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# The New Frontiers of Copyright: Enforceable Rights in the Space Age\*

James O. Moermond, III\*\*

## I. Introduction

The topic of this article is the status of international copyright protection for intellectual property. Satellite transmissions will be discussed as illustrative of the new stresses being placed on the traditional foundation of copyright. This analysis will attempt to de-emphasize perceived biases in the current literature, by two "new" approaches. The first is to shift the emphasis away from the author and towards that of the public and publishers. The second is to shift the emphasis away from copyright law and towards property law as a whole, as well as space and international law. This article is intended to help form a framework for meaningful discussion aimed at changing the foundation or base upon which current international copyright protection is founded.

The traditional concepts of copyright in particular, and intellectual property in general, are becoming inadequate to protect the interests of creators in today's global society. This inadequacy results from a lack of consensus as to what the owners of the quasi-property, copyright are actually entitled to as compensation and from new technologies which strain old definitions. A new approach, a *sui generis* international agreement emphasizing the transactional aspects of intellectual property rights should be implemented to compensate for current and likely increasing deficiencies in the current system.

Copyright will be examined in light of trilateral rights, divergent perspectives, and technological challenges. These three premises will help explain some of the reasons behind the arduous task of protecting intellectual property internationally. They are inter-related, and have been somewhat arbitrarily divided for illustration.

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### A. *Trilateral Rights*

It is important to examine copyright or intellectual property comprehensively, recognizing the interdependent, if not equal, trilateral rights of the author, publisher, and public. Copyright is particularly appropriate for a trilateral approach because the rights or benefits derived by one point of the triangle are dependent upon the other two. To receive a remuneration from a work, the author needs, not only a public willing to pay for that work, but also a publisher to distribute that work to the public. The public needs both the author and the publisher to benefit from the work, and the publisher in turn requires both an author and a public to benefit from the work. "The challenge to be faced relates to the need to protect the legitimate interests of the authors at the same time of ensuring the widest possible public access to the authors' works via satellite and cable."<sup>1</sup>

Initially, copyright was a concept used to protect book publishers. Copyright "later was supplemented with concepts defined in terms of rights granted to the author."<sup>2</sup> There has since "arisen a confusion between the protection of the publisher and the protection of the author, with the former being able to hide, as it were, behind the author, despite their often conflicting interests."<sup>3</sup> Confusion and conflict are increased when considered in light of the essential requirements for information in modern economies.

A majority of the literature on copyright protection for satellite broadcasts tends to focus on the rights of the author, defending their copyright. However, "bias, and fear of bias, make an author's judgment on copyright a little unreliable."<sup>4</sup> "This defensive attitude also has the unfortunate result that a critical analysis of copyright concepts and practices is taken as an attack on those who are protected by copyright."<sup>5</sup> The issue then is whether the traditional copyright is the best way to govern access and control over the work in question.

### B. *Divergent Perspectives*

International protection of intellectual property rights and the dissemination of information raise some fundamental ideological conflicts that have frustrated a uniform or universally accepted copy-

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1. M.H. PICHLER, *Copyright Problems of Satellite Transmissions of Programme-Carrying Signals in Western Europe* in PROCEEDINGS OF THE TWENTY-NINTH COLLOQUIUM ON THE LAW OF OUTER SPACE 128 (1986).

2. E.W. PLOMAN & L.C. HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 178 (1980) [hereinafter PLOMAN & HAMILTON]; see, e.g., Statute of Anne, 8 Anne c.19 (1709).

3. PLOMAN & HAMILTON, *supra* note 2, at 178.

4. A. PLANT, *The Economic Aspects of Copyright in Books*, in *ECONOMICA*, May, 1934, at 168, cited in PLOMAN & HAMILTON, *supra* note 2, at 176.

5. PLOMAN & HAMILTON, *supra* note 2, at 176.

right law. Specifically, divergent political, economic and cultural approaches have resulted in equally divergent legal approaches to the protection of intellectual property. "Different interests and changing balances of power are observable in the process of forming the international practice and legal regulation in this special field of space law and even of international copyright law."<sup>6</sup>

1. *Commodity vs. Resource Dichotomy.*—Generally stated, the author, or copyright owner, has the exclusive right to sell, perform, or authorize distribution of the work. Thus the author retains some rights in the work after such a transaction.

As to the legal nature of copyright, it must be emphasized 'the author's right is not a property right either, as understood under the law of property it can only be subsumed under the broader category of intellectual property if the latter is understood as a special term in common parlance for exclusive rights *sui generis*, resulting from intellectual creations. The label "intellectual property" proved to be a mere indication of the exclusive nature of the rights in intellectual creations rather than a legal classification there of.'<sup>7</sup>

Simply stated, "property" is subject to many different and valid interpretations. Private ownership, in the American sense of the word, does not exist in communist or socialist states. Private versus state or public ownership of property raises the vital issue of how copyright is to be characterized. The dichotomy of a commodity versus resource approach presents itself.

2. *Commodity Approach to Copyright Characterization.*—"The concept of information as a commodity has . . . evolved in countries with a market economy."<sup>8</sup> The commodity concept is based upon the notion that certain information, which may or may not be copyrighted, is capable of being bought and sold. The respec-

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6. I. SZILAGYI, *International Copyright Questions of Indirect Broadcasts by Satellites*, in PROCEEDINGS OF THE TWENTY-SECOND COLLOQUIUM ON THE LAW OF OUTER SPACE 213 (1979). To a large extent these opposing perspectives or viewpoints have frustrated uniform laws on many issues, both internationally and domestically. For example, within the United States the Uniform Commercial Code is subject to many different state interpretations. Although these deviations are generally minor, they illustrate the problem of reaching a common ground for laws within one nation, let alone on an international plane.

7. I. SZILAGYI, *Space Law-Copyright-Neighboring Rights: A Theoretical Approach*, in PROCEEDINGS OF THE TWENTY-SEVENTH COLLOQUIUM ON THE LAW OF OUTER SPACE 197 (1984), citing G. Boytha, *Whose Right is Copyright?*, 85 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, INTERNATIONALER TEIL, 379-385 (1983). Perhaps the biggest obstacle preventing intellectual property, including copyrights, from being wholly accepted as property in the classic sense is the inherent restraint on alienability imposed on those who wish to use the work. While this does not remove the work from the rubric of property, it does make the fit somewhat more uncomfortable for copyright owners.

8. PLOMAN & HAMILTON, *supra* note 2, at 218.

tive values to the buyer and seller are protected within the concept of the transferability of a private property interest.

3. *Resource Approach to Copyright Characterization.*—In contrast, the concept of information as a resource is related to the notion of *res communis*, or the common heritage of mankind. The resource concept essentially precludes an individual nation from exercising the property right of exclusion by denying appropriation in the name of the common heritage of mankind. This principle is embodied in such international agreements as the Convention on the High Seas at Article 2,<sup>9</sup> the Antarctic Treaty at Article 14(2),<sup>10</sup> and the Outer Space Treaty at Article 2.<sup>11</sup> The Radio Regulations of the International Telecommunications Conference also consider space to be the common property of mankind, not subject to private or individual state ownership.<sup>12</sup> However, these agreements regulate natural resources, *not* intellectual property or human creations.

4. *Effects within Socialist and Developing States.*—Developing states tend to view some information, gathered by remote sensing for example, as not only important for economic development, but necessary for survival. The withholding of vital crop statistics in lieu of high copyright payments is viewed by some developing states more as criminal extortion threatening starvation, and less as the mere operation of market forces. The withholding of this information also inhibits economic development resulting from agricultural or natural resources.

The importance of information lies in its role as a central factor in decision-making, including all matters related to development. Information is a precondition for identifying alternatives, reducing uncertainties about their implications, and facilitating their implementation. As such, information is a critical resource, not the least for enhancing the negotiating capabilities of developing countries in the pursuit of clearly defined objectives, in particular in dealing with transnational corporations.<sup>13</sup>

The Socialist and developing states tend to view individual or

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9. *Done at Geneva*, April 29, 1958, *entered into force* for the U.S., Sept. 30, 1962, 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

10. *Done at Washington*, Dec. 1, 1959, *entered into force* for the U.S., June 23, 1961, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

11. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *done at Washington, London, and Moscow*, Jan. 27, 1967, *entered into force* for the U.S., Oct. 10, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 [hereinafter OUTER SPACE TREATY].

12. Radio Regulations, *infra* note 49, art. N28/7.

13. U.N. CENTER FOR TRANSNATIONAL CORPORATIONS, TRANSBORDER DATA FLOWS: ACCESS TO THE INTERNATIONAL ON-LINE DATABASE MARKET (New York: United Nations, 1983); *cited in* OTA, *infra* note 20, at 229.

group intellectual work product as the property of society as a whole. Adolf Dietz suggests that associations of authors and users are similar to labor unions and that agreements between them should be viewed as collective bargaining agreements. This is evidence of a "trend implying that copyright should be detached from the domain of property rights and be brought into the area of labour law."<sup>14</sup> "To some extent, this line of reasoning seems to bring the market-oriented approach closer to the principles that have been adopted in socialist countries."<sup>16</sup>

5. *Rights of Author and Public in Context of the Universal Declaration of Human Rights*.—Interestingly, the Universal Declaration of Human Rights<sup>16</sup> recognizes both the interests of the public and copyright owners at Article 27.

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) 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.

To some extent, a law or doctrine which recognizes both these rights is at war with itself. These rights, however, are not mutually exclusive. The problem surfaces when one tries to strike a balance between them. Different cultures, economies, and governments respond differently to changing needs for copyrighted materials or information. It is in this context that domestic and, more importantly, international legal frameworks for governing the exchange of information are needed if a just, value for value, transactional atmosphere is to survive. The creation of such an environment is what should become the goal of international intellectual property law. The alternative could well be what copyright owners would perceive as a taking, possibly causing them to guard the works more closely, or possibly not to create them at all.

### C. *Technological Challenges*

Satellite transmissions are just one example of how the advances of technology have rendered copyright protection more difficult to

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14. PLOMAN & HAMILTON, *supra* note 2, at 46; see A. DIETZ, *LE DROIT D'AUTEUR DANS LA COMMUNAUTE EUROPEENE: ANALYSE COMPARATIVE DES LEGISLATIONS NATIONALES RELATIVES AU DROIT D'AUTEUR FACE AUX DISPOSITIONS DU TRAITE INSTITUANT LA COMMUNAUTE ECONOMIQUE EUROPECHE*, Commission of the European Communities, Brussels (1976).

15. PLOMAN & HAMILTON, *supra* note 2, at 46.

16. UNIVERSAL DECLARATION OF HUMAN RIGHTS, Dec. 10, 1948, U.N.G.A. RES. 217 A (III), U.N. DOC. A/810, at 71 (1948) [hereinafter HUMAN RIGHTS].

enforce internationally.<sup>17</sup> Enforcement is further hampered by various multi-media publications or packages. For example, movies can be broadcast in the traditional sense, transmitted by satellite, or distributed through videodiscs or cassettes. Add to this the fact that technology has increased scope or area of distribution from regional to global proportions. In the case of satellites, technology is presently unable to limit geographically the "footprint"<sup>18</sup> of satellite transmissions. This results in broadcasts or distributions which are not limited by political boundaries. Thus, multi-media publications, transmitted to multiple jurisdictions, subject a single movie with an identified copyright interest, to multiple laws.

"While these advances should not be seen as presenting dangers but opportunities, the point is made that the new media all share one central characteristic: They involve the use of protected works on a scale and in a manner that precludes the possibility of individual control."<sup>19</sup> This results in authors and users forming associations and national governments concluding treaties to resolve new copyright problems as they arise. These new arrangements, again, may be viewed as shifting away from the strict market-orientation which has resulted in either authors or users having unfavorable bargaining power within the "triangle."

Because the present set of international legal regulatory regimes and institutions are generally linked to a particular technology, new combinations of older technologies might, like new technologies, create inconsistencies between traditionally separate policies and institutions. To deal with such cross-cutting issues, the international protection for intellectual property may need to be considered in a larger social, legal, and technical context.<sup>20</sup>

## II. International Conventions

There are four conventions closely related to copyright protection for satellite broadcasts that will be discussed in this paper. While they do not represent all the conventions or treaties that could

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17. See generally OTA, *infra* note 20; PLOMAN & HAMILTON, *supra* note 2, at 148-74.

18. A satellite footprint is "the area of the earth's surface in which satellite transmissions can be received . . . Note that a footprint is a fluid concept and not a static one. Its size will depend on the technical characteristics of the receiving dish and environmental conditions. Therefore, a particular satellite transmission will have one footprint when 10-foot earth based dishes are being used and another one when 3-foot dishes are being used." MOTION PICTURE EXPORT ASSOCIATION OF AMERICA, INC., MPEAA MEMORANDUM ON THE USES OF SATELLITE TECHNOLOGY 9 (1984).

19. PLOMAN & HAMILTON, *supra* note 2, at 180.

20. OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 249 (1987) [hereinafter OTA].

possibly be applied, they are representative of the current law.<sup>21</sup>

### A. *The Berne Convention*

The Berne Convention<sup>22</sup> is significant for satellite transmissions because it grants express protection to authors' rights and against the unauthorized use of their works in Article 11*bis*. The Berne Convention also affords authors the exclusive right to authorize broadcasts of their works. A broadcast is defined as the "wireless diffusions of signs, sounds, or images."<sup>23</sup>

It could be argued that since the drafters did not mention "satellite transmission" they were not intended to be covered. This logic, however, "proves too much" as it would render many types of transmissions, either known or unknown, to be "outside" the Berne Convention.

There is "[n]o doubt that direct broadcasting by satellite comes under the ruling of Article 11*bis* of the Berne Convention, since technically there is no third party who could intervene between the original organization and the general public."<sup>24</sup> Here, there is, "no question who should be paying royalties."<sup>25</sup>

There is some question, however, as to whether Article 11*bis* applies when the satellite transmissions are retransmitted by foreign or non-authorized cable TV systems. One school of thought contends retransmissions of this nature are indeed broadcasts under the Berne Convention. While another camp holds that the term "broadcasting" refers "only to the transmission of signals that can be received directly by the public."<sup>26</sup> Such retransmissions are not protected under the Berne Convention.

A suitable legal base for throwing the responsibility upon the originating organization can only be established if we introduce the notion of a *sui generis satellite broadcasting right* by an international treaty. This solution would not affect Article 11*bis* of the Berne Convention for technical reasons and would

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21. For a more complete discussion of the relative international agreements see generally JOHNSTON, COPYRIGHT HANDBOOK 115-24 (1982); OTA, *supra* note 20, at 216-18; PLOMAN & HAMILTON, *supra* note 2.

22. The Berne Convention for the Protection of Literary and Artistic Works, opened for signature Sept. 9, 1886, revised Nov. 13, 1908, revised Mar. 20, 1914, revised June 2, 1928, revised June 26, 1948, revised July 24, 1971; 828 U.N.T.S. 221 [hereinafter BERNE CONVENTION]; reprinted in 4 M. NIMMER, NIMMER ON COPYRIGHT app. 27 (1979). On October 31, 1988, the United States ratified the Berne Convention with the *Berne Convention Implementation Act of 1988*, H.R. 4262 100th Cong., 2nd. Sess. 568 (1988). See also, 37 BNA PATENT, TRADEMARK & COPYRIGHT J. 462 (Mar. 9, 1989).

23. *Id.* art. 11 *bis*(1).

24. I. SZILAGYI, *supra* note 7, at 199.

25. *Id.*

26. See T.J. CRYAN & J.S. CRANE, *International Telecommunications Pirates: Protecting U.S. Satellite Signals From Unauthorized Reception Abroad*, 17 N.Y.U.J. INT'L L. & POL. 851, at 867 (1985) [hereinafter CRYAN & CRANE].



serve the interests of the authors much better and effectively since the collection of royalties could be effected at the source where the works are used.<sup>27</sup>

The Berne Convention employs the "national treatment" principle<sup>28</sup> which means that foreign authors, or copyright owners, enjoy the same protections as domestic authors. The system of "national treatment" actually creates a group mechanism for bilateral application of national or domestic laws. In this sense, it does not create a new uniform copyright law, but rather, codifies a conflicts of law system, specially geared towards copyright law. Violations of the Berne Convention are punishable subject to national implementation law.<sup>29</sup> Enforcement under the Berne Convention, however, is controlled by the International Court of Justice (ICJ),<sup>30</sup> unless the states involved have agreed to a different method of dispute resolution. Since each state must submit to the jurisdiction of the ICJ, a judicial settlement of copyright disputes may be unlikely.<sup>31</sup>

The U.S. has not adhered to the Berne Convention because Article 2 and *2bis* would require the U.S. to change its domestic copyright law. Particularly offensive to the U.S. is the "automatic recognition of copyright without any formalities, the protection of 'moral' rights and the retroactivity of copyright protection with respect to works which are already in the public domain in the United States."<sup>32</sup> The U.S. is currently considering membership in the Berne Convention, however, the merits of that debate are beyond the scope of this article.

### B. *The Universal Copyright Convention*

The Universal Copyright Convention (UCC)<sup>33</sup> was formed by the U.S. and other states not willing to sign the Berne Convention. Article *4bis* of the UCC grants copyright owners "the exclusive right to authorize the reproduction by any means, public performance and broadcasting." While Article *4bis* does recognize the author's "economic interests" it does not expressly recognize them as being property interests per se, rather only one stick in the bundle, the right to exclude.

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27. I. SZILAGYI, *supra* note 7, at 200.

28. BERNE CONVENTION, *supra* note 22, art. 5(3).

29. *Id.*, art. 36.

30. *Id.*, art. 33.

31. See generally I.C.J. Stat. art. 36(2), done at San Francisco, June 26, 1945, entered into force for the U.S., Oct. 24, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1052.

32. S. Rep. No. 5, 83rd Cong., 1st Sess. 3 (1953).

33. Universal Copyright Convention, opened for signature Sept. 6, 1952, revised July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 216 U.N.T.S. 134 [hereinafter UCC]; reprinted in 4 M. NIMMER, NIMMER ON COPYRIGHTS app. 25 (1979).

The UCC, like the Berne Convention, employs the principle of "national treatment" in Article 2. Again, this creates a system of bilateral agreements rather than one comprehensive law. There is an important distinction, however, between the UCC and Berne Convention regarding the application of national treatment. The UCC makes no attempt at reciprocity or equality of protective rights. "[T]here is no minimum level of protection within the UCC for a foreign author to rely upon, neither can he claim the level of protection from his country of origin in another contracting country."<sup>34</sup> This may or may not be beneficial to states with low levels of protection as they can avoid royalty payments on imported works, but it is certainly dubious as an incentive for improved protection of copyrights.

Under the UCC, like the Berne Convention, the applicability of "broadcasting" to satellite transmissions and retransmissions is uncertain. "[T]he UCC regime has not begun to develop norms on the role of the Convention with regard to modern electronic technologies."<sup>35</sup> Enforcement or dispute resolution is governed by "the International Court of Justice for determination"<sup>36</sup> if no other method can be negotiated.

"Furthermore, the recent U.S. decision to withdraw from UNESCO means that future UNESCO-moderated negotiations regarding UCC protection of satellite signals will not reflect U.S. interests."<sup>37</sup> Of course, a U.S. copyright owner faced with no minimum level of protection abroad might argue that they never did, thus reflecting the increased politicization and polarization which influenced the U.S. withdrawal from UNESCO.<sup>38</sup>

### C. *The Brussels Satellite Convention*

The Brussels Satellite Convention<sup>39</sup> is the only international convention with the goal of preventing the theft of satellite transmissions. The Brussels Convention covers both radio and T.V. signals.<sup>40</sup> Member States are to take "adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted is not intended."<sup>41</sup> The Convention does not impose new laws on its members, nor does it

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34. PLOMAN & HAMILTON, *supra* note 2, at 59.

35. CRYAN & CRANE, *supra* note 26, at 870.

36. UCC, *supra* note 33, art. 15.

37. CRYAN & CRANE, *supra* note 27, at 870 (citation omitted).

38. See S. FINGER, *Reform or Withdrawal*, 61 FOREIGN SERVICE J. 18-23 (1984).

39. Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, *opened for signature* May 21, 1974, 13 I.L.M. 1444 [hereinafter Brussels Convention]. The U.S. is currently a member of the Brussels Convention.

40. *Id.*, art. 1.

41. *Id.*, art. 2(1).

establish a national treatment structure. Members are free to create a new copyright or neighboring right, property interests, civil, criminal, commercial, or administrative regulatory controls. The focus of Article 2 is on the unauthorized distribution, not reception of satellite transmissions.

The Brussels Convention protects the "neighboring right" of the broadcaster and not the "copyright" of the author; the Convention protects the container and not its contents. The "Convention offered to the owners of intellectual property no enlargement of established property rights. Rather, it afforded at the world level a means whereby existing property rights might not be used by pirates or poachers to the detriment of the owner."<sup>42</sup> Further, it allows "the broadcasting services, e.g., originating organizations, and the creators of program content to adopt a common stand against potential poachers."<sup>43</sup>

Copyright owners, however, may not have sufficient bargaining power to take such a stand under the Brussels Convention. It has been said that the "convention is absolutely insufficient to protect the copyright interests of authors. The context of this convention only reflects the basic interests of the great broadcasting organizations and those of the authors are almost totally omitted."<sup>44</sup>

The Brussels Convention expressly excludes direct broadcast satellite signals.<sup>45</sup> Article 4 contains several exceptions from coverage that could conceivably exclude many signals. For example, reports or current events used for educational purposes, programs quoted in compliance with "fair practice," or programs distributed for solely educational purposes are all excluded.<sup>46</sup> Article 7 seeks to guard against the "abuses of monopoly." At what point the exercise of a copyright becomes an "abuse of monopoly" under any given member's law is uncertain to say the least. Again, we are faced with the problem of where to draw the line between private and public rights.

#### D. *The International Telecommunications Conference*

The International Telecommunications Conference (ITC)<sup>47</sup> which is administered through its Radio Regulations<sup>48</sup> is adhered to

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42. C. CHRISTOL, *The 1974 Brussels Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite: Its Strengths and Weaknesses*, in PROCEEDINGS OF THE TWENTIETH COLLOQUIUM ON THE LAW OF OUTER SPACE 44 (1977).

43. *Id.*, at 91.

44. I. SZILAGYI, *supra* note 6, at 214 (1979).

45. Brussels Convention, *supra* note 39, art. 3.

46. *Id.*, art. 4.

47. The International Telecommunications Conference, *latest revision* Oct. 25, 1973, 28 U.S.T. 2495, T.I.A.S. No. 8572.

48. The Radio Regulations, *latest revision* July 17, 1971, 23 U.S.T. 1527, T.I.A.S. No.

by at least 157 nations.<sup>49</sup> Article 17 of the Radio Regulations requires members to prevent and prohibit "(a) the unauthorized interception of radio communications not intended for the general use of the public [and] . . . (b) publication or any use whatsoever, without authorization, . . . obtained by the interception of radio communications mentioned [in paragraph (a) above]."

Article 1 of the Radio Regulations defines Broadcasting Satellite Service as a "radio communication service in which signals transmitted by space stations are intended for direct reception by the general public." A space station is defined as "[o]ne or more transmitters or receivers or a combination of transmitters and receivers, including the accessory equipment . . . located on an object which is beyond, is intended to go beyond, or has been beyond, the major portion of the Earth's atmosphere."<sup>50</sup> Individual and community receptions are covered by Article 1 as well.

While it is clear that satellite transmissions are intended to be covered by the ITC and Radio Regulations, the definition of "broadcasting" or perhaps more accurately, its interpretation has hampered uniform enforcement with regard to satellite broadcasts and related copyrights. Under the ITC those receiving signals argue that all satellite signals are intended for use by the general public, and thus Article 17 does not apply. Those seeking copyright protection argue that their satellite signals are *not* intended for use by the general public, but rather, the signals are intended for only the paying public. The ITC, like many international agreements, has no effective enforcement mechanism. Article 50 of the ITC merely allows the parties to a dispute to settle it among themselves or submit the dispute to arbitration.

The great success of the ITC is attributed to its subject matter. The ITC is generally concerned with transmission frequencies and orbit/spectrum efficiency, *not* with copyright protection for authors. The ITC regulates a natural resource with physical characteristics that are not subject to appropriation,<sup>51</sup> or human alterations.<sup>52</sup> Copyright owners are not so much concerned with the road their works take to the public, as they are with being paid for making the deliv-

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7435. The Radio Regulations are similar to the U.S. Communications Act, 47 U.S.C. § 601 (1985).

49. Georgetown Space Law Group, *The Geostationary Orbit: Legal, Technical, and Political Issues Surrounding its Use in World Telecommunications*, 16 CASE W. RES. J. INT'L L. 223, 237 n.68 (1984).

50. Radio Regulations, *supra* note 48, art. 1.

51. *Id.*, art. N28/7.

52. See generally FLEMING, DUCHARME, JAKHU & LONGMAN, *State Sovereignty and the Effective Management of a Shared Universal Resource: Observations Drawn From Examining Developments in the International Regulation of Radiocommunication*, 10 ANNALS OF AIR AND SPACE L. 327 (1985).

ery possible.

### III. Analysis

#### A. *Definitional Aspects*

A common problem in the four conventions discussed above is the failure to clarify the definition of a "broadcast," and when a broadcast is intended for the general public. This obstacle "is inherent in the legal definition of 'broadcast' which does not include signals not directly receivable by the public."<sup>53</sup> At least three distinct broadcasting services and their attendant legal frameworks have been identified.<sup>54</sup> First, domestic broadcasting satellite service occurs when "the general public directly receiving satellite signals [is] . . . within the jurisdiction of the administration which has registered the transmitting satellite with the International Telecommunications Union (ITU)."<sup>55</sup>

Second, transborder satellite service occurs when "the signal being directly received outside the jurisdiction of the transmitting satellite's administration is the *same signal* as that being received inside the jurisdiction of that administration."<sup>56</sup> Third, an international broadcasting satellite service occurs when "the signal being directly received outside the jurisdiction of the transmitting satellite's administration is a *different signal* from that being received inside the jurisdiction of that administration."<sup>57</sup>

The problem of transborder broadcasting involves the signal's footprint or "spillover" effect.<sup>58</sup> Copyright owners face enforcement problems when signals carrying their programs are transmitted by a domestic broadcasting service and received where they are either not intended, or where those receiving the signal are not compelled by law to make royalty payments. For example:

As with nearly every other island in the Caribbean, there is wholesale video and signal piracy in Jamaica . . . Many homes and commercial facilities such as hotels have Television Receive only dishes that intercept satellite signals without authorization. One of these has been operated by the Jamaica Broadcast Company, a government owned operation that has intercepted motion picture programming and rebroadcast it to the entire island without charge. The impact of such practices is self-evident.<sup>59</sup>

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53. I. MORA, *infra* note 60, at 58.

54. M.A. ROTHBLATT, *Transborder Broadcasting Satellite Service*, in PROCEEDINGS OF THE TWENTY-FIFTH COLLOQUIUM ON THE LAW OF OUTER SPACE 322 (1982).

55. *Id.*

56. *Id.*

57. *Id.*

58. See MPEAA, *supra* note 18.

59. Motion Picture Association of America, Inc., *Brief Description of Film Piracy*, for

Of course, this view is not universal. "The opponents even say: an opera transmitted by radio from Austria can be heard in Hungary — and on short waves even in distant Australia — and nobody dreamed of asking an additional fee for that. Why, then for television?"<sup>60</sup>

In the case of an international broadcast, the transmission is intended for an audience outside of the jurisdiction of the broadcaster. While such a transmission may also have the "transborder" effect mentioned above, the intent of the copyright owner is less clear cut than when only a domestic broadcast is intended. This is so because the copyright owner has intentionally subjected his copyright interest to the uncertainties of multi-jurisdictional enforcement. It is only less clear because it is well known that domestic broadcasts by satellite are subject to transborder or spillover effects. This is the same dilemma facing U.S. copyright owners when their broadcasted works spillover into Latin America and Canada.<sup>61</sup>

### B. Property Aspects

Another problem facing copyright owners is the extent to which intellectual property is placed within the rubric of property in its "traditional" sense. Specifically, does the copyright owner get all the sticks in the bundle? In American jurisprudence, the answer is generally yes. Internationally, however, this concept may not hold true. The author may only have a right to be paid for his time, which could be significantly less valuable than an ownership right. The divergent perspectives on what constitutes property rights are a fundamental chasm preventing the international enforcement of copyrights.

This is particularly apparent when the concept of an "international commons" is applied to transmission signals in the sense that they are receivable and more importantly, when it is applied to information, regardless of whether it is copyrighted. Copyright owners might point to the Universal Declaration on Human Rights which provides that "[N]o one shall be arbitrarily deprived of his property."<sup>62</sup> If the information received, however, is viewed as an international commons, i.e., not subject to appropriation, then there is no property and thus no deprivation.

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U.S. Department of State International Copyright Panel, Mar. 22, 1985, p.3.1; cited in OTA, *supra* note 20, at 245.

60. I. MORA, *The Future of Direct Transmissions Via Satellite From the Aspect of the Author*, in PROCEEDINGS OF THE TWENTY-SECOND COLLOQUIUM ON THE LAW OF OUTER SPACE 58 (1979).

61. See generally Note, *Signal Piracy: The Theft of United States Satellite Signals*, 8 FORDHAM INT'L L.J. 62, 83-92 (1984); MPEAA, *supra* note 18.

62. Human Rights, *supra* note 16, art. 17(2).

Proponents of this application of the concept of international commons may also cite the Universal Declaration of Human Rights for support in receiving, or reducing to possession, satellite signals for themselves. "Everyone has the right to . . . receive and impart information and ideas through any media and regardless of frontiers."<sup>63</sup> More importantly, "[e]veryone has the right *freely* to participate in the cultural life of the community . . . [and] to share in scientific advancement and its benefits." (emphasis added).<sup>64</sup> The Radio Regulations which govern satellite transmission also preclude private ownership of outer space.<sup>65</sup> Additionally, Article 1 of the Outer Space Treaty provides that outer space shall be used for the benefit of all countries, "and shall be the province of all mankind."<sup>66</sup> Article 1 further provides that outer space shall be used "without discrimination of any kind, on a basis of equality."<sup>67</sup>

These advocates claim that since some distributors of satellite transmissions will be discriminated against in favor of others, space will not be available on the basis of equal access or "without discrimination of any kind." These arguments, however, are erroneous and may actually work to the detriment of the less developed countries who tend to support this view.

First, "international cooperation is not a principle founded upon the notion of 'gift' but, rather it is the operation as a whole . . . . [T]o have an operation as a whole, there must be a shared activity. Otherwise, an 'enrichment sans cause' would be legitimated."<sup>68</sup>

Second, if copyright law, space law, and international law are to be in accord with the principles of justice, the rights of all the parties must be protected. To the extent that distribution without compensation is allowed, the rights of the authors and publishers are sacrificed. If our "triangle" is to remain intact, this situation is not sustainable. "[A]s between all sellers and buyers there is a need to assure the effective and uninterrupted transmission of intellectual property."<sup>69</sup>

Initially, the costs of signal piracy will be paid by authorized distributors and customers.

If the broadcaster cannot guarantee control over the retransmission of a particular program to audiences within a specific country or geographic area, he will be called upon to pay

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63. *Id.*, art. 19.

64. *Id.*, art. 27(1).

65. RADIO REGULATIONS, *supra* note 48, art. N28/7.

66. OUTER SPACE TREATY, *supra* note 11, art. 1.

67. *Id.*

68. M.A. FERRER, *The Brussels Convention Concerning the Protection of Signals Transmitted from Satellites*, in PROCEEDINGS OF THE SEVENTEENTH COLLOQUIUM ON THE LAW OF OUTER SPACE 28 (1974).

69. C. CHRISTOL, *supra* note 42, at 83.

his program contributors for coverage in the additional area. That area is likely to include countries offering no legal protection, under the concepts of copyright or neighboring rights, against the retransmission of the programs on their territories. If the originating broadcaster receives no benefit from the expanded coverage, he is unlikely to be willing to pay program contributors substantially higher licensing fees to cover it, and the result could well be a decision not to use the satellite at all.<sup>70</sup>

Since there are a greater number of less developed states, it follows that they will have more rights to protect. While their current focus is on the right to receive the transmission, and thus information, soon they will have distributors and authors with rights in need of protection. It is therefore in the interests of both developed and less developed states to protect intellectual property rights being transmitted via satellite.<sup>71</sup> The difficulty is in balancing the trilateral rights involved so that our triangle does not collapse.

### C. *Trade or Business Aspects: The Issue and the Answer*

Information is becoming more important for economic success; it is a vital commodity. In the U.S., industries relying on copyright law for remuneration "showed growth in sales from \$6.2 million, or 2 percent of the gross national product (GNP), in 1954 to \$140.9 billion, or approximately 5 percent of the GNP, in 1982."<sup>72</sup> One "estimate notes that the world information market equaled approximately \$350 billion or 18 percent of world trade in 1980."<sup>73</sup> Undoubtedly, information is valuable and copyright is but one method of protecting that value. While information, whether copyrighted or not, is recognized as being an item of trade or of having value, it is perhaps ironic that most, if not all, international agreements drafted to protect the interests of the authors, do not deal with information as a commodity.

The rights of the authors to control their works are vitiated because those works do not enjoy a universally accepted status as an item of trade, like "goods" for example. This is a result of the authors' desire or need to control the works distribution after the initial "sale," or transaction. That the sale has "strings attached" does not sit well with many buyers. Therefore, because copyright law does not

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70. Draft Report of the General Rapporteur [to the Brussels Satellite Convention], 13 I.L.M. 1449 (1974).

71. See generally M.A. FERRER, *supra* note 68.

72. OTA, *supra* note 20, at 225 (1987); M.H. RUBIN, THE COPYRIGHT INDUSTRIES IN THE UNITED STATES: AN ECONOMIC REPORT PREPARED FOR THE AMERICAN COPYRIGHT COUNCIL 1 (1985).

73. OTA, *supra* note 20, at 225; C.J. HAMELINK, TRANSNATIONAL DATA FLOWS IN AN INFORMATION AGE 23 (1984).



allow the buyer to exercise dominion in the same way that a buyer of goods may, international copyright agreements have not given this aspect much attention.

This problem has been partially solved by licensing agreements restricting the use of the work sold. Logically, the foundations of successful licensing agreements could be incorporated into an international agreement on information, allowing it to be treated as a commodity.

1. *Trade Sanction Protections.*—The transactional nature of information or the value of intellectual property rights is an important trade issue. In an attempt to protect U.S. intellectual property owners abroad, the Trade and Tariff Act of 1984<sup>74</sup> allows the President to condition qualification for trade preferences under the Generalized System of Preferences (GSP)<sup>75</sup> upon, among other things, protection of U.S. copyrights. The Caribbean Basin Economic Recovery Act<sup>76</sup> uses a “carrot and stick” approach by listing the protection of U.S. copyrighted works broadcast in the Caribbean Basin as a condition to be considered for those states to receive U.S. aid. Another program is the International Security and Development Act of 1983 (ISDCA),<sup>77</sup> which allows the President to consider the extent to which a foreign government participates or tolerates the broadcasting within its borders of U.S. copyrighted materials without the permission of the authors or owners.<sup>78</sup> The ISDCA also addresses the Federal Communication Commission’s authority over transborder broadcasting.<sup>79</sup>

Such unilateral trade sanctions, however, may not be helpful in the long run as they are not based on universally accepted principles. Thus, they may cause resentment towards the U.S. for imposing its laws on other states.

Furthermore, economic or trade sanctions do not seem appropriate for copyright treaties not concerned with economic or trade relations per se. The logical solution is to treat intellectual property as a commodity within existing agreements or fashion a *sui generis* intellectual property trade agreement.

2. *GATT Protection.*—One existing agreement that may suitably include information-based products or services within its framework is the General Agreement on Tariffs and Trade (GATT).<sup>80</sup>

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74. Pub. L. 98-573.

75. S. Rep. No. 485, 98th Cong., 2d Sess. 1 (1984).

76. Pub. L. 98-67.

77. H.R. Rep. No. 2992, 98th Cong., 2nd Sess. 1 (1983).

78. H.R. Rep. No. 192, 98th Cong., 1st Sess. 4, Sec. 904 (1983).

79. See Note, *supra* note 61, at 90-92.

80. U.N. Conf. on Trade and Employment, *signed at Geneva*, Oct. 30, 1947, 55

There are several advantages to using the GATT. First, the provision of existing international enforcement mechanisms with trade sanctions is a viable means of preventing intellectual property infringement. Such enforcement mechanisms are *not* part of existing copyright conventions. Second, the GATT has broader support than the copyright conventions and a history of building consensus among its members. Third, the GATT recognizes the different needs and abilities of its developed and less developed members.<sup>81</sup>

3. *Contractual Agreements.*—The notion of copyrighted works being sold in a contractual setting and therefore being controlled by an agreement based on contractual principles, is logical and desirable. When signals are “pirated” or “poached” there is, in effect, the formation of an implied contract. In the case of nations within a satellite signal’s footprint, the position of the receiving state is that since they have neither sought nor asked for the signals they should not have to pay for them. To the extent that the signal can be received and is used for personal or household use, this notion is somewhat controversial and evokes fair use considerations.

In terms of a “rebroadcast” for profit, however, it may be said that the original signal constitutes an offer to use that signal for profit and that its subsequent use for profit is an acceptance. The value of this contract and its measure of damages is also a point of conflict. Damages can be measured by either the actual losses of signal piracy, none, or by the theory of lost profits or the benefit of the bargain in a contractual setting, or perhaps what is known equitably as unjust enrichment. These damages may be substantial.

4. *A New Framework of Protection.*—A *sui generis* agreement governing the sale of intellectual property internationally is a logical solution for several reasons. First, the issue would appear to be the compensation of authors for their works, which entails recognition and enforcement of a contractual relationship between all points of our triangle. By recognizing the triangle as an important aspect of international trade, a broad-based, or multi-product enforcement mechanism could be validly incorporated. Trade sanctions for intellectual property infringement would be legitimized.

Second, as discussed above, technology is quickly eroding the traditional aspects of copyright and the doctrinal boundaries between copyright and other forms of intellectual property. A contractual or trade-based agreement could avoid this problem. If recognition of intellectual property as a valuable commodity, whether subject to

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U.N.T.S. 187.

81. See OTA, *supra* note 20, at 228.

copyright, patent, or other protection, in a generic sense is adopted, the particular form will not inhibit remuneration of its creator. An agreement recognizing the enforceability of a value for value or contractual relationship would emphasize the sale itself, not what is being sold as such. This is desirable because the basic idea of buyers and sellers or contractual relationships has essentially remained intact since time immemorial. Conversely, the proliferation of technology and information-based products and services has challenged traditional concepts of copyright dramatically.<sup>82</sup> A *sui generis*, transaction based agreement for intellectual property would not be as easily influenced by technological advances as the existing copyright conventions are proving to be.

Third, unions, societies, and associations of authors representing the interests of copyright owners could conclude agreements with various satellite broadcasters or publishers for the collection of royalty fees. Non-compliance would then be sanctioned by a pre-determined formula of trade sanctions, such as tariffs, resembling liquidated damages in a contract. "[A] Clearing House could be set up to collect such fees internationally, and distribute them internationally to the authors whose works have thus been used."<sup>83</sup> In operation such a system would be very similar to U.S. law. This new international regime should be "a system in which no individual licenses would be required but rather a general (compulsory) license against a statutory fee. Those to whom this system seems to be far-fetched should be reminded of the latest U.S. legislation in the matter of cable television and phonograph recordings."<sup>84</sup> Each member state's "union" of authors would be represented at the state level within the larger "union" of states.

The adoption of a new *sui generis* agreement would require a quasi-governmental organization or regime. This could be established within an existing regime like the ITU or the GATT, or it could be established independently. Since such a regime would be *sui generis*, its independent establishment might be preferable. The GATT, however, because of its established enforcement mechanism may also be desirable. The ITU should be left to regulating natural resources and not trade relations.

#### IV. Conclusion

The adoption of such an agreement would be difficult to say the least. There are many complex issues involved and widespread disagreement on fundamental concepts. These issues should not be con-

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82. See generally PLOMAN & HAMILTON, *supra* note 2, at 148-74.

83. I. MORA, *supra* note 60, at 58.

84. *Id.*

sidered as trade frictions, but rather as the adjustment process of trade systems. This adjustment process will require considerable effort towards a meaningful, multilateral understanding and acceptance of diverse legal systems. It is my proposition that a *sui generis* intellectual property trade agreement be pursued as a new and hopefully enduring approach to this difficult issue.

Implicit in the adoption of such an agreement are the premises that authors or creators have the right to be paid for their works, that the public has the right to enjoy them, and that publishers or distributors be compensated for their services as well. Ideally, all points of the triangle should be able to benefit equally from the creation of intellectual works.

