

## **B3 DRAFT PROTOCOL ON INTERPRETATION OF THE WIPO TREATIES 1996**

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### **(a) Introduction**

#### **(b) Text**

#### **(a) Introduction**

While the WIPO Treaties 1996 require the recognition of the Internet “making available” right, that is, the right of authors, performers and phonogram producers to authorise or prohibit the making available to the public, by wire or wireless means, of their respective works, performances (fixed in phonograms) and phonograms, in such a way that members of the public may access such works performances or phonograms from a place and at a time individually chosen by them<sup>1</sup>, the Treaties do not define what constitutes the act of making available in this context, the persons who make available, or where the making available takes place. Neither, in so far as making available involves reproduction, do the Treaties define the place of reproduction or the persons who make reproductions. The Draft Protocol here submitted contains proposals for definitions in this connection.

#### **The making available right**

*As to the act of making available*, the Draft Protocol proposes that the whole gamut of activities from uploading to the effecting of receipt should be embraced in the act of making available (Art.2). This will, as regards certain activities, and subject to agreed limitations on liability, embrace the service provider, as well as the content provider. Furthermore, it may be noted that the proposed definition of the act of making available does not embrace the member of the public who accesses the material, unless that person then engages in acts of uploading to a server site, or effecting other transmissions.

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<sup>1</sup> WIPO Copyright Treaty 1996, Art.8; WIPO Performances and Phonograms Treaty 1996, Arts.10, 14. In this Introduction and in the draft text, the right is referred to as “the making available right”, though it should be noted that this is not the only right in respect of which the Treaties use the term “making available”: see Article 6 of the WIPO Copyright Treaty and Articles 8, 12 of the WIPO Performances and Phonograms Treaty.

As to the persons who make available, the Draft Protocol proposes that these should include the content provider and the service provider (as defined in Article 1). Possibly other persons may be held to be engaged in making available.

As to the place where the making available occurs, the draft proposes an approach similar to that of the “communication theory”.<sup>2</sup> It is suggested that it is not practical to apply the “emission theory” in this context, since the transmission system of the Internet, involving as it does multiple transmission points, is entirely different from the satellite broadcast transmission system, which basically involves an identifiable transmission point. As regards the Internet, the location of the point of initial transmission may be extremely difficult, if not impossible, to identify, since the material in question may be stored on one site, or on many interlinked sites, and these sites may or may not be located at the place where the service provider offering the site subscription is located. Furthermore, the borderless nature of Internet communication amply justifies, it is submitted, a concept which covers the whole gamut of the communication activity.

Two US cases are of interest in this connection.

In *National Football League v PrimeTime 24 Joint Venture*, 211 F.3d 10; 54 USPQ2d 1569 (2<sup>nd</sup> Cir 2000), cert denied 26 March 2001, the defendant captured by satellite US copyright television programmes and transmitted the material to Canada, where it was publicly displayed: held, this was public display or performance *in the United States*, and thus infringement of the right under the US Copyright Act to perform or display the work publicly, since “Congress intended the definitions of “public” and “performance” to encompass each step in the process by which a protected work wends its way to its audience” (quoting *David v Showtime/ The Movie Channel Inc.* 697 F.Supp 752, 759 (SD NY 1988)): the uplink transmission of signals captured in the US was a step by which the protected work reached the public audience.

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<sup>2</sup> In this connection see Reinbothe, J., von Lewinski, S. “*The WIPO Treaties 1996*” (Butterworths, 2002), pp.108-109 (submission that the act of making available extends to the entire transmission to the user), and Ficsor, M. “*The Law of Copyright and the Internet*” (Oxford University Press, 2002), pp.405, 508-509 (submission that the communication theory should apply in the context of interactive transmissions).

In *National Football League v TV RadioNow Corp.* 53 USPQ 2d 1831 (WD Penn., 2000) (the “iCrave TV” case), the defendant companies captured US television broadcasts, such broadcasts admittedly constituting or containing material in which the plaintiffs owned the copyright. Having captured the television signals, the defendants converted them into computerised data and “streamed” (i.e. transmitted) them over the Internet from the website iCraveTV.com, located in Canada. This enabled Internet users in the United States to receive the programs via the Internet.<sup>3</sup> As to infringement, the Court, noting that there were numerous visits to the iCrave TV website from US visitors, held that the plaintiffs were likely to succeed in showing that the defendants were unlawfully publicly performing the plaintiffs’ copyright works *in the United States*, by transmitting (through use of “streaming” technology) performances of works to the public by means of the telephone lines and computers that make up the Internet. The Court held that the infringements occurred *in the United States* and violated US copyright law (at page 1837). The Court also held that the defendants engaged in contributory infringement by making the plaintiffs’ copyright works available on the Internet with the knowledge that third parties could and would further infringe the plaintiffs’ copyrights by further transmitting (and publicly performing) the programmes. This streaming materially contributed to the further infringements.

It is submitted that this case supports the proposition that communication to the public as regards the making available right takes place in the country of reception, as well as in the country of originating transmission.

### **The reproduction right**

The Draft Protocol contains suggested definitions of the place of reproduction and of the persons who make reproductions, designed to embrace, *inter alia*, transmissions over the Internet.

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<sup>3</sup> As to jurisdiction, the Court found that the Court had subject matter jurisdiction in the case, because, although the streaming of the plaintiffs’ material originated in Canada, acts of infringement were committed in the United States when US citizens received and viewed the defendants’ streaming of the copyright materials. The Court had personal jurisdiction over the defendants, either because they were Pennsylvania residents, or because of contacts with the State (e.g. transacting business in the State; additionally the defendants’ activities in the forum were integrally a part of the activities giving rise to the cause of action asserted.

(b) Text

**DRAFT PROTOCOL ON INTERPRETATION OF THE WIPO TREATIES 1996**  
**[Version of February 9, 2004]**

**Preamble**

**The Parties to the International Copyright Protection Agreement**

- Wishing to agree on the interpretation of certain provisions of the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaties 1996 (“the Treaties”),

have agreed as follows.

**Article 1 Definitions**

In this Protocol the following terms bear the meanings respectively ascribed to them as follows:

*accessor*: a person who, in the capacity of an individual member of the public (whether of the public generally, or of a restricted category of the public), accesses or may access material retained on a server site.

*content provider*: a person who effects or is responsible for the initial placing of material, including representative signals, on a server site, whether that server site is or is not one for which that person is responsible.

*making available*: in the context of dissemination of representative signals, making available of subject matter to the public, by wire or wireless means, in

such a way that members of the public may access such subject matter from a place and at a time individually chosen by them.

*representative signals*: signals of any description which by transmission permit an item of subject matter or part of such item to be immediately or subsequently perceived by a human being or by a device.

*server site*: a specific location at which data is retained in an on-line service, such location being accessible by members of the public generally, or by restricted categories of such members.

*service provider*: a provider of on-line services or network access, or the operator of facilities therefor.<sup>4</sup>

*subject matter*: bears the meaning ascribed to it in the International Copyright Protection Agreement.

## **Article 2 Interpretation**

The Parties agree the following interpretations with reference to the making available and reproduction rights as recognised in the Treaties:

- (a) The act of making available is constituted by any of the following:
  - (i) transmitting representative signals to a server site or providing such signals for transmission from a server site to accessors;
  - (ii) retaining representative signals on a server site;
  - (iii) maintaining the facility of access to representative signals retained on a server site;
  - (iv) effecting transmissions of representative signals to accessors.

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<sup>4</sup> Cf. US Copyright Act 1976, S. 512(k)(B). Various persons may be regarded as service providers, including site operators, general service providers, access providers, hosting providers and communication providers (for suggested definitions of these terms, see *World Copyright Law*, 2<sup>nd</sup> edition, paragraph 9.22): cf. B5 Protocol on Limitation of Liability of Service Providers.

- (b) The persons who make available include the content provider and the service provider.
  
- (c) Making available takes place at any of the following:
  - (i) at the place where for the purpose of on-line transmission the content provider transmits material to a server site, or provides material for such transmission;
  - (ii) at the server site;
  - (iii) at the reception point or points at which an item of subject matter which is available on-line is or may be accessed.
  
- (d) The act of making a reproduction in the context of making available takes place at the initiating point of upload, at the server site or sites, at the intervening transmission point or points and at the reception point or points.
  
- (e) The persons who make a reproduction in the context of making available include the content provider and the service provider.

**Article 3 Administration and final provisions**

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