

Appendix F

Hague Convention

Article 3: Defendant's forum

Article 3 provides that a defendant may be sued in the courts of the country where he or she is 'habitually resident'. Where the defendant is a non-person, proceedings in relation to foreign copyright may be brought in the jurisdiction where it has its statutory seat, under whose law it was incorporated or formed, or the place where it has its central administration or principal place of business.

If the applicable law was Australian law amended to limit contracts which override the copyright exceptions, an overseas plaintiff may have lesser prospects of success in an action against a defendant in Australia.

Article 6: Contracts

Article 6 deals with grounds of jurisdiction in relation to contracts. Debate on the provision has focussed on Internet contracts.

At the Diplomatic Conference, there was no consensus on the basis for jurisdiction in contractual matters. In the Conference outcomes,¹⁰³⁰ two basic options are advanced: Alternative A refers to activity (eg, promotion, negotiation and performance), with several sub-options, and Alternative B focuses on the place of performance or where goods and services are supplied, as per the 1999 draft of the Convention.¹⁰³¹ The Committee notes that Alternative A would be more favourable to the supplier, whereas Alternative B would be more favourable to users.

¹⁰³⁰ See footnote 783 above.

¹⁰³¹ The 1999 Draft proposed:

'A plaintiff may bring an action in contract in the courts of a State in which -

- in matters relating to the supply of goods, the goods were supplied in whole or in part; and
- in matters relating to the provision of services, the services were provided in whole or in part;
- in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.'

The Committee also notes that neither of these options for Art. 6 addresses the choice of law issues to be resolved, but merely provides rules to determine which court will have power to hear a case.

Article 7: Contracts concluded by consumers

Article 7 applies to consumer contracts. It allows a consumer to sue in his or her country of habitual residence, (and to be sued only in his or her country of habitual residence, subject to certain exceptions). In the absence of this provision, a consumer would have to make use of the general contracts jurisdiction (Art. 6), or sue in the supplier's forum.

This provision has been supported by EU countries¹⁰³² and Australia, but has met strong resistance from the United States.

Article 10: Torts and Delicts

An action for copyright infringement not governed by contract would be regarded as an action in tort and dealt with under Art. 10, which provides as follows:

1. A plaintiff may bring an action in tort [or delict] in the courts of the State-
 - (a) in which the act or omission that caused injury occurred, or
 - (b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State.
2. A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity into that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.¹⁰³³

¹⁰³² See, Ali A. Beware the European buyer. NZLJ 2001;295, for a justification of the emphasis on consumer protection.

¹⁰³³ This proposal seeks to insert an activity-based jurisdiction similar to that proposed in relation to Art. 6 Contracts, Alternative A, para. 1. There is no consensus on this proposal.

3. The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid acting in or directing activity into that State¹⁰³⁴
4. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.¹⁰³⁵
5. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.¹⁰³⁶

The Committee notes that it is not clear how either of the criteria in draft Art. 10(1) would be interpreted. With respect to infringement over the Internet, is the relevant place where the server is located or where the web page is uploaded? With respect to email, is it the place of origin or the place of receipt?¹⁰³⁷

Additionally, Art. 10 appears to place a positive obligation on defendants to take active steps to avoid acting in or directing activity into fora.¹⁰³⁸

There is thus an argument that the criteria set out in Art. 10 should be further refined in their application to copyright. The Committee is aware that the Hague Conference has worked in conjunction with WIPO, and it may be that further work is needed to develop specific provisions setting out which court will have jurisdiction in private international copyright actions.

¹⁰³⁴ This proposal seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State. There is no consensus on this proposal.

¹⁰³⁵ The deletion of this paragraph that appeared as Art. 10, para. 3 of the preliminary draft Convention of October 1999 has been proposed. There is no consensus on its deletion.

¹⁰³⁶ The deletion of this paragraph that appeared as Art. 10, para. 4 of the preliminary draft Convention of October 1999 has been proposed. There is no consensus on its deletion.

¹⁰³⁷ The issue has arisen in the case of satellite transmissions. The EC Satellite Directive provides that the act of communication to the public occurs in the country from which the satellite signal is uplifted. This may provide a useful analogy in the case of multiple communications over the Internet. The various infringing acts could be determined by the laws of the places where those servers are located, even if the recipients of transmission from those servers are located in other jurisdictions.

¹⁰³⁸ Although this is not elaborated on, it appears that this may include concepts such as 'de-targeting' certain jurisdictions. This concept refers to situations where the seller/offeree seeks to limit the reach of its site, by placing disclaimers on its website, notifying the boundaries of its sales territories, informing buyers of certain countries not to place orders, use of a particular language, use of passwords or using particular modes of payment: see, Ali, *op. cit.*, p. 298.

Article 12: Exclusive jurisdiction in respect of some IP rights

The Committee understands that it has not been argued in negotiations that copyright should be placed in a special category whereby exclusive jurisdiction would be retained by the State granting the right, (as has been argued is necessary for patents and trade marks and other registrable rights).¹⁰³⁹

¹⁰³⁹ While Draft Art. 12 reserves exclusive jurisdiction to the courts of the Contracting State in respect of patents, trade marks and designs, where actions concern the validity (and on recent drafts, the infringement) of such rights, Art. 12 explicitly does not extend such exclusive jurisdiction in relation to proceedings concerning copyright or any neighbouring rights (which would include moral rights, and circuit layouts).

Appendix G

EU institutions and legislative procedures

The EU has four main institutions, beginning with the European Council. The Council is made up of the fifteen heads of State or Government of each Member State plus the President of the European Commission. Its function is to establish policy guidelines for European integration. The European Parliament comprises 626 members who are the elected representatives of the people of the Member States. Under the cooperation procedure and the co-decision procedure (discussed below) the Parliament can not only put forward amendments to Community legislation and seek their acceptance by the Council, it can also act as a co-legislator with the Council. Next, there is the Council of the European Union which is made up of representatives of the governments of the fifteen member states. The Council's main role is to lay down and implement legislation. Finally, there is the European Commission which has twenty members (two from Germany, Italy, the UK and Spain and one from each other Member State) and includes a president and two vice-presidents. The Commission is described as the driving force behind EC policy.¹⁰⁴⁰

For instruments of general application there are four types of legislative procedure: consultation, cooperation, co-decision and approval. The co-decision procedure is the means by which the Copyright Directive was adopted and the Committee considers it worthwhile describing that process briefly in order to understand how the Directive developed.

The Commission develops a proposal, which has a first reading in Parliament which then sends its opinion to the Council of the European Union. The Economic and Social Committee and the Committee of the Regions are also given an opportunity to state their positions at this stage. If Parliament makes no amendments or the Commission accepts all of the Parliament's amendments, the instrument may be

¹⁰⁴⁰ Borchardt, *op. cit.*, p. 45.

adopted at this stage. If not, the Council of the European Union, by a qualified majority, adopts a common position based on the Commission's proposal, and the opinions of Parliament and the committees. The common position is then sent to Parliament for a second reading. Parliament must within three months either:

- accept the common position or provide no response, in which case the instrument is taken to be adopted as per the common position;
- reject the common position outright, in which case the process comes to an end; or
- amend the common position.

Where Parliament amends the common position, the Council of the European Union must adopt all the amendments. Otherwise a Conciliation Committee comprising representatives of both the Parliament and the Council is convened with the aim of reaching a compromise which can be adopted by the requisite majorities of both the Council of the European Union and the Parliament. If the process is successful, the Council of the European Union and the Parliament must confirm its acceptance within six weeks at a third reading. This requires a qualified majority in the Council of the European Union and an absolute majority in the Parliament. If conciliation fails, the process comes to an end.

Appendix H

Maryland's UCITA

Maryland's UCITA (the Maryland Act)¹⁰⁴¹ came into effect on 1 October 2000. A number of amendments were made to the original UCITA, including:

- creation of a Joint Technology Oversight Committee to oversee implementation and report annually on 1 December on any necessary amendments, until 30 June 2005;
- providing that a contract term is unenforceable to the extent that it would vary a statute, rule, regulation, or procedure that may not be varied by agreement under the federal copyright law, including provisions of the federal copyright law related to fair use;¹⁰⁴²
- providing that a term will not form part of a mass-market licence if it is not available for viewing before and after assent in a printed or printable form;¹⁰⁴³
- providing that a term in a mass-market licence that limits the duration of the licence must be conspicuous;¹⁰⁴⁴
- providing that, in the absence of an enforceable agreement on choice of law, a mass-market transaction is governed by the law of Maryland;¹⁰⁴⁵
- providing that a choice of forum clause is unenforceable if it is unreasonable or unjust¹⁰⁴⁶ and that in a mass-market transaction, the enforceability of a choice of forum clause shall be decided by a Maryland court;¹⁰⁴⁷

¹⁰⁴¹ Maryland Code, Commercial Law, Title 22.

¹⁰⁴² s. 22-105(a)(2).

¹⁰⁴³ s. 22-209(a)(4).

¹⁰⁴⁴ s. 22-209(d).

¹⁰⁴⁵ s. 22-109(b)(2).

¹⁰⁴⁶ s. 22-110(a)(1).

¹⁰⁴⁷ s. 22-110(a)(2).

- making reduced limitation periods for mass-market agreements unenforceable;¹⁰⁴⁸
- providing that terms in a consumer contract which attempt to exclude or modify implied warranties of merchantability of a computer program¹⁰⁴⁹ or implied warranties of fitness for a particular purpose,¹⁰⁵⁰ or which attempt to exclude or modify a consumer's remedies for a breach of those warranties is unenforceable;¹⁰⁵¹
- providing that warranties of merchantability of a computer program¹⁰⁵² or implied warranties of fitness for a particular purpose¹⁰⁵³ do not apply to computer information or a computer program provided for no fee¹⁰⁵⁴ or as a beta test or similar experimental version;¹⁰⁵⁵
- providing that certain warranties¹⁰⁵⁶ do not apply to a computer program provided under a licence that does not impose a licence fee for the right to the source code, to make copies, to modify, and to distribute the computer program;¹⁰⁵⁷
- requiring a party who intends to discontinue contractual rights of access to give notice in a record to the party in breach: giving three days notice; setting out the nature of the claimed breach; stating that there is an opportunity to cure the breach;¹⁰⁵⁸ and providing information to allow for communication regarding the breach.¹⁰⁵⁹

¹⁰⁴⁸ s. 22-805(b)(2) (whereas UCITA merely prohibits reduced limitation periods with respect to consumer contracts).

¹⁰⁴⁹ per 22-403.

¹⁰⁵⁰ per 22-405.

¹⁰⁵¹ s. 22-406(i)(l).

¹⁰⁵² per 22-403.

¹⁰⁵³ per 22-405.

¹⁰⁵⁴ Unless the computer information or computer program is provided in conjunction with the sale or lease of goods, services, other computer information, or another computer program: s. 22-406(k)(1).

¹⁰⁵⁵ s. 22-406(k)(2).

¹⁰⁵⁶ per 22-403.

¹⁰⁵⁷ s. 22-406(l).

¹⁰⁵⁸ per 22-703.

¹⁰⁵⁹ s. 22-814(b) (although notice is not required in the case of a material breach of a contractual use term: s. 21-814(c)).

Virginia's UCITA

Virginia's UCITA (the Virginia Act)¹⁰⁶⁰ came into effect on 1 July 2001 and also contains a number of amendments to the original UCITA, including:

- providing that a choice of law agreement is not enforceable in a consumer contract to the extent that it would vary a statute, administrative rule or regulation that may not be varied by agreement under the law of Virginia.¹⁰⁶¹ In the absence of an enforceable agreement on choice of law, a contract is governed by the law of Virginia;¹⁰⁶²
- providing that a term prohibiting transfer of a party's contractual interests is not enforceable if the term is in a mass-market agreement, the transfer is made along with a computer and the transfer is a gift or donation to a public school, a public library, a charity or a consumer;¹⁰⁶³ or if the transfer is in connection with a merger or the acquisition or sale of a subsidiary or affiliate involving the licensee and another person and is made to preserve the integrity of information and information processing systems used by the licensee, or to ensure compatibility of information and information processing systems among the parties involved;¹⁰⁶⁴
- providing that the parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable or unjust;¹⁰⁶⁵ and that a judicial forum specified in an agreement is not exclusive unless the agreement expressly so provides and, in a mass-market transaction, the agreement expressly and conspicuously so provides;¹⁰⁶⁶
- providing that a term is not part of a licence if it is not available for viewing before and after assent in a printed or printable form;¹⁰⁶⁷

¹⁰⁶⁰ Code of Virginia, Title 59.1, Trade and Commerce.

¹⁰⁶¹ s. 59.1-501.9(a).

¹⁰⁶² s. 59.1-501.9(b).

¹⁰⁶³ s. 59.1-505.3(2)(C).

¹⁰⁶⁴ s. 59.1-505.3(2)(D).

¹⁰⁶⁵ s. 59.1-501.10(a).

¹⁰⁶⁶ s. 59.1-501.10(b).

¹⁰⁶⁷ s. 59.1-502.9(a)(3).

- providing that, in a mass-market agreement, a term that has the effect of forbidding or restricting the rights or abilities of licensees to engage in public disclosure or description criticism, comparison or evaluation of computer information or its licence terms is unenforceable to the extent that these rights or abilities are not prohibited by other law;¹⁰⁶⁸
- providing that, to the extent that the conduct is not otherwise unlawful or restricted under the Copyright Act or other law, in a standard form contract for the use of a tangible copy of information content, a licensee that is a non-profit library, archive or educational institution¹⁰⁶⁹ may (without any purpose of commercial advantage): make the tangible copy available to library or archive users; make a copy of the tangible copy for archival or preservation purposes; engage in inter-library lending of tangible copies of the copy and make classroom and instructional use of the tangible copy.¹⁰⁷⁰ These provisions may be varied by a term in a standard form contract, but only if the term is conspicuous, the licensee manifests specific assent to the term and, where the term is not made available prior to ordering, the licensee had reason to know that terms would follow and has a right to return the copy and be reimbursed for reasonable expenses incurred.¹⁰⁷¹

¹⁰⁶⁸ s. 59.1-502.9(d).

¹⁰⁶⁹ Which terms have the same meaning as in the US Copyright Act: s. 59.1-503.10(d).

¹⁰⁷⁰ s. 59.1-503.10(a).

¹⁰⁷¹ s. 59.1-503.10(b).