

*Summary presentation of the Brainstorming exercise convened by WIPO  
on April 6 and 7, 2017*

Following a proposal by the Group of Latin American and Caribbean Countries (GRULAC),<sup>1</sup> the Standing Committee on Copyright and Related Rights, during its 33<sup>rd</sup> session from November 14 to 18, 2016, requested the WIPO Secretariat to conduct a study on the impact of digital technology on the development of national legal frameworks governing copyright and related rights over the past ten years.

Accordingly, after preparing a mapping of certain national instruments, WIPO organized a meeting of academic experts on April 6 and 7, 2017, to: discuss the preliminary results of the study; ascertain whether the national legal instruments that had been amended or supplemented addressed the challenges of the digital era; and make additional observations and consider whether it would be necessary to supplement or clarify WIPO-administered treaties in light of changes in technology.

The options available to the experts were by their nature open since the initiatives to be considered ranged from completely new instruments to “lighter” solutions, such as recourse to “soft law”.

It was an innovative very rewarding procedure in that:

- the International Bureau was comparing its analysis to that of individual experts who have long pondered future trends in this area;
- these experts were able to discuss issues freely their viewpoints with experts from WIPO; and
- WIPO had made every effort to bring together experts who:
  - o hailed from different legal traditions;
  - o held differing views or beliefs on these complex issues (such that the analyses could well be convergent or divergent); and
  - o came from different geographical regions with all continents represented.

Accordingly, the participants were:

- two experts from Africa: Mr. Joseph Fometeu (Cameroon) and Ms. Marisella Ouma (Kenya);
- two experts from Latin America: Mr. Fernando Zapata (Colombia) and Mr. Andres Guadamuz (Costa Rica);
- two experts from Asia: Mr. Daniel Seng (Singapore) and Mr. Tatsuhiro Ueno (Japan);
- three experts from Europe: Mr. Mihaly Ficsor (Hungary), Mr. Pierre Sirinelli (France) and Ms. Raquel Xalabarder (Spain);

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<sup>1</sup> Document SCCR/31/4, *Proposal for a Review of Copyright in the Digital Environment*  
[http://www.WIPO.int/edocs/mdocs/copyright/EN/sccr\\_31/sccr\\_31\\_4.docx](http://www.WIPO.int/edocs/mdocs/copyright/EN/sccr_31/sccr_31_4.docx)

- two experts from North America: Ms. Jane Ginsburg and Mr. Justin Hughes (United States of America);

The extremely rich discussions at this meeting are understandably very difficult to summarize, mainly because of the briefness of this report. However, even without doing justice to the sheer variety of viewpoints expressed, it is still possible to present some of the key ideas that emerged from the discussion.<sup>2</sup>

Furthermore, while it may be possible to make some suggestions on the next stages in the work of this Organization (II), caution needs to be exercised before any initiative is taken. This should be done for several key reasons, but especially because it seems necessary to understand and master existing instruments before considering new ones, if at all (I).

### *I - Appeal for caution predicated on the need to have a better understanding of existing instruments*

The first idea that emerged from the experts' discussion was an appeal for caution.

It is known that caution is a cardinal virtue of the legislator.<sup>3</sup> In this case, caution is necessary for three reasons. It is important to:

- have a better understanding of situations around the world;
- have a better understanding of the phenomena described; and
- avoid a hasty approach that would disrupt the fragile balances already struck.

In short, this entails gaining a greater understanding of existing instruments so as to take a more informed decision as to whether it is necessary to make any legislative changes.

However, the problem is twofold. First, it is necessary to have a greater understanding of the solutions outlined in international treaties (A). Second, it is necessary to be aware that copyright and related rights solutions are no longer the sole component of legislation regulating the exploitation of creative works. Other sources of law coexist with copyright and related rights (B).

### *A - Develop a fuller understanding of the content of applicable laws – the solutions set out in existing international instruments*

Examples of existing instruments include the two WIPO treaties of December 20, 1996. Do we agree on the **scope of the rules as envisaged** at that time? And do these rules permit

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<sup>2</sup> It is understood that this document represents a summary of the discussions undertaken during the brainstorming exercise; as such it does not reflect the full richness of the discussion and it does not exhaustively express the totality of the experts' points of view."

<sup>3</sup>It suffices here to refer to Montesquieu who, in *Les Lettres Persanes*, was not afraid to state that "by reason of some extravagance springing rather from the nature than from the mind of man, it is sometimes necessary to change certain laws. But the case is rare; and when it happens it requires the most delicate handling", although he also acknowledged that "useless laws debilitate such as are necessary".

coherent and effective coverage of the rapid growth in digital technology? What role do other plurilateral treaties, such as free trade agreements, play? On this point, the experts – including a former WIPO official who was deeply involved in preparing the drafts of these instruments– noted that **the boundaries among the three most fundamental rights** recognized worldwide, namely, the rights of reproduction, distribution and communication to the public, are **no longer as clear-cut** as might be imagined.

**1 –** Of course, it is undeniable that the **right of reproduction** is exercised **less frequently** today than in the past, because it is possible to make works available via digital networks. At the very least, this right is currently applied less than the right of communication to the public.

Furthermore, it should be noted that the WIPO Copyright Treaty of 1996 simply relied on the Berne Convention.

However, although this reduced frequency of use is undeniable and understandable, we should not deny a more substantial reality. “Digital technology” is not only about making works available online. Media are still in use; that is why it is important to fully understand the scope of the right of reproduction.

**There are certain issues** that would need to be addressed in the future. These include: the much-discussed issue of data mining; the deceptively simple issue of 3D printing; and the increasingly relevant issue of copies in the cloud (private use/legal or not?).

To that end, should we intervene and create new standards or simply reinterpret the Berne Convention to clarify our understanding of these issues? There are different views on the matter.

**2 –** In any event, the phenomenon described above is accompanied by the growing prominence of the **right of distribution**.

Nonetheless, the solutions adopted in some countries may not be satisfactory. There is an emerging idea that, during a download, the right of communication to the public is increasingly **supplanted** by the right of distribution.

We may find this **surprising**, considering that barely a few decades ago the dominant view was that the right of distribution only applied to the circulation of physical copies and not to acts which make works available via digital networks. (This view is also supported by the Agreed Statement concerning Articles 6 and 7 of the WIPO Copyright Treaty: “As used in these Articles, the expressions “copies” and “original and copies”, being subject to the right of distribution and the right of rental under the said Articles, *refer exclusively to fixed copies that can be put into circulation as tangible objects.*)

However, while it is necessary to take note of this development, one fundamental technical question arises immediately: Is this right exhausted after the first use when a product is distributed digitally?

3 – Another equally surprising observation must be made: Not only is the **right of communication to the public** under threat by the rapid growth of another right; it also has to fight against the **impoverishment of its content** through judicial implementation.

Hence, today some countries wonder whether the mere “**making a work available to the public**” is enough to implement the right of communication to the public or whether, in addition, an act of actual transmission is needed. The issue is fundamental considering the current trend in the “consumption” of works.

The question may come as a surprise on reading Article 8 of the WIPO Copyright Treaty of December 20, 1996, which provides for “the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them”. The wording “may access” clearly extends the exclusive right to both potential and actual making available.

Unfortunately, case law interpretation of this right has too often increased the uncertainty regarding its scope. For example, the interpretation by the Court of Justice of the European Union (CJEU) of the scope of this right of communication to the public has become exceedingly complex, involving 16 different criteria (which can be considered individually or jointly). Such complexity can only harm the predictability that should characterize any legal system.

The CJEU criteria also include the “**new public**”, a notion that negotiators of WIPO-administered treaties had considered for a while (during the proceedings of the Brussels Conference of 1948) and which led to the adoption of Article 11*bis*(1) of the Berne Convention before it was discarded for lack of relevance (criteria for “an organization other than the original one”). For more on this matter, see Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable in *Copyright*, WIPO, 1984, nos. 63-67, pp. 144 *et seq.*)

In light of the above, the experts suggested that **WIPO should explore the possibility of clarifying this notion of “communication to the public”**.

### ***B - Learn more about the actual content of the applicable standard - diversity of sources***

The study by Guilda Rostama is an excellent summary of the extraordinary fusion of legal systems, an indication that the problems are indeed universal. It provides a mapping of the legal provisions that address these issues, but the final picture remains inadvertently incomplete. Why?

First, because legal provisions should not be mistaken for positive law.

The experts unanimously agreed that, on account of rapid changes in technologies and associated uses, legal standards necessarily appear to be incomplete. Accordingly, judges have the role of interpreting them and conferring on them a certain scope and relevance.

This means that, in addition to the mapping that has been prepared, another mapping should be prepared for solutions set out in case law.

To this situation we must add the impact of contractual arrangements, practical uses, practices of collective management societies, and the growing role of “soft law” processes.

Second, the experts found that the applicable solution was not confined to copyright law. Copyright law can no longer stand alone. Its implementation is also underpinned by rules from other disciplines such as fundamental rights, competition law or rules of liability established to govern e-commerce.

However, these rules can conflict with each other, often to the point of bending copyright rules or hampering their effective application.

This observation immediately leads to another, which is that authors no longer hold a central position in the implementation of copyright law.

- First, traditionally, because they must share that stage with other stakeholders. Moreover, there is a proliferation of new players, some of whom are requesting the recognition of their intellectual property rights. One current example would be news publishers in Europe.
- Second, the direct connection with consumers, increasingly facilitated by digital technology, has brought consumerist approaches into the field of copyright.
- Last, and above all, the use of digital technology has spawned a multiplicity of interventions from technical service providers. The result is that special statutes have been adopted for these providers, creating specific regimes of limited liability that may prevent rightholders from obtaining the fair remuneration due to them for the exploitation of their works.

Thus, many experts have argued that, while it is obviously crucial to focus on issues such as cross-border access to the exploitation of works in our global market, there is also a need to think about a [more equitable sharing of value](#). In other words, we should ensure that the authors – who are lost within this vast chain of exploitation – are not marginalized to the point where they are denied even the fair compensation they deserve.

This concern is clearly expressed in the document prepared by GRULAC.

In this light, some experts have highlighted current efforts within the European Union to ensure a better sharing of value between authors and technical service providers and among the various categories of rightholders.

Articles 14 and 15 of the proposal for an EU directive of September 14, 2016, focus on the sharing of value.

- o Article 14: Demand for greater transparency in relations between various categories of rightholders (e.g., producers and authors or artists). For example, an obligation of accountability would make it possible to establish transparency and confidence. The

same applies to relations between rightholders and technical service providers. The goal remains to ensure better sharing of value.

- Article 15: The possibility of revising the contract of exploitation when the remuneration originally agreed is no longer commensurate with the economic reality. According to the proposal, authors and performers may request an adjustment to ensure a fairer sharing of value.

This is not to say that Article 15 is supported by everyone. However, it should be recalled at this juncture that copyright law exists because there is a creator who is a natural person and that creator is **at the origin of the works** offered to the public. To forget this fundamental element is to forget the very foundation of this discipline.

In addition to considering the rationale of the protection of literary and artistic works, the experts naturally also examined some technical aspects of laws adopted to tackle digital technology.

## *II - Suggestions and recommendations of the experts for next steps*

The experts have no intention of replacing the role of Member States and WIPO in evaluating the appropriateness of adopting concrete initiatives.

However, some suggestions on potential topics to be considered emerged from their rich discussions.

### *Suggestions on topics for consideration*

*I -* The following suggestions were made regarding **the scoping study**:

- Give greater consideration to **case law and judicial interpretation** of the laws. Although the task is complex, recourse to the works of learned societies or think-tanks may be useful.
- Analyze the impact of plurilateral and **bilateral agreements**, such as those signed between the United States of America and other countries, on national solutions.
- Study the contributions of **collective management, with a special focus on the digital environment**.
- Consider the **exhaustion of rights in the digital environment**, as well as the challenge of **computer-generated works**.
- It was also suggested that consideration be given to whether some Member States have provided for a **“second level of interoperability”**, i.e., no longer only between two software components, but also between content playback devices or software playback devices and software, or, at the very least, the files stored on these devices. If there is no

interoperability, the device – but also the rightholder – is a prisoner of proprietary systems. According to some experts, these problems not only fall under copyright law but also consumer and competition law.

- Furthermore, it was suggested that consideration be given to **notice and counter-notice procedures** put in place by Member States to limit the liability of intermediaries (this can be done by referring to the study of Professors Seng<sup>4</sup> and Garrote<sup>5</sup> presented in 2014).

**2 - In general**, certain issues deserve particular attention and should be mentioned briefly, because even if they will not be addressed within the current or subsequent mandates, they could become the focus of future studies.

The following brief presentation of these topics is obviously not exhaustive and in no way reflects the diversity of the sometimes conflicting viewpoints that emerged from the discussion.

#### *a - Status of intermediaries and intermediary liability regime*

First, the liability of intermediaries was discussed. Some experts believed that it was necessary to examine instead the **liability of Internet users** who illicitly download and/or make a work available to the public, and that not too much “pressure” should be put on intermediaries.

However, other experts highlighted the extreme complexity of the current system, which **does not allow for a quick and simple identification of the natural persons** undertaking these acts. Hence, some experts suggested that this problem be resolved by **preventing infringing sites from setting up payment methods that give Internet users “premium” (i.e., unlimited) access to works.**

The special status of the **advertisers and agencies** that place advertising on infringing sites was also discussed. Insofar as they do not commit any act of reproduction or communication to the public, they are not liable for copyright violations. While this is obviously logical, there is a need to raise their awareness and pre-empt situations in which they unwittingly finance acts of infringement. Soft law experiences in this area were raised.

During discussions on this topic, the WIPO Secretariat reminded participants that **norm-setting initiatives in the field of enforcement do not fall within the mandate of the SCCR** and that the role of **intermediaries** should above all be analyzed from the perspective of the **value chain**.

Experts also discussed the issue of the value captured by intermediaries. Some experts indicated that many content sharing platforms or social networks were making works available to the public, generating significant profits which they failed to share fairly with rightholders. The experts then stressed that the problem of the value gap would have to be addressed through (i) **transformation of the role of intermediaries**; (ii) **transparency of**

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<sup>4</sup> Available at [http://www.wipo.int/export/sites/www/copyright/en/doc/liability\\_of\\_internet\\_intermediaries.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries.pdf).

<sup>5</sup> Available at [http://www.wipo.int/export/sites/www/copyright/en/doc/liability\\_of\\_internet\\_intermediaries\\_garrote.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries_garrote.pdf).

**contracts** between platforms and authors; and (iii) establishing **collaboration and trust** between rightholders and operators.

Some solutions related to e-commerce are currently being developed or adapted, including within the European Union, to promote better sharing of value. The proposed EU directive of September 14, 2016, was briefly presented, with a focus on its effort to clarify what constitutes a passive role (which allows an intermediary to be exempted from liability for the presence of pirated works on its platform) and an active role (which includes the actual undertaking of acts, including promotional activities). In the latter case, the liability of the platform could be established in a manner similar to that applied with respect to publishing. Moreover, even where intermediaries are recognized as having a passive role, the proposed directive establishes a duty of loyalty and transparency for hosting websites *vis-à-vis* rightholders, which forces them to report to rightholders, or to set up a digital footprint recognition system for works and to revise their agreements when the remuneration originally agreed is no longer proportionate with the financial results from exploitation of the work. However, the effort cannot be unilateral. In other words, a duty of collaboration would be established between platforms and rightholders.

Experts from the United States of America recalled that during the preparation of the *Digital Millennium Copyright Act* requests for take-down of content were still rare, but that they now total one million a day. Currently, the entire content removal system is thus managed by machines, a development not foreseen in the 90s. The effectiveness of this system is therefore questionable.

It was suggested **that, given its experience in providing alternative dispute resolution systems, WIPO could also have the jurisdiction to resolve conflicts arising from the equitable sharing of value.**

### ***b - Scientific publications and free access***

The experts were particularly sensitive to this issue. It was reported that many professors and academics were obliged to transfer the rights in their intellectual creations to publishers of scientific journals free of charge and that the digital environment had aggravated the situation. Some experts stated that sometimes authors even had to pay publishers to get published since the number of publications was crucial to their career development and the rating of their universities. Hence, they highlighted a certain degree of “**manipulation**” of scientific publishing.

The experts presented **some solutions** that have been implemented by some Member States to counter this phenomenon. **The United Kingdom**, for example, is currently considering a system of *de facto* free access to scientific publications, and by 2018 universities should be able to publish scientific articles under *Creative Commons* licenses, with an opt-out arrangement for the authors. In **France**, the parliament adopted a law in the summer of 2016 which provides that when a work is created by an author paid to conduct research and that work is published in a journal, the author may, after six months, recover the rights and place the creation, free of charge, at the disposal of the university to which the author is affiliated. Insofar as the author has this *possibility* to recover the rights, it is generally considered that



this provision is not contrary to international instruments. In **Spain**, any person who publishes a scientific article and is paid with public funds must allow free access to the work. There is no opt-out.

The **possibility of implementing a two-tier arrangement was discussed**. The first tier would be an exchange among scientists, through which authors would be free to share their research results with colleagues. The second tier would be the publication of research results for the general public and would remain the responsibility of publishers.

However, it is obvious that the question is not purely legal. Challenges to cultural policy or knowledge sharing are weighty issues, as is the delicate situation of journals involved in research. This means that the quest for a solution lies in striking a delicate balance between interests that are not always convergent and aspirations that are sometimes conflicting.

### *c – Out-of-commerce and unavailable works*

The experts felt that it was important to distinguish between out-of-commerce works (which are not subject to copyright) and unavailable works (which were published and put on the market at some point but which are no longer available and/or published).

One example cited was Uruguay, where the law allows a work to be expropriated for educational purposes when it becomes unavailable. European experts also presented the French attempt to implement an opt-out system for authors who do not wish to put their unavailable works at the disposal of the public. However, this solution was not fully endorsed by European authorities.

The experts considered that it would be appropriate to continue discussions on this issue on the basis of initial experiences implemented at the national and regional levels.

### *d - Digital lending*

The Secretariat drew attention to a recurring issue raised by some Member States regarding cross-border digital lending by libraries.

Some experts emphasized that digital lending was just one of the issues faced by libraries in the digital environment and that libraries face other issues such as the digitization of works for archival purposes.

The quest for **solutions at the national level or soft-law mechanisms** seemed to offer potentially interesting options for future studies.

### *e – Some ideas for further consideration*

As indicated above, caution is required in this area. Moreover, it is not the responsibility of experts to adopt a position on this matter; that role belongs to WIPO and its Member States. However, they can still make suggestions on possible **actions** that could be taken.

Three ideas worth exploring were suggested by the experts for the subsequent stages of their studies and analyses:

- an updated Guide to the Copyright and Related Rights Treaties Administered by WIPO, which was published in 2003.<sup>6</sup> This update could be undertaken by a representative group of experts;
- an check-list of fair contractual provisions which could serve as a toolbox for rightholders to guide them in the preparation of their copyright assignment or licensing contracts and ensure that they benefit from a better sharing of value;
- a reflection on ways and means of preparing a reliable and easily accessible mapping of information related to ownership of rights, akin to the voluntary *cadastre/documentation/registration* systems at the national, regional and international levels. Such an initiative could facilitate transactions and create conditions that enable existing and new rightholders in both big and small countries to benefit from fair access to global markets.

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<sup>6</sup> Available at [http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo\\_pub\\_891.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf).