

DRAFT INTERNATIONAL COPYRIGHT CODE

by

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PREFACE

At the ALAI Congress in Berlin in June 1999, I suggested that an attempt be made to draft an International Copyright Code, and this proposal received support.

At the Fordham University School of Law Eighth Annual Conference on Intellectual Property Law and Policy, New York, 27-28 April 2000, I outlined the basic points of the suggested draft, in a paper to be published in the Conference documents and in *International Review of Industrial Property and Copyright Law*. I then elaborated the following draft, which, with many helpful suggestions, was translated into French by Estelle Derclaye, into German by Florian Koempel, and into Spanish by Cristina Garrigues.

I express thanks to Professor Adolf Dietz, Professor Graeme Dinwoodie, Professor Gerald Dworkin, Paul Emerson, Professor Ysolde Gendreau, Professor Gunnar Karnell, Dr. Uma Suthersanen and other colleagues who have already commented on the draft, and to Malcolm Langley for preparation of the website.

Comments

Comments on the draft are welcome, and may be sent by e-mail to ccls-icc@qmw.ac.uk

It is understood that comments so received may be placed on the website in their original or edited form.

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31 May 2001

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INTRODUCTION

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1. Objective

The objective is to formulate a Code which will give effective international protection to owners of copyright and related rights in the digital era, taking into account in particular all forms of transborder communication, including the Internet.

2. The three approaches

The drafter of an International Copyright Code has three choices: the ideal, the low- level, and the practical.

Under the ideal approach, the Code would contain the highest level of protection required under the relevant international and regional instruments, with mandatory application of all its provisions in all countries accepting the Code. But such a Code would have no chance of wide adoption in a short period, and the problems facing the international copyright community in this area need urgent solution.

Under the low-level approach, the Code would establish protection at the lowest common denominator available, say, under the TRIPS Agreement. But such a Code would not cover gaps in the TRIPS Agreement (for instance, as regards recognition of moral rights, dissemination of protected material on the Internet, and protection of audiovisual performers). Furthermore, a low-level Code would give no inspiration to increase the level of protection, and would find little favour with countries, such as those of the European Union, where a high level of protection is established in many areas.

Under the practical approach, the disadvantages of the ideal and low-level approaches are avoided by adopting a text which incorporates the highest level of protection required under the relevant international and regional instruments, with improved protection in those areas where these

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instruments are considered to fall short, and at the same time allowing countries to apply their particular local provisions in appropriate cases. In this way, the objective which can and should be reached is set, while recognising the standards of local law as far as practical implementation is concerned. It is on this basis that the following Code is elaborated.

3. Basic concept and initial draft

The basic concept of the Code is that the world is to be viewed as one country, with one copyright law applicable everywhere, subject to the Code's rules.

Jurisdiction, applicable law and enforcement

In the borderless society of the digital era, the implementation of copyright protection faces three major challenges in any case which involves "foreign elements" (for example, where the allegedly infringing act takes place outside the country where the action is brought). There is firstly the question of jurisdiction (in the sense of competence): that is, whether the court can hear the action. Secondly, there is the question of applicable law, that is, where the court decides that it has competence to hear the action, what law is to apply: for instance the law of the country where the action is brought, or the law of the country where the infringement is alleged to have been committed. Thirdly, when the court has made its decision on jurisdiction and applicable law, there is the question whether a judgement in one country can be enforced in another.

A vast area of international law has been developed over the centuries to deal with cases involving "foreign elements". But in the past, the various acts under consideration could often be localised. Recent discussions have shown the complexity of attempts to fit the old law to the international copyright situation in the digital era, particularly as regards transborder transmission. It is difficult to fit the traditional concepts to a case where, for instance, an initiating infringement is in Country A, with hyperlinks to a site in Country B, caching in countries C, D and E, and transmissions through and access in all these countries and many others. The Code should cut the Gordian knot, so that problems of jurisdiction, applicable law and enforcement disappear or are substantially solved as far as the rules of the Code itself are concerned. Where problems in this area remain, for instance regarding applicable law in the case of contract, new international solutions may be adopted and eventually included in the Code.

The following draft is a first attempt to outline the main features of the Code.¹

¹ For a general description of the problems inherent in the present system of international copyright protection, and the basic considerations to be taken into account in formulating the International Copyright Code, see Sterling, J.A.L. "International Codification of Copyright Law: Possibilities and Imperatives": paper presented at the

4. Source Provisions

The Code takes as its starting point the mandatory provisions of the Berne Convention (1971 text), the Universal Copyright Convention (1971 text), the Rome Convention 1961, the TRIPS Agreement 1994, the WIPO Treaties 1996, the EC “copyright” Directives, and the other international and regional instruments listed under “Source instruments” below. In general, the Code provides that

- (a) the beneficiaries and subject matters of protection are those established by the source instruments;
- (b) the rights granted are in general those afforded in the source instruments, so that, for instance, the moral rights of Article *6bis* of the Berne Convention are included; as far as economic rights are concerned, the Code affords exclusive rights of use, and, through the definition of such rights, recognises the principle of participation in any benefits from exploitation of the respective item of subject matter;
- (c) the general duration of creator’s right is life plus 70 years, as under the EC Term Directive. For related rights, the basic term is 70 years.

5. Juridical and administrative structure

The Code lays down a number of rules concerning recognition of the basic rights of the respective parties who are protected under the Code (the substantive provisions, Articles 1 to 12).

An International Copyright Tribunal is established, with a Tribunal Office (Articles 20, 21). Actions may be brought before the Tribunal in accordance with the Procedural Rules, and the Tribunal may make orders providing remedies by way of injunctions, damages etc. Orders made by the Tribunal must, to be effective in a Code country, be confirmed by the local court of the Code country where the order is to be enforced (Article 22, see below). The confirmatory process will be facilitated where (as may well be the case) the Tribunal Judge is located in the country where the order is to be enforced. The Tribunal has no power to impose penalties, though it may recommend them for consideration by the relevant authority. Enforcement is through the local courts in accordance with the respective local rules.

Before the adoption of the Code, the situation is that, in general, the claimant launches an action in a national court under the provisions of the respective national law. The Code adds an alternative procedure. When the Code is adopted, the claimant may choose to proceed under national law before the local court, or under the Code before the Tribunal. Proceedings under the national law will be appropriate for situations not involving foreign elements.

The advantages of proceeding under the Code are threefold. In the first place, the claimant can proceed before the Tribunal without having to go to another country and institute action there. Secondly, the Code establishes a common protection system, so that the claim will be judged initially by the same rules, wherever the alleged infringing act takes place. Thirdly, the claimant should have available the facilities of the E-Justice system established under the Code, permitting all stages of an infringement action to be effected by electronic means, thereby increasing procedural efficiency, and achieving savings in time and expense.

Administrative and final provisions deal with the setting up of an Administrative Council, and an Administrative Bureau, languages of the Code etc. (Articles 30 to 35).

6. The principle of parallel application

The principle of parallel application finds its basic expression in the provisions which require that any order of the International Copyright Tribunal must, to be effective in a Code country, be confirmed by the local court of the country where the order is to be enforced (Article 22). Where the Code grants a right which is not recognised in the law of a Code country, a Tribunal injunction based on such a right will not be confirmed by the court of that country.

Subject matter is sometimes differently classified in different countries. In some countries, for instance, sound recordings are protected as original works, in others by a related right. Where the claimant seeks confirmation of an order involving rights in sound recordings, it will be open to the defendant, in a country which applies the criterion of originality, to contest the confirmation on the basis that the recording in suit is not original. In this context, it should be borne in mind that the Code can be revised, so that, for instance, phonographic works could be added to the definition of "works", if consensus were reached in this respect.

It will be noted that to constitute infringement, "knowledge" is not necessary (Article 13): if a defence of "no knowledge" is available in a particular country, this can, if not accepted by the Tribunal, be pleaded by the defendant before the relevant local court.

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Limitations and exceptions

The principle of parallel application is of particular importance in the field of limitations and exceptions. In the source instruments, there is no comprehensive list of specific limitations and exceptions which must be accepted, and there are many different provisions in national laws in this area. To avoid the prolonged debate which would doubtless be involved in attempting to provide a mandatory list at this stage, no limitations or exceptions to granted rights are at present provided in the Code. Nevertheless, the provisions of the “three step” test are incorporated in the Code, so that, in considering the position in any Code country, the Tribunal can make its assessment on the basis of the test. Where a defendant wishes to plead a particular limitation or exception, this can be claimed before the Tribunal or in the respective local court. The Tribunal may take the provisions of the particular local law into account (Article 22(3) first sentence) and in this connection, apply the “three step” test. In the circumstances of the case, the Tribunal may refuse to grant an injunction. If an injunction is granted by the Tribunal, it must be confirmed by the local court before enforcement, giving the defendant the opportunity to demonstrate that, in the circumstances, the injunction should not be enforced in the local territory.

Where international agreement is reached on particular limitations and exceptions, the relevant provisions can be inserted in the Code. Thus, for instance, a standard procedure could be established combining the approaches of the US Digital Millennium Copyright Act and the European rules in the area of limitation of liability of Internet service providers. Such procedure could be incorporated into the Code.

Term of protection

Many countries do not at present recognise the life plus 70 years term of protection for creators, but the Code adopts this term to reflect the position reached in legislation over recent years, for instance in the European Community and in the United States. The Code should thus provide an incentive for increased protection in this area, at the same time allowing for the operation of the principle of parallel application in countries still operating under the life plus 50 years term in the Berne Convention.

With regard to related rights, there is a certain inequality in the source instruments, which the Code seeks to redress (even under the WIPO Performances and Phonograms Treaty, the duration of protection for performances and phonograms is not co-terminous (Art.17)). Under the Code, creators' works are protected for a minimum of 70 years, and it does not seem inequitable to adopt this period (as applied in relation to published and unpublished material) as the basic term for all related rights, thus recognising a term which will in general cover the professional life of most performers; and a performance can only be retained through some form of recording, so a similar period for recordings and broadcasts is provided, both on the basis of this consideration, also on the principle of equality of treatment, and because of the greatly increased period of the commercial value of outstanding recordings and broadcasts: these can

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retain their value well beyond 50 years as shown in the large number of older recordings now being remastered and sold in new formats: and this process will increase as present day recordings and broadcasts can be retained long into the future in ever improving presentations. Nevertheless, the principle of parallel application can be invoked in countries not recognising this term so that, for instance, where the Tribunal gives a remedy on the basis of a longer term than that available under the local law, the defendant may, before the local court, seek restriction of application of the order in accordance with the local term.

With regard to rights in semiconductor topographies and databases, a formulation based on the source instruments is provided.

Private use

A particular act of private use may be permissible in one country but not permissible in another. Through the principle of parallel application, the Code system permits a general decision which, in its application, will be implemented according to the respective local law.

7. Particular aspects

The following comments on particular aspects of provisions of the Code may be noted.

Non-discriminatory protection, Articles 1, 3(1)

Since all persons qualifying as creators etc. will, without discrimination, be protected irrespective of nationality, place of publication etc., the concepts of “country of origin” and “connecting factors” are unnecessary.

Area of Code application, Article 3(2)

The Code embraces all activities, even those taking place in Space, whether or not they have effect on Earth.

Right to entitlement, Article 3(3)

Decisions relating to assignment and licensing will, so far as necessary, be implemented according to the principle of parallel application: see further under Contracts, Article 12, below.

Terminology, Article 4

The age-old discussions about the meaning and scope of the terms “copyright”, “author’s right” and “author” are avoided, since these terms are not used in the Code, other than as examples in Article 4(2)

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and in the title of the Code and of the International Copyright Tribunal, which uses will be understood everywhere and do not presuppose any particular definitions.

Recognised society, Article 4(1)(c)

The definition of “recognised society” is broad enough to include collecting societies, organisations representing particular individuals or groups of individuals (such as performers), and competent authorities designated to represent unknown authors (for example in the case of national arrangements concerning works of indigenous cultural heritage (folklore) (cf Berne Convention Article 15(4)(a))).

Categories of beneficiaries, Article 5

The beneficiaries under the Code are creators of works, owners of related rights (including performers, sound and film recording producers and broadcasters) and makers of certain categories of production (including makers of semiconductor topographies).

Two categories of beneficiaries, not present in the relevant international instruments, are included in the Code, together with their respective rights, namely publishers of inaugural editions (that is, editions of previously unpublished works, after the creators’ rights have expired) (these publishers are granted related rights) and makers of databases (these makers are granted rights of extraction and re-utilisation). These categories of beneficiaries appear in the respective European Community Directives. There are two possibilities as to the presence of these beneficiaries in the Code: firstly, both categories can be retained: in this event, the local court of a Code country which does not recognise the particular category of beneficiary or the relevant accorded rights can simply desist from confirming any Tribunal Order implementing the rights. Secondly, international consensus may require the deletion of one or both categories of beneficiary from the Code: in this event, the deletion or deletions can be made without in any way affecting the other provisions of the Code.

Economic rights, Article 9

In the analogy of personal property, all use must be authorised by the rightowner, in default of exceptions or limitations provided by law. A similar approach is adopted in the Code by recognising rights of owners of creator’s right and related rights to authorise all uses of their respective items of subject matter. The economic rights accorded by the Code cover the mandatory exploitation rights mentioned in the source instruments, and possibly other rights, but in practice, by the principle of parallel application, the only rights which will be enforced in a particular Code country are the rights recognised in that country. The *droit de suite* is not specifically mentioned, but a litigant before the Tribunal would not be precluded from claiming such right: in such event, the Tribunal would very

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possibly make reference to Article 22(4), first sentence, and “take into account the legal rules of the relevant Code countries”.

Contracts, Article 12

In default of agreed international rules, no attempt is made to lay down Code rules on applicable law in regard to contracts: the Tribunal will, in effect, need to take into consideration the laws of the Code countries where the contractual terms are to apply. In any event, a Tribunal decision involving a point of contract law will be the subject of confirmation by the local court of the jurisdiction in which the contractual terms are to be applied. The Tribunal has a number of options when a question involving applicable law in the case of contract arises, including the following:

- (i) it may make a decision on the basis of the national law which it considers should apply (Article 22(3), first sentence);
- (ii) it may refer the matter to the local court of the country concerned (Article 22(3), second sentence);
- (iii) it may, under its general powers, make a decision recognising different legal situations in different countries (Article 22(5)(a)(vi)).

Thus, for example, when a dispute arises as to whether “work made for hire” provisions apply in a particular situation, the Tribunal has flexibility in making its decision, and in any event, in any particular country, the matter will be determined by the local rules.

Eventually some generally recognised principles in respect of contracts may emerge.

Remedies for infringement, Article 13

The Tribunal’s powers permit it to order injunctions and other remedies for infringements and threatened infringements taking place in Code countries, or outside Code countries (say in a non-Code country, or on the high seas, or in Space). All persons, wherever they are located, will be subject to Tribunal orders: the effectiveness of the enforcement of such orders will depend on the rules of the Code countries, and eventual decisions which may be made as to enforcement in respect of persons who are carrying on infringing activities outside Code countries. Persons within Code countries who are acting in concert with persons outside Code countries will be subject to enforcement of Tribunal orders as confirmed by the local courts of the Code countries.

Damages, Article 22(5)(a)(iii)

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The Tribunal may order the defendant to pay damages, but any such order will be subject to confirmation by the local court of the Code country concerned, thus giving the defendant the opportunity, at the local level, to contest the award itself, or the amount of the award (Article 22(5)(b)).

Industrial designs

The protection of industrial designs by rights distinct from creator's right is not covered by the Code in its present text. Questions of overlap of rights in this area should be covered at the local level by the principle of parallel application.

8. The E-Justice system

The E-Justice system implemented by the Code is designed to afford a practical means of bringing actions and of implementing Tribunal orders by electronically based procedures. Briefly, claims, defences and other documents in actions before the Tribunal are filed and served electronically through the Tribunal Office. Proceedings before the Tribunal established under the Code are, as far as possible, conducted electronically, and electronic means can be used to notify orders and supervise their observance.

The operation of the Code does not depend on or have as a pre-requisite the implementation of the E-Justice system. Claims could be pursued under the Code by traditional paper-based methods, but electronic implementation will, it is believed, be in harmony with modern communication methods and, of principal importance, give effective means of implementing rights in the international context in the digital era.

Appendices

The draft concludes with three Appendices (not part of the Code), setting out the main headings of the Tribunal website, a tentative list of forms to be used in the E-Justice system, and a case example, designed to show the practical working of the system. Clearly, these Appendices must be regarded as mere examples of possible procedures, and will need considerable expansion and organisation for application in practice. There will, for instance, need to be extensive rules as to the maintenance of the website, and the authenticity and security of filed documents.

9. Technological measures and rights management information

Provisions concerning prevention of circumvention of technological measures, and obligations concerning rights management information are outside the scope of the Code. Countries which are members of WTO are bound to implement the provisions of the TRIPS Agreement in these areas.

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SOURCE INSTRUMENTS

- (1) Berne Convention (1971 text)
 - (2) Universal Copyright Convention (1971 text)
 - (3) Rome Convention (1961)
 - (4) Phonograms Convention (1971)
 - (5) Satellites Convention (1974)
 - (6) Integrated Circuits Treaty (1989)
 - (7) TRIPS Agreement (1994)
 - (8) WIPO Copyright Treaty (1996)
 - (9) WIPO Performances and Phonograms Treaty (1996)
 - (10) European Television Programme Exchange Agreement (1958)
 - (11) European Television Broadcast Programme Protection Agreement (1960)
 - (12) EC Semiconductor Topography Directive: EC Directive 87/54/EEC
 - (13) EC Computer Program Directive: EC Directive 91/250/EEC
 - (14) EC Rental/Lending and Related Rights Directive: EC Directive 92/100/EEC
 - (15) EC Satellite Broadcasting and Cable Retransmission Directive: EC Directive 93/83/EEC
 - (16) EC Term Directive: EC Directive 93/98/EEC
 - (17) EC Database Directive: EC Directive 96/9/EC
 - (18) EC Copyright/Information Society Directive (2000)
 - (19) European Convention on Transfrontier Broadcasting by Satellite (1994)
 - (20) North American Free Trade Agreement(1992)
 - (21) Decision 351 (1993) under the Andean Pact (Cartagena Decision)
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DRAFT INTERNATIONAL COPYRIGHT CODE

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Part I: Substantive Provisions

- Article 1: General overview
 - Article 2: Basis of protection
 - Article 3: Structure of protection
 - Article 4: Terminology and interpretation
 - Article 5: Beneficiaries of protection
 - Article 6: Subject matter of protection
 - Article 7: Protection criteria
 - Article 8: Moral rights
 - Article 9: Economic rights
 - Article 10: Limitations and exceptions
 - Article 11: Term of protection
 - Article 12: Exercise of rights
 - Article 13: Infringement
 - Article 14: Remedies, penalties and enforcement
- [Additional provisions: Articles 15 -19]

Part II: Judicial Provisions

- Article 20: The International Copyright Tribunal
 - Article 21: The Tribunal Office
 - Article 22: Actions before the Tribunal
- [Additional provisions Articles 23 - 29]

Part III: Administrative and Final Provisions

- Article 30: The Administrative Council
 - Article 31: The Administrative Bureau
 - Article 32: Code Country eligibility
 - Article 33: Entry into force of the Code
 - Article 34: Denunciation of the Code
 - Article 35: Languages of the Code
- [Additional provisions Articles 36 - 40]

Annex: Procedural Rules

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PART I: SUBSTANTIVE PROVISIONS

ARTICLE 1 GENERAL PRINCIPLES

1. Every human being who creates a work of the mind has in respect of that work a *creator's right*, embracing protection of his/her personal and economic interests and covering all use of that work.
2. Persons who present creators' works to the public have *related rights*, embracing protection of their respective interests and covering all use of the achievements of their respective activities.
3. Persons responsible for certain contributions to specified categories of production have *separate classification rights*.
4. Creator's right, related rights and separate classification rights are recognised and enforceable in accordance with the provisions of this Code.

ARTICLE 2 BASIS OF PROTECTION

1. The basis of protection of the creator's right is the recognition of the individual's own intellectual creation.
2. The basis of protection of related rights is the recognition of achievement in performance or in professional or organisational expertise.
3. The basis of protection of separate classification rights is the recognition of investment of resources or specialised facilities in the making of particular productions.

ARTICLE 3 STRUCTURE OF PROTECTION

1. Protection under this Code is granted irrespective of any criterion of nationality, location, place of fixation or place of publication.
2. Protection under this Code extends to every place, whether terrestrial or extra-terrestrial.

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3. Protection under this Code is accorded to the initial rightowner and successors in title of such rightowner. In the case of published pseudonymous or anonymous works the publisher shall be presumed to be entitled to exercise the creator's right, and where such works have not been published, such right is exercised in a Code country in accordance with the rules of that country.

ARTICLE 4 TERMINOLOGY AND INTERPRETATION

1. The following terms have the meaning respectively ascribed to them:
 - (a) *Code country*: a country which is bound by this Code;
 - (b) *local court*: the court having jurisdiction in the respective Code country in cases concerning the rights recognised in this Code;
 - (c) *recognised society*: a society recognised by a Code country as legitimately representing rightholders;
 - (d) *the Tribunal*: the International Copyright Tribunal established under this Code;
 - (e) *works*: creative productions, including literary, dramatic, musical and artistic works, audiovisual works, computer programs and collections of works, data and other material, including databases;
 - (f) *performers* includes actors, singers, musicians, dancers and variety and folklore artists;
 - (g) *recording*: a material fixation of sounds or moving images;
 - (h) *sound recording*: the initial recording of sounds;
 - (i) *phonogram*: a recording of sounds, including the initial recording, but not including a recording incorporated in a cinegram;
 - (j) *phonogram producer*: the person responsible for the sound recording;
 - (k) *moving image recording*: the initial recording of moving images, including any accompanying sounds;

- (l) *cinégram*: a recording of moving images, with or without accompanying sounds, including the initial recording;
- (m) *cinégram producer*: the person responsible for the moving image recording;
- (n) *semiconductor topography*: the layout design of an integrated circuit;
- (o) *semiconductor topography maker*: the person who makes the layout design of an integrated circuit;
- (p) *database*: a collection of independent works, data or other material arranged in a systematic or methodical way and individually accessible by electronic or other means;
- (q) *database maker*: the person who makes a substantial investment in obtaining, verifying or presenting the contents of a database;
- (r) *specified categories of production*: semiconductor topographies and databases;
- (s) *reproduction*: a retained series of representative signs, signals, sounds or images permitting a work or other item of subject matter to be directly or indirectly perceived or transmitted by a human being or by a device;
- (t) *performance*: a manifestation of representative signs, signals, sounds or images permitting a work or other item of subject matter to be directly or indirectly perceived or transmitted by a human being or by a device;
- (u) *telediffusion* includes any form of transmission by radiophonic or electronic means;
- (v) *exclusive right* includes the right to authorise or prohibit the doing of the respective act, and embraces in relation to that right the entitlement to participate in any benefits arising from exploitation of the respective item of subject matter.

(w) *inaugural edition*: an edition constituted by a lawful first publication of a previously unpublished work after the creator's right in the work has expired.

2. The nomenclature used to describe the rights recognised by this Code may be determined by the local legislature and may include "copyright" or "author's right" to describe creator's right, "neighbouring rights" to describe "related rights" and "*sui generis rights*" to describe "separate classification rights".

ARTICLE 5 BENEFICIARIES OF PROTECTION

1. Creators of works are the beneficiaries of creator's right under this Code.
2. The beneficiaries of related rights under this Code are:
 - (a) performers
 - (b) phonogram producers
 - (c) cinegram producers
 - (d) wireless broadcasters
 - (e) cable distributors
 - (f) publishers of inaugural editions.
3. The beneficiaries of separate classification rights under this Code are:
 - (a) semiconductor topography makers
 - (b) database makers.

ARTICLE 6 SUBJECT MATTER OF PROTECTION

1. Works, performances, sound recordings, moving image recordings, wireless broadcasts, cable programmes, inaugural editions, semiconductor topographies and databases which fulfil the relevant criteria constitute the subject matter protected under this Code.

ARTICLE 7 PROTECTION CRITERIA

1. Any work resulting from an individual's own intellectual creation is protected under this Code.
2. Any other item of subject matter mentioned in Article 6 is protected under this Code provided it is not a mere copy or duplicate of another item of subject matter of the same class.

ARTICLE 8 MORAL RIGHTS

1. Creators have the right to claim to be identified as the creators of their works and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to their works which would be prejudicial to their honour or reputation.
2. Performers have the right to claim to be identified as the performers of their performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of their performance that would be prejudicial to their reputation.

ARTICLE 9 ECONOMIC RIGHTS

1. Beneficiaries of creator's right and beneficiaries of related rights have, as regards the respective subject matter in which they hold rights, the exclusive right to make use of such subject matter by any means, including reproduction, adaptation and making the subject matter or any representation thereof publicly available in tangible form or in intangible form by any means of performance including telediffusion or otherwise.
2. Beneficiaries of semiconductor topography makers' rights have the exclusive right to authorise the reproduction or the importation, sale or other distribution for commercial purposes of their semiconductor topographies, or articles incorporating such topographies.
3. Beneficiaries of database makers' rights have the exclusive right to authorise the extraction or re-utilisation of the contents of their databases.

ARTICLE 10 LIMITATIONS AND EXCEPTIONS

1. No limitations on or exceptions to the rights afforded by this Code are provided hereunder, but any such limitations or exceptions which are permitted under the law of

any Code country shall be confined to certain special cases which do not conflict with the normal exploitation of the material concerned and do not unreasonably prejudice the legitimate interests of the rightowner.

ARTICLE 11 TERM OF PROTECTION

1. The general terms of protection of the rights afforded by this Code are as follows:
 - (a) *creator's right*: life of the creator and 70 years thereafter, save in the following cases, where the duration is as indicated:
 - (i) works of joint creation: life of and 70 years from the death of the last surviving creator;
 - (ii) pseudonymous and anonymous works: until 70 years from the year in which it is reasonable to assume that the work was created and if made available to the public in that period, 70 years from the year in which the work was so made available;
 - (b) *performers' rights*: 70 years from the giving of the performance, and if a recording of the performance is published within that period, 70 years from such publication;
 - (c) *phonogram producers' rights*: 70 years from the making of the sound recording, and if the recording is published within that period, 70 years from such publication;
 - (d) *cinégram producers' rights*: 70 years from the making of the moving image recording, and if the recording is published within that period, 70 years from such publication;
 - (e) *wireless broadcasters' rights*: 70 years from the first transmission of the broadcast;
 - (f) *cable distributors' rights*: 70 years from the first transmission of the cable programme;
 - (g) *rights of publishers of inaugural editions*: 25 years from the first publication of the edition;

- (h) *semiconductor topography makers' rights*: 15 years from the first fixation or encoding of the topography, and if the topography is commercially exploited within that period, 15 years from such exploitation;
- (i) *database makers' rights*: 15 years from the making of the database, and if the database is made publicly available during that period, 15 years from such making available.

2. Duration is calculated from the first day of January of the year following the respective event.

ARTICLE 12 EXERCISE OF RIGHTS

1. In actions before the Tribunal, contracts concerning the granting or exercise of rights shall be interpreted and applied as the Tribunal considers appropriate in the circumstances of the case.

ARTICLE 13 INFRINGEMENT

1. The unauthorised use of the whole or any substantial part of an item of protected subject matter constitutes infringement of the respective right accorded under this Code.
2. A use is constituted by doing or participating in the doing of an act.

ARTICLE 14 REMEDIES, PENALTIES AND ENFORCEMENT

1. Civil remedies under this Code are available by way of action brought under this Code in accordance with the Code's provisions.
2. Criminal proceedings are not in the competence of the Tribunal, but may be the subject of recommendation by the Tribunal to the relevant authority.
3. Enforcement of Tribunal orders in Code countries is effected through confirmed orders of the respective local courts in accordance with the provisions of Article 22.
4. Code countries shall in their respective territories maintain the facilities for sustaining actions before the Tribunal and for enforcing confirmed Tribunal orders, and in this connection shall ensure that, under sanction for non-compliance, all persons providing

telediffusion services which make subject matter protected under this Code available to the public must, as provided under the Procedural Rules, notify their service details to the relevant authority of the respective Code country.

[ADDITIONAL PROVISIONS: ARTICLES 15 - 19]

PART II: JUDICIAL PROVISIONS

ARTICLE 20 THE INTERNATIONAL COPYRIGHT TRIBUNAL

1. The International Copyright Tribunal hereby established is composed of Judges ("Tribunal Judges") appointed by Code countries. Each Code country shall appoint four Judges.
2. The Tribunal has competence to hear and determine actions brought before it in accordance with this Code.

ARTICLE 21 THE TRIBUNAL OFFICE

1. The administrative functions of the Tribunal are performed by the Tribunal Office as established under this Code in accordance with the rules adopted by the Tribunal.
2. The members of the Tribunal Office are appointed by the Tribunal.
3. The duties of the Tribunal Office are
 - (a) to assist the Tribunal in all administrative aspects of its functions;
 - (b) to maintain the Tribunal website;
 - (c) to make available on the Tribunal website all relevant documentation in connection with actions before the Tribunal;
 - (d) to process all documentation lodged with the Office in connection with the taking of actions, by forwarding such documentation to Tribunal Judges and other persons in accordance with the Procedural Rules;
 - (e) to maintain all necessary records in connection with actions before the Tribunal;
 - (f) to perform such other duties as may be confided to it by the Tribunal.

ARTICLE 22 ACTIONS BEFORE THE TRIBUNAL

1. Actions for actual or threatened infringement of the rights accorded under this Code are carried out through the Procedural Rules, as established in the Annex to this Code and by the Tribunal. Actions must be commenced within three years from the end of the year in which the act of which complaint is made took place.

2. Actions before the Tribunal are commenced before a single Tribunal Judge. Appeal from a decision of a Tribunal Judge lies to the Appeal Division of the Tribunal, in accordance with the Procedural Rules.
3. The decisions of the Tribunal shall be based on this Code and the Tribunal may in making such decisions take into account the legal rules of the relevant Code countries. Where the Tribunal considers that an action should be transferred to a local court, the Tribunal may make the appropriate order.
4. (a) In any action before the Tribunal it is presumed that :
 - (i) phonogram and cinegram producers are entitled, either in their own right, or as representatives of the respective rightowners, to exercise the economic rights in their respective productions and in the works constituted by such productions;
 - (ii) employers are entitled, either in their own right, or as representatives of the respective rightowners, to exercise the economic rights in subject matter created or produced by employees in the course of their employment duties;
 - (iii) recognised societies are entitled to represent their members.
- (b) Any litigant may contest any presumption under (a) above, and the Tribunal shall proceed as appropriate in such event.
5. (a) In any action brought under this Code, the Tribunal has power:
 - (i) to issue injunctions ordering the defendant to take or desist from certain actions;
 - (ii) to make orders for the seizure, destruction or disposal of infringing material and of material associated with such material;
 - (iii) to make orders for payment of damages;
 - (iv) to make orders for the giving of indemnities;
 - (v) to make orders for payment of costs and security therefor;
 - (vi) to make any other orders which the Tribunal considers just in the circumstances of the case.
- (b) To be effective in a Code country, orders of the Tribunal must as provided by the Procedural Rules be confirmed by the local court of the Code country in

which the order is to be enforced, such confirmation to be obtained on the petition of the party seeking such enforcement. In proceedings for such confirmation, the defendant may petition for the order to be discharged or varied in its application in the Code country, on the ground that the order was wrongly issued, or that some limitation of or exception provided under the law of the Code country applies, and the local court may accordingly restrict the application of the order entirely or in part. The onus of showing that the order should be discharged or varied is on the defendant.

- (c) Any right or defence afforded in a Code country may be claimed in that country in accordance with the law of that country, and may be recognised and applied by the respective local court.
6. Where the Tribunal finds that the defendant has committed an infringement, the Tribunal may, in respect of that defendant, recommend the commencement of criminal proceedings by the relevant authority.
7. Nothing in any order of the Tribunal prevents the respective local court from granting such remedies or applying such criminal procedures or penalties as are available under the respective local law.

[ADDITIONAL PROVISIONS: ARTICLES 23 - 29]

PART III: ADMINISTRATIVE AND FINAL PROVISIONS

ARTICLE 30 THE ADMINISTRATIVE COUNCIL

1. The Administrative Council hereby established deals with all matters concerning the maintenance, development and implementation of the Code.
2. Each Code country is represented on the Council by one delegate, who may be assisted by alternate delegates, advisers and experts.
3. Each country member of the Council has one vote.

4. The Council establishes its own rules of procedure, including those relating to convocation, quorum and required majorities for various kinds of decisions; however, decisions on revisions of the Code shall require a majority of three quarters of the votes cast.

ARTICLE 31 THE ADMINISTRATIVE BUREAU

1. The Administrative Council shall appoint an Administrative Bureau to perform the administrative tasks concerning the Code, other than those tasks which are the responsibility of the Tribunal Office.

ARTICLE 32 CODE COUNTRY ELIGIBILITY

1. Any country which is a member of the United Nations and which agrees to be bound by this Code becomes recognised as a Code country and is eligible for membership of the Administrative Council.

ARTICLE 33 ENTRY INTO FORCE OF THE CODE

1. This Code shall come into effect when six eligible countries have agreed to be bound by it.

ARTICLE 34 DENUNCIATION OF THE CODE

1. A Code country may by written declaration to the Chairman of the Administrative Council give notification that, as from a declared date no less than one year from the date of the declaration, it will not be further bound by the Code, and such declaration shall become effective on such declared date.

ARTICLE 35 LANGUAGES OF THE CODE

1. This Code is established herewith in texts in English, French, German, Spanish and [.....], each of which is equally authentic. The Administrative Council may approve texts in other languages as authentic.

[ADDITIONAL PROVISIONS ARTICLES 36 - 40]

ANNEX
PROCEDURAL RULES

1. Claims and defences in actions under this Code and all other documents submitted with reference to such actions shall, subject to other order of the Tribunal, be filed on the website of the Tribunal in the forms made available on the website for those purposes.
2. Litigants may appear before the Tribunal in person or by their representatives, and such appearances shall be in such form and manner as the Tribunal approves.
3. First Instance proceedings take place before a Judge nominated by the Tribunal. Appeals from First Instance decisions shall be brought before Judges of the Appeal Division as nominated by the Tribunal.
4. The Tribunal shall communicate its decision in any action before it to the litigants involved in such action. The Tribunal shall, on request made in accordance with these Rules, communicate its decisions to the relevant local courts, and may also communicate such decisions to such other recipients as it deems fit.
5. The service details to which reference is made in Article 14(4) of the Code shall include the name, postal address, telephone number, fax number and e-mail address of the service provider, together with such other details as may be provided by these Rules.

APPENDICES

APPENDIX A: TRIBUNAL WEBSITE HOME PAGE

1. **Introduction**
2. **International Copyright Code: Text** (English, French, German, Spanish,) (with commentary)
3. **Code countries**
4. **The Administrative Council**
5. **The International Copyright Tribunal**
 - (A) General
 - (B) Tribunal Judges
 - (C) Tribunal Office
 - (D) Procedural Rules (with commentary)
 - (E) News
6. **Actions before the Tribunal**
 - (A) General
 - (B) Manual
 - (C) Tutorials
 - (D) Official records
 - (i) Registered practitioners
 - (ii) Tribunal case listings
 - (iii) Tribunal reports
 - (iv) Other records
 - (E) Action proceedings (interactive)
 - (i) Forms
 - (ii) Payment of fees
 - (iii) Translation
7. **Reference materials** (Source Instruments, etc.)
8. **General queries** (interactive)

APPENDIX B: TRIBUNAL FORMS

[Tentative list]

(All these Forms may be transmitted electronically)

Litigant/practitioner registration	Form	1	
		1A	Litigant/practitioner registration application
		1B	Confirmation of registration
Claim	Form	2	
Document receipt	Form	3	
ICTO/litigant communications	Form	4	
Defence	Form	5	
Ancillary Communications	Form	6	
Case Conference procedure	Form	7	
Case Direction Order	Form	8	
Submission of evidence	Form	9	
Submission of briefs	Form	10	
Notice of hearing	Form	11	
Appearances at hearing	Form	12	
Hearing: Associated Documents	Form	13	
Notification of decision	Form	14	
Interim orders	Forms	15-20	
Appeal proceedings	Forms	21-25	
Final orders	Forms	25-30	

[An example of completed Form 1A follows, to complete Appendix B]

Form 1A

LITIGANT/PRACTITIONER REGISTRATION APPLICATION

To the Office of the International Copyright Tribunal

I hereby apply for registration by the International Copyright Tribunal Office ("ICTO")

A. As a litigant before the International Copyright Tribunal YES/NO

or

B. As a practitioner admitted to appear before the International Copyright Tribunal YES/NO

Family name

Given names

Address.....

Telephone number

Fax number

E-mail

Local practitioner details

Practitioner status: [e.g. Attorney]

Practitioner certificate

Date

Validity

Issued by [name of issuing body]

Address

Telephone number

Fax number

E-mail

I agree that ICTO may take any steps to confirm the information given herein

I agree to be bound by the International Copyright Tribunal Procedural Rules as currently and hereafter appearing on the Tribunal website.

I herewith submit registration fee [\$20] (electronic payment (credit card etc.) details)

Signed(signature confirmed electronically)

Date

[The registered litigant's or practitioner's password and ID are notified under secure conditions.]

APPENDIX C: CASE EXAMPLE

I **FACTS**

<u>Work involved:</u>	“Sunrise”, a piece of music by composer A
<u>Creator’s right owner:</u>	A, for whole world
<u>Alleged infringing act:</u>	Making “Sunrise” available to the public on a website without A’s consent
<u>Alleged infringer:</u>	B, an Internet service provider
<u>Claimant:</u>	A, a person resident in Country C
<u>Defendant:</u>	B, a person resident in Country D
<u>Country status:</u>	Countries C and D are both Code countries

Case history

A, on becoming aware that B has under his control a website on which, without A’s consent, a recording of A’s work “Sunrise” is made publicly available, asked B to take down the “Sunrise” recording from the website, but B refused.

II **PROCEDURE**

(Each of the following steps is executed electronically: proceedings for interim orders (Forms 15-20) can be instituted at any stage)

1. E, an attorney in Country C, engaged by A to sue B, registers with the International Copyright Tribunal Office (“ICTO”) as a Tribunal practitioner (Forms 1A, 1B).
2. E sends B a pre-action letter: if no satisfactory reply is received, E files Claim with ICTO (Form 2A, see under III Claim Example, below). ICTO sends Document Receipt to E (Form 3) (this is done for each filing).
3. ICTO sends Claim to defendant B (Form 4).
4. B registers with ICTO as litigant (Forms 1A, 1B) and files Defence with ICTO (Form 5) (B has decided to appear in person: if B wishes to appear by an attorney, then the attorney must register (Forms 1A, 1B), then file defence on behalf of B).
5. ICTO sends Defence to E (Form 4).

6. E files Further Document 1 with ICTO (Form 6).
7. ICTO sends Further Document 1 to B (Form 4).
8. B files Further Document 2 with ICTO (Form 6).
9. ICTO sends Further Document 2 to E (Form 4).
10. The claims and defences having been stated, Tribunal Duty Judge allocates the case to a Tribunal Judge for hearing (normally, the hearing Judge will be located in the Code country of the defendant's residence).
11. To facilitate the hearing by establishing the issues in dispute and the evidence needed to resolve those issues, and settling other procedural aspects, there will be a Case Conference between the parties and the hearing Judge, as a result of which the Case Direction Order will be issued by the Judge (Forms 7, 8).
12. ICTO sends Case Direction Order to E and B (Form 4).
13. Submission of evidence by E and B (Form 9).
14. ICTO invites E and B to submit hearing briefs (Form 4).
15. Claimant and defendant submit briefs to ICTO (Form 10).
16. ICTO informs E and B of date and place of hearing, and requests notification whether parties intend to be present at hearing in person or electronically (Form 11).
17. E and B file details of appearance with ICTO (Form 12).
18. Hearing: Associated Documents (Form 13).
19. Tribunal Judge reaches decision (e.g. accepting whole claim, or accepting claim in part, or rejecting claim) and makes order accordingly. ICTO sends order to E and B, with appeal details (Form 14).

[Forms 21-25: Appeal procedure]

[In the following steps, it is assumed that an order upholding the claim in whole or in part has been made.]

20. Upon receipt of request made in accordance with the Procedural Rules, ICTO sends First Instance Judge's order (or Appeal Division order) to local court in country D, and to local court in any other Code country in which the order is to be executed.
21. E applies to local court (or local courts) for confirmation of order.
22. Local court in country D (or local court in other relevant Code country) confirms order, which is then executed in accordance with the procedural rules of country D (or other relevant Code country) (alternatively, the court may refuse to confirm the order, or may vary it).

III CLAIM EXAMPLE

Application for issue of Claim

Password
 ID
 Name of claimant
 Address
 Telephone number
 Fax number
 E-mail
 Name of practitioner representing claimant
 Address
 Telephone number
 Fax number
 E-mail
 Name of defendant
 Address
 Telephone number
 Fax number
 E-mail

Particulars of claim

1. The claimant is the owner for the whole world of the creator's right in the composition "Sunrise".
2. The defendant is an Internet service provider responsible for making material available to the public on a website www.xxxx.yy.
3. The defendant is making the claimant's work "Sunrise" available to the public on website www.xxxx.yy without the claimant's consent, and is thereby infringing the provisions of Articles 9(1) and 13 of the International Copyright Code.
4. The claimant asks the Tribunal
 1. to order the defendant to desist immediately from making the claimant's work available as aforesaid; and
 2. to order the defendant to pay the costs of these proceedings; and
 3. to make such other order as the Tribunal considers just.

.....

5. The claimant believes that the facts stated in this claim are true. [I am duly authorised by the claimant to sign this statement.]

Application fee [\$20.00] (electronic payment (credit card etc.) details).

Signed Litigant/Attorney

Date

Appendices © J A L Sterling 2001

[End of document]