

**UNITED STATES PATENT AND TRADEMARK OFFICE REQUEST FOR  
COMMENTS CONCERNING PROPOSED CONVENTION ON JURISDICTION AND  
FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS**

**(66 FED.REG.4357 OF AUGUST 14, 2001)**

**Comments of Professor J.A.L. Sterling**

**Introductory**

I was called to the English Bar in 1953. I teach international copyright law at postgraduate level in the University of London. I have over 45 years experience in the field of copyright, at the national, regional and international levels. I am the author of a number of works on copyright.<sup>1</sup> I represent the British Computer Society on the British Copyright Council (a non-governmental association representing creators of copyright works, performers and publishers throughout the United Kingdom), but these comments constitute an independent submission and represent a personal view.

**A. Scope of comments**

These comments are limited to considerations concerning actions for infringement of copyright.

**B. Basic comment**

It is submitted that the proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters ("the draft Convention") in its present form,<sup>2</sup> leaves open certain questions which need to be settled if a just and practical system in relation to jurisdiction and recognition and enforcement of judgments in copyright infringement actions is to be established. These questions are the following.

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<sup>1</sup> Latest book publication: *World Copyright Law* (Sweet & Maxwell, 1998) ("WCL"). Latest article publication "The Draft International Copyright Code and E-Justice: Global Solutions to Global Challenges" [2001] *European Intellectual Property Review* (EIPR), November.

<sup>2</sup> These comments are based on the text of the draft Convention as incorporated in the summary of the First Part of the Diplomatic Conference on the Draft Convention, June 6-20, 2001, available on <http://www.hcch.net/e/workprog/judgm.html>.

1. Enforcement of judgments: the grounds on which recognition or enforcement of judgments may be refused need clarification and amendment.
2. The interrelation between jurisdiction and recognition and enforcement of judgments on the one hand and the rules concerning applicable law on the other needs to be addressed.

### C. Background

Over 150 copyright statutes are in force throughout the world.<sup>3</sup> Although, through the effect of international Conventions, Treaties and Agreements<sup>4</sup>, these statutes contain similar provisions on a number of matters, there are fundamental differences between national laws in a number of areas.

Here are some examples.

1. Ascription of authorship: countries have different rules as to the persons who may be considered as authors of works. For example, in Germany the cameraman may be considered as an author of the cinematographic work.<sup>5</sup> In the United Kingdom ("UK") only the producer and the principal director can be authors of the film.<sup>6</sup> In France the cameraman is not included among those who are *prima facie* considered to be authors of the cinematographic work.<sup>7</sup> In the US, there is no fixed rule in this respect: the ascription of authorship will depend on creative contribution (see below).
2. Subject matter of protection: some countries, such as the United Kingdom and the other countries of the Commonwealth<sup>8</sup>, protect sound recordings and

<sup>3</sup> For a list (to 1998) of the statutes see WCL, para 51.01 and following.

<sup>4</sup> The main international instruments in this area are the Berne Convention for the Protection of Literary and Artistic Works (1886, Paris Act 1971), the Universal Copyright Convention (1952, Paris Act 1971), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961, the TRIPS Agreement 1994, the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaty 1996. Except for the Rome Convention, the US is a party to all these Conventions and Treaties, and the TRIPS Agreement.

<sup>5</sup> Schricker, *Urheberrecht Kommentar* (Beck, 2<sup>nd</sup> ed., 1999), p.124.

<sup>6</sup> UK Copyright, Designs and Patents Act, 1988, as amended to date ("the UK Copyright Act"), s.9(2)(ab).

<sup>7</sup> French Intellectual Property Code, 1992, art.L.113-7.

<sup>8</sup> The Commonwealth consists of the United Kingdom, Canada, Australia, New Zealand, India, Pakistan and a number of countries in the Caribbean, Africa, South East Asia etc. Israel and Ireland have laws based on the British

broadcast transmissions by copyright. The US Copyright Act<sup>9</sup> protects sound recordings by copyright, but does not protect broadcast transmissions as such. France, Germany and other civil law countries<sup>10</sup> do not protect sound recordings or broadcasts by author's right, but by a "neighbouring" or "related" right. The US Copyright Act has no category of "neighbouring" or "related" rights.

3. Initial ownership: under the US Copyright Act and the copyright laws of the United Kingdom and the rest of the Commonwealth, the copyright in works created by employees in the course of their employment belongs initially to the employer, if there is no contract to the contrary. Under the French and German laws and other statutes of the civil law system, the economic rights in the work belong initially to the employee, if there is no contract to the contrary.
4. Protection criteria:
  - (a) Fixation: in the US and the countries of the Commonwealth, fixation of the work is a prerequisite of copyright protection.<sup>11</sup> In the civil law countries, unfixed works may be protected by author's right.<sup>12</sup>
  - (b) Originality test: under the copyright law of the United States, a work to be considered "original" and thus entitled to copyright must evince a "modicum of creativity": mere investment of labour is not enough<sup>13</sup>. Under the UK Copyright Act, the general test for originality is the investment of skill and labour.<sup>14</sup> So a work which is not "creative" but results from investment of skill and labour can be protected in the UK, but, if lacking creativity, will not be protected by copyright in the US. The "skill and labour" test applies throughout the Commonwealth, apart from

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system. All these countries can be said to have laws based on the "common law" copyright system.

<sup>9</sup> S.102(a)(7). References to the US Copyright Act are to Pub.L.No.94-533, the US Copyright Act 1976, as amended to date.

<sup>10</sup> The civil law countries include all countries of Continental Europe (including Russia), most Central and South American countries (including Mexico) and the French speaking countries of Africa.

<sup>11</sup> US Copyright Act, s.102(a); UK Act, s.3(2).

<sup>12</sup> See the articles on France by Plaisant/Lucas and on Germany by Adolf Dietz in Nimmer/Geller *International Copyright Law and Practice* (Matthew Bender, looseleaf, 1988-), sections 2[1][a]. The Berne Convention allows Member States to decide whether or not to adopt the fixation criterion (Art.2(2)).

<sup>13</sup> *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* 499 US 340; 113 L.Ed. 2d 358; 111 S.Ct. 1282; 18 USPQ 2d 1275 (1991).

<sup>14</sup> See Copinger on Copyright (Sweet & Maxwell, 14<sup>th</sup> ed., 1999) para 3-89.

Canada, where the "creativity" approach has been adopted. Civil law countries and the United States adopt a "creativity" criterion.<sup>15</sup>

5. Statutory moral rights: the statutes of the civil law countries grant moral rights (including the rights of the author to be identified, and to object to prejudicial distortion, mutilation etc. of the work).<sup>16</sup> However, the position is different in common law countries: some countries, such as the UK, Australia and Canada, grant statutory moral rights: others do not, relying on protection available under other headings of law (defamation, contract, unfair competition etc.). In its Federal law, the US only grants statutory moral rights in respect of certain works of visual art.<sup>17</sup>
6. Limitations: copyright laws generally contain specific provisions restricting or excluding the exercise of copyright in certain cases. In the national laws-taken together, there are literally hundreds of provisions concerning limitations. In some laws, many limitations are specified.<sup>18</sup> On the other hand, in France, for example, there are few general limitations.<sup>19</sup>

What may be called "exceptions" must also be taken into account in this connection, that is, material which as a whole is specifically excluded from copyright protection. Thus statutes and judgments are not protected under the US Copyright Act, but they are protected by copyright under the copyright laws of the United Kingdom and most other common law countries. So, for instance, under the terms of the UK Copyright Act, the texts of the US Copyright Act and the texts of judgments of US courts are

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<sup>15</sup> French law requires in general that to be protected by author's right, the work must bear "the imprint of the author's personality". German law refers in this context to "personal intellectual creations" (German Author's Right Law 1965, art.2(2)). See the articles on France by Plaisant/Lucas, and on Germany by Adolf Dietz in Nimmer/Geller *International Copyright Law and Practice* op. cit., sections 2[1][b][iii][A] and 2[1][b] respectively.

<sup>16</sup> Moral rights must be accorded by all Member States of the Berne Convention: see Article 6bis.

<sup>17</sup> US Copyright Act, s. 106A.

<sup>18</sup> See for example US Copyright Act ss.107-122 and UK Copyright Act ss.28-76 (extensive limitation provisions), German Author's Right Law 1965, arts.45-60 (considerable number of limitations). For details, see WCL paras.10.17-10.21.

<sup>19</sup> See the French Intellectual Property Code 1992, art.L.122-5 (restricted limitations (four headings)): see WCL para.10.17.

protected by copyright in the UK, though not protected in the US.<sup>20</sup> Such material is not generally protected in civil law countries.

There is no international agreement on a common list of specific limitations. So, as regards a particular use, an author may be protected in one country, but not (because of the effect of a limitation) in another. Of particular relevance in this connection are the provisions in the US Copyright Act concerning "fair use": these provisions find no counterpart in the laws of countries of the civil law system, and only limited comparisons in those of other common law countries.<sup>21</sup>

There is also the complicated area of term of protection. In the US, and the European Community<sup>22</sup>, the general term of protection for an author's work is life of the author plus 70 years, but in most of the rest of the world, the Berne Convention term applies (life of the author plus 50 years (Art.7(1))). There is however, a difference between discrepancies as to term of protection and discrepancies in national laws in the six examples mentioned above: the Berne Convention specifically provides that countries may apply the "comparison of terms" rule where the foreign country concerned grants a shorter period of protection than the country where the action is being taken: the term of protection of the foreign work can be restricted to the duration of the local term.<sup>23</sup> With regard to ascription of authorship, protection of particular items of subject matter, initial ownership rules, the fixation and originality tests, statutory recognition of moral rights and limitations to rights, however, there is no Conventional rule specifically dealing with the situation where the national laws concerned are different, in the case where the foreign law may be applicable.<sup>24</sup>

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<sup>20</sup> See Berne Convention, Art.3. A Member State cannot refuse protection in respect of a foreign work merely because the work is not protected in its country of origin (subject to certain exceptions (Arts.2(7), 6(1), 7(8), 14ter(2), which do not apply in this case)).

<sup>21</sup> See for instance the "fair dealing" provisions of the UK Copyright Act, ss.29-30 (confined to specific cases concerning research and private study, criticism, review and news reporting).

<sup>22</sup> Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom,

<sup>23</sup> Berne Convention, Art.7(8).

<sup>24</sup> Reference may be made to Article 5(2) of the Berne Convention which provides that the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively

#### **D. The fundamental requirements for legal recognition of copyright**

There are three fundamental requirements for legal recognition of copyright: the jurisdiction of the court, the applicable law and the procedure for recognition and enforcement of judgments. If one of these requirements is absent, there can be no effective recognition of copyright. Considerations concerning these three requirements are inextricably interwoven with each other.

The draft Convention deals with two of these requirements, namely jurisdiction and recognition and enforcement of judgments.

#### **E. The need for the highest attainable degree of certainty**

If copyright is to be effectively exercised and enforced in the international context, it is in the interests of rightowners, users of protected material and the public generally that the highest attainable degree of certainty be reached in the relevant rules of jurisdiction, applicable law and enforcement of judgments.

##### **(a) Jurisdiction**

I make no comment on the ambit of the rules governing jurisdiction as contained in the draft Convention. There are many questions still to be solved in this connection, but I take the draft provisions as they are for the purpose of these comments.

##### **(b) Applicable law**

The draft Convention does not purport to provide conflicts (or "choice of law") rules<sup>25</sup>, but the question arises as to whether in the context of international copyright infringement actions, the draft Convention will, in the absence of agreed conflicts rules, create more problems than it solves, since there can be cases where diversity in rules of applicable law may affect the enforceability of the foreign judgment in the country of the addressed court, see below.

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by the laws of the country where protection is claimed. However, there is no unanimity as to what the term "the country where protection is claimed" means, i.e. whether it refers to the law of the forum, or the law of the place of the infringing act: see Ricketson *The Berne Convention for the Protection of Literary and Artistic Works 1886-1986* (Queen Mary College, Kluwer, 1987) para.5.87.

<sup>25</sup> That is, the rules to be applied where the laws of more than one country are or may be involved in the dispute.

(c) Recognition and enforcement of judgments

It is submitted that the rules on the grounds for refusal of recognition and enforcement of foreign judgments must be comprehensive, otherwise the effective administration of rights will be prejudiced by uncertainty.

**F. Conflicts problems bearing on the validity of foreign judgments**

When foreign elements are involved, as where the country of origin of the work, or the place of the alleged infringing act is a foreign country, questions of the law to be applied inevitably arise. Here are some examples, among many possible instances, of cases where the result could have been different, according to whether the foreign law or the US Copyright Act is applied.

In these examples, the following assumptions are made:

- (1) All countries concerned are bound by the Berne Convention 1971.
- (2) The country of origin of the work in suit is the USA.
- (3) The rendering court is in a foreign country, and this country and the USA, the country of the addressed court, are bound by the draft Convention (on the assumption that it comes into force).
- (4) The plaintiff is a resident of the country of the rendering court, and the defendant is a US resident.
- (5) The alleged infringing act took place in the country of the rendering court.
- (6) In each case, the rendering court has found for the plaintiff on all counts and has awarded the plaintiff \$50,000 damages against the defendant. The defendant seeks to have the judgment recognised and enforced in the US.

“Local law” means the law of the country where the trial takes place.

The permutations and combinations of cases based on different countries of origin of works and different places of infringement are almost limitless, but cases based on the above assumptions will be sufficient to demonstrate the complexities which need to be taken into account in assessing the relationship of foreign judgments to the law of the addressed court.

**Case 1: ascription of authorship****Place of trial: UK**

The plaintiff film producer made no creative contribution to a film, but is the initial copyright owner under the UK Act (s.9(2)(ab)). The judge applied local law. The US defendant was held to have copied the film unlawfully in the UK.

Under the US Copyright Act, the plaintiff was not of the class of persons who can be authors under the Act (on the assumption that the “work made for hire” provisions do not apply).

**Case 2: subject matter of protection****Place of trial: UK**

A broadcasting organisation is in the UK the owner of copyright in a broadcast transmission. The judge applied local law and the defendant was held to have broadcast the plaintiff's protected transmission unlawfully.

Under the US Copyright Act, the subject matter of the action is not protectable by copyright.

**Case 3: initial ownership****Place of trial: France**

The author of the work in suit (a painting created in 1970) was a French resident, and sued for infringement of author's right by unauthorised copying. The plaintiff worked for the defendant. The judge decided to apply US law on the question of ownership of the rights in the work (cf. *Itar-Tass Russian News Agency v. Russian Kurier Inc.* 153 F. 3d 82 (2<sup>nd</sup> Cir 1998)) and found for the plaintiff. However, the judge did not apply US law correctly, because he should have based his decision on the US Copyright Act 1909, which, on the facts of the case (cf. *Playboy Enterprises Inc. v. Dumas* 53 F3d 549, 34 USPQ2d 1737 (2<sup>nd</sup> Cir. 1993)) would have given a finding opposite to that resulting from the application of the US Copyright Act 1976. So the US judge would here be

required to enforce a judgment against a US resident in a case where the foreign judge has applied US law, but has applied it incorrectly.<sup>26</sup>

#### **Cases 4(a) and 4(b): protection criteria**

##### (a) Fixation

###### Place of trial: France

The plaintiff arranged a spectacular floodlighting of the Eiffel Tower. The judge applied local law and held that the floodlighting was a creative work, although the plaintiff did not fix it in any form (cf. the French *Eiffel Tower* case, Cass.1 civ., March 3, 1992; WCL para 6.12). The defendant made a television broadcast of the floodlighting (no recording being made of the broadcast), and was found to have infringed the plaintiff's right of communication to the public.

Under the US Copyright Act the work in suit would not be protected because it was not fixed before or simultaneously at the time the alleged infringing act took place.

##### (b) Originality

###### Place of trial: UK

The plaintiff, using skill and labour, but investing no creativity, took a photograph of a painting by Rembrandt; the photograph reproduced the painting as accurately as is possible by photography. The judge applied local law and held that the photograph was original, and that the defendant's copy of the photograph infringed the plaintiff's copyright.

It is argued that invested skill and labour in taking photographs of works of art is sufficient to constitute originality for the purpose of the UK Copyright Act and that photographs of the type involved in this case are protected by copyright.<sup>27</sup> On the

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<sup>26</sup> In so far as a precedent is relevant in this situation, Article 28(1)(b) of the draft Convention provides a ground of refusal to enforce a judgment where the judgment is inconsistent with a judgment in the State addressed, but it is not clear from the text of the draft whether this refers to a judgment in proceedings between the same parties, or to a preceding judgment in proceedings between any parties.

<sup>27</sup> See Garnett, K. "The problem of photographs of other works" in [2000] EIPR 229, and further discussion in [2001] EIPR 179, [2001] EIPR 354.

other hand, according to the decision in *Bridgeman Art Library Ltd. V. Corel Corp.*<sup>28</sup>, such a photograph, if lacking creativity, is not protected by copyright. Here there is a different aspect from the case where US law has been incorrectly interpreted, for the decision involves a criterion which has been held by the US Supreme Court to be a Constitutional requirement (namely, the investment of "a modicum of creativity").<sup>29</sup>

#### **Case 5: statutory moral rights**

Place of trial: France

The plaintiff claimed that the US defendant had infringed the plaintiff's moral right in the literary work in suit. The judge applied local law and found for the plaintiff.

Under the US Copyright Act, there are no moral rights in literary works.

#### **Case 6: limitations (exception)**

Place of trial: UK

The plaintiff owned the copyright in a judgment rendered in the High Court of England and Wales. The US defendant circulated in the UK unauthorised copies of the judgment. The judge applied local law: verdict for the plaintiff.

Under the US Copyright Act, the plaintiff would not have been able to claim copyright in the judgment.

#### **G. Public policy and similar considerations**

Article 28(1)(f) of the draft Convention provides that recognition or enforcement of a judgment may be refused on the ground that such recognition or enforcement would be manifestly incompatible with the public policy of the State addressed. However, no indication is given of what would be considered as incompatible with such policy in this respect.

<sup>28</sup> 25 F Supp 2d 421 (S.D. N.Y. 1998); 36 F Supp 2d 1991 (S.D. N.Y. 1999).

<sup>29</sup> *Feist Publications Inc. v Rural Telephone Service Co. Inc.* 499 US 340; 113 L.Ed. 2d 358; 111 S.Ct. 1282; 18 USPQ 2d 1275 (1991).

In the above cases, the question could arise as to whether it would be against public policy in the US or some other provision of the US law to enforce the respective judgments in the US. It may be that, in applying the principle of comity of nations, and the general practice in the US in this area, US courts would enforce the foreign judgments in the above cases. As general approach, it may be argued that the defendant has gone to a foreign country and must bear the consequences of acts which the defendant committed there. However, there are two points to be made in this connection. Firstly, it needs to be established whether certain judgments (for instance those involving errors in interpretation of US law, or not in accordance with Constitutional provisions) are agreed to be against public policy or other provisions of law. Secondly, the above examples concern US defendants, but US plaintiffs seeking enforcement of foreign judgments in other countries may find that there are different rules on public policy and on the rules for refusal of recognition or enforcement of judgements.<sup>30</sup>

#### H. Discrepancies in conflicts rules

A further point which needs settlement in the interest of clarity is the question whether the validity of a foreign judgment may be challenged where the conflicts rule applied by the rendering court is at variance with the law of the country of the addressed court.

These and many associated questions have long troubled lawyers working in the field of private international law and copyright.<sup>31</sup>

There is no international agreement on the rules for determining the applicable law to govern the six cases mentioned above. The consequences of this lack of agreement

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<sup>30</sup> For a survey of the enforcement rules in Europe, the Asia Pacific Region, North America and Latin America, see Platto and Horton *Enforcement of Foreign Judgments World Wide*, (Graham and Trotman and International Bar Association, 2<sup>nd</sup> ed. 1993).

<sup>31</sup> For a description and analysis of the problems in this area, see the Introduction by P.E. Geller to Nimmer/Geller *International Copyright Law and Practice* op cit. See also the Report of Ginsburg, J.C. "Private international law aspects of the protection of works and objects of related rights transmitted through digital networks", WIPO Document GCPIC/2, November 30, 1998, and update presented at the WIPO Forum on Private International Law and Intellectual Property, Geneva, January 30 and 31, 2001, text available on <http://www.wipo.int/pil-forum/en/documents>.

are of great importance in the current situation. Firstly, copyright owners, administrators of copyright and users of protected material need as much certainty as possible in the rules governing exercise of copyright, particularly in the current developments which more and more permit the transfer and international use of material emanating from many countries. Secondly, the Internet poses problems which have not previously confronted the copyright owner and the public wishing to have access to protected material. Copyright is based on a territorial concept, that is, normally, national copyright laws are to apply in situations arising in the respective national territories. But now, at the touch of a button, a protected copyright work can be made instantly available throughout the world: it can be downloaded, modified and further transmitted by a similar instantaneous process. What conflicts rules are to apply in this situation?

Certainly the abovementioned WIPO Treaties 1996, which are likely to enter into force imminently, make an important contribution to the development of substantive law in this area, in particular by establishing the "on demand availability" or "Internet" right, that is, copyright owners are to enjoy the exclusive right of authorising the placing of their works on the Internet. But the Treaties do not indicate where the "making available" takes place, e.g., in the country of upload or download, or both: and in any event, it may be difficult to identify the country of upload in the case of networked websites, or transmissions effected through hyperlinks.

Because the draft Convention does not give guidance on the question of applicable law where foreign elements are involved, and because there is at present no international agreement in this area, judges will be called upon to make their own decisions in the light of the respective national laws, and the principles on which these decisions are made may vary from country to country. Thus a copyright owner may well be assured under the draft Convention that the courts of a particular country will have jurisdiction in the case in hand, but, particularly in the Internet context, will not, in default of established rules, be able to determine what law the judge will apply in certain situations, and consequently, whether infringement proceedings will have any chance of success.

## I. Possible solutions

The following are some of the approaches which could be studied as solutions to the problems outlined above.

- (1) On the problem of grounds of refusal of recognition or enforcement of foreign judgements
  - (a) Article 28(1)(f) of the draft Convention could be amended to extend its scope by a general provision.<sup>32</sup>
  - (b) The draft Convention or its Agreed Statements could specify grounds on which recognition or enforcement of foreign judgments would be manifestly incompatible with the public policy or other laws of the State addressed (e.g. error in application of law of addressed country).
  - (c) A combination of (a) and (b) above.<sup>33</sup>

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<sup>32</sup> At the WIPO Forum on Private International Law and Intellectual Property, held in Geneva on January 30 and 31, 2001, Professor Rochelle C. Dreyfuss and Professor Jane C. Ginsburg presented a Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters (text available on <http://www.wipo.int/pil-forum/en/documents>). Like the draft Convention of the Hague Conference here considered the Dreyfuss/Ginsburg draft does not lay down specific rules of applicable law, but the authors of the draft do recognise the problems in this area: this recognition is reflected in Article 25(1)(g) of their draft (which corresponds in substance with Article 28 of the draft Convention of the Hague Conference) which provides that recognition or enforcement of a judgment may be refused where the rendering court's choice of law was arbitrary or unreasonable. In their comments on Article 25(1)(g) the authors state "While this is not a choice of law convention, the forum's choice of law rules are likely to influence what forum the parties choose. We therefore believe the issue of applicable law would need to be confronted, at least indirectly at some point. By making arbitrary and unreasonable choice of law a ground for non-recognition, we hope to supply an incentive to courts to apply reasonable choice of law rules, and to reduce the fear that the territoriality of intellectual property rights will be lost."

<sup>33</sup> It has been proposed that an International Copyright Code should be established, setting out general rules applied by an International Copyright Tribunal, and with computerisation of international copyright actions through electronic proceedings from filing to decision. For the text of the draft International Copyright Code proposed by the author of these comments on May 31, 2001, (in English, French, German and Spanish), and draft forms for use in the system of international computerisation of copyright infringement actions, see the website <http://www.ccls.edu/iplaw/icc.html>, with invitation to comment by e-mail at [ccls-icc@qmw.ac.uk](mailto:ccls-icc@qmw.ac.uk). The text of the draft Code is also reproduced in [2001] EIPR, November. Under the draft Code, decisions of the Tribunal would be subject to confirmation by the addressed court, and the defendant would be able to raise defences allowed by the local law, subject to that law's rules on enforcement of foreign judgments. Consequently, the

(2) On the problem of conflicts rules

A general conflicts rule could be adopted.<sup>34</sup>

**J. Summary**

The nature of copyright, and its theoretical, territorial and constitutional aspects, combined with the widely different provisions of national copyright laws on a number of basic issues, require the elaboration of specific rules taking account of these factors in respect of copyright infringement actions involving more than one country. The draft Convention requires amendment to take account of a number of problems arising in this area, and the ultimate aim should be an integrated system covering jurisdiction, applicable law and recognition and enforcement of judgments, capable of ensuring effective international recognition of copyright in the global information society.

Respectfully submitted,

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draft Code would go hand in hand with the internationally accepted enforcement rules.

<sup>34</sup> Possibly, as a point of departure for study, a general conflicts rule in copyright infringement actions could be that with regard to ascription of authorship, subject matter of protection, protection criteria, statutory moral rights and limitations, the applicable law should be that of the country where the alleged infringing act took place (as if all these factors were local), while the law of the country of origin of the work in suit would apply to the question of ownership of rights (allowing, for instance, application of the US "work made for hire" rules to works of US origin). Consideration would need to be given to certain special cases e.g. (1) where the country of the alleged infringing act has no copyright law (there are few countries which fall into this category); (2) where the infringing act takes place extraterritorially, e.g. in a satellite or another object in Space, and (3) where alleged infringing acts take place in a number of countries, e.g. in an Internet transmission: it is thought that the rendering court would have to take the law of each country into consideration (apart from matters concerning ownership), pending international agreement in this area. As to (2), it may be envisaged, for instance, that databases accessible from Earth will be located in satellites operating extraterritorially. The question of applicable law in such circumstances will be of vital concern to copyright owners. For another suggestion concerning choice of law rules, see the Report of Professor Ginsburg presented at the WIPO Forum, Geneva, January 30 and 31, 2001, op. cit.