

Standing Committee on Copyright and Related Rights

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PROPOSAL FOR ANALYSIS OF COPYRIGHT RELATED TO THE DIGITAL
ENVIRONMENT

Document presented by the Group of Latin American and Caribbean Countries (GRULAC)

I. Introduction

GRULAC presents a proposal of discussion on questions regarding the update of copyrights related to ongoing uses of protected intellectual goods in the digital environment in the works of the Standing Committee of Copyright and Related Rights of the World Intellectual Property Organization (SCCR/WIPO).

Different actors have raised the need for a debate involving the digital environment, from the creators and performers themselves to government representatives. It is no coincidence that WIPO Director General Francis Gurry affirmed that it is time to “stand up, for music” in order to “ensure that our musicians get a fair deal, and that we value their creativity and their unique contribution to our lives”. The message was delivered in the context of World Intellectual Property Day (IP Day), when the main subject was exactly “Get up, Stand up, For Music”. According to Gurry, we cannot “lose sight” of the role of creators and performers in the new digital economy¹.

Taking into account these concerns, the objective of this proposal is the pursuit of common solutions for the benefit of society and rights holders, in the face of challenges arising from new rights encompassing intellectual goods protected by copyrights in the digital environment.

GRULAC offers three areas of work to be discussed in the SCCR/WIPO:

1. Analysis and discussion of legal frameworks used to protect works in digital services;
2. Analysis and discussion of the role of companies and corporations that make use of protected works in the digital environment and their way of action, including the verification of the level of transparency on business and the proportions of copyright and related rights payment to the multiple rights holders.
3. Building consensus on the management of copyright in the digital environment, in order to deal with the problems associated to this matter, from the low payment of authors and artists to the limitations and exceptions to copyrights in the digital environment.

II. Background

In response to the first shock wave from Internet and digital technology, the organization discussed and adopted, in 1996, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

The solution adopted by the two treaties consists in the classification of a new exclusive right denominated “making available” and in the use of technical protection measures to assist copyright enforcement in the digital environment.

The WCT conceded a certain degree of freedom for national laws to make the legal characterization of this new right, which could be classified as distribution, communication to the public or even a combination of already existing rights.

Differently from the WCT, the WPPT defined “making available” as an independent right. Through an agreed statement concerning article 15 of the Treaty, it was defined the impossibility to achieve a complete resolution on the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Failing to reach a consensus, Member States decided to leave the question open for a future resolution.

¹ http://www.wipo.int/ip-outreach/en/ipday/2015/dg_message.html

After the adoption of these treaties, new services emerged and others disappeared in the digital environment, with substantial changes in the way protected intellectual goods are produced and distributed.

Nowadays, there is a multiplicity of services whose prevailing trend seems to be the access to works rather than the transference of ownership or possession. Normally, these services need licenses of more than one right, which maintains correlation with the technological solutions that are used.

Despite the recent technological advances in the digital environment, the Beijing Treaty on Audiovisual Performances, approved in 2012, followed the same formula of the WCT and the WPPT. Just like the WPPT, the Beijing Treaty also brought the provision of equitable remuneration as an option to the exclusive right to authorize the direct and indirect use of interpretations and executions embedded into fixations of audiovisual works for broadcasting and communication to the public.

In this context, the low payment of creators, composers, songwriters and performers is today the most visible part of the impact caused by technological advances in the use of protected works in the digital environment. Particularly in the music industry, despite the fact that digital technology has allowed a wider access to music by society as never before, there are questions about the importance that has been attributed to these creators and performers and if it is enough.

Music is a fundamental instrument of entertainment, cultural promotion and economic development. Therefore, it must be valued, as well as all the actors responsible for its creation and performance. Over the past year, the dissatisfaction of the artistic community in relation to this issue became clear, with increasing manifestations and movements worldwide demanding a fairer remuneration for the use of music works in the digital environment, such as in the World IP Day and in other events running in parallel with the SCCR reunions.

III. Fundamentals

The application of copyright law in the digital environment is a subject that involves different issues, which have been object of complaints by creators and performers in many countries today. In this context, the low payment resulting from digital services is one of the most frequently mentioned problems in relation to the digital environment. Composers and artists from all around the world complain about the low payment that comes from digital platforms, especially from those that use the technology of streaming. On one occasion, musician Jason Isbell affirmed that web streaming did not add to his income anything that was not negligible. Similarly, the singer Taylor Swift pulled all of her music from a digital music service and questioned another one in the launch of a new music streaming service, due to the company's intention of not paying creators and performers for the use of the service during its free test phase.

The discontentment comes from the overall impression that the income from digital services does not reach composers and performers, especially those that are out of the spotlight. Not surprisingly, streaming looks to be the future of music consumption. However, as expressed by musician David Byrne², "the amounts these services pay per stream is miniscule – their idea being that if enough people use the service those tiny grains of sand will pile up". Nevertheless, according to him, it is more than clear that if, in the future, "artists have to rely almost exclusively on the income from these services, they'll be out of work within a year", because "the whole model is unsustainable as a means of supporting creative work of any kind". Mr. Byrne

² <http://www.theguardian.com/music/2013/oct/11/david-byrne-internet-content-world>

highlighted that “what is at stake is not so much the survival of artists like him, but that of emerging artists and those who have only a few records under their belts”.

Despite the issue involving the payments being more visible in the music industry, which justifies the emphasis given to this field by this document, the situation in other areas is even more worrisome due to the practically nonexistent payments from the use of intellectual works in the digital environment. If composers and performers are still underpaid when compared to the number of their works' performances, digital market is still dominated by the music industry, which covers 99% of the digital collections³. Therefore, it is fair to say that the potential for gains from the digital environment does not even represent a likely source of income for creators from different cultural areas other than music, such as audiovisual, literature and photography.

The copyright in the digital environment is a complex subject, which requires a multilateral dialogue between governments and the different protagonists involved. A consensual solution that reaches the new business models needs to be pursued; without losing sight of the importance of guaranteeing the balance between the interests of intellectual property rights holders and the users of these intellectual goods, in order to shape a fairer and more effective protection system in the digital environment.

a) Legal framework of new forms of use of intellectual works in the digital environment

The solution found in 1996, through the approval of the WCT and the WPPT, and replicated by the Beijing Treaty, is apparently not enough to deal with the technological developments and innovations that have flourished on the digital age. There are issues to legally classifying the new uses of protected works in the digital environment. Existing rights related to the use of intellectual goods are not enough, since, except for the making available right, they have been thought and conceived to meet a reality where the economic exploitation of protected intellectual goods occurs in the physical environment.

In this context, although the copyright and related rights license agreements that are offered to many right holders by digital platforms mention the right of making available, they provide it alongside other traditional rights, including the reproduction right, which seems to be the least suited to cover many digital services. This situation occurs many times against the interests of authors and performers. The difficulties regarding the reproduction right in the digital environment arise from the conception of “incidental reproduction”, which means a temporary reproduction whose sole purpose is to make the work perceptible. The Diplomatic Conference could not reach an agreement on the provisions regarding incidental or ephemeral reproduction, which is an element present in most digital services⁴.

The reproduction right seems to be barely adequate because, in some types of digital transmission, the reproduction is only an accessory act inherent to the technological process used to make the work accessible to users. In these cases, the reproduction does not have “any relevance from the viewpoint of the exploitation of the protected material”⁵. Although the WCT brings an agreement statement applying the right of reproduction to the uses made in the digital environment, the Contracting Parties still could allow limitations and exceptions to temporary

³ CISAC (2015). *Global Collections Report 2015*. Available on: <http://www.cisac.org/Cisac-University/Publications/CISAC-publishes-new-Global-Collections-Report>

⁴ WIPO/CR/KRT/05/7. *Copyright In The Digital Environment: The WIPO Copyright Treaty (WCT) And The WIPO Performances and Phonograms Treaty (WPPT)*. Prepared by Dr. Mihály Ficsor, Director, Center for Information Technology and Intellectual Property (CITIP), Budapest.

⁵ WIPO/CR/KRT/05/7. *Copyright In The Digital Environment: The WIPO Copyright Treaty (WCT) And The WIPO Performances and Phonograms Treaty (WPPT)*. Prepared by Dr. Mihály Ficsor, Director, Center for Information Technology and Intellectual Property (CITIP), Budapest, p. 10.

reproduction following the three-step test⁶. The consequence is a lack of harmonization among national legislations, which provide different approaches to the reproduction right in relation to the digital environment.

In the absence of law or specific legal provisions on the use of protected intellectual goods in the digital environment traditional rights are often interpreted by analogy or conceptual proximity of legal theories originally envisaged for the physical environment. This exercise usually ignores the fact that many aspects of the physical environment are difficult to apply in the digital environment. It is the case of the exhaustion of rights and the principle of territoriality.

The exhaustion of rights is negatively affected in the digital environment when a digital intellectual good is negotiated and the transference results in fact on the production of a copy without any qualitative distinction compared to the original good. Therefore, after the first sale, any other sale or loan would not take place in the same support in which the work was originally fixed, but in an immaterial copy, which would cause the impossibility of applying the principle of the exhaustion of rights according to its traditional doctrinal conformity.

The principle of territoriality is also negatively affected since limits of physical boundaries are hardly an issue to the exchange of information through the Internet, there are doubts about the scope of domestic laws in relation to the global business initiatives that make use of copyrighted works. The content of a website created in a country, for example, can be accessed from different parts of the world, without having physical boundaries as obstacles.

The adjustment of the traditional rights related to the physical environment to the digital one is complex. It is possible that business models designed in the digital environment could take advantage of certain rights similar to the traditional rights projected to the physical environment. However, the rights identified on the different business models are interdependent, which means that, in order for the service to work completely, each one of the rights involved must be object of a specific licensing, in compliance with the exclusive right of authorization and consequent remuneration.

In the case of the business models based on streaming, for example, there are controversies about the rights involved. It is disputed whether the use of protected works necessarily implies the right of communication to the public or whether it only involves this right. In the same way, there is an issue of classification of streaming services either as trade of intellectual goods or time bound rent of intangibles. There is the perception that this kind of service would be a middle ground between services and goods provided by the radio and traditional record stores.

These definitions, trade or rent, are fundamental once they are related to different rights. The classification has a direct influence in the license agreements for this type of service and, consequently, in the proportion of remuneration to the rights holders.

b) The role of companies and corporations that make use of copyrighted works in digital the digital environment and their way of proceeding

Currently, the number of companies that develop new business models based on the use of copyrighted works in digital platforms is increasing. However, these new models raise concerns nationally and internationally, given the lack of transparency in these businesses and the low remuneration of authors and performers worldwide.

In the case of streaming, for example, some services have two kinds of usage model: a paid model in which the user signs the service and pays a monthly fee in return for some

⁶ WIPO/CR/KRT/05/7. *Copyright In The Digital Environment: The WIPO Copyright Treaty (WCT) And The WIPO Performances and Phonograms Treaty (WPPT)*. Prepared by Dr. Mihály Ficsor, Director, Center for Information Technology and Intellectual Property (CITIP), Budapest.

advantages, such as the right to use “offline mode”, which implies a copy, and a model “free of charge”, whose revenue is generated by advertising.

The first model is called “Premium”. Despite the growth of streaming services worldwide, the number of subscriptions is still relatively small, which not only results in the low remuneration of authors and performers, but also casts doubts on the economic viability of some of these services.

The second model is commonly referred to as “Freemium”. In this model, the main source of concern is the lack of transparency in the sharing of advertising revenues of digital platforms. The lack of control over the “monetization” of these services, involving sometimes the uses of protected intellectual goods without financial compensation, and the imposition of models and remuneration conditions that are difficult for authors and performers to understand are also causes for concern.

In the absence of effective regulation, the “market” and its agents impose their rules, without a proper transparency in billing methods and in the allocation of remuneration of rights. The situation becomes even more complex in the cases involving international contracts of licensing of repertoire.

There is an imbalance in the remuneration of right holders in the context of these international contracts. The modern music business involves a multiplicity of micro-transactions, in which stakeholders receive fractions of revenues. Although new technologies should provide more transparency, the music industry has used an opaque framework that is difficult for creators and artists to understand.

Despite the fact that streaming services are paying the same percentage of the revenue paid for music sales through “online record stores”, low payouts and many intermediaries are creating new concerns. The data available to artists are usually shady and, consequently, they are not able to understand the payments and accounts they receive. Probably, this opacity benefits the intermediaries⁷.

The proportion of remuneration of related rights of phonogram producers, for example - normally to the digital environment – is substantially higher than that earned by authors and performers. The use of old license agreements without a proper adjustment to the digital reality privileges, in practice, phonogram producers.

Even the patterns of global license agreements create serious problems in the digital environment. The current tendency is the verticalization in the relations between actors present in the music global value chain, in which predominates the risk of control by digital platforms (*players*) and record companies (*majors*) over all this chain in the digital environment.

As David Byrne observes⁸, many streaming services are at the mercy of the record labels, especially the biggest ones, and nondisclosure agreements keep all parties from being more transparent, which is perhaps the biggest problem artists face today. For example, when artists question digital platforms about the way resources resulted from advertising are distributed, they do not succeed in obtaining a concrete response with exact numbers. Therefore, for Mr. Byrne, before musicians and their advocates can move to enact a fairer system of payout, they need to know exactly what is going on.

The prevalence of economically stronger actors results in risks of creating business models centered on few companies, as suppliers of digital services (monopolies/oligopolies) or as

⁷ See: “Fair music: transparency and payment flows in the music industry”, from the Berklee Institute of Creative Entrepreneurship.

⁸ <http://davidbyrne.com/open-the-music-industrys-black-box>

consumers of protected works (Monopsony/oligopsony), which normally affects the interests of authors and performers, who tend to be the weakest link in this chain.

The way digital music market is organized creates a breeding ground for other unfair and anti-competitive practices in the context of these business models. The use of robots that artificially increase the use of certain catalogs, playlists assembled by phonogram producers and search algorithms that lead to the *mainstream* tend to induce to a higher consumption of specific repertoires, characterizing a similar practice to payola, considered illegal in many countries.

The global license agreements of repertoire, involving authors and performers, make room for the breach of the principle of territoriality, one of the basic premises of copyright. Often, in these agreements, the law of a country is imposed on others, not considering particularities of each territory, in clear violation of the provisions of the Berne Convention and the TRIPS Agreement.

The application of the principle of territoriality also involves the necessity that the revenues generated with the licensing of rights in a country be received in this same country. However it is not clear whether and how this happens, considering that many digital services require payment by international credit cards and in USD, instead of the local currency, which hampers the surveillance on the circulation of these resources and allows that the use of protected intellectual goods in a territory be paid in another.

In this context, we must discuss not only the verification of possible anti-competitive practices and the lack of transparency on business carried out in the scope of digital business models, but also the imposition of jurisdiction and contract models by stronger actors against performers. These are practices that occur, to a great extent, due to the asymmetry of information and the economic imbalance between the parties of the contractual relationship.

In this sense, a fairer system of payment in the digital environment would necessarily involve an accurate process of identification of the right holders of works and phonograms that are being used, as well as the interpretations and performances associated with those works and phonograms.

Considering the difficulty in standardizing the identification of works through the adoption of international registrations, the creation of a global database of right holders, works, phonograms, interpretations and performances, with the compulsory sharing of information between governments, right holders and collective management associations, could solve most of the problems associated with the digital music market, since it would reduce the conflicts generated by the existence of different databases.

This global database also could make the way of distribution of payment to the different right holders more transparent, making the identification by the own right holders of all the uses made by end users of their works in digital platforms easier.

Although the digital market is a potential source of income for authors and performers, this potential has yet to materialize in practice, which creates great dissatisfaction in the community of authors and performers around the world. Overall, original rights holders have affirmed to be receiving an unfair remuneration, considering the incompatibility between the money received and the number of times their works were used. The protection of intellectual property and the music industry goes beyond the combat of piracy and involves the promotion of a fairer compensation for creators and performers. Despite the fact that the rapid growth of streaming is often described as encouraging, the issue involving the fair share of revenues among the many agents that are part of the chain of value remains⁹.

⁹ CISAC (2015). *Global Collections Report 2015*. Available at: <http://www.cisac.org/Cisac-University/Publications/CISAC-publishes-new-Global-Collections-Report>

c) Equitable remuneration as an option to the exclusive right of authorization

The possibility of equitable remuneration for the use of protected works, in replacement of the exclusive right of authorization, provided for the WPPT and for the Beijing Treaty, could be an option for the digital environment, since it would make the use of protected work in digital platforms easier and would be in consonance with the speed and dynamics that can be seen in business models in the network (online).

Even more relevant, at least in the case of performers, the prospect of equitable remuneration could guarantee better remuneration for the communication to the public and the broadcasting of their interpretations and executions fixed in phonograms, since it is considered in many national laws an inalienable right that cannot be negotiated in record contracts. As it happens with the exclusive rights, equitable remuneration could ensure greater balance in the relationship between these artists and record companies.

Nevertheless, there are still restrictions on the use of equitable remuneration. Besides not being provided for most national laws, its implementation at the multilateral level is limited to interpretations and performances fixed in phonograms. Moreover, there is no consensus among authors, performers and phonogram producers about the benefits of adopting equitable remuneration for the communication to the public and the broadcasting of their works. Because of this, right of equitable remuneration is rarely used, when compared to the exclusive right, hindering its adoption in the digital environment.

In any case, this is also a theme to be discussed at the international level, as a way of ensuring a fairer payment to performers. This solution could be discussed even regarding the situation of the authors, considering that the uses that digital platforms make of the works are mainly through phonograms. By authorizing the use of works in the phonograms, the authors are already exercising their exclusive right. This makes it possible to think about the possibility of ensuring equitable remuneration in the digital environment for the authors too.

d) Limitations and exceptions to copyright in the digital environment

The limitations and exceptions to copyright is another important issue in the digital environment. If the identification of the different rights involving the uses of protected intellectual goods in the digital environment is challenging, it is even more difficult to recognize the uses that could be characterized as acceptable exceptions or limitations in the exercise of these rights.

International treaties, such as WIPO's WCT and WPPT, admit the use of technical measures as necessary mechanisms to protect the exercise of exclusive rights - notably those related to the repression of counterfeiting - even encouraging the criminalization of actions aimed at suppressing them or leaving them unusable for any work or protected production.

These technical measures were already applied to fixed copies of works destined for trade channels related to the physical environment, preventing the copying of the content of the original supports. Even in the physical environment, these measures were an obstacle to the exercise of some uses that a number of legislations considered as limitations or exceptions to copyright, such as private copying.

In the digital environment, the use of technological measures takes place in a much more natural and effective way. Business models are already structured with the assistance of new technological solutions for the digital environment, which offers almost absolute control of digital intellectual good, something never achieved in the physical environment.

With the assistance of new technologies - such as streaming -, these new digital business models are evolving to a logic of access and restriction to access to intellectual goods. The classic commercial dynamics for sale or renting of good(s) is gradually abandoned, once there

are clear changes in the nature of the procedures to the transfer of the ownership or possession of these goods.

The business models characterized by the sale of goods, through download, limit, to a certain extent, the real ownership transference of digital goods and the subsequent actions of the user, whom gets attached to a specific format of digital goods that he acquired, to the application that manages the transference of good(s) and to the previously registered profile. The digital format of the good for example, may halt even the simplest operations, such as the interoperability and portability of these goods, hindering the free transit between different media and equipment.

In the business models characterized by the rental of works, as in the services in which the access to copies of works only occurs upon payment, the business transaction takes place under an absolute control of the transference of ownership by the service provider. In this case, the temporary copy on the user's device is made and removed remotely by technological measures, under the strict control of the service providers.

Therefore, technological constraints naturally limit the users' space of action in the digital environment, providing a material support characterized by the absolute control of all the processes inherent to the service that is offered.

In this context, the technological impositions play a key role in defining or identifying fair or acceptable uses as limitations or exceptions to copyright in the digital environment.

Furthermore, as if there were not enough technological barriers in the legal sphere, doubts about the effectiveness of the three-step test in identifying limitations or exceptions to copyright remain in the digital environment.

The difficulty lies in applying the second step of the test, when the exception or limitation to be established should not conflict with the normal exploitation of the work. Not to mention the fact that, in the World Trade Organization, the understanding on what is "normal" is associated with practices consistent with internationally accepted legal parameters.

Considering that the new business models in the digital environment exploit intellectual goods through the use of technological measures that are provided by international treaties, any limitations or exceptions that require the removal or destruction of such technological measures may be considered unreasonable, since it would conflict with the "normal" way of economically exploiting such goods in the digital environment.

To sum up, both technological measures present in the new business models in the digital environment, which are usually presented as inherent – something inexorable – to technological solutions, and the normative forecasts of these measures in international treaties, associated with the application of three-step test, have limited the identification scope of limitations or exceptions applicable to copyright in the digital environment.

However, in despite of all these difficulties, we should highlight the character of public interest of limitations and exceptions, which are essential to safeguarding other fundamental rights, such as freedom of expression and access to culture, knowledge and information.

Moreover, the user cannot be seen as a potential infringer of copyrights, but as the agent who finances, directly or indirectly, the entire global business chain in the digital environment, having rights that necessarily pass through the possible uses that may be considered under the limitations and exceptions to copyright.

IV. Conclusion

The release of the digital agenda and the approval of the WIPO treaties – the WCT and the WPPT – paved the way for the progress of multilateral discussion on copyright regulation in the

digital environment. However, the technological advances and the new business models turn the adopted solutions – so far – insufficient.

This reality justifies the discussion on the subject that pursues a consensual solution at WIPO. A solution that reflects the recent advances in informational and communication technologies, and their corresponding business models in e-commerce.

We understand that a more embracing analysis regarding the issue is necessary, so we can build a consensus on how to act in order to make the regulation of digital related issues more effective at the multilateral level.

This discussion is fundamental for a fairer and more balanced use of intellectual works in the digital environment. This debate will favor the development of the digital market of protected intellectual goods, which will benefit holders of copyright and related rights and the international community at large.

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