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**General Council
Council for Trade-Related Aspects of
Intellectual Property Rights**

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ELECTRONIC COMMERCE AND COPYRIGHT

The following communication, dated 12 December 2016, is being circulated at the request of the delegation of Brazil.

Taking into account the Declaration on Global Electronic Commerce (WT/MIN(98)/DEC/2), of 1998, on the establishment of a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, including those issues identified by Members, General Council discussions, TRIPS Council relevant debates, and the Ministerial Decision of 19 December 2015, deciding to continue the Work Programme, it is important to highlight three areas of possible convergence for WTO on the implementation of copyright rules and the digital environment. The development of national copyright systems in the digital environment would greatly benefit from a basis of shared understandings among member states on (a) transparency; (b) balance of rights and obligations; and (c) territoriality of copyright.

1 TRANSPARENCY

1.1. Since the Declaration on Global Electronic Commerce, innovative business models developed through the progress of new technologies created new forms of management of copyright. A system based on the trade of "intellectual goods" in physical format (CDs, Books, etc.) is increasingly being transported and transformed in the digital environment. New business models are increasingly based on providing access to digital content through streaming of data. In 2015, revenue from e-trade surpassed physical trade for the first time in the music industry. In this new context, authors and other rightholders complain of lack of remuneration for their rights in the digital environment, producers and cultural industry complain of a "value gap" in the amount due for their rights.

1.2. Digital platforms affirm considerable part of their revenues is directed to the payment of rights. As policy makers, national authorities face a complex system of many rightholders and users with, sometimes, conflicting interests. As a first possible decision on the management of copyright towards the fair payment for authors and performers, WTO Members could stress the increased importance of the principle of transparency in the remuneration of copyright and related rights in the digital environment.

2 BALANCE OF RIGHTS AND OBLIGATIONS

2.1. In order to maintain an appropriate balance between the interests of rightholders and users of protected works, copyright laws allow certain limitations on economic rights, that is, cases in which protected works may be used without the authorization of the rightholder and with or without payment of compensation. In the Berne Convention and the TRIPS agreement, a three step test was included to determine the scope of exceptions and limitations to copyright. Exceptions and limitations must (1) be restricted to "certain special cases", (2) "not conflict with a normal exploitation of the work" and (3) "not unreasonably prejudice the legitimate interests of the author". National copyright systems are trying to expand and update their list of exceptions and limitations in order to keep pace with changes in technology and with new uses of intellectual works.

2.2. In this direction, there is a growing concern that obligations related to the inviolability of technological protection measures might exclude the possibility of enjoying exceptions and limitations in the digital environment. These technologies are essential for the normal exploitation of the work in e-trade and its circumvention could be understood as a breach of international obligations (step 2 of the three step test).

2.3. As a second collective initiative to improve management of copyright in the digital environment, WTO Members should unequivocally assert the principle that exceptions and limitations available in physical formats should also be made available in the digital environment.

3 TERRITORIALITY OF COPYRIGHT

3.1. The digital environment is borderless by its nature while the copyright system is based on national laws. These different characteristics make more challenging the task of implementing the shared objective of protecting authors, performers and other copyright holders in the digital environment. Remuneration of intellectual rights might not respect the national law, since payments can be made through international credit cards and therefore circumvent the law in the country of access to the creative content. In order to allow for the protection of authors, Member states should make their best efforts to make their national copyright legislation applicable to trade relations where content is accessed from within their national borders.

3.2. A third collective initiative that can be envisaged to improve the business environment in the electronic copyright trade is reaffirming the territoriality of copyright in the digital environment as a principle of the international trading system.

3.3. These three principles should be understood as building blocks of a sound business environment for international trade of intellectual goods. Shared understandings on these basic features have the possibility of increasing international trade of goods and services, enhancing the international flow of information and allow for the fair payment of authors in developing and developed countries.
