

## **Committee on Development and Intellectual Property (CDIP)**

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EXECUTIVE SUMMARY OF THE SCOPING STUDY ON PROMOTING THE USE OF  
INTELLECTUAL PROPERTY IN CREATIVE INDUSTRIES IN THE DIGITAL ERA IN  
CHILE, INDONESIA, THE UNITED ARAB EMIRATES AND URUGUAY

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Madrid (Universidad Autónoma de Madrid).*

1. The Annex to this document contains the Executive Summary of the Scoping Study on Promoting the Use of Intellectual Property in Creative Industries in the Digital Era in Chile, Indonesia, the United Arab Emirates and Uruguay.

2. This document was prepared in the context of the Development Agenda project on Promoting the Use of Intellectual Property in Creative Industries in the Digital Era. It was prepared by Mr. Ignacio Garrote Fernández-Díez, Professor, Autonomous University of Madrid (Universidad Autónoma de Madrid).

3. *The CDIP is invited to take note  
of the information contained in the  
Annex to the present document.*

[Annex follows]

## **EXECUTIVE SUMMARY OF THE SCOPING STUDY ON PROMOTING THE USE OF INTELLECTUAL PROPERTY IN CREATIVE INDUSTRIES IN THE DIGITAL ERA IN CHILE, INDONESIA, THE UNITED ARAB EMIRATES AND URUGUAY**

### **I. OBJECTIVES AND OVERVIEW OF THE STUDY**

This Study<sup>1</sup> is designed to cover issues that must be addressed to foster the use of intellectual property (IP) rights in the digital era in Chile, Indonesia, the United Arab Emirates and Uruguay.

The Study aims to draft strategic recommendations to assist the four countries achieve their national objectives. It selects different issues in national legislations that should be addressed in five selected sectors (i.e., the audiovisual, videogames/mobile applications, music, publishing and fashion industries).

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

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

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

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

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

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

The current state of the creative industries in the four countries varies greatly, depending on national characteristics. There are also multiple differences in the degree of development of each sector within countries.

However, those differences should not be overstated. The practical functioning of the market is quite similar in heavily internationalized digital business environments, such as audiovisual, music, video games/mobile apps, and, to a lesser extent, publishing and fashion.

Regarding market structure in the four countries, most of the companies operating in the creative industries are domestically owned and operated. Many local companies are already

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<sup>1</sup> The full Study will be made available at: [https://dacatalogue.wipo.int/projects/DA\\_1\\_4\\_10\\_12\\_19\\_24\\_27\\_01](https://dacatalogue.wipo.int/projects/DA_1_4_10_12_19_24_27_01)

experiencing a process of differentiation in their operation (discriminating among physical goods and digital products and services), while others have directly transitioned to the digital market.

As for market evolution, the share of contribution of the creative industries to national GDP and workforces is growing steadily, being a big part of the digital market in the four countries. The video games/mobile applications sector is contributing significantly to the increase in sales in the four countries.

The audiovisual industry is characterized by having a strong digital market, heavily dominated by big international platforms, with some exceptions in countries like Indonesia and the United Arab Emirates.

The musical sector has almost completely made the transition to the model of music marketed as a digital service. In the four countries, the annual increase in sales of digital music is significant.

Publishing is a diverse sector, and its transition to the digital market is not homogenous. While the transition to purely digital exploitation has almost been completed in the four countries in the field of scientific publications, and, to a lesser extent, in press publications, the process is slower in other fields, such as e-books.

In the fashion industry, the sale of counterfeited goods is being facilitated by the rise of e-commerce platforms. However, the emergence of e-clothing in the metaverse and avatars for the gaming industry, among other new markets, is generating new opportunities for the industry.

The pandemic negatively impacted some sectors such as fashion, but also provided a boost for native digital industries like video games/mobile applications and accelerated the transition to digital streaming services in the music and audiovisual markets. In any case, the effects of the pandemic have been overcome by now.

All four countries have active national policies for the promotion of creative industries and have also made recent legislative reforms to promote the protection of intellectual and industrial property rights.

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

The constitutional framework and legal traditions in the four countries analyzed in this Study differ dramatically, but these variations are much less important in the field of copyright law.

This is a part of the law that has benefited from the coming into force of different international multilateral treaties with references between them. It has created a truly international copyright regime that is, to some degree, homogeneous. This guarantees the principles of territoriality and national treatment, a protection system with no formalities required, and a minimum level of protection for the duration, economic rights, exceptions, and limitations, among other things. All four countries regulate moral rights, and three of them base their legislation on the humanistic approach of the continental legal tradition, with Indonesia having a more hybrid character.

Regarding the role of IP rights in the different countries, the Study shows that copyright and related rights are a crucial part of the day-to-day operation of the creative industries in the digital markets. In fact, almost all sources of monetizing digital works and other subject matter – from classical streaming and downloading to newer markets such as sales in social networks – require the management of complex IP rights.

The Study has identified four areas of legal protection of copyright and related rights considered crucial to guarantee adequate protection of rights in the digital environment. These include the scope of works protected by copyright, and its adaptation to new forms to express creativity in a digital form, the economic rights protected by copyright, the exceptions and limitations to economic rights, and the rules on ownership and transfer of copyright and related rights. Those areas are addressed individually in the Study considering the national legislation of Chile, Indonesia, the United Arab Emirates and Uruguay.

The Study concludes that, in general terms, the legislation in the different countries is well prepared to protect works in the digital form. The four countries have also adapted their definitions of economic rights to encompass technological developments and have included rules to assign initial copyright ownership and transfer of economic rights. However, the national legislatures have not, for the most part, adapted their national exceptions and limitations for the new digital uses of works and protected subject matter.

Three further areas concerning the practical functioning of IP rights are dealt with in the Study separately for every country, namely the national system of collective management of rights, the enforcement of rights in the digital environment and the regulation of the liability of online intermediary services providers in cases of copyright infringement.

The national structure and practical functioning of Collective Management Organizations (CMOs) in the different countries have room to improve, and there are already significant efforts taking place at the national level.

On the issue of enforcement in the digital environment, the landscape varies significantly between the four countries, and the Study shows differences in a resumed way. It also concludes that, despite the multitude of efforts by law enforcement authorities in the four countries, levels of infringement remain high, particularly in the online environment. There is also room for improvement regarding the safeguarding of technological protection measures and rights management information, as the rules of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) treaties on these matters have not been, for the most part, correctly implemented into national laws.

Regarding the rules of secondary liability of internet intermediaries, the national legislation differs dramatically, as shown in the Study. The conclusion here is that legislative action could help to secure copyright protection.

#### IV. RECOMMENDATIONS TO PROMOTE THE USE OF IP RIGHTS IN THE DIGITAL ENVIRONMENT IN CHILE, INDONESIA, THE UNITED ARAB EMIRATES AND URUGUAY

The Study divides the regulatory recommendations for the selected countries into four main fields, namely, the adaptation of national copyright legislation to the digital environment, the creation of a healthy collective management rights ecosystem, the promotion of enforcement of IP rights in the digital environment and the regulation of the role of online intermediary services providers in copyright infringement. It also includes some recommendations on educational measures and adequate policies that could be adopted.

##### 1. Recommendations on the adaptation of national copyright legislation for the digital environment

The Study shows that the four countries have a solid legal basis to protect IP rights in the digital era. There is no need, therefore, for a radical change. However, it is recommended for national

legislatures in specific cases to consider small amendments to their national copyright acts to enhance legal certainty.

The recommended actions to adapt national copyright legislation to the digital environment cover the definition of copyright subject matter and economic rights, the adaptation of exceptions and limitations to digital uses of works, and the rules dealing with copyright ownership. In all cases, the recommendations are tailored in the Study specifically for every country.

By contrast, when dealing with existing rules on the transfer and/or licensing of copyright and related rights the Study does not make specific recommendations, due to the lack of an international consensus on this matter. Instead, it merely refers to a set of general principles or mandatory statutory rules that might be beneficial to include in national law if the legislature wishes to establish a more complete set of provisions to deal with copyright and related rights contracts.

The Study then moves on to new questions on protecting IP rights in the digital environment that might create uncertainties. This includes the legal status of works created by artificial intelligence engines, non-fungible tokens based on copyrighted works or other subject matter, and user-generated content.

In those cases, the Study suggests that a reliable solution can be found normally by national judges simply by applying existing national and international rules. That renders premature to initiate legislative action at the national level to specifically tackle these new realities.

## 2. Recommendations on the collective management rights ecosystem

The building of a functional CMOs ecosystem is vital to the practical operation of the creative industries in the digital market. It allows the complex issues of IP rights among rights owners and users to be managed more efficiently and in a cost-friendly manner.

The Study notes that the legal regime for collective management in the selected countries is diverse, so “one-size-fits-all” recommendations are not adequate. Instead, it includes a wide set of internationally accepted good practices and statutory rules that, if adopted, could improve the efficiency of domestic collective management ecosystems.

Those include a *de lege ferenda* proposition on the ideal national structure of collective management entities and how national rules should deal with the authorization for CMOs to operate in the country.

The Study also recommends the inclusion of adequate rules of membership and transparency for national CMOs, and some normative proposals to deal with the complex licensing issues in digital markets (including the implementation of mandatory collective management and extended collective licensing mechanisms in specific cases).

Finally, the Study underlines the importance of the creation and maintenance of databases to tackle the complex licensing process in digital markets. Those databases are a guarantee of accuracy and transparency, and a pivotal instrument for performing rights clearance in a cost-effective manner and reasonable time.

## 3. Recommendations on the promotion of enforcement of IP rights in the digital environment.

The Study sustains that only minor modifications are needed at the legislative level regarding civil remedies, administrative and criminal sanctions, and the safeguarding of technological

protection measures and information rights management. It also describes which modifications would be appropriate for each country.

It is recommended for the four countries the creation of an administrative mechanism to control and sanction online copyright infringement, as this is a particularly effective procedure to guarantee that rights are adequately enforced in the digital environment.

The Study particularly stresses that this mechanism should be carefully drafted in the law to guarantee proper respect for the fundamental rights of freedom of expression and information. It also states that any administrative procedure implemented must balance the principles of speed and the effective protection of the right holders with those of proportionality and the right of defense of the online copyright infringer, who, in any case, must have the opportunity to be heard.

#### 4. Recommendations to regulate the role of online intermediary service providers in copyright infringement

The Study affirms that a crucial part of the protection of rights holders against online infringement is to regulate the role of online intermediary services providers (OISPs).

On this issue for Chile, it is recommended to adapt existing provisions to new technological circumstances. For Indonesia, the United Arab Emirates, and Uruguay it is advised to update their copyright law to regulate the liability of OISPs in the event of copyright/related rights infringement, following some *de lege ferenda* rules or models at the international level already in place.

It is also recommended for the national legislatures to select a “vertical” approach, specifically drafting legislation to establish the role of OISPs in cases of copyright and related rights infringement. To do so, the Study recommends differentiating among the situation of “classic” OISPs performing acts of mere intermediation and online content-sharing service providers (OCSSPs)

For classic OISP, it is recommended a standard system of limitations on liability or safe harbors. The Study describes some core principles of such a system that would be appropriate to include, and suggests that, in some scenarios, a dynamic injunctive relief-based mechanism might be sufficient to adequately protect right holders against online infringement.

For OCCSPs, the Study argues that it seems preferable to attribute liability, in principle, to the service provider for the infringing acts carried out by its users, which can be evaded a posteriori if certain conditions are met. The Study details some specific recommendations on how such a system could be drafted into national law, stressing that in any case, national legislatures must establish appropriate guarantees to avoid unduly restrictions of the user’s freedom of expression or the exercise of national exceptions and limitations to copyright and related rights.

#### 5. Recommendations on educational measures and adequate policies to promote the use of IP rights in the digital era

It is recommended for the four countries to apply a wide set of educational measures specifically targeted to users, enforcement authorities, rights holders, and rights management entities.

Those measures should be used to raise awareness in the public on the importance of respecting copyright and related rights in the digital age. They also have to be designed to increase proper knowledge among rights holders on what rights are applicable to their content and how to effectively market their works and other protected subject matters to prevent third-party infringements.

The Study specially recommends that private and public stakeholders invest substantially in providing proper legal knowledge for companies exploiting creative products and/or services in the digital environment.

It is also recommended that efforts should be continued to properly educate judges dealing with IP disputes, including the creation of judicial bodies specialized in IP disputes.

The main recommendation on the policy-making side is for the four countries to have a specific national policy to promote IP rights in the digital markets. The digital economy presents challenges that make a policy tailored to the exploitation of works and other subject matters in such an advisable economy.

From the institutional point of view, the Study recommends the creation of an independent copyright office as a governmental agency, separated from the industrial property office. The practical functioning of copyright and related rights has sufficient peculiarities and differences with other IP rights to justify such separation. A national task force devoted to the massive infringement on the Internet is also recommended.

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