

COPYRIGHT MARKET IN COLOMBIA

TITO YEPES • MAURICIO RAMÍREZ

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AUTHORS

TITO YEPES
MAURICIO RAMÍREZ

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Copyright Market in Colombia.

Authors: Tito Yepes, Mauricio Ramírez.

Fedesarrollo, Directv, Bogotá, D.C., 2019

ISBN: 978-958-52187-2-7

Format: 17 x 24 cm | Pages: 114

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ISBN: 978-958-52187-2-7

First edition: august 2019

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Fedesarrollo
Bogotá D.C., Colombia
www.fedesarrollo.org.co

Directv
Bogotá D.C., Colombia
www.directv.com.co

Design and diagramming: David Russi • [behance.net/davidrussi](https://www.behance.net/davidrussi)

Translation: Victoria Escobar Sierra

Printing and binding: Open Gráficos
Impreso en Colombia | Printed in Colombia

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EXECUTIVE SUMMARY

The market of copyrights and related rights is one of the pillars of the orange economy. In this market, licenses or authorizations are traded for the use of intangible goods such as literary, scientific or artistic creations recognized by the laws of Colombia and by most legislations around the world. Copyright and related rights ensure that creators and owners are recognized as participants in the process of producing the works and get paid for their use. It is a market linked to a high-complexity value chain with multiplicity of agents participating in each exchange.

This study focuses on authorizations for public communication and commercialization of musical and audiovisual Works. “Works” is capitalized to refer to those that are subject to copyright according to the definitions under Law 23 of 1982, which includes the related rights that complement the initial authorship represented in copyright with value-added until reaching the final Work as known by the public. The study fills a gap in Colombia of a comprehensive presentation about this market beyond the legal framework. It raises multiple questions to be expanded by researchers and market participants.

The copyrights and related rights market has multiple products where Works can have a wide variety of presentations and therefore different prices for each presentation. The same song constitutes a different product if you listen in a private or public sphere, just to mention a generic difference, although there are multiple alternatives depending on the media and value-added transformations complementing the Work. This is possibly the largest source of confusion for the user industries in Colombia: when obtaining an authorization, there is not enough information or full understanding that they have only paid for one of the presentations.

WHAT IS THE GENERAL CONTEXT OF THIS MARKET IN COLOMBIA?

The copyright and related rights market in Colombia is experiencing a great deal of conflict because of the need to adapt regulations to the complexity of the creative processes, technological changes, and the great variety of participants. This conflict needs to be oriented constructively to further boost the creative industries in the context of the objectives set out in the 2019-2022 National Development Plan.

The market in which copyright and related rights are traded is small compared to other sectors of the national economy, albeit it has grown strongly over the past decade doubling its size. Subscription television is the most dynamic subsector, while radio, open television, advertising design, book and magazine publishing, and periodicals have reduced their participation, even though all presented positive growth similar to the overall growth rate of the economy. Notwithstanding, this is a growing market due to the increase in time spent by final users on leisure and reading activities. Also, it is a market in constant disruption due to the entry of new participants with technological changes, which is a traditional element in the history of this market.

Overall, rights holders are effectively benefiting from the growth of the sector. The payment of royalties increases consistently with the increase in productivity in the sector, which is measured as income or value added per employee. However, this growing relationship would have been expected to be caused more by intensity in the use of Works than by the level of productivity. When breaking down the sample of companies into those that use the Works more and less intensively, there is no statistically significant change in the curve that measures the relative importance of royalties on income or value added. In other words, royalties are paid mostly by more productive companies, but not necessarily by those using the Works more intensively.

Sector averages, however, do not allow to look at specific situations of royalty distribution among members of a segment; for example, among members of Collective Management Societies. The referred technological disruption makes it possible to conclude that, despite having a growing market, some market players may be absorbing negative effects caused by the market permanent re-accommodation.

HOW ARE COPYRIGHT AND RELATED RIGHTS MANAGED?

The management of rights in Colombia is done through the Collective Management Societies –(CMS)— recognized by the National Copyright Office, namely: the Society of Authors and Composers of Colombia SAYCO, the Association Of Colombian Phonographic Interpreters and Producers ACINPRO, the Collective Management Entity for Rights of Audiovisual Producers EGEDA, ACTORES Colombian Management Society, Audiovisual Directors Colombian Society DASC, the Colombian Center of Reprographic Rights CDR, and the Colombian Network of Writers for Audiovisual, Theater, Radio and New Technologies REDES.

Individual management (IM) is also recognized in the Colombian legal system, due to the Constitutional principle of the right of association that implies the non-obligation to belong to a collecting society in order to manage rights. However, the coexistence of collecting and individual managers has created tensions as users are increasingly visited by a greater number of copyright and/or related rights representatives in addition to CMS. In multiple cases they faced threats of legal processes and there is confusion in the market affecting users, collective management societies and right holders.

Individual managers do not have a clear and detailed regulatory framework that governs their actions. The poor regulation of this modality of copyright management has opened up a space for these new players to enter the market without the same legal duties and obligations as the CMS. This has led to market distortions: atomization of copyright administration, uncertainty for users about the payment of obligations, and, as a result, legal uncertainty for the market chain as a whole.

The economic benefits of collective management must be balanced with the freedom of association. On the one hand, CMS must be allies of users by speeding up the payment of royalties and avoiding operational difficulties, and allies of the holders of copyright and related rights by reducing management costs. On the other hand, individual managers, although they materialize the right of association, manage few authorizations for the use of the Works. It leads to no cost savings in management and make it more difficult for users to have clarity on the process. In an extreme case, hundreds of users would have to manage as many contracts as the holders exist. Maintaining the dual scheme of collective and individual management requires necessarily that the National Copyright Direction also has legal and administrative instruments to oversight the individual management.

HOW ARE PRICES OR RATES SET?

The main element for understanding rate determination in this market is that Work availability is unlimited, unlike with other goods in which there is rivalry between consumers and limitation of materials. Normally, competition carries prices to be equal to the marginal cost of production, which includes material costs, capital returns, wages and taxes. Since Intangible Works have virtually no direct marginal costs, the prices of the Immaterial Works would approach to zero. Unauthorized uses of the Works, for example, do not affect their availability. If no action is taken to enforce the payment of the authorizations granted by the authors, there would be an unlimited and unpaid use of the Works. That is, the market fails in the creation of prices via competition.

The criteria for defining the values of rates and players who have the power to intervene in conciliation mechanisms respond to the need to ensure the maximization of the social welfare achieved when the value of the rates guarantees the availability of Works and there is no competitive impact (Baumol, 2004).

In Colombia, State intervention in rate fixing is low and not intensive compared to other countries. It follows the principles of proportionality in relation to the use made of the Work; transparency that makes it compulsory to publish rate schemes; and the requirement that rates fixing be a result of a consensus between the CMS and the users. Lack of validation or accompaniment in the conciliation process by some authority reduces the rate setting process to one step with no iterations between parties. After rates are set, in accordance with Article 242 of Law 23 of 1982 and Article 2.6.1.2.6 of Decree 1066 of 2015, the only way to request their review is by applying for an alternative settlement mechanism in a civil court (or the DNDA, fulfilling the role of a civil judge). The system has numerous lawsuits.

The national statistical office, DANE, has an Annual Services Survey (EAS) that shows that sectors that use copyrights (royalties as a proportion of costs) most intensively tend to have a payment range much narrower and lower than other activities. Several reasons could explain this: differential treatment towards these sectors, greater bargaining power of those sectors that use copyright more intensively or because of the composition of the royalty segment from the EAS, which may vary according to the industries analyzed.¹

An exception, without a doubt, is film, video, TV program production, sound recording and music editing, which are among the activities with the widest range of payment. This can be

¹ The survey defines royalties as payments caused by trademarks, patents, copyrights, rights to use the trade name, licenses, SAYCO, ACINPRO and others. Unfortunately, for this survey it is impossible to disaggregate the data to isolate the copyright payment.

explained by the view that copyright corresponds to the main input without which services in the sector could not be provided. The EAS shows that companies that are above the median income in their sector pay higher royalty ranges in proportion to costs. This could be due to a lack of control by the CMS over the relatively smaller establishments.

The comparison of rates reported by the CMS regulations and those actually paid, and reported in the EAS, shows that some activities may have greater margin in the consultation process and that companies in the same activity are sufficiently heterogeneous to make the rates established in the tariff regulations and those observed to differ. For example, when the charges of the CMS tariff regulations are added, the companies that perform the subscription television activity would pay 13.25% of their gross operating revenues. However, the average royalty payment as a proportion of the average income of Division 61 of the CIU "Telecommunications", to which the subscription television activity belongs, is 1.20%. This would reflect that (i) some telecommunications activities, such as voice or data transmission, have different fees than subscription television, (ii) the negotiation process between the CMS and the companies favors the industry, although discrimination of rates could exist, and (iii) fees discrimination may be due to the heterogeneity of the companies in the same activity, for example, when the size of the company establish a different rate per subscriber.

As an essential input, radio stations employ authorizations for the use of Works and pay a fee which is very close to what is established in the CMS's bylaws, and also the highest effective rate compared to other sectors. For the restaurant, *catering* and bars, and accommodation sectors, there is a much lower negotiation margin. While bylaw rates include a payment representing 0.66% and 0.55% of gross revenue respectively, the rates actually paid are on average 0.80% and 1.20%. In other words, there is an effective payment higher than what is contemplated in the bylaws. This may be due to not only less room for negotiation, but because the royalty payment registered in DANE's survey includes both copyright and other payments such as trademarks, licenses and use rights for trade names.

WHAT IS THE ROLE OF THE LEGAL FRAMEWORK?

This is a changing market by definition. Its long-term stability can even be a bad sign, as creativity and transformations are inherent to its nature. Under these conditions, the legal framework must be equally dynamic and adaptable. The regulations on copyright protection seek to guarantee that the necessary tools are in place to ensure that rights holders get paid for the use of their Works.

Without an adequate legal framework, the market of copyright and related rights would not exist. The incentive to creative activities involved in the production of the Works requires that remuneration to authors will not be reduced or disappear for unauthorized uses. Protection is crucial, as copyright-intensive goods are intangible and infinitely reproducible, even more so in a digital environment where the quality of the Work is not affected by copying, whether authorized or not.

A weak legal and institutional framework creates weak incentives and alienates society from the greatest profit it can gain from cultural industries. It causes distortions and conflict, because the authors will seek compensation for the lost remuneration in segments where there are unauthorized uses by charging higher rates to users that are easier to monitor and enforce.

ARE THERE CONCEPTUAL CONFLICTS IN REGULATION?

A general view would lead to the idea that there is an overlap of regulatory roles between the antitrust or competition law framework and the intellectual property framework, given that the two fronts generate definitions that guide the copyright and related rights market. However, a detailed review allows understanding that its functions and objectives are different and have a high degree of complementarity. The protection of copyright and related rights is one of the branches of intellectual property that seeks to protect the creative industries from the inconvenient results of an unregulated operation. Competition law develops marginal interventions to prevent the concentration and exercise of monopoly power.

The competition law entity in Colombia, the Superintendence of Industry and Commerce (SIC), plays a cross-sector role in the economy; therefore, its regulatory framework is not developed according to the particularities of the copyright and related rights market. It makes a subsequent control by applying mainly sanctioning penalties that signal the market on acceptable trading practices according to the definitions in the Civil Law. In this way, its principle of action is not guiding the functioning of companies as it cannot be seen as a regulator. However, companies in this market, as in all markets, must be subject to the competition ruling as a central element for the correct functioning of markets.

In contrast, the National Copyright Office (DNDA) was created and operates for the care of the particularities of the copyright and related rights market. It is a specialized agency, with specialized personnel, for a market with a key conceptual difference compared to other markets. Its legal framework is closer to the intangibility of the Works and its sole offeror

characteristic for being original creations, in contrast with multiple suppliers in markets of tangible goods. Although the quality of market competition must be preserved by SIC, there are particularities that only a specialized agency such as DNDA, with a regulatory role, can undertake.

COULD A ONE-STOP SHOP FACILITATE THE MARKET OPERATION?

It is necessary to maintain the conceptual division between the objectives of setting rates and rates collection, although they may be united in a one-stop shop. In fact, SAYCO and ACINPRO Organization (OSA) perform both roles in the market of premises open to the public. In particular, individual rates for each of the copyright and related rights components should be the result of a negotiation process between CMS and user sectors. Of course, a one-stop shop, which we relate to the concept of a collecting entity, could also be the trading space in which rates could be defined.

It is best to strengthen rate negotiation mechanisms without replacing them with technical models while consolidating the collection models where they already work. It is required to document and consolidate a legal statute of the rate setting for each type of Work and component of copyright and related rights—to identify and to document where the rates are already clearly defined and accepted, and the current status of legal disagreements.

WHAT IS THE SITUATION OF THE TOPIC KNOWN AS *MUST CARRY* IN COLOMBIA?

Must carry is an exception to the payment of related rights for retransmission which has been causing great legal controversy. According to the Law, supported by jurisprudence, the retransmission of the signal from open television channels by subscription television operators does not generate an economic retribution or payment for the related rights.

The General Secretariat of the Andean Community (CAN) recommended repealing these provisions as they go against the Community agreements. As Colombia has not implemented the recommendation, the CAN Court of Justice, as we are writing this report, is evaluating the alleged breach. The parties of the process, the Colombian State and RCN and Caracol open television channels, have already presented their arguments and a sentence is expected.

WHAT OTHER ISSUES AFFECT COMPETITION IN THIS MARKET?

The CMS have monopoly power because they are presumed to be unique representatives of a broad repertoire of a type of Works, unlike individual copyright or related rights holders that do not have a dominant position despite the exclusivity of use over their Works because there are multiple holders. However, the presumption of a broad repertoire must be preserved and strengthened as it gives meaning to the management role of CMS for user sectors. They facilitate market functioning by centralizing rates payments. Even more, in other countries there is the concept of a global repertoire while individual management outside of the government authorized CMS is not allowed.

The intermediation of CMS in the exchanges among rights holders and end users implies challenges for competition protection because CMS are simultaneously involved in the rates fixing and in the distribution of royalties collection between rights holders. This means that CMS have a dominant position on both sides of the market and a high potential for asymmetric information since each collecting society manages copyright or related rights that is not managed by any other CMS.

In Colombia, SIC has recognized the dominant position of a CMS versus their associates and, by Resolution 76278 of 2016, it sanctioned SAYCO for abuse of its dominant position. For the market side where authorizations of Works' use are granted, the SIC has not initiated any dominant position sanctioning action. However, users have reported multiple complaints about CMS alleged rate abuses. These complaints have resulted in lawsuits, legal processes and press complaints. These said abuses are also frequent in other parts of the world. The Max Planck Institute for Intellectual Property and Competition (2013) conducted a report for WIPO that includes a chapter with extensive documentation about legal sentences in several countries (Latvia, Italy, Ireland, Spain, Lithuania, Finland, Hungary, Mexico, Croatia and Bulgaria) and shows how the corresponding authorities have sanctioned CMS for rate abuses or exercise of dominant position.

In addition to this monopoly status of the CMS that has to be properly assessed, strengthened and regulated, in the copyright market there are three more distortions accepted by the Colombian Law:

- I. Price discrimination by the CMS: in Colombia, CMS set reference rates and then an individual negotiation with each user is conducted. This situation leads, by definition, to the existence of different rates for the same repertoire and for users in the same industry. This is unusual compared to other copyright and related rights markets, where the negotiation includes all users in the same industry, so negotiated rates apply to

all comparable users. This situation is also the largest source of tension between the CMS and users in Colombia.

- II. Asymmetries in the bargaining power of some CMS: SAYCO's entitlement to use law enforcement to oversee the payment of rates creates an asymmetry in bargaining power with other the CMS and with the user industries. As a result, the process of rates agreement is limited to one round of negotiations in which the arrangement reached is not optimal. Both parties could be better off if they had the opportunity to negotiate in a greater number of iterations and with equal conditions in the event of negotiation failure.
- III. Co-existence of individual managers (IM) and CMS: this coexistence creates distortions in the market because it reduces the possibility of user industries to purchase a grid of a universal copyrights authorizations increasing their transaction costs. An institutional arrangement in which GI represent authors behind CMS (and not necessarily directly user industries) could respect the right to associate and ensure the universality of the repertoires represented by the CMS.

IS TECHNOLOGICAL CHANGE A THREAT TO THIS MARKET?

Technological change is necessary and inherent to this market and historically it has had a positive effect on copyright and related rights: it has changed the sources of income in the creative industries. For literary, phonographic and audiovisual production, these changes have reduced the fixed and variable costs of the production and reproduction of Works allowing greater dissemination, but at the same time it has facilitated illegal reproduction.

The more modern media arise, the better definitions and mechanisms of remuneration to the creative industries should be. Hence, throughout history copyright laws have adapted to these technological changes and granted more rights to authors, allowing them to benefit from new sources of income created by technology (Okamoto, 2006), preserving incentives for the survival of the creative ecosystem.

In the phonographic industry, musicians and singers prior to the nineteenth century received their income from live performances. The emergence of the phonograph, the radio, different types of discs and the internet helped to expand the market and find new sources of revenue, despite the complex processes of adapting regulatory frameworks. In the television market, service by subscription (whether satellite or cable) has become very popular al-

lowing television to reach places that didn't have access to open television. Open television has seen its advertisement revenues shrink, also due to competition with internet channels (DNP, 2016).

These transformations are natural and complement the copyright and related rights market. The regulatory framework and collective management models need to adapt more quickly and regularly to technological innovation. The important aspect about these new digital channels is that they are now mainstream tools through which artists and their works become popular. This has allowed artists to increase other revenues, such as those from live performances and advertising. Management models today must create more holistic approaches and rely on innovation.

CONCLUSIONS AND RECOMMENDATIONS

Market

- Public policy must work to ensure that the regulatory frameworks for copyright and the right to competition are consistent and allow the development of this market.
- It is recommended to promote pedagogical instruments on the recognition of copyright and related rights by the industries that use the Works.
- It is proposed to provide negotiation mechanisms to CMS and users, so that the iteration is not interrupted by asymmetries in the negotiating power.

Regulations

- It is necessary to complete the regulatory framework around individual managers (IM).
- It is suggested to establish a sectoral negotiation of parametric criteria that allow establishing rates. However, the decisions of which parameters to apply and their values must be left entirely to the agreement between the parties.
- These parameters will be the reference for charges to individual companies that may remain part of the confidential agreements.

Institutions

- It is important to strengthen the surveillance and control capacity of the DNDA so that it can penalize the abuses of power that arise in the relationship between the CMS and the users.
- It is recommended to publish the repertoire of works that each CMS and IM represents, so that users make early decisions about the works they will use, saving transaction costs.
- Likewise, it is recommended to extend the monitoring function to individual management societies and other forms of copyright management.
- It is proposed to strengthen the single window as a goal-oriented to collection and facilitation of fee negotiations. However, it is not recommended to work as a pricing mechanism.

1. INTRODUCTION

Copyrights are those intangible goods derived from literary, scientific or artistic creation, recognized by the laws of Colombia and by most legislations around the world; they guarantee that creators and their owners are recognized for their work and remunerated for it.

Copyright, however, is not limited to receiving remuneration for the use of the works: there are other aspects related to the moral rights that are not alienable and that are a fundamental part of the legal structure that underpins the Copyright¹. Authorizing the use of a work, whether a payment is arranged or not, does not imply that the author has to accept any use or destination for his work. In other markets, the exchange implies the transfer of total responsibility for the use of the goods (flour to make bread, for example). An interesting recent case is the rejection of Ana Torroja for the modification of her song *Quédate en Madrid*, of 1988, intended to be done by a participant of the Spanish competition Operación Triunfo 2018. The organization, which had the necessary licenses for the use of the song's proprietary rights, had to explain the reasons to the composer who participated as a jury. However, the intense debate on a word that today is judged as homophobic, the artist exercised her moral rights and prevented the modification.

This research focuses on the authors' rights to authorize the use of their creations—or proprietary rights—, with emphasis on the music and audiovisual industries. We do not delve into situations in which the authors, in the exercise of their moral rights, oppose certain purposes for their works, despite having authorized the use of proprietary rights licenses. From now on, when we refer to author's rights we will be referring to author's proprietary rights, unless the difference is pointed out.

Another clarity that is important to point out from the beginning is related to the work. In this research we will refer to the Works (with a capital letter) to name those that are subject to copyright according to the definitions of works of the Colombian Law 23 of 1982. In this

1 Sentences C-1118 of 2005 and C-035 of 2015 of the Constitutional Court expand and specify that conception of copyright in Colombia.

text, Work also includes the neighboring rights component that complement the copyright, unless the differences are indicated when necessary. Neighboring rights are generated, for example, for artists, performers, or producers of phonograms, among others from a list that has been expanding in the Colombian case with different legal reforms². Work, then, refers to its final form, the form in which holders of copyright and neighboring rights have participated.

During the development of this document it will be shown that in this market, like in many others, the good—the Works—has a variety of presentations. It is a multiproduct market and therefore there are many different prices for each presentation. This is possibly the biggest source of confusion for the users of the Works: when obtaining a use authorization with certification of having paid the copyright, there is no complete information or understanding that it has only been paid for one of the varieties. Although the user rightly claims that he has paid for the variety he is using, the varieties happen to be related to each other and are not from different markets; they are nested in their creation and production process.

According to most of the participants of this research's workshops, an example always helps to understand what the work is and the copyright and neighboring rights. In simple cases, and up to a certain point, that is true. Let's see: back in 1942, Juancho Polo Valencia wrote *Alicia adorada* after his wife's death. More than two decades later, Alejo Durán made some arrangements, he musicalized it and interpreted it on the night he was crowned the first king of the Vallenato Legend Festival in 1968. Juancho Polo would have the author rights as a composer and Alejo Durán the neighboring rights as an interpreter and possibly an author for incorporating the music. Later on, in 1994, Carlos Vives recorded a new version of *Alicia adorada* on his album *Clásicos de la Provincia*, recorded with Sonolux. The successful album generates royalties for neighboring rights to Carlos Vives as an interpreter, for Sonolux as a producer and again as copyright for Juancho Polo as a composer, and possibly also for the different music and arrangements contributors.

The song continues being interpreted in several concerts and thus it continues generating new copyright and neighboring rights for live performances, whereas at the same time, when the phonogram is being reproduced in bars and restaurants, copyright is generated for public communications. The song could also be used on a television show or soap opera, adding more to that chain of value once more and generating additional neighboring rights to the previously mentioned for the broadcasting organizations who have put together the show.

² In this document we do not enter into the detail of each component, as it is not a revision of the legal framework.

The relationship between Juancho Polo and Alejo Durán was clear and relatively simple. The example helps in the beginning, but the story gets more complex every time that the creation is transformed into the chain of value of the creative industries. It could not be considered that the success of *Alicia adorada* exclusively depends on the space where it is presented and that Juancho Polo, and many others contributed to the Work's final form.

Even more this example allows for an understanding that the most successful Works are the ones that generate the most conflicts, because they produce more transformations and developments in the creative industries: more participants are involved in the construction of the value of the final Work, that will every time be different from the original composition.

This document seeks to approximate to the understanding of the main problems of the copyright market in Colombia, always keeping in mind a background in which the Works and remuneration for their use, despite being under a legal protection framework with a long tradition and international support, maintain a high complexity which is intrinsic to the creative industries. However, in general, this study focuses on copyright by public communication and disposal. These industries are intensive in Works protected by copyright or neighboring rights, and in Colombia they are defined in Law 1834 of 2017 or *Ley Naranja* as "sectors that combine the creation, production and marketing of goods and services based on intangible cultural content and / or those that generate copyright protection".

Some elements have been left out of this document, since the objective is to present the most relevant and ensure that the different participants understand the general state of the issues, other participants' position and, hopefully, they can reorient this divisiveness towards a constructive path in order to drive forward even more the creative industries in the context of the objectives set out in the National Development Plan 2019-2022 (Plan Nacional de Desarrollo 2019-2022).

To achieve this objective a revision of the institutional framework is made, an identification of the main participants, an analysis of the mechanism for the formation of fees and of the competition environment and an examination of the impact of technological changes impact and of the public policy instruments. For its development, multiple interviews were carried out, as well as workshops in order to consult the opinions opinion of government institutions related to the topic, user company associations, the open and subscription television companies, multiple lawyers specialized in copyrights and intellectual property in Colombia and abroad and the Collective Management Societies.

2. MARKET DYNAMICS

2.1. A GROWING MARKET

Great dynamic, but a fairly small market.

The growth of trade flows, technological advances and the growing importance of intellectual property rights have contributed to the consolidation of the participation of industries related to intellectual property rights in the global economy. (WIPO, 2017). It is estimated that a third of the products acquired in the world economy come from intangible goods (based on the profit for intellectual property rights), and that the incomes attributable to these in the 19 highest global value manufacturing industries increased by 75% between 2000 and 2014 (WIPO, 2017). The copyright-intensive industries, which represent a segment of intellectual property, have not been alien to the growth of the intensive industries in this intangible capital.

In Colombia, the average annual growth of the value added by industries related to copyright grew between 2005 and 2017 by 6.1%, reaching a share in the national value added of 0.85% in 2017, compared to 0.67% in 2005. In this period, the value added in this market (at constant prices in 2015) doubled: it went from \$ 3.2 trillion pesos in 2005 to \$ 6.4 trillion in 2017. Despite the good performance, the sector slowed down between 2015 and 2017 with an average growth less than 1.1%¹.

The importance of the copyright market in the Colombian economy increases when related industries are considered. Some estimates for Colombia suggest that, in 2008, creative activities and activities related to copyright alone contributed 3.3% of GDP and 5%

¹ These results correspond to the National Culture Satellite Account prepared by the DANE, which systematizes all the information for the economic valuation of cultural products and the activities that generate them. It includes activities related to literary creation (CIU 9001), musical (9002), theatrical (9003) and audiovisual (9004), although for the purpose of this document we exclude the subsectors cultural education and toy manufacturing.

of employment (WIPO, 2015)². Related industries, such as television content distribution, have increased their participation. The income of cable television subscription operators increased by 17% between 2016 and 2017, while the income of satellite subscription operators increased by 3% (ANTV, 2018)³. The DANE culture satellite account proves that the value added of subscription television grew at an average annual rate of 12.9%, which led this subsector to double its participation in the market of industries related to copyright. In contrast, radio and open television, advertising design, book and magazine publishing and periodicals reduced their participation, although all of them presented positive growth similar to the general growth of the national economy. In the Cultural Activities account the Work Creation subaccount stands out, which is the result of DANE's analysis of the SAYCO data. Its share in the value added of the sector was 0.39%, although it has also shown a similarity to the economy's growth.

2 These estimates include industries that are primarily dependent on copyright, interdependent (related) copyright industries, industries that are partially dependent on copyright and supporting industries. For more detail, see Castañeda et al. (2008) and WIPO (2015).

3 Current prices.

Table 1. Value added of Cultural Industries related to copyright in Colombia

	Annual Growth 2005-2017	Participation in the value market		Increase in participation
		2005	2017	
Performing arts	12.1%	0.9%	1.8%	0.9%
Visual arts	9.2%	0.1%	0.2%	0.0%
Films and videotapes	9.4%	2.5%	3.6%	1.1%
Movie show	10.8%	5.2%	8.7%	3.5%
Radio and television	4.6%	19.7%	16.6%	-3.1%
Television by subscription	12.9%	11.5%	24.3%	12.8%
Work creation or copyright	4.8%	0.45%	0.39%	-0.1%
Advertising design ⁴	4.2%	13.7%	11.0%	-2.7%
Books	-0.7%	16.3%	7.4%	-8.9%
Newspapers, magazines and periodicals	3.6%	23.6%	17.7%	-5.9%
Other editions	8.5%	2.0%	2.7%	0.6%
Music recordings	7.1%	1.6%	1.7%	0.2%
Live music shows	10.6%	2.4%	3.9%	1.6%
Total value added of the market (trillion pesos of 2015)	6.1%	\$3.2	\$6.4	
National value added	4.0%	0.67%	0.85%	0.2%

Source: Based on the DANE.

Growth based on changes in consumer habits

Consumers not only have more means through which they access goods subject to copyright, but the proportion of time spent on their use has also increased. In 2016, 92.8% of the population over 12 years old watched television, 66.9% used the internet and 64.1% listened to the radio. Regarding the content consumed by Colombians for their entertainment, the consumption of video (61.4%), recorded music (52%) and video games (20.5%) predom-

⁴ The Cultural Consumption Survey includes in the advertising design line item not only activities associated with advertising (7,310), design activities (7,410) and architecture and engineering activities (7,110), but also computer consulting activities and administration activities, computer installations (6,201) and edition of computer programs (software) (5,820). It is important to make this clear due to the enormous potential that the software has in terms of value added as a product that is protected by copyright. See, for example, article 23 of CAN decision 351.

inate. Other goods used for entertainment include reading (47% read at least one book), cinema attendance (40%), theater (17%), recitals (30%) and exhibits (12%) (DANE, 2018⁵).

On the other hand, the average hours dedicated to the use of communication media⁶ increased from 3.15 hours per day in 2012-2013 to 3.44 hours in 2016-2017. While in 2012-2013 people over 10 years of age spent an average of 18% of the time devoted to personal activities (17.55 hours) to the use of communication media, in 2016-2017 this proportion increased to 21.4% (DANE, 2018⁷).

However, with large differences in the intensity of use of works between sectors

The proportion of income of industries that use copyrighted goods in their value chains varies significantly between industries. At first it seems that a greater participation of works subject to copyright in the value chain (see Table 2) leads to higher royalty payments (include payment for the use of trademarks, patents, rights to use the commercial name, licenses and payments of copyright to the CMS). This is consistent with what the legal framework of copyright protection seeks. For example, in 2017, the programming and television transmission activities sector reported revenues of \$ 54.5 billion pesos and in total it allocated 4.0% (\$ 2.1 billion) to the payment of royalties. In 2017, the other sectors with the highest proportion of income allocated to the payment of royalties were gambling, cinematographic activities and advertising.

By digging into the DANE figures in a little more detail (with microdata that allows for looking anonymously into the companies one by one), it is observed that the payment of royalties increases consistently with the increase in the income or the value added of companies. However, when controlling by size (measured by number of employees) and by sector, it is observed that royalties increase with the increase in productivity. That is, royalties increase when the indicator of income (or value added) per employee and differentiated by sector increases. This is to be expected, because the benefits of the industries that use the copyright should also benefit the holders of those rights.

5 Data from the Cultural Consumption Survey (ECC) prepared by DANE.

6 According to the definition of the survey, this includes the following activities: watching television, videos or movies, listening to music, downloading music over the internet or listening to the radio, surfing the internet, chatting, playing with the computer or with a video game console, talking on the phone, reading books, magazines or newspapers.

7 Data from the National Weather Use Survey of Colombia for 2016-2017 prepared by DANE.

Table 2. Proportion of income of the sector destined to payment of royalties

Sector (Division CIU 4.0)	Income from rendered services (000 pesos)	Royalties generated (000 pesos)	Royalties / Incomes
Accommodation (Division 55)	\$4,862,862	\$60,758	1.2%
Edition (Division 58)	\$12,860,266	\$77,149	0.6%
Cinematographic activities (Division 59)	\$27,305,144	\$748,446	2.7%
Programming, transmission and broadcasting activities (Division 60)	\$54,513,918	\$2,163,448	4.0%
Telecommunications (Division 61)	\$134,237,418	\$1,601,903	1.2%
Information services (Division 63)	\$29,689,621	\$110,748	0.4%
Publicity (Division 73)	\$15,636,013	\$302,652	1.9%
Creative activities (Division 90)	\$12,422,080	\$161,368	1.3%
Gambling and betting (Division 92)	\$44,460,111	\$1,446,764	3.3%
Sport activities (Division 93)	\$14,891,550	\$4,798	0.0%

Source: Prepared by the authors, based on the Annual Services Survey prepared by DANE

Note: It is important to bear in mind that the previous table shows the aggregate behavior of each of the sectors. The royalties paid by the companies include the payment for the use of trademarks, patents, rights to the use of commercial names, licenses and payments of copyright to the CMS.

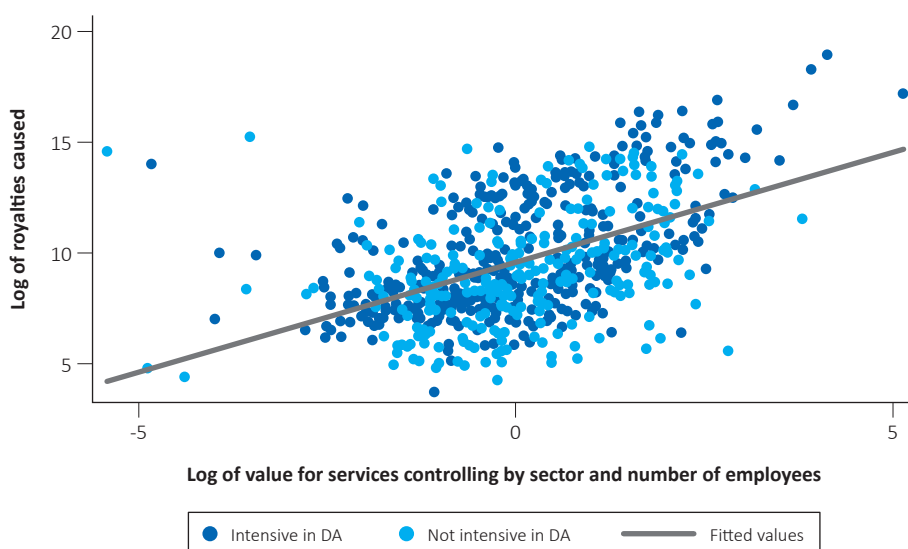
However, it would be expected that this growing relationship is due more to the intensity of the use of the Works than to the level of productivity. Otherwise, that the Works significantly influence productivity. If we classify companies as being more intensive in the use of copyrighted goods (blue points) and less intensive ones (red points), there is no statistically significant change in the curve that measures the relative importance of royalties in income or in the value added. It can be said that visually, a part of the cloud of blue points is identified above the set and a part of the red points is lower than the set, although statistically the difference is not relevant.

It is not a complete model of the determinants of royalties, but of correlations controlled by sector, size of the company and intensity in the use of the Works. Each point has been adjusted to be comparable, regardless of the sector or the number of employees (see Figure 1). These are basic corrections to make companies comparable, since it would not make sense to equate (without controlling) small companies with large ones or companies that belong

to really different sectors. The fact that there is no statistically significant correlation, despite what can be visually interpreted, indicates that on average, the payment of royalties is not due to the intensity in the use of the Works, but to the productivity of the companies (more income or value added per employee). The exercise is far from complete given that intensity is at the same time correlated with productivity. Nor does it propose a model of determinants of royalties, but rather a correlation that should be investigated not as an average, but in the context of the individual sectors, as proposed throughout this study.

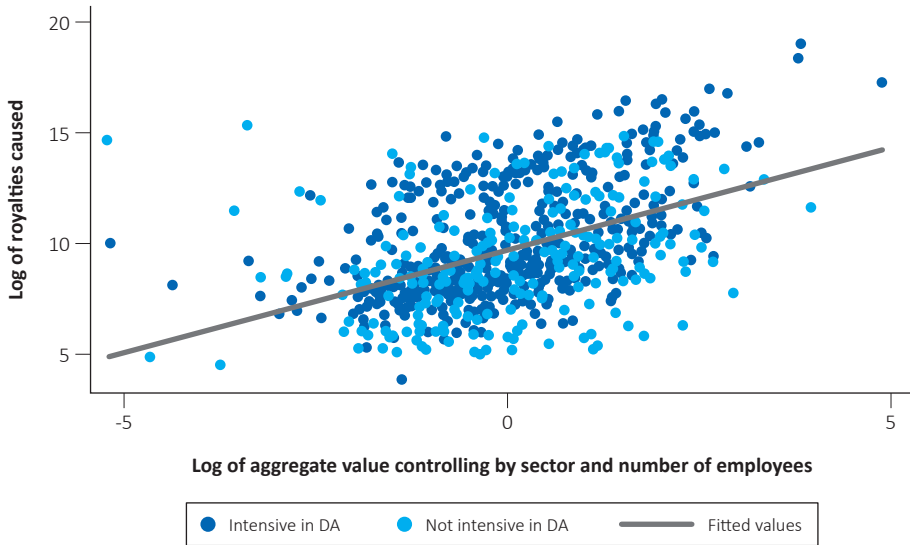
Figure 1. The greater use of copyright goods is positively related to more income and greater generation of value added⁸

Correlation between the logarithm of the royalties caused and the logarithm of income from services controlling by sector and size of the company



⁸ The correlation coefficient between the logarithm of royalties caused and the logarithm of income from services is 0.6362. The coefficient of correlation between the logarithm of royalties caused and the logarithm of the value added is 0.6004.

Correlation between the logarithm of the royalties caused and the logarithm of the value added controlling by sector and size of the company



Source: Prepared by the authors based on the Annual Service Survey by DANE (2018).

2.2. MARKET BASED ON THE PROTECTION OF COPYRIGHT

Without a legal framework of protection, there would be no market for copyright

Legal protection is fundamental for the existence of the copyright market and for the safeguarding of the result of the creative process of production of the works. There is an interest in society in establishing incentives for authors to play their role in creative processes. The interest in copyright protection is based on the economic result according to which the remuneration for the development of these intangible goods must be guaranteed in order to obtain a greater social welfare.

Every country develops policies that protect copyright. 176 States are part of the Berne Convention⁹ the protection of literary and artistic works, whose first text was produced in 1886. Countries have various copyright protection mechanisms, ranging from regulations that only consider the defense of competition in related industries, to sectoral regulation by each of the creative industries.

⁹ The Berne Convention or Treaty is administered by the World Intellectual Property Organization (WIPO) and Colombia acceded in December 1987 and ratified it in March 1988.

The regulation that protects the author's rights establishes as the subject of the protection the Works and not the necessarily activities to create them. Although formally the copyright refers to the "exclusive right by law of the author of a work to disclose it as his own creation, to reproduce it and to transmit it or disseminate it to the public in any way or by any means and also to authorize others to use it in definite ways "(WIPO, 1980), The goods subject to the policies for the protection of copyright are the result of a production process in which, on occasion, several rights holders intervene. The Berne Convention provides for the protection of literary and artistic works, including all productions in the literary, scientific and artistic fields, whatever the mode or form of expression.

In Colombia, the protection of copyright is established for scientific, literary and artistic works (Law 23 of 1982¹⁰), and its regulation is subject to compliance with some basic rules, agreed by the Andean Community¹¹ (Comunidad Andina), which take precedence over national laws of the member countries (Bolivia, Colombia, Ecuador and Peru). Copyright originates in the work of people who, using their intellect or ingenuity, produce goods or services that need protection, as do tangible assets over which property rights are exercised.

The copyright protection policy guarantees, according to the type of Work, a right of authorization or prohibition of the use of intangible property, whether or not it includes profit in proportion to its use. It also prevents the transfer of ownership of the property without the recognition of the right of the authors. The rights to economic exploitation of copyright are called proprietary rights and are, for the most part, transferable, available and available, and may be assigned or licensed¹². Then, the proprietary rights are the rights subject to exchange in the market and those that generate the profit to the author or to their substitute holders¹³. In contrast, the work is also subject to irrevocable, inalienable and perpetual moral rights¹⁴, such as the claim of authorship (paternity), opposition to the modification of the work (integrity)¹⁵, its first disclosure (uneducated), its withdrawal from circulation and its modification subsequent to its publication or start of circulation¹⁶.

10 Article 61 of the Colombian Political Constitution of 1991 establishes that it is up to the State to protect intellectual property for time and through the formalities established by law.

11 Andean Decision 351 of 1993.

12 Some limitations on these transfers were introduced by the Fanny Mikey and Pepe Sánchez laws. See, for example, paragraph 1 of Article 98 of Law 23 of 1982, as amended by Law 1835 of 2017.

13 Article 12 of Law 23 of 1982 includes the exclusive rights to authorize or reproduce the works, translate, adapt or make any transformation of the works, and communication of the work to the public through representation, execution, broadcasting or other medium. The law limits the transfer of economic rights to the modalities of exploitation, time and territory that are determined contractually.

14 Article 30 of the same Law.

15 As long as it causes a damage to the work or affects the reputation of the author.

16 The withdrawal of circulation and modification after its publication or start of circulation may only be exercised provided that the author indemnifies for the damages caused by the exercise of these powers.

The incentive to the creative activities that take part in the production of the Works supposes the creation of a legal framework that avoids that the remuneration to the authors is reduced by the non-authorization of its use. Protection is crucial, since copyright-intensive goods are intangible and infinitely reproducible, especially in a digital environment in which the quality of the Work is not affected by the copying of it, whether authorized or not. This implies that the use of the good by a person does not reduce the possibilities that others may have of using them (a concept known in economics as non-rivalry). They can also be played infinitely at an additional cost of zero, which could lead to everyone being included. Without being able to exclude anyone and without there being rivalry to use the goods subject to copyright, nobody would pay for these rights and therefore the economic incentive to the production of the Works would be null. Hence the definitive importance of the legal protection framework.

Without a legal framework of copyright protection, there would be a loss of social welfare, because if the free market does not pay authors, the creative industries would not produce. In the same way, a weak legal and institutional framework generates weak incentives and drives society away from the greatest benefit it can obtain from cultural industries. It also causes distortions and conflict, because the authors will seek to compensate the lost compensation in the segments in which there are unauthorized uses with higher charges to users who can be more easily supervised. The copyright market works by generating welfare profit for society given the use of the Works, but the existence of this market and its proper functioning are conditioned by the legal and institutional framework that protects those copyrights.

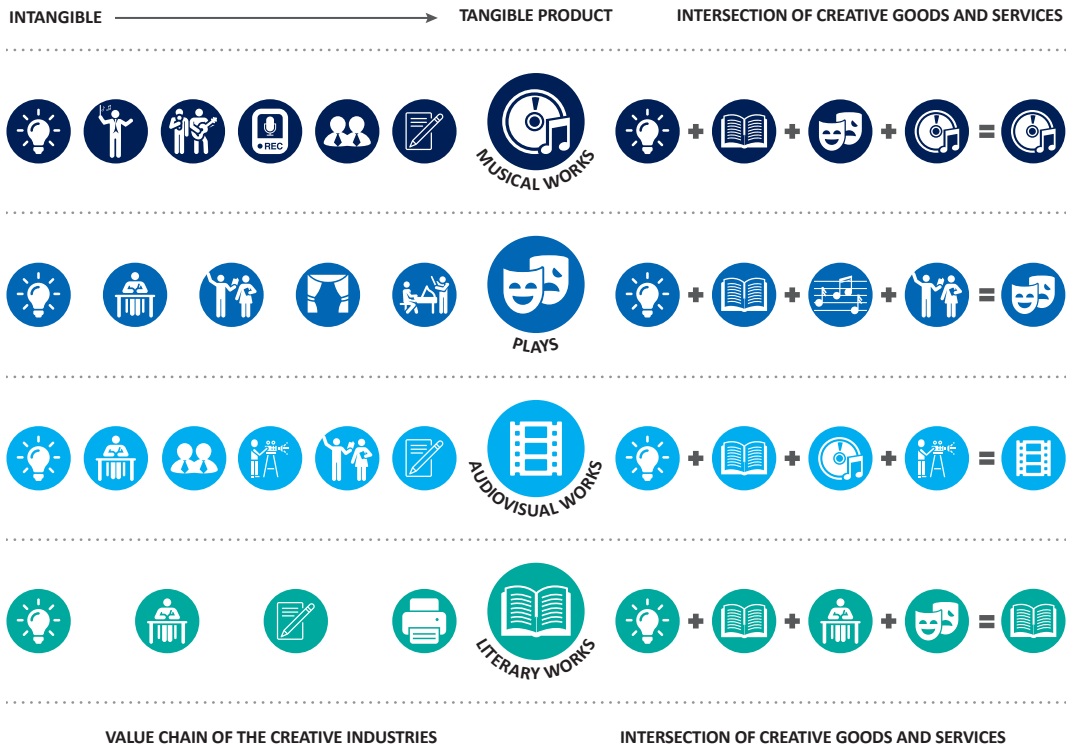
2.3. MARKET LINKED TO A HIGHLY COMPLEX VALUE CHAIN

The copyright market is characterized by the presence of a multiplicity of agents in a single exchange operation. For example, an audiovisual work can use written works, musicals and many other processes of authorship and interpretation that transform the work into its final form. In the same way, even works of different complexity, once developed, enter as supplies for other sectors. A single market operation implies the existence of different types of copyrights, some totally independent and others interdependent. Moreover, another market operation with the same Work that is presented by a different means of communication can generate a different combination of copyright and therefore give rise to another rate. This, of course, does not mean that each user has a different rate: A Work with the same use must have the same rate for every user.

The main reason for the protection of copyright is to preserve the goods and creative services as a result of effort, work and human talent¹⁷ in order to ensure incentives so that the agents that participate in the production of these goods and their related industries continue to be part of the creative process. It also has the fundamental role of being the protocol that allows multiple components to be combined in the value chain. This section presents the value chain of the copyright market, with the aim of illustrating the complexity faced by copyright protection policies to ensure the flow of value added between the different stages of production and in the use of these goods.

The final consumption of goods subject to copyright requires two large production processes: the first is the transition from the creation of artistic works to the materialization in a tangible good and the second is the intermediate use of the good (see Diagram 1). During the first process, the combination of different artistic expressions of one or several authors generates a tangible good and with the adequate level of maturity for use or consumption. For example, the production process of a song begins with the composer's idea and ends with its musical edition. However, in the process, an author who wrote the song lyrics and an interpreter who sang the song could also have taken part, as well as a sound producer who recorded the song using equipment that represents tangible capital investments. All the previously mentioned, author, interpreter and phonographic producer, are subjects of protection of the copyright or related rights.

17 There are also moral rights, as mentioned in the introduction.

Diagram 1. Creative process in the copyright industries

Source: Prepared by the authors. Reference figures taken from Power Point image gallery.

The relationships among the many actors involved in the production of a copyrighted good are symbiotic, as long as they are interdependent and benefit each other. The interactions of each writer, composer or performer¹⁸, along with other agents that carry out the same activity as them or whatever necessary to produce a work ready for its final use, highlight the mutual need to effectively obtain a compensation for the proprietary rights derived from the exercise of their activity¹⁹. As a result, the good or work produced represents the ownership of different authors and contributors of related services (see Diagram 2), and there arises a market in which the transaction on copyright and related rights is permanently observed. The negotiation between the owners of each of the components integrated in the works on their value and the proprietary rights is really common these days in the market.

¹⁸ From now on, the word author is used to refer to any type of copyright holder: composer, author, performer, actor, producer, and so on.

¹⁹ Article 4 of Law 23 of 1982 recognizes as holders of copyright and related rights within this value chain authors, artists, performers, producers, broadcasting organizations, assignees of the above and persons who obtain from a contract the rights derived from the production of a protected work.

In the second process- intermediate use of the good- the relevant industries use the works in their value chain to produce other goods or services²⁰. The participation of the good in the value chain depends on each industry, some being more intensive than others. Whereas in a nightclub a musical work that entertains and attracts audiences plays a very important role within the value chain, the public reproduction of the same work in the waiting room of a hospital plays a role of fairly minor importance on the final service's objective, in the health service case.

Diagram 2. Participants in the development of the works



Source: Prepared by the authors. Reference figures taken from Power Point image gallery.

This, however, does not imply that the related industries do not add value to the good before it reaches the final consumer. While some industries add a significant amount of value to the end consumer to acquire a transformed good, other industries use the works to add

²⁰ Or a new good subject to copyright.

value to their main service. For example, building a TV lineup adds value to several goods by studying consumers' preferences to achieve a consistent selection with their target market. This is opposite to the process of distributing work through infrastructure, compact discs or multimedia platforms.

The participation of multiple authors in the first process implies that the intermediate use of the goods in this second process generates a remuneration for each one of the authors involved in the production of the good. In Colombia, for example, the National Copyright Office identified the different licenses to be acquired in thirteen copyright-related industries (see Table 3). One case: To carry out concerts, two types of licenses must be acquired for the use of musical works: one for the participation of the author of the lyrics and music of the musical work, which is usually obtained in the collective management society SAYCO (Sociedad de autores y Compositores de Colombia), and another by the phonogram and the interpretation of the musical work set in the phonogram, generally obtained in the collective management society ACINPRO (Colombian Association of Interpreters and Producers of Phonograms). Meaning, that the use of the work implies the generation of a proportional remuneration for each one of the actors and interpreters who participated in the production of the work, remuneration that is based on the proprietary rights of the authors and of the rights related to the other participants in the creative process, and that will be in the hands of different holders if they have previously been transferred or alienated.

Table 3. Use of licenses according to the type of industry related to copyright

Type of good subject to copyright				
Service or copyright user industry	Musical Works	Phonograms	Reprography	Audiovisual Works
Establishments open to the public	<ul style="list-style-type: none"> Public performance of music in establishments open to the public Reproduction by digital storage of musical works 	<ul style="list-style-type: none"> Reproduction by digital storage of phonograms 	<ul style="list-style-type: none"> Reprographic reproduction of protected editorial material 	<ul style="list-style-type: none"> Public communication of audiovisual works in establishments open to the public
Concerts, events and musical acts	<ul style="list-style-type: none"> Public performance of musical works in live events or phonograms Public execution of musical works in promotional caravans and porches 	<ul style="list-style-type: none"> Public performance of phonograms in concerts, events and shows Public execution of phonograms 	<ul style="list-style-type: none"> Analogue or digital reproduction of sheet music 	
Production of phonograms	<ul style="list-style-type: none"> Reproduction of musical works in phonograms (phonomechanical reproduction) - special presses 			
Audiovisual production	<ul style="list-style-type: none"> Synchronization of musical works in audiovisual works and recordings 			
Multimedia production				<ul style="list-style-type: none"> Reproduction of audiovisual works in multimedia productions

Type of good subject to copyright			
Service or copyright user industry	Musical Works	Phonograms	Reprography
Production of radio and television commercials	<ul style="list-style-type: none"> • Reproduction of the musical work in a radio commercial • Synchronization of the musical work in a television commercial • Public communication of the musical work reproduced or synchronized 	<ul style="list-style-type: none"> • Public communication of the reproduced or synchronized phonogram 	Audiovisual Works
Telephony	<ul style="list-style-type: none"> • Digital storage and public availability of musical works 		
Internet	<ul style="list-style-type: none"> • Digital storage and public availability of musical works 	<ul style="list-style-type: none"> • Digital storage and making phonograms available to the public 	<ul style="list-style-type: none"> • Reproduction / making available of audiovisual works on streaming channels or other online channel.
Radio	<p>Broadcasting:</p> <ul style="list-style-type: none"> • Public performance of musical works on radio stations <p>Internet:</p> <ul style="list-style-type: none"> • Digital storage and public availability of musical works 	<p>Broadcasting:</p> <ul style="list-style-type: none"> • Public performance of phonograms on radio stations <p>Internet:</p> <ul style="list-style-type: none"> • Digital storage and making phonograms available to the public 	

Type of good subject to copyright				
Service or copyright user industry	Musical Works	Phonograms	Reprography	Audiovisual Works
Television	<ul style="list-style-type: none"> Public performance or for individual receivers of musical works 	<ul style="list-style-type: none"> Public execution or for individual recipients of phonograms 		<ul style="list-style-type: none"> Public performance or for individual receivers by wire, cable, fiber optics or other similar procedure of audiovisual works or interpretations.
Theater and dance shows	<ul style="list-style-type: none"> Public performance of musical works in dramatic, dramatic musical, choreographic or similar events 	<ul style="list-style-type: none"> Public performance of phonograms in concerts, events and shows 		
Educational or cultural institutions			<ul style="list-style-type: none"> Reproduction of protected editorial material Digital storage and making available 	
Public and private institutions, in general	<ul style="list-style-type: none"> Reproduction and public performance of musical works in telephone holding systems Public performance of musical works in environmental music systems Public performance of phonograms in environmental music systems 		<ul style="list-style-type: none"> Reproduction of protected editorial material 	<ul style="list-style-type: none"> Public communication of audiovisual works

Source: developed based on DNDA (2011) and information provided by the CMS

3. THE MANAGEMENT OF COPYRIGHTS AND COLLECTIVE MANAGEMENT SOCIETIES

The law on copyright protection recognizes the right to authorize or prohibit the use of works, to obtain a prior and equitable remuneration, to establish the way in which authors can exercise their economic rights and collect remuneration. The exercise of the proprietary rights to obtain remuneration requires that the supervision activities of the use of the property subject to copyrights and of the collection of the economic remuneration be carried out¹. The ultimate objective of these activities is to ensure that the necessary instruments exist for the author to access his remuneration and that it is not affected by illegal use through, for example, piracy. The protection of copyright introduces two types of actors in that market: rights managers and government entities in charge of the inspection and surveillance of these managers.

Individual and collective copyright management

Rights managers are societies, individuals or other figures that represent the proprietary rights of one or several authors and of the other persons who participate in the production process of a Work or repertoire. In the development of its object, the managers maintain two types of relationships: on the one hand, with the author holder of the proprietary rights over the Works they manage and, on the other, with the users of those Works. They are commercial relationships of different natures that determine the different types of existing managers. Among these, collective management stands out because it has the characteristic of managing large repertoires simultaneously, which allows it to reduce management costs and has the character of self-management by the rights holders' community. However,

¹ In Colombia, Law 23 of 1982 grants authors the right to authorize or prohibit the following acts: (i) reproduce the work, (ii) communicate the work to the public by any other means, (iii) distribute the original to the public and copies through sale, (iv) importing works made without authorization from the right holder, (v) commercial rental to the public and (vi) translating, adapting, making arrangements or transforming the work.

technological change has been transforming these principles: collective management allows greater control over the use of Works and their management costs are lower than individual management ones.

Collective Management Societies (hereinafter CMS) centralize rights (some of authors and others, related rights), facilitating access to authorizations for use by related industries, either within cultural industries or outside them. In this sense, they are allied to users, since they speed up the payment of copyright protected by law and reduce the possibility of unauthorized use. At the same time, collective management reduces management costs, since it makes it possible to take advantage of economies of scale in contract management.

In contrast, individual managers only have the ability to offer authorizations to use a single author's Works (or a few), which prevents the use of economies of scale and makes it difficult for the user to manage the payment of multiple obligations. In the end, hundreds of users would have to manage as many contracts as copyright and related holders exist. These economic benefits of collective management must, however, be balanced with the freedom to associate or not, as stipulated in the Political Constitution of Colombia, as the Constitutional Court has ruled on the protection of freedom of association (this is expanded upon later).

These economic benefits of collective management must, however, be balanced with the freedom to associate or not, as stipulated in the Political Constitution of Colombia, as the Constitutional Court has ruled on the protection of freedom of association (this is expanded upon later).

State institutions oriented to the protection of copyright

The entities in charge of the inspection and monitoring of the rights managers determine the way in which they can manage and collect the remunerations. In particular, surveillance and inspection of CMS should ensure the proper functioning of the market, which includes promoting the authors' rights and ensuring that welfare is materialized for the use of these goods in society.

On the other hand, the entities that protect the right to competition also intervene in the copyright market. In contrast to those who exercise surveillance and inspection on CMS, the competition entities play a transversal role in the economy. That is to say, they are in charge of the management of all the economy's markets and, therefore, its normative framework does not develop according to the particularities of each market. Another contrast of great

importance for the Colombian case, in which different reforms have been considered, is that the competition authority performs post-control, applying mainly corrective penalties for violations of the rights of the competition. Markets must function with established rules of trade and observe compliance with the competition law. It is not the responsibility of the competition authority to develop oversight functions to guide the operation of companies, as for example with public utilities. In essence, they cannot be considered as regulators, as is the case of entities that are born and operate with attention to the particularities of copyright.

In addition, copyright entities usually have a greater closeness to the intangibility of the Works and their unique character as original creations, in contrast to the more tangible goods of the markets where the competition authorities mainly operate.

Therefore, copyright protection policies become the public instrument that guarantees that authors receive remuneration in the exercise of their economic rights. and that encourages the creative industries.

The purpose of this chapter is to present the regulation of copyright management in Colombia. The first section presents the normative and institutional framework through which copyright and related rights are managed in Colombia. The second section presents the aggregate results of the copyright policy in this market in our country. This second section also includes an exercise that exemplifies how the regulation that regulates rights managers, their rules of distribution of royalties and the application of costs impact the aggregate result of the economy.

3.1. NORMATIVE AND INSTITUTIONAL FRAMEWORK OF THE COPYRIGHT MARKET IN COLOMBIA

The normative framework of the copyright market is defined by national laws, international treaties and jurisdiction that act as an antecedent in judicial decisions

In Colombia, the protection of copyright and related rights began with Law 1 of 1834, which guaranteed for a certain time the ownership of literary productions and some others (Pabón Cadavid, 2009). Later on, the Constitution of 1886, in its article 35, protected the literary and artistic property as a type of transferable property during the life of the author plus eighty years. In accordance with this, Law 32 and Decree 665 of the same year ordered the creation

of a general register of literary property, instructing the Ministry of Public Instruction to open books for the registration of works (Cavalli, 1986)².

Nowadays, copyright legislation in Colombia is based on Law 23 of January 22, 1982. Its objective was to establish a legal framework for the protection of these rights through the definition of market concepts, instruments through which the authors could materialize the remuneration for their economic rights, their limitations and exceptions, among other things.

A decade later, through Law 23 of 1982, the development of the institutionality of the copyright market led to the creation of the National Copyright Office (Dirección Nacional de Derechos de Autor- DNDA). This was born as an entity attached to the Ministry of Government (later Ministry of the Interior). Its functions, established in Decree 2041 of 1991, a focus on the legal context of the copyright component of intellectual property. In addition to designing, administering and executing public policy in the field of copyright, the DNDA was assigned the functions of managing the registration of protected works and controlling and supervising the CMS. The development of the institutionality of the policy for the protection of copyright sought to strengthen the instruments for the recognition of remuneration to the proprietary rights holders. Recently, Law 1915 of 2018 reformed the regime of copyright inaugurated by Law 23 of 1982, updating it to the context of the current digital environment.

Copyright payment exception: the common good over the particular good

In the 1990s, the signing of international treaties contributed to the maturity of the copyright protection policy. This ensured the existence of competitive environments for authors to develop their creative activities with legal certainty on a transnational scale. Within the framework of the Andean Community Commission, Colombia adopted Decision 351 of 1993 as an instrument establishing a regime for the protection of copyright and related rights in a multi-country environment (Colombia, Ecuador, Peru, Bolivia and, at that time, Venezuela). The binding nature of the Decision implies that any dispute in the member countries must be analyzed by the Andean Court of Justice.

Decision 351 of 1993 established the criteria from which countries could determine the exception of the payment of remuneration to the holders of proprietary rights. The possibility of finding works for free use responds to the need to guarantee the use of creations that

2 For a detailed analysis of the background of copyright in Colombia, it is recommended to consult: Pabón Cadavid Jhonny Antonio (2009). Approach to the history of copyright: normative background. Externado University of Colombia. Available at <https://revistas.uxternado.edu.co/index.php/propin/article/view/457/3624> and Rodríguez, R. (2012). Copyright in Colombia from a humanist perspective. Prolegómenos Magazine. Rights and Values, 15, 30, 141-159. Available at <https://www.redalyc.org/pdf/876/87625443008.pdf>

contribute to the development of societies by not requiring remuneration for their use. This type of goods, like, for example, mathematical developments, are those goods that generate higher value when the generation of new goods of greater value for the development of societies is guaranteed.

In accordance with article 11 of Law 680 of 2001, National Television Authority (ANTV) resolutions 2291 of 2014, 1022 of 2017³ and 683 of 2018 defined the conditions under which subscription television operators should ensure the distribution of the signal of open television channels. The first determined that the delivery of a signal from the open television channels could not be subject to payment of remuneration. The second defined that the pay-TV operators should not charge their users for the distribution of this signal. The third established that regional channels should be included in the TV operators' television lineup and that if a national HD channel were added, all the others should be included. These obligations led to a meeting between the rights of economic freedom of subscription television operators and copyright and related rights.

As regards economic law, the argument that the payment of remuneration for the use of copyright in the goods forming the programming of the open television channels is that there is no use of the property subject to copyright with profit as no value is generated by the distribution of the television signal. This analysis, based on the operation of the value chain, would imply the exception of the payment of royalties of the goods included in the programming of the open television channels. For its part, the common copyright framework of CAN Decision 351 provides that exceptions to the remuneration of proprietary rights must not cause harm to copyright⁴ holders. The colliding of both rights has motivated the taking of judicial actions by the open television channels and, at the moment, a decision of the Andean Court of Justice is expected (see Box 1).

The recognition of the different authors involved in the production of copyright goods by the law promoted the creation of new CMS

Subsequently, the Colombian State adopted other regulations and decisions that were modified and adapted the copyright market to the new realities and junctures (see Diagram 3). Decree 460 of 1995 regulated the Copyright National Registry, and the laws 1403 of 2010 (Fanny Mikey) and 1835 of 2017 (Pepe Sánchez) extended the recognition of the remuneration to the public communication of interpretations and cinematographic works, respectively.

3 By means of which article 11 of Law 680 of 2001 is regulated and compliance with the T-599 sentence of the Constitutional Court is followed.

4 Article 21 of Decision 351 of 1993 of the Commission of the Cartagena Agreement.

Box 1. The payment exception for related rights by retransmission: *must carry* in Colombia.

In Colombia, according to law and case law, the retransmission of the signal from the open television channels by the subscription television operators does not generate an economic consideration or payment for related rights of retransmission. This exception to related rights has caused a great controversy in the last years in this market and in the cultural industries in Colombia.

The exception is enshrined in Article 11 of Law 680 of 2001, which required subscription television operators to guarantee the retransmission of free-to-air Colombian television channels free of charge to users (known in Colombia as a *must carry*).

Subsequently, the decision handed down by the Superior Court of the Judicial District of Bogotá, within the framework of the file 2014-16592-06 (suit filed by Caracol Televisión SA and RCN Televisión SA for unfair competition by Telmex Colombia SA and others), stated that said article is a limitation or exception to the related right of ownership of broadcasting organizations, which is the legal authority to authorize or prohibit “the broadcasting of their broadcasts by any means or procedure”, legal authority enshrined in the literal Article 39 of Andean Decision 351 of 1993. The Tribunal considered that the three-step rule enshrined in the Berne Convention applies, and also argued that this limitation is indispensable in order to guarantee the population’s access to the television and to safeguard information pluralism. At present, private television channels must allow subscription television operators to broadcast their live signal without requiring payment of a consideration.

It should be emphasized⁵ that the exception concerns the related right of retransmission of ownership of private channels as broadcasters. In fact, the Andean Decision 351 of 1993, a supranational community rule, incorporated in domestic law as agreed in the Cartagena Agreement and which is superior to national laws, enshrines the provisions relating to neighboring rights, and at its disposal. “Article 33.- The protection provided for Related Rights shall in no way affect the protection of copyright in scientific, artistic or literary works. Consequently, none of the provisions contained in this Chapter may be interpreted in such a way as to impair such protection. In case of conflict, it will always be to what most favors the author”.

5 Clarification provided in response to comments on the preliminary version of the study, which asked to clarify that the controversy was not about copyright in general, but exclusively about the related rights of retransmission.

Sentence C-654/03 established that this exception does not ignore freedom of enterprise and is proportional to television policy. In that sense, and in order to guarantee cultural rights, the Constitutional Court, in Judgment T-599 of 2016, ordered the National Television Authority (ANTV) to guarantee the transmission of signals from regional channels throughout the territory national-must carry. In compliance with the mandate of the Constitutional Court, ANTV issued Resolution 1022 of 2017, modified by Resolution 683 of 2018, which requires closed television operators to retransmission, at no cost, the signal of the television channels open national and regional in both formats (SD and HD) and according to their technical capabilities.

The open television channels Caracol and RCN continued their legal dispute within the framework of the Andean Community of Nations (CAN) and sued the Colombian State before that organization. According to its arguments, *must carry* violates Decision 351 of the CAN, which establishes a Common Regime on Copyright and Related Rights.

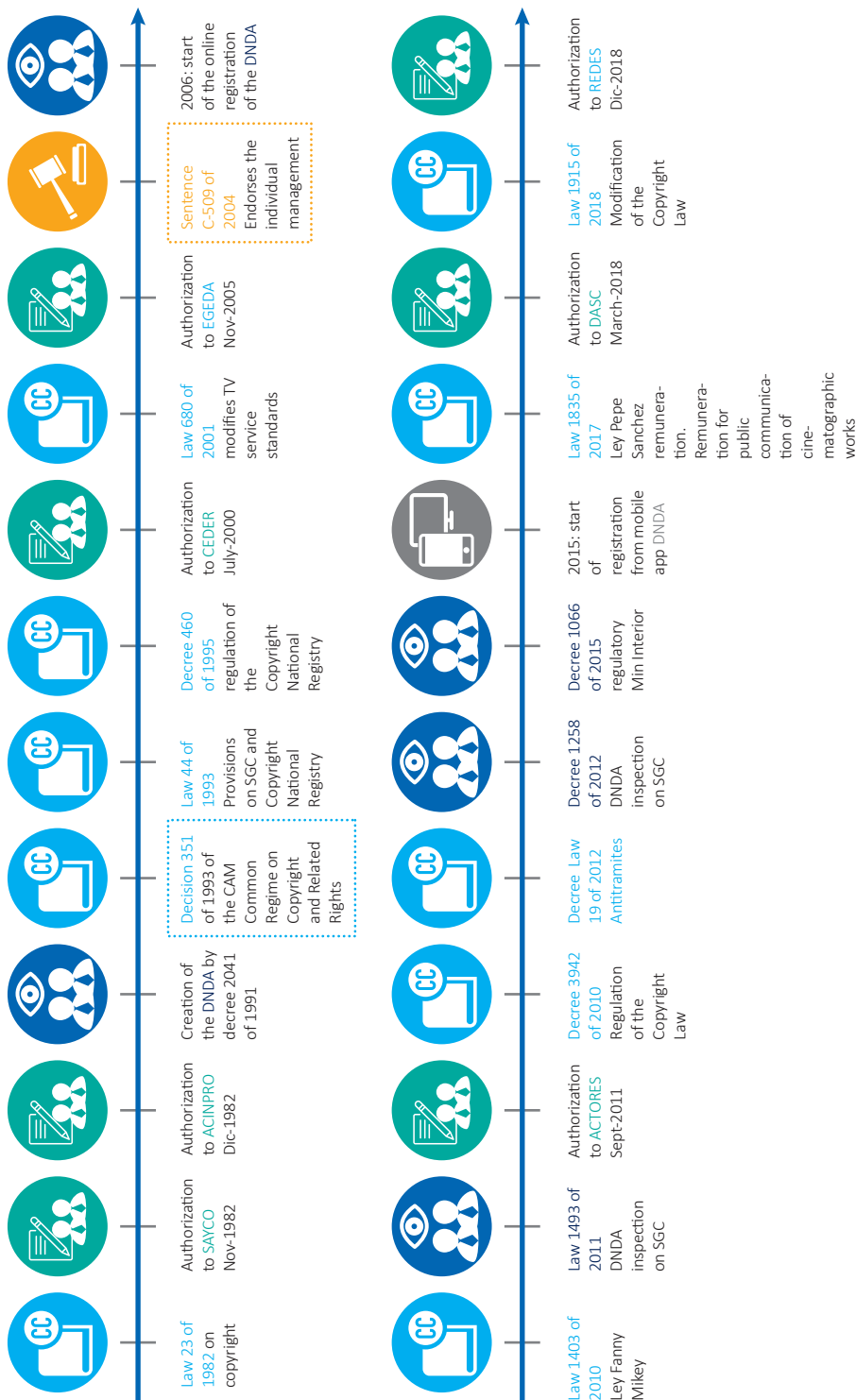
Verdict No. 003 of 2017 of the General Secretariat of the Andean Community determined that the *must carry* violated three articles of CAN Decision 351 (21, 39 and 42):

- Article 21 provides that exceptions to copyright should not prejudice the normal exploitation of works.
- Article 39 provides that broadcasters have the exclusive right to authorize or prohibit the retransmission of their broadcasts.
- Article 42 states that in the cases permitted by the Rome Convention, the domestic legislation of member countries may establish limits to copyright.

The General Secretariat of the Andean Community recommends repealing the provisions of administrative acts that go against the community regulations (Res. No. 2291 of 09/22/2014, Circular No. 10 of 04/23/2015 and Res. 1022 of 12/06/2017). As Colombia did not act, the CAN Court of Justice, at the time of writing, was evaluating and determining the alleged non-compliance. Both the Colombian State and the open television channels RCN and Caracol have set out their arguments in the process, so a verdict is pending.

As a result, the DNDA has provided six CMS with legal status and operating authorization to carry out the management of the proprietary rights related to the creation activities recognized in the national regulations: the Society of Authors and Composers SAYCO, the Colombian Association of Interpreters and Producers of Phonograms ACINPRO, the Collective Management of Rights of Audiovisual Producers EGEDA, ACTORES Colombian Society of Management, Audiovisual Directors of the Colombian Society DASC, the Colombian Center for Reprographic Rights CDR and the Colombian Network of Audiovisual Writers, Theater, Radio and New Technologies REDES. Each of these companies is in charge of managing proprietary rights of different nature and, therefore, each issue different types of licenses for the same type of proprietary rights. For example, while ACINPRO protects phonograms and musical performances and issues licenses for their public communication, EGEDA manages the copyright for audiovisual works and its licenses authorize certain forms of public communication such as retransmission and communication open to the public; the authorization of EGEDA does not exempt it from the payment of equitable remuneration to ACTORES for the communication of the audiovisual interpretations that are fixed in the audiovisual works.

Diagram 3. Development of the normative framework of copyright protection in Colombia



Source: Prepared by the authors. Reference figures taken from Power Point image gallery.

A market with horizontal and vertical relationships

The regulation for copyright protection defines four types of roles in the copyright and related rights market (see Diagram 4). First, ownership of proprietary rights is granted to participants in the production of goods subject to copyright and related rights⁶. Its function is to produce goods in the exercise of its activity. Second, there are those agents who make use of the goods in their production chain with the aim of generating profit with their activity, users. Third, there are the rights managers, who act as intermediaries between right holders and users. Its actions are aimed at guaranteeing the remuneration for the holders whose participation in the production of goods is used in other value chains. Finally, there are state entities responsible for monitoring and inspecting rights managers.

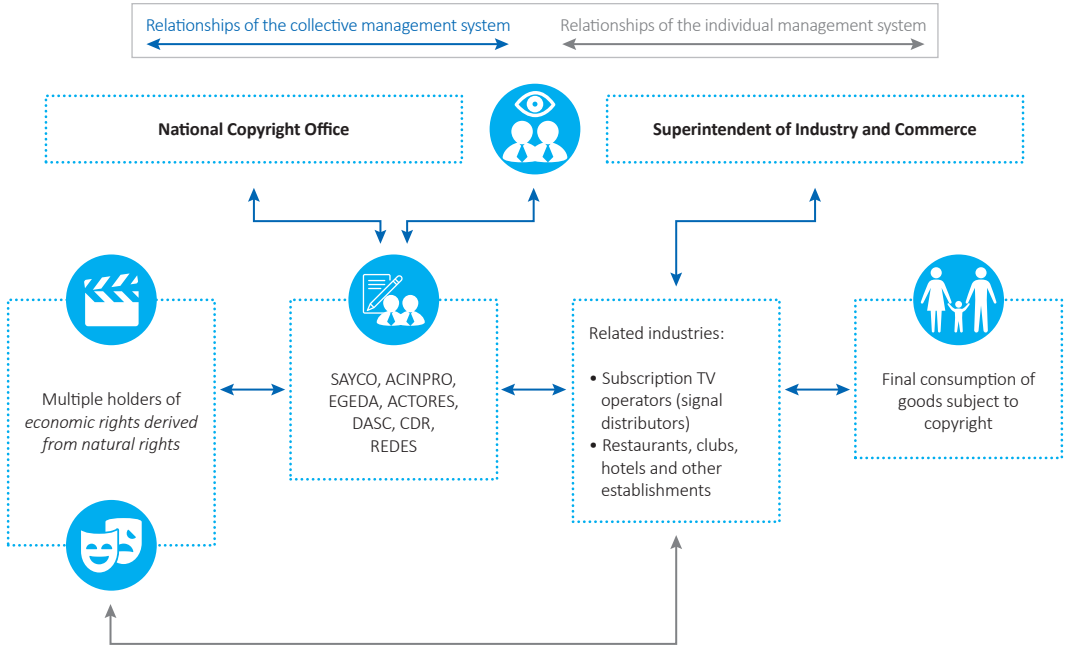
While the relationships between rights holders and managers and between these and users are horizontal relationships, the relationship between copyright authority and managers is vertical. The first type of relationship is characterized by representing the existing exchanges in the market. In the event that the use of goods subject to copyright does not require an intermediary such as the manager, the relationship between owners and users would be a relationship between a producer and a consumer as in any market. In contrast, vertical relationships arise as a consequence of the market failure solution by the government. Since it is up to the authority to establish the way in which the managers must operate, it is also their responsibility to ensure that their actions are carried out as established when they perform their function. In this sense, vertical relationships respond to the presence of a horizontal relationship between two agents of the market.

Three additional vertical relationships arise as a consequence of the horizontal relationships that occur in the copyright market. The first two are the relations between the CMS and its affiliates and between the CMS and the users of goods subject to copyright. When dealing with relationships in which a market sector with the same activity interacts with another sector (the CMS, the interpreters, the radio stations), these must be monitored by the Superintendent of Industry and Commerce (SIC) regarding the regime of competition. The SIC has pronounced in particular on the dominion position that the CMS enjoy and, in the case of the relationship between a CMS and its affiliates, has proved the dominance of this position⁷.

6 Article 4 of Law 23 of 1982 recognizes the following rights holders: (i) the author of his work, (ii) the artist, performer, on its interpretation or performance, (iii) the producer on his phonogram, (iv) the broadcasting organization on its issuance, (v) the causes of a singular or universal title of the aforementioned holders, and (vi) the individual or legal entity that obtains the production of a scientific, literary or artistic work.

7 Case SAYCO: Resolution 20964 of 2012 and Resolution 76278 of 2016.

Diagram 4. Actors and relations in the copyright and related rights market in Colombia



Source: Prepared by the authors. Reference figures taken from Power Point image gallery.

The third vertical relationship is one in which the agents of the same sector interact with each other. In most of these sectors, the government has delegated the function of designing public policy that guarantees competition within the sector and that implements it with the application of rules that ensure the maximization of social welfare. For example, in the case of pay television operators, of open television, of internet operators and mobile telephony, among others, the Communications Regulation Commission is the entity in charge, among other things, of establishing the system of regulation that promotes the social welfare of users and promotes and regulates free competition for the provision of telecommunications networks and services⁸.

⁸ Article 19, Law 1341 of 2009.

3.2. PERFORMANCE OF COPYRIGHT PROTECTION IN COLOMBIA

The instruments for the distribution of remunerations and the royalty collection from the CMS impact the copyright market

Copyright management is done in Colombia through three main mechanisms: Collective Management Societies, individual managers and other forms of association. As mentioned, there are six CMS recognized by the DNDA.

The CMS arise as a solution for the asymmetry of information that exists in the copyright market, and their reason for being is to strengthen the remuneration incentives so that the goods subject to copyright continue to be produced. The fundamental role of the CMS is to license many works of many authors for many clients (Searle, 2015). The CMS solve several of the existing market asymmetries for copyright transactions between artists and users of their works thanks to the specialization in rights management. In particular, information asymmetries that affect the costs of searching, negotiating and executing contracts between users and authors (Watt, 2016).

The CMS reduces the costs that holders must incur to manage their rights and, consequently, add more value to the economy. The CMS increase the probability of increasing the remuneration and encourage the entry of new owners into the market. The CMS, as an intermediary actor between users and owners, reduce transaction costs by improving the supervision of the use of copyrighted goods and, therefore, improve the income from the use of works. At the same time, cost reduction versus individual management can make the rational decision of a new holder to be the participation in the creative market. That is, if the cost of supervising individually discourages the development of the authors' creative activity, the reduction of this cost through the economies of scale introduced by the CMS can make the development of their activity profitable.

The CMS have a dominance position as a consequence of the value added that the reduction of costs of supervision and collection of royalties entails, resulting in a centralization of the holders' bargaining authority. Then, under this management scheme, the surveillance of the CMS by the authority in charge of protecting competition must seek to ensure that they do not abuse their ownership authority against the owners and against the users. Despite the control, the entity responsible for the copyright policy must design the regulatory framework that encourages the reduction of management costs and the proper functioning of the market through the rules of distribution of royalties in the CMS.

The type of rights management affects the economy's aggregate result

The rules of distribution of royalties of the CMS play a fundamental role in the copyright market. The reduction in management costs depends on the capacity of the CMS to represent the global repertoire. In this sense, the distribution rules must provide an incentive for the owners who decide to participate in collective management to receive a benefit no less than what is received in other management models. In this way, distribution rules can influence management costs and, therefore, the value that users pay for licenses. In addition, distribution rules can also increase the value added of creative activities by determining rules that attract new owners for whom the costs of other types of management would not generate positive remuneration.

In contrast, individual managers are characterized by higher management costs than those of the CGS and generate a lower aggregate value than that obtained when the CMS manages the global repertoire. Those owners who manage their rights individually have the certainty of receiving a remuneration large enough to cover the costs of individual management, but the social cost is the increase of unit costs in collective management. The high costs of management can also discourage the development of creative activities to authors who do not achieve a higher remuneration to the costs of management. That is to say that each owner decides the way in which their own rights are managed by comparing the income that would be received when managing collectively or individually. This suggests that CMS should use the heterogeneity of owners in the copyright market as input for the construction of distribution rules in order to maximize social welfare (see Box 2).

Box 2. The protection of copyright through Collective Management Societies maximizes social welfare

In addition to the conclusion of the economic theory of rationality, according to which the protection of intellectual property, including copyright, is necessary to encourage innovation, and therefore the development of economic activity, it is possible to explain the protection of intellectual property based on game theory (Ramanujam, 2006). The advantage of using game theory to explain the relationships between the agents of the copyright market on rational theory is that it allows analyzing the result of the strategic interaction of the agents and how this varies with normative changes. The following is a static game to analyze how the authors behavior changes when they are faced with the possibility of managing their rights individually or collectively and their effects on the economic aggregate.

Imagine that the universe of authors of the same type of work is composed of two agents: author A and author B. Each of the authors has the right to collectively manage copyright through a CMS or individually. The only difference between the two forms of collection of remuneration are management costs, while in the economy the same amount is always collected for the remuneration of the authors. The incentives established in the regulations are reflected in the payments received by each author when choosing one of the two available strategies: collective management (CMS) or individually (IM). The game that these payments and these strategies represent is as follows:

		Author A	
		CMS	IM
Author B	CMS	$\frac{r}{2} - \frac{c}{2}, \frac{r}{2} - \frac{c}{2}$	$\frac{r}{2} - i, \frac{r}{2} - c$
	IM	$\frac{r}{2} - c, \frac{r}{2} - i$	$\frac{r}{2} - i, \frac{r}{2} - i$

Where r corresponds to the total collection of royalties for the use of goods subject to copyright in the economy, both when performed by CMS, and when done individually; c is the cost of managing copyright through an CMS and i is the cost of managing copyright individually. The first term of each cell indicates the payment that author A receives given his strategy and the strategy of author B, while the second term represents author B's payment.

According to the game, the payment for author A if he chooses CMS, and given that author B chooses IM, is $\frac{r}{2} - c$, while the payment for author B is $\frac{r}{2} - i$. To know what is the dominant strategy, that is, the one that each of the authors chooses regardless of the strategy adopted by the other, it is necessary to make assumptions about the management costs c and i . Knowing the strategies of each one of the authors will allow to identify the Nash equilibrium, which represents the result of the strategic decisions of the authors.

Scenario 1: the dominant strategy depends on the copyright management costs

In the case where the total copyright management costs of the CMS is less than the cost of the individual management for each author, it must be $c < i$, which implies that $\frac{c}{2} < i$. In this scenario there is a single dominant strategy for each author and, therefore, a single Nash

equilibrium. The dominant strategy for author A is CMS, where he receives a payment from $\frac{r}{2} - \frac{c}{2}$, regardless of the decision of author B. This happens because in the alternative scenario in which A chooses IM, he would receive a payment of $\frac{r}{2} - i$, which is less than $\frac{r}{2} - \frac{c}{2}$. Following this same logic, it follows that when $c < i$, The dominant strategy of author B is CMS, where he receives a payment from $\frac{r}{2} - \frac{c}{2}$. The Nash equilibrium in this scenario is CMS for both authors, where each receives a payment of $\frac{r}{2} - \frac{c}{2}$.

The Nash equilibrium in which both authors decide to collectively manage their rights highlights two characteristics of collective management. First, the aggregate result of the economy, that is, the sum of the author A's and author B's payments, is greater in the Nash equilibrium than in any of the alternative scenarios. In other words, as the costs of collective management are less than the costs of individual management and the collection of royalties for the use of copyright is the same, the net remuneration for authors is greater when there is collective management. Second, this result, besides being a Nash equilibrium, is Pareto optimal because it is not possible for one of the authors to obtain a higher payment without the other receiving a lower one. This happens because when both decide to manage their rights collectively, the costs are reduced by half $\frac{c}{2}$, whereas when each one manages the rights collectively and the other does so individually, the cost of collective management increases by $\frac{c}{2}$ to c . The Nash equilibrium is maintained because we have assumed that the total cost of collective management (c) is less than the individual cost (i).

These conclusions are maintained in the case where the aggregate costs of individual management are lower than the costs of collective management ($2i < c$), which implies that the unit costs of individual management are less than the individual costs of collective management $i < \frac{c}{2}$. However, the new Nash equilibrium is when both authors play the dominant IM strategy and each receives a payment of $\frac{r}{2} - i$.

It is known that the royalties collected by some authors are significantly different depending on whether their rights are managed collectively or individually, because the collection capacity can be higher (lower) in one of the two ways, either by greater (lower) coverage capacity or by greater (lower) bargaining power. Then, if there is a difference in the royalties received and the costs are the same for all authors, the best strategy for each author will depend on their ability to negotiate with the users against the negotiation capacity with the CMS, which depends on the distribution rules. In other words, the costs of collective or individual management are not the only instrument to define the incentives that maximize welfare in the economy, but also the distribution rules of each CMS and, more importantly, there must be consistency between the Distribution rules and allocation of costs.

Scenario 2: collective management is only more efficient if it represents all the authors

Now, suppose that $\frac{c}{2} < i$, but that $i < c$, that is, the costs of collective management are only less than the costs of individual management for each author when both decide to collectively manage their rights and the total costs of collective management are less than the sum of all the costs of individual management. In this scenario there is no dominant strategy for either of the two authors and there are two Nash equilibria. The first Nash equilibrium is when both authors decide to manage collectively. This Nash equilibrium, as in the first scenario, is also Pareto optimal. The second Nash equilibrium is the one where both authors choose individual management. This equilibrium is not optimal Pareto, unlike the Nash equilibrium where both manage collectively, because it is possible that both authors improve their collection if they decide to manage collectively.

This scenario shows that the result of the strategic interaction of the authors can lead to results that do not maximize social welfare. While the total remuneration in the economy is $r - c$ when both manage collectively, the total remuneration is $r - 2i$, which is less than $r - c$. This means that the challenge of copyright law is to establish appropriate incentives so that the rational and strategic decision of the authors is to advance collective management jointly. The regulation should guarantee, in this case, that the payment that each author receives when choosing collective management is greater than the payment they receive when they choose individual management, regardless of the decision of the other author, which occurs when $c < i$. That is, the incentives of the regulations should encourage the CMS to guarantee distribution schemes and management costs that allow them to represent the global repertoire of the works of each type, without restricting the possibility that each author may manage their rights individually.

Discussion: what do the costs c and i represent?

The proposed game allows modeling the effects of different regulatory frameworks on the outcome of the strategic decisions of the authors through the cost parameters of the management models. On the one hand, there are two extreme scenarios (scenario 1), in which the aggregate and individual costs of some form of rights management (collective or individual) are less than the aggregate and individual costs of the other form. As a result, in each scenario, there is a dominant strategy that is the same for each author and that represents a Nash equilibrium that is Pareto optimal.

These results highlight the fact that the maximum benefit for the economy and, therefore, for society, is found when all the authors of rights have as a strategy the choice of the management model with lower management costs and collect the same amount of royalties. That is, the model that represents higher net income for the authors. This implies that two authors, for whom the goods subject to copyright are substitutive in some proportion, should receive the same payments, either through collective management or individual management. This scenario, of lower management costs and equal payments between rights with a high substitution rate, is better represented by the role played by the CMS, where economies of scale allow a unit cost less than the unit cost when the management is individual ($\frac{c}{2} < i$).

According to the scenarios of scenario 1, copyright management results in the tendency of the growth of royalties collection is highly correlated with the growth of remuneration for authors and management costs increase marginally with respect to the collection increases, as in the case of SAYCO (Graph A). This is because there are rules of distribution of royalties and an allocation of management costs that are consistent, in such a way as to guarantee a similar net income for authors whose property subject to copyright has a high degree of substitution. These characteristics highlight the interest that copyright law should have in promoting incentives that allow the CMS to represent the global repertoire of the economy.

On the other hand, scenario 2 represents one of the reasons why the growth of remuneration may not be correlated with the growth of collection of royalties, as is the case of ACINPRO in recent years. (Figure 3). This scenario shows that it is possible that there is a rule of distribution of royalties and a cost allocation for which there is no dominant strategy and in which decisions to manage rights collectively or individually have a positive probability of occurrence different from one. In this case, since the authors do not have complete information about the strategies of the other authors, it is possible to arrive at a scenario where there is a significant volume of authors that collectively manage their rights and another that does so on an individual basis.

Figure 2. Evolution of collections, expenses, social welfare and SAYCO distributions.

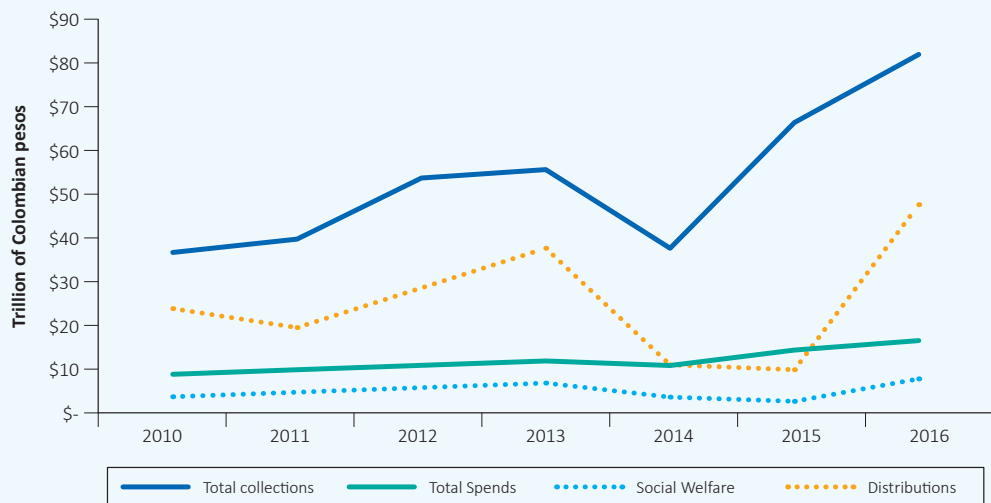
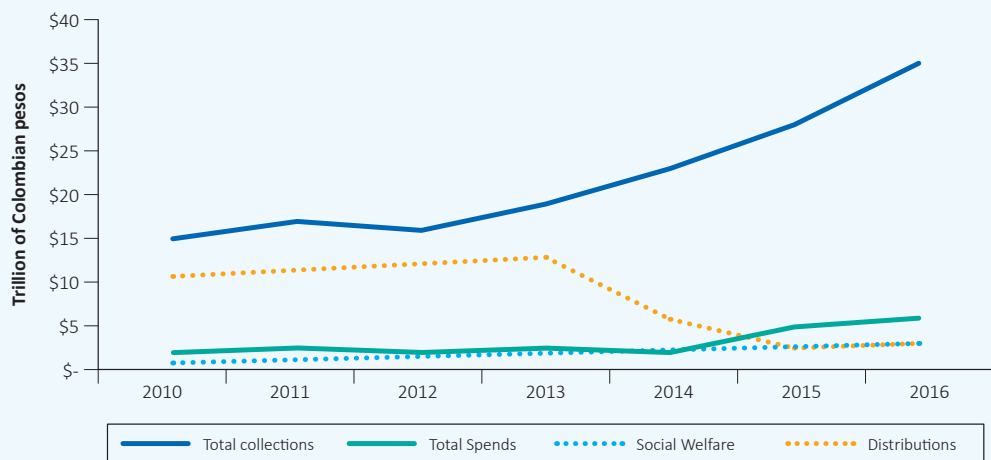


Figure 3. Evolution of collections, expenses, social welfare and distributions of ACINPRO



Fuente: SIC con base en DNDA.

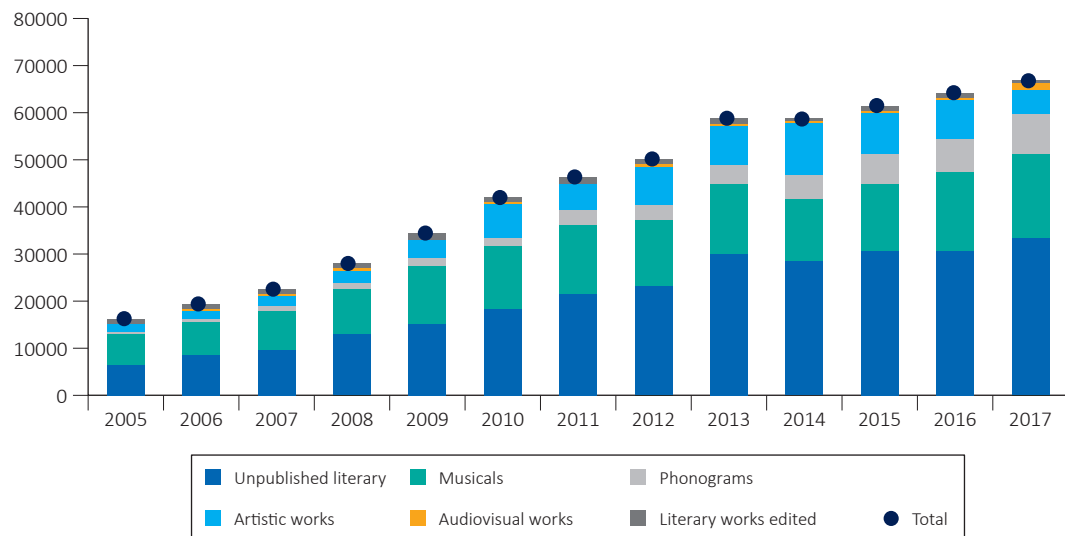
Colombian regulations have regulated the operation of Collective Management Societies

In Colombia, the CMS must be authorized to perform copyright management by the DNDA. Among the requirements for its operation, in addition to having at least 100 partners, is also to have statutes that guarantee the governance of the CMS through a general assembly composed of all members, a board of directors, a vigilance committee and a prosecutor⁹. The issuance of Law 23 of 1982 granted legal status to the first two CMS in Colombia: SAYCO in November 1982 and ACINPRO in December of the same year. With their legal operation, both CMS began to act as intermediary agents between the authors and the users of the works. Today, both CMS came together to create a collection window called OSA (Organization Sayco Acinpro), which is responsible for collecting payment for public communication in different business establishments.

Among the attributions that the law grants to the CMS are the representation of its partners, the negotiation of the licenses to authorize the use of the protected material, the collection and the distribution of the remunerations coming from the proprietary rights paid by the users, the conclusion of agreements with other foreign CMS and the representation of foreign CMS with whom representation contracts exist.

The registry of works before the DNDA tripled in the last ten years: it reached 670,000 works. The largest proportion of these are unpublished literary works, followed by musical works, phonograms and artistic works (see Figure 4). In addition to coinciding with the dynamics presented regarding the value of the cultural industry and the payment of royalties, it also agrees with the implementation of mechanisms to guarantee the protection of copyright, such as the issuance of new laws that extend protection to more types of works and authorization for the operation of new Collective Management Societies (CMS).

9 Law 44 of 1993.

Figure 4. Works registered in the DNDA

Source: Prepared by the authors based on elaboración propia con base en Dirección Nacional de Derechos de Autor.

Colombian regulations allow collective management and individual management, but the copyright authority requires better supervision instruments for individual management

Colombian law and its jurisprudence allow individual management as a way of managing copyright. The first antecedent that explicitly recognizes the collection for the use of author's rights through individual management is Sentence C-509 of 2004 of the Constitutional Court. Subsequently, Decree 1066 of 2015 of the Ministry of the Interior recognizes individual management as that performed by the owner of the copyright or related rights not affiliated with any CMS. According to this decree, the individually managed repertoires must be specified in each of the contracts that give license to use the works. Thanks to this authorization, numerous IMSs have started to operate in recent years. The DNDA, for its part, stipulated three conditions for the development of its activity: being a legitimate owner or representative (through a contract), being able to present quality accreditation of the owner or representative and specifying in the contracts which codes are being authorized by the use of works¹⁰.

¹⁰ Circular No. 22 of May 20, 2016 of the DNDA.

The IMS do not have a clear and detailed regulatory framework that regulates their actions. The little regulation of this type of copyright management has opened a space for these new players to enter the market without the same duties and obligations that the law contemplates for the CMS. This has caused distortions in the market: an atomization of the administration of copyright, uncertainty for users against the payment of obligations and therefore legal uncertainty for the chain as a whole.

The lack of a normative development in the face of individual management and other forms of association has created a legal vacuum in which there are no principles that guarantee the maximization of social welfare in a context in which several management schemes coexist.

Giving legal certainty against new forms of management of copyright, respecting the current regulations and the judgments of the Constitutional Court, is an urgent task in the institutional framework of copyright. Both, centralization or decentralization, can be appropriate management schemes, provided that the regulation establishes the criteria with which they should operate and that these are in line with the objective of maximizing social welfare with incentives that promote the production of creative goods. In particular, it must be sought that the incentives in both types of management produce the appropriate results to ensure that content consumption occurs for citizens.

4. PRICE FORMATION IN THE COPYRIGHT MARKET

The formation of the price of a license is not determined in the traditional way in which the market operates. Theoretically, the price formation of any good responds to the interaction between supply and demand of the market. However, in the copyright market, the necessary intervention of rights managers, whether collective or individual, requires an institutional and regulatory scheme that determines the way in which prices are determined. Prices are the result of the interaction between buyers and sellers, subject to the restrictions that dictate the regulation of the copyright market and the regulation that protects the right of competition.

The copyright protection policy has developed the mechanisms through which the values for the use of goods subject to copyright should be determined.

The criteria to define the values of the fees and the actors that have the power to intervene in the coordination mechanisms respond to the need to guarantee the maximization of social welfare. The maximization of social welfare in the copyright market occurs when the value of the fees guarantees that the consumption of the goods subject to copyright is satisfied and there is no impact of competition in the markets in which the goods are inputs of value chains (Baumol, 2004).

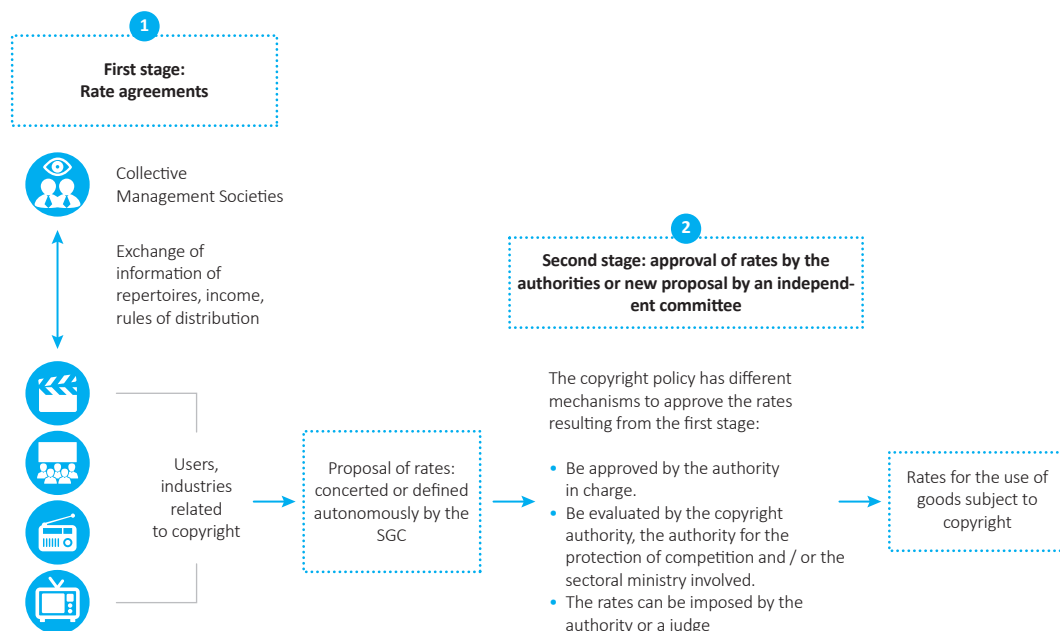
This chapter presents a conceptual framework that explains how mechanisms work to determine the prices of CMS licenses. That is to say that the question is not answered as to what is the value that should be charged for a license, but to what are the mechanisms used to determine the price of the license. The first section compares the price formation mechanism with that of other countries; the second presents the fees for the use of copyright in Colombia, highlighting how these respond to the universal criterion of economic value of the good subject to copyright in the value chains.

4.1. PRICE FORMATION MECHANISMS

The value of copyright licenses is determined in two stages

The processes of price mechanisms in the copyright market have two stages (see Diagram 5). The first is negotiation between the CMS and users or user associations. In this the exchange of information on the use of the goods subject to copyright in the value chain of each industry and the mechanisms of distribution of royalties among the authors results in fees. The second stage consists in the intervention of the state to resolve the conflicts that could have arisen with the fees during the negotiation process.

Diagram 5. Formation of fees in two stages in the copyright market



Source: Prepared by the authors. Reference figures taken from Power Point image gallery.

The pricing mechanisms can be classified according to three characteristics related to each of the stages mentioned. See Table 4 about criteria in different countries.

-
- The first is the level of transparency present between the negotiation of the CMS and the users. It consists of how much information of the CMS the users have and how much information of the users the CMS has during the stage of negotiation of fees. Although in some countries it is not the obligation of the CMS or users to share information related to the distribution of royalties and the use of copyrighted goods in the value chains, in others, such as Germany, it is mandatory that both parts share the information requested by the other.
 - The second is the intensity of the state's participation in the establishment of fees. On the one hand, the participation of the designated authority may be limited to accompaniment during the negotiation process between the parties, and its ultimate objective is to support them so that they reach a negotiated agreement satisfactory to both parties. In this case, the participation of the state is low and not very intensive, since its concepts on fees are not mandatory. At the other extreme, the authorities in charge must validate the fees presented by the CMS after the negotiation processes with the users have been completed; if any of the parties is not satisfied, the authority can decide what fees will govern and can define its value with its work team or with specialized and independent committees provided by law for this task. In this scenario, the state has a very active participation, because its decisions on the values of fees are mandatory.
 - The third aspect to consider about the price mechanism is the way in which fees are determined. Most of the methodologies in copyright regulation for the establishment of fees include four groups of variables. The first, and the most common, is the economic value generated by the use of works subject to copyright in the value chains of different users. The second group includes those variables related to the activity in which the works are used: the size of the final market to which the contents arrive, the geographical area, among others. The third group includes those criteria in which the aspects included by the CMS of other countries can guide the setting of fees in the domestic market. The fourth group includes the works according to their religious, social and cultural interest. In the regulations on copyright of each country, the enumeration of these aspects is not exhaustive; The principle of economic value generated by the activity is generally followed.

Table 4. Characteristics of price mechanism processes for several countries and Colombia

Characteristic	Colombia	Hungary	Romania	Poland	Bulgaria	Latvia	Slovenia	Croatia	Austria	Germany	Czech Republic	Estonia	Lithuania
The negotiation between the CMS and the users (or associations) is carried out through state entities related to intellectual property or copyright.		Yes	Yes										
The fees presented by the CMS to the entities in charge of their supervision are the result of a prior negotiation process between the CMS and the users.	Yes	Yes		Yes	Yes								
There is a mediator who intervenes in case the negotiation is not successful between the CMS and the cable retransmission rights. Their proposals are not mandatory.			Yes	Yes		Yes	Yes	Yes					
There is a mediator that intervenes in an optional way for all disputes related to fees. Their proposals are not mandatory.		Yes			Yes				Yes	Yes	Yes	Yes	Yes
There is an independent arbitration committee that imposes the fees in case negotiation and mediation are not sufficient to reach an agreement.			Yes		Yes		Yes		Yes				
The regulation on copyright establishes procedures for the courts (civil or administrative) to determine a final decision that does not correspond to a replenishment if an agreement is not reached in the previous procedures.	Yes	Yes	Yes	Yes		Yes	Yes			Yes			Yes

Source: Compilation based on Law 23 of 1982 and decree 1066 of 2015 for Colombia. For the rest of the countries, see Matanovac-Vuckovic, 2015.

In the copyright literature, it is observed that in most cases the economic income of the activity in which goods subject to copyright are involved is the main aspect to be taken into account in determining the fees (Matanovac-Vuckovic, 2015). Even several cases related to the issue have been resolved in this way by the Court of Justice of the European Union. Among others, the Tournier, Kanal 5 Ltda, and OSA case stand out. Table XX presents the first

two. The Kanal 5 is interesting because it deals with the existence of abuse of a dominant position when differentiated fees are established for companies that develop the same economic activity.

Table 5. Two cases on the prevalence of the economic criterion in price mechanisms

Case	Situation that allegedly evidences abuse of dominant position	Arguments that support the abuse of dominant position	Arguments that discredit the existence of abuse of the dominant position
<p>Tournier Case C-395/97</p>	<p>Jean-Louis Tournier, director of SACEM, CMS of authors, composers and music publishers in France, was sued for demanding the payment of excessive, inequitable or undue remuneration for public communication in a discotheque in Juan-les-Pins.</p>	<p>Three arguments about abuse of dominant position are presented:</p> <ol style="list-style-type: none"> 1. The rates are inequitable and reflect the exploitation of the dominant position, while the differences in fees with respect to other member states are high, and even in comparison with other value chains, such as public communication through television or radio. 2. It is considered that there is a restriction on competition through the concerted practice that property rights management companies do not offer partial licenses or licenses outside their geographical jurisdiction. 3. The payment of the physical material through which copyrighted material is reproduced already includes the payment of remuneration to the authors, even if the physical material was acquired in another geographical location. 	<p>The arguments for each of the three points are the following:</p> <ol style="list-style-type: none"> 1. To determine if the rates are fair and respond to the abuse of dominant position, comparisons should be made between standard business statements where the parameters are taken into account. As for other value chains in which the same material participates, the Commission notes that "in order to determine the excessive nature of the remunerations, a comparison with the percentages applied to other forms of exploitation of music could also be relevant. However, in such a case, the importance of music in the affected form of management should be taken into account; it would be important, for example, to appreciate the proportion of the entrepreneur's income due to music." 2. There is no restriction on competition insofar as the reciprocal contracts signed between the CMS respond to that (i) they guarantee the equality of conditions of foreign and national authors in the same territory and (ii) they prevent foreign CMS from incurring the costs of adding their contract networks with national users and their own on-the-spot controls. 3. The payment of remuneration for the public communication of protected works in one place does not imply that the remuneration for public communication in another place should not be recognized, even though it is done through sound supports that are already in the common market.

Case	Situation that allegedly evidences abuse of dominant position	Arguments that support the abuse of dominant position	Arguments that discredit the existence of abuse of the dominant position
<p>Kanal 5 Ltda Case C-52/07</p>	<p>Kanal 5 Ltda. And TV 4 AB sue Föreningen Svenska Tonsättare Internationella Musikbyrå (STIM) for abuse of dominant position, reflected in the differential between rates applied to public television channels and to private television channels for the dissemination of music on television.</p> <p>It looks to Article 82 of the European Commission (EC), which defines the abuse of a dominant position, particularly the numeral c that establishes the abuse of a dominant position when different conditions are applied to equivalent transactions, resulting in a competitive disadvantage.</p>	<p>The decision is requested from the Court of Justice on three aspects:</p> <ol style="list-style-type: none"> 1. Is it an abuse of the dominant position that a function be established to determine the remuneration based on income from the dissemination of music? 2. Does an income-based remuneration formula constitute an abuse of dominant position when it is possible to identify and quantify both the music transmitted and the audience? 3. Does the fact that the remuneration formula does not apply in a similar way to public service companies, with whom a fixed amount is previously agreed, influence the response on abuse of dominant position? 	<p>The Court of Justice stated that:</p> <ol style="list-style-type: none"> 1. The rates established by STIM maintain a “reasonable relationship with the economic value of the service provided by STIM” and that the rates must be examined in relation to the value of the use of protected musical works for the purpose of television broadcasting in the economic exchanges. 2. The application of fee systems can be abusive when there is another method to identify and quantify more precisely the use of these works and when using this method can achieve the aim of protecting copyright without disproportionately increasing costs of the management of contracts and control of the use of works protected by copyright. 3. The application of different rates according to the nature of the television companies may consider abuse of the dominant position if it is determined that public television competes with private television in the same market and if the use of the works constitutes a participation in the generation of advertising or relative revenues due to the generation of value in a value chain of the same nature.

The second type of variables are those that are most taken into account when establishing the methodology to set rates according to the activity that makes use of the goods subject to copyright. A transnational example is found in the Broadcasting by Cable and Satellite Directive of the European Union (Directive 93/83/CEE), which establishes criteria such as the audience, the potential audience and the language of the contents so that all the CMS of the Union contemplate them when determining fees and it is not difficult to integrate retransmission due to differences in the rates charged by the CMS of each country.

4.2. THE PRICE OF THE USE OF COPYRIGHT IN COLOMBIA

The fixing of fees in Colombia follows three principles. The first, in accordance with article 48 of CAN Decision 351 and article 2.6.1.2.7 of Decree 1066 of 2015, is proportionality, according to which the use made of copyright must be taken into account and the fee charged. The second is transparency, which according to article 2.6.1.2.4 of Decree 1066 of 2015, refers to the obligation of all the CMS to publish their fee regulations. The third is the agreement, which, according to Article 73 of Law 23 of 1982, requires that the fixing of fees be the result of consensus between the CMS and users. Table 5 presents the criteria of the CMS in accordance with the fee regulations.

In general, the mechanism has three characteristics that indicate that state intervention is low and not very intensive compared to other countries, as can be seen in the comparison in Table 4. First, the price mechanism scheme only takes into account the first stage, that is, the one where the CMS determines the rates agreed with the users, and the only obligation of the authority in matters of copyright, the DNDA, is to verify that these agreed and indicative rates that may differ from those finally collected are published on the web pages of the CMS. Second, the DNDA does not have any influence on the rates determined by the CMS, since it is assumed that they are the result of a theoretical negotiation process with the users. Third, the State's participation in setting rates is so low that there are no mechanisms to request its review by any of the parts other than the judicial complaint, where the DNDA can play the role of judge (with the difficulty of guaranteeing impartiality, since the DNDA is the entity in charge of monitoring and inspecting the CMS).

The absence of validation or accompaniment in the conciliation process by some authority reduces the process of setting rates at the first moment of agreement. After this moment, in accordance with article 242 of Law 23 of 1982 and article 2.6.1.2.6 of Decree 1066 of 2015, the only means to request the revision of rates is to resort to alternative mechanisms of solution or civil judges (or the DNDA, in compliance with the function of a civil judge).

Table 6. Criteria and fees of some CMS in Colombia for certain economic activities

Collective Management Society	Free television	Television by subscription or closed TV	Stations	Hotels - public areas	Restaurants, events and shows
Sayco - Society of Authors and Composers <ul style="list-style-type: none"> • Free television: 3.75% of gross operating income from subscriber fees. • Television by subscription or subscribers: 3.75% of gross operating income from subscriber fees. • On the value of gross operating income: 3.75%, 3%, 2.5% depending on the category. <ul style="list-style-type: none"> • Minimum charge: depending on the geographical location of the stations • Musical ambience: 3.75% of gross operating income. <ul style="list-style-type: none"> • Minimum fee: two (2) minimum salaries. 					
Acinpro - Colombian Association of Performers and Phonographic Producers <ul style="list-style-type: none"> • National private channels correspond to 50 min salaries • National public channels: 13 minimum salaries • Regional channels correspond to 11 minimum salaries • Local channels for profit: 15 minimum salaries • Non-profit channels: depends on the categorization of the municipality. • 3.5% of operating income. <ul style="list-style-type: none"> • Basis of agreement when income cannot be certified and according to the classification of the operator or channel. • Community channels: 35% of minimum salary • Commercial broadcasters: 3.75% of gross operating income. <ul style="list-style-type: none"> • Basis of agreement when income cannot be certified and according to the geographic location of the station. • Commercial advertising: base rate of agreement varies between 4.5 and 5 min salaries per year depending on the means of diffusion of the phonogram (radio, television, internet, screens or media packages). • Events and shows: 5% of the income recorded on the occasion of ticket sales. In case of not applying, minimum rates are established according to capacity. 					

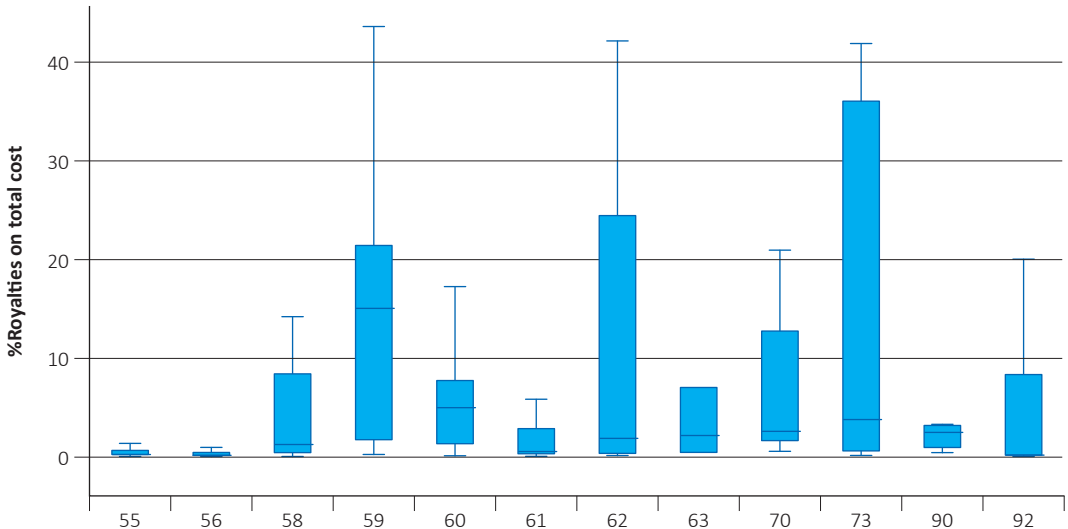
Collective Management Society	Free television	Television by subscription or closed TV	Stations	Hotels - public areas	Restaurants, events and shows
<p>Egeda - Collective Management Entity of Rights of Audiovisual Producers of Colombia</p>	<ul style="list-style-type: none"> It is not charged when it is issued from the primary issuer. Otherwise, the same rates apply as for subscription television. 	<ul style="list-style-type: none"> Retransmission: \$ 943 per month and for each subscriber, for each subscriber or home connected to the distribution network. The fee is \$ 471.5 for closed community television. 	<ul style="list-style-type: none"> Fixed rates for each available hotel space and for each month, depending on the category (stars) of each hotel. 	<ul style="list-style-type: none"> Establishments open to the public: \$ 2,011.8 per month and space available with access to audiovisual works. 	
<p>ACTORES - Colombian Management Society</p>	<ul style="list-style-type: none"> Free television: 4% of the operating income of the chain, linked or derived from the exploitation of the entity's repertoire. 	<ul style="list-style-type: none"> Subscription television: 4% of the operating income of the cable or satellite operator, linked or derived from the operation of the entity's repertoire. Movie theaters: 4% of the net proceeds from the box office and other operating income. 	<ul style="list-style-type: none"> Rate for common areas of \$11,000 per month per television set. Monthly rate per available room depends on the category of the hotel. The range is between 1,000 pesos for 1-star hotels and 6,000 for 5-star hotels. 	<ul style="list-style-type: none"> Establishments open to the public: \$ 11,000 for each TV receiving device. 	

Source: Compilation based on the fee regulations of the web pages.

When analyzing Annual Service Survey (Encuesta Annual de Servicios-EAS) developed by DANE, the difference in payment ranges between each of the sectors is appreciated. Some of these, which intuitively make greater use of copyrights –bars and restaurants, telecommunications, creative activities–tend to have a much narrower and lower payment range than other activities less intense in copyright such as gambling and betting, advertising and marketing studies, information services activities and business management (see Figure 5). Several reasons could explain this: a differential treatment towards those sectors, a greater negotiation capacity of those sectors that use more intensively copyrights or by the same composition of the royalty segment of the EAS, which can vary according to the industries analyzed¹.

An exception, undoubtedly, are the cinematographic activities, of video, production of television programs, sound recording and music editing, which are among the activities of widest range in payment. This can be explained because copyright is not an input in the value chain, as in the other sectors, but they correspond to the main input, without which the services of the sector could not be provided. This ends up granting a higher valuation.

1 The survey defines royalties as payments caused by trademarks, patents, copyrights, rights to the use of trade names, licenses, SAYCO, ACINPRO and others. Unfortunately, for this survey it is impossible to disaggregate the data to isolate the payment for copyright.

Figure 5. Payment of royalties as a proportion of the total cost by sector

55. Accommodation
 56. Food and drinks activities
 58. Editing activities
 59. Cinematographic activities, production of TV programs and music recording
 60. Programming, transmission and dissemination activities²
 61. Telecommunications³
 62. Development of computer systems
 63. Information service activities
 70. Business administration activities
 73. Advertising and market studies
 90. Artistic and entertainment activities
 92. Gambling and betting activities

Source: Compilation based on Annual Service Survey, DANE.

However, although the rates should be proportional, according to the regulations of the CMS, this survey shows that for most sectors there is a difference between the proportion paid by companies according to their income. Below are three examples of the food and

² According to DANE, this division includes content creation activities or the acquisition of the right to distribute content, such as programs through the sound broadcasting service, television and entertainment programs, news, debates and the like, for later spread them. Also included is data transmission, normally integrated with the transmission of radio and television signals. The transmission can be done using different technologies, by air, via satellite, through a cable or internet network. This division also includes the distribution to third parties of programs that in principle are of limited diffusion (limited format, such as news, sports, education or programming aimed at young people) on a subscription basis or rate by agreement with a third party, for subsequent transmission to the public.

³ According to DANE, it includes activities for the provision of telecommunications services and related service activities, that is, transmission of voice, data, text, sound and video. Activities of wired, wireless, satellite and other telecommunications activities.

beverage, accommodation and programming, transmission and dissemination activities sectors, where it is seen that companies that are above the average income of their sector end up paying higher for royalties in proportion to the costs of providing services that companies that are below the average (see Figure 6). This could be due to the lack of control by the CMS regarding the relatively smaller establishments.

It is possible to make an approximate comparison of the nominal rates and the fees actually paid in the sectors that most intensely use copyrights. Regarding the first, the fee regulations of the CMS should be consulted. Regarding the second, the same Annual Service Survey gives some insight into the consumption of copyright material by companies.

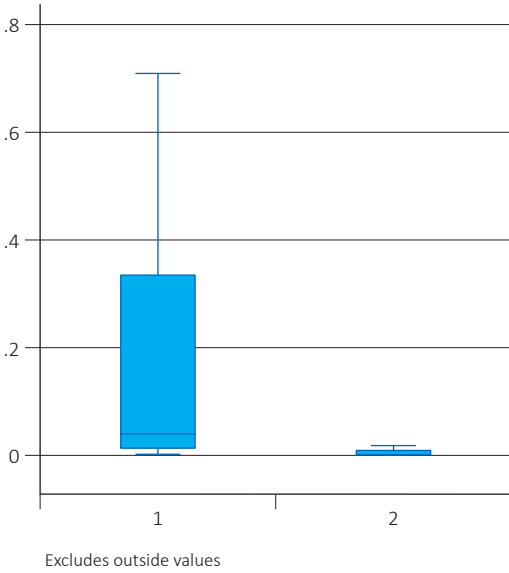
The comparison of rates reported in the CMS regulations and those actually paid. In the “Telecommunications” sector, 61 Division of the CIU, to which the television by subscription belongs, there is a greater margin in the process of contracting fees when compared with the other sectors. When the collections of the CMS fee regulations are added, these activities would pay 13.25% of their gross operating income. However, the average paid rates reported in the Annual Service Survey DANE are 1.20%. The process of negotiation between the CMS and the companies, after the issuance of the fee regulations, seems in principle to favor this industry highly intensive in copyright. Although it should be noted that they start from the highest rate in the regulations compared with other sectors.

The radio stations that have as an essential input the authorizations to use the Works, pay a fee very close to that established in the regulations, which also has the highest effective rate in comparison with the other sectors.

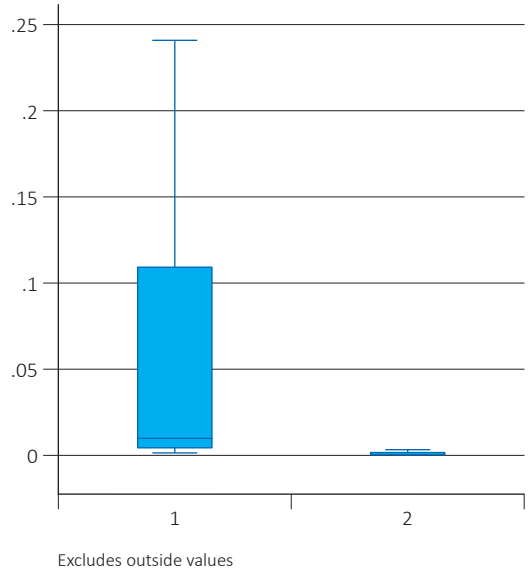
For the sectors of restaurant, *catering* and bars and accommodation there is a much smaller negotiation margin. While the nominal rates contemplate a payment of 0.66% and 0.55% of the revenues respectively, the rates actually paid on average are 0.80% and 1.20%. That is to say: there is an effective payment higher than the one contemplated in the rates. This may be due to the fact that not only is there less room for negotiation, but also that the payment for royalties allocated by that survey not only includes copyright, but also other payments such as trademarks, licenses and rights of use of the commercial name.

Figure 6. Difference of the payment of royalties between companies below and above the average of income for three sectors

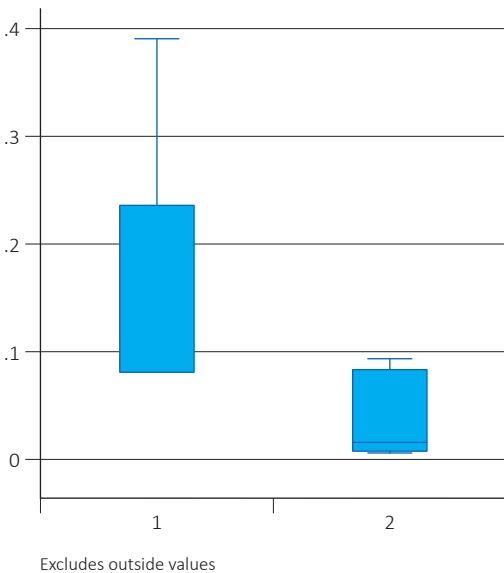
Accommodation sector



Bar and restaurant sector



Programming, transmission and dissemination activities sector



- 1. Companies with income higher than the industry average
- 2. Companies with income lower than the industry average

Source: Compilation based on Annual Services Survey, DANE.

Table 7. Payment of hypothetical and effective copyright

Sector/SGC	Value of the license as a proportion of the income according to the fee regulation					Average royalties / Average income in the EAS-DANE	Difference between (e) y (f)
	SAYCO	ACINPRO	EGEDA	Actores	Total		
	(a)	(b)	(c)	(d)	(e)	(f)	(g)
Telecommunications (Television by subscription)	3.7%	3.5%	2.0%	4.0%	13.2%	1.2%	11%
Radio stations	3.0%	0.7%	NC	NC	3.7%	4.0%	-0.2%
Restaurants	0.1%	0.2%	0.2%	0.0%	0.6%	0.8%	-0.1%
Accommodation	0.1%	0.1%	0.1%	0.0%	0.5%	1.2%	-0.3%

Source: Compilation based on the fee regulations of Sayco, Acinpro, Egeda and ACTORES, in the Annual Service Survey by DANE and in cases of representative agents for each sector (see Appendix 1). NC: means not contemplated.

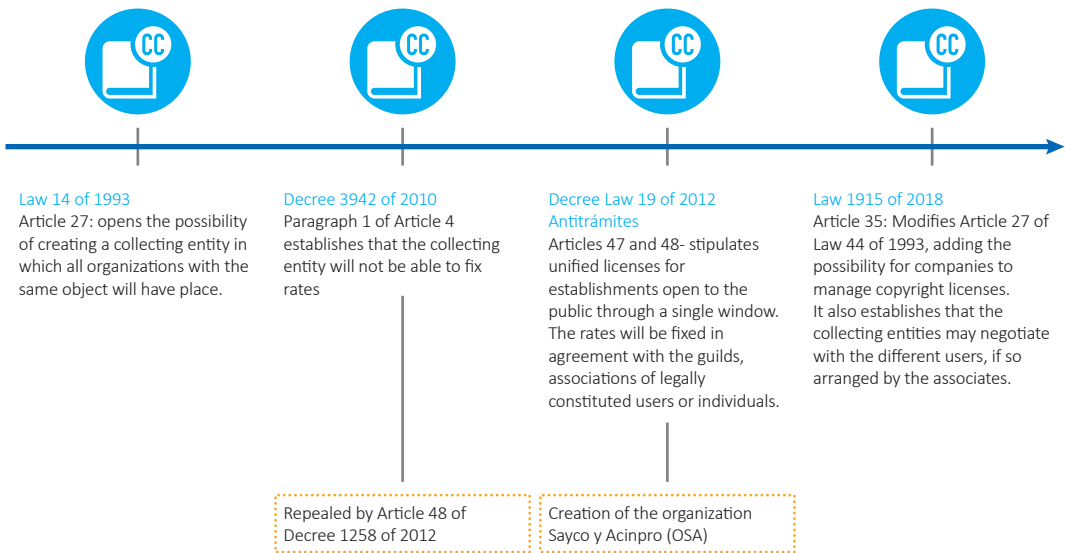
The interpretation of this table and the previous graphs must be done with great care due to the lack of public information about the copyright market. First, and as mentioned, because the concept of royalties from the Annual Service Survey does not exclusively include copyright, but also other concepts. In this case, these four sectors were considered, so their relative intensity in the use of copyright should be reflected in the payment of royalties.

Secondly, because in all cases the fee regulations do not contemplate for the activities of the sectors a payment as a proportion of the income for the services rendered. Although that is the case for television transmission in the regulation of SAYCO and ACTORES, the calculation of this proportion was made for the other boxes based on the calculation of what a representative agent would pay. The calculation of each of the boxes respects the parameters that would be established for that representative agent in the current fee regulations. The representative agents were elaborated according to what would be an average company in each of the sectors. Annex 1 details the procedure followed for the construction of these representative agents and the table.

Single window: set rates and collect

The copyright law establishes the possibility of establishing a single window as an instrument to guarantee the collection of remunerations for the use of copyright.⁴ (see Diagram 6). The collection of remuneration for the use of copyright through a single entity reduces transaction costs, complementing the function of the CMS in the sense of lowering management and transaction costs. The payment for the use of a Work can be carried out through a single joint transaction, instead of isolated transactions for each type of right to which the Work is subject according to its use in the value chain of the cultural industries. This, in addition, facilitates the integration of complete or partial repertoires.

Diagram 6. Regulatory framework for the collecting entity



Source: Prepared by the authors. Reference figures taken from Power Point image gallery.

It is important to maintain a conceptual division between the objectives of setting rates and collection. A collection entity or solution such as the single window would reduce costs, but it would not necessarily have an effect on the setting of rates. Collection and fixing are two different objectives that may or may not be united in a single window. In the case of integrat-

⁴ Article 27 of Law 44 of 1993 and Law 1915 of 1993.

ing the fixing of fees, which have a different legal framework, it must be taken into account that the total fee for a Work corresponds to the sum of the fees for each of the copyright holders participating in the value chain of the Works. These individual rates for each of the components must result from negotiation processes that we consider are more convenient for the user economic sectors than for the individual companies.

Of course, the single window, which we assimilate to the concept of collecting entity, could also be the space in which the fees for the use of the Works are defined. Although Decree 3924 of 2010 established that collection entities could not exercise this function, Decree 1258 of 2012 repealed that provision. Furthermore, Law 1915 of 2018 allows collection agencies to negotiate with different users if they wish. The development of this mechanism requires that the CMS and the GI negotiate with the users for each sector the different components of the rate for use of the Works.

For example, the Sayco y Acinpro Organization (OSA) performs both functions in the market of establishments open to the public. Given the high number of these, the centralization of both functions allows to save costs in that market. OSA, as a single window, has a web platform that allows online settlement and payment of fees and has established the fee manual based on (i) the location of the establishment, (ii) the category that reflects the incidence of the Works in the economic activity of the establishment, (iii) the customer service capacity (size) and (iv) the socioeconomic stratum.

The negotiation of rates facilitated by a single window has two alternatives:

1. Individual negotiation of each CMS with each type of user to then record a consolidated fee that will be collected through the window for each type of Work.
2. Prior negotiation between the CMS to establish a distribution of collections for each type of Work and then negotiate the aggregate rate with each group of users.

Although in the different interviews the users felt that the second option would be the best alternative, since it would involve a single negotiation, it is clear that the users would also have to recognize the totality of copyrights and related rights involved in the Works. The latter is not easy to solve today, because legal disagreements persist.

It is also not easy to agree on a joint fee between the CMS, even if there were no legal disagreements with the users, due to the conceptual difficulties in defining the weight or the participation of each component of the copyright and related rights in the final value of the works. In the development of this study, several agents felt that an objective methodology

should be used to define these weights or considerations, such as an index of costs or prices. The difficulty lies in the intangibility of the Works. Our team considers that the uncertainty in the fixing of prices ends up being, precisely, an essential engine for the cultural industries. Negotiation is a mechanism that replaces competition between suppliers. Replacing the negotiation with a technical mechanism could make the pricing model more vulnerable due to the potential asymmetry among the interest groups that participate in this market. Since there is no such thing as the parity or target price in an intangible market, its valuation is vulnerable to non-technical influences.

Moreover, the lack of consensus in the process of negotiating a type of copyright could put at risk the collection of the remunerations of the others, which already have a less unstable base. That is why we believe that it is best to strengthen the mechanisms for negotiating rates without replacing them with technical models and at the same time consolidate the collection models where they already work, the first of the scenarios.

Restarting with a totally new model involves greater risks. On the contrary, it is convenient to advance by improving and consolidating what exists. For example, currently the weakest point of fee fixing is the time where more experts and documentation exists. It is necessary to document and consolidate a legal statute of the fee fixing for each type of Work and component of copyright and related rights. Document where fees are already clearly defined and accepted, and document the current status of legal disagreements. This is a task that must be led by an external commission selected jointly by the users and the CMS, without the participation of the authorities. It is about putting agreements and disagreements on the table. In fact, many of the comments that the preliminary version of this study received went in the direction of requesting clarification on each of these elements. More than exceeding the scope for its high legal component, we consider that the important thing is to surround this process with a legitimacy that starts with the users and the CMS.

5. COMPETITION REGULATION

The process to set the remuneration for copyright is of interest both for the use of the Works that these remunerations favor, and for the effects that can have on the competitiveness of the sectors that use the Works as an input in their value chain.

5.1. INTELLECTUAL PROPERTY AND RIGHTS OF THE COMPETITION

The copyright market, by definition, is changing. Its very long-term stability can even be a bad sign, because creativity and transformation are inherent to its nature. Under these conditions, the regulatory framework must be equally dynamic and adaptable. There is a need to combine the rules of copyright and the rules of protection to competition. Both seek to promote the right incentives for the development of a dynamic market that allows (i) the production of new goods and (ii) the existence of as many distribution channels as demand preferences claim. This approach explicitly recognizes the presence of relationships in the copyright markets that we will refer to in a differentiated way. The first is the relationship between the authors and the managers (Authors-Managers); the second is the relationship between managers and related industries that use works subject to copyright (Managers-Users).

Combined, both regulations allow promoting to that system that encourages the development of a dynamic market, with distribution channels for demand, and at the same time solve the current market failures: (i) the imposition of barriers for the entrance of other actors in the market, (ii) the artificial increase in prices, and (iii) the improper use of protected works. One of the biggest challenges within institutional frameworks is to promote creativity and at the same time protect the welfare of consumers.

The objective of entities that watch over competition is to maximize social welfare, ensuring the proper functioning of markets. The exchange of goods and services in a free competition market guarantees the maximization of social welfare. The main reason why markets cannot

comply with this premise are the asymmetries of information and the alteration of prices that arise. The market power of a particular agent is due to the presence of these asymmetries: in that case, the ability of that agent to influence prices goes against the maximization of social welfare. That is, the influence on the price of any good is the materialization of market inefficiencies, and the presence of an agent capable of influencing the price must be analyzed to determine the market failure that gives the agent of that capacity.

The task of determining the source of an agent's ability to influence the price of a good or service implies an adequate definition of the relevant market. The relevant markets are determined according to two aspects: the first is the good that is subject to exchange, including its characteristics and the possibility of replacing the consumption of this good with similar ones; the second is the geographical space where the exchange between agents takes place. In this way, the analysis of the agents' interactions in a market seeks to determine whether the behavior of the price of a *specific good* in a *specific geographical space* responds to the action of some agent or group of agents that enjoy a *relatively greater capacity than others* to unilaterally and significantly influence the process of forming the price of the good.

The development of anti-competitive practices analysis in the copyright markets presents a particular difficulty in defining a relevant market (Max Planck Institute, 2013). This responds to the nature of the good that is transacted. Copyright is an intangible property whose owner enjoys exclusivity over its use. As a result, defining a relevant market present the following difficulties:

- I. Difficulty in determining the degree of substitutability on the demand side: given that the utility that consumers perceive for the *final* use of goods subject to copyright depends on the preferences of each one, the heterogeneity of tastes prevents identifying which goods they are substitutes for some particular good. In other words, the subjectivity that establishes the value of a good subject to copyright is not a reliable source for determining its substitute goods.
- II. Difficulty in determining the degree of substitutability on the supply side: the existence of multiple channels of distribution of goods subject to copyright makes it difficult to identify the degree of substitutability between the channels through which the consumer can access the goods.
- III. Scarce resources to determine the levels of substitutability on the demand and supply side: the heterogeneity of preferences and distribution channels require an exhaustive monitoring of the goods and the quantities that are actually traded in the market. Therefore, rely on reliable information to establish the degree of substitutability in the

market of a particular good, carry costs of access to information and the availability of sufficient human capital to collect and analyze it.

5.2. MARKET FAILURES

The differences in the market of copyright and other markets do not fall on the characteristics of the good, in this case a Work, but on the formation of prices. The fact that the use of the Works is immaterial does not prevent other people from returning to consume or use the Works. The availability of a Work is unlimited, unlike other goods in which there is rivalry between consumers due to the material limitation. Normally, competition drives prices to equal the marginal cost of production, which includes the costs of materials, the return on capital, wages and taxes. Since the intangible works have virtually no direct marginal costs, the prices of these would be close to zero. The unauthorized uses of the Works, for example, do not affect their availability. If there is no intervention to enforce authorizations of use granted by the authors, there would have unlimited and unpaid use of the Works. That is, in the case of copyright, the market fails in price formation via competition. The main problem of the above is that the production of creative Works is not encouraged and the loss for social welfare is generated.

Another option is to set the remuneration to the rights of users when it comes to maintaining the incentive to creativity. This is an undesirable solution for three reasons: i) there are no objective conditions that allow a central or government planner to determine the amount of Works that should be created, and the remuneration would have to be limited to the availability of resources; ii) There is no guarantee of an offer of works large enough to satisfy the heterogeneous and changing preferences of users; and iii) the production of few types of creative works can be transformed into a restriction for economic growth.

The two extremes are: i) Not intervene the market, leaving the remunerations to zero and eliminating the incentive to creativity ii) Set the rates from the government, running the risk of committing the mistakes that centralization brings with the allocation of incentives.

Under these conditions it is understandable the protection of copyright as one of the branches of intellectual property. Protecting creative industries from the inconvenient results of unregulated operation is a societal necessity. Also understand the role of competition law in the market of copyright before the need to regulate with marginal interventions that avoid centralization and the exercise of monopoly power in the definition of prices and incentives.

5.3. IMPACT OF THE COMPETITION

Collective Management Societies (CMS) are monopolies born because of two characteristics inherent to their nature. First, because they require government permission to operate; second, because it is presumed that they represent the authors of a broad repertoire¹ of each of the types of Works. The ability of governments to grant operating permits to CMS means that they also have the ability to monitor the non-abuse of their dominant position in setting fees. This indicates that the recognition and defense of copyright by the government are not, in any way, contrary to the defense of competition law and, therefore, the government itself must guarantee competition in the market of copyright and the industries related to content subject to copyright.

The participation of the CMS in the exchange relationships between the authors of the goods and the final consumers also implies new challenges for the protection of the competition because, in the relation of the CMS with the authors they represent and in which they maintain with the related industries, the monopolistic power of the CMS intervenes in the processes of price formation and distribution of royalties. This means that the CMS has a dominant position on both sides of the market.

In Colombia, The Superintendent of Industry and Commerce (SIC) has recognized the dominance position that the CMS have over its associates and, through Resolution 76278 of 2016, sanctioned SAYCO for abuse of this dominant position: it imposed a fine of 1,378 million Colombian pesos. This sanction was a consequence of the violation of the protection of competition regime for having abused its position of dominion in the representation of copyright in two events: the first, seeking to subordinate the collective management of all copyrights and related rights from some owners to the management of public communication of the works; the second, preventing the holders from opting for alternative management modalities, such as the individual management of copyright.

It is important to clarify that in the exercise of dominance position in the markets where licenses are granted, the SIC has not undertaken any sanctioning action. However, users have submitted multiple complaints about the CMS for alleged fee abuses. These complaints have resulted in lawsuits, legal proceedings and complaints in the press². These abuses have

1 Several comments to the preliminary version insisted on clarifying that in the Colombian legal system there is no concept of global repertoire or presumption of a global repertoire. That is, having a broad repertoire does not imply the representation of the totality of the works. This situation is consistent with the existence of Individual Managers (IM).

2 See, for example, El Universal de Cartagena Pilas con Sayco, published on November 14, 2011 <http://www.eluniversal.com.co/opinion/columna/pilas-con-sayco-NSEU133817>.
Corrillos. Así se le pone el tatequieto a los cobros de Sayco y Acinpro, published on July 28, 2016 <http://corrillos.com.co/2016/04/28/asi-se-le-pone-el-tate-quieto-a-los-abusos-de-sayco-acinpro/>

been recurrent in other parts of the world. The Max Plank Institute for Intellectual Property and Competition (2013) produced a report for WIPO that includes a chapter with extensive documentation of failures in several countries (Latvia, Italy, Ireland, Spain, Lithuania, Finland, Hungary, Mexico, Croatia and Bulgaria) in which it is evident how the authorities in charge of monitoring the right to competition have sanctioned CMS for fee abuses or other types of abuses of dominant powers.

In this sense, the recognition of market power against copyright does not imply that authors have a dominant position due to the exclusive use of their work. It is the monopoly that has the CMS in the representation of the holders (derived from the difficulty that the authors present to manage the remuneration for their participation in the production of the goods) which gives way to the surveillance of the SIC.

The SIC must balance the surveillance in the violating aspects of the competition in the broad spectrum in the market in which it operates. For example, on the side of users of the Works, it should monitor the violation of standards when differentially affect participants in a market. Aspects in which the government should deepen when considering the reforms to have clarity about the scope of action of the different authorities.

On the front of the surveillance on the establishment of fees should have as a last objective to guarantee the non-abuse of the dominant position that the CMS enjoy against the industries that use content subject to copyright and related rights. Mainly in the logic of the welfare of society as a whole. The rates seek to guarantee a sufficient collection so that the authors find motivation to participate in the creative processes, but at the same time as a balance they should not discourage the use in the industries in which the contents are an input. By discouraging use when rates are set higher than the value that industries are willing to pay (which is positively correlated with the value that end users are willing to pay to enjoy these works), social welfare is reduced in the economy.

In the copyright market, there are three main distortions protected by copyright regulations in Colombia.

- I. Price discrimination by the CMS: in Colombia the CMS establish the reference rates and then an individual negotiation is made with each user. Situation that leads, by definition, to the existence of different rates for the same repertoire for users of the same industry. This is unusual compared to other markets for copyright and related rights, where negotiation includes all users of the same industry, so that the negotiated rates apply to all comparable users. This situation is also the greatest source of tension between the CMS and users in Colombia

- II. Asymmetries in the bargaining power of some CMS: The possibility that SAYCO has to resort to the public force so that it controls the payment of copyright creates an asymmetry in the bargaining power between the CMS and with the industries related to the goods subject to copyright and related rights. As a consequence, the processes for concluding fees are limited to a negotiation round in which the arrangement reached is not optimal, in the sense that both parts could be better if they had the opportunity to negotiate in a greater number of iterations and in equal conditions in case of failure of the negotiation.
- III. Coexistence of individual managers (IM) with the CMS: this coexistence generates distortions in the market because it reduces the possibility of user industries to acquire a universal copyright grid increasing transaction costs. An institutional arrangement in which individual managers represent authors before Collective Management Societies (and not necessarily facing user industries) would respect the right to association and guarantee the universality of the repertoires represented by the CMS.

5.4. RELEVANT MARKETS

The task of determining the source of an agent's ability to influence the price of a good or service requires the proper definition of the relevant market. The relevant markets are determined according to two aspects. The first is the good that is subject to exchange, including its characteristics and the possibility of replacing the consumption of this good with similar ones. The second is the place where the exchange between the agents takes place. In this way, the analysis of the agents' interactions in a market seeks to determine whether the behavior of the price of a given good in a specific geographical space responds to the action of some agent or group of agents that have a relatively greater capacity than others to unilaterally and significantly influence prices.

Taking as a basis the two elements of a relevant market, geographic space and goods (and their substitutes), it can be explained how the copyright market is not univocal. The geographical space is only the one delimited by the Colombian jurisdiction. However, there are multiple goods that respond to the logic of use and the type of work that is protected. The goods of this market are then the licenses that authorize the use (public communication, reproduction, etc.) of a protected work (phonogram, musical, audiovisual or editorial work) in a certain space (television, radio or establishments open to the public).

The development of anti-competitive practices analysis in the copyright markets presents a particular level of difficulty in defining the relevant market (Max Planck Institute, 2013). This difficulty responds to the nature of the good that is transacted. Copyright is an intangible good whose owner enjoys exclusivity over the use of the good. As a consequence, determining the relevant market presents the following difficulties:

- I. Difficulty in determining the degree of substitution on the demand side.
- II. Difficulty in determining the degree of substitution on the supply side.
- I. Scarce resources to determine the degrees of substitution on the demand and supply sides.

This indicates that, in addition to the difficulty involved in the number of agents involved in the creation of copyrighted goods, the multiple industries that use them and the impossibility of determining rates of substitution between the use of goods subject to copyright, the definition of the product market faces the problem of not considering a relationship between producer and consumer, but also of including the CMS as a third participant in the exchange relations of goods subject to copyright.

The definition of the economic literature on the relevant market has been traditionally based on two elements: the product and the place where the good is traded. The first refers to a good or any of its substitutes that can compete with it when a consumer makes his purchase choice. The second refers to a geographical space where any consumer can find the good and its possible substitutes. This definition has been adopted by the main agencies for the protection of competition in the world. In the case of Colombia, The Superintendent of Industry and Commerce (SIC) defines the relevant market as the “market that will affect competition as a consequence of the projected integration operation. It is composed of the product market and the geographic market. “

In the case of goods subject to copyright, the geographic market is delimited nationally, in accordance with Colombian legislation. The copyright user does not necessarily have to physically move to a place to bring permission for the use of copyright to their industry, but they must obtain authorization from the owner or the rights administrator through a contract that is in accordance with the national legislation.

The definition of the product market requires a more detailed analysis than that of the geographic market: it not only must define the sub existing markets in the copyright market, but also the means through which consumers access the created good. That is, in addition to a market for each agent involved in the process of creating the good, there must also be taken

into account *the value added of the good created* in the value chain of the medium through which the final consumer is reached.

This primary segmentation of the copyright market still does not fulfill the function of determining the product market, because it does not take into account the degree of substitution between goods subject to copyright. In the case of these goods, the definition of a good or its substitutes needs a little more elaboration. What is really transacted are not the rights as such, but the licenses that authorize the users to use the protected works. Bearing in mind that copyright covers several types of artistic, literary and scientific creations, and a varied possibility of uses, it should not be spoken of a single copyright market, but of a multiplicity of markets.

The difficulty in determining the degree of substitution between the use of different copyrighted goods in the same economic activity is due to the fact that the degree of substitution in the value-added chain depends on the preferences of the final users and not only on the use of *any* musical work. Thus, for example, the degree of substitution between the use of one or another musical work in the audiovisual production of a work depends on the value added of each of the musical works, which, in turn, depends on the preference of the final consumer for the enjoyment of the audiovisual work with one or another musical work. That is, the marginal cost of a musical work in the production of an audiovisual work differs according to the aggregate preferences of consumers, which are not fully identifiable.

6. IMPACT OF TECHNOLOGICAL CHANGE

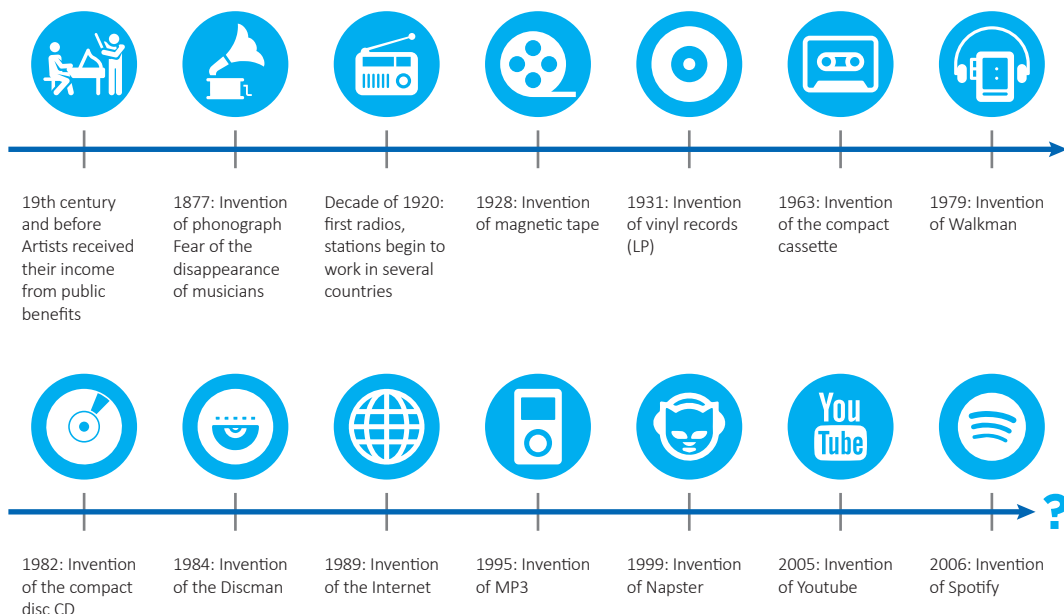
Technological change as an inherent process in the copyright market

We are in a time of acceleration of technological change that is radically modifying business models. This transformation, in turn, gives a greater depth to the market and therefore encourages the supply of works from the creative ecosystem. However, these positive effects cannot be thought that the role of the government and the legal framework can be passive. It is necessary to maintain a permanent and proactive update approach.

Technological change is necessary and inherent to this market and historically has had positive effects on copyright: it has modified the sources of income of the creative industries. In the literary, the phonographic and in the audiovisual production, these changes have reduced the fixed and variable costs of the production and reproduction of the works. This has allowed a greater diffusion, but at the same time it has facilitated the illegal reproduction.

However, the more modern media that emerge, the better definitions and mechanisms of remuneration for the creative industries should be. Hence, throughout history, legislation on copyright has adapted to these technological changes and granted more rights to authors, allowing them to benefit from new sources of income created by technology (Okamoto, 2006).

With the adaptation of the legal framework, incentives have been maintained so that authors can continue to carry out their creative work and have contributed to the survival of the creative ecosystem. Diagram 7 summarizes the transformation that the phonographic and musical industry has undergone and how artists have obtained new forms of remuneration.

Diagram 7. Technological disruption in the phonographic and musical industry

Source: Prepared by the authors. Reference figures taken from Power Point image gallery.

The phonographic industry is an excellent example to analyze how technological changes have affected musical production. The musicians and singers of all the history previous to the XIX century received their income from their live musical presentations. The invention of the phonograph in 1878 initially caused false fears for the eventual disappearance of the musicians, since their work could be reproduced without their presence. With the improvement of this invention, and after the appearance of the gramophone and record player, the laws in the different countries were recognizing the authorship of the people who created the pieces reproduced by these machines and the artists obtained a new income derived from the right to authorize the reproduction of his work. In fact, the recording in acetates allowed the survival of works that otherwise could have been forgotten.

The radio, which became popular at the beginning of the 20th century, began to publicly broadcast music and sound in several countries in the 1920s. As in the previous process, it was thought that the radio would end with the musicians and with the phonographic reproduction, since it was a free tool to broadcast music. The laws related to copyright advanced: they recognized the benefit obtained by radio stations for their sale of advertising space and demanded that they remunerate the artists who own the musical pieces they broadcast in

exchange for authorizing the transmission of their works. However, the public continued to acquire phonogram music for the ease of reproducing it at any time.

Throughout the twentieth century, the new technology was making the old devices obsolete. It was perfecting the way in which inventions created new ways of reproducing, storing and spreading music. That century, and the beginnings of the present, saw the birth and death of acetates (Vinyl records), cassettes, compact discs, walkmans and discmans. Each of these inventions created a new source of income for the authors, with goods and services at lower prices for consumers, which helped to spread the music and artists could be widely known.

Nowadays Internet is the technological change that transforms the phonographic and musical industry. Even though the Internet became massive since 1990, only a decade later it began to modify the production and reproduction of music. Napster began operating in June 1999 as the first *peer-to-peer* network that allowed two people to share free MP3 files. However, from the year 2000, this type of technology acquired enormous popularity and several similar networks were created such as Ares, Kazaa, Emule, LimeWire, among others. These platforms violated the principle of remuneration of copyrights, but they disseminated musical pieces never transmitted before massively. MP3 devices for easy storage of digital files increased the demand for digital music from both iTunes-like sites and *peer-to-peer* platforms. However, the laws and the authorities in charge of protecting copyrights persecuted the developers of the sites that violated the copyright and charged them millions in fines.

Paradoxically, these technological changes helped to create solutions to remunerate artists through websites. Nowadays, in addition to the *peer-to-peer* networks, the Internet offers pages such as YouTube or Spotify, in which producers and authors can publish their works directly in exchange for remuneration for individual reproductions. In turn, these sites earn revenue on account of advertising space or paid affiliation of subscribers who prefer to avoid advertising. Although these remunerations can be very small (\$ 0.0038 USD for reproduction on Spotify or \$ 0.0006 USD for reproduction on YouTube at the beginning of 2018)¹, these platforms contribute to the diffusion of the music of the artists and their popularity. Thus, thanks to the low costs that users have to incur to access music (time in which there is to see advertising or low subscription costs), legal reproduction becomes widespread. Popularity opens the door to more incomes from live performances, and the use of names in commercial brands of clothing, sports and musical elements, among others.

1 What Streaming Music Services Pay. Updated 2018. Digital Music News. Available on <https://www.digitalmusicnews.com/2018/01/16/streaming-music-services-pay-2018/>

The widespread use of mobile devices permanently connected to the Internet—*smartphones* or *tablets* has made it irrelevant to store MP3 music that was previously used by iPods and MP3 devices, and has discouraged the use of *peer-to-peer* platforms, with the consequent increase in the use of networks of music and videos.

The most recent developments have to do with platforms that allow to make available phonographic works directly by their authors without the intervention of related services and without seeking a remuneration for different copyright to the popularity that opens the door to the later profit by live presentations. This scheme, moreover, has caused the explosion of an offer that simply seeks to participate in creative processes, even if they do not represent real income potential. Today, the indicator for the most famous artists stopped being the number of albums sold, to be the number of reproductions on digital platforms.

Despite the opportunities that music streaming brings, the challenges are so great that it cannot be said to be a consolidated model. For example, in terms of artists, it is a very difficult model if it is not associated with other alternatives, such as live presentations. The number of streams that a song must have in order to generate a monthly income equivalent to the minimum wage in the United States is very high: in Apple, 200,000; 366,000 on Spotify, more than two million on YouTube, just to mention the three responsible for 90% of music streaming in the world². These figures refer to the individual authors; the artists represented by record companies have another bargaining power. Despite the low remuneration for artists, Spotify, which is the market leader in terms of income generation, has not produced profits since its creation and has accumulated losses exceeding \$ 3,000 million. *Fortune*³ magazine estimates that 79% of Spotify's income goes to the payment of royalties, to which must be added the multimillion-dollar pending lawsuits of different record companies and authors' societies on a global scale. The royalties and the expenses to maintain their positioning determine that this is a business still in development: with time, surely, it will show more traditional nuances, like those of the record companies, in contrast with the original idea of being a measurement of popularity for artists⁴.

2 Streaming Music Royalties are Even Worse Than We Thought — At Least According to This Indie Label <https://www.digitalmusicnews.com/2019/01/30/2018-streaming-music-price-bible/>

3 Quoted in this article of the BBC <https://www.bbc.com/mundo/noticias-43621944>

4 Are Artists Finally Profiting From the Streaming Era? <https://www.theringer.com/tech/2018/3/16/17126048/lil-pump-record-industry-revenue-streaming-era>

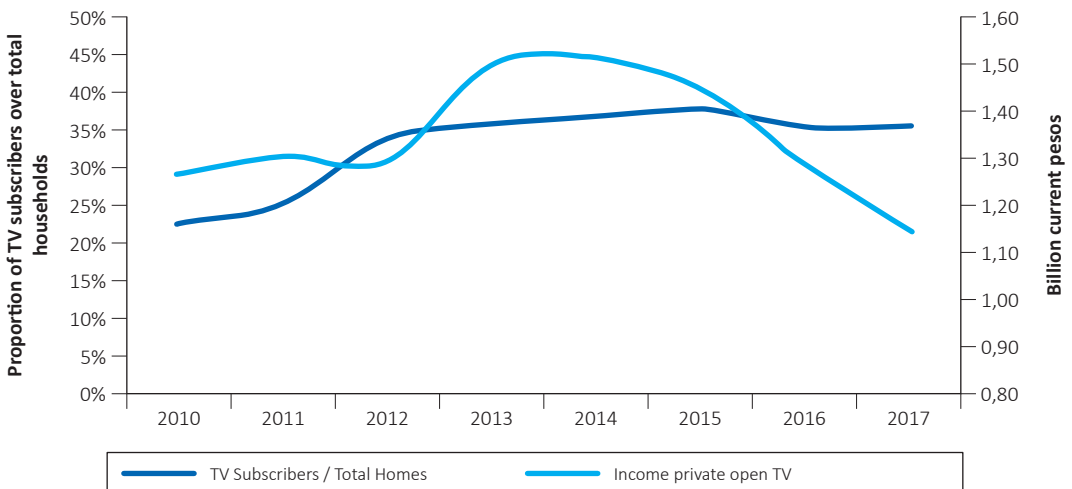
The television market has also been transformed, and this change has affected business models

In the television market, as in the other creative industries, technological change has had an impact on the audiovisual industry in Colombia. Subscription television (either satellite or wired) has become popular in the country. New technologies have allowed television to reach regions that had not been able to reach open television.

Open television, on the other hand, has lost revenue in its normal operations of selling advertising space, due in part to the fact that the digital platforms of the Internet entered to compete strongly in the advertising business (DNP, 2016). These platforms offer not only a new scenario for advertising, but also have finely adapted the advertising to the socio-economic characteristics of the target populations thanks to the algorithms of the web.

Figure 7 shows how the revenues of private open television in Colombia have been reduced in recent years. It is compared with the relationship between households subscribed to pay television services (satellite and wired), divided by total households (according to DANE projections). While the proportion of households subscribed to a pay television service shows a growing trend that goes from 23% in 2010 to 36% in 2017, the revenues of the open television reached its peak in 2014, with 1.35 billion pesos, and fell to 1.15 billion pesos in 2017.

Figure 7. Proportion of households subscribed to pay TV versus private open TV revenues



Source: Own calculations based on data from DANE and ANTV.

This trend has pushed open television channels to demand resources from television operators for the use of their channels. RCN and Caracol Television acquired licenses 20 years ago to operate as the only private television channels. During the first decade of validity of the licenses they worked successfully, but then the technological changes, as well as the lower possibility of access to the open signal in urban areas due to interference and the deficient definitions of construction standards to maintain communal antennas in the buildings, they took these channels to their dependence on subscription television operators in order to reach the audiences. Precisely the controversy surrounding the *must carry* led private channels to lawsuit the Colombian State before The Andean Court of Justice, given that Colombian law considers as an exception to the remuneration to copyright by requesting mandatory inclusion on the TV lineup of the operators by subscription. This litigation has multiple edges and interpretations that are not easy to balance due to the potential costs associated with one or another position. Regardless of how the litigation is resolved, it is possible to analyze the way in which people tune into the national private channels in the schedule of higher charge for advertising (from 7 to 10 pm) to illustrate to what extent the two television models are chained.

Table 8. Modes of access to private national television channels in AAA Schedule

	Access mode through		Total	
	Open signal	Subscription		
Preferences by channel types	Prefers not to watch private national channels	39.5%	37.5%	84.1%
	Prefers to watch private national channels	17.5%	12.6%	80.0%
	Watches private national channels and other channels	43.1%	49.9%	86.5%
Total	15.3%	84.7%	100%	

Source: Compilation based on the data of the Audience Study of Public Television in Colombia, conducted by the University of Antioquia (2017)⁵.

⁵ Table 7 was constructed from the data of the Study of Audiences of Public Television in Colombia (2017) made by the University of Antioquia and financed by the ANTV. That study did a survey that included questions about viewers' channel preferences, the times they watch TV and the way they access television. In order to simplify the analysis, groupings of the two main variables were made: 1. The channel preference, which was a question with four response options and up to three possible choices, and which was grouped into three groups, and 2. The mode of access to television, which was a question with six response options and was grouped into two. After having made this grouping, it was selected, only for effects of the table, to viewers who declared watching television during the hours of 7 to 10 in the night from Monday to Friday. With these six groupings and that schedule, the comparative table was designed.

National private television channels are important on the grid of subscription television operators in the AAA schedule. 85% of the people who tune in to any television channel during that time do so through subscription television operators. Of that group, 62.5% can tune into private national channels at that time, either exclusively or in combination with other channels on the grid. However, it is important to emphasize that there is a greater proportion of people who access private national channels through the open signal and prefer to watch only private national channels (17.5% vs. 12.6%).

Expected effect of recent technological changes

Technological changes have had a wide impact on the copyright market and it is very likely that in the future they will continue to affect this market and the functioning of the CMS. As a prospective, you can think of three scenarios that would modify this market.

A first scenario foresees the possible disappearance of the CMS to the extent that models on demand such as Netflix and Spotify give greater certainty to the authors on the use of their works and are easily transformable to business models in which there are several owners. These platforms have eliminated the costs of monitoring the use of their material and now the authors have direct information on how many times their material has been reproduced and how much the platforms pay them for each of their works. In this scenario, the role of the CMS in its current form and its intermediation lose relevance: the digital era provides tools to directly connect the creative offer with its demand; Intermediaries are no longer necessary. Of course this is a scenario that must be corrected by the developments that the business model is having, as mentioned above. In an extreme case, the individual management of copyright would replace the collective management of the same.

A second scenario contemplates the sustainability of the CMS if they adapt to the changes. One of the difficulties that technological change has not been able to overcome is the legal gaps in the use of protected material in the different legislations of the different countries. The CMS, as legally established entities, could take advantage of this in their respective legal systems to negotiate through digital platforms the use of the protected material in their charge in the world and fill the empty spaces that still exist regarding the use of the works in certain jurisdictions. Another way in which the CMS can adapt is by directly engaging in that change and creating platforms that can tell them in real time what is the protected material that has been used and how many times. This would give greater certainty to authors about the use of their creations in cases where they cannot do direct surveillance through existing digital platforms (public communication in establishments open to the public, for example)

and this would encourage them to continue to resort to the CMS for the administration of their rights.

A third scenario assumes the appearance of new business models tied to technological change. In this the artists worry less about the payment of royalties of copyright and more for the popularity they acquire thanks to these platforms. In a certain way, this is the current scenario, with platforms such as YouTube, Spotify and SoundCloud, whose technological implementation costs have been decreasing dramatically in the last five years. These platforms are already available in open source and the costs of the servers are extremely low and of very high capacity (Amazon, Google or Microsoft, for example). Moreover, the new developments of distributed recordings (Distributed Ledger Technologies) that support the decentralized applications that appeared with bitcoin and the ecosystem of the cryptocurrencies represent an opportunity to manage the registry of works and the management of copyright, closing the way to the unauthorized managers. These alternatives must be seriously considered because of their high current accessibility for their development and implementation. DLT could solve an old problem associated with the multiple attempts of catalogs of Works as the Global Repertoire Database closed in 2014, a problem consisting of the difficulty of putting a digital seal to the licenses of use.

It is important to bear in mind, however, that although these solutions may allow the use of licenses for use and the remuneration of artists for reproductions, they currently generate very low income for the vast majority of them. The technological issue is not the only problem. The content supply of the creative industries has increased exponentially and, despite the fact that demand has been highly dynamic and market value has increased, many segments are seeing dramatic changes in their business models due to excess supply or saturation. The market, necessarily, will continue to adapt to technological change and the range of alternatives.

Current collective management models, then, must adapt very soon with technological innovation in a natural and complementary transition. The important thing about these new digital platforms is that they have become the main tools through which artists and their works become globally viral. This has allowed them to increase other income, such as live presentations and even advertising. These elements must be linked to the management model. Artist accounts on the platforms attract thousands of users, which has made them powerful advertising venues for certain brands that want these artists to use their products, of course limited to the most recognized artists. Today's management models must make more holistic approaches and rely on innovation. Of course, in the context of that third scenario, which, like the other two, may not be presented.

7. CONCLUSIONS AND RECOMMENDATIONS

There are several spaces for regulatory improvements in the copyright and related rights market.

- The authorities could fill the institutional gaps around individual managers (IM), which today represent an additional source of tension between management models and users.
- There are possibilities to improve the regulatory framework of fee formation mechanisms, in such a way that the protection of copyright and related rights can be promoted, while guaranteeing fair conditions of competition.
- Due to the transformations that the business models have had and will continue to have in the short and medium term, the current scenario of high conflict among market participants could get worse.
- This situation of greater conflict leaves as the only alternative the need to raise more consistent mechanisms for setting and collecting fees.
- This study considers that the only realistic alternative, because it is not vulnerable to pressure groups, is the sectoral negotiation of parametric criteria that allow prices to be set. Although government entities must facilitate negotiation processes and issue the necessary regulations to ward off threats of collusion lawsuits, decisions on which parameters to apply and their values must be left entirely to the agreement between the parts.
- Additionally, as it is defined in the current regulation, the agreed parameters and values for the rates will be the reference for the collections to individual companies that will be able to continue being part of the confidential agreements. However, a legal

reform should be considered so that these parametric agreements are the only objective mechanism from which the claims in the litigation before the civil jurisdiction are settled. These litigations today have no standard, which causes greater conflict. A reform in this sense would force the parties to strengthen the negotiation mechanisms in the sector and at the same time minimize litigation, since it would be certain that in any case these parameters will be the rules for the liquidation.

Taking into account the need to maintain the harmony between the regulations of copyright and the protection of competition, the following recommendations are made in the case of the copyright market in Colombia.

- There is no normative model of copyright and competition protection more desired than another. The role of public policy should be to ensure that the regulatory frameworks for copyright and related rights and the right to competition are consistent and allow the development of this market and the user-related industries.
- Promote pedagogical instruments on the recognition of copyright and related rights by the industries that use the Works. Although cultural industries and associations that use protected works intensively recognize the obligations derived from copyright, many small entrepreneurs and new entrepreneurs are unaware of them. The objective of the pedagogical instruments is to make users aware that the works they use are an important input in their business models and that they add value to their production chains or to the services they offer. Sometimes, when users are clear about their obligations, they ignore that the payment is intended to reward creators for their works and in reality it is considered a tax. This perception prevents the recognition of the value added that the protected works give to the different industries. This work could be in charge of the National Directorate of Copyright or the CMS itself. Also good pedagogy is needed on the different components of copyright and related rights involved in the Works depending on their use.
- Provide negotiation mechanisms to the CMS and users and user associations, so that the iteration is not interrupted by asymmetries in bargaining power, and on the contrary have the endorsement of the authorities. One way of guaranteeing reliable negotiation mechanisms is for the DNDA and the SIC to jointly and periodically summon the CMS and IM and the users to make negotiation rounds of the parameters that would be used to collect royalties in different sectors. As competent authorities, the DNDA and the SIC would act as arbitrators, guaranteeing impartiality, transparency and availability of information. In addition, other competent authorities such as the

Ministry of Commerce, Industry and Tourism (Ministerio de Comercio, Industria y Turismo) and DANE would participate in this space, in order to promote the representativeness of the different user associations of copyright and related rights, as well as the owners and authors of the Works.

On the institutional front it is recommended:

- To combine the regulation of the vertical relation of the CMS of the regulation of the horizontal relations (CMS with affiliates versus CMS with user industries). This distinction could be made in the standard, explicitly assigning each of these spheres to different authorities. Regarding the relations between the CMS and its affiliates, the DNDA has promoted guidelines for good corporate governance and has made several publications in this regard. The idea is to strengthen the surveillance and control capacity of the DNDA so that it can sanction the behaviors that undermine such practices. The relations of the CMS and the user industries should be mediated by authorities that guarantee compliance with the fee regulations in the contracts, so as to complement the SIC's work in this market with respect to the monitoring of the conditions of competition.
- The regulations determine the horizontal relationships and, as such, must be subject to external approval: they cannot be approved by the CMS and the IM. Once general parameters have been negotiated between the CMS, the IM and the users for the collection, it must have the authorization of the DNDA as the entity in charge of the surveillance and control so that its regulations can operate. It is not about defining but validating and sanctioning the validity so that it becomes a legal instrument. The role of the authorities would be to verify that these regulations respect the negotiation parameters agreed between the CMS and the IM with the users. A support mechanism to enforce collective agreements between the parties.
- Publish the repertoire of works that each CMS and IM represents. In spite of the fact that the contracts represented by the CMS and IM must be specified in the contracts, this implies that the information is obtained when the users start to incur in the negotiation costs. That the information of the represented works should be published and updated periodically in easily accessible sites such as web pages, would help users to make decisions in advance about the works they will use and would save transaction costs against contracts that do not materialize. In the same way, this practice would prevent organizations that pretend to be managers of certain repertoires from deceiving users. The above creates an environment of greater certainty and legal securi-

ty for users and for CMS and IM. It is suggested that the CMS consider the creation of a joint mechanism of information without this necessarily implying the setting of fees.

- Extend the monitoring function to individual management companies and other forms of copyright management. Decree 1066 of 2015 reaffirmed the rights enshrined in sentences 509 of 2004 and 429 of 2005 of the Constitutional Court to authorize forms of management of copyright other than the collective. However, the regulatory development has fallen short in the establishment of duties for new types of management, which has resulted in the creation of new management organizations that do not have the same control and surveillance as the CMS. A pending task is to define and clearly classify what are the alternative forms of copyright management and what is the role and nature of each of them. This normative update would contribute to generate legal and financial security conditions for users.

Regarding setting fees:

- The promotion of agreed parameters in the negotiation processes can generate better conditions to promote the cultural industries given a greater certainty on the remunerations and lower costs for judicial processes.
- The parameters must be submitted to technical reviews by the entity that monitors the horizontal relationships. These technical reviews would not only guarantee the maintenance of the objective conditions negotiated between the CMS and the IM with the users, but would also evaluate the strengthening of the negotiation conditions. It is not a matter of the authority defining the parameters but rather contributing to the technical strengthening of what is agreed between the parties. The authority would also help to collect statistical information from the copyright and related rights market that feeds the monitoring of the parameters and serves as an input for further negotiations.
- Promote the iteration of negotiations to reduce the asymmetry of bargaining power, but limiting the time of this and promoting instances of bipartite conciliation (friendly composition). The periodic revision (annual or similar) of the parameters would help to mitigate the affectation of some of the parts, effects these produced by the technological changes or new forms of use of copyright.
- Strengthen the single window as a goal oriented to the collection and facilitation of fee negotiations. However, it is not recommended that it work as a rate setting mechanism.

Finally, it is proposed to hold a workshop with all the agents of this market that will allow us to trace a route to follow. It is evident that the conflict has increased and that there is a risk of losing time at a decisive moment for cultural industries in the context of the National Development Plan (Plan Nacional de Desarrollo) 2018-2022, which also makes a clear emphasis on the orange economy.

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ANNEX 1. ASSUMPTIONS FOR THE COMPARISON OF THE NOMINAL RATES OF THE FEE REGULATIONS OF THE CMS

This annex is constructed in such a way that any person can obtain the same proportion between income associated with the service and payment for royalties, taking into account the same assumptions for the representative agents and the variables contemplated in the fee regulations.

1. CONSTRUCTION OF REPRESENTATIVE AGENTS

This exercise was done for the sectors that in the fee regulations contemplate particular parameters and a rate calculation.

A. Subscription TV service provider

With the information of the Industry Report of the ICT sector (2017), published by the Communications Regulation Commission (CRC)¹, it is possible to characterize what would be an average subscription television operator. According to that report, the total of television users towards the end of 2017 was 5,568,655 and the average monthly income per connection was 47,059. Taking into account that in 2017 the ANTV authorized 59 television operators by subscription², the representative operator had on average 94,384 subscribers. From these

1 Available on https://www.crcm.gov.co/recursos_user/reporteindustria2017.pdf

2 Available on <https://www.antv.gov.co/index.php/informacion-sectorial/informes-de-la-tv/send/5-informes-de-la-tv/7947-informe-sectorial-de-la-television-2017>

figures it can be estimated that this television operator by subscription has an income of 4,441,615,858.

B. Restaurant, catering and bar sectors

Given how complex it is to define the possible structure of an average restaurant, to avoid any arbitrary criteria, the research paper *Operación Restaurante en Colombia* was taken into account³, in which the Ministry of Commerce, Industry and Tourism of Colombia, FONTUR and the Colombian Association of Gastronomic Industry. This study counted 56 restaurants and characterized them in ranges according to their characteristics. The important data for this simulation are the following: that 50% of the registered restaurants have between 50 and 99 seats and 47% registered sales between 50 and 99.9 million. Given that these two data constitute the majority of the proportion in their criteria, the medians of the ranges were chosen to construct the representative agent.

The representative restaurant has a capacity of 75 people and a monthly income associated with its service of 75 million pesos. Bearing in mind that some of the fee regulations include precise locations and socioeconomic strata in the parameters, a stratum 3 building in the Chapinero central neighborhood was chosen as a representative location. This selection was purely arbitrary, since choosing an average site was not possible. It was also considered that the average establishment has four televisions, computers, amplifiers and sound equipment⁴.

C. Accommodation

To build the representative agent in this case, the last public version of the Hotel Indicators of Cotelco⁵ was used, In addition to the latest hotel occupancy data published by DANE, which corresponds to 55.8%⁶.

For the Cotelco report, responses were received from 400 hotels, representing 27,405 rooms. With this information, the average hotel size is 68 rooms. Likewise, the report gives the average room rate of \$ 224,327. With this information, it can be calculated that the

3 Available on <https://imgcdn.larepublica.co/cms/2014/07/28221803/Operaci%C3%B3n-Restaurantes-Final-Marzo.pdf?w=auto>

4 In the fee regulations, the number of these devices does not matter, except for the number of televisions, which is relevant in the calculation of the actor rate.

5 Available on https://docs.cotelco.co/04cd39a9aa3ee381639adfa29acf16b767880dda/?_dwn=ok

6 Available on https://www.dane.gov.co/files/investigaciones/boletines/mmh/pres_mmh_nov18.pdf

average income associated with the hotel service is \$ 255,000,000 per month. The representative hotel has 3 stars.

2. CONSTRUCTION OF THE BOXES

		Nominal rates			
		A	B	C	D
		SAYCO	ACINPRO	EGEDA	ACTORES
Programming activities and television transmission	1	3.75%	3.50%	2.00%	4.00%
Telecommunications	2	3.00%	0.72%	Not contemplated	Not contemplated
Restaurants, catering and bars	3	0.19%	0.21%	0.20%	0.06%
Accommodation	4	0.15%	0.15%	0.17%	0.08%

- 1A. The SAYCO regulation contemplates a payment of 3.75% of gross operating income for all TV broadcasting activities.
- 2A. Type B category broadcasters are chosen as representative agents. That is to say, those that use 30% to 80% of music in their usual programming. For this case, a payment of 3% of gross operating income is contemplated.
- 3A. With the parameters of the representative restaurant, when making the calculation with the guidelines defined by SAYCO in its fee regulation, the payment for copyright would be \$ 1,711,219 per year (\$ 142,602 per month). With this income, the proportion would be of the order of 0.19%.
- 4A. With the parameters of the representative hotel, in accordance with the fee regulation, the hotel would pay 0.14% of its income.
- 1B. The established fee for subscription television is used as a base in the fee regulation of ACINPRO (3.50%).
- 2B. For a Bogota station that has an FM dial, 3.5 SMMLV are charged. Assuming income of \$ 400,000,000, for the station the payment would be 0.72%.
- 3B. In the Acinpro page there is no fee regulation for this segment and for the calculation it is sent to the page of the Sayco and Acinpro Organization OSA. If the rate calculated by OSA is chosen as the *representative agent* (<http://www.osa.org.co/simulador-de-tari>

fas), This is \$ 1,876,800 per year (\$ 156,400 per month). With the parameters already established, the restaurant pays for copyright 0.21% of its income ⁷.

- 4B. In the Acinpro page there is no fee regulation for this segment and for the calculation it is sent to the page of the Sayco and Acinpro Organization OSA. If *the representative hotel* is chosen, the OSA (<http://www.osa.org.co/simulador-de-tarifas>) calculates a rate of \$ 4,709,000 per year or \$ 392,416 per month. That is, 0.15% of the income according to the parameters of the *representative agent*.
- 1C. According to the fee regulation, the current rate is \$ 943 for each subscriber. With the parameters of the representative agent, 2% of the income from the activity is paid.
- 2C. Given that this concept provides for radio telecommunication, the fee regulation does not take audiovisual works into account in this segment.
- 3C. The fee calculated by the regulation is \$ 2,011.8 per seat per month, so for the representative restaurant would be \$ 150,885. The payment constitutes 0.2% of the monthly income.
- 4C. According to the fee regulation, you must pay \$ 6,444 pesos for each place and month for the representative hotel. With these parameters, the charge would be 0.17% of gross operating income.
- 1D. According to the fee regulation, there is a fixed rate of 4% for any television format.
- 2D. There are no parameters included in the fee regulations.
- 3D. With a cost of \$ 11,000 for television, the representative restaurant would pay \$ 44,000, which constitutes 0.06% of monthly operating income.
- 4D. The current rate for a 3-star hotel is \$ 2,970 for each place and month. The representative hotel must pay 0.08% of the total income.

⁷ In this case, the application of the Sayco and Acinpro Organization-OSA was used to perform the calculation in the absence of a fee regulation of Acinpro for this sector. It is important to mention, however, that OSA functions as a single payment window for these two organizations, so in principle that amount should be divided between the two organizations. This also allows us to contrast what was calculated by that application with what was calculated following the formula and parameters of the SAYCO fee regulation for that same representative agent

DIRECTORY OF PEOPLE CONSULTED FOR THIS STUDY

Company or entity	Email	Correo electrónico
Agencia Nacional de Televisión	Fabiola Téllez	fabiola.tellez@antv.gov.co
Agencia Nacional de Televisión	Mariana Viña	mariana.vina@antv.gov.co
Comisión de Regulación de Comunicaciones	Alejandra Arenas Germán Darío Arias	
Dirección Nacional de Derecho de Autor	Andrés Varela Algarra	andres.varela@derechodeautor.gov.co
Dirección Nacional de Derecho de Autor	Jhon Jairo Hernandez	jhon.hernandez@derechodeautor.gov.co
Dirección Nacional de Derecho de Autor	Miguel Angel Rojas Chavarro	miguel.rojas@derechodeautor.gov.co
DNP	Paola Bonilla	pabonilla@dnp.gov.co
DNP	Oscar Salazar	osalazar@dnp.gov.co
Superintendencia de Industria y Comercio	Juan Pablo Herrera Saavedra	mrueda@sic.gov.co
Superintendencia de Industria y Comercio	María Carolina Corcione	mccorcione@sic.gov.co
MinCIT	Giovani Bataglin Suárez Burgos	gbsuarez@mincit.gov.co
MinCIT	Luz Mary Martínez Moliona	lmmartinez@mincit.gov.co
MinCIT	Mónica Leonel	Mleonel@mincit.gov.co
MinTIC	Jorge Guillermo Barrera Medina	jbarrera@mintic.gov.co
MinTIC	Gloria Patricia Perdomo Rangel	gperdomo@mintic.gov.co
Acinpro	Lucero Moya	bogota@acinpro.org.co
Actores	Santiago Cabrera	direccionejecutiva@actores.org.co
Egeda	Vivian Alvarado Baena	vivian.alvarado@egeda.com
Sayco	César Augusto Ahumada Avendaño	cahumada@sayco.org.co
Sayco	Ricardo Gómez Duran	ragomez12@hotmail.com
CDR	Nathalia Gomez Vargas	ngomez@cdr.com.co
DASC	Mario Mitrotti	contacto@directorescolombia.org
América Móvil / Claro	Juan Carlos Archila	juan.archila@claro.co
Claro	Santiago Pardo	santiago.pardo@claro.com.co
Claro	Adriana Güiza	adriana.guiza@claro.com.co

Company or entity	Email	Correo electrónico
Claro	María Teresa Castañeda	maria.castaneda@claro.com.co
Claro	Hilda Pardo	Hilda.Pardo@claro.com.co
Directv	Juan Camilo Castro	juan.castro@directvla.com.co
Directv	Paula Vergara	pauver@directvla.com.co
Directv	Rafael González	rafgon@directvla.com.co
Emcali	Ramiro Torres	ratorres@emcali.com.co
ETB	Ilia Obando	ILIA.OBANDOO@ETB.COM.CO
ETB	Norma Quiroz	norma.quirozv@etb.com.co
ETB	Angela Estrada	angela.estradao@etb.com.co
ETB	Mariela Arango	mariela.arangoh@etb.com.co
Movistar	Natalia Guerra	natalia.guerra@telefonica.com
Movistar	Martha Ruiz	martha.ruiz@telefonica.com
Movistar	Maria Fernanda Bernal	maria.bernalc@telefonica.com
Tigo-Une	Felipe Garzón	felipe.garzon@telefonica.com
Tigo-Une	Carlos Téllez	Carlos.Tellez@TigoUne.com
Tigo-Une	Ana Marina Jiménez	ana.jimenez@tigoune.com
Acodres	Guillermo Enrique Gómez París	presidencia@acodres.com.co
Andesco	Alberto Solano	alberto.solano@andesco.org.co
Andi	Santiago Pinzón Galán	spinzon@andi.com.co
ASJET	Eduardo Chomali	eduardo@tel.lat
Asobares	Adriana Plata	direccion.ejecutiva@asobares.org
Asobares	Andrea Chaparro Chaves	juridica@asobares.org
Asomedios	Tulio Angel	tangel@asomedios.com
Asomedios	Isabella Gaitán Riascos	igaitan@asomedios.com
Asotic	Gale Mallol	galemallol@asotic.com.co
Asotrans	Marino Quintero Tovar	marinoquin@yahoo.com
CCIT	Alberto Yohai	ASYOHAI@CCIT.ORG.CO
Cotelco	Gustavo Toro	apico@cotelco.org
Cotelco	Claudia Barreto	cbarreto@cotelco.org
Cotelco	Camilo Rojas Chitiva	c.rojaschitiva@gmail.com
Universidad Externado de Colombia	Ernesto Rengifo	propintel@uexternado.edu.co

Company or entity	Email	Correo electrónico
Universidad Externado de Colombia	Diego Guzmán	diego.guzman@uexternado.edu.co
Fenalco	María Cristina Camejo	mariacamejo@fenalco.com.co
Fenalco	María José Pérez Muñoz	mariaperez@fenalco.com.co
Consultor	Teresa Hoyos Lopez	hoyoslopeztere@gmail.com
Consultor	Santiago Márquez	smarquez@marqueztobledo.com
Consultor	Diego López	dlopez@uniandes.edu.co
Consultor	Marcel Tangarife	mtangarife@tangatiferres.com.co
Consultor	Jairo Ruge	jairoeruge@hotmail.com
Abogado PI	Liza Erazo	lerazo@erazomunoz.com
Abogado PI	Carlos Conde	magnoconde@gmail.com
Abogado PI	Alicia Lloreda	aloreda@lloredacamacho.com
Abogado PI	Tatiana Carrillo	tcarrillo@lloredacamacho.com
Abogado PI	María Fernanda Castellanos	mcastellanos@bc.com.co
Abogado PI	Mauricio Jaramillo	mjaramillo@gomezpinzon.com
Abogado PI	Alvaro Correa	alvaro.correa@bakermckenzie.com
Abogado PI	Fernando Triana	tum@tumnet.com
Abogado PI	Juan Moure	juan.moure@olartemoure.com
Abogado PI	Eduardo Varela	eduardovarela@cavelier.com
Abogado PI	Juanita Acosta	juanita.acosta@dentons.com
Abogado PI	Mauricio Patiño	mauricio.patino@ppulegal.com
Abogado PI	Ernesto Cavelier	ernesto.cavelier@phrlegal.com
Abogado PI	Ximena Castellanos	xcastellanos@castellanosyco.co
Abogado PI	Margarita Castellanos	mcastellanos@castellanosyco.co
Abogado PI	Ian Raisbeck	ian.raisbeck@roclaw.co
Abogado PI	Tatiana López Romero	Tatiana.lop.rom@gmail.com
Abogado PI	Danilo Romero	Danilo.RomeroRaad@hklaw.com
Abogado PI	Juan David Gutierrez	juadagut@gmail.com
Abogado PI	Natalia Barrera	nbarrerasilva@yahoo.co
Abogado PI	Pablo Márquez	pablo@marqueztobledo.com
Abogado PI	Fernando Zapata López	fezalo@hotmail.com



The copyright and related rights market is one of the pillars of the orange economy. It licenses or authorizes the use of intangible goods such as literary, scientific or artistic creations recognized by the laws of Colombia and most of the laws around the world.

This study approaches the understanding of the main problems of the copyright market in Colombia, with an emphasis on the music and audiovisual industries. The analysis of the study focuses on the complex and intrinsic relationship that exists between the property subject to copyright and the remuneration for its use.

ISBN: 978-958-52187-2-7



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