

**ADDITIONAL COMMENTS BY GESAC
ON ARTICLE 3
OF THE PRELIMINARY DRAFT PROPOSAL FOR A REGULATION ON
THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (ROME II)**

Introduction

In May 2002 the Commission officials presented a preliminary draft proposal for a Regulation on the law applicable to non-contractual obligations (known as Rome II) which covers torts and delicts in the domain of literary and artistic property.

In the context of the public consultations organised by the Commission, and in particular during the hearing on 7 January 2003, the wording of Article 3 was severely criticised by organisations representing right holders because of its lack of clarity and its ambiguity, in particular with regard to the principle of territoriality.

GESAC, the European Grouping of Authors' Societies and Composers¹ agrees with the right holders' general view that the current version of the preliminary draft regulation is not acceptable.

Back in September 2002, GESAC² had expressed concern about the current wording proposed for Article 3.

Thus GESAC had in particular:

- Pointed out that the principle of territoriality is a fundamental principle of copyright in that it allows authors and other right holders to assert their rights in each of the countries where said rights are infringed.
- Considered that the wording of Article 3.1 and 3.2 should be clearer and confirm this principle of territoriality.

¹ GESAC is a European grouping comprising 24 of the most important authors' societies in the European Union, Norway and Switzerland. In this capacity, GESAC represents almost 480 000 authors and right holders in the fields of music, graphic and plastic arts, literary and dramatic works and audiovisual works as well as music publishers.

² GESAC position paper of 19 September 2002 (document 174en02)

- Expressed the wish that the Commission staff would withdraw the preliminary draft regulation and draw up a Green Paper that would permit an in-depth debate on the choice of law applicable in the context of copyright infringements.

At the hearing on 7 January, the Commission asked whether a provision drafted in line with Article 5 of the Berne Convention (which refers to the “legislation of the country where protection is claimed”) would be satisfactory.

This document sets forth GESAC’s position in this respect:

- 1. A provision modelled on Article 5.2 of the Berne Convention would not settle the complex issues relating to the protection and exploitation of literary and artistic property rights raised by the choice of applicable law for delicts in this domain, particularly with respect to electronic commerce and digital communications.**

Article 5.2 of the Berne Convention states:

“(…). Consequently, apart from the provisions of this Convention, the extend of protection, as well as the means of redress afforded to the author to protect his rights, *shall be governed exclusively by the laws of the country where protection is claimed.*”

It is generally recognised that this provision does indeed constitute a rule governing conflicts of laws.

Article 5.2 of the Convention is also generally interpreted as giving competence to the law of the place in which the delict is committed (“lex loci delicti”) in opposition to the law of the country of origin of the work.

Hence it is indeed a territorial law.

Nevertheless, the principle of territoriality does not settle everything. In fact, once the idea that the applicable law is that of the country in which the delict took place is accepted, a criterion must still be determined to connect the delict to a given territory.

With regard to traditional methods of exploiting works, it is generally accepted by jurisprudence in Member States that the law applicable is not that of the country of origin or of the court to which the case is referred, but rather that of the countries on whose territory the delict has taken place.

However, this rationale can only be imperfectly transferred in the case of the Internet.

In fact, Article 5.2 of the Berne Convention does not state clearly what law is applicable in the case of infringements on digital networks, notably because of the problem of locating delicts.

The interpretation of Article 5.2 is not unanimously accepted, moreover, and may lead to the application of the following laws in a digital context, depending on the case:

- *The law of the country of origin of the transmission*, understood as the law of the country in which the work is injected into the networks, or the law of the country in which the exploiter of the work is established. Since dissemination on digital networks is much more volatile than dissemination by satellite, application of the law of the country of origin of the transmission is likely, by its very nature, to raise many problems in relation to copyright protection; therefore it cannot be accepted (see also GESAC's arguments on this point in its position paper of September 2002).
- *The law of the country of reception*, in other words the law of the country where connections are possible and hence acts of exploitation, for instance downloading. With regard to the Internet, this concept leads to the potential implementation of a large number of laws, for which the court to which the case is referred must make a distributive application.
- *The law of the country in which the victim of piracy is established or resident*: this option has the dual merit of designating a single law, and of attaching the law applicable to a place where, very often, authorisation should have been given if the user was not a pirate; nevertheless it risks not to be easily accepted at international level and possibly lead to the application of a law insufficiently protective.

2. Article 5.2 of the Berne Convention must be amended or clarified as regards its interpretation at international level in the context of WIPO

Article 5.2 of the Berne Convention should be clarified so that it corresponds clearly, as far as digital networks are concerned, to the application of the law of the country of reception, in other words the law of the country in which the protected work or object is accessible to users.

Nevertheless, it is neither justified nor desirable at this stage to include a different provision in the Community Regulation to the current text of the Berne Convention, the clarification of which, regarding a problem raised at worldwide level, should be dealt within the framework of WIPO.

3. Until the adoption of a new international treaty or of clarification and a unanimous interpretation of Article 5.2 of the Berne Convention, it would be advisable to exclude literary and artistic property from the scope of the draft Community Regulation Rome II.

In the absence at this stage of a new international treaty or of a unanimous interpretation of Article 5.2 of the Berne Convention, it would be preferable to exclude literary and artistic property from the scope of the draft regulation under discussion, until work on this matter have permitted the emergence of consensus at international level.
