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JUSTIFICATIONS FOR TOPICS PROPOSED AS FUTURE WORK
BY THE EUROPEAN COMMUNITY AND ITS MEMBER STATES
AT THE SCCR OF MARCH 10 - 12, 2008

Document prepared by the Secretariat

The Annex to this document contains a proposal put forward by the European Community and its Member States, received by the Secretariat on October 27, 2008.

[Annex follows]

ANNEX

Justifications for topics proposed as future work
by the European Community and its Member States
at the SCCR of 10-12 March 2008

Artist's resale right

What is the artist's resale right?

The artist's resale right entitles artists or their heirs to a royalty based on the price obtained for any resale of an original work of art subsequent to the first transfer by the artist, when art market professionals (such as an auctioneer, a gallery or any other art dealer) participate in the sale. The resale right forms an integral part of copyright and is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works. A harmonised artist's resale right was introduced at EU level with *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.*[1]

Why should the artist's resale right be discussed in WIPO?

The artist's resale right is set out in the Berne Convention in its Article 14ter and provides that the resale right is available only if legislation in the country to which the author belongs so permits. The European Community and its member States would be interested in finding out which other countries have introduced the artist's resale right and the modalities under which it functions, thereby looking to identify Member States of the SCCR who offer, or in the future wish to offer, comparable protection to authors and those entitled under the artist after her/his death.

Orphan works

What are orphan works?

Orphan works are works which are still in copyright but whose owners cannot be identified or located. Protected works can become orphaned if data on the author and/or other relevant rightholder(s) (such as publishers or film producers) is missing or outdated. This is often the case with works which are no longer exploited commercially.

The issue of orphan works has come to the fore in view of large scale digitisation projects undertaken both by public entities and by private entities such as search engines (e.g. the Google Library project) to allow an access as wide as possible to the richness and diversity of cultural heritage. There is a significant demand to disseminate works or sound

[1] OJ L 272/32 of 13.10.2001.

recordings of an educational, historical or cultural value. It is often claimed that such projects are held up due to the difficulty in finding a satisfactory solution to the orphan works issue.

The issue of orphan works is mainly a rights clearance issue – how to ensure that users can use orphan works in a legitimate way, e.g. to allow the digitalization of orphan works in a way as secure and fair as possible, respecting the rights of the rightholders. Apart from liability concerns also the interests of the consumers and the immense cost and time needed to locate or identify the rightholders (especially in case of works of multiple authorship) must be taken into account.

What is at stake is to assure legal certainty for the exploitation of orphan works, without dissolving Copyright Law. The problems involved may vary according to the categories of protected matter and so may their solutions.

Why should the issue of Orphan works be discussed in WIPO?

The orphan works issue is currently being considered both at the national and at the EU level, as well as in other WIPO member states. The European Community and its Member States believe that an exchange of information on this important topic at the international level would be a very useful exercise, and especially meaningful in the cross-border effects of digitisation activities.

Collective management

What is collective management?

Collective rights management is the system under which a collecting society jointly administers rights and monitors, collects and distributes the payment of royalties on behalf of several rightholders. This system evolved in view of the large number of uses, users and rightholders involved.

Collecting societies currently administer rights in the area of music, literary and dramatic works as well as audiovisual works, productions and performances for activities such as communication to the public and cable retransmission of broadcasting programmes, mechanical reproductions, reprography, public lending, artist's resale right and private copying.

Why should the issue of Collective management be discussed in WIPO?

For cultural, historic and legal reasons, there are varied solutions on national levels on how collecting societies are set up, the conditions under which they operate and on their relations with rightholders, users and other collecting societies. These questions have not yet been harmonized at the level of the European Community. The European Community and its Member States would be interested in an exchange of information and a sharing of national experiences within the international context.

Applicable law

What does applicable law mean?

The applicable law is the national law which applies to copyright-relevant acts. Choosing the law applicable to copyright-relevant acts is governed by an area of law referred to as conflict of laws. Generally speaking, national courts usually apply the law of the country where the work is exploited or the law of the country of origin of the work, or a combination of both. The European Community has harmonized only one aspect of this broad legal field, notably the question of applicable law concerning non-contractual obligations. *The Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (»ROME II«)*[2] deals in Article 8 with the law applicable to the infringement of intellectual property rights.

Why should the issue of applicable law be discussed in WIPO?

The determination of the applicable law comes into play in situations which involve an international dimension. The courts must choose between the competing laws of the different jurisdictions which have a connection with a particular situation. Due to information technology and networks, works are often exploited and used across borders, and such situations arise increasingly often.

The European Community and its Member States would be interested in an exchange of information on this topic and on the possible difficulties in that the choice of law rules lead to contradictory outcomes in different jurisdictions.

[End of Annex and of document]

[2] OJ L 199/40 of 31.7.2007.