

B4 DRAFT PROTOCOL ON SPACE COPYRIGHT LAW AND EXTRATERRITORIAL USE OF PROTECTED MATERIAL

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(a) Introduction

(b) Text

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Areas outside the territories of States, such as the high seas or Space, may be classed as “extraterritorial”. The problems created by transborder communication of material protected by copyright or related rights have received attention in the WIPO Treaties 1996. However, these instruments do not deal specifically with the situation as regards material created or produced extraterritorially, e.g. in Space, or with use of protected material where such use is initiated extraterritorially, and the Berne, UCC and Rome 1961 Conventions and the TRIPS Agreement are similarly silent on this subject. The Satellites Convention 1974 refers to an emitted signal that goes to or passes through a satellite (Article 1(iv)) but does not mention signals initiated in a satellite.

Material of protectable categories is already being produced extraterritorially, e.g. in Space or on bodies in Space (for instance, photographs taken by robot devices on the planet Mars). It can also be anticipated that use of protected material will increasingly take place extraterritorially. Broadcasts towards countries on Earth and receivable there may be initiated in satellites or objects in Space, and databases containing protected material may be stored in similar locations, and be accessible from countries on Earth.

Subsistence of rights

As regards subsistence of rights, some of the protection criteria established by the relevant international instruments relate to nationality (e.g. under Article 3(1)(a) of the Berne Convention 1971, Article 5(1)(a) of the Rome Convention 1961) and this criterion may be applied to extraterritorial activities, though such application is not expressly described in the said instruments. On the other hand, protection criteria relating to place of fixation (as under Articles 4(a), 5(1)(b) of the Rome Convention 1961), and place of first publication (as under the Article 3(1)(b) of the Berne Convention 1971 and Article 5(1)(c) of the Rome Convention 1961), will not be fulfilled, under the present

system, if the action concerned takes place outside the territories of States. A distinction needs to be made between extraterritorial acts which take place (1) in or on particular objects within the jurisdiction of a State (e.g. on a ship or in a vehicle, vessel or other object over which a State has jurisdiction ("State jurisdiction object")), and (2) those which are done by human beings outside and away from such objects. Fulfilment of the fixation and transmission criteria may take place where the relevant act occurs in or on a State jurisdiction object: thus, a person doing an act, say, fixing sounds or moving images in a recording, on a ship registered in the name of a particular State may be regarded as doing that act in that State and thus fulfilling the criterion of fixation in respect of that State. The same should, it is submitted, apply to fixation in or transmission from a State jurisdiction object located in Space. In this way, a fixation in or transmission from a Space vehicle under the jurisdiction of a particular State may be assessed as taking place in that State, so that, for instance, if a robot device on Mars is regarded as being under the jurisdiction of the State which built and controls it, fixations made in or transmitted from that device should be deemed as taking place in that State. Where satellites etc. are subject to national registration, a similar position will arise. A considerable portion of material created or produced in Space may therefore be classed as fulfilling the respective criteria, thus bringing about protection. The same would apply to a performance taking place in or on a State jurisdiction object in Space. This leaves, then, activities which take place outside and away from State jurisdiction objects, for instance where a photograph is taken by an astronaut on a "Moon walk". Here the criterion of nationality should apply (and in the case of broadcasts, the criterion should be the location of the headquarters of the broadcasting station (Rome Convention 1961, Article 6(1)(a)).

The criterion of publication may be fulfilled where copies manufactured extraterritorially are disseminated to the public in a State. The number of persons remaining together in extraterritorial areas is at present limited; however the possibility that issue of copies to a considerable number of persons in a State jurisdiction object in an extraterritorial area should not be ignored. Dissemination of copies to, say, 1,000 persons on a ship at sea may be regarded as publication in the State where the ship is registered, and the same should, it is submitted, apply where the relevant number of persons receiving copies are present, for instance, in a State jurisdiction object in Space.

The conditions under which material created or produced extraterritorially may be protected by copyright, related rights or separate classification rights should be clarified, and the Draft Protocol here submitted contains provisions which are designed to confirm protection when the respective item of material conforms to the nationality or territorial criteria of the relevant international instrument.

Infringement of rights

On present rules, persons who commit unauthorised acts extraterritorially may not, at least as far as copyright, related rights and separate classification rights are concerned, be subject to the jurisdiction of any State in respect of those acts. Here again the distinction between acts taking place in or on State jurisdiction objects and those taking place outside and away from such objects should be made. Acts in or on State jurisdiction objects should be no less infringing acts because the act is done, say, in Space rather than on Earth.

In the context of infringement, two consequences may flow from extraterritorial acts, namely an extraterritorial consequence and a territorial consequence. The extraterritorial consequence may be subject to a specific national law, but as regards the territorial consequence, there are ways in which liability may be established in this connection: for instance, national laws already have rules concerning civil and criminal liability for unauthorised acts committed outside the State and having their effect within the State, and persons who commit, aid or abet such acts may in certain circumstances be liable to criminal proceedings. The Draft Protocol adopts the principle of such rules, applying this principle where the infringing consequence occurs in the territory of a State, including in a State jurisdiction object.

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(b) Text**DRAFT PROTOCOL ON SPACE COPYRIGHT LAW AND EXTRATERRITORIAL
USE OF PROTECTED MATERIAL
[Version of February 9, 2004]****Preamble**

The Parties to the International Copyright Protection Agreement

- Noting that material protectable by copyright, related rights or separate classification rights is being and will continue to be created or produced extraterritorially, whether on or near Earth or in Space,
- Noting that the use of such material may be initiated by acts committed in extraterritorial areas,
- Wishing to agree the principles on which such material may be protected and by which such use may be regulated,

have agreed as follows.

Article 1 Definitions

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

extraterritorial: refers to any area (whether on or near Earth or in Space) not forming part of the territory of any State, and *extraterritorial* and *extraterritorially* have corresponding meanings.

infringement, *infringing*, *Member State* and *subject matter* bear the meanings respectively ascribed to them in the International Copyright Protection Agreement.

relevant extraterritorial act means an act committed in an extraterritorial area, which, if it had been committed in a Member State, would have required in order to be legal the licence of the rightholder for that State of the copyright, related right or separate classification right, as the case may be, in the subject matter concerned.

rights bears the meaning ascribed to it in the International Copyright Protection Agreement.

telecommunication means any communication of signs, signals, writing, images, sounds or data of any nature by wireless broadcasting, cable (wire), or any electronic, optical or other energy-based system.

Article 2 Criteria of protection

Authors of works created in extraterritorial areas, as well as performers of performances given in, producers of phonograms or moving image recordings first fixed in, transmitters of wireless and cable transmissions initiated in, publishers of inaugural editions published in and makers of semiconductors topographies and databases made in such areas shall on fulfilment of the respective criteria as established by the relevant international Conventions, Treaties and Agreements enjoy protection in Member States as regards their respective works and other subject matter as abovementioned. Such protection shall be on the basis of national treatment and shall accord the rights respectively afforded by such Conventions, Treaties and Agreements.

Article 3 Preservation of other protection

The protection afforded in accordance with Article 2 hereof shall not limit or prevent the granting of any protection otherwise available to the respective claimant.

Article 4 Committing, aiding or abetting relevant extraterritorial acts

Each Member State shall 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 its territory shall be guilty of an offence punishable by fine or imprisonment or both, in addition to any civil liability for such consequence. Acts committed in a State with which the Member State in which the infringing consequence occurs has no relevant treaty relations shall be deemed extraterritorial acts.

Article 5 Acts in places and objects located in extraterritorial areas

In the context of the fulfilment of criteria for protection and in the context of infringement of rights, an act (such as performance, fixation, transmission, publication or making) which is done in or on a place or object located in an extraterritorial area shall, where such place or object is within the jurisdiction of a State, be deemed to be done in the territory of that State.

Article 6 Place of telecommunication

The place of telecommunication includes any place on Earth or in Space where such telecommunication is initiated or is received or may be received.

Article 7 Administrative and final provisions

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