiovisual or otherwise), it should be taken into account that this content is frequently disseminated under a subscription or prior payment, encoded or not, and carries information necessary for monitoring the exploitation of the concerned work, normally as metadata (see Part 5 of this study). These are the technological protection measures and rights management information (RMI) that accompany the works and can also be protected by IP laws.

As the online dissemination of audiovisual content involves, almost by definition, its simple and simultaneous transnational exploitation, it is also crucial to analyze the means for protecting rights effectively against infringement in digital environments, especially when this happens on a mass scale through the Internet. The digital piracy of audiovisual content poses a serious threat to lawful dissemination because of its scope and economic impact.

Protection against IPR infringement includes a variety of legal actions defined in different jurisdictions (administrative, civil or criminal) and, in some legal systems, also provides for different degrees of liability of the intermediaries, that is, the Internet service providers (ISPs).

However, when it comes to the online digital dissemination of audiovisual content, or any exploitation of any other type of IP-protected content, the laws of each country where the dissemination and exploitation take place are applicable. Consequently, who holds which rights specifically, the possible exceptions and limitations, and the existing scope of protection need to be determined country by country. Each country where the content is disseminated is a party to international IP agreements or treaties containing a series of protection standards that tend to homogenize domestic laws, at least to a certain point.

Moreover, the *lawful* exploitation of audiovisual content through online systems requires, as shown, the mandatory authorization of the holders of rights over such content, who will normally be either the content producers or the distributors, sales agents or aggregators, or the content broadcasters or content platforms if they are the audiovisual producers.

However, as shown in the previous section, the audiovisual producers do not hold all the exclusive rights over the audiovisual content originally. In fact, it is essential that they acquire the necessary rights from the authors, performers and many others to be able to exploit the content lawfully. The mixture of contracts in which IP rights are transferred, assigned or licensed is usually called the chain of title.

Thus, there is an IP legal framework with an international dimension and a national dimension, and contractual practice³⁵ that affects each item of audiovisual content considered individually, and which can have characteristics specific to each country according to their respective legal systems and cultures.

In addition to IP as a central regulatory axis for the dissemination of digital audiovisual content online, there are also national and international laws aimed at promoting the production, commercialization and/or preservation of audiovisual content, most typically of film, such as laws on aid and subsidies or on artistic and cultural heritage. This set of norms, usually called “film laws” complement the IP system.

Given the market and the players involved in online content distribution, the regulation of telecommunications and e-commerce, privacy, competition and tax issues must also be taken into consideration.

Below follows an analysis of the IP regulatory legal framework, while Part 3 focuses on contractual practices.

4.2 THE INTERNATIONAL LEGAL FRAMEWORK

4.2.1 Preliminary issues: the principle of territoriality and the online market

As shown, the audiovisual market has, by definition and increasingly, a multi-territorial scope, and habits of audio and visual content consumption seem to focus more on the content itself than on the means, blurring the boundaries and times (or windows) of exploitation. From a legal perspective, the audiovisual content itself is protected by IP laws (whether as audiovisual works or recordings).

³⁵ Practice that also includes agreements on other matters that do not specifically concern IP, as will be shown.

However, given that IP is governed by the “principle of territoriality” (the IP laws of a certain country only apply within the borders of that country, known as *lex loci rei sitae*, meaning that the governing law is that of the country where the goods are located or, in this case, the country where protection is sought), there are different regulations for the same scenarios in different countries. From the term of protection to the establishment of who the authors of the audiovisual works are, the type of rights that they hold and how those rights may be exercised, among many other issues, inconsistent regulation poses a barrier to the development of an online audiovisual market.

In addition, as will be shown in Part 4, the principle of territoriality also raises highly important questions about contractual practice, significantly, the territories for which there is authorization to commercialize the content, which is often granted country by country or by groups of countries and not “regionally”. Another important question for the online distribution of audiovisual content in more than one territory or country is the determination of the legislation applicable to such contracts for the performance thereof, or the jurisdiction to which the parties voluntarily submit themselves in the event of a dispute.

In practice, this means, for example, that a specific item of content may be commercialized online in several countries in a single zone or only in some of them; that the same persons involved in the creation of a film may be considered authors thereof in one country but not in others; or that a television series may enter into the public domain in some countries at a particular moment while remaining protected in others.

For the development of an online audiovisual content market, the following IP-related questions are particularly relevant:

- whether the rightholders have the right to make their works available online;
- whether the creators and/or performers have simple remuneration rights over their works and performances; and
- whether there is adequate legal protection against the unauthorized use of audiovisual content, to limit the unlawful exploitation thereof (piracy).

These are very complex legal questions to which each country, according to its own legal tradition and culture, provides different responses. This regulatory diversity makes it complicated for online content distributors to be able to make the content available simultaneously in different territories or even regionally, limiting the possibilities of developing the market for this type of content.

However, there are a number of multinational treaties and instruments establishing a series of minimum IP standards, applicable in all contracting countries, and which support the homogenization of laws (to a certain point) for the dissemination of IP-protected works, such as audiovisual content. Except in one case, Argentina, Brazil, Costa Rica, Ecuador, Peru and Uruguay are parties to these treaties, which will be analyzed in the following section.³⁶

In any event, the analysis of IP law in relation to the development of an online digital market for audiovisual content dissemination must take into account the new and many possibilities for such dissemination in the market. The absence of an international or regional law on (essentially) telecommunications applicable to broadcasters, cable operators or ISPs (from IPTV services to OTT services) and the inconsistency in the laws of the countries studied is notable.

Beyond each national reality, even taking into consideration the regulatory and technological differences among these countries (and the rest in the region), the large block or share of purely television audience that had existed until a few years ago is now fragmented. Audiences have

³⁶ For an analysis of the historical evolution of IP in Latin America, see, for example, https://scielo.conicyt.cl/scielo.php?script=sci_arttext&pid=S0718-00122016000100002.

shifted from being more or less massively concentrated around television means to being focused on an enormous amount of specific audiovisual content, and that regardless of the origin, nationality or provenance of the content or of the means through which they can be accessed (legally or *illegally*).

All this occurs in a context of distinctly international consumption and production, but for which, in the region analyzed, there is no unified law on IP, telecommunications, e-commerce and other legally relevant questions, to enable the balanced development of the potential audiovisual market.

The rapid market penetration of multiple OTT platforms and services in recent years has laid bare a certain imbalance between telecommunications regulations affecting broadcasters (already inherently disparate) and OTT service regulations in Latin America. For this reason, some in the sector have been proposing to redefine the boundaries between services that consumers may come to regard as interchangeable or substitutable, such as those of paid television and OTT services.³⁷

In any case, no clear or uniform regulatory position has yet been established, although there is an observable tendency to review (or adjust) legislation affecting the audiovisual sector, in view of the previously mentioned factors. It should be highlighted that at the national level, Argentina, Uruguay, Ecuador and Brazil have recently made important reforms, although not all in the same direction. The tendency to regulate OTT and broadcasting services (more) uniformly, following the example of the United States of America and the European Union,³⁸ appears to be gaining traction (except in certain cases, such as Uruguay).

4.2.2 Applicable international treaties

a) Copyright

- Berne Convention for the Protection of Literary and Artistic Works (1886, last revision 1979)

The Berne Convention,³⁹ administered by WIPO, is an international instrument to which 187 countries are party and is fundamental for the international exploitation of IP-protected audiovisual works (and other types of works), as it regulates the rights of the owners, the term of protection, limitations and exceptions and other important substantive issues.

The Convention provides a transnational mechanism for the protection of audiovisual works: even if the IP norms of a country establish otherwise, the works originating in any country party to the Convention must be protected in all the other countries parties *at least* in the terms set therein.

To achieve an equal minimum of protection in all the countries, the Convention places an obligation on the parties to establish minimum protection standards in their respective territories. As a result, *at least* the works enjoy the substantive protection contained therein equally in all the countries parties thereto. Naturally, this does not mean that each country does not set protection

³⁷ See, for example, Ibero-American Telecommunications Organization. *Experiencia regulatoria de mercado de contenidos audiovisuales en América Latina*. Mexico City: Ibero-American Telecommunications Organization, 2016. Available at: <https://otitelecom.org/wp-content/uploads/2017/05/OTI-experiencia-regulatoria-de-mercado-de-contenidos-audiovisuales-en-america-latina.pdf>; <https://otitelecom.org/intehttps://otitelecom.org/sobre-nosotros/>

³⁸ For example, Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. This Directive refers to VOD services as audiovisual communication services (such as broadcasting), albeit with certain rules applicable only to the former, given the differences between some and others. The text is available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32007L0065>.

³⁹ Most recent version (1979) available at: <https://wipolex.wipo.int/en/treaties/textdetails/12214>.

standards *greater* than those in the Convention (typically, the term of protection), which, ultimately, does not resolve the previously mentioned issue of regulatory diversity.

In broad strokes, the Convention establishes that the authors of the work shall be exclusive holders of at least the economic rights of reproduction, distribution, communication to the public and transformation, and the moral rights of attribution (paternity) and integrity. These rights shall have a minimum term of 50 years from the date of the death of the last co-author of such works. It also establishes certain limitations and exceptions to IPRs, such as in the case of quotations (Article 10) or the “three-step test” for the right of reproduction under Article 9.2.

In addition, the Berne Convention sets out specific regulations on cinematographic works, considered applicable to all audiovisual works by assimilation. Firstly, Article 14*bis* allows the laws of the country where protection is claimed (that is, the country where the work is exploited) to determine the authors of the audiovisual work and, consequently, the original holders of the IP rights over it, and not the laws of the country of origin. This rule, analyzed further in Part 3, implies that the authors of audiovisual content will very likely be different in each country where the content is commercialized.

The purpose of this rule is to ensure that the individual rights of the creators will be respected in each country where such rights are recognized, taking into account the international dimension of the exploitation of cinematographic works and the different legal traditions existing in that regard. For instance, in accordance with this rule, if an Argentinian film is shown unlawfully in Peru, it is Peruvian law that determines the authors of the film (and therefore the original owners of the rights over it) when legal action is brought in Peru to stop unlawful use.

The implications of this rule are relevant, both for contracts and for rights management and licensing, gaining special importance in the framework of digital distribution analyzed here.⁴⁰ As has been highlighted, these territorial differences add complexity in obtaining the chain of title and in making international OTT content available on a massive scale in the various territories, albeit by means of a single OTT platform.

In addition, and consistent with the above, the Convention allows the minimum term of protection of audiovisual works to be calculated differently from the general rule. They should be protected in all States party to the Convention for at least 50 years from their publication date (although the Convention allows the 50 years to be calculated from the date of death of the last co-author of the work).

This system implemented by the Berne Convention is based on three essential principles: (i) the principle of “national treatment” established therein, whereby the content originating in a country party to the Convention⁴¹ must, for the purposes of the level of protection, be regarded as created by national persons in each of the other countries parties thereto, meaning that, for example, a Uruguayan work will be protected in Ecuador as if it were Ecuadorian and in Brazil as if it were Brazilian; (ii) the principle of the absence of formalities to gain protection⁴²; and (iii) the principle that protection shall be independent of the existence or absence of protection in the country of origin of the work.⁴³

However, the Berne Convention does not regulate the consequences of the infringement of these rights, leaving them completely open to what is determined by the legislation of each country, a gap that was subsequently filled with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

⁴⁰ Who the authors of the works are normally determines key questions such as the term of protection of the works in each country where they are exploited and the moral rights that the authors hold.

⁴¹ That is, the works created by a national or resident of each country party to the Berne Convention or which have been published for the first time in a country party to the Convention.

⁴² Although in the country where the work is exploited, formalities would be required for national works.

⁴³ Except the rule on the shortest duration, established in Article 7(8) of the Berne Convention.

In any case, and despite the limitations that it presents to the development of an online market for audiovisual content, the Convention is the most important basic international law existing today as it establishes a minimum of protection for authors, on the basis of which, together with the rest of the international treaties that will be referred to below, the international exploitation of audiovisual content is structured.

- TRIPS Agreement (1995)

Although the WTO TRIPS Agreement signed in 1994^{44,45,46} was intended to establish a series of international rules to facilitate international trade, it includes important IP rules. Specifically, it incorporates certain provisions of the Berne Convention by reference and, in a way, regulates what was previously provided for in the Rome Convention on related rights in order to, for example, add the concept of most favored nation. Given the interaction between the TRIPS Agreement and the Berne Convention, WTO and WIPO signed a cooperation agreement in 1995.⁴⁷

As well as contributing to the standardization of IP protection in many countries that were not party to the Berne Convention when the TRIPS Agreement was adopted in 1994,⁴⁸ the Agreement complemented the Berne Convention by including certain substantive rights not contained therein (such as protection for computer programs or databases) and, very relevantly, in Part III, a series of obligations on States party to the Agreement to ensure the *effective* enforcement of IPRs, obligations that had not existed at the international level until then. Specifically, Part III of the TRIPS Agreement obliges the member States to establish in their domestic law “...*enforcement procedures...so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.* [...]” (Article 41.1).

The TRIPS Agreement does not impose the obligation to “*put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general...*” (Article 41.5), but it does require parties to ensure adequate protection against IPR infringement through fair and equitable IPR enforcement procedures that are not unnecessarily complicated or costly and do not entail unreasonable time limits or unwarranted delays (Article 41.2).

The Agreement also provides for the obligation on States parties to establish specific civil and administrative remedies for IPR infringements, such as cease-and-desist orders or actions for damages (Section 2 of Part III), as well as provisional measures (Section 3 of Part III) and other procedural instruments, including the need to establish criminal procedures for certain cases of piracy on a commercial scale, punishable with imprisonment and monetary fines (Section 5, Article 61).

⁴⁴ https://www.wto.org/english/tratop_e/trips_e/trips_e.htm

⁴⁵ Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on April 15, 1994. Available at: <https://wipolex.wipo.int/en/text/305907>.

⁴⁶ A detailed analysis of the TRIPS Agreement exceeds the limits of this report. For more information on the interaction between the Berne Convention and other international IP treaties, see the above WTO webpage or, for example, *Implications of the TRIPS Agreement on treaties administered by WIPO*, originally published by WIPO in 1997, which details how the TRIPS Agreement has affected the regulation provided for in the Berne Convention and other treaties. Available at: https://www.wipo.int/edocs/pubdocs/en/intproperty/464/wipo_pub_464.pdf.

⁴⁷ https://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm

⁴⁸ Since Article 9 of the TRIPS Agreement obliges compliance with the Berne Convention, even if they are not parties to the latter, and grants performers and phonogram producers rights in accordance with the principles established in the Rome Convention.

In any case, the ultimate purpose of the TRIPS Agreement is to develop trade between signatory countries, and it has resulted in the signing of a number of agreements affecting IP in the region⁴⁹ (and even earlier, such as the agreement establishing the Southern Common Market, known as MERCOSUR, in 1991).

In fact, the TRIPS Agreement contains imperative norms but also allows the member States enough flexibility to regulate certain issues. In any case, negotiations on IP within WTO have continued under the Doha Round, which has not yielded tangible results. All this, together with the desire to establish protection standards higher than those provided for in the Berne Convention and the TRIPS Agreement, has led to the signing of various additional free trade agreements (FTAs) containing IP norms (diverse norms in various multi- or bilateral agreements, generically called “TRIPS Plus”, as they surpass the TRIPS protection standards).⁵⁰ See the section on FTAs below.

- WIPO Copyright Treaty (1996)

At the beginning of the 1990s, IP laws were (and still are) governed by the principle of territoriality and, by their very nature, were (and are) evolving too slowly with respect to the rapidly changing reality. The TRIPS Agreement was adopted as the Internet was becoming established as a borderless communication means, and digital technology as incredibly fast-changing. However, it became clear that greater clarification was needed at the international level on certain questions for which, until then, there had been no legal response. In 1996, the international community adopted what are known as the “WIPO Treaties”,⁵¹ which avoided repeating what was already consolidated in the Berne Convention and the TRIPS Agreement, such as the principle of national treatment and the absence of formal requirements.

As a new feature, these treaties establish the right of making available for the exploitation of protected works and performances via the Internet, as shall be shown. They also provide for the establishment of a series of limitations and exceptions that incorporate the three-step test of Article 9.2 of the Berne Convention, making clear that such limitations and exceptions apply to all the rights recognized in the treaty and that, in addition, they may be extended to the digital environment (or new ones may be established in the States parties), as long as the three-step test is met. These treaties also added the obligation to safeguard technical protection measures and RMI and to adopt measures for the enforcement of rights and legal remedies against their infringement.

The WIPO Copyright Treaty (WCT), which has a formal relationship with the Berne Convention as a “special arrangement”,⁵² incorporates its provisions and obliges compliance with them, thus constituting a kind of extension of the Convention to the digital world. It includes two types of works not included in the 1971 Paris Act of the Berne Convention (but which are included in the TRIPS Agreement): computer programs and “original” databases.

Furthermore, the WCT adds “new” rights to those provided in the Berne Convention, in particular the “right of making available”, designed as a subclass of the more generic right of communication

⁴⁹ For instance, see Joffé, Pedro and Santa Cruz, Maximiliano. *Los derechos de propiedad intelectual en los acuerdos de libre comercio celebrados por países de América Latina con países desarrollados*. UN-ECLAC. 2006. Available at: https://repositorio.cepal.org/bitstream/handle/11362/4416/1/S2006610_es.pdf.

⁵⁰ The possible conflicts between the imperative obligations of the TRIPS Agreement and the TRIPS Plus norms have been analyzed in various studies. For instance, see:

https://www.researchgate.net/publication/275213531_Las_medidas_ADPIC_plus_y_los_compromisos_comerciales_multilaterales.

⁵¹ For an in-depth analysis of the Berne Convention and the WIPO Treaties, see, for example, Ricketson, Sam and Ginsburg, Jane C. *International Copyright and Neighboring Rights: The Berne Convention and Beyond*, Oxford University Press, January 2006, or Reinbothe, Jorg and von Lewinski, Silke. *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP*, Oxford University Press, March 2015.

⁵² Article 1 of the WCT.

to the public. According to Article 8 of the WCT, this is the right of authors to authorize any communication to the public, by wire or wireless means, including “*the making available to the public of their 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.*”

This last definition, the right of making available, could be understood to include the communication to the public of audiovisual works over the Internet interactively, via streaming or downloading, which in turn comprises all forms of IPTV and VOD, whether transactional or subscription VOD or any other system. The WCT further provides for the right of distribution and the right of commercial rental to the public of any type of work (with limitations and only in certain cases: computer programs, cinematographic works and works incorporated into phonograms).

As a new addition to the provisions of the Berne Convention, this treaty obliges the States parties to establish remedies against acts aimed at neutralizing technological measures for protecting works (such as encoding), essentially equating tampering with them to the infringement of substantive rights. This obligation also seeks to protect RMI, which is necessary for the exercise of rights by, for instance, CMOs.

WCT			
COUNTRY	Date of accession to the Treaty	Date of entry into force	Notes
Argentina	November 19, 1999	March 6, 2002	
Brazil	N/A	N/A	Not a party to the Treaty
Costa Rica	May 23, 2000	March 6, 2002	
Ecuador	June 21, 2000	March 6, 2002	
Peru	July 30, 2001	March 6, 2002	
Uruguay	March 5, 2009	June 5, 2009	

Source: WIPO

b) Performers' rights

Performers' IPRs are regulated by various international instruments. The Rome Convention and the WIPO Performances and Phonograms Treaty (WPPT) regulate performers' rights, although rights are not granted to those whose performances are recorded in audiovisual media (leaving actors outside the scope of application of the Convention). The rights of the latter are recognized by the Beijing Treaty on Audiovisual Performances, which was adopted in 2012 and entered into force in 2020.

- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)

The Rome Convention⁵³ is a treaty designed to ensure the international protection of related or neighboring rights—more precisely, of some of those rights.

The Convention protects performers against certain acts to which they have not consented: the broadcasting and communication to the public of their performance; the fixation of their performance; and the reproduction of said fixation if it was originally carried out without their consent or if the reproduction was carried out for purposes other than those to which they had consented. Significantly, the Convention excludes performances fixed in audiovisual recordings from its scope of protection (Article 19), which had to wait until 2012 for equivalent protection in the Beijing Treaty, an international treaty that entered into force in 2020.

⁵³ Available at: <https://wipolex.wipo.int/en/treaties/textdetails/12656>.

In addition to establishing international protection under criteria similar to those of the Berne Convention (such as national treatment and absence of formalities), the Rome Convention grants producers IPRs *over their phonogram recordings* and also provides for the possibility of establishing an obligation to pay performers, producers or both a single equitable remuneration for secondary exploitations of such phonograms.

Furthermore, the Convention provides for the establishment of certain limitations and exceptions to those rights and sets a minimum protection term of 20 years from the fixation of the performances and/or the phonograms (or from the performance itself if it was not fixed), and 20 years from the first transmission for broadcasting organizations. This protection term is greater in national laws, which often establish a duration of 50 years as provided for in the TRIPS Agreement and later included in the WPPT.

ROME CONVENTION			
COUNTRY	Date of accession to the Treaty	Date of entry into force	Notes
Argentina	December 2, 1991	March 2, 1992	
Brazil	June 29, 1965	September 29, 1965	
Costa Rica	June 9, 1971	September 9, 1971	
Ecuador	September 19, 1963	May 18, 1964	
Peru	May 7, 1985	August 7, 1985	
Uruguay	April 4, 1977	July 4, 1977	

Source: WIPO

- WIPO Performances and Phonograms Treaty (1996)

The WPPT⁵⁴ grants IPRs to any performer whose performances are fixed in phonograms and to phonogram producers, for the digital environment. Phonograms, while more typically *musical* media, are records that may incorporate any sound performance.⁵⁵

The WPPT grants both categories of rightholder the exclusive rights of reproduction, distribution, rental and making available. Unlike the WCT, it regulates the right of making available specifically, not as a subtype of the right of communication to the public.

Article 10 of the WPPT defines the right of making available: “*Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.*” In particular, this right includes making available upon request via the Internet.

As in the Rome Convention, the WPPT also recognizes the possibility of establishing an obligation to pay performers, producers or both a single equitable remuneration for secondary exploitations of such phonograms.⁵⁶

⁵⁴ Available at: <https://wipolex.wipo.int/en/treaties/textdetails/12743>.

⁵⁵ WPPT Article 2(b) defines phonograms as “*the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work.*” That is, any recording of any sound except the sound of audiovisual works, since that forms part of the audiovisual recording.

⁵⁶ This obligation may be limited by making a reservation to the WPPT, which would allow the rest of the States parties to apply reciprocity instead of national treatment.

Also, as an addition to the existing system, the WPPT grants performers moral rights (of attribution and of integrity). The term of protection, in accordance with the provisions of the TRIPS Agreement, must be at least 50 years.

WPPT			
COUNTRY	Date of accession to the Treaty	Date of entry into force	Notes
Argentina	November 19, 1999	May 20, 2002	
Brazil	N/A	N/A	Not a party to the Treaty
Costa Rica	May 23, 2000	May 20, 2002	Withdrew its reservation on Article 15.1 in 2019, wherein it had stated that the provision would not apply to traditional free, non-interactive over-the-air broadcasting.
Ecuador	June 21, 2000	May 20, 2002	
Peru	April 18, 2002	July 18, 2002	
Uruguay	May 28, 2008	August 28, 2008	

Source: WIPO

- Beijing Treaty on Audiovisual Performances (2012)

The Beijing Treaty,⁵⁷ which was adopted in 2012 and entered into force in April 2020, regulates performers' IPRs over performances *fixed in audiovisual media*, at the international level.

These performers are mainly actors, who, until the adoption of the Treaty, had no internationally recognized rights. As in the other treaties studied here, the rights are recognized without the need for formalities and on the basis of the principle of national treatment.

Similarly to the WPPT, the Beijing Treaty recognizes the exclusive economic rights of reproduction, distribution, rental and making available, with similar regulation, and the minimum term of protection is 50 years.

Regarding communication to the public, the Beijing Treaty permits States parties three possible solutions: (a) grant performers this right over their performances fixed in audiovisual recordings as an exclusive right; (b) establish an equitable remuneration right; or (c) limit, and even deny, the right, provided that the State makes the corresponding reservation to the Treaty.⁵⁸

The Treaty also recognizes certain rights over live performances (broadcasting, except in the case of a retransmitted performance), communication to the public (except in the case of a broadcasted performance), and the right of fixation.

Like the WPPT, it provides for moral rights of attribution and integrity over performances fixed in audiovisual recordings, with nuances: when dictated by the manner of using the performance, failure to recognize the performer shall not be regarded as a violation of the right of attribution or paternity, and the nature of the audiovisual fixations shall be taken into account when applying the right of integrity.

Considering the usual mode of production and exploitation of audiovisual recordings and works, which, as has been shown, relies on the producer's acquisition of all the exploitation rights of the creators, performers and other beneficiaries to be able to commercialize the concerned

⁵⁷ Available at: <https://wipolex.wipo.int/en/treaties/textdetails/12213>.

⁵⁸ This allows the rest of the States parties to apply reciprocity instead of national treatment.

audiovisual content, the Beijing Treaty provides a flexible rule regarding the system for the transfer of performers' economic rights.

Specifically, Article 12 thereof allows the States parties to establish in their laws a presumption of assignment to the producer of performers' exclusive rights, as long as the performers have given prior consent for the fixation of their performances⁵⁹ and the parties have not established otherwise in the contract. In addition, the Treaty provides for the establishment of a right either to royalties or to equitable remuneration (usually under mandatory collective management) for the use of the performance.

Such a provision in an international treaty reinforces the importance of contractual practices for this sector, a matter addressed in Part 4.

Regarding limitations and exceptions, like the WCT and the WPPT, the Beijing Treaty integrates the three-step test and allows States to create new exceptions and limitations appropriate to the digital environment, provided that they respect this test.

It also recognizes the obligation on States to establish legal actions against the infringement of rights, which include tampering with technological protection measures and with RMI, as in the WCT and the WPPT,⁶⁰ as long as such protection measures apply to performances protected in the corresponding national law.

The Beijing Treaty provides for the protection of future and existing performances upon its entry into force, although countries may limit protection of the latter for any or even all of the rights recognized by the Treaty, and other States parties may also do so reciprocally.

BEIJING TREATY			
COUNTRY	Date of signature	Date of entry into force	Notes
Argentina	N/A	N/A	Has not signed the Treaty
Brazil	N/A	N/A	Has not signed the Treaty
Costa Rica	June 26, 2012	N/A	
Ecuador	N/A	N/A	Has not signed the Treaty
Peru	June 26, 2012	N/A	Peru ratified the Treaty on September 27, 2008. It declared that it had opted for the right to equitable remuneration for the use of performances for broadcasting or for communication to the public, in conformity with Article 11.2 of the Treaty.
Uruguay	N/A	N/A	Has not signed the Treaty

Source: WIPO

c) Rights of other stakeholders

⁵⁹ That is, in no case may the rights over non-consensual recordings be presumed to have been assigned to the producer.

⁶⁰ The interaction between limitations and exceptions and the safeguarding of technological protection measures is clarified in the agreed statements concerning the Beijing Treaty, available here: <https://wipolex.wipo.int/en/text/295816>.

i) Audiovisual producers

Currently, audiovisual producers' related rights over their audiovisual recordings are not recognized in an international instrument, beyond what the national legislation of each State grants them, where applicable. Consequently, the protection of audiovisual recordings is subject matter regulated by the laws of each country.

In any event, and regardless of whether producers are granted exclusive rights over audiovisual recordings, when producing and exploiting audiovisual content, they must also acquire all the rights of the creators, performers and other holders of rights over pre-existing works, performances and recordings included in such audiovisual recordings.

To make it easier for production companies to be able to produce and exploit their audiovisual content, several of the above treaties contain provisions on the transfer of rights to them by at least the creators of the audiovisual work and the performers.

Article 14*bis*(2) of the Berne Convention stipulates that authors who have made a creative contribution to the audiovisual work may not object to its exploitation⁶¹ unless otherwise agreed. This can be extended to screenwriters, directors and composers of the original music soundtrack, as long as national legislation expressly provides for that. It is not, in the strict sense, a presumption of assignment of such rights, although national laws usually provide for such a presumption, going beyond the wording of Article 14*bis*(2).

Also, as previously stated, Article 12 of the Beijing Treaty allows a presumption of the assignment of the performer's exclusive rights to the audiovisual producer to be established in national legislation, provided that the performer has previously consented to the fixation of the performance.

ii) Broadcasting organizations

In contrast to the protection of artistic performances and phonograms, the protection of television broadcasts has not been updated since the Rome Convention, drafted in 1961. At that time, the television industry was beginning to develop cable and satellite television, and the Internet did not even exist. In other words, the ecosystem has changed so much⁶² over the last 70 years that many, especially broadcasting organizations, are calling for a new international instrument.

The Rome Convention granted broadcasting organizations the right to authorize the fixation and reproduction of their signals, and the communication to the public of their television broadcasts when this is carried out in places accessible to the public upon payment of an entry fee. It also recognized the right over the retransmission of their broadcasts.

In addition to the Rome Convention, program-carrying signals transmitted by satellite are protected under the Brussels Convention (1974),⁶³ which obliges States to prevent the unauthorized distribution (authorization is generally dependent on a broadcasting organization) of such signals, except when they are distributed directly by satellite.

⁶¹ Defined in a manner limited specifically to objection to the acts of "[...] reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the [cinematographic] work."

⁶² Some of these transformations are mentioned in the study "Current Market and Technology Trends in the Broadcasting Sector", available at: https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=307382.

⁶³ Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite. Available at: <https://wipolex.wipo.int/en/treaties/textdetails/12242>.

The WIPO Standing Committee on Copyright and Related Rights has agreed on a work plan to develop a new draft treaty to update the regulation of the rights of broadcasting organizations.⁶⁴

iii) Phonogram producers

Phonograms (any sound recording, typically musical) are protected, and several international instruments grant phonogram producers, along with performers, related rights over same: the Rome Convention; the WPPT (see the overview above); and the Phonograms Convention,⁶⁵ which is limited to establishing a commitment by the States parties to protect against the unauthorized reproduction, importation and distribution of phonograms in the countries parties to the Convention.

4.2.3 Supranational and regional IP treaties

At the regional level, there are some international instruments that regulate aspects concerning IP, although they are specific on the subject matter and only one of them—Andean Community Decision 351—is currently in force.

These supranational IP regulations were adopted within the framework of various free trade organizations or agreements, such as MERCOSUR, or, in the case of Decision 351, the Andean Community. This decision will be addressed first, as it concerns a supranational decision specifically aimed at regulating certain IP-related aspects uniformly in several of the countries studied here.

a) Andean Community Decision 351⁶⁶

Andean Community Decision 351 Establishing the Common Regime on Copyright and Neighboring Rights was adopted on December 17, 1993. Its purpose was to set out common IP regulations in all the countries forming the organization (Bolivia, Ecuador, Peru and Chile, with Argentina, Brazil, Uruguay and Paraguay as associate countries), within the Andean Integration System, which aims to achieve comprehensive, balanced and autonomous development through Andean integration, with a view toward South American and Latin American integration.⁶⁷

Before the TRIPS Agreement and the WIPO Treaties were adopted, Decision 351 was a first step toward greater regulatory alignment on copyright in the Community countries. However, although Decision 351 regulates the questions that were most important when it was adopted and boosted IP protection significantly, at the beginning of the 1990s it left many issues to the laws of the member States. Moreover, the process following the signing of FTAs and, evidently, the exponential, albeit inconsistent, development of new technologies, renders its content somewhat outdated. That is, at least in relation to the aim of this study, since it leaves out matters such as the digitization of works and their exploitation via the Internet, the protection of technological

⁶⁴ A summary of the work carried out to date can be read at:

<https://www.wipo.int/pressroom/en/briefs/broadcasting.html>.

⁶⁵ Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, adopted in Geneva in October 1971. Available at: <https://wipolex.wipo.int/en/treaties/textdetails/12639>.

⁶⁶ See the following link:

<http://www.comunidadandina.org/StaticFiles/201761102019%20en%20Propiedad%20Intelectual.pdf>, or the WIPO website: <https://wipolex.wipo.int/en/legislation/details/9445>.

⁶⁷ The Andean Community (initially the Andean Pact) was created on May 26, 1969 by the Cartagena Agreement, which sets the objectives of Andean integration, defines its institutional system and establishes mechanisms and policies to be developed by the Community bodies. Today it is amended by the Cochabamba Protocol.

measures or rights information, or the possible liability of intermediaries in these processes of online commercialization of protected works.⁶⁸

It has been stated that “[t]he adaptation of copyright law to the challenges of new technologies has essentially been the responsibility of the domestic law of the member countries of the Andean Community. In practice, each country has passed adaptation laws to the extent required by the international commitments to which it is a party. The WIPO Internet Treaties and bilateral free trade agreements, especially those signed with the United States, have been the main drivers of such updating. As a result, the member countries of the Andean Community have a rather idiosyncratic system for copyright protection in the online environment, with significant differences from one country to another.”⁶⁹

The substantive content of Decision 351 establishes a series of minimum standards for protection (which may be broadened in national legislation), collective management and a national treatment system. However, and unlike EU directives, for example, it is directly applicable in the member States of the Community and preferable to domestic regulations, as stated in the case law of the Court of Justice of the Andean Community.⁷⁰

In relation to “digital” rights, and specifically the right of making available, although not expressly regulated in the decision, it seems that the literal and broad wording of Articles 13(b) and 15 makes it clear that this right is part of communication to the public.

Article 13. The author, or his successors in title where applicable, shall have the exclusive right to carry out, authorize or prohibit:

- a) the reproduction of the work by any means or process;*
- b) the communication of the work to the public by any means serving to convey the words, signs, sounds or images thereof;*
- c) the distribution of copies of the work to the public by means of sale, lending or hiring;*
- d) the importation into the territory of any Member Country of copies made without the authorization of the owner of rights; and*
- e) the translation, adaptation, arrangement or other transformation of the work.*

[...]

Article 15. Communication to the public shall be understood to mean any act by which two or more persons, whether or not they are gathered together in the same place, may have access to the work without the prior distribution of copies to each one of them, and especially the following:

[...]

- (i) in general, the dissemination of signs, words, sounds or images by any known or future process.*

In addition to the substantive law norms contained in Decision 351, directly and preferably applicable in the States of the Community, it is important to note the Court’s authority over the

⁶⁸ Regarding the process of the adoption of Decision 351 and of regulatory alignment in the Andean Community, as well as the development of a market in the Community for IP-protected content, see Cerda Silva, Alberto.

“Armonización de los derechos de autor en la Comunidad Andina: hacia un nuevo régimen común”, *Revista Ius et Praxis*, Universidad de Talca - Facultad de Ciencias Jurídicas y Sociales, 17(2), 2011, pp. 231–282. Available at: <https://scielo.conicyt.cl/pdf/iusetp/v17n2/art09.pdf>.

⁶⁹ Cerda, *op. cit.*

⁷⁰ For instance, the judgement of December 3, 1987 on case 1-IP-87 and subsequent concurring judgements. The Court’s case law can be consulted at: <http://www.comunidadandina.org/Documentos.aspx>.

interpretation of such rules. The Court forms part of the Andean Integration System⁷¹ and exercises its jurisdiction throughout the Community.⁷²

The Court ensures the uniform application and interpretation of the rules of Decision 351 (among other Community rules forming the *Andean legal system*^{73,74}) in all countries in the Community. It has consolidated the principles of immediate and direct application, preeminence and autonomy through its judgements and decisions (similarly to the Court of Justice of the European Union).⁷⁵

An important function performed by the Court to achieve consistent interpretation across the Community is the preliminary interpretation⁷⁶ of questions of Community law, similar in many respects to preliminary rulings in EU law. For example, the Court recently issued a decision on preliminary interpretation proceeding 33-PI-2019,⁷⁷ in which it analyzed Decision 351 (Articles 17 and 37) and confirmed that phonogram producers had the right to a single equitable remuneration for the communication to the public of their fixations.

It should be noted that the Andean Community includes MERCOSUR members as associate countries, as will be shown below.

4.2.4 Bilateral free trade agreements

To strengthen IPRs beyond what is established in the TRIPS Agreement and the WIPO Treaties, a series of bilateral and multilateral trade agreements have been signed over the last 20 years among the countries of the region and with the United States of America, the European Union and the European Free Trade Association (EFTA). Although they have not introduced significant changes in the substantive regulation of IP, they do considerably raise the minimum protection standards and establish additional, albeit flexible, obligations regarding enforcement and respect for IPRs.

The FTAs with the United States of America, the European Union or the EFTA that affect the countries in this study⁷⁸ reaffirm the international commitments contained in the Berne Convention, the TRIPS Agreement and the WIPO Treaties. At the same time, they establish general rules regarding technological protection measures and the prohibition of evading them; regulate exceptions and limitations in a very restrictive way (they are essentially subject to the generic three-step test); raise the minimum term of copyright protection to 70 years from the death

⁷¹ Article 8 of the Cartagena Agreement.

⁷² In accordance with Articles 4 and 91 of Andean Community Decision 500 approving the Statute of the Court of Justice of the Andean Community, and the Court's ample case law.

⁷³ In accordance with Article 1 of the Treaty creating the Court of Justice of the Andean Community, signed on May 28, 1996 (Cochabamba Protocol), the legal system of the Andean Community comprises: (a) the Cartagena Agreement, its Protocols and additional instruments; (b) the norms of the Treaty and its Amending Protocols; (c) the Decisions of the Andean Council of Ministers of Foreign Affairs and the Commission of the Andean Community; (d) the resolutions of the General Secretariat of the Andean Community; and (e) the Industrial Complementation Agreements and others adopted by the member Countries among themselves and within the framework of the Andean subregional integration process.

⁷⁴ For a more comprehensive analysis of the evolution of Andean law, see *Apuntes de Derecho Comunitario Andino* https://www.tribunalandino.org.ec/libros/LIBRO_DERECHO.pdf.

⁷⁵ Guillermo Jiménez, William. "Papel de la jurisprudencia del Tribunal de Justicia de la Comunidad Andina en decisiones judiciales de los países miembros", *International Law, Revista Colombiana de Derecho Internacional*, no. 23 (2013), pp. 87–118. Available at: <http://www.scielo.org.co/pdf/ilrdi/n23/n23a04.pdf>.

⁷⁶ On the functioning of preliminary interpretation in the Court, see, for example, the Andean Community Procedural Manual on Dispute Resolution. Available at:

http://www.comunidadandina.org/StaticFiles/201166181126libro_patentes.pdf. More specifically, on the interaction of this type of decision with arbitration in the Community countries, see Fuentes Hernández, Alfredo. "La interpretación prejudicial en la comunidad andina y su relevancia en el arbitraje nacional en Colombia"; or Namén Baquero, David. "La interpretación prejudicial del Tribunal de Justicia Andino y sus efectos en el arbitraje".

⁷⁷ See the Court's decision here: <http://www.comunidadandina.org/DocOficialesFiles/Gacetas/Gaceta%203735.pdf>.

⁷⁸ Reference is only made to these because they contain TRIPS Plus regulation on IP.

of the author, in certain cases; and establish a series of rules for the enforcement of rights, including criminal penalties.

Regarding the application of exceptions and limitations to the digital environment, only the agreement between the United States of America and Central America and the Dominican Republic states that the exceptions and limitations of the Berne Convention apply to the digital environment. Another relevant question for the development of an online digital market for audiovisual content is, of course, the treatment of temporary and ephemeral digital copies,⁷⁹ and, specifically, whether they are permitted and with what scope, on the basis of an exception to be able to carry out acts of making available, such as streaming. While the agreements of this type signed by the countries studied do not contain any exceptions in this regard, it does not mean that exceptions are not permitted in accordance with the three-step test.⁸⁰

These agreements, as already mentioned, incorporate technological protection measures and rights information, which go beyond the provisions of the Berne Convention, the TRIPS Agreement and the WIPO Treaties. In general, regulation is similar to US or EU law, containing, in more or less detail, rules prohibiting acts of circumventing these measures or rights information, as well as manufacturing or trade using devices for such purpose.

In the same vein, these bilateral agreements go further than the international treaties on some issues and regulate matters such as ISP liability, providing for the obligation to create mechanisms for blocking or shutting down ISPs that directly or *indirectly* infringe IP, and the establishment of liability for such infringements, although not in every case.

Furthermore, the agreements oblige (albeit very flexibly) the signing countries to provide for rules on the enforcement of rights and remedies in the event of non-compliance, including administrative, civil and criminal proceedings, which also apply to technological measures and rights information, as well as provisional measures and dispute resolution.⁸¹

The FTAs containing IP rules and which are referred to in this section affect Costa Rica, Ecuador and Peru. The latest developments in MERCOSUR will also be highlighted briefly.

a) *Bilateral treaties*

Costa Rica

*Central America–Dominican Republic–United States Free Trade Agreement*⁸²

It incorporates the Berne Convention, the TRIPS Agreement and the WIPO Treaties, increases the term of protection to 70 years, regulates technology transfer and details the legal remedies for the enforcement of rights, including criminal penalties, as well as regulating ISP liability.

Signatories: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States of America. Effective in Costa Rica since 2009.

⁷⁹ As stated in Díaz, A., *América Latina y el Caribe: La propiedad intelectual después de los tratados de libre comercio*, UN-ECLAC, Santiago de Chile, 2008, p.183. Available at: http://repositorio.colciencias.gov.co/bitstream/handle/11146/193/1492-CEPAL_AL_Proplntelectual_despues_de_TLCs.pdf?sequence=1&isAllowed=y.

⁸⁰ As stated in Díaz, A., *América Latina y el Caribe: La propiedad intelectual después de los tratados de libre comercio*, UN-ECLAC, Santiago de Chile, 2008, p.183. Available at: http://repositorio.colciencias.gov.co/bitstream/handle/11146/193/1492-CEPAL_AL_Proplntelectual_despues_de_TLCs.pdf?sequence=1&isAllowed=y.

⁸¹ And also customs measures at the border.

⁸² http://www.sice.oas.org/trade/cafta/caftadr_e/caftadrin_e.asp.

- *European Union–Central America Association Agreement*⁸³

It incorporates the Berne Convention, the Rome Convention, the TRIPS Agreement and the WIPO Treaties, increases the term of protection to 70 years, regulates technology transfer, details the legal remedies for the enforcement of rights, including criminal penalties, and refers to the role of CMOs.

Signatories: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and the European Union. Effective since 2013.

- *FTA between the EFTA States and the Central American States*⁸⁴

Article 6.1 and Annex XIX⁸⁵ establish IP rules incorporating the provisions of the TRIPS Agreement and the WIPO Treaties, and oblige the States parties to ratify the Beijing Treaty.

Signatories: Costa Rica, Panama, Iceland, Liechtenstein, Norway and Switzerland. Effective since August–September 2014.

Peru

- *Peru–United States Trade Promotion Agreement*⁸⁶

Chapter 16⁸⁷ of the agreement includes the Berne Convention, the Brussels Convention, the TRIPS Agreement and the WIPO Treaties. It raises the standards of protection, includes the right to make temporary digital reproductions and the right of making available, and increases the term of protection to 70 years from the author's death. It also contains rules on the enforcement of rights, including technological protection measures and rights information, as well as measures at the border. In addition, the agreement regulates ISP liability and establishes a detailed system for the identification and notification of infringing content.

Effective since February 1, 2009.

- *Trade agreement between Peru, Colombia and Ecuador, and the European Union*

It incorporates the Berne Convention, the Rome Convention, the TRIPS Agreement and the WIPO Treaties. Title VII⁸⁸ of the agreement contains rather detailed rules incorporating, by reference to the WIPO Treaties, the regulation of technological protection measures and rights information and expressly includes the right of making available, as well as the other exclusive rights regulated by EU law, moral rights and the possibility of establishing certain equitable remuneration rights for performers. It also increases the term of protection of the rights to 70 years from the author's death.⁸⁹

The agreement also regulates IPR enforcement in great detail. For example, Article 236 expressly, albeit flexibly, extends legal standing for the defense of the owners' rights to any

⁸³ http://www.sice.oas.org/Trade/CACM_EU/Text_Sept14/Text_e.asp#p4t6

⁸⁴ <https://www.efta.int/media/documents/legal-texts/free-trade-relations/central-america/EFTA-Central-America-free-trade-agreement.pdf>

⁸⁵ https://www.efta.int/media/documents/legal-texts/free-trade-relations/central-america/annexes-sp/annex_xix_ipr_sp.pdf

⁸⁶ http://www.sice.oas.org/Trade/PER_USA/PER_USA_e/Index_e.asp

⁸⁷ Text available at: http://www.sice.oas.org/Trade/PER_USA/PER_USA_e/PER_USA_text_e.asp#c16

⁸⁸ Text available at: https://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf.

⁸⁹ Although not relevant for the aim of this study, it is interesting to note that this agreement also regulates the resale right on the sale of works of art.

licensees, to CMOs and to professional defense bodies regularly granted the right to represent IPR owners.

Among other rules on this matter, in the case of an IPR infringement committed on a commercial scale, it also obliges States to enable their competent judicial authorities to order the opposing party to communicate relevant banking, financial or commercial documents under its control, subject to the protection of confidential information. (Article 237). The same title contains a complete section (Section 3) on regulating ISP liability.

Signatories of the agreement: Peru, Colombia, Ecuador and the European Union and its member States. Effective since March 1, 2013 (Peru), August 1, 2013 (Colombia), and provisionally in Ecuador since January 1, 2017.

Ecuador

- *Trade agreement between Peru, Colombia and Ecuador, and the European Union* (see section immediately above).

MERCOSUR

MERCOSUR is an economic and trade integration mechanism⁹⁰ that seeks the free movement of goods, services and factors of production in member countries and advocates the establishment of a common external tariff and the development of a common policy toward third parties.⁹¹

The topics addressed by MERCOSUR include culture and cultural industries, which by definition also includes aspects of IP and other areas relevant for the development of an online market in the region, including the development of the digital agenda,⁹² which will address aspects important for the digital market for audiovisual content, the specific subject of this study. MERCOSUR has also carried out some work in the audiovisual field through its Specialized Meeting of Cinematographic and Audiovisual Authorities, which is its advisory body on cinematographic and audiovisual matters, formed by the highest national governmental authorities on the matter.

The member States are Argentina, Brazil, Paraguay and Uruguay (Venezuela is suspended at the time of publication of this study). As mentioned above, MERCOSUR and the rest of the Latin American countries, and the Andean Community⁹³ have moved closer together, with a gradual trend toward greater integration. Thus, Chile, Colombia, Ecuador, Guyana, Peru and Suriname are MERCOSUR associate members (Bolivia requested to join in 2015).

With the main aim of establishing a common trade area, MERCOSUR has signed various agreements with countries in the region and with countries and organizations in other continents.

Of note in relation to the matter at hand is the political agreement on strategic partnership reached between the European Union⁹⁴ and MERCOSUR on June 28, 2019, Article 13 of which addresses IP.⁹⁵ The bilateral agreement, in accordance with Article 13, will include the right of making available set out in the WIPO Treaties (the WCT and the WPPT) and will establish minimums of protection greater than current ones, in line with EU standards, and provisions regarding technological protection measures, rights information and CMOs. This agreement is especially

⁹⁰ Created by the 1991 Treaty of Asunción and amended and updated by the 1994 Protocol of Ouro Preto.

⁹¹ As MERCOSUR defines itself on its web page: <https://www.mercosur.int/en/about-mercosur/mercosur-in-brief/>

⁹² <https://www.mercosur.int/temas/agenda-digital/>.

⁹³ On relations between the Andean Community and MERCOSUR, see

<http://www.comunidadandina.org/Seccion.aspx?id=111&tipo=TE&title=mercosur>.

⁹⁴ Before this agreement, the basic legal framework of trade relations between the European Union and MERCOSUR was based on bilateral framework cooperation agreements with Argentina (1990), Brazil (1995), Paraguay (1991) and Uruguay (1992), and an interregional Framework Cooperation Agreement (1999).

⁹⁵ https://trade.ec.europa.eu/doclib/docs/2019/september/tradoc_158329.pdf

important because Brazil, the largest of the MERCOSUR countries, is not a party to the WIPO Treaties but may eventually accede to them in the coming years.

4.2.5 Other supranational treaties relevant to the audiovisual sector

Regarding the encouragement of the co-production and distribution of independent cinematographic works in Ibero-America, an international organization with a regional Ibero-American scope, the Conference of Audiovisual and Cinematographic Authorities of Ibero-America, has existed since 1989, with the purpose of contributing to the development of cinematography within the audiovisual space in Ibero-American countries. It was created by the Convention on Ibero-American Cinematographic Integration,⁹⁶ and all the countries in this study are parties.⁹⁷

The organization created the Latin American Audiovisual Space, constituted by the Convention on Ibero-American Cinematographic Integration and the Ibero-American Cinematographic Co-Production Agreement,⁹⁸ signed by all the countries in this analysis.⁹⁹ The most recent amended version of this agreement has been in force since September 15, 2016, for all the countries that have ratified it so far:¹⁰⁰ Brazil, Colombia, Costa Rica, Nicaragua, Panama, Paraguay, Spain and Uruguay.

Some of the member countries of the Convention, including Argentina, Brazil, Ecuador and Peru, also signed an agreement for the creation of the Latin American Common Market, the only specific norm on audiovisual content in the region that is geared toward the development of an audiovisual market.

Article I states: “*The purpose of the Latin American Common Film Market shall be to implement a multilateral participation system of exhibition spaces for cinematographic works certified as national by the signatory States of this Agreement, with the aim of expanding the market possibilities of such countries and protecting the bonds of cultural unity among the peoples of Ibero-America and the Caribbean.*” It goes on to define cinematographic work as “[...] *that of an audiovisual nature, recorded, produced and disseminated by any system, process or technology*” (Article II).

Among the initiatives resulting from the above agreements, the aid program IBERMEDIA stands out. Its primary mission is to promote the development of an Ibero-American audiovisual space through financial aid open to all independent film producers of the member countries of Latin America, and Spain and Portugal. IBERMEDIA contributes to the networking of production companies to facilitate co-productions, assists in continual training and promotes film excellence in Ibero-American and the use of new technologies.

4.3 LEGAL FRAMEWORK IN ACCORDANCE WITH DOMESTIC LAW

⁹⁶ <http://caaci-iberoamerica.org/wp-content/uploads/2016/09/conici-1989.pdf>

⁹⁷ The States signatories to the Convention are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Uruguay and Venezuela.

⁹⁸ <http://caaci-iberoamerica.org/wp-content/uploads/2016/09/acuerdo-iberoamericano-de-coproduccion-cinematografica-texto-refundido-vigente.pdf>

⁹⁹ And the Rules implementing the Agreement, available at: <http://caaci-iberoamerica.org/wp-content/uploads/2016/09/raicoci-2007-reglamento-acuerdo-coproduccion-2007.pdf>.

¹⁰⁰ The text of the Ibero-American Cinematographic Co-Production Agreement of June 22, 2000 is applicable on a transitional basis to Argentina, Bolivia, Cuba, Chile, Mexico, Peru, Portugal and Venezuela.

4.3.1 Introduction

As has just been shown, the international IPR system applicable in the countries studied is relatively uniform, so there are many similarities between their respective national laws. However, there are key differences in regulation as it affects audiovisual content. Examples concerning persons considered authors of an audiovisual work, which are considerably relevant in practice, include the rights that the producer of an audiovisual recording holds (or does not hold), the level of protection recognized and how the rights are managed (directly or through CMOs).

As highlighted throughout this study, these regulatory differences must be taken into account whenever audiovisual works are exploited outside their country of origin or production, owing to the territorial nature of IP. This is even more important in an online digital environment, where content could (and can) be made available in different countries at the same moment.

In general terms, audiovisual works are defined either as an independent category of works or as a subtype of cinematographic works, or vice versa. In any case, there is no question that audiovisual works, cinematographic or not, are protected in all the countries studied.

It is also clear that, in all of them, the authors of the plot and screenplay, the director and the composer of the original music for the film are considered co-authors of the audiovisual work. In some countries, such as Argentina and Costa Rica, the producer is also recognized as a co-author of the audiovisual work and, in others, the authors of the designs are recognized as co-authors in the case of animated audiovisual works.

The laws of all the countries grant audiovisual authors the rights of reproduction, distribution, communication to the public, making available and transformation, with a greater or lesser degree of detail regarding the right of making available.

Generally, co-authors are granted moral rights, although in several cases only the director holds moral rights (or their exercise is limited to the director alone). A number of countries also legally entitle the producers to exercise the co-authors' moral rights, which involves an interesting innovation.

The regulation of performers' rights is less consistent. Although broadly speaking, all the countries recognize rights over artistic performances, they are not always exclusive and are not always clearly granted to performers in audiovisual works. Apart from Peru, the rest of the countries studied are not parties to the Beijing Treaty; their joining it would help to increase the standardization of the rights of performers in audiovisual works, thereby facilitating the online distribution of audiovisual content.

While the protection of phonograms is clearly recognized in all the countries, the protection of videograms, which would correspond to audiovisual producers, is not (although the protection of the audiovisual work is recognized). There are diverse approaches to this particular issue, as shown in the attached summary tables. The signals of broadcasting organizations are likewise protected in all the countries analyzed.

The term of protection of the rights is 70 years in almost all the countries, but the calculation of the term varies. In some cases it is calculated from the death of the last co-author of the audiovisual work; in others, from the publication of the audiovisual work. There is no regulation on orphan works, except in Ecuador.

Below follows a brief discussion of the regulation of the most relevant aspects in IP concerning audiovisual works, performances and recordings, as understanding them is essential for the exploitation of audiovisual content online internationally.

4.3.2 Definitions applicable to audiovisual work or an audiovisual fixation

Argentina: Only cinematographic work is defined.

Brazil: It is considered a subtype of audiovisual work. Brazilian law (on IP, cinematography and other areas) contains a wide variety of definitions of various types of audiovisual work and content, in many cases related to requirements for obtaining public aid.

Costa Rica: Cinematographic work and audiovisual work are defined.

Ecuador: Both audiovisual work and audiovisual recording are defined. Until recently, cinematographic work was also defined (in the Cinematography Act), a definition now repealed because it is understood to be included in the more general definition of audiovisual work.

Peru: There are similar definitions for both audiovisual work and cinematographic work.

Uruguay: Audiovisual work is expressly recognized, and cinematographic work is regarded as part of it.

4.3.3 Authors, performers and producers of audiovisual work

As mentioned above, all the countries analyzed recognize the screenwriter and director as co-authors of the audiovisual work, and, in (almost) all cases, the composer of the music originally created for the work. In some cases, the producer, the author of the drawings for animated works, and the author of pre-existing adapted works (such as novels) are also recognized as co-authors.

Argentina: producer, screenwriter and director, and also the composer in the case of musical audiovisual works.

Brazil: author of the plot (screenwriter), director and composer, as well as the authors of the drawings in the case of animated films.

Costa Rica: author of the plot (screenwriter), director, composer and producer (in principle, it would apparently only apply to the producer as a natural person).

Ecuador: author of the plot, screenwriter, director, composer, artist in the case of animated works and, where applicable, the author of the adapted work.

Peru: author of the plot, screenwriter, director and composer, in addition to the author of the designs in animated works, and the author of the pre-existing work, who is assimilated to the authors of the audiovisual work.

Uruguay: author of the plot, screenwriter, director, composer, artist in the case of animated works, and, where applicable, the author of the adapted work.

There is no question that the rights of live performers and of those whose performances are fixed in phonograms are recognized, but protection is more variable for performers in audiovisual works and recordings, ranging from full recognition in Ecuador to the situation of Uruguay, where the granting of a simple remuneration right for performers in audiovisual work is awaiting a court decision. On this point, it must be remembered that all the countries studied are parties to the Rome Convention and (apart from Brazil) to the WPPT, but only Peru has ratified the Beijing Treaty, which is correspondingly reflected in the national laws.

More diverse still is regulation concerning audiovisual producers. As previously mentioned, the producer is considered a co-author in certain countries (Argentina and Costa Rica), and it is

generally presumed that the other authors assign the producer their exclusive rights over the audiovisual work (and even their moral rights, with the nuances that will be described below). However, the producer is not always granted rights over the audiovisual recording.

Inconsistency as to who the owners of rights over the audiovisual works are, the exclusive and/or simple remuneration rights of the performers and whether audiovisual recordings are protected adds an extra layer of legal complexity to the already complicated exploitation of audiovisual content online.

4.3.4 Recognized rights

a) Economic and simple remuneration rights

All the countries grant the co-authors of audiovisual works the rights of reproduction, distribution, communication to the public and making available, and transformation. They can be said to have incorporated all the substantive rights contained in the international treaties as far as authors are concerned, especially with regard to the right of making available. It must be remembered here that all the countries are signatories of the WCT, except Brazil, where the right is recognized equally in national legislation more or less precisely. In many cases, authors are also accorded simple remuneration rights for the exploitation of audiovisual works.

As previously stated, the rights of performers, specifically the recognition of their exclusive rights and simple remuneration rights, are less consistent, at least for those who participate in audiovisual works recordings.

In general terms, the principle of national treatment applies to foreign rightholders both for the works and for the performances and recordings, although it should be noted that this applies under reciprocity in Brazil.

Below follows a brief overview of the various rights recognized in the legislation of each country.

Argentina: The co-authors of audiovisual works are recognized as having all the economic rights of exploitation, many of which are administered through CMOs. They are also granted the right to be remunerated for the exploitation of the works and, while not “simple remuneration” rights, they are assimilated in practice.

Under Law 11,723, performers in audiovisual works are only granted a right to remuneration for their performances, which is managed by the corresponding CMOs (there are several). It is important to highlight here that in Argentina, the provisions contained in international treaties are directly applicable and therefore do not need to be incorporated into national legislation, which means that some performers have exclusive rights recognized through the WPPT. However, since Argentina is not a party to the Beijing Treaty, the rights of performers in audiovisual works would be limited to the right of simple remuneration contained in Law 11,723. The same rights are granted to foreign rightholders.

Brazil: The co-authors of the audiovisual work are granted all the economic rights, including the right of making available as worded in the WCT and the WPPT. In this regard, it must be highlighted that the generic concept of “public performance” in Brazilian IP law includes streaming and other uses of works online, as established by the Brazilian Supreme Court.

In fact, performers are granted a very broad right of exploitation, since they may authorize or prohibit *any* type of use of their performances.

The audiovisual producer does not have rights over the audiovisual fixation.

Regarding foreign rightholders, the principle of reciprocity applies: the law is applied to foreigners, as long as their national law recognizes equivalent rights to Brazilians.

In principle, Brazilian IP law does not recognize simple remuneration rights, although many exclusive rights are managed collectively.

Costa Rica: All the rights of the co-authors of audiovisual work and of the performers of any type of work are recognized. Audiovisual recordings are not specifically protected.

Simple remuneration rights are not granted to the holders of rights over audiovisual content.

Foreign rightholders are protected under the principle of national treatment.

Ecuador: Under the recent reform of Ecuadorian IP legislation, all the economic rights and, expressly, the right of making available in the case of performers, are granted. For authors and producers, the right of making available is considered included in the right of communication to the public as a subtype.

Producers of phonograms and of audiovisual recordings are expressly granted related rights, and performers are recognized as having simple remuneration rights for the communication to the public, making available and rental of their performances. For authors, the simple remuneration right is that of rental, which is derived from exploitation in public places with an entry fee, the rest (also for producers) being exclusive. The exclusive rights of audiovisual authors are managed collectively.

Ecuador grants full and unconditional national treatment to all foreign rightholders.

Peru: All the economic rights are granted to the co-authors of the audiovisual work, although the right of making available is not explicitly recognized, being understood to fall within the generic right of communication to the public as a subtype not mentioned in the law. In fact, the right of making available is only expressly defined in the law in reference to the rights of phonogram producers.

Peru also grants related rights to performers, including audiovisual performers, and establishes a right to a single and equitable simple remuneration (shared with the producers) for certain acts of exploitation, essentially communication to the public. In addition, the law recognizes a right to simple remuneration for the transfer of the performance to a different medium, but it does not seem to be implemented.

As to the related rights granted to producers, Peruvian IP law only recognizes rights over those recordings that do not constitute audiovisual work (establishing, in parallel, a presumption of the assignment of the rights of the authors and performers to the producer in the latter case).

In Peru, full national treatment is given to all foreign rightholders.

Uruguay: all the exclusive rights are granted to the authors of the audiovisual work, and performers in phonograms, phonogram producers and broadcasting organizations are granted related rights unequivocally. The right of simple remuneration for audiovisual creators was incorporated into Uruguayan law in December 2019.

The rights of performers in audiovisual works and recordings are not made explicit in the Uruguayan Copyright Act, although it contains a generic provision (Article 36) regarding the right to remuneration for the uses of their performances, which is open to different interpretations, so much so that the recognition of related rights (specifically, the right to receive remuneration for the exploitation of the performances) is awaiting a court decision.

Audiovisual producers are not recognized as having rights over the audiovisual recordings, although a CMO operating in Uruguay is mandated by its members to manage certain exclusive rights.

In Uruguay, works and performances are unconditionally protected under the principle of national treatment, and simple remuneration rights are granted to foreign rightholders.

b) Moral rights

All the countries studied grant moral rights to the co-authors of the audiovisual works, at least those of attribution or paternity and of integrity, although several of the countries entrust their exercise to the director only. The recognition of other rights also defined as moral, such as the right of access to the sole copy or a rare copy of a work and the right of modification, varies from one country to another. In several cases, the producer is legally entitled to exercise the moral rights over the audiovisual work, including the power to decide on its disclosure.

Except in Peruvian law, the establishment of the definitive version of the audiovisual work (that is, the final cut over which the moral rights would be exercised) does not seem to be regulated.

The performances of performers in audiovisual works are protected with moral rights insofar as they are also recognized as having economic rights (which, as shown, is not always the case) and not always to the degree provided for in the international treaties.

The regulation of moral rights over audiovisual works, and more specifically of their exercise, has certain characteristics in the legislation of some of the countries analyzed, which must be taken into consideration.

Argentina: The rights of disclosure, attribution and integrity are recognized. Moreover, producers have an obligation to include all the creators and performers in the credits of the audiovisual work, as well as themselves.

Remember that Argentina recognizes producers as co-authors of audiovisual works and they therefore possess moral rights over such works in their own name. However, there is a doctrinal debate as to whether, in this case, that right would only apply to the producer as a natural person or whether, exceptionally, it would also be granted to production companies.

Brazil: Although co-authors of audiovisual works are recognized as having various moral rights, only the director is entitled to exercise them.

Performers' moral rights of integrity and paternity are also recognized.

Costa Rica: Unlike other countries, in the specific case of audiovisual works, the moral rights are vested in the director only. Performers' rights of attribution and integrity are recognized.

In addition, Costa Rican law grants the producer legal standing to exercise such moral rights in protection of the authors and of the works. In other words, directors (as rightholders) and producers (as legally entitled and in their own name as co-authors) may exercise moral rights over the audiovisual work.

Although not strictly speaking moral rights, mention should be made of certain obligations on the producer that are laid down in Costa Rican law and which relate to the attribution or paternity of the works and performances. Specifically, the law (Article 54) provides that, unless otherwise agreed, producers are obliged to name the authors and performers in the credits of the audiovisual work, as well as themselves. While this requirement is certainly very far from being a moral right in the strict sense, it allows the rest of the co-authors of the audiovisual work other

than the director, as well as the performers (who have none of these rights), to demand that their authorship and performances be recognized in the audiovisual work. Evidently, the scope of the obligation is limited to the producer (it does not apply to all) and its violation would not necessarily entail the same consequences.

Ecuador: The co-authors of the audiovisual work are recognized as having the moral rights of disclosure, integrity, attribution and access to the sole copy or a rare copy of the work. The rights of integrity and attribution are also granted to the performers.

The limitation on the duration of the rights of disclosure and integrity (until the work and, it is understood, the performances, enter the public domain) is significant, and the rights of attribution and access to the sole copy of the work are imprescriptible (as stipulated in Andean Community Decision 351).

Peru: Peruvian law provides a similar solution to that proposed by Brazil and Costa Rica, the director being the sole co-author entitled to exercise moral rights over the audiovisual work, unless the parties have agreed otherwise. Also, producers are legally entitled to “defend in their own name” the moral rights over the audiovisual work and to decide on its disclosure, unless otherwise agreed with the authors.

As in Costa Rica, the producer must name the authors in the credits of the audiovisual work, except in advertising works and in very short works.

The final version is that established in the manner agreed upon by the director and the producer (which may be to establish it jointly, that one of the two or a third party decides, or any other method that they may agree upon).

Uruguay: Uruguay grants all the moral rights to the co-authors of the audiovisual work except the right of access to the sole copy or a rare copy of the work. Performers are explicitly only granted the moral right of disclosure but not the rights of attribution and integrity (which would be expected in view of Article 5 of the WPPT, at least for those who act in phonograms).

In the case of audiovisual works, as in Brazil, Costa Rica and Peru, the producer has legal standing to exercise the moral rights. The producer is also legally *authorized* to decide on the disclosure of the work and to alter or modify it. It is not clear whether the latter is a particular manifestation of the exercise of the moral right of integrity or, rather, a limitation of said right of the co-authors.

4.3.5 Term of protection of audiovisual works and performances

The term of protection for audiovisual works in all the countries is 70 years, but in some cases the 70 years is counted from the publication of the audiovisual work (shortest term) and in others from the date of the death (or from January 1 of the following year) of the last surviving co-author (longest term). The exception is Argentina, which sets a protection term of 50 years from the death of the last co-author.

In the first case, audiovisual works will very easily exhaust their term of protection yet remain protected through the separate authorial contributions, as incorporated into the audiovisual work, which is known as the theory of underlying rights. Assignment of rights contracts are therefore particularly important in determining the *de facto* term of protection of audiovisual works. Each case must be considered individually to determine whether an audiovisual work is in the public domain, since the contractual language is decisive in this regard.

Where they have recognized rights, performers in audiovisual works and recordings also have protection for 70 years. As in the previous case, the calculation of this term varies from one country to another.

Audiovisual recordings, as shown, are only explicitly protected in Peru, as long as they do not contain audiovisual works, and in Ecuador.

Argentina: term of 50 years from the death of the last co-author. The performances are protected for 70 years from the date of publication.

Brazil: term of 70 years from publication (or fixation, transmission or performance to the public in the case of related rights, depending on how the initial disclosure was made).

Costa Rica: term of 70 years from the date of exhibition (or the death of the last co-author or performer in other types of work).

Ecuador: term of 70 years from publication, or else from the carrying out of the work.

Performers' rights last 70 years from January 1 of the year following that in which the performance was carried out. The audiovisual recording is protected for 50 years, and the phonogram recording for 70 years, in both cases from publication.

Peru: term of 70 years from the first publication, or else from the termination of the audiovisual work (understood to mean the date of establishment of the final version) in the absence of publication.

In either case, Peruvian law clarifies that protection for 70 years from publication of the audiovisual work does not prevent the co-authors' contributions (screenplay, original music, designs in the case of animated films, etc.) from being protected for the general term of 70 years from the date of the author's death.

The audiovisual (or phonogram) recording is also protected for 70 years from publication.

Performances are protected during the performer's lifetime and for 70 years after death, counting from January 1 of the year following the death.

Uruguay: term of 70 years from the date of the last co-author's death and, in the case of performances, from the date of publication (or performance, if it was not fixed). Phonograms are protected for the same term, as are the signals of broadcasting organizations.

4.3.6 Relevant issues regarding exceptions and limitations

With respect to exceptions to rights, beyond the term of protection stated above, it is worth highlighting that there is no specific exception to the right of reproduction for private use ("exception for private copying") in Argentina, Costa Rica, Ecuador, Uruguay and, partially, Brazil. In Peru, private copying is provided for and, notably, there is an exception for *communication to the public* in a private environment, contained in Article 41 of the Copyright Act, among others.

Furthermore, in the case of Ecuador, which has recently embarked on an important reform of its IP laws, it should be noted that it has incorporated a generic exception for fair use, very similar in form to the US "fair use" doctrine.¹⁰¹ The generic exception for fair use is accompanied by a long list of exceptions set forth in Article 212 of the Organic Code of the Social Economy of Knowledge, Creativity and Innovation, which are non-waivable (Article 95). Notwithstanding their broad scope,

¹⁰¹ 17 US Code § 107.

these exceptions should be interpreted in accordance with the three-step test (“...*provided that they do not conflict with a normal exploitation of the works and do not unreasonably prejudice the legitimate interests of the rightholder(s)*”).

In addition, the Ecuadorian Organic Code of the Social Economy of Knowledge, Creativity and Innovation provides for a series of obligatory licenses (also called “legal licenses”), regulated in Articles 217 to 220. Of special relevance is the obligatory license that may be requested from a national IP authority for audiovisual works and recordings not available on the national market one year after their dissemination in any format. In this case, the rightholder will have a right to collect compensation for the effective use of the work.

In any case, the extent and scope must respect the provisions in international treaties and agreements, in particular the Berne Convention (three-step test) and Andean Community Decision 351.¹⁰²

There seem to be no specific limitations or exceptions in Uruguay that might affect the online exploitation of audiovisual content.

4.3.7 Assignment of economic rights and other contracts

Generally speaking, it can be said that, to a greater or lesser extent, all the studied countries provide for a presumption of assignment of the economic exploitation rights of the authors (and, in certain cases, of the performers) to the audiovisual producer. The purpose of these presumptions is to enable the producer to exploit the audiovisual works—even where contracts are inadequate—given the effort and resources necessary to produce them.

However, it should be noted that many of these presumptions provide for assignments limited in time, territory and duration. To this end, for the effective exploitation of works and other audiovisual content online, the express assignments in the contracts are those that actually standardize and guarantee producers the exploitation of such content in *all* territories and in *all* means and formats, including online digital ones.

Argentina: As shown, the producer (whether a natural or legal person) is regarded as a co-author of the audiovisual work and, therefore, an original co-owner of all the rights (moral and exploitation rights) over it. In addition, it is stipulated that the producer shall have the right to show the audiovisual work without needing the consent of the other authors, which is accomplished with collectively managed rights.

Brazil: Brazilian law establishes a presumption of non-exclusive assignment of the rights of authors and performers of the audiovisual work, since exclusivity requires express agreement. In particular, with regard to audiovisual works, Article 81.1 of the Copyright and Neighboring Rights Act stipulates that the exclusivity of the assignment of the rights of authors and performers to the audiovisual producer:

- a) requires express agreement, and
- b) expires ten years after the granting thereof.

Interpreting this article in the light of Article 49.IV of the Act, it seems to involve non-exclusively assigning to the producer the rights for the exploitation of audiovisual works in their *main* means of exploitation. Each case must be considered individually to determine what that means is (for example, television means for television series, theatres and VOD for cinematographic works).

¹⁰² See Andean Community Ruling no. 002-2017 analyzing this matter.

In addition, Article 85 provides that, unless otherwise agreed, the co-authors may use their contribution to the audiovisual work independently in other modalities of exploitation (such as written publication of the screenplay).

Such use shall be free if the producer does not finalize the production in the period agreed upon in the contract by the parties or does not release it within two years following its finalization. That is, in the case of pre-existing works, which, significantly, includes the screenplay, Brazilian law provides that the screenplay may be used freely if the audiovisual production has not been released two years after its finalization. In another case, it may be used after 10 years.

However, several rules from the end of the 1970s and which are still in force prohibit the assignment of authors' and performers' rights for the result of their professional services, adding that authorization must be given for each specific use and that they shall be remunerated.

These rules, in apparent contradiction with the presumption of assignment provided for in Article 81 of the Copyright Act, seem to be resolved in practice by considering, *de facto*, that there are simple remuneration rights in relation to the making available online of audiovisual content.

Costa Rica: Article 55 of the Costa Rican Copyright Act stipulates that the audiovisual producer shall have the right to exploit audiovisual works without restriction and in accordance with the contracts signed with the authors of the works. The article adds that "programs analogous to cinematographic works, such as videograms" shall be protected as such. In other words, audiovisual recordings do not have specific protection but are protected as if they were audiovisual works.

Ecuador: Ecuadorian law provides for a presumption of assignment of economic exploitation rights to the audiovisual producer, specifically, as established in Article 154 of the Organic Code of the Social Economy of Knowledge, Creativity and Innovation, the rights of reproduction, distribution and communication to the public, which would not include the right of making available.

However, Ecuadorian law establishes limits on assignments in the absence of express agreement, which would be understood to apply also to audiovisual works. These limits are especially relevant for the online exploitation of such works because the assignment would be restricted to 10 years and, in particular, to the country in which the assignment was concluded (that is, Ecuador).

The presumption of rights in favor of the producer is further qualified clarified in Articles 198 and 199, which stipulate the need to conclude a contract in every case, although these articles are rather intended for the exploitation of the works and chiefly relate to the payment of remuneration for such exploitation.

Moreover, in the case of Ecuador, it is mandatory to hire artists (at least for television means) using employment contracts.

Peru: The law establishes a presumption of assignment in favor of the producer, who, in addition, retains the authority to decide on the disclosure of the work. Although Peruvian law provides for certain limits on assignments of rights, those limits, including the territorial ones and those related to exploitation modalities, do not apply to audiovisual works. Therefore, the scope of the presumption of assignment of rights to the producer is total.

The authority to decide on the disclosure of the work is normally regarded as a moral right (or at least an exclusive right) of the authors and preliminary to the possibility of exercising the others, in practice. Considering that, in Peru, the producer has the possibility of defending the moral rights of the authors of the audiovisual work in his or her own name, which, in practice, would be

roughly equivalent to the producer being an original rightholder, it makes sense that the producer is also the one who decides on its disclosure.

Although not explicit in Peruvian law, from an interpretation of the scope of the presumption of assignment to producers, the “moral” powers that they can defend in their own name and the chosen term of protection, audiovisual works could be seen as *quasi*-collective.

Uruguay: Article 29 of the Copyright Act contains a presumption of assignment of all the rights over the audiovisual work to the producer. At the same time, the contract of assignment of rights must be in writing to be valid, which suggests that the absence of a written contract would also render the presumption of assignment ineffective.

Furthermore, the Copyright Act establishes two generic limitations to assignments of rights (presumed or explicit) that may have an important impact on the exploitation of audiovisual works online. The first is an obligation of effective exploitation that grants the authors or other assignees the possibility of terminating the assignment within one year from making a formal request, in this case to the producer, to exploit the work, with Article 32 suggesting an automatic reversion of rights. The second limits the term of assignments of rights to 15 years from the date of the assignor's death, the rights reverting to his or her heirs.

The possible employment nature of the contracts of the co-authors or performers of the audiovisual work with the producer makes no difference.

Moreover, there is no employment contract obligation in Uruguay, although, at least for technicians and performers, it is usually carried out through labor unions or associations. Uruguayan law also does not provide regulation for other types of contracts; however, the financing of the production of audiovisual works is supported by the public sector through aid and various instruments.

4.3.8 Collective management applicable to audiovisual works and performances

Argentina: The country as a highly developed collective management system in which certain rights, whether exclusive or remuneration rights, and in certain cases the applicable rates, are defined by rules related to CMOs, as is the case of the rights of directors and screenwriters. Technically, all the rights managed through CMOs are exclusive, except those of performers, which are simple remuneration rights. However, the result is similar in practice, as the fees or rates, even for exclusive rights, are often determined in regulations or laws.

Brazil: Collective rights management in relation to music is completely settled, and there are various organizations that manage rights for the four groups of concerned rightholders (authors, artists, performers and phonogram producers). Many of these organizations are members of the Central Bureau for Collection and Distribution, created by law.

Although in relation to audiovisual content, there is a certain amount of controversy about the nature of the rights (exclusive or simple remuneration) of the corresponding holders, in recent years several different organizations have been created to manage the rights (exclusive but managed collectively) of screenwriters, film directors, soundtrack composers, performing actors and dubbing actors of audiovisual works. However, at present, the public performance of audiovisual works, which, as mentioned, includes all online uses, only seems to benefit the rightholders connected to musical works.

Costa Rica: The Association of Music Composers and Authors is responsible for collecting for music included in audiovisual works, managing both exclusive and simple remuneration rights. Apart from this organization, there are currently no CMOs registered in Costa Rica to manage the rights of authors or performers of audiovisual works.

Ecuador: Performers have simple remuneration rights for the communication to the public, making available and rental of their performances. In the case of authors, the simple remuneration right is that of rental, derived from exploitation in public places with an entry fee, the rest (also for producers) being exclusive. The exclusive rights of audiovisual authors are managed collectively through the Union of Audiovisual Artists of Ecuador (which also manages simple remuneration rights), and those of audiovisual producers are administered by the Ecuador office of the Organization for the Management of the Rights of Audiovisual Producers.

Peru: There are two CMOs in the audiovisual sector, Inter Artis (performers) and the Organization for the Management of the Rights of Audiovisual Producers (producers). Both collect simple remuneration for the communication to the public of audiovisual works and performances. For the purposes of this study, it is worth mentioning that in Peru, by law, there is no simple remuneration right for the exploitation of audiovisual works, performances and recordings on the Internet.

In addition, Peruvian law recognizes a simple remuneration right for the transfer of the performance to a different means, but it does not seem to be implemented by Inter Artis, or, at least, does not appear in its fee schedule.

Uruguay: Audiovisual authors and performers have simple remuneration rights (audiovisual producers are not granted a related right).

The right of simple remuneration for audiovisual creators was incorporated into Uruguayan law in December 2019. The General Association of Authors of Uruguay administers the rights of authors (currently music authors) and, in future, may possibly become involved in the management of directors' and screenwriters' rights (given how recently they were granted legal recognition, there is still no CMO to represent them for these purposes).

The recognition of the simple remuneration right of audiovisual performers in Uruguay is currently awaiting a court decision, as there are various interpretations of the scope of the norm regulating the right (Article 36 of the Copyright Act only refers to performers of musical and literary works). The recently created Uruguayan Society for the Management of Actors manages these rights.

4.3.9 Public domain and orphan works

Both Argentinian and Uruguayan law stipulate that the use of works in the public domain generates the obligation to pay fees (paying public domain). The other countries establish the free use of works in the public domain. The moral rights in force, which are those of paternity and integrity except for some exceptions already mentioned, must be respected in each case.

In Argentina, the fee for the use of cinematographic works and other audiovisual works in the public domain seems to be regulated only in relation to their exploitation in physical media (magnetic or other similar media). This rule dates back to 1991, when the videocassette was the only way (or almost only way) to carry out such exploitation.

In Uruguay, the General Association of Authors of Uruguay is responsible for managing the paying public domain and collecting the fees. It is also worth noting the recent recovery from the public domain of works that were in it when the law extending the term of protection of works and performances to 70 years was passed (December 2019).

With respect to orphan works, only Ecuadorian law provides for their regulation, albeit briefly, in Article 214 of the Organic Code of the Social Economy of Knowledge, Creativity and Innovation: "*Orphan works or performances. Orphan works or performances are understood as those for*

which copyrights or related rights are in force according to the terms of protection established in this Code, but the owners of which are not identified or if they are, are unlocatable.

Whoever intends to use orphan works or performances shall carry out all reasonable acts and steps aimed at identifying the rightholder and notify the national competent authority for intellectual rights.

In the event that the legitimate rightholder or his or her successor in title appears and duly justifies such quality, he or she may exercise the actions provided for in this Code."

4.3.10 Registration and legal deposit of audiovisual works

Generally, some of the laws of the countries analyzed maintain certain formalities (requirement to enter the works and/or contracts of assignment of rights in the IP register), although, because of the application of international regulations, such formalities would not apply to foreign rightholders.

Argentina: Works must be registered to be protected; however, this only applies to Argentinian works owing to the application of the Berne Convention. Also, the *transfer or assignment* of rights must be entered in the National Intellectual Property Register, in accordance with Article 53 of Law 11,723, although this obligation only refers to the total or partial sale of rights. Consequently, the majority of the transactions commonly carried out in the audiovisual sector (such as assignments, transfers, authorizations and licenses, whether exclusive or not) are left out.

Legal deposit is regulated on a mandatory basis jointly with registration.

Brazil: The registration of audiovisual content is neither required nor customary. However, it is mandatory to obtain a Brazilian Product Certificate, issued by the Brazilian Film Agency, if the audiovisual content in question meets certain requirements.

Legal deposit is only mandatory for musical works and phonograms.

Costa Rica: It is not obligatory to register audiovisual works, given that there is no local entity to manage this. However, a registration can be made with declaratory effect in the National Register of Copyright and Related Rights, in which case a copy of the work must be deposited.

Ecuador: It is unnecessary to register works to protect them or transfers of rights to make them effective.

There is also no explicit obligation in the laws in relation to legal deposit, although the Organic Law on Culture does indirectly mention that the distribution of physical copies of any kind of work requires prior legal deposit. In addition, it is interesting to note that, generally, audiovisual works produced in Ecuador *automatically* become part of the national cultural heritage 30 years from the first dissemination, which implies reinforced protection found in few laws around the world.

Peru: It is not mandatory to register the works in the IP register; however, legal deposit is obligatory when copies of such works are to be distributed in physical format.

Uruguay: Works do not need to be registered, but IPR transfer acts and contracts must be registered, in accordance with Article 8 of the Copyright Act. However, in copyright law regulations it is clarified that this registration is optional for audiovisual works and, in accordance with the requirements of the Berne Convention, for foreign works of any type.

Legal deposit is also not mandatory in Uruguay.

4.3.11 Summary of regulations by country

A table summarizing the main applicable provisions has been published together with this study.

5. CONCLUSION

Despite the recent proliferation of trade agreements that help to raise protection standards uniformly in the countries studied (and in others in the region), these agreements generally allow countries considerable flexibility to incorporate IP regulations. Moreover, except for the Berne Convention, the Rome Convention, the TRIPS Agreement and the WIPO Treaties (remember that Brazil is not a party to the latter), there is no norm that consistently regulates the digital aspects mentioned above throughout the region. Such a norm would undoubtedly facilitate the development of an online digital market for audiovisual content by establishing unified protection standards, which would in turn simplify the licensing of content and its protection against infringements and piracy.

Regarding preferential trade agreements, in a recent study¹⁰³ on the state of regional integration in Latin America and the Caribbean, the Inter-American Development Bank proposed to leave the web of preferential trade agreements behind and is now calling for the creation of a broader FTA among all the countries of the region, into which IP would be incorporated in a second phase. The organization highlights that, notwithstanding the political difficulties that such a proposal would entail, it is realistic, as the majority of regional trade is now duty-free.

The agreements on cinematographic co-production contribute to developing a single market in which the commercialization of audiovisual content through online digital means is fundamental.

However, and despite the regulatory commendable efforts made at the international level,¹⁰⁴ the national laws of the countries analyzed differ significantly on the regulation of who should be considered authors of the audiovisual work, the exclusive rights that performers hold, the term of protection of audiovisual works, the presumptions of assignment of rights to the producers and the rights that they originally hold, or the rights (to simple remuneration or otherwise) to be administered by CMOs. These are just a few examples of the issues most relevant to the development of an online digital audiovisual market.

And this is only in relation to IP, as *cinematographic* audiovisual production is also subject to significant regulation in several national laws, especially where public aid, promotional or stimulus measures apply, although it is true that international co-productions have legal frameworks in the region that provide peaceful legal standards.

In addition to the essential rules principally concerning audiovisual content, the online digital audiovisual market is affected by rules related to e-commerce, personal data protection, competition law, telecommunications and audiovisual communication services (traditionally broadcasting organizations), not forgetting tax treatment, the analysis of which goes beyond the limits of this study.

In short, even with partial alignment in IP legislation, to exploit audiovisual content, the producers of such content must still hold all the rights over all the creations and performances of which the content consists, as well as the recordings into which they are incorporated. This is required for:

- each territory in which exploitation is to be carried out;

¹⁰³ Mesquita Moreira, Mauricio. *Connecting the Dots: A Road Map for Better Integration in Latin America and the Caribbean*. Available at <https://publications.iadb.org/publications/english/document/Connecting-the-Dots-A-Road-Map-for-Better-Integration-in-Latin-America-and-the-Caribbean.pdf>.

¹⁰⁴ In the case of authors, for example, the matter has been studied commendably by the International Confederation of Societies of Authors and Composers. See: <https://www.cisac.org/Newsroom/studiesguides/av-remuneration-study>.

- the entire time during which such exploitation is to be carried out; and
- each of the means, systems or formats in which such exploitation is to be carried out.

In other words: to be able to develop an online audiovisual market, the regulations of each country would have to be considered and the contracts adjusted to the regulatory realities of each one. Alternatively, and in the absence of unified international laws for an online digital audiovisual market, the normal contractual practice in the sector would have to continue, which is to make maximum assignments with the largest territorial, temporal and modal scope possible, so that the producer can commercialize the produced content with the greatest possible flexibility.

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