

WIPO



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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

Eighth Session
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SHORT DESCRIPTION OF POSSIBLE SUBJECTS FOR REVIEW
BY THE STANDING COMMITTEE

prepared by the Secretariat

I. INTRODUCTION

1. Theseventh sessionoftheStandingCommitteeonCopyrightandRelatedRights (SCCR)which tookplacefromMay13to17,2002,decidedthat,fortheeighth sessionofthe Committee,theWIPOSecretariatshouldpreparealistofallthenewissuesproposedfor futurereviewandactionbytheCommittee.TheCommitteecouldthen,onthebasisofthat list,decidewhichissuescouldbestudiedanddeterminetheir priority,urgencyandmethodof work.

2. TheissuesproposedbyMemberStatesduringtheseventh sessionareexplainedbelow.

II. RESPONSIBILITY OF INTERNET SERVICE PROVIDERS

3. Whenaworkorobjectofrelatedrightsistransmitted overdigitalnetworks,numerous partiesareinvolvedinthetransmission.TheseincludeInternetserviceproviders (ISPs)that provideInternetaccessor onlineservices,suchascompanies thatprovideconnectiontothe Internetorservicesrelatingto Internethosting.Thequestionistodeterminewhetherornot suchserviceprovidersshouldberesponsibleforensuringthatprotectedworks,whichare transmittedusingtheirservicesorhostfacilities,donotinfringecopyrightorrelatedrights investedinthoseworks.If infringementtakesplace,theISPsbecome liable.Itcould arisein oneoftwoways:iftheISPitselfisfoundtohaveengagedinunauthorizedactsof reproductionorcommunicationtothepublic,orifitisheldresponsiblefor contributingto,or makingpossible,theactofinfringementbythirdparties.

4. TheagreedstatementtoArticle8oftheWIPOCopyrightTreaty(WCT)states that“itis understoodthatthemereprovisionofphysicalfacilitiesforenablingormakinga communicationdoesnotin itselfamountto communicationwithinthemeaningofthis Treaty ortheBerneConvention.”Thisstatement,however,seemsonlytoaddress thequestionof directliability,nottheoneofcontributoryorvicarious liability.

5. Thereisagrowingbeliefinsomecountriesthatclarificationoftheissuewouldbe useful.ThatclarificationcouldbeprovidedbylegislationsspecificallydirectedatISPs' activitiesratherthanbyrelianceongeneralpre-existing legaldoctrineslikethedoctrinesof contributoryorvicariousliability.Onethresholdquestionthatlegislators mightdealwithat thenationalleveliswhethertheapproachshouldbespecific tocopyright,orwhathasbeen calleda“horizontalapproach,” thatis,arulegoverningtheresponsibilityofserviceproviders irrespectivelyofthegroundsforillegalityofthetransmittedmaterial.Inotherwords,the horizontalapproachwouldcovernotonlycopyrightinfringementbutalsootherlawssuchas libelorobscenity(suchasintheEuropeanDirectiveonElectronicCommerce).Ontheother hand,a copyright-specificapproachwouldtakeintoaccountspecificattributesofintellectual propertyandofcopyrightinparticular(suchasintheUnitedStatesof Americaand Singapore.)AsfarastheSCCRisconcerned,however,possible discussionsmightbelimited totheresponsibilitiesrelatedtoinfringementsofcopyrightandrelatedrights.

6. Animportantfeatureinsomeexistingnational legislationisthatitregulatestheservice providers'obligation toreactappropriatelywheninformedaboutirregularitiesonwebsites hostedand/ortransmittedbythem(“noticeand takedownrules”).

7. WIPO has been dealing with this issue since the adoption of the WCT and the WIPO Performances and Phonograms Treaty (WPPT). In 1999, WIPO organized a Workshop on Service Provider Liability in Geneva.¹ The issue was also discussed, in general, during the WIPO International Conferences on E-Commerce organized early in 1999 and 2001, in Geneva.²

III. APPLICABLE LAW IN RESPECT OF INTERNATIONAL INFRINGEMENTS

8. Copyright and related rights are territorial, that is to say, protection is granted within the national borders of sovereign States, sometimes on a regional basis, but never on a global scale. Although the Berne Convention has been a driving force behind the development of international copyright laws since 1886, as well as the Rome Convention in 1961 in respect of related rights, the territorial basis of copyright and related rights remains the same.

9. Private international law addresses problems that arise from the territoriality of legal systems. When a dispute involves more than one country, especially in the current digital age in which we live, it is necessary to decide which country's courts have jurisdiction to hear the case, to determine under which law the dispute can be decided, and to ensure that the judgment is recognized and enforced in the other countries concerned. Today, private international law attributes jurisdiction to national courts when disputes involve a foreign element, determines the law of the country or countries which should apply (applicable law) and facilitates the recognition and enforcement of foreign judgments. It does so, in most cases, on the basis of such territory-based factors as the domicile of a person, the place of registration of an industrial property right or the place of infringement. The rules of private international law distinguish between the law applicable to a contract, and the law applicable to an infringement of rights.

10. Questions of private international law have assumed increasing importance in the field of intellectual property as markets have become increasingly global. In addition, with the advent of the Internet, these questions have become both more pressing and complex. Because of the global nature of the transactions on the Internet, it has become increasingly difficult to apply territory-based law to transactions which recognize no geographical frontiers, and to determine, with reasonable certainty, which court will have jurisdiction to hear the case.

11. WIPO has dealt with issues of private international law in various fields of its work: in 1998, WIPO organized a Group of Consultants on the Private International Law Aspect of the Protection of Works and Objects of Related Rights Transmitted through Global Digital Networks, in Geneva.³ Since 1999, the WIPO Standing Committee on Trademarks, Industrial Designs and Geographical Indications has been discussing aspects of jurisdiction, choice of law and enforcement in the trademarks field.⁴ In 2000, WIPO published a Primer on

¹ <<http://www.wipo.int/eng/meetings/1999/osp/index.htm>>

² <<http://ecommerce.wipo.int/meetings/1999/index.html>>
<<http://ecommerce.wipo.int/meetings/2001/conference/index.html>>

³ <<http://www.wipo.int/eng/meetings/1998/gcpic/index.htm>>

⁴ <<http://www.wipo.int/sct/en/>>

Electronic Commerce and Intellectual Property Issues (WIPO/OL OA/EC/Primer)⁵ which, *inter alia*, provides an overview of topical issues concerning jurisdiction, enforcement and applicable law. The WIPO Forum on Private International Law and Intellectual Property was organized in 2001, in Geneva. ⁶This event facilitated an exchange of views on this topic as a first step in the process of identifying possible issues for international cooperation.

12. Various associations and organizations have also focused on such issues in their respective programs. For example, the Hague Conference on Private International Law (“Hague Conference”) prepared a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, ⁷ which contains provisions that concern intellectual property disputes. The matter is still under discussion.

IV. VOLUNTARY COPYRIGHT RECORDAL SYSTEMS

13. Article 5(2) of the Berne Convention states that “the enjoyment and the exercise of copyright shall not be subject to any formality.” This is one of the fundamental principles of the Convention. It establishes that protection may not be made conditional on the observance of any formality. However, in certain countries party to the Berne Convention, the national copyright law provides facilities to national and/or foreign creators and copyright owners for registering their works through a voluntary recordal system. Advantages in an optional recordal system may include the following: (i) establishing a public record of the copyright claim; (ii) establishing *prima facie* evidence in court of the validity of the copyright and of the facts stated in the certificate; and (iii) availability of statutory damages and attorney’s fees to the copyright owner in court actions.

V. RESALER RIGHTS OR “DROIT DESUITE ”

14. The “*droit desuite*” or resaler royalty right, is a right for visual artists to receive a royalty from each resale of their copyright works. Article 14 *ter* of the Berne Convention provides for this right concerning original works of art and original manuscripts. It is an optional right, and may be subject to reciprocity, that is to say, countries with laws which recognize the resaler right are only obligated to apply it to foreign works if the legislation in the country to which the author of such foreign works belongs also recognizes it.

15. Although hits recognition is not mandatory for the countries of the Berne Union, this right has been included in a number of national and regional copyright laws. For instance, a European Directive⁸ in that respect must be implemented in the coming years by the States members of the European Union. This right will be introduced in some countries for the first time (e.g., United Kingdom). In other countries, such as the United States of America, the matter is subject to local statutory rules (e.g., California Resale Royalties Act of 1976) or to

⁵ <<http://ecommerce.wipo.int/primer/index.html>>

⁶ <<http://www.wipo.int/pil-forum/en/documents/index.htm>>

⁷ <<http://www.hcch.net/e/workprog/jdgm.html>>

⁸ European Directive 2001/84/EC on the resaler right for the benefit of the author of an original work of art.

contractual alternatives. A relevant document in that respect is the US Copyright Office Report requested by the Congress on the feasibility of implementing this right.⁹

VI. OWNERSHIP AND AUTHORIZATION OF MULTIMEDIA PRODUCTS

16. Multimedia products or works are created often by interactive systems and by multiple creators which unite, in a single digital support, elements such as graphical expressions (texts, signs, words); sounds (musical works, recitations, soundtracks); fixed images (photographs, drawings, pictures); or moving images (cinematographic works and other audiovisual fixations). They allow their users to interact through these different elements.

17. In general, multimedia products are made from a multitude of pre-existing works, owned by a large number of copyright owners, exercising a large number of overlapping rights. In addition, right owners may belong to different segments of the cultural industry (music, cinema, software, education), applying different licensing practices. Multimedia publishers wishing to acquire rights might very well end up having to negotiate with hundreds of right holders for one single multimedia product.

18. As a consequence, the legal characterization of these products is often hard to establish. The original and derivative features of such works are complex and their legal characterization is crucial for applying the appropriate ownership regime, including the determination of the field of application of the rules on the producer's exercise of contributing authors' rights in Article 14*bis* of the Berne Convention regarding audiovisual works.

VII. IMPLEMENTATION OF THE WCT AND WPPT, PARTICULARLY REGARDING PROVISIONS ON TECHNOLOGICAL MEASURES OF PROTECTION AND LIMITATIONS AND EXCEPTIONS

Technological Measures of Protection

19. Technological measures of protection (e.g., conditional access and encryption systems) are means by which right owners may limit access to users of protected works. As such systems can be circumvented, for instance, by breaking encryption codes or otherwise providing unauthorized access, legal measures against such circumvention have become necessary as a complement to the existing enforcement measures.

20. Provisions to this effect have been included in Article 11 of the WCT and Article 18 of the WPPT. According to these provisions, adequate legal protection and effective legal remedies shall be provided against the circumvention of effective technological measures that are used by authors or other right owners in connection with the exercise of their rights and that restrict acts, in respect of their works, performances or phonograms, which are not authorized by the right owners concerned or permitted by law.

⁹ *Droit de Suite*: The Artist's Resale Royalty: A Report of the Register of Copyrights, by the Library of Congress Copyright Office General Counsel, 1992.

21. Concerns have been expressed about the possibility that an uncontrolled use of technological measures together with anti-circumvention legislation and contractual practices will allow rights owners to extend their rights far beyond the bounds of the copyright regime, to the detriment of public interest. At the same time, concern has also been expressed that a narrow definition of exceptions and limitations to the protection of technological measures will unduly restrict reasonable access to and use of protected works. Authors and right owners, on the other hand, are of the view that unless there is strong protection for technological measures and assurance that exceptions are precisely laid down, they will be unable to exercise their due rights. The fundamental question is, therefore, how to strike the right balance in national laws, their implementation and enforcement.

22. Legal protection of technological measures does not work the same way in all legal systems. Countries that hitherto have implemented the WCT and the WPPT have tried to reset the balance in different ways, following their own philosophical, social, economic and legal approaches.¹⁰ However, a number of governments are seeking guidance regarding some fundamental questions: (i) how strong should that legal protection be? (ii) what kind of activities should they cover (i.e., copying, access)? (iii) when should it be permissible to circumvent technological protection measures? (iv) when should it be permissible to distribute devices, including software, that defeat such measures? and (v) should limitations and exceptions only apply to non-skillful computer users unable to circumvent technological protection measures without assistance?

Limitations and Exceptions

23. Limitations and exceptions on the scope and exercise of copyright and related rights vary from one country to another. Being based on the particular social and economic needs of each country, that diversity has been permitted, and even promoted at international level, notably by the standards provided by the Berne Convention and the Rome Convention, and more recently by the WCT and the WPPT.

¹⁰ For instance, under Article 6(4) of Directive 2001/29/EC of May 22, 2001, on the harmonization of certain aspects of copyright and related rights in the information society, member States are obliged, under certain circumstances, to ensure that a rightholder will provide the means which enable the beneficiaries of a few of the copyright exemptions to perform the exempted but technologically blocked act. However, the obligation may not be imposed on a rightholder, if a work is distributed on demand online and there is a contract prohibiting the act. Under Article 12 of the Directive, the European Commission shall every three years submit a report on the implementation of the Directive, examining in particular, *inter alia*, whether acts which are permitted by law are being adversely affected by the use of effective technological measures. In addition, article 1201(a)(1) of the Digital Millennium Copyright Act of the United States of America provides that every three years, the Librarian of Congress must determine if users of a class of works are likely to be prejudiced in their ability to engage in non-infringing uses, by the prohibition on circumvention of access controls. If the Librarian so finds, he is to suspend for the next three years the prohibition on circumvention of access controls on the concerned class of work without distinguishing on the basis of different categories of users.

24. The agreed statements to Articles 10 and 16 of the WCT and the WPPT, respectively, permit that national legislation carry forward or extend the traditional limitations and exceptions, and even devise new ones to the digital environment. That applies subject to the three-step test provided for in the text of those Articles, according to which limitations for exception to rights can only be introduced in certain special cases, when they do not conflict with a normal exploitation of the work, performance or phonogram and they do not unreasonably prejudice the legitimate interests of right owners.

25. But with today's ease of reproduction and dissemination, a major challenge relates to the implementation of these provisions. Issues such as private copying, time shifting and space shifting, free use by libraries or for purposes of education and research, among others, not to mention widespread unauthorized downloading, exchange and reproduction of works by consumers, lead to the broader question how to achieve balance in the global information infrastructure between the protection of right owners controlling the exploitation of protected works and the recognition that certain communities and groups of the public will benefit from reasonable exceptions.

26. Being two of the main issues of the WCT and the WPPT, technological measures of protection and the limitations and exceptions of copyright and related rights in the digital environment have been a matter of thorough discussions in many different WIPO meetings, among them: the WIPO Workshop on Implementation Issues of the WCT and the WPPT, held in 1999,¹¹ and the International Conferences on Electronic Commerce, held in 1999 and 2001, in Geneva.¹²

VIII. ECONOMIC SOFCOPYRIGHT

27. Copyright and related rights are a tool for economic, social and cultural growth and development. Understanding the economic role of this protection and how copyright-based industries and business (press and literature, music, theatrical production, opera, motion pictures and video, radio and television, photography, software and databases, visual and graphic arts, etc.) can benefit from it, will enable governments to develop policies and facilities to support those activities. Recently substantial economic research has been carried out on the issue.

28. Although some countries¹³ have done survey work and shown the contribution of cultural and information industries to the national economy, that contribution is not sufficiently demonstrated, particularly in developing countries. Undertaking surveys which measure the share of copyright-based activities in the national economic activities thus will assist the governments in the above-mentioned tasks.

¹¹ <http://www.wipo.int/eng/meetings/1999/wct_wppt/index.htm>

¹² <<http://ecommerce.wipo.int/meetings/1999/index.html>>

<<http://ecommerce.wipo.int/meetings/2001/conference/index.html>>

¹³ e.g., Australia, Austria, Canada, Finland, Germany, Japan, the Mercosur countries and Chile, New Zealand, the Netherlands, Norway, Sweden, United Kingdom and the United States of America.

29. In light of the above, WIPO organized a meeting in July 2002, in cooperation with the Government of Finland, for the preparation of a handbook on survey guidelines for assessing the economic volume of creative industries. A WIPO Handbook on Survey Guidelines for Assessing the Economic Contribution of Copyright and Related Rights will be published in early 2003. It aims at providing governments and other entities wishing to carry out surveys a practical framework and guide for assessing the volume of copyright and related rights in the national economy.

30. The studies which have been prepared so far often differ as to objectives, parameters, scope, data collection, source and reliability of statistics, calculation of estimates and analysis of the findings. Given the different situations in different countries, particularly where statistics could be insufficient, the results of surveys can be uncertain, and meaningful comparisons in time and across frontiers become difficult. WIPO's Handbook project would reduce considerably such uncertainty. At the same time, it would be a contribution in an area of growing interest to policymakers and to industry and where, as yet, no international cooperation has taken place.

IX. COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS

31. Many creative works are increasingly delivered in digital form and particularly through global networks. Questions have emerged in connection with the licensing and monitoring of use as well as of the collection and distribution of remuneration in a digital environment. The advent of multimedia productions, together with the ever-increasing possibilities offered by digital networks like the Internet, is affecting the conditions of protection, exercise, management and enforcement of copyright and related rights.

32. Questions which are being raised today relate to the role of traditional collective management societies in the digital environment, the scope for individual management of rights, the use of digital rights management tools, whether collective management societies should be public or private entities, the role of the government in this context, collective management and competition.

33. Among the major activities organized by WIPO to address the main issues of management of copyright and related rights, particularly in the digital environment are the WIPO International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology, in 1997, in Seville, Spain;¹⁴ and the International Conference on Electronic Commerce, held in 1999 and 2001, in Geneva.¹⁵

34. Furthermore, a new WIPO Guide on Collective Management of Copyright and Related Rights will be published before the end of 2002.

¹⁴ WIPO International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology (Seville, 1997), WIPO Publication No. 756.

¹⁵ <<http://ecommerce.wipo.int/meetings/1999/index.html>>
<<http://ecommerce.wipo.int/meetings/2001/conference/index.html>>

X. COPYRIGHT PROTECTION OF FOLKLORE

35. The Berne Convention and the WCT offers some protection to expressions of folklore. The Berne Convention through Article 15(4) (unpublished works whose author is unknown but who can be presumed to be a national of a Member State) and Article 7 (term of protection of an anonymous work from the moment the work is made available to the public). Article 1(4) of the WCT obliges Contracting Parties to comply with Articles 1 to 21 of the Berne Convention, that is, also with Articles 7 and 15(4) of the Berne Convention.

36. Also, performers of folklore are protected under the WPPT. The definition of “performers” in Article 2 of the WPPT explicitly includes “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform... expressions of folklore.”

37. While literary and artistic productions derived from folklore and made by current generations of society can in many cases be protected under current copyright standards, the underlying folklore itself is the result of a collective, continuous and slow process of creative activity exercised in a given community by consecutive imitation. Works protected by copyright must, according to general copyright norms, bear a mark of individual originality. Traditional creations of a community, such as the folktales, folk songs, folk music, folk dances, folk designs or patterns, may often not fit into the notion of literary and artistic works. Copyright is author-centric and, in the case of folklore, an author – at least in the way in which the notion of “author” is conceived in the field of copyright – is not always present. In addition, as regards the term of protection, most expressions of folklore undoubtedly go back much further in time than the term of 50 years granted by the Berne Convention. Hence, to the extent that many expressions of folklore could meet the legal requirements for copyright protection, this protection would have lapsed for most such expressions now in existence. Nonetheless, copyright remains a realistic practical option for creators working within a traditional cultural or folklore framework, inasmuch as they produce new works that flow from their traditional cultural background or folklore heritage but can still be recognized as specific objects of copyright protection in their own right.

38. At the WIPO General Assembly session in 2000, the Member States established an Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for the purpose of discussions on these subjects. A distinct forum for this purpose was deemed appropriate because each one of these subjects cuts across the conventional branches of intellectual property law and does therefore not fit into existing WIPO bodies. For example, the laws of trademarks, industrial designs, geographical indications, unfair competition and patents are also relevant to the protection of expressions of folklore. At the same time, the three subjects are closely interrelated, and none can be addressed effectively without considering aspects of the others.¹⁶ The IGC has met three times, the latest being in June 2002. The outcome of that meeting and the next step to be taken are described in document WIPO/GRTKF/IC/3/17 available also on the WIPO website.¹⁷

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¹⁶ <http://www.wipo.int/eng/document/govbody/wo_gb_ga/doc/ga26_6.doc>

¹⁷ <http://www.wipo.int/eng/meetings/2002/igc/doc/grtkfic3_17.doc>