

INTERNATIONAL COPYRIGHT PROTECTION SYSTEM

A INTRODUCTION

The main international instruments dealing with copyright and related rights (Berne Convention, Universal Copyright Convention, Rome Convention, TRIPS Agreement and the WIPO Treaties 1996) provide the framework for the international establishment and recognition of these rights, but numerous aspects are left to national legislation, or await the conclusion of further international agreements.

There is first the consideration that the international instruments, taken together, provide a large measure of consensus on applicable rules, by reason of the mandatory provisions of the respective instruments (see *World Copyright Law*, 2nd edition (“WCL”) paragraph 26Z.01). However, there are gaps to be filled, and there is the need for a new initiative to take further account of the problems created by global dissemination of protected material by satellite communication and the Internet.

Among the issues to be settled in order to ensure an effective international exercise of the rights are those concerning private international law (jurisdiction, applicable law, and enforcement of foreign judgements), and the determination of the scope and application of the on-demand availability right (or “Internet “making available” right”) provided in the WIPO Treaties 1996. These are matters of general import, and two areas of more particular aspect need agreed international rules, namely (1) the situation as regards protection of material created or produced in Space, and the extraterritorial exploitation of protected material, including exploitation in Space, and (2) limitation of liability of Internet service providers.

Establishment of comprehensive international rules on substantive law is of little use without effective remedies, and remedies on paper are of no use if they cannot be effectively enforced. Today, the practice and administration of justice makes increasing use of electronic means of communication; pleadings and court decisions can be delivered electronically, and court proceedings can be conducted on open or closed circuit television. Courts at the national level are increasingly using electronic communication facilities, and there seems no reason why this should not take place on an international basis, especially if private international law rules are harmonised.

All these considerations have led the undersigned to prepare drafts as a means of studying and reaching agreement on approaches to the issues in this area. The drafts constitute the International Copyright Protection System, itself composed of two main elements:

- (1) the **Draft International Copyright Code**, setting out a code based on the mandatory principles of the existing international instruments, and establishing an International Copyright Tribunal, operating through electronic communication procedures, and
- (2) the **Draft International Copyright Protection Agreement**, dealing with private international law issues, and its Protocols on interpretation of the WIPO Treaties 1996, Space Copyright Law and extraterritorial use of protected material, and limitation of liability of service providers.

For descriptions and texts of the drafts, see B1 [Draft International Copyright Code](#), B2 [Draft International Copyright Protection Agreement](#), B3 [Draft Protocol on Interpretation of the WIPO Treaties 1996](#), B4 [Draft Protocol on Space Copyright Law and Extraterritorial Exploitation of Protected Material](#), B5 [Draft Protocol on Limitation of Liability of Service Providers](#). In the following paragraphs, brief descriptions of the scope and content of the drafts are given.

B1 Draft International Copyright Code

The first element of an international copyright protection system which will effectively deal with the problems created by digital technology and international communication through satellite and the Internet is an international code which will draw the mandatory provisions of the diverse international instruments into a comprehensive whole, remove ambiguities in the existing systems, and use modern means of electronic communication to provide effective international recognition and enforcement of rights.

The undersigned's Draft International Copyright Code published in 2001 has these objectives.¹

The Code is based on the principles of non-discrimination and territorially unlimited operation, and covers the relevant aspects of copyright/author's right, related rights and *sui generis* rights. The operation of the Code is based on adjudication through the International Copyright Tribunal established under the Code, and implementation of Tribunal decisions through local courts.

The basic rights recognised by the Code are creator's right (covering the rights of authors), related rights (covering the rights of performers, phonogram and film producers, broadcasters and publishers of inaugural editions) and "separate classification rights" (covering the *sui generis* rights of semiconductor topography makers and database makers).

There are extensive provisions in the Code concerning the "E-Justice" system used in actions before the Tribunal, i.e. actions conducted on a world-wide litigation system through electronic communication.

B2 Draft International Copyright Protection Agreement

The Draft International Copyright Protection Agreement sets out proposals for a harmonised approach to the private international law issues of jurisdiction, applicable law and recognition and enforcement of judgements in relation to situations where "foreign elements" are involved (e.g. where the website operator is a foreigner, where the website is located in a foreign country, where an infringing transmission is initiated in a foreign country etc.). Specific aspects which are related to these general issues (covering the interpretation of the Internet "making available" right, protection of

¹ See J.A.L. Sterling "The International Copyright Code and E-Justice: basic proposals for global solutions to global problems" [2001] E.I.P.R. 528 (Eighteenth Herchel Smith Annual Public Lecture, 2001, together with text of draft Code). See also for background J.A.L. Sterling "International Codification of copyright law: possibilities and imperatives" (2002) 33 I.I.C. 270, 464.

material produced extraterritorially, e.g. in Space, and limitation of liability of service providers) are dealt with in Protocols annexed to the Agreement.

B3 Draft Protocol on Interpretation of the WIPO Treaties 1996

The Draft Protocol on Interpretation of the WIPO Treaties 1996 contains the following proposals as to the act of making available in the context of the Internet “making available” right established by the Treaties.

As to the act of making available, the Draft Protocol proposes that the whole gamut of activities from uploading to server site to the effecting of receipt should be embraced in the act of making available.

As to the persons who make available, the Draft Protocol proposes that these should include the content provider and the service provider. Other persons may also be held to be engaged in making available.

As to the place where the making available occurs, the Draft Protocol proposes that making available takes place, *inter alia*, at the point of upload to the server site, at the server site, and at the point of access.

B4 Draft Protocol on Space Copyright Law and Extraterritorial Exploitation of Protected Material

The Draft Protocol on Space Copyright Law and Extraterritorial Use of Protected Material deals with the subsistence of copyright, related rights and separate classification rights in works and material produced outside the territories of States, e.g. in Space. As regards infringement, the Draft Protocol requires each Member State to provide in its law that a person who commits, aids or abets the commission of any relevant extraterritorial act of which an infringing consequence occurs or may occur in that State shall be guilty of an offence punishable by fine or imprisonment or both, in addition to any civil liability for such consequence.

B5 Draft Protocol on Limitation of Liability of Service Providers

Particular problems are involved in formulating rules concerning the limitation of liability of service providers (see WCL paragraphs 13.42 to 13.47). The Draft Protocol on this subject deals in detail with the issues involved, and classifies the areas of limitation of liability according to the concepts of “mere conduit”, “caching” and “hosting” and in regard to information location tools. The substantive and procedural provisions of the Draft Protocol are designed to conform to the requirements of section 512 of the US Copyright Act and Articles 12 - 14 of the EC E-Commerce Directive. The Annex to the Draft Protocol gives synopses of the relevant forms and notices, including the proposal for an International Take Down Notice, which may be used internationally, in conformity with the respective requirements of local legislations: the texts of these forms and notices may be accessed at <http://www.rightswatch.com> (Reports/UK and Ireland Working Group Report).

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