

Space Copyright Law: the new dimension

A Preliminary Survey and Proposals

(Version of 15 December 2008)

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PART I: PRELIMINARY SURVEY

A. Introductory

1. Definitions

For the purpose of this article the term “Space” includes all areas of and the celestial bodies in the Universe beyond Earth’s territorial airspace.²

The term “extraterritorial” is used here to describe any area, place or object, whether on or near Earth or in Space, which is not under the jurisdiction of any State. Conversely, a “territorial area” is an area which is under the jurisdiction of a State.

2. Copyright in the context of Space

In due course we may see the presence of thousands of human beings in Space. What copyright law will they take with them, and how will it be exercised and administered?³

² The phrase “Earth’s territorial airspace” is here used to describe those areas of Earth’s airspace over which States have jurisdiction. Areas beyond Earth’s territorial airspace are more strictly described as “outer Space”. The Outer Space Treaty 1967 refers to “outer Space, including the Moon and other celestial bodies”. Article 2 of the UN Convention on the Law of the Sea 1994 provides that the sovereignty of a coastal State extends to the airspace over the territorial sea of the State. On the problems in determining precisely where Earth’s territorial airspace ends, and where outer Space begins, see B. Cheng, *Studies in International Space Law* (Clarendon, 1997) Chapter 14. Article 1 of the Draft Space Copyright Treaty proposed in Part II below sets out additional definitions of relevance to the matters here considered.

³ In this article “copyright” refers to the right granted in respect of original works of authorship, and “related rights” to rights in other material, such as performances and broadcasts. “US Act” means the US Copyright Act 1976 as amended. “UK Act” means the United Kingdom (UK) Copyright, Designs and Patents Act 1988 as amended (text available at www.intellectual-property.gov.uk/resources/copyright/law.htm). Under the US Act, original sound recordings are protected by copyright (s. 106). Under the UK Act,

Copyright is a territorially based discipline which has developed in relation to places on Earth: now we have to consider the situation as regards places outside Earth. A body of Space law has evolved⁴, some of it covering intellectual property generally, and patents⁵, but none of it dealing specifically with the rules to apply as regards copyright and related rights.

Material which is or may be protected by copyright or related rights is even at present being produced in or transmitted from Space, some of it of great scientific value (e.g. data reports, still and moving images). This development is likely to increase with the growth of human presence in Space, bringing questions of subsistence of rights. In addition, activities which constitute or may constitute infringement of copyright or related rights may take place in Space. Many problems in this area await resolution, and studies aimed at agreeing international solutions to them should, it is submitted, be instituted without delay. The object of this preliminary survey is to indicate and describe a number of these problems, some of which derive from the interface between the principles of territoriality in copyright law and the principles to be adopted in relation to locations in Space which do not form part of the territory of any State.

Here are some examples of the types of question which arise.

In the context of subsistence,

- an astronaut on the Moon creates a work. Is the work protected by copyright? If so, will the astronaut or the Government entity responsible for the expedition be the copyright owner?

sound and film recordings are protected by copyright, without having to fulfil the criterion of originality, but they must not be mere copies of other recordings (ss.1(1)(b), 5A, 5B). In France, Germany and other civil law countries, original works (including cinematographic works) are protected by author's right, whereas performances, sound and film recordings and broadcasts are protected by a related (or neighbouring) right. Under the EC Rental and Related Rights Directive (1992, codified version 2006/115/EC) performances, sound and film recordings and broadcasts are protected by related rights.

⁴ There is an extensive literature on Space Law: for general surveys see B. Cheng, *op. cit.*; G. Lafferranderie, D. Crowther, *Outlook on Space Law over the Next 30 Years*, Kluwer, 1997; N. Jasentuliyana, *International Space Law and the United Nations*, Kluwer, 1999. On intellectual property in Space, see generally R. Abeyratene, "The application of intellectual property rights to outer Space activities" (2003) 29/1, 2 *Journal of Space Law* 1. Extensive material on Space exploration is available on the NASA website at www.nasa.gov.

⁵ See A.M. Balsano, A.de Clercq, "The community patent and Space-related inventions" (2004) 30/1 *Journal of Space Law* 1. Some legislation has been adopted concerning patents for inventions in Space. Section 105 of the United States Patent Act in Space 35 USC may provide a precedent in cases where an act of relevance to copyright takes place in a Space object or component under the jurisdiction of the United States or of a State Party to an international agreement between the Party and the United States; see A. Piera, "Intellectual Property in Space Activity. An analysis of the United States patent regime" *Air and Space Law*, Vol.XXIX/1, Feb. 2004, 42. See also B.L. Smith "New initiatives for intellectual property law for Space activities" 43 *Colloque on the Law of Outer Space (International Institute of Space Law) 2000*, at 195 (proposal for single intellectual property legislation for Space activities, and a Space Patent).

- photographs and moving pictures of objects in Space are taken by automatic and robot devices operating in Space vehicles or on the surfaces of celestial bodies such as Mars: are these copyright works, and if so, who are the copyright owners?

In the context of infringement,

- a member of a Lunar expedition performs on the Moon a copyright work and the performance is broadcast throughout the World by the Government entity in charge of the mission – all without the permission of the copyright owner. Does an action for infringement lie against the performer or the Government entity, and if so, on what grounds and in which countries?
- what legal remedies are available when unauthorized copies of a copyright work are made on the Moon or other celestial body in Space, or when an unauthorized performance of a copyright work is given in such location before a sufficient number of persons to constitute a public?
- without authorization someone on the International Space Station feeds copyright material into a file-sharing website, so that persons on Earth can get free downloads. What action can be taken by the copyright owner, and how does the fact that some 15 different countries are Parties to the Space Station project affect the situation?

Generally,

- how do the existing international copyright and related rights instruments apply in extraterritorial areas – or do they apply at all?

An attempt to answer these questions will need to identify (if possible) the applicable law – and, in case of alleged infringement, the courts before which action can be taken, assuming such courts accept jurisdiction.

3. Methodology

Broadly speaking, the questions mentioned above raise general and specific issues. General issues are those which are already encountered in the application of existing law, such as gaps in entitlement to protection, the fulfilment of the criterion of originality in the case of photographs, and identification of the place of communication to the public (place of initial transmission, place of reception or both). Specific issues are those concerning extraterritorial areas, including liability for acts committed in such areas, in particular where such acts have no consequent effect in any State.

The method here adopted in dealing with these questions is, firstly, to mention, as background material, relevant areas and locations (B), national laws (C), regional and international instruments (D) (E) and international law issues (including jurisdiction, applicable law and enforcement of judgements) (F). Some specific questions are then briefly considered, namely, subsistence of

rights (G), publication (H), ownership and exercise of rights (I), communication to the public (J), limitations and exceptions (K), infringement (L) and remedies (M). There follows, for the purpose of practical analysis, a description of four scenarios of activities in Space (N) and comments on eight illustrative cases based on these scenarios (O). Part I concludes with a summary of some unresolved issues (P).

The preliminary survey in Part I is followed in Part II by proposals as to approaches to solutions to some of the questions which arise in this area, such proposals being incorporated in a Draft Space Copyright Treaty (“the Draft Treaty”) (Appendix A).

It should be mentioned that this article is concerned mainly with copyright and related rights and the perspective is that of a copyright lawyer.⁶ Other considerations which apply in respect of the other main branches of intellectual property law, such as patents and trademarks, are not considered here. Lawyers expert in other disciplines, including those of public and private international law, maritime law and Space law as established by the various treaties and agreements, will no doubt have their own perspectives, which will need to be taken into account in formulating theoretically sound and practical solutions of international validity.

B. Areas and locations

On Earth a distinction is made on the one hand between territories forming part of a State (including its territorial seas and territorial airspace, and, by extension, objects under State registration (e.g. ships)), and on the other hand, areas not forming part of such territories.⁷

The present survey proceeds on the basis that there are no areas of Space which are under the jurisdiction of any State, but that there are objects within Space which may be under State jurisdiction or control (such as Space vehicles, robot devices etc.). Special considerations (mentioned below) apply in respect of the International Space Station.

Human activities may take place in an object (as in a ship registered in the name of a particular State) or outside such object (as where a person explores an unclaimed area on foot). In Space (as on Earth) there are important

⁶ Furthermore it should be noted that the author is not a US lawyer and his views on the interpretation and application of the US Act should be regarded accordingly.

⁷ More specific classifications of territories outside State jurisdiction include (1) *res nullius* (unoccupied area, but subject to appropriation by States) and (2) *res extra commercium* (area not subject to State appropriation): see B. Cheng, *op. cit.* at 80. There is also the concept of “the common heritage of mankind” (a concept formalised in the Moon Agreement 1979 and relating to areas (e.g. the Moon, including its natural resources) not subject to State appropriation, and jointly managed by all States: see N. Jasentulyiana, *op. cit.* at 139). The Outer Space Treaty 1967 recognises the whole of outer Space (as defined in the Treaty, see above) as *res extra commercium*, and that international law is applicable to the entire area: see B. Cheng, *op. cit.* at 400-401. UN Resolution 1962 (XVIII) declares that “outer Space and celestial bodies” are not subject to national appropriation.

consequences to this distinction, including those as to subsistence of rights, jurisdiction, applicable law, etc.: see F. 2, 3 below.

Exploration of Space, the consequent increasing presence there of humans and their devices, together with current treaties and agreements and those to be concluded, the jurisdictional status of areas of Space and related issues still to be resolved all bring about perspectives not previously experienced on Earth. It is, consequently, appropriate to place the questions in the context of Space, rather than simply in relation to places on Earth which are outside the jurisdiction of any State.

C. National laws

It appears that no national law at present deals specifically with the issues raised by the use in Space of material protected by copyright or related rights. For the present, therefore, the general principles and rules of existing national laws must in national litigation be applied in considering any particular aspect of the subsistence or exercise of such rights in Space.

D. Regional instruments

Regional instruments containing provisions concerning copyright and related rights include the EC “Copyright” Directives⁸, the North American Free Trade Agreement (NAFTA), and the Cartagena Agreement.⁹ US bi-lateral and multilateral trade agreements also deal with intellectual property issues.¹⁰ In addition there are the Council of Europe Broadcasting Agreements and Conventions.¹¹ None of these instruments contains specific provisions regarding copyright and related rights in the context of Space.

⁸ See the Directives on Computer Programs 91/250/EEC [1991] OJ L 122/42; Rental/Lending and Related Rights 1992, codified version 2006/115/EC O.J. L376/28; Satellite Broadcasting and Cable Retransmission 93/83/EEC [1993] OJ L 248/15; Term of Protection 1993, codified version 2006/116/EC O.J. L372/12; Databases 96/9/EC [1996] OJ L 77/20; Information Society 2001/29/EC [2001] OJ L 167/10; Artist’s Resale Right 2001/84/EC [2001] OJ L 272/32. There are substantive provisions in the EC Copyright Directives which are not reflected in the US Act, including those regarding protection of broadcasts by a related right (Directive 2006/115, Articles 7(2)(3) (fixation right), 8(3) (rebroadcasting and certain public communication rights), 9 (distribution right)), and the *sui generis* database right (Directive 96/9/EC (Article 7)).

⁹ Sub-Regional Agreement of May 26, 1969 implemented by Decision 351 of December 17, 1993 (for Spanish text see *Gaceta Oficial del Acuerdo de Cartagena*, Year 10, No.145, December 21, 1993, p.5.16: English translation in (1994) *Copyright* November).

¹⁰ See for example the US Free Trade Agreements with Singapore (January 15, 2003), Chile (June 6, 2003), Australia (May 18, 2004), Central America and Dominican Republic (August 5, 2004) and Peru (Trade Protection) (April,12, 2006): all these instruments contain, *inter alia*, specific provisions concerning recognition of copyright and related rights. For details see www.ustr.gov.

¹¹ European Television Programme Exchange Agreement 1958, European Television Broadcast Protection Agreement 1960, European Agreement for the Prevention of Broadcasts from Stations outside National Territories 1965, European Convention on Transfrontier Television 1989 and European Convention on Transfrontier Broadcasting by Satellite 1994 (not yet in force). For details see J.A.L. Sterling, *World Copyright Law*, (Sweet & Maxwell, 3rd ed., 2008) (“WCL”), paras.25.02, 31A.20, 31A.21, 40.04.

E. International instruments

A number of UN instruments and the International Agreement on the Civil International Space Station deal with activities in Space.¹² None of these instruments provides specific rules concerning copyright and related rights, but their principles and provisions may be applicable in certain respects, e.g. as regards transmissions from artificial Earth satellites, the definition of territorial limits, and jurisdiction and liability etc. in respect of activities in the International Space Station.¹³ The provisions of these instruments, together with those of any other or new instruments regarding Space law, will need to be considered in establishing the parameters and provisions of the copyright and related rights law to apply in Space.

As far as international instruments are concerned, it is proposed, for the purposes of this article, to consider the eight illustrative cases in the context of the Berne Convention for the Protection of Literary and Artistic Works, 1971, as amended 1979 ("Berne Convention")¹⁴, the Rome Convention for the Protection

¹² Relevant instruments in force include: (a) *UN Outer Space Treaty* 1967 (covering principles governing activities of States in the exploration and use of Outer Space), (b) *UN Liability Convention* 1972 (covering damage caused by Space objects) and (c) *UN Moon Agreement* 1979 (concerning activities of States on the Moon and other celestial bodies). For extracts from and details of ratifications of these instruments, see Appendix D. The texts of and other information concerning these and other relevant UN instruments are available at <http://www.unoosa.org/oosa/SpaceLaw/treaties.html>. See also *Convention on Registration of Objects launched into Outer Space* 1976, *UN Principles on Direct TV Broadcasting* 1982 (covering principles governing the use by States of artificial Earth satellites for international direct television broadcasting) (UN Resolution 30/192 of 10 December 1982), and *UN Convention on the Law of the Sea* 1994 (covering territorial sea limits, economic jurisdiction, status of sea bed etc., and providing that sovereignty extends to land territory, adjacent belts of sea and to airspace over territorial sea). The *Intergovernmental Agreement on the Civil International Space Station* 1998 covers jurisdiction, operation, liability etc. in respect of the International Space Station (for signatories of and extracts from the Agreement, see Appendix D(d): see also footnote 40).

¹³ For some of the relevant provisions in these instruments, see Appendix A. Article 21 of the Civil International Space Station Agreement 1998 contains provisions referring to intellectual property, but not specifically to copyright and related rights: see O., Case 7 below. For a general review of the concept of jurisdiction of States in this area, see K.H. Bockstiegel, P. M. Krämer, I. Polley "Patent protection for the operation of telecommunications satellite systems in outer Space?" in (1988) 47 *Zeitschrift für Luft – und Weltraumrecht*, 2. It may be possible to extend the provisions of Article XI of the UN Liability Convention 1972 (State liability for damage to property of persons caused by Space objects launched by a member State) to damage caused to copyright and related rights owners by activities in Space, but it seems doubtful that the Convention in its present text is necessarily to be read as so providing. See also Article XIV of the UN Moon Agreement 1979 (States' responsibilities for activities on the Moon). Problems concerning applicable law in relation to the international Space Station are mentioned in O. 7 below.

¹⁴ China, India, Japan, Russia and US, and UK, France and Germany (and all other States of the European Union) are among the Member States of the Berne Convention, now totalling over 164 States (November 1, 2008): for full details of membership see www.wipo.int/treaties/. In addition countries bound by the TRIPS Agreement 1994 ("TRIPS") (including twelve non-Berne Convention countries) are obliged to comply with Articles 1-21 (apart from the moral rights provisions) of the Berne Convention and the Appendix thereto (TRIPS Article 9(1)). For membership of TRIPS, see www.wto.org.

of Performers, Producers of Phonograms and Broadcasting Organizations 1961 (“Rome Convention”), the WIPO Copyright Treaty 1996 (“WCT”) and the WIPO Performances and Phonograms Treaty 1996 (“WPPT”)¹⁵, here called “the source instruments”, since they provide recognition of the basic rights embraced by copyright and related rights.¹⁶ There are, as it were, no additional rights granted by the provisions of the Universal Copyright Convention 1971, the Phonograms Convention 1971 or the TRIPS Agreement 1994, which are not recognised by the mandatory rights granted by the provisions of the source instruments.¹⁷ The Satellites Convention 1974 may be relevant in respect of distribution of certain programme-carrying signals transmitted by satellite, but the Convention does not grant specific rights in signals or programmes, and is not here regarded as a source instrument: the same applies in respect of other international instruments concerning satellite transmissions or telecommunication rules. The Integrated Circuits Treaty 1989 is not yet in force.

F. International law issues

1. General

International law issues in the context of Space may be seen from the perspectives of public and private international law. Here a brief summary of the jurisdiction situation is given, together with some remarks on the issues of applicable law and enforcement of judgements.¹⁸ These issues are also considered in connection with the proposals made in Part II below.

¹⁵ For Rome Convention, WCT and WPPT membership details see www.wipo.int/treaties. Countries bound by WCT are obliged to comply with Articles 1-21 and the Appendix of the Berne Convention. In this article references to “Berne/TRIPS/WCT countries” should be taken as embracing countries which are Member States of or Parties to the Berne Convention, TRIPS or WCT. Afghanistan, Eritrea, Ethiopia, Iran, Iraq, Kiribati, Lao People’s Democratic Republic, Marshall Islands, Nauru, Palau, San Marino, São Tomé and Príncipe, Seychelles, Somalia, Timor-Leste, Turkmenistan, Tuvalu and Vanuatu (none of them signatory to the Civil International Space Station Agreement) are UN countries which are not Member States/Parties of any of the source instruments or TRIPS (based on WIPO and TRIPS membership information sites visited November 1, 2008).

¹⁶ In June 2008 a draft WIPO Treaty for the protection of broadcasting organizations failed to obtain the agreement necessary for submission to a Diplomatic Conference: see WCL para. 17.17 and the WIPO website at www.wipo.int. International instruments eventually agreed could be added as source instruments. The same could apply to amendments to the four source instruments. For background on rights in broadcasts, see M. Ogawa, *Protection of Broadcasters’ Rights* (Martinus Nijhoff, 2006).

¹⁷ The provisions of Article 14(3) of TRIPS (concerning rights of broadcasting organizations) are not mandatory.

¹⁸ For descriptions of the problems of jurisdiction, applicable law and enforcement of judgements, see generally P.E. Geller, Introduction to *International Copyright Law and Practice* (Matthew Bender, loose leaf 1988 -); J.C. Ginsburg “Global use/territorial rights: private international law questions of the Global Information Infrastructure” 42 *J. Copr. Soc’y* 318 (1995), “Conflicts of laws and copyright cases: infringement and ownership issues” 51 *J. Copr. Soc’y* 315 (2004), “Private international law aspects of the protection of works and objects of related rights transmitted through digital networks” (WIPO Forum on Private International Law, December 1998, Paper GOPIC/2); “Choice of forum for claims arising out of an internationally accessible website” in H. Hansen (ed.), *International Intellectual Property Law and Policy*, vol.5, 96-1 (New York, Juris Publishing 2000) and “Berne without borders: geographic indiscretion and digital

2. Jurisdiction

In using the term jurisdiction, a distinction has to be made between the jurisdiction of a State over territories, objects or persons (State jurisdiction)¹⁹, and a court's jurisdiction over persons and to hear and determine a particular action. Each of these aspects has important consequences in considering activities in Space. While State jurisdiction can apply in respect of objects in Space which are under the jurisdiction of a particular State, it will not normally apply in extraterritorial areas. In the context of court actions, there are in relation to extraterritorial areas the problems associated with establishing personal and subject matter jurisdiction. Jurisdiction over persons in Space locations under multi-State jurisdiction, e.g. the International Space Station, will also need special consideration, as will distinctions between jurisdiction in civil and criminal matters.

Determination of State and court jurisdiction as regards persons and objects in Space will, as the facts require, involve (but not be limited to) analysis of the rules to apply in respect of:

- (i) astronauts and other persons present in Space
- (ii) satellites
- (iii) Space transport vehicles including shuttles and probes
- (iv) the International Space Station²⁰, and
- (v) bases and devices on the Moon and other celestial bodies.

It may be that the national court, faced with the question whether it has personal jurisdiction in relation a person's actions in Space will adopt the same approaches as in Earth situations. Where the person in question has done the act in a Space vehicle under the jurisdiction of a particular country, it may apply the same rules as those regarding actions on State-registered ships on the high seas. There has developed, however, and, it is believed, will further develop, a new and extensive area of human activity, namely that taking place in Space areas and locations not within the jurisdiction of any State. The consequence of this development is that analysis of copyright in the Space context must take into account situations where there are large numbers of persons (sufficient to constitute a public) congregated in an extraterritorial location, and where actions in an extraterritorial location have an effect (1) in that location, or (2) in a State or States on Earth, or (3) in other extraterritorial locations, or in a combination of Earth and Space locations.

communications" (2002) *Intellectual Property Quarterly* 110; Fawcett and Torremans *Intellectual Property and Private International Law* (Clarendon Press 1998); J. Drexel, A. Kur (eds.) *Intellectual Property and Private International Law (IIC Studies, Vol.24*, Hart Publishing 2005). See also for a general overview, WCL paras.3.15 to 3.31. On the specific problems of jurisdiction in Space, see B. Cheng, *op. cit.* at 440-444.

¹⁹

For a detailed description of State jurisdiction see B. Cheng, *op. cit.* 72-80.

²⁰

Satellites in orbit around Earth are regarded, for the purposes of this article, as extraterritorially located, whether they are considered as operating in the Earth's atmosphere, or outside or both in and outside such atmosphere: for the heights of satellite perigees, see B. Cheng, *op. cit.* at 393-398. The same applies as regards the International Space Station.

In what cases would a court on Earth have jurisdiction in respect of actions occurring in an extraterritorial location where those actions have no effect in the forum State, for instance where many persons are present in such location and unauthorized copies are made in (and remain in) that location, and are circulated to those persons? Clearly special rules will need to be established in this connection, along with rules concerning applicable law and enforcement of judgements. For proposal as to jurisdiction in extraterritorial areas, see Articles 4 and 11 of the Draft Treaty.

3. Applicable law

Where the act under consideration takes place in the territory of a State or in an object (such as a Space vehicle) under the jurisdiction of a State, and where the territories of two or more States are involved the court will be able to apply the prevailing rules on applicable law. Where, however, at least one of the locations involved is extraterritorial, and no copyright law is in force in that location, how will the court proceed? The problem arises in particular in relation to subsistence of rights, ownership of rights, the identification of the place of communication to the public, publication, limitations and exceptions and infringement. For proposal, in this connection, see Articles 4 and 12 of the Draft Treaty.

4. Enforcement of judgements

Should special rules apply in respect of foreign judgements where the subsistence or liability rules of the rendering court as regards acts in Space are different from those of the addressed court?²¹

Here again, as with the question of jurisdiction, it will be necessary to establish special rules. For proposal in this connection, see Article 16 of the Draft Treaty.

G. Subsistence of rights

1. Copyright

Works created in Space will under present rules be subject to the same protection criteria tests as those which apply on Earth, namely form (whether fixation is required), content (whether originality is required etc.) and status (generally, qualifying nationality or place of publication). Subsistence of rights under the source instruments will depend on the fulfilment of the protection criteria established by those instruments, and duration of the rights by the rules on term of protection.

As regards works of authorship recognised by the Berne Convention, the protection criteria relate to Member States and in the main are based on

²¹ For discussion of this point in the US context, see the judgement of Kaplan J. in *Bridgeman Art Library Ltd. v. Corel Corpn. and anor.* 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

nationality of the author and place of first or simultaneous publication.²² Unpublished works of nationals of countries bound by the Berne Convention are protected under the Convention, wherever they are created. It is therefore irrelevant, from the point of view of subsistence of rights, whether a qualifying author's work is created in a particular country, in the air, on the high seas or in Space. See O., Case 1 below. Cinematographic and architectural works (and artistic works incorporated in architectural works) will gain protection if satisfying the criteria of Article 3 (nationality of author or place of publication) and may also fulfil the protection criteria by reason of compliance with rules as to place of maker's headquarters or habitual residence (in the case of cinematographic works) and location of work (in the case of architectural works and incorporated artistic works).²³ The prospect of the erection of architectural works in Space locations under the jurisdiction of a State may be distant, but moving pictures constituting cinematographic works are now being made in Space, so even if the general protection criteria of Article 3 of the Convention are not fulfilled, such works may qualify for Berne protection where the maker's headquarters or habitual residence is located in a Berne/TRIPS/WCT country.

As regards the criterion of publication, see H. below.

2. Related rights

Under the Rome Convention, national treatment is guaranteed in respect of performances, phonograms and broadcasts fulfilling the requisite criteria related to Contracting States, namely (briefly summarised) (1) as to performances, place of performance or incorporation in protected phonogram or (if unfixed) in a protected broadcast, (2) as to sound recordings, nationality of producer, or place of first fixation or first publication (Contracting States may choose not to apply either the fixation or the publication criterion), and (3) as to broadcasts, location of organization headquarters or of transmitter (Articles 4, 5 and 6). Some of the effects of these provisions are considered in the Cases in O. below.

3. Excluded works

In view of the extensive participation of Governments and Government agencies in Space exploration, questions arising in respect of excluded works need examination.

"Excluded works" may be defined as works which on general principles would be protected by copyright, but are excluded from such right because they are statutes, judgements, official material or works of Government employees etc.

Excluded works and national laws

Section 105 of the US Act provides that copyright protection is not available under the Act for any work of the US Government (such work being defined in section 101 as "a work prepared by an officer or employee of the United States

²² Berne Convention, Art. 3. Nationality of the author or place of first or simultaneous publication will also determine (through definition of the country of origin) the rules concerning duration of protection (Arts 5, 7(8)).

²³ Berne Convention, Art.4.

Government as part of that person's official duties").²⁴ Conversely, in the UK there is copyright (belonging to the Crown ("Crown copyright"), with duration of 125 years) in works made by an officer or servant of the Crown in the course of his duties.²⁵ There do not seem to be decided cases in the UK on the question whether a work which is excluded from copyright in the US, and is not and never has been protected by copyright there, is protected in the UK if the relevant criteria are fulfilled, but it is submitted that works of foreign Governments conforming to the criteria of fixation, originality and status (nationality or place of publication) will be eligible for protection by copyright in the UK.²⁶

While there are legislative provisions or adopted principles in civil law countries excluding official material from protection, the situation varies as regards reports made for Governments.²⁷

Excluded works and the Berne Convention

The provisions of Article 5(2) of the Berne Convention²⁸ would seem to indicate that Convention works which are excluded works in their country of origin may be protected by copyright in other Berne Convention, TRIPS and WCT countries, if the respective criteria of fixation (where required), originality etc. are fulfilled. A question awaiting resolution is whether, by the operation of the comparison of terms rule, Article 7(8) of the Berne Convention precludes protection of works excluded from protection in a Berne Convention country from protection in another Berne Convention country.²⁹ However, as regards

²⁴ For the view that copyright can subsist in the US for works of foreign governments see Nimmer on Copyright, 17.06B.

²⁵ UK Act, s.163. In a number of Commonwealth countries (but not all such countries) the position as to ownership of copyright in works of Government employees or servants is similar in principle to that in the UK: see J.A.L. Sterling, "Crown copyright in the United Kingdom and other Commonwealth countries" (1996) 10/2 *Intellectual Property Journal* 157.

²⁶ Section 12(6) of the UK Act applies the comparison of terms rule where the country of origin of the work is (as in the case of the US) not a European Economic Area State: the duration of copyright is that to which the work is entitled in the country of origin (with the UK upper limits). The UK Statutory Instrument (SI 2005/852) applying the UK Act's provisions to works originating in other countries contains no exception as regards works excluded from protection in their country of origin. Whether the comparison of terms rule would in the UK prevent protection of excluded works remains to be decided.

²⁷ The French Intellectual Property Code 1992 has recently been amended (Law 2006-961, August 1, 2006) to provide (subject to certain conditions and limitations) for transfer to the State of the right of exploitation of a work created by a State employee (*agent de l'Etat*) in the exercise of his functions or according to instructions received (art.33 of the amending Law): for the position before the amendment, see A. Lucas, H-J. Lucas, *Traité de la Propriété Littéraire et Artistique*, 2nd ed., para.106. Official works published for public information are not protected under the German Author's Right Law 1965, but a work created in the course of the author's employment or service relationship may enjoy author's right, in so far as the ambit (*Inhalt*) or nature of such relationship does not indicate otherwise (*nicht anders ergibt*) (arts.5, 43).

²⁸ Article 5(2) of the Berne Convention provides that the enjoyment and exercise of the rights of authors under the Convention shall be independent of the existence of protection in the country of origin of the work, protection and means of redress being governed exclusively "by the laws of the country where protection is claimed". See WCL para.3.25.

²⁹ Article 7(8) provides that unless the legislation of the country where protection is claimed otherwise provides, the term of protection shall not exceed the term fixed in the country

extraterritorial rights, the complexities involved in this question do not arise in the Draft Treaty, in which the comparison of terms rule does not apply (see Article 10, and Part II C2, comment (c) below).

NASA as copyright owner

Section 105 of the US Act provides that the US Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise. Thus in the case where NASA requests another party to carry out a task (for instance enhancement of unenhanced images (see O., Case 6 below)), the other party, may, if the resulting work is original and otherwise complies with the applicable criteria, enjoy copyright in the work and may assign that copyright to NASA, which will then become the owner of the copyright in the work.³⁰

4. Economic and moral rights

The source instruments prescribe the granting of economic rights (e.g. reproduction) to the respective beneficiaries, and the Berne Convention (with which WCT Contracting Parties are bound to comply) ascribes certain moral rights to authors (Article 6*bis*). WPPT ascribes certain moral rights to performers (Article 5). However, countries may grant greater rights than those respectively granted in these instruments.

By virtue of the national treatment rule of the Berne Convention (Article 5(1)) moral rights may subsist in a work of US origin even where (as in the case, for instance, of literary works) the US Act does not grant such rights to such works.³¹ This can have important consequences for copyright owners, for instance in the case where a protected work is published without recognition of authorship, or where the work is modified or distorted in such a way as to constitute derogatory treatment of the work. So, for example, use of a literary work of US origin in a Space location under the jurisdiction of the UK would, if it is submitted, be subject to protection of the moral rights provided under the UK Act (sections 77, 80, 84, 85) (including attribution (subject to assertion) and integrity).

5. Extraterritorial rights

As indicated above, the source instruments and relevant regional instruments and national laws do not expressly provide for the exercise of copyright or

of origin of the work. Article 19 allows countries of the Union to provide for greater protection than that afforded by the Convention. For extensive analysis of the question of the protection of excluded works and the various possible interpretations of comparison of terms rules in the context of the Universal Copyright Convention, see B. Ringer and L. Flacks "Applicability of the Universal Copyright Convention to certain works in the public domain in their country of origin" in (1980) 27 *Bull. Copr. Soc'y.* 157.

³⁰ See NASA Copyright Information at

<http://sunearth.gsfc.nasa.gov/eclipse/SEpubs/copyright.html>.

³¹ Cf. US Act, s.106A, and the French *Huston* case, *Turner Entertainment Co v Huston* Cass 1 civ, 28 May 1991: (1991) 149 RIDA 197; (1992) 23 IIC 702; CA Versailles, 19 December 1994: (1995) 164 RIDA 256, concerning a claim in France for breach of moral rights in respect of the film *Asphalt Jungle* by colourization, where it was held that moral rights are claimable in France even if the country of origin of the work (here the US) does not grant such rights in the work.

related rights in extraterritorial areas. While existing rules allow claims for subsistence of rights based on nationality, problems arise where subsistence criteria are based on location, and there is the general position that liability for infringement can only arise where there is a right which can be infringed, and where the infringing act is within the ambit of the applicable law. There is, for example, no copyright law internationally recognised as applying on the Moon or the planets.

In Part II below, the suggested proposals in the Draft Treaty are designed to fill the gaps in the present situation as regards protection of copyright and related rights in Space and other extraterritorial areas. It is proposed in the Draft Treaty that extraterritorial rights be granted to all authors, performers, phonogram producers and broadcasting organizations.

H. Publication

To constitute publication in terms of the Berne Convention, the availability of copies must have been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work (Article 3(3)). "Publication" is defined in the Rome Convention as the offering of copies of a phonogram to the public in reasonable quantity (Article 3(d)). There must therefore be a sufficient number of persons present in the relevant conditions for publication to be possible. There is no international agreement as to the required number of persons or qualifying conditions to constitute a public.

In the context of Space, problems regarding publication which arise are already encountered on Earth, for instance whether making available on the Internet and similar services can constitute publication, and whether, if Internet availability can constitute publication, where such publication takes place, i.e. at the location of the server site or at the point of access or both. If publication is deemed to take place at the point of access, how will the relevant country or countries be identified, and how will the simultaneous publication rule apply (Berne Convention, Article 3(1)(4))?

The definition of the place of publication becomes relevant as regards Space where works are made available from transmission points in Space, or to persons in Space locations (see O., Cases 1, 7 and 8 below). Will supply of copies to a large number of persons in an extraterritorial area constitute publication under the Berne Convention? For proposal in this connection, see Article 10(b) of the Draft Treaty.

I. Ownership and exercise of rights

Determination of ownership of copyright and related rights in material created, performed or produced in or transmitted from Space will in national courts be established according to the respective national rules. However, different countries have different rules as to initial ownership, e.g. in the cases of cinematographic works and works of employees. The problems concerned with identifying the relevant applicable law in this connection are familiar (e.g.

whether the law of the country of origin or of the place of alleged infringement should apply).³² Furthermore, there is, in the context of Space, the question of how copyright and related rights are to be exercised and licensing procedures as regards the use of protected material. See O., Case 1(c) below, and for proposals in this connection, see Articles 4 and 5 of the Draft Treaty, and Part II C2, comment (e) below.

J. Communication to the public

In respect of communication to the public, in particular in the case of transborder transmissions, there is no international agreement as to where the act of communication to the public takes place. WCT (Article 8) and WPPT (Articles 10, 14) grant rights to make protected material available to the public on the Internet and similar services, but give no indication as to whether the making available takes place at the location of the website, or at the point of access, or both.³³

Determination of place of communication to the public will be crucial in relation to transmissions initiated in Space and received or accessible by the public on Earth or in other Space locations, and where transmissions from Earth are received or are accessible by a number of persons (sufficient to constitute a public) congregated in Space locations. See O., Case 5 below.

These and similar questions await resolution at the international level. For proposal in this connection, see Article 7 of the Draft Treaty.

K. Limitations and exceptions

1. Copyright

International application of limitations and exceptions to copyright (and related rights) presents one of the thorniest areas of international copyright law. The Berne Convention contains only one mandatory exception (Article 10(1) concerning fair practice quotations), while all other limitations and exceptions

³² See for example *Itar Tass Russian v Russian Kurier Inc.* 153 F. 3d 82 (2nd Cir. 1998) (rules of country of origin applied to determine initial ownership of author's right; rules of place of alleged infringement applied to determine whether infringement occurred). *Quaere* whether a similar approach would be taken in the UK when determining categories of authorship as distinct from initial ownership of copyright. In general, the position is complicated by the need to determine whether the phrase "the law of the country where protection is claimed" ("*la législation du pays où la protection est réclamée*") (Berne Convention, Art.5(2)) means "the law of the country in which protection is claimed" or "the law of the country in respect of which protection is claimed". See also *Bridgeman v Corel*, footnote 21, and WCL para.3.25.

³³ For a summary of the "emission" theory (communication takes place at the point of initial transmission) and the "communication theory" (communication takes place at the points of transmission and reception) see WCL para.9.28. See also M. Ficsor, *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) and J. Reinbothe, S. von Lewinski, *The WIPO Treaties 1996*, (Butterworths, 2002 pp. 108-109) (submission that act of making available in online services in the context of WIPO Treaties 1996 extends to the entire transmission to the user). See also O., Case 3 below.

which may be introduced by a Member State are not mandatory but must (as far as States bound by TRIPS, WCT or WPPT (and, with limited scope, the Berne Convention) are concerned) conform to the “three step test”.³⁴ Consequently there are great variations in national laws in this area: some laws, like those of the US and the UK, provide for extensive exceptions, while others, like that of France, have provisions of more limited scope in this connection.³⁵ Suppose the US agrees to grant extraterritorial rights to authors so that rightowners may sue in respect of infringing acts taking place, say, on the Moon. Where the plaintiff claims before the US court that a harmful effect from an unauthorized extraterritorial act occurs in the US, and claims damages for such effect, it seems reasonable to suggest that the US court would decide the defendant’s liability as regards the effect in the US taking into account limitations and exceptions provided in the US Act, e.g. as regards fair use. Suppose however that there is no harmful effect of the defendant’s action anywhere on Earth, in terms of infringing importation or communication, etc. The plaintiff’s work has been copied on the Moon without any authorization. Assume the Court finds it has personal and subject matter jurisdiction. Will the Court take into account the limitations and exceptions of the law of the forum? Or what law should apply in this respect in relation to the Moon? See O., Case 8 below, and for proposal in connection with limitations and exceptions see Article 9 of the Draft Treaty and Part II C2, comment (f) below.

2. Related rights

The Rome Convention specifies a number of permitted exceptions (e.g. for private use) and allows a State to provide the same limitations as regards the rights accorded by the Treaty as it provides in connection with copyright in authors’ works (Article 15). In addition, the Convention allows reservations concerning the right granted to performers and phonogram producers under Article 12 of the Convention to equitable remuneration for the broadcasting or communication to the public of phonograms (Article 16). The proposals in Articles 5(e), 9 and 17 of the Draft Treaty are designed to accommodate these provisions.

L. Infringement

Starting with the general principle that the law of the place where the alleged infringement is committed is determinative in respect of liability as regards damage in that place, there is the question to which reference has already been made: what if the allegedly infringing act is committed in a place where no copyright law applies? Possibly the right owner will have a remedy in a particular country where a harmful effect of the act is suffered, but what of the damage caused, for instance, in the extraterritorial area itself, or the case where no damage is sustained outside the extraterritorial area where the act is committed? For proposals in this connection see Articles 13 and 14 of the Draft Treaty.

³⁴ TRIPS Art.13, WCT Art.10(2), WPPT Art. 16(2). Cf. Berne Convention Art.9(2) (“three step test” applies as regards exceptions to the reproduction right).

³⁵ See French IP Code, art.L.122-5 and amendments to the Code made by Law 2006-961 of August 1, 2006.

Infringement by importation or operation

Copyright and related rights laws normally provide remedies against the importation of infringing copies of protected material. There are at present no such provisions regarding importation into extraterritorial areas of infringing copies or material which can effect infringement, yet if there are to be extraterritorial rights, there should, it is suggested, be remedies in respect of such importation.

Technological means give the possibility of importation into or operation in extraterritorial areas or locations, where humans may or may not be present, of articles, components or other devices capable of effecting infringing acts. Thus, for example, a device may be installed in a satellite permitting unauthorized access to a database incorporating protected material, or facilitating unauthorized file-sharing. Where the satellite is registered in the name of a State, it may be possible to regard such devices as located in the State concerned. A different problem arises when such a device is located in an extraterritorial area.

Article 13(b)(ii)(iii) of the Draft Treaty contains proposals for dealing with infringement of extraterritorial rights by unauthorized importation or operation, together with similar proposals in Article 14(b)(ii)(iii) concerning breach of associated protection measures.

M. Remedies

Assume States recognise that extraterritorial rights should be granted to owners of copyright and related rights. Assume also that a competent court or Tribunal finds the defendant guilty of infringement of an extraterritorial right in an extraterritorial area. What remedies will be available? Will these include both civil and criminal remedies? How will “forum shopping” be avoided, so that claimants will not flock to the country with the most drastic sanctions? For proposals on these issues, see Articles 4, 15 and 16 of the Draft Treaty, and, concerning copyright piracy on a commercial scale, Part II, C2, comment (h) below.

N. Four scenarios

Pondering on the events of July 20, 1969, when Neil Armstrong stepped onto the surface of the Moon and his words then spoken were broadcast to millions throughout the world, the mind of the copyright lawyer may turn to the following scenarios, which might occur in the future.

In the first scenario, a NASA Space vehicle lands on the Moon.³⁶ Two astronauts, one a US citizen (employed by NASA), the other a British citizen

³⁶

The situation of NASA in relation to s.105 of the US Act (providing that no copyright is available for works of the Government) has been considered in G. 3 above. The situation of other Space agencies (e.g. other national agencies and the European Space

(employed by the UK Government), descend onto the Lunar surface. The astronauts give extensive verbal reports of what they see: their words as they speak them are transmitted by radio to and recorded by NASA at NASA headquarters in the US, and thence without interruption immediately transmitted by broadcast to the public throughout the World by NASA or by arrangement with NASA. On their hand-held cameras, the astronauts take motion pictures of each other walking on the Lunar surface. The astronauts, overcome by the magnificence of the occasion, together burst into a rendition of a popular song entitled "Rock-a-Moon Rock", a joint authorship work which is protected by copyright in all Berne/TRIPS/WCT countries. The sounds and images of the astronauts' performance are likewise transmitted to and recorded by NASA and thence, like the reports, without interruption immediately transmitted by broadcast to the public throughout the World. No permission for the recording, broadcast or any other use of the song has been given by the copyright owners or licensees concerned, and NASA was unaware that the astronauts would perform the song.

In the second scenario, a NASA robot emerges from a NASA Space vehicle which has landed on Mars, and, by means of devices in the robot, still and moving images of the planet's surface are taken and transmitted to and recorded by NASA ("NASA unenhanced images").³⁷ The images are enhanced (either by NASA employees or by third parties who transfer their rights to NASA) by highly specialised treatment, according to colour codes and other techniques, so that the heights and depths and other features of the Martian terrain are indicated³⁸, and NASA releases the images ("NASA enhanced images") on the

Agency) must be assessed according to the respective laws and agreements applicable to them.

³⁷ In this article the term "image" is used to mean any recording of light or other form of energy (e.g. x-rays, radio waves, infrared or ultra-violet rays or sound waves) producing a visual image. Images may be still (as in a photograph) or moving (as in "moving pictures"). In this usage, "photograph" (a still recording of light) is a type of image. Sound waves emanating from Space may be recorded visually, as in the case of the sounds made by electrons passing through magnetic fields of planets and other bodies. Cf. s.4(2) of the UK Act, where the phrase "recording of light or other radiation" is used in the definition of "photograph". In the US Act, photographs (not defined) are included under pictorial, graphic and sculptural works" (s.101). Because the Greek etymology of "photograph" implies "light writing", the term is not strictly appropriate for recordings made by means other than the impression of light, and an internationally agreed term to reflect this distinction has not yet been adopted. For proposals in this connection, see J.A.L. Sterling *Intellectual Property Rights in Sound Recordings, Film and Video*, Sweet & Maxwell, 1992, paras 3.06-3.10.

³⁸ Just as in traditional photography based on chemical reaction on a sensitive surface (the negative) followed by development techniques that may be merely mechanical, or the result of choices and processes adopted by the developer, so in digital imaging one may distinguish the initial digital recording of the radiation or other readings, followed by the enhancement of the readings effected either automatically through program operation or by the assistance of a program, where the operator makes choices. From the copyright point of view a distinction needs to be made between (1) computer-generated images, where the enhancement is effected without human decision, and (2) computer-assisted images, where a human operator makes choices which are effected by the use of a computer. The assessment of these processes in terms of originality will need to be taken into account: see further O., Case 6 below.

NASA website, which is accessible over the Internet throughout the World.³⁹ By permission of NASA, Dataspace, a UK registered company, copies and further enhances the NASA images by filtering, superimposition and other techniques so that additional images of the Martian landscape are produced (“Dataspace enhanced images”).

In the third scenario, a person in the International Space Station⁴⁰ uploads (through radio contact with Earth) onto a website located in the United States a quantity of material protected by copyright or related rights in many countries, without the permission of the respective right owners. The uploaded material includes a sound recording of a performance of a musical work, such sound recording and such musical work being protected by copyright under the US Act. Each of these items of subject matter is also protected by copyright or related rights in many other countries, including those of the European Union. This material is made available from the website throughout the World over the Internet.

In the fourth scenario, a group of astronauts and scientists of different nationalities land on the Moon with their support teams and spend some time exploring the Lunar surface (no country having any territorial claim over the area occupied by the group). While on the Moon, one of the support team, having circumvented a technological protection device on a sound recording of a performance of a musical work, makes copies of the recording and distributes the copies to the other members of the group, who use them for entertainment, leaving the copies on the Moon when they return to Earth. The copied sound recording is protected by copyright in the US and by copyright or related rights in many other countries, including those of the European Union; the musical work is protected by copyright in all Berne/TRIPS/WTO countries. The performance is also protected in many countries.

Viewed from the perspective of subsistence and infringement of copyright or related rights, questions arise as to whether the abovementioned reports, motion pictures, sound recordings, performances, transmissions to and from NASA, and the unenhanced and enhanced Mars images are protected by copyright or related rights, and if so, in which countries and under which rules of

³⁹ The colour enhancement process is described by Oliver de Goursac, in *Visions of Mars*, English translation by L. Ammon, Harry N. Abrams, Inc., New York 2005, at pp. 145-150, where the author describes the colour in the enhancement as “an interpretation”. Briefly, enhancement is generally effected by computer-based processes involving treatment of scanned data, requiring selection of colours and filters and use of superimposed images and other technical procedures.

⁴⁰ For a general description of the International Space Station and the agreements concerning State responsibility in its various sections, see P. Sattler, “US commercial activities aboard the International Space Station”, *Air and Space Law* Vol. XXVIII/2 (April 2003) 66. See also H.P. Sinha, “Criminal Jurisdiction on the International Space Station” (2004) 30/1 *Journal of Space Law* 85. Fifteen countries (Canada, Japan, Russia, the US and the eleven countries of the European Space Agency (Belgium, Denmark, France, Germany, Italy, Netherlands, Norway, Spain, Sweden, Switzerland, UK)) are bound by the Intergovernmental Agreement prescribing the rights and obligations etc. of the participating countries. For extracts from the Agreement see Appendix D(d). In addition there are the agreements between NASA, the European Space Agency and the various Space agencies of the other participating countries: see P. Sattler, *op. cit.* at 69-71, and the NASA website at www.nasa.gov.

ownership of the rights. Questions also arise as to whether there has been any infringement of rights in the transmission, recording and broadcasting of the performance, the uploading from the Space Station and the copies made on the Moon, and, if so, by virtue of which laws. These questions form the basis of the eight illustrative cases considered in O. below.

O. Eight illustrative cases

It is proposed to consider eight illustrative cases based on the four scenarios mentioned in N above. The consideration will in each case relate, as relevant, to the various issues discussed above, viewed from the international point of view in the light of the provisions of the four source instruments, and, as a starting point for viewing the national situation, in terms of the US and UK Acts, with some references to the civil law approaches on certain points, as evinced, for example in the French Intellectual Property Code 1992 (“French IP Code”) and the German Law on Author’s Right and Related Rights 1965 (“German Law”).⁴¹ At the end of each case a short reference is made to the relevant provisions of the Draft Treaty.

In general it may be remarked that the following analysis is presented not as a comprehensive overview of the issues raised, but as an indication of some of the questions involved and the areas where clarification and new rules are needed.

Case 1. The astronauts’ reports (Scenario (1))

Synopsis: literary works created on the Moon by US and UK astronauts

(a) Subsistence of rights

The astronauts’ reports will (on the assumption that they are original and apart from the question of excluded works) qualify as protected literary works under the Berne Convention and the US and UK Acts and other national laws. Works of nationals of Berne Convention countries are protected under the Convention wherever they are created, so the fact that the reports were made in an extraterritorial area does not affect this situation.⁴² The fixation requirements of the US Act (section 102(a)) and the UK Act (section 3(2)) are fulfilled by the recording of the reports as the astronauts spoke. As indicated in G. 3 above, a caveat needs to be placed on the question of subsistence of copyright in the US astronaut’s report. If the report is regarded as a work of the US Government, there will be no copyright in it under the US Act. If it is not so excluded, then copyright will subsist in it in the US according to the usual rules. The UK astronaut’s report may fall under the Crown copyright provisions of the UK Act

⁴¹ For text of the UK Act see footnote 3. For texts or English translations of the French IP Code and the German Law, see the WIPO Collection of Laws at <http://clea.wipo.in/clea/lpext.ddl>.

⁴² Berne Convention, Art.3(1).

depending on the circumstances of the relevant engagement terms (see G.3 above).

(b) Publication

Broadcasting does not constitute publication (Berne Convention, Article 3(1)), so as long as copies of the reports are not issued to the public, the reports will be regarded as unpublished, and their countries of origin will be the US and the UK respectively. On publication, subsistence of rights under the Convention and the US and UK Acts will continue and the rules of Article 5 of the Berne Convention will determine country of origin. If a report is created by a non-Berne national, it will, as long as it remains unpublished, not be protected under the Berne Convention; it will however, be protected under the US Act (section 104(a)), but not necessarily under the UK Act (under which protection for unpublished works depends on qualification by nationality or citizenship of or domicile in qualifying countries (including Berne/TRIPS/WCT countries)).

(c) Ownership of rights

The ownership of the copyright/author's right in the reports will, in the context of the Berne Convention, be determined "according to the law of the country where protection is claimed" (see I. above). It seems likely that where such reports are made in the course of official duties, copyright/author's right (where subsisting) will in general belong to the employing official entity, either by statutory rules or contractual provisions (see G. 3 above). If the works are created otherwise than in the course of official duties, different considerations apply (see Case 2).

Assuming that the US astronaut's report is protected by copyright in the UK, the question of copyright ownership will arise. If the UK court applies UK law to determine ownership, then NASA or the US Government will (according to the facts) be the owner of the UK copyright, since section 11(2) of the UK Act contains a provision similar to that of section 201(b) of the US Act, in respect of ownership of copyright by employers. It is thought that the UK court would be more likely to apply UK law than to follow the decision in *Itar Tass Russian v Russian Kurier Inc.*⁴³ and apply US law. Mandatory reference to the law of the country of origin in this respect can lead to paradoxical results, as where the UK court would be obliged, for instance in the case of films, to recognise the scriptwriter as one of the authors of a film of which the country of origin is France, contrary to section 9(2)(a) of the UK Act, which declares that the producer and the principal director are taken to be the authors of the film.

(d) Infringement

The astronauts may be taken as having consented to the recording and transmission of the works constituted by their reports. As to the position if the giving of the verbal reports constituted performances, see Case 3.

(e) Draft Treaty

⁴³ 153 F. 3d 82 (2nd Cir. 1998). See footnote 32.

The astronauts' reports would be protected by extraterritorial rights (Article 12(a)).

Case 2. The astronauts' motion pictures (Scenario 1)

Synopsis: motion pictures made on the Moon by US and UK astronauts

It is assumed that the astronauts made their motion pictures for their personal use and entertainment, that they were permitted to do so as far as NASA is concerned, and that such making was not part of their duties. Consequently, the possibility that the motion pictures were, as regards the US astronaut, excluded works, can be put aside.

If the motion pictures constitute original works, they will be protected in Berne/TRIPS/WCT countries, irrespective of the fact that they were made on the Moon, their authors being Berne Convention nationals. As far as US law is concerned, the pictures will have to evince the "modicum of creativity" required to fulfil the originality criterion.⁴⁴ The moving pictures of both astronauts will be protected under the UK Act, whether they are "original" or not.⁴⁵

The astronauts may be taken to have consented to the recording and transmission of the works (if any) constituted by their motion pictures. As to the position if the filmed actions of the astronauts constituted performances, see Case 3.

Draft Treaty

The astronauts' motion pictures would be protected under the Draft Treaty (Article 2(a)).

Case 3. The astronauts' performances (Scenario 1)

Synopsis: performances on the Moon by US and UK astronauts

As in the case of the motion pictures, it is assumed that the performance of the song by the astronauts was not part of the astronauts' official duties. Since there were two performers, the rights of each performer should be considered separately.

Performances are not protected as such under the Berne Convention or WCT, the relevant source instruments being the Rome Convention and WPPT. Many national laws, and TRIPS, the Cartagena Agreement and the EC "Copyright" Directives contain provisions affording protection in respect of performances, so

⁴⁴ *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 340 (1991); 113 L Ed 2d 358; 111 S Ct 1282; 18 USPQ 2d 1275 (1991).

⁴⁵ UK Act ss.1(1)(b), 5B, 8, 159 and Orders made thereunder. Copyright does not subsist in sound recordings or films which are (respectively) copies of previous sound recordings or films (ss.5A(2), 5B(4)).

whether any protection for the astronauts' performances is available at the national or regional levels must be assessed in terms of the respective instruments. In this connection, the "anti-bootlegging" provisions of s.1101 of the US Act need to be considered. These provisions appear to apply to fixed performances wherever the fixation takes place (section 1101(a)(3)), so unauthorized distribution, sale etc. in the United States of a phonorecord fixed anywhere of a performance taking place anywhere (including one taking place on the Moon) would apparently breach these provisions, where the fixation took place without the permission of the performers.⁴⁶ Performances of the UK astronaut and (with limited extent) of the US astronaut would be protected under the UK Act (S.I.2006/316, para.6).

Two sets of actions by the astronauts need consideration, one possibly constituting a performance in terms of the Rome Convention and WPPT (namely the giving of the verbal reports) and the other obviously constituting a performance in terms of those instruments (namely the performance of the song). As there are different results as regards the protection of the performances in the cases of sound and audiovisual recordings, each set of actions will be discussed here.

(a) The giving of the verbal reports

Performers are defined in the Rome Convention (Article 3(a) and WPPT (Article 2(a)) as, *inter alia*, persons who "deliver, declaim or otherwise perform" literary works, and it may be argued that the giving of the verbal reports by the astronauts constituted performances in these terms. In any event, it is clearly possible that persons present on the Moon could perform literary works, and that their performances could be recorded, so the case merits analysis.

The criteria of protection for performances under the Rome Convention and WPPT are performance in a Contracting State or incorporation in a protected phonogram or protected broadcast. Here the sound recordings and the transmissions by broadcast were made by or by arrangement with NASA. The US is not a member of the Rome Convention. The US astronaut's performance of the report is not protected under the Rome Convention (the Moon not being in the territory of a Rome Contracting State, and the US recording and broadcast not being protected under the Rome Convention). The US is a member of WPPT, and under that Treaty the criteria for protection are the same as under the Rome Convention, but referring to all Contracting Parties of WPPT as relevant countries (Article 3(2)). Thus under WPPT, the performances of the reports will be protected, since the recordings made by NASA are phonograms protected under WPPT (i.e. the performances fulfil the criterion of incorporation in phonograms protected under that instrument, by virtue both of nationality of the phonogram producer (US) and place of first fixation of the phonogram (US)).⁴⁷ The UK astronaut's performance is not protected under the Rome Convention, because although the UK is a Contracting State of that Convention,

⁴⁶ See Nimmer on Copyright, 8E.03.

⁴⁷ Rome Convention Art.4(b) as applying under WPPT Art.3(2). It is submitted that the performance would also be protected under TRIPS (cf. Arts.1(3), 14(1)). The nationality of the performer is irrelevant in this respect.

and not yet being Party to WPPT, the performance does not conform to the criteria of Article 4 of the Convention (*i.e.* it did not take part in a Contracting State and was not incorporated in a phonogram or broadcast protected under the Convention). As to protection of the performances in the US and under the UK Act, see above.

(b) The performance of the song

Separate performances may be involved in the performance of the song, e.g. where the astronauts sing different verses. Both performances were the subject of audiovisual fixations, and such fixations are not protected under the Rome Convention or WPPT. Thus the performances of the song were not, in terms of the Rome Convention and WPPT, incorporated in a protected phonogram and (the US broadcast not fulfilling any relevant criterion) are not protected under these instruments (but as to protection of the performances in the US and under the UK Act, see above).

(c) Infringement

There has been no communication of the song to any public congregated on the Moon, but the performance of the song has been communicated to the public by broadcasting throughout the World. It would therefore seem that the transmitters of the performance (and possibly, the performers) could *prima facie* be liable for copyright infringement by unauthorized communication of the song to the public, depending on the respective national laws of the places where the public receives the broadcast. There is, as mentioned in J above, no international agreement as to the place of communication to the public in the case of transborder transmissions. However in a number of countries the cases indicate that persons broadcasting into the national territory without the necessary authorization of the rightholder for that territory or statutory exemption, will be guilty of infringement.⁴⁸ Whether defences of fair use etc. will

⁴⁸ As regards the US, see the definition of “publicly” in s.101 of the US Act, and *Los Angeles News Service v Conus Communications Co.* 969 F. Supp 579 (CD Cal. 1997) affd. 211 F.3d 1273 (9th Cir, 2000) (transmissions from Canada viewed without copyright owners’ authorization on television sets in US: held, infringement of public performance rights under US Act) and for similar approach *National Football League v TV Radio Now Corp et al* 53 U.S.P.Q. 2d 1831 (WD Penn, 2000) (preliminary injunction). See also *National Football League v PrimeTime 24 Joint Venture*, 211 F.3d 10 (2nd Cir, 2000) cert. denied 121 S. Ct 1402 (2001) (unauthorized secondary television programme transmissions from US to Canadian subscribers: held, defendant infringed US copyright in the programmes by unauthorized public performance, quoting *David v. Showtime/The Movie Channel Inc* 697 F.Supp 752 (SD NY 1988) where Judge Tenney concluded that “Congress intended the definition of “public” and “performance” to encompass each step in the process by which a protected work wends its way to its audience”); and compare *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers and others* [2004] 2 S.C.R. 427, 2004 SCC 45, where the Supreme Court of Canada held that an Internet communication that crosses one or more national boundaries “occurs” in more than one country, at a minimum the country of transmission and the country of reception. On findings of liability to rightowners in receiving countries, see also the French case *Radio Monte Carlo*, CA Paris, December 19, 1989, and the Austrian cases *Tele-Uno*, OLG Graz, December 6, 1990: (1991) G.R.U.R. Int. 386; OGH, May 28, 1991: (1991) G.R.U.R. Int. 920; *Direct Satellite Broadcasting II*, OLG Vienna, June 27, 1991: (1991) G.R.U.R. Int. 925, and *Direct*

apply will depend on the provisions of the applicable law, as will questions whether there has been contributory or other infringement by the performers.

Possibly the end result would be that infringing communications could be held to have taken place in some countries, but not in others.

The astronauts may be taken as having consented to the making of the recordings of their performances by NASA, and the transmissions, but where fixation of a performance is made without the consent of the performers, the provisions of section 1101 of the US Act will be relevant (see above, and Case 6(b)).

(d) Draft Treaty

The astronauts' performances would be protected by extraterritorial rights (Article 2(a)).

Case 4. The NASA recordings (Scenario (1))

Synopsis: sound recordings and audiovisual recording made by NASA of material incorporated in transmissions from the Moon

In the course of the first scenario, NASA has made sound recordings of the astronauts' reports and an audiovisual recording of the astronauts' performance. These recordings are considered here: other recordings made by NASA are considered in Case 6 below.⁴⁹

(a) The sound recordings of the reports

NASA will not, on the basis that it is a US Government entity, have copyright in the US in the sound recordings. However as indicated in G.3 above, NASA may enjoy protection of the recordings in other countries, by virtue of WPPT or under the respective local provisions concerning reciprocal protection.

(b) The audiovisual recording of the performance

As with the sound recordings, NASA will not, as a Government entity, have copyright in the US in the audiovisual work. Again, the audiovisual recording may be protected in other countries, and here the point that, unlike phonograms, audiovisual recordings may, in particular in civil law countries, be protected both by author's right as original works and by a related right granted to the film producer needs to be taken into consideration.

⁴⁹ *Satellite Broadcasting III*, OGH, June 16, 1992: (1992) *G.R.U.R. Int.* 933; (1993) 24 *I.I.C.* 665. For summaries of these cases see WCL paras 9.28-9.34, 9.44. See also J. above. What are referred to as sound or audiovisual recordings made from transmissions are recordings of transmitted signals; such recordings by subsequent processes may be manifested as sound or moving images. The distinction between rights in the transmitted signal and in the material (e.g. literary work) which may be manifested by the signal is of importance. This aspect is briefly considered in Case 5 below. There remains the question whether there can be copyright in a recording of a signal, if such signal is not manifestable in sound, or still or moving images. It seems that such a recording does not fall into any of the categories specified in s.102(1)-(8) of the US Act.

(c) Infringement

The unauthorised recording of the song by NASA would, subject to any applicable limitations or exceptions, constitute infringement of copyright (cf Case 3(c)).

There is also the question of protection by copyright or related rights in recordings made without the permission of the owner of the copyright or related right in the material which has been recorded. While (even apart from the question of excluded works) the provisions of section 103(a) of the US Act (concerning unlawful use of protected material) may preclude such protection in the US, the position in the UK (and possibly other countries) appears to be that copyright protection will not be refused to a recording (or indeed to a work of any category) merely on the basis that it was made without the permission of the owner of the rights in the pre-existing material which has been recorded (or otherwise used).⁵⁰

(d) Draft Treaty

NASA's sound recordings and audiovisual recording would be protected by extraterritorial rights (Article 2(a)).

Case 5. The transmissions to and from NASA (Scenario (1))

Synopsis: transmissions by NASA from the Moon to US recorded by NASA and immediately further transmitted by broadcast to the public throughout the World

(a) Subsistence of rights

Broadcasts (in the sense of transmissions of sounds or of images and sounds by wireless for public reception) are not protected as such by copyright under the US Act.⁵¹ The US is not a member of the Rome Convention, so US broadcasts will not be protected under that Convention but may nevertheless be protected under other national laws.⁵² Broadcasts are not protected under WPPT, to which the US is a party. What protection for broadcasts will be afforded under the proposed WIPO Broadcasting Treaty remains to be seen. The material (such as literary works) represented in transmissions may be protected by copyright if the relevant conditions (including in the US and other countries, fixation) are fulfilled. Unauthorized recording in the US of an initial transmission as it proceeds from the Moon to the US may constitute in the US infringement of the copyright in the material represented in the transmission.⁵³

⁵⁰ See *Wood v Boosey* (1868) LR 3 QB 223, and the references and French and German cases quoted in WCL para.6.33.

⁵¹ Broadcasts may be protected under other US legislation, as to which no view is expressed here.

⁵² See for instance Statutory Instrument 2006/316, art.4, made under the UK Act (protection of US broadcasts).

⁵³ See *National Football League v McBee & Bruno's Inc* 792 F 2d 726 (8th Cir, 1986). See also *Baltimore Orioles Inc. v. Major League Baseball Players Assn.* 805 F.2d 663 (7th Cir. 1986) (a fixed telecast of a baseball match was an audiovisual work in which

(b) Infringement

As to the position of NASA and the performers in relation to the unauthorised transmission of the song, see Case 3 (c) above.

The astronauts may, as mentioned above, be taken as having consented to the transmissions, but where in the US there is transmission or communication to the public of the sounds or the sounds and images of a live musical performance without the consent of the performers, the question whether the provisions of section 1101(a)(2) of the US Act will apply needs to be considered.

(c) Draft Treaty

The transmissions to and from NASA, as constituting one uninterrupted chain of communication to the public would be protected by extraterritorial rights as broadcasts: see Part II, C1, Article 1 below.

Case 6. The Mars images (Scenario (2))

Synopsis: unenhanced images taken by NASA robot on Mars are enhanced by NASA and further enhanced by Dataspace, a British company

In the context of subsistence of rights, three separate categories of images need to be considered: (a) the NASA unenhanced images, (b) the NASA enhanced images and (c) the Dataspace enhanced images.⁵⁴

(a) The NASA unenhanced images

If the NASA unenhanced images were taken by the robot device without any human input of selection, then it seems doubtful that the criterion of originality will be fulfilled, since the images will lack any ingredient of human authorship.⁵⁵ However, the operation of robot and remote sensing devices and such instruments as the Hubble Space Telescope needs skilled selection and expert guidance to ensure capturing of images in the desired location. Such selection and guidance may be sufficient to constitute an original contribution. Zapruder's pictures of the assassination of President Kennedy were held to have many elements of creativity: the kind of camera, the kind of film, the kind of lens, the

copyright subsists). Transmissions not intended for public reception are not protected under the Rome Convention..

⁵⁴ Considerations similar to those relating to the Mars images apply to remote sensing from satellites or other Space vehicles, producing maps and geological and other data concerning Earth and other areas, though the constraints of s.105 of the US Act on attribution of copyright to NASA in the US would apparently not apply as regards other rights, or to non-Governmental operators. National legislation may provide rights concerning such data: see e.g. the US Land Remote Sensing Policy Act 1992, PL 102-555. The national situations as regards protection of data obtained by remote sensing must be assessed country by country and are not discussed here. For an initial study of these aspects see Barbara A. Luxenberg "Protecting intellectual property in Space: policy options and implications for the United States" in D.S Papp, J.R. McIntyre eds. "International Space Policy", Quorum 1987. See also "*Meteosat image*" case, footnote 56.

⁵⁵ Cf. (irrespective of the question of excluded works) the abovementioned requirement of a "modicum of creativity" mentioned in Case 2 above.

areas in which the pictures were to be taken, the time they were to be taken, and the spot on which the camera was to be operated were all selected by the photographer.⁵⁶ It may be thought that these choices are precisely the ones to be made in obtaining the desired pictures through the directions given to a robot or remote sensing device, even in the case of unenhanced images.

Whilst in any event the unenhanced images lacking input of a modicum of creativity will not be protected by copyright under the US Act, they may be protected by copyright in the UK as computer-generated works, i.e. works having no human author (UK Act, sections 9(3), 178). The UK Act provides that in the case of such works, “the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken” (section 9(3)). This person would presumably be NASA, and it is thought that, despite the provisions of section 105 of the US Act, copyright in such images could subsist in the UK (subject to possible application of comparison of terms rule, *cf.* G. 3 above). The situation in other countries would depend on the status accorded in such countries to computer-generated works.⁵⁷

(b) The NASA enhanced images

Enhancement by selection of procedures achieving transformation of unenhanced images into images showing, emphasising or presenting new features, even if such features are not represented in reality, may well support a finding of originality. Selection of colours to represent, for instance, climatic conditions in variations of energy patterns, or renderings of the craters and mountains of the Martian landscape, may fulfil the originality criterion. As to excluded works, a distinction must be made between original works made by NASA employees in the course of their duties and original works made by persons who are not NASA employees and in which copyright is initially owned by such persons or their employers. Section 105 of the US Act provides that the US Government is not precluded from receiving or holding copyrights transferred to it. Accordingly, NASA may become the owner of copyright through assignment, in which case the exclusion rule would not apply. In such cases, the work will be protected by copyright in all Berne/TRIPS/WCT countries. It is therefore suggested that it should not be assumed that merely

⁵⁶ *Time Inc v. Bernard Geiss Associates*, 293 F. Supp. 180 (S.D.N.Y. 1988) at 143. See also on selection as an element in originality *Rogers v. Koons* 960 F.2d 301; 22 USPQ2d 1492; (2nd Cir, 1992), cert denied 113 S Ct 365 (1992). For an interesting German case concerning a remote sensing image taken from a satellite, see “*Meteosat image*” LG Berlin, May 30, 1989 (plaintiff claiming rights in photographic image under German Author’s Right Law 1965 did not prove which natural person made the image by means of technical aids, with subsequent transfer to the plaintiff of the rights in the image (either as creative production (art.2) or non-original photograph (art.72)): suit dismissed) (German text with English translation and with commentary by M. Mejia-Kaiser in 47 Colloque on the Law of Outer Space (International Institute of Space Law) 2004, 91).

⁵⁷ The UK is not the only country to accord copyright to computer-generated works: see e.g. the Copyright Acts of Barbados (1998, ss.2(1), 10(4)), Jamaica (2000, ss.2(1), 10(4)), Ireland (2000, ss.2(1), 30), New Zealand (1994, ss.2(1), 22(2)). The German Author’s Right Law 1965 also protects photographs not resulting from creative input (art.72), see footnote 56.

because a work is issued under the NASA logo that NASA (or some other party) does not own the copyright in the work.

(c) The Dataspace enhanced images

Where the enhancement processes applied to the NASA images by Dataspace are sufficient in terms of creative selectivity and arrangement to constitute originality by virtue of transformation of the NASA material into independently original works, copyright/author's right will subsist in the Dataspace images in all Berne/TRIPS/WCT countries: even though in the US the NASA enhanced images may fall within section 105, the Dataspace images being creative transformations of the NASA images will there be protected by copyright.

(d) Draft Treaty

In so far as the NASA unenhanced images are original (see (a) above), they would be protected under the Draft Treaty (cf. Appendix C, A 1). The NASA and Dataspace enhanced images, being original, would be protected by extraterritorial rights (as photographs) (Articles 1(d), 2).

Case 7. The International Space Station uploads (Scenario (3))

Synopsis: unauthorized upload of protected material from the International Space Station onto a website server in the US

The Annex to the Civil International Space Station Agreement lists the Space Station elements to be provided by the Partner States, e.g. the US is to provide, through NASA, a habitation module, laboratory modules etc. Partner States are to register the flight elements in accordance with the Convention on Objects Launched into Outer Space, 1976, and each Partner State retains jurisdiction and control over the element it so registers and over personnel in or on the Space Station who are its nationals (Article 5). Article 21(2) of the Agreement provides that, for the purposes of intellectual property law, an activity occurring in or on a Space Station flight element shall be deemed to have occurred only in the territory of the Partner State of that element's registry (with special provision as to European Space Agency registered elements) (see Appendix D(d)). Under Article 22, Canada, the European Partner States, Japan, Russia and the US may exercise criminal jurisdiction over personnel in or on any flight element who are their respective nationals.

Case 7 can be regarded as involving three possible acts of infringement, namely, reproduction of the protected material by the effecting of the uploading process, communication to the public (or public performance) of the protected material, and authorizing of or contributing to infringement (by the unauthorized storing, making available etc. on the website).

Case 7 may be considered on the basis that the uploading took place within the Station (1) in a flight element under the jurisdiction and control of a Partner

State, or (2) in an area (if such there be) not under the jurisdiction and control of any Partner State.⁵⁸

The uploading from a registered flight element could fall to be regarded as if it had taken place in the relevant registering State, with the attendant consequences of the application of that State's law. The result of this approach could be that an act of uploading could entail different consequences (or no consequences), according to the flight element in which the act took place: the uploading might or might or might not, for instance, be viewed as part of the chain of communication to the public, or a limitation or exception might or might not be applicable.

Whether the uploading occurred in a place inside or outside a registered flight element, it seems that a national court could base jurisdiction on the "effects" principle, so that the act could be viewed from the point of view of its effect in the State concerned, the person causing a damaging effect being liable accordingly. Regulation of the situation in extraterritorial areas (or places or objects in such areas) needs to take into account not only acts occurring there, but the subsequent effect of such acts elsewhere, e.g. where broadcasts or other transmissions initiated in an extraterritorial area are received in territorial areas (in particular, countries on Earth: see Case 3).

In sum it would seem that remedies may be available where the uploading takes place in a registered flight element or where there is an effect in the territory of the State. Where, however the act of which complaint is made occurs in an area outside a registered flight element, with no effect in a territorial area, it would seem that obtaining of relief in a national court would, among other considerations, depend on whether such court would accept jurisdiction in such a case. All in all it seems reasonable to conclude that the possibility of obtaining relief in these circumstances is highly speculative: here the situation is not dissimilar to that in Case 8, below.

It must be apparent that a situation in which some 15 different copyright and related rights laws can apply in a relatively confined area can lead to a confused situation and one of little advantage to the rightholder or to a person in the Space Station wishing to act in a legitimate fashion. The question therefore arises as to whether the Partner States might agree that a single copyright and related rights law should apply throughout the Station, perhaps on the lines of the system proposed in the Draft Treaty. The problem of diverse laws arises in

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Outside and immediately on the exterior surface of the Space Station, areas may be classified according to the status of the adjacent portion of the Station (cf. Civil International Space Station Agreement, Art.21(2)). Ascertainment of the law to apply where a person committing a continuous act of infringement (e.g. by transmission) passes from an exterior surface area under the control of one State to that under the control of another State could be difficult. Possibly it would be preferable to regard persons outside a Space vehicle in Space (e.g. on a Space walk) as being present in an extraterritorial area. Such persons would then be in the same position as persons present on the Moon or another celestial body in Space: see Case 8. As to questions which can arise concerning liability in tort in respect of persons present on objects situated over an area in which rights of passage exist, see the judgement of Cardozo J. in *Hynes v New York Central Railroad Co.* (1921) 231 N.Y. 229 (C.A.N.Y.).

any extraterritorial area where a number of States together establish a combined unit of activity or settlement, and represents, it is submitted, a major challenge to the international community.⁵⁹

Draft Treaty

The extraterritorial rights in the musical work, the sound recording and the performance would be infringed by the reproduction in the uploading process, and by authorizing or contributing to the infringement on the website (Articles 1, 13).

Case 8. The Moon copies (Scenario (4))

Synopsis: on the Moon, unauthorized circumvention of a technological protection measure and unauthorized copying of a sound recording of a performance of a musical work, the copies so made not leaving the Moon

The first question will be whether in any extraterritorial area such as the Moon the copyright or related right owners have any remedies regarding circumvention of technological protection measures or rights to authorize copying of protected material. In many countries unauthorized circumvention of technological protection measures is subject to civil or criminal remedies, such measures having been introduced either before or following the coming into force of WCT, WPPT and the EC Information Society Directive, but whether such remedies apply to acts taking place in the territories of other States or in extraterritorial areas will depend on the legislation of the State concerned.⁶⁰

None of the source instruments obliges States to provide protection of granted rights as regards unauthorized acts committed in extraterritorial areas. In default, therefore, of a specific national, regional or international provision imposing liability in this case, right owners will in general have no remedy under copyright or related rights law in respect of the unauthorized copies made on the Moon. It seems doubtful whether, under general rules, a national court would grant relief by way of injunction, since the court's ability to enforce an order to prohibit an act taking place on the Moon would be limited or non-existent, other than in the case of a copier being under (or in or returning to an area within) the jurisdiction of the court.

Clearly, new international rules need to be adopted to cover the serious gaps in protection indicated by this example. For proposals in this regard, see Articles 2, 13, 14 and 15 of the Draft Treaty.

⁵⁹ For a conceptual overview of the law to apply in Space, see the study of M. Couston "Spatioéthique: réflexions sur la teneur éthique du droit spatiale" in (2004) *Revue Française de Droit Aérien et Spatial*, 398.

⁶⁰ States bound by WCT and WPPT are obliged to provide remedies for unauthorized circumvention of technological protection measures (WCT Art.11, WPT Art.18). (Similar obligations apply under WCT (Art.12) and WPPT (Art.19) as regards protection of rights management information.) For examples of national laws, see US Act, ss.1201-1204, and UK Act, ss.296ZA-296ZF, and generally WCL paras.13.54-13.66.

Draft Treaty

There would be infringement of the extraterritorial rights in the sound recording, the musical work and the performance, and also (depending on the agreement made by the Contracting Parties) contravention of the associated protection measure (Articles 13, 14).

P. Summary

The foregoing considerations indicate that in relation to extraterritorial areas there are gaps in the present system of protection of copyright and related rights, of which the following are examples:

- (1) absence of rules concerning jurisdiction of courts to entertain and determine actions regarding unauthorized use of protected material in extraterritorial areas, and concerning applicable law in this respect;
- (2) absence of rights to authorize reproduction of protected material in extraterritorial areas or communication to the public or other use of such material in or from such areas.

These and other issues outlined above indicate that there is a vacuum of increasing importance in the protection of copyright and related rights and that international agreement is imperative if an ordered system of exercise of these rights in relation to activities in Space is to be achieved. Part II below sets out proposals for the establishment of such a system, and its content and operation.

PART II: PROPOSALS

A. Introductory

1. Draft Treaty and Draft Protocol

Protection of copyright and related rights in extraterritorial areas should, it is proposed, be effected by the conclusion of an international instrument, and the Draft Treaty and Draft Protocol presented here are intended to indicate some of the issues involved and to suggest possible solutions.⁶¹

A feature of the Draft Treaty is the proposal that, in order to achieve a simple and consistent system, and avoid the complexities arising from input of national procedural rules, actions for infringement of the extraterritorial rights established

⁶¹ The author will welcome comments on the drafts at j.a.i.sterling@gmul.ac.uk. The author's proposals concerning a parallel initiative for an International Copyright Code to deal with territorial copyright and related rights is available on this website: see QMIPRI Research home page.

by the Treaty are to be brought before the Space Copyright Tribunal established under the Treaty. Another feature, again with the object of providing consistency and clarity, is the proposal for the establishment of the Space Copyright Bureau, through which extraterritorial rights are to be exercised. The provisions regarding the proposed Tribunal and Bureau are outlined in the Draft Protocol to the Draft Treaty.

The Draft Treaty introduces a system of universal extraterritorial rights which are of the same nature, scope and term in all extraterritorial areas. To achieve this, the Draft Treaty identifies the specific categories of subject matter which are protected by extraterritorial rights (Article 1(d)(g)(h)), and the specific rights which are granted (Article 1(j)). See further 2. Draft Agreed Statements below.

Under the Draft Treaty, the Contracting Parties agree to grant extraterritorial rights, being rights of the same nature (e.g. those of reproduction) as those respectively granted under the Berne and Rome Conventions, WCT and WPPT to all authors, performers, phonogram producers and broadcasting organizations (Article 2).

Persons infringing an extraterritorial right or not paying remuneration or sums due are subject to civil liability (Article 13). Liability is also established in respect of contravention of measures concerning technological protection and rights management information (Article 14). The Contracting Parties are to agree the rules as to categories and application of criminal remedies (Article 15(b)).

Apart from certain specific cases, no limitations or exceptions apply (Article 9) and no reservations to the Treaty are admitted (Article 17).

Terms of protection are respectively in accordance with the Berne and Rome Conventions, WCT and WPPT, with a proposal concerning term of protection for broadcasts (Article 10).

The Draft Protocol provides that proceedings before the Tribunal are to be commenced through the Tribunal website, and that the repertoire descriptions of rights administered by the Bureau and facilities for licensing such rights shall be publicly available through the Bureau website (Draft Protocol, paragraphs 2(b), 7(b)), thus embracing the concept that persons in territorial or extraterritorial areas should through online communication be able to engage in Tribunal proceedings and to ascertain details of protected repertoire and obtain the necessary licences for use of material protected by such repertoire.

In this Part the basic principles of the Draft Treaty are described (B), followed by a commentary on the main provisions of the Treaty (C) and of the Draft Protocol to the Treaty (D), with a Conclusion (E). The texts of the Draft instruments are in Appendixes A and B.

2. Draft Agreed Statements

The Contracting Parties to the WIPO Treaties 1996 adopted a number of Agreed Statements, setting out their agreement on the interpretation and application of a number of points in the Treaties. Similarly, it is proposed that

following the adoption of the Draft Treaty and Draft Protocol, Agreed Statements by the Contracting Parties will specify the categories of subject matter covered and rights embraced by extraterritorial rights (see Appendix C). In this way, right owners and users of protected material will be able to ascertain in detail the scope and content of the extraterritorial rights granted by the Treaty.

B. Basic principles

1. Non-discriminatory protection

The Draft Treaty is based on the principle of non-discrimination, that is, that copyright is to be granted to all authors, and related rights to all performers, phonogram producers and broadcasting organizations in regard to their respective works, performances, sound recordings and broadcasts. While discriminatory protection (i.e. protection depending on particular nationality or place of publication etc.) has been maintained in the Berne Convention, the Rome Convention, WCT and WPPT, it is submitted that the retention of the principle is no longer justified, first and foremost because it denies a category of human rights to certain individuals on the basis of their nationality, and secondly because there is no reasonable justification for allowing (as the international instruments do at present) the unauthorized use of some works, performances, phonograms and broadcasts, but not others. In addition, from the practical point of view, non-discriminatory protection will simplify and render more efficient the administration of copyright and related rights in the borderless society created by the Internet.

2. Recognition of extraterritorial rights

Owners of copyright and related rights have at present under the source instruments no specific rights to control the use of protected material in extraterritorial areas. In areas under the jurisdiction of States, the present system is to a large extent based on the application in different countries of different rules. There is no good reason why this fractured system of protection should be transported into Space. Rather it is proposed that beneficiaries be granted extraterritorial rights of the same nature in all extraterritorial areas, with common rules as to entitlement, subsistence of rights, limitations and exceptions and infringement.

C. Draft Space Copyright Treaty: Commentary

1. Summary

Preamble

The Preamble notes the need for the regulation of copyright and related rights in Space and recalls the provisions of the Universal Declaration of Human Rights 1948 proclaiming the principle of human rights for all and the rights of authors to protection of the moral and material interests in their productions.

Article 1: Definitions

Article 1 contains a number of definitions of fundamental importance in the Treaty, including those defining extraterritorial areas and extraterritorial rights. The definitions include “associated protection measures” (a new term here proposed), i.e. the technological protection measures and measures for the protection of rights management information as provided in Articles 11 and 12 of the WCT and Articles 18 and 19 of WPPT. The Treaty contains provisions concerning the acceptance of obligations in regard to such measures (see below, Article 3).

The definitions of beneficiaries and subject matter in general adopt or follow the provisions of the source instruments, but in two cases these provisions are expanded, namely in the case of “work of joint authorship” to include works produced by collaboration whether or not the respective contributions are distinguishable (Article 1(f)), and “broadcast”, where the Draft Treaty proposes that all transmission signals forming part of an uninterrupted chain of communication effected by the broadcast are embraced by that term (thus including the transmission signal as it proceeds to the transmitting aerial) (Article 2(h)).

Article 2: Grant of extraterritorial rights

The Contracting Parties accept the principle of non-discrimination in granting extraterritorial rights to all authors, performers, phonogram producers and broadcasting organizations.

Article 3: Associated protection measures

Contracting Parties agree to accept in respect of acts taking place in extraterritorial areas the obligations concerning associated protection measures, as provided in WCT and WPPT.

The inclusion of broadcasting organizations among the Parties whose associated protection measures are to be protected is placed in square brackets: broadcasting organizations are not so protected under WPPT, but there are provisions concerning such measures in the proposed WIPO Broadcasting Treaty.

Article 4: Space Copyright Tribunal and Space Copyright Bureau

Article 4 deals with the establishment of the Space Copyright Tribunal (“the Tribunal”) and the Space Copyright Bureau (“the Bureau”), in accordance with the provisions of the Draft Protocol to the Treaty. The Tribunal is to have the jurisdiction as set out in Article 11, and the powers described in paragraph 3 of the Draft Protocol. Broadly, the system proposed is that actions will be brought before the Tribunal and that enforcement of the Tribunal’s orders will be subject to enforcement proceedings in the courts of the relevant Parties. The Tribunal is not permitted to recognise rights additional to those granted in accordance with the Treaty (Draft Protocol, paragraph 3(b)).

Article 5: Exercise and licensing of extraterritorial rights

Article 5(a) states that extraterritorial rights may only be exercised through the Bureau.

The functions of the Bureau as prescribed in the Draft Protocol include the administration of extraterritorial rights (paragraph 6(b)). The Contracting Parties may agree to the extension of the Bureau's functions to encompass other rights, e.g. where it is desired to give the Bureau competence to administer copyright or related rights in respect of particular objects or places located in Space (paragraph 6(e)).

Article 5(b) deals with the notification of claimed rights. Article 5(c) proposes a solution to one of the most difficult areas in international copyright law, namely the question of ownership and exercise of rights in cinematographic works and works created by employees in the course of their employment. As mentioned in Part I, national laws contain different provisions defining ownership of rights in these cases. The Draft Treaty proposes a system of notification of claims by authorized representatives of the authors concerned, the same system applying in the case of performances by two or more performers. See 2, comment (e) below.

In three instances, the source instruments require decisions by States in respect of the granting or exercise of certain exclusive rights, namely the author's right of rental of certain works (WCT, Article 7), the performer's right of rental of phonograms (WPPT, Article 9), and the broadcaster's right of public communication of television broadcasts, (Rome Convention, Article 13(d)). Article 5(d) does not contain these requirements, and provides that the Contracting Parties are to agree the conditions of exercise in these cases, thus establishing unified rules.

In order to reflect the provisions of Article 12 of the Rome Convention and Article 15(2) of WPPT, Article 5(d) of the Draft Treaty provides that the Contracting Parties shall, in the absence of agreement between the Parties, set the terms of the sharing of equitable remuneration between performers and phonogram producers in respect of the broadcasting or communication to the public of phonograms.

The Draft Treaty adopts in Article 5(e) the system of Tribunal approval of proposed tariffs, similar in principle to the system applying for many years under the Canadian Copyright Act, sections 66-78. The Bureau being the only entity entitled to exercise extraterritorial rights will be required to submit proposed tariffs to the Tribunal each year, and may only apply such tariffs as then approved by the Tribunal (Draft Protocol, paragraph 8).

Article 6: Ambit of protection

Article 6 provides for the preservation of any protection available to the claimant in respect of acts taking place (or which may take place) in any territorial area. It also provides that an act done in a place or object in an extraterritorial area where such place or object is under the jurisdiction of a State, shall be deemed to be done in that State, so that, for instance, an act done in a US Space vehicle in Space will be deemed to be done in the US.

Article 7: Broadcasting and communication to the public

Article 7 deals with the problem of place of broadcasting and communication to the public, and proposes a solution based on the communication theory. Broadcasting or communication to the public is, in the context of any extraterritorial right, deemed to occur in the extraterritorial area of initiation of the signal (if the signal is so initiated), and in any case in any extraterritorial area in which the transmission is received or receivable by the public, and the question whether there has been broadcasting or communication to the public in any territorial area shall be a matter for determination by the law of the territory where the transmission is initiated or is received or receivable.

Article 8: Exhaustion of right

In a sense, the Draft Treaty proceeds on the concept that extraterritorial areas as a whole form “one country”, with invariable rules applying throughout that country. Accordingly, Article 8 introduces the principle of “extraterritorial exhaustion” of distribution rights in relation to extraterritorial areas. The right of making available to the public of the original and copies of a work, performance fixed in a phonogram, or a phonogram through sale or other transfer of ownership is exhausted as regards any extraterritorial area in respect of an object being the original or copy of such work, performance fixed in a phonogram, or phonogram where the first sale or other transfer of ownership of that object takes place in any extraterritorial area with the consent of the respective author, performer or phonogram producer owning such right in such object. Rights concerning importation of originals or copies into territorial areas are unaffected by this provision. Broadcasting organizations are not granted distribution rights under the source instruments, but if (as currently proposed) such rights are granted to them under the proposed WIPO Broadcasting Treaty as adopted, it would be appropriate to extend the exhaustion principle of Article 8 to such rights (cf. footnote 16).

Article 9: Limitations and exceptions

Article 9 permits two categories of limitations and exceptions to extraterritorial rights, namely making of quotations as provided in the mandatory provisions of Article 10(1) of the Berne Convention, and specified limitations and exceptions as unanimously agreed by the Parties, and subject to the “three step” test (cf. TRIPS, Article 13). Otherwise no limitations or exceptions apply to the exercise of extraterritorial rights. This achieves, it is believed, a solution to the problem caused by the wide variety of permitted limitations and exceptions under national laws. A constant regime will thus be established in extraterritorial areas, without affecting the situation as to acts taking place in territorial areas. See further 2, comment (f) below.

Article 10: Terms of protection of extraterritorial rights

The terms of protection under the Draft Treaty are fixed throughout all extraterritorial areas, and are based on the provisions of the source instruments (e.g. life plus 50 years as the general term of protection for authors’ works, as provided in Article 7(1) of the Berne Convention). In three cases, namely those

of cinematographic works, anonymous or pseudonymous works and works of joint authorship, proposals which are in conformity with the source instruments are made in order to provide uniformity and clarity: for details, see 2, comment (f) below. Making available of copies to a public congregated in an extraterritorial area is not to be taken into account in assessing term of protection (Article 10(b)).

As far as existing subject matter is concerned, all items will have the terms ascribed in Article 10, so that, for instance, a work of which the author died more than 50 years ago will not be entitled to protection by extraterritorial rights. In any case extraterritorial rights can under the Draft Treaty only be claimed through the Bureau, so that it will be for all authors, performers, phonogram producers and broadcasting organizations to notify or ensure notification of their claims to the Bureau in accordance with the procedures required by the Bureau; see Draft Protocol, paragraph 7(a).

Under the Rome Convention, the minimum term of protection for broadcasts is 20 years, and international agreement on a fixed term of longer duration has not yet been reached. Consequently, in Article 10(a)(vi) the proposed term of 50 years protection for broadcasts (in line with that proposed for performances and sound recordings) is placed in square brackets.

Article 11: Jurisdiction

National courts and the Tribunal are to have personal and subject matter jurisdictional powers in relation to actions or proceedings for infringement or threatened infringement of an extraterritorial right or concerning contravention or threatened contravention of an associated protection measure.

Article 12: Applicable law

The applicable law in proceedings before the Tribunal is the law established by the Treaty itself. The basic concept of the Treaty is the creation of rules of law to apply in extraterritorial areas, leaving the laws to apply in territorial areas intact. In this way a unified system of rules applies in all extraterritorial areas. See further 2, comment (a) below.

Article 13: Liability for infringement of extraterritorial rights

Under the Draft Treaty, liability for infringement of an extraterritorial right in an extraterritorial area can be constituted by (i) the unauthorized doing of an act, or (ii) the unauthorized importation of an article, component or other device the making of which would have infringed if it had been made in the area into which it is imported, or of which the primary purpose is the effecting of such infringement, or (iii) the unauthorized operation whether initiated in or outside such area of any article, component or other device located in such area which effects the infringement in such area of such right. Infringement can also be constituted by authorizing or contributing to the unauthorized activities described in (i) (ii) and (iii). The provision regarding unauthorized operation is intended to cover the situation where an article or component (e.g. a facility affording access to a database of protected material) is placed in an object in an extraterritorial

area (e.g. in a satellite), resulting in infringement of an extraterritorial right in such area.

Article 14: Liability for contravention of associated protection measures

Rules similar to those of Article 13 regarding liability for infringement are provided in Article 14 for contravention of associated protection measures.

Article 15: Remedies

In order to achieve a unified and systematic scheme of remedies, the Draft Treaty provides that the Contracting Parties are to agree the specific remedies and sanctions for Infringement or threatened infringement of extraterritorial rights and contravention of associated protection measures.

As regards civil remedies, the Contracting Parties agree to comply with the provisions of TRIPS in this respect, and to agree the specific remedies available. Such agreement draws the parameters of the civil remedies which can be ordered by the Tribunal, and the enforcement of which will depend on the enforcement rules of the country concerned (Article 15(a)).

As regards criminal remedies, different considerations apply, linked to the complex questions of procedures for applying such remedies to acts done in extraterritorial areas. Consequently, Article 15(b) provides that the Contracting Parties are to make the necessary agreement as to what criminal remedies shall apply and how they shall be imposed. In the event that there are difficulties in reaching such agreement, the operation of the Tribunal in ordering civil remedies will not be impeded.

Similarly the Contracting Parties are to agree the specific legal remedies to apply as regards contravention or threatened contravention of associated protection measures (Article 15(c)).

Article 61 of TRIPS requires members to provide for criminal procedures and penalties to be applied in cases (*inter alia*) of copyright piracy on a commercial scale. The Draft Treaty provides in Article 15(d) that any act in an extraterritorial area which by way of copyright or related rights piracy on a commercial scale infringes an extraterritorial right of a national of a Contracting Party shall *ipso facto* be considered as an act entitling such Party to hold the person committing such act criminally liable for such act and to impose on such person in respect of such act remedies as mentioned in Article 61 of the TRIPS Agreement. See further 2, comment (h) below.

Article 16: Enforcement of Tribunal orders

Each Contracting Party agrees that an order of the Tribunal or a judgement rendered by a court of another Contracting Party in an action or proceedings concerning an extraterritorial right or an associated protection measure shall be enforced in its territory in accordance with the provisions of the Treaty and the respective rules on enforcement of judgements as obtaining in its territory. Thus the addressed Court of a country will not be obliged to approve enforcement of a

Tribunal order which is contrary to the general enforcement rules of that country, e.g. where there is conflict with Constitutional provisions.

Article 17: Reservations

No reservations are permitted under the Treaty. This provision reflects the similar situation under the Berne Convention, WCT and WPPT, and is aimed at preserving a unified system throughout extraterritorial areas. See further 2, comment (j) below.

Articles 18-20

These Articles deal with application and entry into force of the Treaty, and administrative and final provisions

2. Comments

(a) Applicable law

As to applicable law, five possibilities present themselves in the context of extraterritorial acts, that is, the court may apply in respect of particular issues:

- (i) the law of the country of origin or qualifying country of the item of subject matter concerned;
- (ii) the law of the country where protection is sought;
- (iii) the law of the country in respect of which protection is claimed;
- (iv) one or more of the laws of (i), (ii) and (iii) according to the issue to be tried (e.g. as to ownership the law of the country of origin or qualifying country, and as to infringement, the law of country in respect of which protection is claimed);
- (v) a “stand alone” law as established by the Draft Treaty, with specific rules on subsistence and infringement of rights, beneficiaries, term etc.

Any solution requiring application of the laws mentioned under (i) to (iv) is bound in some cases to lead to highly complex questions.⁶²

The Draft Treaty adopts the solution of a “stand alone” law, and contains no provisions concerning country of origin: consequently the provisions of the Berne Convention relating to application of or reference to the law of the country of origin are not reflected in it.⁶³ In this respect the Draft Treaty follows the precedents of the Rome and Phonograms Conventions, in which the country of

⁶² Consider, for example, the difficulties faced by a court in applying the different national laws adopting different rules in pursuance of the tortuous provisions of Art. 14bis(2)(c),(3) of the Berne Convention, concerning agreements relating to contributions to cinematographic works.

⁶³ Berne Convention, Art.5 (Conventional protection does not apply in country of origin (other than for non-nationals resident in such country)) and Art.7(8) (comparison of terms).

origin principle is not incorporated.⁶⁴ The concept of universal extraterritorial rights, on which the Draft Treaty is based, ensures that all authors, performers, phonogram producers and broadcasting organizations will respectively have the same protection in all extraterritorial areas, irrespective of protection or lack of protection in any territorial area.

Extraterritorial rights are, as stated above, limited to individual rights specifically nominated in the source instruments (Articles 1(j), 2(b)), and thus, as under the Phonograms Convention 1971, the principle of national treatment, like that of country of origin, does not apply under the Draft Treaty.

The source instruments allow the granting of greater protection than that provided by the respective instrument, and legislative options in a number of areas, including limitations and exceptions, works which may be excluded from protection, and reservations, together with provisions on reciprocity. Consequently, protection rules are not the same in all countries. There are also works of variable status, i.e. works protected in one country but not in another, and the non-mandatory artist's resale right under the Berne Convention (Article 14*ter*). The following comments exemplify the disparities in this area, and indicate why the choice has to be made between a system of specific categories of protected subject matter and extraterritorial rights on the one hand and one that allows variations to take account of different national laws on the other, and why the choice in the Draft Treaty is for a "stand alone" law as regards extraterritorial rights.

(b) Granting of additional protection

A country of the Berne Union may grant protection additional to that afforded by the Convention (Berne Convention, Article 19): for instance it may grant artists the right to display their works in public. If the Treaty required all Contracting Parties to accord such additional rights in extraterritorial areas and for such rights to be recognised by all such Parties, it would be extending to extraterritorial areas rights available under some national laws but not recognised in the source instruments or in the laws of all Parties. The Draft Treaty therefore provides for recognition of those specifically nominated rights granted under the source instruments (Articles 1(j), 2(a)), and to achieve uniformity also provides that extraterritorial rights are limited to those prescribed in the Treaty (Article 2(b)). In parallel, the Draft Protocol provides that the proposed Tribunal shall not recognise rights additional to those granted in accordance with the Treaty (paragraph 3(b)).

(c) Excluded works

⁶⁴ It may be of interest to note that the proposal that the concept of country of origin should not be included in the Rome Convention was initially made (to the author's personal knowledge) at the Rome Diplomatic Conference 1961 (when the Convention was adopted) by Dr. Arpad Bogsch, then Legal Adviser to the Copyright Office of the USA and a member of the US delegation at the Conference (later Director General of WIPO). The proposal in the Draft Treaty to dispense with the country of origin principle thus has a creditable precedent.

Extraterritorial rights may be claimed in excluded works, and such claims may be notified to the Bureau, thus covering the situation where the work excluded under the law of one country is protected under another law or other laws. As to enforcement of a Tribunal decision recognising such rights in such works, see C1, Article 16 above.

(d) Works of variable status

Several categories of work may be protected by copyright/author's right in one country of the Berne Union but not in another. Here are some examples:

- (i) Open category works: works which are protected in an open category system (that is, where the list of protectable subject matter is not exhaustive) may not be protected under a closed category system.
- (ii) Unfixed works: unfixed works are protected under some laws (e.g. the French IP Code) but not under other laws (e.g. the US and UK Acts).
- (iii) Inconsistently classified works: in one country a particular work may be regarded as not original and thus unprotectable by copyright, yet in another country it may be regarded as original and thus protectable.

Should works of variable status have special rules as to extraterritorial rights? Different considerations apply in answering this question in relation to the three abovementioned categories.

As to open category works: the Draft Treaty limits protection to specified categories of works (Article 1(d)(j)). There would be no certainty as to what was protected by extraterritorial rights if the categories of protectable subject matter were open. Contracting Parties having open category systems would of course retain them as regards territorial claims and in this respect the provisions of Article 6(a) (preserving locally available protection) would apply.

As to unfixed works: unfixed works are *prima facie* protected under the Berne Convention, though Berne Union countries may prescribe that protection is subject to fixation in some material form. Protection against unauthorized fixation of unfixed performances and broadcasts comes within the ambit of the Rome Convention (Articles 7(1)(b), 13(b)) and under WPPT performers have rights in this connection (Article 6(ii)). On balance, therefore, it seems right that unfixed material otherwise qualifying for protection should enjoy extraterritorial rights. However, account needs to be taken of the situation in countries such as the US where fixation is required for the protection of works. Here it will be for the addressed court to decide whether an order of the Tribunal, for instance for the award of damages for unauthorized use of an unfixed work, may, according the local enforcement rules, be enforced (cf. Draft Treaty, Article 16). Enforcement of the order in a country where the fixation criterion does not apply should present no problems.

Ignorance would be no defence to a charge before the Tribunal of infringement of extraterritorial rights in unfixed subject matter. Before performing a work in public, or fixing a performance or communicating it to the public, the prospective user should refer to the Bureau website to ascertain the protection status and any applicable licensing conditions.

As to inconsistently classified works: the same position as to enforcement etc. arises with regard to inconsistently classified works as in the case of unfixed works.

(e) Ownership and exercise of extraterritorial rights

Some works involve contributions of more than one person. There are differences between national laws as to the identity of the relevant right owners in these cases. Thus in the case of cinematographic works (i.e. motion pictures and other audiovisual works) different laws indicate different persons as the authors of the cinematographic work. In the UK the producer and the principal director are taken to be the film authors (UK Act, section 9(2)(ab)). In France the authors of the script, adaptation, dialogue and specially composed musical work and the director are presumed (unless proved otherwise) to be joint authors of the audiovisual work (article L.113-7). In Germany the director, the cameraman and the cutter are, in the first line, taken to be the authors. Under the US Act, no specific categories of persons are named as the authors of audiovisual works.

A similar problem presents itself in relation to works created by employees in the course of their duties. Under the laws of some countries, as in many of those belonging to the civil law system, the initial owner of the rights in a work is the individual who created it, and if rights in the works are to belong to the employer, a contract must so provide.⁶⁵ In the common law system, as in the US and the UK, the reverse applies: the employer is taken to be the author or first owner of the rights in the employee's work, subject to a contract providing otherwise (sections 101, 201(b) of the US Act (works made for hire) and section 11(2) of the UK Act). There is also the joint ownership system as provided in the Civil Code of Ukraine 2004, and the reversion system of article 96 of the Serbian Author's Right and Related Rights Law 2005 under which the employer has the economic rights for five years, after which the rights revert to the employee.

Under the "work made for hire" provisions of the US Act, the commissioner of certain works (including a contribution to an audiovisual work) will, subject to the statutory provisions, be considered the author, while under the UK Act the author is the initial owner of the copyright in any commissioned work, subject to contract.

The position of performers in this connection may also be mentioned: how will performers' rights be exercised in the case of group performances? Can one

⁶⁵ There are exceptions, e.g. the recent amendments to the French IP Code provide for State ownership of the exploitation rights in certain works of State employees: see footnote 27

member of the chorus in a recording of Verdi's *Aida* prevent exploitation of the recording when all the other chorus performers agree to the exploitation?

A proposal in the Draft Treaty that the authors of cinematographic works should be defined in an exclusive list would be unlikely to receive wide support – countries like the UK might not wish to include the cameraman or cutter, and German legal theory views the film script writer or film adaptation writer as enjoying separate author's rights in their creations. Similarly, a provision in the Treaty that initial ownership of copyright in employees' works is to be ascribed to the employer would be unlikely to find favour in civil law countries.⁶⁶ Similarly there would be differences of opinion in the case of commissioned works, and in the case of performances a practical system of exercise of rights where two or more performers are involved is needed.

The Draft Treaty does not attempt to present exclusive lists of authors of cinematographic works, nor to suggest initial ownership rules as regards employees' works or commissioned works. The system proposed in Article 5(c) of the Draft Treaty is one which, in the case of "multiple author" works (e.g. cinematographic works), employees' works, commissioned works and performances by two or more performers, the authors and performers respectively involved are to agree on an authorized representative to make notifications to the Bureau of their extraterritorial rights and to act for them in all matters concerning the rights as so notified. This solution allows the maintenance of existing national provisions on initial ownership of rights.

Finally, it may be noted that Article 5(f) provides for appeal to the Tribunal against decisions of the Bureau in connection with the exercise of extraterritorial rights.

(f) Limitations and exceptions

There is a wide variety in national law provisions on limitations and exceptions. The problems in this area are well exemplified by the rules on copying for private use. There is no specific exception for private use copying under the US or UK Acts, and though the UK Act has an exception for fair dealing for private study, such exception does not apply to sound recordings (section 29(1)). On the other hand, there are laws allowing a private use exception, sometimes with a levy system (e.g. in France and Germany). Thus where a person on the Moon makes a copy of a sound recording protected by copyright or related rights under the respective national laws, the copying would be permissible if one national law were applied but not if another such law were applied.

Rather than having a provision in the Treaty which requires reference to a multitude of laws to determine whether private copying or any other limitation or exception is applicable, the Draft Treaty provides in Article 9 for the mandatory

⁶⁶ At the WIPO Diplomatic Conference 2000 on a proposed Treaty on Audiovisual Performers Rights no agreement was reached on adoption of "works made for hire" or "employer owner" rules and the proposed Treaty was not adopted: see WCL para.17.16.

“quotations” exception in Article 10(1) of the Berne Convention, and specified limitations and exceptions (subject to the “three step” test) as unanimously agreed by the Contracting Parties: otherwise no limitations or exceptions are to apply. A prospective user may apply to the Bureau to ascertain whether a license is required.

(g) Term of protection

(i) Cinematographic works: national laws provide a number of different methods of measuring the term of protection of cinematographic works, ranging for example from a fixed term of 50 years from making or publication to life of the last survivor of four nominated persons plus 70 years (in the European Union); and where in the US a work made for hire is concerned, yet another term applies (US Act, section 302(c)). In conformity with the aims of providing consistent rules for extraterritorial rights, Article 10(a)(ii) of the Draft Treaty provides a fixed term for protection of cinematographic works, namely 100 years from making of the work. This term is proposed as reflecting (1) the consideration that under the life plus 50 years rule, works may in some cases receive 100 years protection, or even more and (2) Article 7(2) of the Berne Convention allows countries of the Union to provide a fixed term of protection of 50 years for cinematographic works (calculated from making available to the public, or (in default of such making available) 50 years from the making of the work); such countries may however grant longer protection (Article 7(6)). It is suggested that the 50 year fixed term of protection for cinematographic works is now totally out of line with the longer period of protection accorded in the US, the States of the European Union and many other countries.

(ii) Anonymous or pseudonymous works: Article 10(a)(iii) of the Draft Treaty adopts the provisions of Article 7(3) of the Berne Convention, which fixes the term for anonymous or pseudonymous works at 50 years after the work has been lawfully made available to the public, with the application of the life plus 50 years term where the identity of the author is or becomes known.

(iii) Works of joint authorship: Article 7*bis* of the Berne Convention provides that the term of protection for works of joint authorship is to be measured from the death of the last surviving author. However, there is no internationally agreed definition of “work of joint authorship”; some laws (such as that of the UK) apply an “indistinguishable contribution” test, other laws (such as the US Act) do not require the contributions to be indistinguishable. To give clarity, the Draft Treaty defines a work of joint authorship as a work of collaboration, whether or not the respective contributions are distinguishable (Article 1(f)). Thus, by the application of Article 10(a)(iv) of the Draft Treaty, whether or not the contributions to a joint work are distinguishable, the extraterritorial rights in the work will expire 50 years after the death of the last surviving author: this does not apply, however, in the case of cinematographic or anonymous or pseudonymous works being works of joint authorship: in these cases, the terms indicated in (i) and (ii) above will apply. The Contracting Parties may wish to incorporate a more precise or more restrictive definition than that proposed in Article 1(f).

(h) Remedies for copyright piracy

Piracy as conceived in terms of international law is a crime *iure gentium* concerning which any State may take measures.⁶⁷ Whether piracy as at present conceived in international law may embrace piracy of material protected by copyright and related rights is open to question, but the underlying aspect of depredation of property should, it is suggested be taken into account in relation to available remedies, as provided in Article 15(d) of the Draft Treaty.⁶⁸

(i) Reciprocity

Provisions of the source instruments concerning reciprocity do not apply in the Draft Treaty. All Contracting Parties apply the same terms of protection, and all such parties must recognise the artist's resale right (Berne Convention, Article 14*ter*) as regards sales etc. in extraterritorial areas.

(j) Reservations

No reservation is admitted under the Draft Treaty (Article 17). The reservations under Articles 5 and 6 of the Rome Convention (criteria for protection of phonograms and broadcasts) will have no effect under the Draft Treaty, since all phonograms and broadcasts will be protected. While reservations are permitted concerning the equitable remuneration right under Article 12 of the Rome Convention and Article 15 WPPT, and there is the possibility for countries not to grant the artist's resale right (Berne Convention, Article 14*ter*), the Draft Treaty contains no such provisions and provides that tariffs for equitable remuneration for broadcasting or communication to the public of phonograms or for an interest in any sale of original works of art and original manuscripts of writers and composers subsequent to the first transfer by the author of the work shall be those approved by the Validation Division of the Tribunal in accordance with the procedure established as provided in the Draft Protocol (paragraph 8).

D. Draft Protocol to Draft Space Copyright Treaty: Commentary

The fundamental provisions on jurisdiction, applicable law, enforcement of judgements and remedies in relation to the Space Copyright Tribunal having been laid down in Articles 12-16 of the Draft Treaty, the Draft Protocol contains

⁶⁷ For the history and ambit of the concept in international law, see A.P. Rubin *The Law of Piracy*, (Naval War College Press, Rhode Island, 1988). Note also Art.1.8.10 of the US Constitution, providing Congress with the power "to define and publish piracy and felonies committed on the high seas, and offences against the law of nations". See also the UN Convention on the Law of the Sea, Art.101 (definition of piracy including depredation in a property in a place outside the jurisdiction of any State, but limited to acts by crew or passengers of a private ship or aircraft, or (Art.102) cases of mutiny on a Government vessel). The concept of copyright infringement as piracy has a long history: see the examples dating from the 18th Century in the Oxford English Dictionary. See also the definitions of "piracy" and "pirate" in Webster, *New International Dictionary* 1971.

⁶⁸ In an article published in 1965, Dr. Neville March Hunnings analysed, in the context of pirate broadcasting, the question of the exercise of State jurisdiction over citizens or aliens for acts committed outside the territorial limits of the State (N. March Hunnings, "Pirate broadcasting in European waters" (1965) 14 *International and Comparative Law Quarterly* 411). Dr. March Hunnings considered that the exercise of a State's *imperium* in *terra nullius* over its citizens has generally been recognised as an extension of a State's personal jurisdiction and (of particular relevance here) that a visiting alien may be subject to a State's jurisdiction in the protection of the State's legitimate interests in that territory.

rules regarding the constitution of and actions and proceedings before the Tribunal, together with the Tribunal's powers to make orders and the administration etc. of the Tribunal Office. The Tribunal is not to recognise rights in addition to those granted in accordance with the Treaty (paragraphs 1-4).

The provisions concerning the staff, functions and repertoire of the Bureau are then set out (paragraphs 6-7). The procedure for validation of proposed tariffs set out in paragraph 8.

The Budgets of the Tribunal and the Bureau are to the charge of the Contracting Parties (paragraph 9).

E. Conclusion

What then is the new dimension to which reference is made in the title of this article? The submission is that we must visualize a fundamental change in our concept of copyright and related rights: one that moves away from the territorial to the universal, and one that takes account of the facilities of technology harnessed to ensure the promotion and protection of the arts and sciences in the perspective of the family of human beings as one unit in the Cosmos.

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<u>Appendix A:</u>	Draft Space Copyright Treaty
<u>Appendix B:</u>	Draft Protocol to Draft Space Copyright Treaty
<u>Appendix C:</u>	Extraterritorial protection: synopsis
<u>Appendix D:</u>	International Space Law instruments: extracts

APPENDIX A: DRAFT SPACE COPYRIGHT TREATY

DRAFT SPACE COPYRIGHT TREATY

[Version of December 15, 2008]

Preamble

The Contracting Parties

- Noting that material protected by copyright and related rights is being and will continue to be created, performed, produced or transmitted in Space,

- Noting that the use of such material by acts committed in Space, if unauthorized, causes and will cause damage to right holders and to the public interest in the preservation of such rights,
- Recalling that the Preamble to the Universal Declaration of Human Rights 1948 declares that Member States have pledged themselves to achieve the promotion of universal respect for and observance of human rights, that the said Declaration proclaims that every individual and every organ of society shall strive by progressive measures, national and international, to secure universal and effective recognition of human rights, that Article 7 of the Declaration proclaims that all are equal before the law and are entitled without any discrimination to equal protection of the law, and that Article 27 of the Declaration proclaims that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author,
- Noting that international instruments establish protection by copyright and related rights in territorial areas, but that such instruments do not specifically establish such protection in extraterritorial areas;
- Considering that all human beings are entitled in extraterritorial areas to protection by copyright or related rights in their respective works, performances, phonograms and broadcasts, and that conversely all persons are obliged to respect such rights;
- Desiring to establish the principles governing the recognition and exercise of copyright and related rights in Space, and to ensure that such principles also apply in relation to extraterritorial areas on or near Earth.

have agreed as follows.

Article 1 Definitions

For the purposes of this Treaty:

- (a) “Space” includes all areas of and the celestial bodies in the Universe beyond Earth’s territorial airspace;
- (b) “extraterritorial area” means any area of the Universe which is not under the jurisdiction of any State, such term including any place or object which is located in such area and which is not under such jurisdiction;
- (c) “source instruments” means the Berne Convention for the Protection of Literary and Artistic Works, Paris Act 1971 as amended 1979 (hereinafter referred to as “the Berne Convention”), the Convention for the Protection of Performers,

Producers of Phonograms and Broadcasting Organizations, Rome 1961 (hereinafter referred to as “the Rome Convention”), the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaty 1996;

- (d) “works” means original works of the separate categories specifically mentioned in Article 2 of the Berne Convention and of Articles 4 and 5 of the WIPO Copyright Treaty 1996;
- (e) “author” in relation to a work means the person who created the work;
- (f) “work of joint authorship” means a work in the creation of which two or more authors have collaborated, whether or not their respective contributions are distinguishable;
- (g) “performers”, “phonogram producers” and “phonograms” mean respectively persons and phonograms within the respective definitions of Article 2 of the WIPO Performances and Phonograms Treaty 1996;
- (h) “broadcasting organizations” means organizations responsible for the transmission by wireless means for public reception of sounds or of images and sounds and “broadcast” and “broadcasting” are to be understood accordingly and to embrace all transmission signals forming part of an uninterrupted chain of communication effected by a broadcast;
- (i) “copyright” means rights granted to authors and “related rights” means rights granted to performers, producers of phonograms and broadcasting organizations.
- (j) “extraterritorial rights” means rights exercisable in or in relation to any extraterritorial area, such rights being rights of the same nature and scope as the individual rights specifically nominated and without possibility of reservation granted to the respective beneficiaries by the source instruments;
- (k) “associated protection measures” means protection measures applying in fulfilment of the obligations accepted by the Contracting Parties in accordance with Article 3 of this Treaty;
- (l) “the Tribunal” means the Space Copyright Tribunal established in accordance with the Protocol to this Treaty.

Article 2 Grant of extraterritorial rights

- (a) In all extraterritorial areas all authors, performers, phonogram producers and broadcasting organizations shall as from the date

of entry into force of this Treaty enjoy extraterritorial rights in their respective works, performances, phonograms and broadcasts.

- (b) Extraterritorial rights recognised by the Contracting Parties are limited to those prescribed in this Treaty.

Article 3 Associated protection measures

- (a) In respect of acts taking place in extraterritorial areas the Contracting Parties accept the obligations regarding technical protection measures and rights management information as described in Articles 11 and 12 of the WIPO Copyright Treaty 1996 and Articles 18 and 19 of the WIPO Performances and Phonograms Treaty 1996 [and including within such obligations the like commitments as regards measures used by or rights management information relating to broadcasting organizations].
- (b) In pursuance of the obligations accepted under paragraph (a), the Contracting Parties shall conclude an agreement on the specific acts in extraterritorial areas which contravene associated protection measures and the categories of persons who shall be taken as committing such acts.

Article 4 Space Copyright Tribunal and Space Copyright Bureau

The Space Copyright Tribunal (hereinafter referred to as “the Tribunal”) and the Space Copyright Bureau (hereinafter referred to as “the Bureau”) shall be established in accordance with the Protocol to this Treaty, with the powers there described.

Article 5 Exercise and licensing of extraterritorial rights

- (a) Extraterritorial rights may only be exercised through the Bureau in accordance with claim notifications received by the Bureau from such persons and providing such details as the Bureau may stipulate.
- (b)
 - (i) Subject to the provisions of sub-paragraphs (ii) and (iii) below, authors, performers, phonogram producers and broadcasting organizations may themselves notify or may appoint a representative to notify the Bureau of their respective claims to extraterritorial rights, and such representative shall be entitled to notify such claims and to represent the respective rightowners in all matters concerning the extraterritorial rights in the subject matter concerned.
 - (ii) Notifications to the Bureau of extraterritorial rights in respect of (1) works in which the creative contributions of

two or more authors are included and (2) performances involving two or more performers shall in respect of each of these categories of subject matter be made by the person whom the respective authors and performers or persons lawfully acting on their behalf agree shall be their authorized representative in all matters concerning their extraterritorial rights in the subject matter concerned.

- (iii) Notifications to the Bureau in respect of extraterritorial rights in employees' works and commissioned works shall be made by the person whom the employee and employer and the commissioned author and the commissioner respectively agree shall be the authorized representative of the author of the work in all matters concerning the extraterritorial rights in such work.
- (c) The Contracting Parties shall agree the conditions of exercise of (i) the author's right of rental of works embodied in phonograms, as accorded in Article 7 of the WIPO Copyright Treaty 1996, (ii) the performers' right to authorize commercial rental to the public of the original and copies of their performances fixed in phonograms, as accorded in Article 9 of the WIPO Performances and Phonograms Treaty 1996, and (iii) the broadcasting organizations' right of public communication of television broadcasts, as accorded in Article 13(d) of the Rome Convention.
- (d) The Contracting Parties shall, in the absence of an agreement between the entitled performers and phonogram producers, agree the proportions of the sharing of equitable remuneration between them in respect of the broadcasting or communication to the public of phonograms.
- (e) Tariffs for licensing of extraterritorial rights or for equitable remuneration for broadcasting or communication to the public of phonograms or for an interest in any sale of original works of art and original manuscripts of writers and composers subsequent to the first transfer by the author of the work shall be those approved by the Validation Division of the Tribunal in accordance with the provisions of the Protocol to this Treaty.
- (f) Any owner of an extraterritorial right and any authorized representative of such owner may appeal to the Tribunal against any decision of the Bureau concerning the exercise of such right.

Article 6 Ambit of protection

- (a) The protection afforded in accordance with this Treaty shall not limit or prevent the granting by the court of a Contracting Party of any protection available to the respective claimant in respect of

acts taking place or which may take place in any territory, place or object under the jurisdiction of any State.

- (b) An act (such as reproduction, performance, fixation, transmission or publication) which is done in or on a place or object 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 7 Broadcasting and communication to the public

For the purposes of this Treaty, and subject in respect of any Contracting Party to the provisions of any international or regional instrument binding such Party, in the case where broadcasting or communication to the public is effected by a transmission and such transmission is initiated in a territorial or extraterritorial area and is received or receivable by the public in an extraterritorial area or extraterritorial areas, whether or not received or receivable in any territorial area, the act of broadcasting or communication to the public shall, in the context of any extraterritorial right, be deemed to occur in the extraterritorial area of initiation of the signal (if the signal is so initiated) and in any case in any extraterritorial area in which the transmission is received or receivable by the public, and the question whether there has been broadcasting or communication to the public in any territory shall be a matter for determination by the law of the territory where the transmission is initiated or is received or receivable.

Article 8 Exhaustion of right

The right of making available to the public of the original and copies of a work, performance fixed in a phonogram, or a phonogram through sale or other transfer of ownership shall be exhausted as regards any extraterritorial area in respect of an object being the original or copy of such work, performance fixed in a phonogram, or phonogram where the first sale or other transfer of ownership of that object takes place in any extraterritorial area with the consent of the respective author, performer or phonogram producer owning such right in such object.

Article 9 Limitations and exceptions

- (a) The following limitations and exceptions apply to the exercise of extraterritorial rights:
 - (i) the making of quotations from published works in accordance with the conditions provided in Article 10(1) of the Berne Convention;
 - (ii) specified limitations and exceptions as unanimously agreed by the Contracting Parties, being limitations or exceptions which are confined to certain special cases which do not

conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder.

- (b) Subject to paragraph (a) no limitations or exceptions shall apply to the exercise of territorial rights.

Article 10 Terms of protection of extraterritorial rights

- (a) The terms of protection of extraterritorial rights are as follows:
- (i) authors' works: subject to (ii), (iii) and (iv) below, life of the author and 50 years after his death, measured from the end of the year in which such death took place;
 - (ii) cinematographic works: 100 years from the end of the year in which the work was made;
 - (iii) anonymous or pseudonymous works: 50 years from the end of the year in which the work has been lawfully made available to the public, or if not so made available in such period, 50 years from the end of the year in which the work was made, but if in any case the authorship is or becomes known, the term in (i) above;
 - (iv) works of joint authorship other than cinematographic or anonymous or pseudonymous works: the term in (i) above, measured from the end of the year in which the death of the last surviving author took place;
 - (v) performances: 50 years from the end of the year in which the performance was fixed in a phonogram or if not so fixed, 50 years from the end of the year in which the performance took place;
 - (vi) phonograms: 50 years from the end of the year in which the phonogram was published, or failing such publication within 50 years from the fixation of the phonogram, 50 years from the end of the year in which the fixation was made;
 - (vii) broadcasts: [50] years from the end of the year in which the broadcast took place.
- (b) For the purposes of paragraph (a)(iii)(vi), no account shall be taken of the making available of copies to the public in any extraterritorial area.

Article 11 Jurisdiction

In respect of an action or proceedings for infringement or threatened infringement of an extraterritorial right or concerning contravention or threatened contravention of an associated protection measure the courts of the Contracting Parties and the Tribunal shall have (i) personal jurisdiction over any person alleged to have committed or to be

threatening to commit such infringement, or to have contravened or to be threatening to contravene such measure, and (ii) subject matter jurisdiction to hear and determine such action or proceedings.

Article 12 Applicable law

In an action or proceedings before the Tribunal or in the court of a Contracting Party for or in relation to infringement or threatened infringement of an extraterritorial right or liability for contravention or threatened contravention of an associated protection measure the applicable law shall be that established by the provisions of this Treaty.

Article 13 Liability for infringement of extraterritorial rights

- (a) A person who infringes or threatens to infringe any extraterritorial right shall be liable to remedies in respect of such infringement, such remedies being those of the categories agreed by the Parties in pursuance of Article 15(a)(b)(c).
- (b) Liability for infringement of an extraterritorial right in an extraterritorial area is constituted by (i) the unauthorized doing of an act within the ambit of such right, or by authorizing or contributing to such doing, or (ii) the unauthorized importation into such area of an article, component or other device of which the making would have constituted infringement of such right if the article, component or device had been made in such area, or of which the primary purpose is the effecting of such infringement, or by authorizing or contributing to such importation, or (iii) the unauthorized operation whether initiated in or outside such area of any article, component or other device located in such area which effects the infringement in such area of such right, or by authorizing or contributing to such operation.
- (c) A person who in respect of any extraterritorial right fails to pay any equitable remuneration or sum due in respect of an act committed by or with the authority of such person in any extraterritorial area shall as determined by the Tribunal be liable for the payment of such remuneration or sum and to provisional measures for the prevention of the re-occurrence of such failure.
- (d) Liability for any damaging effect in the territory of a Contracting Party resulting from the commission of an act which infringes or threatens to infringe any extraterritorial right shall be determined by the courts of and in accordance with the law of such Contracting Party.

Article 14 Liability for contravention of associated protection measures

- (a) A person who in terms of the agreement reached by Contracting Parties under Article 3(b) contravenes or threatens to contravene any associated protection measure shall as determined by the

Tribunal be liable to the remedies established in accordance with Article 16(c).

- (b) Liability for contravention of an associated protection measure in any extraterritorial area is constituted by
 - (i) the unauthorized doing of an act within the ambit of such measure, or by authorizing or contributing to such doing, or
 - (ii) the unauthorized importation into such area of an article, component or other device of which the making would have constituted contravention of such measure if the article, component or device had been made in such area, or of which the primary purpose is the effecting of such contravention in such area, or by authorizing or contributing to such importation, or
 - (iii) the unauthorized operation whether initiated in or outside such area of any article, component or other device located in such area which in or outside such area effects the contravention of such measure, or by authorizing or contributing to such operation.

Article 15 Remedies

- (a) In respect of civil remedies for infringement or threatened infringement of extraterritorial rights, the Contracting Parties agree to comply with the provisions of Sections 1 to 4 inclusive of Part III (Enforcement of Intellectual Property Rights) of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, and in accordance therewith shall agree the specific legal remedies to be available for such infringement or threatened infringement.
- (b) In respect of criminal remedies for infringement or threatened infringement of extraterritorial rights, the Contracting Parties shall agree the remedies as mentioned in Article 61, second and third sentences of Part III of the Agreement mentioned in (a) above to be available in respect of such infringement or threatened infringement, and the means of imposing such remedies.
- (c) The Contracting Parties shall agree the specific legal remedies to be available in respect of contravention or threatened contravention of associated protection measures, and the means of imposing such remedies.
- (d) Any act in an extraterritorial area which by way of copyright or related rights piracy on a commercial scale infringes an extraterritorial right of a national of a Contracting Party shall *ipso facto* be considered as an act entitling such Party to hold the person committing such act criminally liable for such act and to impose on such person in respect of such act remedies as mentioned in Article 61, second and third sentences of Part III of the Agreement mentioned in (a) above.

Article 16 Enforcement of Tribunal orders

Orders of the Tribunal shall, subject to the respective rules on enforcement of judgements as obtaining in the territories of the respective Contracting Parties, be enforced in accordance with the provisions of this Treaty.

Article 17 Reservations

No reservation to this Treaty shall be permitted.

Article 18 Application of the Treaty

Contracting Parties undertake to adopt the measures necessary to ensure the application of this Treaty.

Article 19 Entry into force

This Treaty shall enter into force three months after the occurrence of the last of the following events, namely (a) deposit of the fifth instrument of ratification, acceptance or access, (b) the establishment of the Space Copyright Tribunal and (c) the establishment of the Space Copyright Bureau.

Article 20 et seq.: Administrative and final provisions

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APPENDIX B: DRAFT PROTOCOL TO THE SPACE COPYRIGHT TREATY**DRAFT PROTOCOL TO THE SPACE COPYRIGHT TREATY****Concerning the Space Copyright Tribunal and the Space Copyright Bureau**

The Contracting Parties to the Space Copyright Treaty (“the Treaty”) agree as follows concerning the establishment of the Space Copyright Tribunal (“the Tribunal”) and the Space Copyright Bureau (“the Bureau”):

1. Constitution of the Tribunal

- (a) The Tribunal shall be composed of a Judicial Division, a Validation Division and an Appeals Division, and shall be assisted in its functions by the Tribunal Office.
- (b) The Judicial Division shall be composed of Tribunal Judges appointed by the Contracting Parties. Each Contracting Party shall appoint four Judges.
- (c) The Tribunal Judges shall elect the President of the Tribunal,
- (d) The Validation Division shall be composed of Tribunal Judges and non-judicial members, being persons appointed by the Contracting Parties to represent the interests of rightholders and the public. Each Contracting Party shall appoint one non-Judicial member being a rightholder representative and one non-Judicial member being a public interest representative.
- (e) The Appeals Division shall be composed of Tribunal Judges.
- (f) An appeal lies to the Appeals Division from any decision of a Tribunal Judge sitting in the Judicial Division.

2. Actions and proceedings before the Tribunal

- (a) The Tribunal has competence to hear and determine actions and proceedings brought before it in accordance with the Treaty and with this Protocol, and shall establish the Tribunal's Procedural Rules in this connection.
- (b) Actions or proceedings for actual or threatened infringement of the rights accorded under the Treaty or for contravention of associated protection measures shall be conducted through the Tribunal website in conformity with the Tribunal's Procedural Rules.
- (c) Actions or proceedings in the Judicial Division are commenced before a single Tribunal Judge.
- (d) Applications for approval of licensing tariffs and conditions in accordance with Paragraph 8 hereof shall be heard by the Validation Division panel consisting of one Judge, one rightholder representative and one public interest representative.

3. Tribunal powers

- (a) In pursuance of Article 15 of the Treaty the Tribunal has powers:
 - (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 or contravening 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) The Tribunal shall not recognise rights additional to those granted in accordance with the Treaty.

4. The Tribunal Office

[Administration, members and duties of the Tribunal Office, including maintenance and operation of the Tribunal website.]

5. Staff of the Bureau

The staff of the Bureau shall be appointed by and shall perform its duties in accordance with the administrative rules established by the Contracting Parties.

6. Functions of the Bureau

The functions of the Bureau are

- (a) to receive notifications of claims for extraterritorial rights and mandates to act in proceedings for infringement of such rights and for contravention of additional protection measures;
- (b) to act in accordance with the notifications and mandates received by the Bureau and to administer the extraterritorial rights confided to it;
- (c) to maintain and operate the Bureau website;
- (d) generally to support and promote the recognition and protection of copyright and related rights and additional protection measures; and
- (e) the Bureau's functions under (a) to (c) above may by agreement of the Contracting Parties be extended to encompass other rights.

7. Repertoire and licensing facilities of the Bureau

- (a) Notification of claims to rights and mandates concerning associated protection measures shall be submitted to the Bureau

in such form and on payment of such fees as the Bureau in accordance with the approval of the Validation Division may require.

- (b) The repertoire, description and licensing facilities of rights administered by the Bureau shall be publicly available on the Bureau website.

8. Validation procedures

- (a) In accordance with the Tribunal's Procedural Rules, the Bureau shall file with the Tribunal Office the tariffs which the Bureau proposes to apply.
- (b) The Tribunal Office shall publish such proposals on the Tribunal website and invite public comments and representations thereon to be submitted to the Validation Division in accordance with the Tribunal's Procedural Rules.
- (c) The Validation Division shall in accordance with the Procedural Rules publish on the Tribunal website the proposed Tariffs as approved by it.
- (d) The Bureau shall not apply any tariff which does not conform to a decision of the Validation Division.

9. Budgets

The budgets of the Tribunal and the Bureau shall be to the charge of the Contracting Parties.

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APPENDIX C: DRAFT AGREED STATEMENTS

DRAFT AGREED STATEMENTS

adopted by the Contracting Parties concerning the Space Copyright Treaty and Protocol thereto

Concerning Article 1(d)(g)(h)(j)

The subject matters covered by and content of the extraterritorial rights to which reference is made in Article 1(d)(g)(h)(j) are as listed below. All rights are exclusive unless otherwise indicated. The extraterritorial rights listed under B. below are subject to limitations and exceptions as applying in accordance with Article 9 of the Treaty.

A. Subject matters of extraterritorial rights

1. Author's original works being books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works, choreographic works and entertainments in dumb show; musical works with or without words; cinematographic works and works expressed by process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works and works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science; translations, adaptations, arrangements of music and other alterations of the foregoing works; collections of works, computer programs, compilations of data or other materials (Berne Convention, Article 2, WCT Articles 4, 5).
2. Performances by actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary or artistic works or expressions of folklore (WPPT, Article 2(a)).
3. Phonograms being fixations of the sounds of a performance or of other sounds or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work (WPPT, Article 2(b)).
4. Broadcasts being transmissions by wireless means for public reception of sounds or of images and sounds (Rome Convention, Article 3(b)).

B. Content of extraterritorial rights

1. In respect of authors' works:
 - (a) rights to claim authorship and to object to derogatory action in relation to the work (Berne Convention, Article 6*bis*);
 - (b) right of translation (Berne Convention, Article 8);
 - (c) right of reproduction (Berne Convention, Article 9);
 - (d) right of communication to the public by wire or wireless means including making available online (Berne Convention, Articles 11, 11*bis*, 11*ter*, WCT Article 8);
 - (e) right of adaptation (Berne Convention, Article 12);
 - (f) in so far as not covered by (d), public performance and communication to the public (dramatic, dramatico-musical and musical works); public recitation and communication to the public of recitation (literary works) (Berne Convention, Articles 11, 11*bis*, 11*ter*);

- (g) in so far as not covered by (c) (d) (e) above, cinematographic adaptation and reproduction of work; distribution, public performance, communication to public by wire of works thus adapted or reproduced (Berne Convention, Article 14);
- (h) right of distribution (subject to exhaustion rule, cf. Draft Treaty, Article 8) (WCT, Article 6);
- (i) right of rental of computer programs, cinematographic works, and (with exercise as agreed by the Contracting Parties (the determination required by WCT, Article 7(1)(c) not being required by the Treaty)), works embodied in phonograms (cf. Draft Treaty, Article 5(c)(i)) (WCT, Article 7(1), subject to the conditions of Article 7(2)).

2. In respect of performances:

- (a) rights of identification and of objection to prejudicial modification (as regards live aural performances and performances fixed in phonograms) (WPPT, Article 5);
- (b) right of broadcasting and communication to the public of unfixed performances (except where performance already a broadcast performance) (WPPT, Article 6(i));
- (c) right of fixation of unfixed performances (WPPT, Article 6(ii));
- (d) right of reproduction of performances fixed in phonograms, and if not fixed in phonograms, (i) if fixed without the performers' consent, or (ii) if fixed for purposes different from those for which the performers gave their consent or (iii) if the original fixation was made in accordance with Article 9 of the Treaty, and the reproduction is made for purposes different from those covered by such Article (Rome Convention, Article 7(1)(c), WPPT, Article 7);
- (e) right of distribution to public of original and copies of performances fixed in phonograms through sale or other transfer of ownership (subject to exhaustion rule, cf. Draft Treaty, Article 8) (WPPT, Article 8);
- (f) commercial rental to public of originals and copies of performances fixed in phonograms (with exercise as agreed by the Contracting Parties (the option of WCT, Article 7(1)(c) not being afforded by the Treaty)), cf. Draft Treaty, Article 5(c)(ii) (WPPT, Article 9(1));
- (g) right of making available to the public of performances fixed in phonograms, by wire or wireless means through making available online (WPPT, Article 10);

- (h) right to equitable remuneration for use of commercially published phonograms for broadcasting or for any communication to the public (WPPT, Article 15).
3. In respect of phonograms:
- (a) right of reproduction of phonograms (WPPT, Article 11);
 - (b) right of distribution of original and copies of phonograms through sale or other transfer of ownership (subject to exhaustion rule, cf. Draft Treaty, Article 8) (WPPT, Article 12);
 - (c) right of commercial rental to public of originals and copies of phonograms (WPPT, Article 13);
 - (d) right of making available to the public of phonograms, by wire or wireless means through making available online (WPPT, Article 10);
 - (e) right to equitable remuneration for use of commercially published phonograms for broadcasting or for any communication to the public (WPPT, Article 15).
4. In respect of broadcasts:
- (a) right of rebroadcasting of broadcasts (Rome Convention, Article 13(a));
 - (b) right of fixation of broadcasts (Rome Convention, Article 13(b));
 - (c) where fixation of broadcast made under permitted limitation or exception for purpose other than such permitted cases, right of reproduction of fixation (Rome Convention, Article 13(c));
 - (d) right of communication to the public of television broadcasts in places publicly accessible for fee, with exercise as agreed by the Contracting Parties (the direction for domestic law as provided in the Rome Convention, Article 13(d) not being required in the Treaty), (cf. Draft Treaty, Article 5(c)(iii)).

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APPENDIX D: INTERNATIONAL SPACE LAW INSTRUMENTS: EXTRACTS

INTERNATIONAL SPACE LAW INSTRUMENTS: EXTRACTS

(The information concerning ratifications of the UN instruments is that applying as at January 1, 2008, as shown on the UN website <http://www.unoosa.org/oosa/SpaceLaw/treaties.html>, visited November 1, 2008.)

(a) UN Outer Space Treaty 1967

(98 ratifications, including all signatories to the Civil International Space Station Agreement (see (d) below), China and India)

Article II: Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Article VII: Each State Party to the Treaty that launches or procures the launching of an object into outer space including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the earth, in air or in outer space, including the moon and other celestial bodies.

Article XIII: The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the moon and other celestial bodies, whether such activities are carried on by a single State Party to the Treaty or jointly with other States, including cases where they are carried on within the framework of international intergovernmental organizations.....

(b) UN Liability Convention 1972

(86 ratifications, including all signatories to the Civil International Space Station Agreement (see (d) below), China and India)

Article I: For the purpose of this Convention:

- (a) The term “damage” means loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical or property of international intergovernmental organizations;
- (b) The term “launching” includes attempted launching;
- (c) The term “launching State” means:
 - (i) A State which launches or procures the launching of a space object;
 - (ii) A State from whose territory or facility a space object is launched;
- (d) The term “space object” includes component parts of a space object as well as its launch vehicle and parts thereof.

Article II: A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.

Article VII: The provisions of this Convention shall not apply to damage caused by a space object of a launching State to:

- (a) Nationals of that launching State;
- (b) Foreign nationals during such time as they are participating in the operation of the space object.....

Article VIII: 1. A State which suffering damage, or whose natural or juridical persons suffer damage, may present to the launching State a claim for compensation for such damage.....

(c) UN Moon Agreement 1979

(13 ratifications, but, except for Belgium and the Netherlands, not including the signatories of the Civil International Space Station Agreement, (see (d) below), or China or India)

Article 1: 1. The provisions of this Agreement relating to the moon shall also apply to other celestial bodies within the solar system, other than the earth, except in so far as specific legal norms enter into force with respect to any of these celestial bodies.....

Article 11: 1. The moon and its natural resources are the common heritage of mankind

2. The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.
.....

Article 14: 1. States Parties to this agreement shall bear international responsibility for national activities on the moon, whether such activities are carried on by governmental agencies or by non-governmental entities

.....

Article 16: [References to States in the above quoted Articles also apply to any international inter-governmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in the Agreement.]

(d) Intergovernmental Agreement on the Civil International Space Station 1998

(Signatories: Canada, Japan, Russia, the US and the eleven countries of the European Space Agency (Belgium, Denmark, France, Germany, Italy, Netherlands, Norway, Spain, Sweden, Switzerland, UK))

Article 5: 1. In accordance with Article II of the Registration Convention, each Partner shall register as space objects the flight elements listed in the Annex which it provides

2. Pursuant to Article VIII of the Outer Space Treaty and Article II of the Registration Convention, each Partner shall retain jurisdiction and control over the elements it registers in accordance with paragraph 1 above and over personnel in or on the Space Station who are its nationals

Article 16: [Cross-waiver of liability by the Partner States and related entities in respect of damage arising out of certain operations, but this cross-waiver is not applicable to intellectual property claims (Article 16(3)(d)(4))]

Article 21:

2. Subject to the provisions of this Article, for purposes of intellectual property law, an activity occurring in or on a Space Station flight element shall be deemed to have occurred only in the territory of the Partner State of that element's registry, except that for ESA-registered elements any European Partner State may deem the activity to have occurred within its territory. For avoidance of doubt, participation by a Partner State, its Cooperating Agency, or its related entities in an activity occurring in or on any other Partner's Space Station flight element shall not in and of itself alter or affect the jurisdiction over such activity provided for in the previous sentence.

.....

4. Where a person or entity owns intellectual property which is protected in more than one European Partner State, that person or entity may not recover in more than one such State for the same act of infringement of the same rights in such intellectual property which occurs in or on an ESA-registered element.

Article 22: 1. Canada, the European Partner States, Japan, Russia, and the United States may exercise criminal jurisdiction over personnel in or on any flight element who are their respective nationals.

.....

See also Article 11 of the Annex to UN General Assembly Resolution on the Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, 37/92 of December 10, 1982 providing (*inter alia*) that States should co-operate on a bilateral and multilateral basis for protection of copyright and neighbouring rights by means of appropriate agreements between the interested States or the competent legal enterprises acting under their jurisdiction.

[END]