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Marketa Trimble

The Multiplicity of Copyright Laws on the Internet: Proposed Solutions, Objections to the Solutions, and the Realities of Cross-Border Copyright Enforcement

From the early days of the Internet commentators have warned that it would be impossible for those who act on the Internet (“Internet actors”) to comply with the copyright laws of all Internet-connected countries if the national copyright laws of all those countries were to apply simultaneously to Internet activity. A multiplicity of applicable copyright laws seems plausible – at least when the Internet activity is ubiquitous, i.e. unrestricted by geoblocking or by other means – given the territoriality principle that governs in international copyright law and either the *lex loci delicti* or *lex loci protectionis* choice-of-law rules that countries typically use for copyright infringements.

Commentators have submitted various proposals to eliminate this multiplicity of applicable national copyright laws. Some experts have called for a new and universal legal regime to govern the Internet that would be distinct from the legal regimes of individual countries; this proposal would result in a single global copyright law that would govern all Internet actors without regard to any particular national copyright laws. Other experts have suggested that the multiplicity be addressed by unifying national copyright laws generally and making the laws identical or almost identical; this suggestion is another way to make a single set of copyright law standards apply globally. Experts working at the intersection of intellectual property law and conflict of laws have proposed conflict-of-laws solutions to simplify the enforcement of copyright on the Internet; their solutions would not eliminate the differences among national copyright laws but would limit the number of national copyright laws that would apply to acts on the Internet in any given scenario.

This article posits that the multiplicity of applicable national copyright laws on the Internet is not as significant a problem for law-abiding Internet actors as some commentators fear. What makes the multiplicity workable for Internet actors are the realities – or inefficiencies – of cross-border copyright enforcement that de facto limit the number of potentially applicable national copyright laws. This article reviews the solutions that have been proposed to address the multiplicity problem and examines the objections to the proposals that have already been or could be raised. The article then analyzes the current realities of copyright enforcement on the Internet and contrasts the realities with the workings of the proposed solutions.

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Introduction

From the beginnings of the Internet¹ a number of commentators have warned that Internet actors – Internet service providers, website operators, content providers, and Internet users – cannot comply with copyright law on the global digital network (or can comply only with exorbitant costs) because of the large number of countries’ copyright laws (“multiple copyright laws”) that apply to the actors’ Internet activities.² The multiplicity of potentially applicable national copyright laws (the “multiplicity problem”) is caused by the nature of copyright as an intangible right created by national laws and by the rules for choice of law applicable to copyright infringements and to other copyright-related acts and occurrences. To determine which country’s copyright law applies, national courts typically use (for infringement and often also for other copyright-related acts and occurrences)³ the choice-of-law rule that points to the law of the place of the tortious activity (*lex loci delicti*, *lex loci protectionis*).⁴ Unless Internet activities are limited geographically through geoblocking⁵ or some form of censorship that disables access to

¹ The term “Internet” is used throughout this article as a generic term for any type of electronic communication, even if it is not based on the Internet protocol. On the definition of the term see Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 575, fn. 25 (2012).

² E.g., Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. Pa. L. Rev. 469, 480-481 (2000); Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 Mich. J. Int’l L. 799, 800 and 807-808 (1998).

³ See, e.g., Graeme B. Dinwoodie, *Developing A Private International Intellectual Property Law: The Demise of Territoriality*, 51 Wm. & Mary L. Rev. 711, 729-733 (2009) (reviewing the scope of application of the *lex loci protectionis* rule).

⁴ Most countries apply these rules to copyright infringement; countries’ rules for choice of law applicable to other copyright-related acts and occurrences vary. Some countries apply the rule of the law of the protecting country (*lex loci protectionis*). Whether the Berne Convention mandates the rule or not has been disputed. See, e.g., Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 L. Copyright Soc’y U.S.A. 318, 336-337 (1995) (advancing the theory that the law of the protecting country implies *lex fori*); Jane C. Ginsburg, *Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks*, WIPO, GCPIC/2, November 30, 1998, p. 41; 2 SAM RICKETSON, JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* §§ 20.17-20.28 (2d ed. 2005), § 20.01 (p. 1292) (“[D]eriving from the Berne text supranational choice of law rules is a delicate, if not improbable, operation.” *Id.*); PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 129 (2010) (arguing that Article 5(2) of the Berne Convention is not a choice of law provision but is “essentially no more than a rule barring discrimination against foreign right holders, which requires a country to apply the same law to works of foreign origin as it applies to works of its own nationals.” *Id.*).

⁵ For geoblocking see, e.g., Trimble, *The Future of Cybertravel*, *supra* note 1, 587-590.

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content on the Internet,⁶ the effects of the activities extend to all countries connected to the Internet (those countries where the result of the activities can be viewed, downloaded, or streamed) where – at least in theory – the activities cause each of the countries to be a place of tortious activity, thereby subjecting Internet actors to the copyright laws of each of the countries.⁷

The multiplicity of national copyright laws is problematic because countries' copyright laws continue to differ despite a significant degree of harmonization that has been achieved in national copyright laws in the past 130 years.⁸ The differences among the laws complicate cross-border activities involving copyrighted works,⁹ and although the laws complicate cross-border copyright activities regardless of whether the activities happen on or off the Internet, the differences among national copyright laws have perhaps more severe implications on the Internet than they do in the offline world.

In the offline world it seems more likely that parties will realize that the copyright laws of multiple countries may govern their activities; for example, a book publisher is likely to recognize the possibility that multiple copyright laws will be applicable when the publisher ships physical books to and sells them in a foreign country. However, many Internet actors seem oblivious to the possibility that their Internet acts may subject them to a foreign country's laws; the actors might see their online activity, such as posting a photograph on a website, as an activity that occurs in a single country – that country being where they are located when they

⁶ E.g., Evgeny Mozorov, *Egypt Action May Spread Internet Kill Switch Idea*, SAN FRANCISCO CHRONICLE, (Feb. 6, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=%2Fc%2Fa%2F2011%2F02%2F05%2FINO91HHD7P.DTL>; Christopher Beam, *Egypt Protest Internet Shut Off: How did the Egyptian government turn off the Internet?*, SLATE, (Jan. 28, 2011), <http://www.slate.com/id/2283000/>; James Crowie, *Egypt Leaves the Internet*, (Jan. 27, 2011), <http://www.renesys.com/blog/2011/01/egypt-leaves-the-internet.shtml>.

⁷ See, e.g., Ginsburg, *Global Use/Territorial Rights*, *supra* note 4, 322 and 334; Graeme W. Austin, *Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace*, 79 Or. L. Rev. 575, 588 (2000).

⁸ In the past 130 years countries have concluded international treaties to harmonize national copyright laws; however, the treaties include various flexibilities that allow countries to maintain differences in their national laws. E.g., Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1896, S. TREATY DOC. NO. 99–17 (1986) (as revised at Paris July 4, 1971 and amended Sept. 28, 1979) (hereinafter “Berne Convention”); Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299 (hereinafter “TRIPS Agreement”); WIPO Copyright Treaty, Dec. 20, 1996. For an overview of flexibilities – both those intentionally introduced in the treaties by treaty negotiators and those unintentionally persisting – see Marketa Trimble, *Advancing National Intellectual Property Policies in a Transnational Context*, ... Maryland Law Review ... (2015) (forthcoming).

⁹ For a discussion of some of the differences *see infra* in this Introduction and *see also*, e.g., Ginsburg, *Global Use/Territorial Rights*, *supra* note 4, 323-330; Graeme W. Austin, *Social Policy Choices*, *supra* note 7, 603-610.

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post the photograph. Alternatively, some Internet actors may mistakenly believe that only the country of their domicile may legitimately regulate their conduct,¹⁰ or that because their acts occur on the Internet no country will or may regulate their conduct.

Because the Internet makes it extremely easy to engage in cross-border activities, it enables all Internet actors to engage in such activities, and even actors who are not vested in the intricacies of international copyright are exposed to cross-border dealings involving copyright issues. While offline cross-border activities concerning copyrighted works¹¹ have often been performed by sophisticated repeat players such as publishing houses, motion picture studios, and press agencies, online activities involving cross-border copyright issues concern Internet actors with varying levels of awareness of, or possibly no awareness of, or experience with, foreign copyright laws that might apply to their activities.¹² The multiplicity problem is exacerbated in the online world because the number of countries' laws implicated will typically be much higher than in the offline world.¹³

Differences among countries' copyright laws impact copyright issues such as protectable subject matter, initial copyright ownership, licensing and assignments, rights, and exceptions and limitations to the rights. Internet actors are able to mitigate some of the differences by identifying copyright owners and obtaining any necessary consent or licenses from them; however, transaction costs may be high, or even higher than the costs of assuming the risk of copyright litigation when the Internet actors do not clear copyright beforehand. Differences among national copyright laws complicate the identification of initial and subsequent copyright owners; the differences also make it difficult to determine where particular rights arise and where national laws carve out exceptions and limitations that allow for use of copyrighted works without permission or a license in a particular situation. The following two examples illustrate the complexities of cross-border activities involving copyrighted works.

¹⁰ Although in many instances Internet actors may be subject to the law of only a single country, and that country may be the country of their domicile (place of residence, place of incorporation, or principal place of business), it is possible that in other instances actors may also be subject to the laws of other countries.

¹¹ In this context, cross-border activities concerning copyrighted works do not include importation for personal use.

¹² This article leaves aside any discussion of whether the Internet is encouraging copyright-infringing behavior because of the anonymity it provides and the misconceptions it creates (e.g., perceptions that it is always legal to view, download, or stream any content that is available for free online).

¹³ Dinwoodie, *A New Copyright Order*, *supra* note 2, 541 ("The problems of cyberspace bring [conflict-of-laws] questions into sharper focus, and it is there that they appear most acute." *Id.*).

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The first example concerns rules for initial copyright ownership; the rules vary among countries, and one who is the owner of a copyright to a work in one country might not be the owner of the copyright to the same work in another country.¹⁴ Assume, for example, that a photographer employed by an advertising agency in the United States takes a photograph within the scope of his employment. Under the work made for hire doctrine applicable in the United States the agency is the initial owner of copyright to the photograph.¹⁵ Germany, however, has no work for hire doctrine;¹⁶ in Germany the initial copyright ownership vests in the author, which in this example is the photographer who, absent his consent or a license he has granted, holds the exclusive rights that attach to the copyright.¹⁷ If the agency intends to use the photograph on a website, it does not need consent or a license from the photographer to do so in the United States, but it will need his consent or license for other countries, such as Germany, where the website is accessible and where the photographer – and not the agency – owns copyright to the photograph.¹⁸

The second example of differences in national copyright laws concerns exceptions and limitations to copyright, which also vary among countries; acts that may be performed in one

¹⁴ Some countries apply the law of the country of origin to the issue of initial copyright ownership with the result that the copyright has the same initial copyright owner in the countries as it has in the country of origin. *See, e.g.*, Portuguese Civil Code, Código Civil, Decreto-Lei n.º 47344/66, Article 48.

¹⁵ 17 U.S.C. §201(b).

¹⁶ Although no work for hire doctrine exists in Germany, an employer is entitled by law to exercise economic rights to a computer program that was “created by an employee in the performance of his duties or based on the instructions from his employer.” Urheberrechtsgesetz, Article 69b(1). This provision is consistent with Article 2(3) of the Council Directive 31/250/EEC of 14 May 1991 on the legal protection of computer programs (now codified as Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs).

¹⁷ A German court will apply German law to determine who the copyright owner is in this case because German courts apply the law of the protecting country (the country where protection is sought) to copyright ownership.

¹⁸ If the facts are reversed (the agency and the photographer were domiciled in Germany), the scenario might not pose a problem; employment contracts in civil law countries often provide for an exclusive permanent license in favor of the employer. Additionally, U.S. courts could decide to apply German law to assess the ownership of copyright to the photograph if the photographer is a German resident, his employer is a German entity, and the work was performed in Germany. *See Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998). *Cf.* Paul Edward Geller, *Conflict of Laws in Copyright Cases: Infringement and Ownership Issues*, 51 J. Copyright Soc’y U.S.A. 315, 327 (2004) (criticizing the choice of law analysis for copyright ownership in *Itar-Tass* and arguing that the Berne Convention implies a conflict of law rule); *but see* Ginsburg, *Global Use/Territorial Rights*, *supra* note 4, 331 (“Apart from the article specifically addressing the law applicable to determine ownership of copyright in cinematographic works, the Berne Convention proffers no general choice of law rule for copyright ownership.”); William Patry, *Choice of Law and International Copyright*, 48 Am. J. Comp. L. 383, 409 (2000).

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country without permission or a license may require permission or a license in another country.¹⁹ For example, one of the enumerated exceptions under the German copyright statute allows the taking and posting on the Internet (i.e., the acts of reproduction, distribution, and making available to the public) of a photograph of a publicly accessible sculpture;²⁰ there is a similar enumerated exception in the U.S. Copyright Act, but the U.S. exception does not cover the acts when they concern a stand-alone sculptural work (a sculpture that is not embodied in an architectural work).²¹ This difference in national laws means that the posting on the Internet without permission or a license of a photograph of a publicly accessible stand-alone sculpture will not infringe the copyright to the sculpture under German copyright law; however, in the United States the posting (the public display) of the photograph on the Internet may infringe the copyright to the sculpture under U.S. copyright law (although the fair use doctrine under U.S. law²² might provide a successful defense in some cases).²³

Commentators have asserted that the multiplicity problem is a major hurdle for the Internet and have developed solutions that address the problem by providing for a single copyright law to apply to Internet activities.²⁴ Two types of solutions seek to limit the number of applicable copyright laws, but they employ different means to achieve the goal.²⁵ The first type of solution calls for the creation of a single set of global copyright law standards that would apply on the Internet globally; the set of standards could be introduced either as an extra-national Internet-specific copyright law (that would be either legislated or developed judicially) or as a uniform copyright law implemented through national legislations.²⁶ The second type of solution aims to narrow the number of applicable copyright laws by utilizing special conflict-of-laws rules – rules for choice of applicable law, personal jurisdiction, and the recognition and enforcement of

¹⁹ E.g., Martin Senftleben, *Breathing Space for Cloud-Based Business Models – Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions*, available on SSRN, pp. 4-16.

²⁰ Urheberrechtsgesetz of September 9, 1965, as last amended, Article 59(1).

²¹ 17 U.S.C. §120(a).

²² 17 U.S.C. §107.

²³ Theoretically, a U.S. court could decide in this scenario to apply German law to the acts of alleged infringement if the court found that German law had the most significant relationship to the acts and the parties. Restatement (Second) of Conflict of Laws, §145; *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998).

²⁴ “Ideally, a choice of law rule that designated the law of a single country to govern the ensemble of Internet copyright transactions would considerably simplify the legal landscape, and thus promote Internet commerce.” Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 Colum.-VLA J.L. & Arts 1, 44 (2000).

²⁵ See, e.g., Andrea Antonelli, *Applicable Law Aspects of Copyright Infringement on the Internet: What Principles Should Apply?*, 2003 Sing. J. Legal Stud. 147.

²⁶ See *infra* section I.

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foreign judgments; the special rules would operate together to achieve a result in which only a single country's law (or the laws of a limited number of countries) applies (or apply) to an Internet activity in any given case.²⁷ So far the two types of proposed solutions have gained little or no support from national governments at the national and international level,²⁸ and the specter of a multiplicity of applicable national copyright laws continues to loom over the Internet, at least in theory.

In practice, various limitations on copyright enforcement reduce the number of copyright laws that will apply to a particular activity on the Internet. This article argues that these limitations fashion a system in which actors who wish to comply with copyright laws face no greater challenges on the Internet than they do off the Internet. Some of these limitations arise because of countries' limited ability to enforce their laws; as Jack Goldsmith noted in 1998 in the early years of the commercial Internet, "the skeptics [have] exaggerate[d] the threat of multiple regulation of cyberspace information flows" because "[t]his threat must be measured by a regulation's enforceable scope."²⁹ Additional limitations come from the practicalities of litigation, when copyright owners must decide which country's or countries' laws they can and want to rely on when they enforce their rights. Even if countries were to adopt conflict-of-laws rules that would expand the enforceable scope of their laws, many litigation limitations would persist and limit the number of countries' laws de facto regulating conduct on the Internet in particular cases.

This article begins by analyzing the proposals for solving the multiplicity problem. The first section discusses proposals that seek to achieve single global copyright standards, and the second section presents proposed conflict-of-laws solutions. For each type of solution the article reviews existing critiques of the proposals and examines additional rationales that make the proposals unacceptable or unpalatable to national governments, including, for the conflict-of-laws solutions, the difficulty of accepting the notion of copyright infringement as a single-place tort. The third section confronts the theoretical concern about the multiplicity of potentially applicable

²⁷ See *infra* section II.

²⁸ For development at the regional level – in the European Union – see *infra* section ... Some courts have referred to the proposals for special conflict-of-laws rules. See *E.g.*, *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39 (appeal taken from Eng.), pars. 93 and 94; *Rundquist v. Vapiano SE*, 798 F.Supp.2d 102, 132 (D.D.C. 2011); Opinion of Advocate General Trstenjak in *Painer v. Standard Verlags et al.*, CJEU, C-145/10, April 12, 2011, fn. 31; Opinion of Advocate General Cruz Villalón in *Solvay v. Honeywell*, CJEU, C-616/10, March 29, 2012, fn. 24; Opinion of the Advocate General Niilo Jääskinen in *Peter Pinckney v. KDG Mediatech AG*, ECJ, C-170/12, June 13, 2013, fn. 53.

²⁹ Jack J. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199, 1221 (1998).

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copyright laws on the Internet and the realities of copyright enforcement. The article posits that the proposed solutions, if implemented, would not dramatically change the copyright litigation landscape because many of the current realities of cross-border copyright litigation would continue to shape the landscape.

I. Global Copyright

The first type of solution proposed to address the multiplicity problem would introduce a single set of global copyright law standards.³⁰ The uniform standards would give legal certainty to Internet actors and copyright owners, who could then shape their activities to comport with the standards. Some observers might view the setting of uniform standards as a natural milestone on the trajectory of international copyright law negotiations through which countries have been gradually harmonizing their copyright laws over the past 130 years.³¹ However, the trajectory might not be so straightforward; current international developments do not seem to be headed towards a deeper harmonization of copyright law, commentators debate the desirability of international uniformity of copyright laws,³² and some critics flatly reject the utility of a uniform global copyright law.³³

1. A Single Copyright Law for the Online Environment

Faced with the specter of a multiplicity of national laws (and not only copyright laws) on the Internet, some experts have suggested that a new legal order be created to govern activities on the Internet.³⁴ For these Internet exceptionalists the process of creating a new legal order would

³⁰ E.g., Antonelli, *supra* note 25, (admitting that “the task seems almost impossible”).

³¹ See *supra* note 8.

³² E.g., J.H. Reichman, *From Free Riders to Fair Followers: Global Competition under the TRIPS Agreement*, 29 N.Y.U. J. Int'l L. & Pol. 11, 23-24, 44-48, and 75-78 (1997); Jane C. Ginsburg, *International Copyright: From A “Bundle” of National Copyright Laws to A Supranational Code?*, 47 J. Copyright Soc’y U.S.A. 265, 267 (2000) (“[N]ational laws allocating copyright ownership form the strongest candidates for preservation; national exceptions to copyright present a more difficult, but potentially persuasive, case for persistence of national norms as well.”). See also Austin, *Social Policy Choices*, *supra* note 7 (commenting on the prospect of a single national copyright law applying in multinational cases and discussing the same rationales against a choice of law outcome).

³³ E.g., Graeme W. Austin, *Valuing “Domestic Self-Determination” in International Intellectual Property Jurisprudence*, 77 Chi.-Kent L. Rev. 1155, 1158 (2002); Paul Torremans, *Copyright Territoriality in a Borderless Online Environment*, in *Copyright in a Borderless Online Environment* (Johan Axhamn ed., Norstedts Juridik, 2012), pp. 23 – 35, at p. 35.

³⁴ David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (“This . . . distinct Cyberspace . . . needs and can create its own law and legal institutions.”); Aron

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provide an opportunity to design the order while respecting and utilizing the architecture of the Internet. The designing of the new legal order would also be a chance for experimentation – a chance to craft the legal order in a manner that would reflect opposition to entrenched copyright norms that existing national legal regimes perpetuate; the new legal order could promote norms that the online community has embraced.

One problem with an extra-national Internet-specific legal regime is its legitimacy: Can anyone design a legal order for the Internet that could legitimately bind all actors on the Internet? Leaving the design of the legal regime to the community of Internet actors might have been attractive at the beginnings of the Internet when it was populated by a limited group of educated users in select countries; indeed, the approach worked for technical Internet architecture-specific issues.³⁵ However, with the complexities of the Internet ecosystem today, including the proliferation of different types of actors and activities on the Internet, it seems highly unlikely that it would be possible to identify (outside the framework of national and international law) a means for the design and adoption of an Internet-specific legal regime that would enjoy the necessary global legitimacy. Graeme Dinwoodie's proposal that national courts devise a special regime through their decisions alleviates the concern about legitimacy (perhaps in some countries more than in others), but the judicially-created system certainly would not eliminate the concern.³⁶

Another problem with the proposals for an Internet-specific legal regime is that the proposals ignore the fact that Internet activities have strong connections to the offline world; because of the

Mefford, *Lex Informatica: Foundations of Law on the Internet*, 5 Ind. J. Global Legal Stud. 211, 222 and 236-237(1997).

³⁵ E.g., standard setting and regulation of the domain name system, including the ICANN dispute resolution mechanism.

³⁶ Dinwoodie, *A New Copyright Order*, *supra* note 2, 542 ff. (“Under this approach ... a court faced with an international copyright dispute would ... develop (and apply) a substantive rule of copyright law that best effectuates [the] range of policies [implicated in the dispute].” *Id.*, pp. 542-543.). For Dinwoodie's response to the legitimacy problem *see id.*, pp. 575-577. Annette Kur pointed out that a judicially-developed Internet-specific regime would decrease legal certainty “at least during the interim phase needed for building up a solid framework of case law.” CLIP Principles, Article 3:603, Note 3:603.N07, p. 321. For Dinwoodie's response to concerns about legal certainty *see* Dinwoodie, *id.*, pp. 571-575. For a criticism of the “cyberspace lex mercatoria” idea in general *see also* Reindl, *supra* note 2, 810-811. For a similar proposal for *jus Internet* (not limited to copyright law) *see* Joanna Kulesza & Roy Balleste, *Signs and Portents in Cyberspace: The Rise of Jus Internet as a New Order in International Law*, 23 Fordham Int'l Prop. Media & Ent. L.J. 1311, 1345 (2013). On a “lex mercatoria for copyright in cyberspace” *see* Jane C. Ginsburg, *The Private International Law of Copyright in An Era of Technological Change*, Recueil des Cours, Académie de Droit International, 1998, Tome 273, 1999, pp. 239 – 406, at pp. 376 – 398.

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connections (not only in copyright but in most areas of the law) countries would be very unlikely to relinquish their prescriptive jurisdiction for the online world. If a motion picture is shared online without the permission of or a license from its copyright owner, the effects of the free sharing will be felt in the offline world, and they will impact the copyright owner's and licensees' revenues, together with countries' tax revenues and other interests.³⁷ An Internet-specific legal regime inconsistent with a country's own copyright law³⁸ would destabilize the delicate balance that the country strives to achieve with its copyright policies.³⁹

The skepticism toward an Internet-specific copyright regime does not mean that every Internet-specific legal regime is unsuitable. Matters that concern the technical infrastructure of the network require Internet-specific regulation, for example the administration of the domain name system; Internet service provider liability for content posted by others has been subject to Internet-specific legislation, including in the area of copyright law.⁴⁰ Some Internet-specific regulation that addresses the technical infrastructure is subject to extra-national regulation (e.g., the domain name system); other Internet-specific regulation, such as limitations on the liability of Internet service providers, is governed by national laws.⁴¹ However, even in the limited areas governed by extra-national Internet-specific legal regimes countries maintain their right to have input into the final decisions.⁴²

Countries hesitate to outsource their control over fundamental rights to non-state bodies, and copyright law involves such rights because it results from a balancing of the right to free speech (freedom of expression) and the right to property (in some countries intellectual property is covered explicitly by the fundamental right to property).⁴³ Countries could, in theory, address the need for an Internet-specific copyright regime without outsourcing the regime to a non-state body by adopting an international copyright law regime. An international law solution would

³⁷ Peter Yu, cloud computing draft...

³⁸ Although an internet-specific regime might match a country's copyright law, the likelihood is high that some differences would exist because different institutions would shape the regime and the law.

³⁹ The balancing involves the intersection of the right to free speech (freedom of expression) and property rights (in some countries intellectual property is covered by the fundamental right to property), which are fundamental rights, and countries would very likely hesitate to outsource the treatment of the rights to a non-state body.

⁴⁰ ...§230; 17 U.S.C. §512.

⁴¹ In the EU the provisions on the limitation of ISP liability are subject to very general harmonization through the Directive ...

⁴² *E.g.*, the anti-cybersquatting provisions of the Lanham Act in the United States; *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento de Barcelona*, 330 F.3d 617 (4th Cir. 2003); seizures of domain names in the United States.

⁴³ *E.g.*, ...

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obviate the problem of legitimacy; although negotiating an international regime entails compromises that may constrain national policies and national sovereignty, international negotiations allow countries to maintain a certain degree of control over the design of the regime and contribute to the shaping of the regime.⁴⁴ Nevertheless, international agreement on a single copyright law for the Internet is unlikely to occur soon; a copyright law for the Internet that would be in harmony with the multiplicity of national copyright laws for the offline world would be difficult to create, and the likelihood that countries could agree on uniform copyright laws for the offline world is slim. Many countries appear reluctant to harmonize copyright laws more deeply than they already have.

2. Uniform National Copyright Laws

A cursory review of the history of treaties on copyright law might suggest a trajectory of gradually deepening harmonization of national copyright laws, but while the impression is accurate as to the past 130 years, the trajectory might not be an accurate predictor of the future of international copyright harmonization. The TRIPS-plus movement, which wants to raise levels of intellectual property (“IP”) protection above the minimum standards contained in the TRIPS Agreement,⁴⁵ has encountered strong opposition from numerous IP experts and at least some of the general public. The general public’s intense concern for the proper protection of IP users’ interests makes expansions of IP rights and increased protection of IP rights highly unpopular. A deeper harmonization of exceptions and limitations might find more supporters, but even this direction of harmonization faces opposition, namely from copyright owners; for example, some copyright owners observed the negotiations of the Marrakesh Treaty⁴⁶ with great concern as to

⁴⁴ Graeme Dinwoodie pointed out that international agreements concerning copyright have been, “in large part, codifications of commonly held, and already nationally implemented, copyright policies, and thus had a backward looking perspective.” Dinwoodie, *A New Copyright Order*, *supra* note 2, 493. This is not a characteristic unique to international copyright negotiations; it is understandable that countries enter international negotiations with the goal of achieving a result consistent with their own legislation and practices, and countries with strong negotiating positions and political powers often achieve their goals. The situation may be different if governments (or some factions in the governments) intend to use the international forum to pursue domestic agendas they pursued unsuccessfully at the national level; the international forum may give the agendas legitimacy and impose the agendas on domestic actors once the agendas are embodied in international treaties that governments must implement. This strategy is commonly utilized in hierarchical settings, such as in regional organizations and federal countries. *See also* Dinwoodie, *id.*, pp. 499-501 (“The relationship [of national, regional, and international developments] is increasingly complex and multidirectional.” *Id.*, p. 499.).

⁴⁵ ... (hereinafter “TRIPS Agreement”).

⁴⁶ The Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013 (hereinafter “Marrakesh Treaty”).

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whether the Treaty, which solidifies certain exceptions and limitations to copyright in favor of access for the visually impaired,⁴⁷ could become a Trojan horse for a further weakening of copyright protection through international treaties.⁴⁸

The concerns of particular stakeholders about stronger or weaker copyright protection are not the only brakes on further international copyright harmonization. The environment at the international level is sufficiently infused with conflict to retard further harmonization efforts. The agendas of the developed countries conflict with the plans of the developing and the least developed countries, which are pursuing an international agenda for the protection of traditional knowledge, folklore, and genetic resources. A number of experts have emphasized the value of diversity in national IP legislation⁴⁹ and argued in favor of greater use of existing treaty flexibilities to tailor IP regimes to countries' unique circumstances. Historical, cultural, socio-political, and economic differences among countries are among the reasons for which individually-tailored national copyright laws seem desirable, and national governments seem more active than they were only a decade ago in searching for ways to stretch national legislation and practice to benefit fully from the range of flexibilities that are provided in international treaties.⁵⁰

Even if countries could agree on a uniform set of copyright law standards, some national differences would persist and/or develop in time. With no unified court structure differences would appear; a truly uniform legal regime cannot exist without a unifying interpretation that all courts and administrative agencies would have to follow. With no uniform interpretation national courts and administrative agencies develop different interpretations of standards and perpetuate existing or create new differences among national copyright laws, notwithstanding identical language in national copyright statutes. Absent a court or other body that renders decisions that are precedential and/or delivers binding interpretations of uniform standards, does so with sufficient frequency to develop the necessary breadth and depth of interpretation, and reacts to permanently changing conditions, the uniformity of national copyright laws is illusory.

⁴⁷ The Marrakesh Treaty does not impose exceptions and limitations that go beyond the existing three-step-test framework. Marrakesh Treaty, Article 1 and the Agreed Statement Concerning Article 4(3).

⁴⁸ See, e.g., William New, *Negotiators, Stakeholders Tell Tale of WIPO Marrakesh Treaty Negotiation, Look to Implementation*, INTELL. PROP. WATCH (Sept. 20, 2013, 11:40 PM), <http://www.ip-watch.org/2013/09/20/negotiators-stakeholders-tell-tale-of-wipo-marrakesh-treaty-negotiation-look-to-implementation/> (last visited March 3, 2014).

⁴⁹ E.g., Dinwoodie, *A New Copyright Order*, *supra* note 2, 518-521.

⁵⁰ E.g., Ruth Okediji, ...

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Additionally, even if copyright laws were uniform, differences in laws that national courts would apply to ancillary issues, such as contract issues, and differences in procedural rules would maintain or create differences in the functioning of the “uniform” laws in various countries.⁵¹

II. Conflict-of-Laws Solutions

If national courts adjudicate cases that involve parties from different countries and/or implicate different national copyright laws, the courts face questions of jurisdiction, choice of applicable law, and potentially also the recognition and enforcement of foreign judgments – all of which are conflict-of-laws questions.⁵² The more deeply that national laws are harmonized, however, the less significant will be the consequences of the choice-of-law analysis;⁵³ if copyright laws were uniform, choice of law, at least as to the applicable copyright law, would be unnecessary.⁵⁴ Operating on the premise that the likelihood is very high that national copyright laws will remain different, some scholars who seek to identify solutions to the multiplicity problem focus on conflict-of-laws rules, including rules for choice of applicable law, as the avenue for solving the problem.

Under the prevailing choice-of-law rule, the laws of all countries connected to the Internet might apply to Internet activities. Copyright vests automatically (in some countries upon fixation, in other countries upon creation), at a minimum, in all 167 countries that are parties to the Berne Convention.⁵⁵ When a work is made available on the Internet, that act can infringe copyright in multiple or even in all of the countries in which the content can be viewed, downloaded, or streamed. Of course, because of differences among countries’ laws, there may be no infringement committed in countries in which the work falls outside copyright protection (because of the subject matter of the work,⁵⁶ its author,⁵⁷ or the expiration of its copyright

⁵¹ For a discussion of the situation involving EU unitary rights (trademarks and designs) *see* Marketa Trimble, *Extraterritorial Enforcement* in *INTELLECTUAL PROPERTY SYSTEMS IN COMMON LAW AND CIVIL LAW*, 303-324 (Toshiko Takenaka ed., Edward Elgar Publishing, 2013), 321-322.

⁵² *See also* Goldsmith, *supra* note 29, p. 1232 (noting that a variety of available tools to “facilitate and rationalize legal regulation of cyberspace ... will not eliminate all conflict of laws in cyberspace any more than they do in real space. ... [T]he elimination of conflict of laws would require the elimination of decentralized lawmaking or of transnational activity.”).

⁵³ On the relationship of substantive laws and choice of law rules *see* Trimble, *Advancing*, *supra* note 8, ...

⁵⁴ Choice of law will still matter for ancillary substantive issues; even if treaties “harmonize national copyright laws comprehensively enough” they will not render the choice of law analysis obsolete. *Cf.* Reindl, *supra* note 2, 813.

⁵⁵ Contracting Parties to the Berne Convention for the Protection of Literary and Artistic Works, WIPO, <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf> (last visited May 7, 2014).

⁵⁶ E.g.,

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term),⁵⁸ or in countries in which the act is not considered infringing (because of a different understanding of the particular right⁵⁹ or because of an applicable exception or limitation to copyright protection). Regardless of whether the laws of all countries hold the work protected and the act infringing, the possibility exists that all countries' laws could apply simultaneously.⁶⁰

Existing rules of personal jurisdiction and choice of law do not provide relief from the multiplicity problem, at least not in theory.⁶¹ Courts of general jurisdiction⁶² may decide all claims raised against an alleged infringer – irrespective of whether the claims are based on their own country's laws or are based on foreign laws – as long as the courts consider the foreign-law claims to be transitory causes of action, meaning causes of action that may be litigated before them even if the causes of action arose under a foreign country's law. Courts in some countries have expressed a willingness to treat copyright infringement as a transitory cause of action,⁶³ meaning that the courts could decide worldwide copyright infringements while applying the laws of all the countries in which infringements occur.

Litigating in one court under multiple national copyright laws should not be possible if the court is a court of specific jurisdiction because courts of specific jurisdiction adjudicate only causes of action arising within their jurisdiction and relating to a ground of specific jurisdiction. In copyright infringement cases specific jurisdiction is typically based on the place of infringement, and because the laws of all countries connected to the Internet may be infringed by Internet activities, the courts of all countries have specific jurisdiction (the court of the alleged infringer's domicile maintains general jurisdiction) and therefore can apply their own laws to the infringement that occurred in their countries.

This section reviews two choice-of-law approaches that may limit the number of laws applicable to Internet activities. The first approach (the “localization approach”) uses the existing choice-of-

⁵⁷ E.g., works by the U.S. federal government in the United States.

⁵⁸ Under international treaties many countries must provide copyright protection for at least a minimum period, but countries may provide a longer term of protection. Berne Convention, WIPO Treaty...

⁵⁹ The scope of individual rights that make up copyright can be slightly different in different countries.

⁶⁰ See *supra* note 5 on geoblocking – the possibility of limiting the accessibility of content on the Internet and thus the number of countries whose laws apply to the content.

⁶¹ For the interaction in practice between the rules of choice of law and the rules of personal jurisdiction see *infra* section ...

⁶² General jurisdiction exists where the alleged infringer has its domicile, which can be, depending on local laws, its place of residence, its place of incorporation, or its permanent place of business.

⁶³ Lucasfilm, ...; Subafilms ... See also *infra* note ...

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law rule of the place of the tortious activity but shifts the focus of the localization of the tort (the identification of the place of the tort) to an occurrence or fact that can be pinpointed in a single location, such as the place where the alleged infringer acted or the place where the copyright owner is domiciled, under the theory that the act or occurrence marks the one place where the tort was actually committed or where all of its effects are felt.⁶⁴ The second approach (the “factors approach”) requires countries to adopt a new choice-of-law rule that calls on courts to choose a single applicable national copyright law (or a small number of applicable national copyright laws) based on a weighing of multiple factors.

The implementation of the two choice-of-law approaches presents obstacles no less significant than those that countries would encounter if they attempted to introduce a single global copyright standard. Although the choice-of-law approaches would relieve the pressure that countries would face if they were to harmonize their substantive laws, and the approaches would allow countries to maintain their different national copyright laws, the approaches would require collective action on choice-of-law rules; only if all countries adopted the same approach would choice-of-law approaches be successful in eliminating the multiplicity problem. Agreeing on choice-of-law approaches might be challenging, particularly since the approaches would only solve the multiplicity problem if they were combined with appropriate rules for personal jurisdiction; the negotiations of the proposed Hague Convention have demonstrated the difficulty that countries have in harmonizing rules of personal jurisdiction internationally.⁶⁵

1. The Localization Approach

The localization approach to solving the multiplicity problem seeks to identify an occurrence or fact that can be understood as the place of a tortious activity and be localized in a single place. One possible place is the place from which the allegedly infringing activity emanates, or “[t]he point of origin of the alleged infringement”⁶⁶ – the place where the alleged infringer acted. On the Internet this rule might lead to the alleged infringer’s domicile, if that is where the infringer

⁶⁴ The discussions of this approach mirror the general debates about tort localization. *See, e.g.*, ERNST RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, Callaghan & Company, Chicago, 1947, Volume Two, pp. 233 ff.; ALBERT A. EHRENZWEIG AND ERIK JAYME, *PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, INCLUDING THE LAW OF ADMIRALTY*, Volume Three. A.W. Sijthoff, Leyden, 1977, pp. 64 ff.; C.G.J. MORSE, *TORTS IN PRIVATE INTERNATIONAL LAW*, North-Holland Publishing Company, 1978, pp. 113 ff.

⁶⁵ Proposal for the Hague Convention...

⁶⁶ ALI Principles, §321, Reporter’s Notes, p. 155.

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acted, but it could lead to another jurisdiction if the infringer acted in the other jurisdiction (e.g., the alleged infringer might have uploaded content while on vacation abroad). Another localization might be in the domicile of the copyright owner; the theory for this approach is that the place of the tortious activity is the place in which the entire harm is concentrated – the place where the harm is internalized by the copyright owner.⁶⁷

Critics argue that the localization approach is problematic because the operative occurrence or fact can be manipulated; their concern is that the alleged infringer can easily choose the place from which he acts, and that the copyright owner can easily choose the place where he is domiciled. The expected result of the race to the bottom and the race to the top is that prospective infringers will move their activities to jurisdictions having the weakest copyright protection⁶⁸ (the jurisdictions having the weakest protection because of either their lower copyright legislation standards or their ineffective enforcement), while copyright owners will relocate to jurisdictions with the strongest copyright protection. It is debatable to what extent this concern is valid; historical, legal, financial, technical, and logistical considerations are some of the many considerations that influence decisions that determine the location of particular persons and entities, and although some persons and entities may relocate into a particular jurisdiction solely because of copyright law, it seems that this behavior will be uncommon. If a jurisdiction develops a reputation as a haven for alleged infringers, countries may reach for means other than choice-of-law rules to achieve the goal of adequate protection of copyright. The following sections discuss additional advantages and disadvantages presented by the two localization rules.

1.1 Localization in the Place of Origin of the Alleged Infringement

The rule that localizes copyright infringement in the place of origin of the alleged infringement – in the place where the alleged infringer acted – promotes, to the extent that the respective

⁶⁷ Paul Geller proposed that courts “localise the place of infringement in the country of the targeted market.” Paul Geller, *International Intellectual Property, Conflict of Laws and Internet Remedies*, 22(3) EIPR 125, 129 (2000). This approach is not discussed in detail in this section because the analysis for this approach involves additional factors; therefore, the approach is included under the “factors approach” *infra*. The approach may or may not lead to a limitation of the numbers of applicable laws. Jane Ginsburg proposed that in some circumstances courts apply “the law of the place of the server or of the defendant’s domicile.” Jane C. Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 Cardozo Arts & Ent. L.J. 153, 173 (1997). The rule of the place of the server may be viewed as a variation on the rule of the place from which the infringement originates because in many cases the result will be identical.

⁶⁸ Ginsburg, *Global Use/Territorial Rights*, *supra* note 4, 336; Ginsburg, *Copyright Use and Excuse on the Internet*, *supra* note 24, 44; ALI Principles, §321, Reporter’s Notes, p. 155; CLIP Principles, Article 3:603, Note 3:603.N07, p. 321.

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national copyright policies are different, the copyright policies of the alleged infringer's jurisdiction to the detriment of the policies of the copyright owner's jurisdiction.⁶⁹ The rule promotes the interests of the infringer's jurisdiction in shaping the conduct of Internet users; the jurisdiction might punish Internet users for copyright infringing conduct (including through punitive damages if a country's law provides for them),⁷⁰ but it might also protect Internet actors' (users') interests through exceptions and limitations to copyright. The rule does not promote the policies of the copyright owner's jurisdiction, nor does the rule promote the copyright policies of any other jurisdictions where the content is accessed or accessible.⁷¹ An inability to promote certain interests in cross-border scenarios will be mitigated if countries' interests are identical or sufficiently similar.

From the perspective of legal certainty the rule is advantageous for Internet actors because they can easily determine *ex ante* which copyright law regulates their conduct,⁷² and they can rely on that law always applying to their conduct regardless of where the copyright-protected work at issue and its copyright owner originate and which country's court might render a decision on the actors' conduct. The rule is disadvantageous to copyright owners because they cannot predict which copyright laws will govern Internet actors' conduct, and they will have to familiarize themselves *ex post* with whatever foreign country's law will govern the actions of the actors and determine whether copyright was infringed.

The localization approach that uses the place of origin of an infringement as the operative fact aligns well with the current rules of personal jurisdiction, as long as an alleged infringer acts in the place of his domicile; in this scenario a court in the place of the alleged infringer's domicile has general jurisdiction, meaning that the court may decide all claims brought against the alleged infringer.⁷³ Under the rule of the place of origin of an infringement, if the alleged infringer acts in his domicile, the court of his domicile would apply the law of its country (the forum law) and decide the infringement worldwide. Courts in other countries would have specific jurisdiction based on the place of the tortious activity, which would allow those other courts to adjudicate

⁶⁹ Ginsburg, *Copyright Use and Excuse on the Internet*, *supra* note 24, 44 (“[T]he point of origin approach has the effect of extruding the country of origin’s copyright policy choices, to the detriment of copyright policies in the other countries of receipt.” *Id.*).

⁷⁰ Punitive damages in copyright are not awarded only in common law jurisdictions; some civil law jurisdictions also provide for punitive damages. *See, e.g.,*

⁷¹ Ginsburg, *Copyright Use and Excuse on the Internet*, *supra* note 24, 44.

⁷² The determination could be complicated if the location of the conduct is disputed. *See infra*.

⁷³ *See supra* for general jurisdiction.

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only infringements that occurred in their respective countries; however, those other courts would also apply the law of the alleged infringement's origin to decide the case.

The fact that a court of general jurisdiction would apply the forum law – the national law with which the court is most familiar – to a worldwide infringement would certainly be a significant benefit of this rule; there is nothing inherently problematic about a court having to apply foreign law – courts must and do apply foreign law from time to time. However, there is value in having a court apply the forum law. The value would not be realized, however, if the alleged infringer acted outside the country of his domicile, for example while on vacation;⁷⁴ in this case the rule would mean that the court of general jurisdiction, which would be the court of the alleged infringer's domicile, would have to apply the law of the foreign jurisdiction where the infringing activity occurred to adjudicate the infringement worldwide, including in the jurisdiction of the court and the infringer's domicile. The court that would be most familiar with the foreign law, the court in the foreign country, would have only specific jurisdiction and could decide only the infringement in its own country.

The localization approach that is based on the place from which infringing conduct emanates is not an abstract academic construct; the approach, which is based on the “emission theory,” found a place in the European Union (“EU”) Satellite and Cable Directive⁷⁵ and in the EU E-Commerce Directive.⁷⁶ The EU Satellite and Cable Directive localizes the “act of communication to the public by satellite” “solely ... where ... signals are introduced into an uninterrupted chain of communication”;⁷⁷ the EU E-Commerce Directive makes only the law of the country in which a service provider is established applicable to the service provider's activities, and limits a country's ability to regulate service providers who are established in other EU member countries.⁷⁸ While the EU Satellite and Cable Directive concerns neighboring (“copyright-related”) rights,⁷⁹ the EU E-Commerce Directive includes a derogation under which

⁷⁴ Jane C. Ginsburg, *Copyright Without Borders?*, *supra* note 67, 172 (noting that “to some extent, the ‘point of origin’ approach and the defendant's domicile may converge.”).

⁷⁵ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (“EU Satellite and Cable Directive”).

⁷⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“EU E-Commerce Directive”).

⁷⁷ EU Satellite and Cable Directive, Article 1(2)(b).

⁷⁸ EU E-Commerce Directive, Article 3(1) and (2).

⁷⁹ EU Satellite and Cable Directive, Article 5.

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the emission principle does not apply to “copyright, neighboring rights, ... and ... industrial property rights.”⁸⁰

Jane Ginsburg recommended the emission principle for copyright infringement cases in a 1995 article; she called for the application of the law of “the country from which the infringing act or acts originated” only if an additional factor was satisfied: the law was also the forum law. In concert with some other commentators she also proposed the use of localization in other places that could all be understood as alternatives to the place of origin of the infringement; she suggested that the forum law should also apply if it is the law of “the country in which the defendant resides or of which it is a national or domiciliary; or the country in which the defendant maintains an effective business establishment.”⁸¹ Other commentators proposed variations of the rule of the place of origin of the infringement; for example they suggested applying the law of the place of the server.⁸² Mark Kightlinger proposed the EU E-Commerce Directive approach as a model for international internet regulation.⁸³

Some commentators have noted that the rule that localizes the place of infringement in the place of origin of the infringement is similar to the “root copy approach” that some U.S. courts have adopted; under that approach “the extraterritorial infringements are all the direct consequences of a local U.S. infringement.”⁸⁴ However, in the cases cited for this proposition U.S. courts have not applied U.S. law to activities abroad but have applied U.S. law solely to acts that occurred in the United States, and the courts then used the constructive trust theory to justify the recovery of profits that accrued from outside the United States but emanated from infringing acts in the United States.⁸⁵ The results of the application of the root copy approach are similar to the results

⁸⁰ EU E-Commerce Directive, Article 3(3) and the Annex.

⁸¹ Ginsburg, *Global Use/Territorial Rights*, *supra* note 4, 338. *See also* Ginsburg, *Copyright Without Borders?*, *supra* note 67, (proposing that “if it is possible to localize in the United States the point from which the unauthorized communication becomes available to the public (wherever that public be located), then U.S. law should apply to all unauthorized copies, wherever communicated”; *id.*, 171; and for defendants who are not domiciled in the United States and who acted from outside the United States, proposing that U.S. courts apply “either ... the law of the place of the server or of the defendant’s domicile”; *id.*, p. 173). *Also* Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 Va. J. Int’l L. 587, 600 (1997).

⁸² Austin, *Social Policy Choices*, *supra* note 7, 592.

⁸³ Mark F. Kightlinger, *A Solution to the Yahoo! Problem? The EC E-Commerce Directive as A Model for International Cooperation on Internet Choice of Law*, 24 Mich. J. Int’l L. 719 (2003).

⁸⁴ *See, e.g.*, Ginsburg, *Global Use/Territorial Rights*, *supra* note 4, 335.

⁸⁵ *Sheldon v. MGM*, 106 F.2d 45 (2d Cir. 1939) (“[A]n infringer ... is like any other constructive trustee.” *Id.*, 48. “The negatives were ‘records’ from which the work could be ‘reproduced’, and it was a tort to make them in this country. The plaintiffs acquired an equitable interest in them as soon as they were made, which attached to any profits from their exploitation, whether in the form of money remitted to the United States, or of increase in the value of

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that U.S. courts would have achieved if they had applied U.S. law to activities outside the United States, and indeed copyright owners resort to the root copy approach as an alternative to litigating under multiple copyright laws; this use of the root copy approach will be discussed later.⁸⁶ The results, however, are not identical. It appears that courts will award profits lost because of the activities abroad but not damages attributable to the activities abroad;⁸⁷ also, only profits linked to a specific type of infringement in the United States will be recoverable,⁸⁸ and statutory damages will not be available for acts committed outside the United States.⁸⁹ A judgment awarding foreign profits under the constructive trust theory will not result in the adjudicated case being *res judicata* for copyright infringement claims under the copyright laws of the foreign countries covered by the foreign profit award.⁹⁰

Some commentators have argued that the localization approach based on any act occurring on the Internet is unfit for the ubiquitous medium that the Internet represents;⁹¹ for example, the ALI Principles argue that the point of origin can be difficult to identify on “digital networks, particularly in the context of peer-to-peer exchanges.”⁹² Undeniably, acts on the Internet can often be localized in multiple places;⁹³ the localization can focus on the technical features of an act (e.g., where the bits are set in motion and/or where they travel on the network when a user

shares of foreign companies held by the defendants. ... [A]s soon as any of the profits so realized took the form of property whose situs was in the United States, our law seized upon them and impressed them with a constructive trust...” *Id.*, p. 52. *See also* Update Art, Inc. v. Modiin Pub., Ltd., 843 F.2d 67 (1988); LA News Service v. Reuters Television Int’l, Ltd., 340 F.3d 926 (2003).

⁸⁶ *See infra* section ...

⁸⁷ LA News Service v. Reuters Television Int’l, Ltd., 340 F.3d 926 (2003).

⁸⁸ “It is only when the type of infringement permits further reproduction abroad that its exploitation abroad becomes the subject of a constructive trust.” Robert Stigwood Group Ltd. v. O’Reilly, 530 F.2d 1096, 1101 (1976).

⁸⁹ Courts award statutory damages per infringed work; statutory damages cover only works infringed under the U.S. Copyright Act. 17 U.S.C. §504(c).

⁹⁰ If the copyright owner subsequently raised his infringement claims under foreign laws, a court would presumably take the existing profit award into consideration when deciding on remedies in the subsequent proceeding.

⁹¹ Reindl, *supra* note 2, 815 (“Efforts to localize infringing conduct on digital networks may be criticized for being too attached to conventional concepts of territorial laws and not sensitive enough for the non-territorial and extra-national nature of digital networks.” *Id.*); Dinwoodie, *A New Copyright Order*, *supra* note 2, 535 (“The place where an act of alleged infringement ‘occurs’ has become difficult to determine in the digital environment; concepts such as ‘place’ of publication or ‘country of origin’ lose meaning in a global and digital world, where geography holds less significance.” *Id.*).

⁹² ALI Principles, §321, Reporter’s Notes, p. 155.

⁹³ *E.g.*, some U.S. courts have localized publication in the United States when the person who posted the content on the Internet was located outside the United States when the person posted the content. *See also* Dinwoodie, *A New Copyright Order*, *supra* note 2, 537 (“[I]n a digital world ... publication may occur simultaneously in a number of countries.” *Id.*).

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requests a website) or on the human aspects of an act (e.g., where the person used a keyboard or other hardware when the person posted content on a website).⁹⁴

The evolution of the Internet and of courts' understanding of the Internet seem to have progressed to the point at which courts focus on the human aspects of acts – the location of the alleged infringer and the accessibility (by humans) of the work, which seems to be a reasonable result given the number of locations through which data travel and where data reside on the network.⁹⁵ For example, when a user posted a work online while the user was in Canada, a U.S. court found that the act of displaying the work publicly occurred in Canada (where the user was located when he acted), but that it also occurred in the United States and other countries where users had access to the work on the Internet.⁹⁶ Places through which the data might have travelled without humans accessing them seemed irrelevant in the analysis as a number of courts rejected localization based on purely technical features that would lead, for example, to localization based on the locations of servers that happen to be involved in the transmission of content.⁹⁷

Localization of persons on the Internet has become easier in recent years as identification and geolocation technologies have evolved to assist in localizing acts on the Internet; this localizing renders the Internet less of a borderless space than it was once perceived.⁹⁸ It may be difficult to localize an Internet user at the particular moment when the user engaged in a specific activity on

⁹⁴ For a discussion of localization of acts on the Internet also see Trimble, *The Future of Cybertravel*, *supra* note 1, pp. 607 – 610.

⁹⁵ John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 Ind. L.J. 893, 981 (1999) (“Jurisdiction should not depend on the physical location of the various computers that enable online communications, or the location of the owners of those computers, but rather on the location of the parties to online communications.”) See also *id.*, p. 983 (arguing for the same focus in a choice-of-law analysis). Cf. the “server test” applied in the Ninth Circuit, which is used to identify the place of copyright infringement.

⁹⁶ E.g., *Elmo Shropshire v. Aubrey Canning Jr.*, N.D.Ca., 5:10-cv-01941-LHK, document 85, August 22, 2011, *8.

⁹⁷ Cf. Ginsburg, *Copyright Without Borders*, *supra* note 67, 173 (proposing that “the law of the place of the server” applies in some circumstances); also Ginsburg, *Private International Law Aspects*, *supra* note 4, p. 45.

⁹⁸ E.g., Ginsburg, *Global Use/Territorial Rights*, *supra* note 4, 320; Ginsburg, *Copyright Without Borders?*, *supra* note 67, 153. Cf. Rothchild, *supra* note 95, 926-929 (commenting on the “ease of evading detection”; *id.*, 926); Dinwoodie, *A New Copyright Order*, *supra* note 2, 535 (referring to the digital world as a world “where geography holds less significance”). See also Goldsmith, *supra* note 29, p. 1203 (arguing that cyberspace is not a borderless medium) and p. 1226 (discussing filtering in 1998 as a “technology [that] is relatively new and still relatively crude”).

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the Internet; but in most cases localization is possible, albeit with costs that might be higher than localization in the offline environment.⁹⁹

1.2 Localization in the Copyright Owner's Domicile

The rule that localizes copyright infringement in the place of a copyright owner's domicile promotes the copyright policy of the copyright owner's country – the country can effectively legislate for the copyright owners' compensation and affect prospective copyright owner conduct in a manner consistent with the country's copyright policies. Provided that the interests of countries involved are different, the interests of an alleged infringer's country in protecting users' interests will not be promoted under this rule, nor will be the interests of that country in regulating (punishing) alleged infringers' conduct. The rule does not promote the copyright policies of other jurisdictions where the content is accessed or accessible.

The rule enhances the legal certainty of the copyright owner, who can rely on the laws of his own jurisdiction applying to acts on the Internet, regardless of where acts of infringement occur and which country's court decides the case. For an Internet actor legal certainty will be weaker than it will be under the rule of the place of the infringing activity's origin because under the rule of the copyright owner's domicile the actor must determine the identity and domicile of the copyright owner, and do so under the law of the country of the copyright owner's domicile – a country that the actor cannot know until he identifies who the copyright owner might be.¹⁰⁰ Once the Internet actor determines the country where the copyright owner is domiciled, he must familiarize himself with the copyright law of that country, which may be burdensome if the Internet actor deals with multiple copyright-protected works governed by different copyright laws.

The interoperability of the rule of the copyright owner's domicile with the current rules of personal jurisdiction is less harmonious than the interoperability of the rule of the place of the infringement's origin with the current rules of personal jurisdiction. Unless the copyright owner's and alleged infringer's domiciles are the same country, a court most familiar with the applicable law – the court of the country of the copyright owner's domicile – has only specific

⁹⁹ See Goldsmith, *supra* note 29, p. 1235-1236 (pointing out that difficulties with localization that are not limited to cyberspace but appear in the offline world as well); Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 Colum.-VLA J.L. & Arts 1 (1999) (“[I]n international law, the concept of the place of harm is relatively easy to manipulate.”).

¹⁰⁰ See *supra* Introduction for the difficulties associated with the identification of a copyright owner.

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jurisdiction and can adjudicate infringement only within its own country. The court of general jurisdiction – the court of the country of the alleged infringer’s domicile – will have to apply foreign law (the law of the copyright owner’s domicile) to adjudicate worldwide infringement. While the advantage (and the desired outcome) of applying a single country’s law to cover infringements worldwide exists under this rule just as it did under the previous rule, the disadvantage under this rule is that the court having jurisdiction to decide worldwide infringement must apply foreign law.

The rule of the place of the copyright owner’s domicile has not found its place in copyright law but commentators have entertained the rule as a theoretically sound possibility. Jane Ginsburg explained the reasoning behind the rule, which recognizes that “the harm goes to the author’s personality (violation of moral rights), and to her pocket (violation of economic rights).”¹⁰¹ Graeme Austin characterized the rule as the result of “a reconceptualization of transnational copyright infringement as harm to domestic economic interests,”¹⁰² and Andrew Guzman argued that “residence and domicile ... [t]o the extent that they are closely related to the location of effects ... may serve as proxies for effects”¹⁰³ of copyright infringement.

A rule that would point to the law of the place of the origin of the work¹⁰⁴ could be regarded as a version of this approach under the assumption that the place of origin of the work is also the place where the harm accrues. As Silke von Lewinski noted,¹⁰⁵ the principle of country of origin appeared in one international copyright treaty, the Convention of Montevideo on Literary and Artistic Property of 11 January 1889, which today has been superseded by other more widely-adopted copyright treaties. Some critics argue that one of the other treaties, the Berne Convention, precludes the rule of the place of origin of the work because Article 5(2) of the Convention includes a provision that some interpret as a choice-of-law provision pointing to the law of the protecting country (“the country where protection is claimed”). Provided that this

¹⁰¹ Ginsburg, *Private International Law Aspects*, *supra* note 4, p. 41. *See also* Jane C. Ginsburg, Myriam Gauthier, *The Celestial Jukebox and Earthbound Courts: Judicial Competence in the European Union and the United States Over Copyright Infringements in Cyberspace*, *Revue Internationale du Droit D’Auteur*, No. 173, Juillet 1997, pp. 61 – 135 (“One might ... contend that copyright infringement, and particularly moral rights infringement, implicate personal rights; the ‘place where the harmful event occurred’ with respect to personal rights would be the place where the copyright owner/author feels the harm, that is at the place of her domicile.” *Id.*, 85.)

¹⁰² Austin, *Domestic Laws and Foreign Rights*, *supra* note 99. *See also* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 *Geo. L. J.* 883, 920 (2002) ().

¹⁰³ Guzman, *supra* note 102, 920.

¹⁰⁴ Austin, *Social Policy Choices*, *supra* note 7, 592.

¹⁰⁵ SILKE VON LEWINSKI, *INTERNATIONAL COPYRIGHT LAW AND POLICY*, Oxford University Press, 2008, par. 1.08, p. 7.

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provision is a choice-of-law provision at all (which some commentators doubt), the provision disallows the application of the law of the country of origin to “the extent of protection, as well as the means of redress,” but the provision seems to leave open the possibility that the law of the country of the copyright owner’s domicile will apply as long as the country can be identified as the protecting country “where protection is claimed.”¹⁰⁶

The choice of law rule of the place of the copyright owner’s domicile has a parallel in the law of defamation. The “multiple publication rule” in defamation is consistent with the traditional notion of choice of law for copyright infringement because the rule “treats each communication of defamatory matter to a recipient as a separate publication,”¹⁰⁷ thus allowing for a multiplicity of applicable laws and available litigation fora because, for the purposes of defamation, publication occurs every time “defamatory matter is communicated ... to one other than the person defamed.”¹⁰⁸ The contrary rule is the “single publication rule,” which views the tort of defamation as occurring in only one place – the place where the plaintiff suffers harm from defamation, which is a rule that resembles the law of the place of a copyright owner’s domicile. In the United States, the Restatement (Second) of Conflict of Laws instructs courts to apply in defamation cases the law of the state of the plaintiff’s domicile if it was also a place of publication.¹⁰⁹ The rule operates alongside the “single publication rule,” which is formulated in the Restatement (Second) of Torts and also in the Uniform Single Publication Act,¹¹⁰ and which allows only one cause of action to be brought for publication that reaches multiple jurisdictions; the action then covers the entire harm caused by the publication.¹¹¹

Recently a sign has emerged of the “single publication rule” (or the single place of harm rule) being transferred to the realm of copyright law as one court has recently indicated its willingness to localize the place of harm in the copyright owner’s domicile. The Court of Appeals of New York, in response to a question certified by the U.S. Court of Appeals for the Second Circuit in *American Buddha*,¹¹² held that in a case of copyright infringement that occurred on the Internet

¹⁰⁶ Berne Convention, Article 5(2).

¹⁰⁷ David Rolph, *Splendid Isolation? Australia as a Destination for “Libel Tourism,”* 19 Austl. Int’l L.J. 79, 85 (2012).

¹⁰⁸ Restatement (Second) of Torts, §577(1).

¹⁰⁹ Restatement (Second) of Conflict of Laws, §150(2) and (3). If the domicile of the plaintiff and the place of publication do not coincide, courts will apply the law of the state or country with “the most significant relationship to the occurrence and the parties.” *Id.*, §150(1).

¹¹⁰ gC U.L.A. 173 (1952).

¹¹¹ Restatement (Second) of Torts, §577A(4).

¹¹² *Penguin Group (USA) Inc. v. American Buddha*, 921 N.Y.S.2d 171 (2011).

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the location of the copyright owner's injury was the residence or location of the principal place of business of the copyright holder.¹¹³ The Court of Appeals of New York opined that in the case of online infringement "identifying the situs of injury is not as simple as turning to the place where plaintiff lost business because there is no singular location that fits that description,"¹¹⁴ and although the Court of Appeals did not explicitly so state, it seemed that the court might consider the place of the copyright owner (the copyright owner's place of residence or the principal place of business) to be the only place of injury in an online copyright infringement case.

The New York Court of Appeals' holding in *American Buddha* was limited to the localization of the injury for the purposes of personal jurisdiction (long-arm jurisdiction), thus subjecting the operation of the rule in the context of personal jurisdiction to additional safeguards that the personal jurisdiction inquiry in the United States involves.¹¹⁵ On remand one of the additional safeguards (the requirement of substantial revenue drawn from interstate or international commerce) prevented the personal jurisdiction of the court in the copyright owner's place of business.¹¹⁶ The outcome in *American Buddha* was therefore consistent with the current U.S. court practice (discussed later)¹¹⁷ of limiting personal jurisdiction in cases involving acts on the Internet.¹¹⁸

The Court of Justice of the European Union ("CJEU") has also searched to pinpoint the place of injury on the Internet, and a question is now pending before the CJEU in a case involving copyright infringement that also seeks to establish the place of the copyright owner as the place of injury. The cases that preceded the copyright infringement case now pending before the CJEU were *eDate* and *Martinez*,¹¹⁹ in which the CJEU ruled that a plaintiff in a case concerning personality rights has the option of filing in a court of general jurisdiction (as regards all damages caused) either in the place of the defendant (the publisher) or in the place "in which the centre of [the victim's] interests is based."¹²⁰ Additionally, the defendant can sue in courts of

¹¹³ *Id.*, 174.

¹¹⁴ *Id.*, 176 (internal quotation and citation omitted).

¹¹⁵ *Id.*, 177.

¹¹⁶ *Penguin Group (USA), Inc. v. American Buddha*, 106 U.S.P.Q.2d 1306 (2013), *7.

¹¹⁷ See *infra* section ...

¹¹⁸ Cf. *Penguin Group (USA) Inc. v. American Buddha*, 921 N.Y.S.2d 171, 176 (2011) ("[T]he absence of any evidence of the actual downloading of Penguin's four works by users in New York is not fatal to a finding that the alleged injury occurred in New York." *Id.*).

¹¹⁹ *eDate Advertising GmbH & Martinez*, CJEU, joined cases C-509/09 & C-161/10, October 25, 2011.

¹²⁰ *Id.*, par. 1 of the ruling. See also *id.*, par. 48 – 50.

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specific jurisdiction (where “content placed online is or has been accessible”),¹²¹ but only as to the damage caused in the country of that court.

Since the *eDate* decision commentators have questioned whether the approach that the CJEU adopted in the cases concerning personality rights could also apply in cases of copyright infringement on the Internet¹²² and open up the possibility of general jurisdiction in the place of the copyright owner’s domicile. A subsequent CJEU decision in a trademark case¹²³ did not answer the question for copyright cases; given the applicable statutory language,¹²⁴ the CJEU ruled that in a case concerning infringement of a registered trademark, the trademark owner can sue in the country of the trademark registration or in the place of the defendant’s domicile.¹²⁵ What approach the CJEU will adopt in cases of infringement of copyright – an unregistered intellectual property right – is yet to be seen; the case of *Hejduk*,¹²⁶ which is currently awaiting a preliminary ruling by the CJEU, promises to shed light on this issue.

Accepting the place of the copyright owner’s domicile as the place of injury for purposes of jurisdictional analysis and allowing courts in that place to be the courts of general jurisdiction does not automatically mean that the courts would then apply a single law – the law of the copyright owner’s domicile – to infringements in multiple countries. EU choice-of-law rules instruct courts in the EU to apply “the law of the country for which protection is claimed”,¹²⁷ U.S. courts will apply the law of the country with “the most significant relationship to the occurrence and the parties.”¹²⁸ Arguably, both of these rules could be interpreted in a manner that allows for the application of the law of the country of the copyright owner’s domicile; protection could be claimed for the country of the copyright owner, which could also be deemed the country with the most significant relationship to the infringement and the parties. But neither rule suggests that a court will apply a single copyright law to infringements worldwide.

¹²¹ *Id.*, par. 1 of the ruling. *See also id.*, par. 51 and 52.

¹²² There is precedent for a CJEU ruling concerning personality rights applying in copyright infringement cases – *Shevill*...

¹²³ *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH*, CJEU, C-523/10, April 19, 2012.

¹²⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), Article 5(3).

¹²⁵ *Wintersteiger AG*, *supra* note 123, the ruling of the court.

¹²⁶ *Hejduk*, CJEU, C-441/13.

¹²⁷ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation), Article 8(1).

¹²⁸ Restatement (Second) of Conflict of Laws, §145(1).

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2. Factors Approach

Under the factors approach courts determine applicable law based on a weighing of multiple factors;¹²⁹ the approach was developed in response to criticism of rigid choice-of-law rules, such as the *lex loci delicti*. The Restatement (Second) of Conflict of Laws adopted this approach¹³⁰ but U.S. courts have not applied the approach to copyright infringements, resorting instead to the traditional *lex loci delicti* rule.¹³¹ However, two sets of proposed principles for conflict-of-laws rules in IP cases – the ALI Principles¹³² and the CLIP Principles¹³³ – suggest that courts follow a factors approach in cases of copyright infringement and use the approach to narrow the number of applicable copyright laws in cases of infringements occurring in multiple countries.¹³⁴ In addition to the two sets of principles, another proposal could imply some weighing of various factors in searching for a single applicable copyright law: Paul Geller’s proposal, articulated in his articles from 1996 and 2000,¹³⁵ suggested that the focus of the choice-of-law analysis be on “consequences for judicial remedies”¹³⁶ and lead to the application of the law of the “country of the targeted market.”¹³⁷ In some instances the identification of the country of the targeted market would require a weighing of several factors.

The ALI and CLIP principles include special provisions that apply to infringements on the Internet, and the application of the provisions can lead to a single copyright law applying to acts

¹²⁹ Other rules may involve multiple factors but not their weighing. *E.g.*, see *supra* note 81 and the accompanying text for the rule proposed by Jane Ginsburg.

¹³⁰ Restatement (Second) of Conflict of Laws, §145.

¹³¹ *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (1998) (“On infringement issues, the governing conflicts principle is usually *lex loci delicti*, the doctrine generally applicable to torts.” *Id.*).

¹³² The American Law Institute’s *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* (the “ALI Principles”) were adopted and promulgated in 2007.

¹³³ The Max Planck Institute Group on Conflict of Laws in Intellectual Property published its Principles (the “CLIP Principles”) in 2013.

¹³⁴ Because of the focus of this article on the problem of the multiplicity of copyright laws on the Internet this section analyzes only the provisions of the proposals that pertain to the solutions to the multiplicity problem. However, it should be noted that by providing for principles for jurisdiction, choice of law, and the recognition and enforcement of judgments, the proposals present coherent conflict-of-laws systems with their own sophisticated internal consistency, and therefore analysis of any individual provision of the proposals must take into consideration the entire system in which the provision ought to operate.

¹³⁵ Paul Geller, *International Intellectual Property, Conflict of Laws and Internet Remedies*, 22(3) EIPR 125, 125 (2000). For a critique of Geller’s proposal from 1996 see Reindl, *supra* note 2, 815-818.

¹³⁶ Geller, *International Intellectual Property*, *supra* note 135, 125.

¹³⁷ *Id.*, 129.

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on the Internet.¹³⁸ Although the drafters of both sets of principles designed the special provisions to concern ubiquitous environments in general, it is clear that if adopted, the special provisions would apply primarily on the Internet: The comment to the ALI Principles' provision concerning choice of law in "cases of ubiquitous infringement" lists "distribution of a work on the Internet" as the only example.¹³⁹ A comment on the CLIP Principles' provision explains that the provision was motivated by situations that arise on the Internet;¹⁴⁰ another comment lists the Internet as the only example of ubiquitous media to which the provision applies,¹⁴¹ and a note to the provision explains that the Principles adopt a narrow definition of "ubiquitousness" that very likely results in the special "ubiquitous infringement" provision applying if not only to than certainly primarily to online cases.¹⁴²

The special provision of the ALI Principles directs courts to apply the "law or laws of the State or States with close connections to the dispute" and provides a demonstrative list of factors that may be considered to determine the close connections: the place of residence of the parties, the center of the parties' relationship, the "extent of the activities and the investment of parties," and "the principal markets toward which the parties directed their activities."¹⁴³ A comment on the provision explains that the choice of factors reflects that the purpose of IP rights is "to create incentives to innovate"¹⁴⁴ and that the factors should therefore lead to the countries "most closely connected to that objective."¹⁴⁵ The focus on the center of the parties' relationship, if a relationship between the parties exists, is justified by the need for legal certainty and the preference for parties' ability to predict the law applicable to IP rights when they enter the relationship.¹⁴⁶

The special provision of the CLIP Principles also calls for the application of the "law of the State having the closest connection with the infringement" in cases of "ubiquitous infringement."¹⁴⁷

¹³⁸ ALI Principles, §321 ("Law or Laws to Be Applied in Cases of Ubiquitous Infringement"), p. 153; CLIP Principles, Article 3:603(1), p. 314.

¹³⁹ ALI Principles, §321, Comment, p. 153.

¹⁴⁰ The provision is "motivated by the attempt to balance the interest in efficient enforcement in the volatile environment of digital media with the need to offer safeguards to ensure that alleged infringers' rights are not substantially curtailed." CLIP Principles, Article 3:603, Comment 3:603.C02, p. 314.

¹⁴¹ CLIP Principles, Article 3:603, Comment 3:603.C09, p. 316.

¹⁴² CLIP Principles, Article 3:603, Note 3:603.N19, p. 324.

¹⁴³ *Id.*

¹⁴⁴ ALI Principles, §321, Comment, p. 154.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ CLIP Principles, Article 3:603(1), p. 314.

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The examples of the factors that a court should consider in determining the state with the closest connection are the “infringer’s habitual residence,” “the infringer’s principal place of business,” “the place where substantial activities in furtherance of the infringement in its entirety have been carried out,” and “the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety.”¹⁴⁸

The special provisions in both the ALI and CLIP Principles include an escape clause that provides for the possibility of a carve-out from the application of the selected applicable law or laws by allowing parties to prove for any country covered by the action that the law in that country differs from the selected law. Under the ALI Principles, if a party proves the differences, “[t]he court shall take into account such differences in determining the scope of liability and remedies.”¹⁴⁹ Under the CLIP Principles, if a party proves that “the rules applying in a State or States covered by the dispute differ from the law applicable to the dispute in aspects which are essential for the decision,” “the court shall apply the different national laws unless this leads to inconsistent results, in which case the differences should be taken into account in fashioning the remedy.”¹⁵⁰

In addition to limiting the number of countries whose laws apply, the principles also aim to limit the number of countries in which an Internet actor can be brought to court. While both sets of principles recognize the general jurisdiction of certain courts, they limit the courts that have specific jurisdiction over the alleged infringer. The ALI Principles limit specific jurisdiction (the jurisdiction of the court of the “State in which the ... activities give rise to an infringement claim”¹⁵¹ and the state of which the defendant is not a resident) to cases in which the alleged infringer “directed those activities to that State.”¹⁵² The CLIP Principles limit specific jurisdiction in a similar manner; an alleged infringer cannot be sued in a court of a state when “he has not acted in that State to initiate or further the infringement and her or his activity cannot reasonably be seen as having been directed to that State.”¹⁵³

¹⁴⁸ CLIP Principles, Article 3:603(2), p. 314.

¹⁴⁹ ALI Principles, §321(2), p. 153.

¹⁵⁰ CLIP Principles, Article 3:603(3), p. 314.

¹⁵¹ ALI Principles, §204(2), p. 47.

¹⁵² ALI Principles, §204(2), p. 47. The commentary explains that the rule applies an objective standard – “[t]he question is whether it is reasonable to conclude from the defendant’s behavior that defendant sought to enjoy the benefits of engaging with the forum” – and provides examples of facts that may evidence the defendant’s directing his acts at the forum. ALI Principles, §204, Comment, p. 49 – 50.

¹⁵³ CLIP Principles, Article 2:202, p. 67. The targeting approach to the limitation of personal jurisdiction is consistent with court practices in a number of countries as discussed *infra*.

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While they limit instances of specific jurisdiction, the principles expand the scope of jurisdiction of some courts with specific jurisdiction by allowing the courts, in some very limited circumstances, to decide infringements worldwide. The ALI Principles provide for an exception in cases where there is no WTO member state (a member state whose membership in the WTO ensures a certain level of copyright protection)¹⁵⁴ in which general jurisdiction over an alleged infringer can be established. In such cases the ALI Principles allow a court with specific jurisdiction to decide claims without territorial limitations if the alleged infringer “directed his activities to that State,” and the alleged infringer “solicits or maintains contacts, business, or an audience in that State on a regular basis, whether or not such activity initiates or furthers the infringing activity.”¹⁵⁵ The CLIP Principles make an exception to the territorial limitation on specific jurisdiction in instances in which the infringing activity has no substantial effect in a state where general jurisdiction over the alleged infringer exists; in such instances, a court with specific jurisdiction may also decide infringements in countries other than the court’s country, if the “substantial activities in furtherance of the infringement” was performed entirely in the court’s country or the harm caused there is “substantial in relation to the infringement in its entirety.”¹⁵⁶

The factors approach should be the champion of promoting the “right” copyright policies; by selecting particular factors for courts to weigh the approach’s designers steer the choice of applicable law toward the law of the country that in a given case has the prevailing interest in having its copyright law applied, or alternatively – in the words of the comparative impairment analysis – the country whose interests would be most impaired if its law were not applied.¹⁵⁷ It can be debated whether the results are different when courts use the factors approach as opposed to when they use rigid rules based on localization. Critics of the localization approach argue that when applying localization-based rules courts often use escape devices, such as creative assessments of the location of an infringing act, to achieve the application of the country’s law that best reflects the courts’ own policy preferences. For these critics, factors approaches merely legitimize the outcomes of the courts’ actual decision-making processes.¹⁵⁸

¹⁵⁴ TRIPS Agreement...

¹⁵⁵ ALI Principles, §204(3), pp. 47 – 48.

¹⁵⁶ CLIP Principles, Article 2:203, p. 85.

¹⁵⁷ On the attempts to draft choice-of-law rules or factors in a policy-neutral fashion *see* Trimble, *Advancing*, *supra* note 8....

¹⁵⁸ “[R]esult-selectivity is an integral element of the positive conflict of laws and that recognition of the need for sound outcomes in multistate cases is growing, especially in areas that have been the subject of important domestic

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The two sets of Principles explored in this section show different policy emphases.¹⁵⁹ The ALI Principles emphasize that choice of applicable law provides legal certainty for parties with a pre-existing relationship;¹⁶⁰ when such a relationship is absent, as is typical in infringement cases, the choice of law under the ALI Principles should promote the policy of creating incentives to innovate.¹⁶¹ The emphasis on incentives to innovate (or create) reflects the common-law utilitarian notion of copyright as expressed in the IP clause of the U.S. Constitution, according to which copyright should “promote the progress of science and useful arts.”¹⁶²

The choice of the emphasis in the ALI Principles is natural, considering their provenance; however, given the vigorous academic debate on the incentives theory one must wonder whether courts are capable of or can successfully implement the theory in particular cases through their selection of applicable law. The results of the analysis might not always be in favor of the law of the country of the copyright owner; in some instances, courts could decide that the law of the country of the alleged infringer better serves the incentives to innovate. A U.S. court could, presumably, give preference to the application of foreign copyright law even if it were the law of a civil law country that does not subscribe to the incentives theory; even if the U.S. law were designed to perfectly reflect the constitutional mandate, in a particular case the court could find that a foreign-country’s copyright law provides more of an incentive to create than the U.S. law does in that particular case. While in the abstract and in its totality U.S. copyright law could be better at providing incentives to create than a foreign-country’s copyright law, in a concrete case it could be the foreign law that provides greater, more effective incentives to create. The question is to what extent it would be easier for courts to identify the most suitable incentives in concrete circumstances when adjudicating particular cases than it has been for academics, policy experts, and legislators to identify the incentives in the abstract when proposing policies and designing legislation.

reforms, such as family and tort law. Openly or covertly, the better law principle now permeates case law, statutes and conventions.” FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE*, Martinus Nijhoff Publishers, 1993, p. 191.

¹⁵⁹ Paul Geller’s approach prefers effective enforcement, which translates into the focus in his approach being on the “consequences for judicial remedies.” *Supra* notes 136 and 137 and the accompanying text.

¹⁶⁰ *Supra* note 146.

¹⁶¹ *Supra* note 144.

¹⁶² U.S. Constitution, Article 1, Section 8, Clause 8.

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The CLIP Principles do not declare a preference for any law that provides the most effective incentives to create, which is understandable given the provenance of the CLIP Principles and also given their authors' desire to present a set of principles that would be universally acceptable to countries with varying IP philosophies. Although the CLIP Principles list choice-of-law factors only demonstratively, and they count on courts applying other or additional factors as they deem fit, the factors that the authors selected as examples are indicative of certain policy preferences. Three of the listed factors concentrate on the infringer's domicile and the place of the "substantial activities" of the infringer,¹⁶³ and the factors thus resemble the rule that localizes the infringement in the place of the alleged infringing activity's origin.¹⁶⁴ The selection of the factors leaves the impression that the CLIP Principles' drafters give preference to the law of the country that has an interest in regulating the alleged infringer's conduct. However, the Principles list the three factors only as examples and add a fourth factor pointing to the place of harm, meaning that courts could still apply the law of another country as long as it is the law with the "closest connection with the infringement";¹⁶⁵ in this manner the Principles presumably allow sufficient leeway for courts to instill in their choice-of-law analysis the respective IP philosophy of their jurisdiction.

While at least in theory it assists the promotion of the "right" policy, the factors approach seems to be detrimental to legal certainty. The localization approach, of course, also provides no absolute legal certainty; localization in the place of the copyright owner and localization in the place of the alleged infringing activity's origin present their own pitfalls for legal certainty.¹⁶⁶ However, the factors approach involves even greater uncertainty because the choice of law depends on the weighing of factors that will necessarily reflect the subjective assessments and preferences of individual adjudicating courts. Critics of the localization approach may argue that legal certainty is not in any more jeopardy under the factors approach than it is under the localization approach; the critics may contend that the localization approach, combined with various escape devices, provides as much flexibility to the courts' choice-of-law analysis as does the factors approach.

Because the choice of applicable law will be case-specific and dependent on courts' individual assessments, it should be difficult to predict the alignment of the Principles with the rules of

¹⁶³ *Supra* note 148.

¹⁶⁴ *See supra* section...

¹⁶⁵ *Supra* note 147.

¹⁶⁶ *See supra* Part II. Consider also the difficulties associated with the identification and localization of a copyright owner and the ex-ante prediction of the location of the alleged infringer or his activities. *See supra* sections ...

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personal jurisdiction. However, if the factors for choice of law reflect many of the same facts and occurrences that influence the results of the personal jurisdiction analysis, it is very likely that the outcome of the choice-of-law analysis will align well with the application of the rules of personal jurisdiction. A court of general jurisdiction that follows the ALI Principles can easily locate “close connections to the dispute” in the country of the alleged infringer,¹⁶⁷ which will allow the court to choose its own law as applicable to all infringements. A court with specific jurisdiction based on the alleged infringer’s activities directed at the country that gave rise to an infringement claim¹⁶⁸ will be able to apply its own law to infringements occurring in its country because the court will identify close connections based on the infringer’s activities directed at its country.¹⁶⁹ Even in the exceptional cases in which the ALI Principles allow a court of specific jurisdiction to decide claims arising anywhere in the world the court could legitimately apply its own country’s law.¹⁷⁰ Choice-of-law analyses in courts of general and specific jurisdiction applying the CLIP Principles would likely have the same outcomes;¹⁷¹ if courts use the CLIP Principles they will also likely apply the law with which they are most familiar – the forum law.

Finally, factors approaches are not immune to the same criticism pertaining to localization approaches: problems with localizing facts and occurrences on the Internet.¹⁷² However, localization problems should be less detrimental to the factors approach than they are to the localization approach; while the localization approach relies entirely on the localization of a single fact or occurrence, the factors approach uses the location of several facts or

¹⁶⁷ See *supra* note 143. The factors that will play a role in the choice will be the place of residence of the parties and the extent of the parties’ activities and investment. *Id.*

¹⁶⁸ See *supra* note 151.

¹⁶⁹ See *supra* note 143. The factors that will play a role in the choice will be the extent of the parties’ activities and investment and “the principal markets to which the parties directed their activities.” *Id.*

¹⁷⁰ See *supra* note 155.

¹⁷¹ See *supra* notes 147 and 148 (on the CLIP Principles’ choice-of-law rules), note 153 (on the CLIP Principles’ limitation of specific jurisdiction), and note 156 (on the CLIP Principles’ exception to the territorial limitation on specific jurisdiction).

¹⁷² See *supra* notes 91 - 99 and the accompanying text.

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occurrences.¹⁷³ Additionally, as noted earlier, concerns about localization may be waning in light of technological developments.¹⁷⁴

3. Copyright Infringement as a Single-Place Tort

The primary hurdle for the conflict-of-laws solutions to the multiplicity problem is countries' aversion to the notion of copyright infringement as a single-place tort, meaning a tort that is perceived to have occurred (or to be centered) in one place and amenable to adjudication under a single country's law notwithstanding the fact that it has effects in other countries.¹⁷⁵ An example of a single-place tort subject to one country's applicable law is a car accident. Although the interests of multiple countries may be implicated (e.g., parties from countries A and B collide in country C while driving cars manufactured in countries D and E), a court will choose and apply a single country's law to adjudicate the tort even if the tort's effects arise in multiple countries (e.g., the parties' injuries were treated in countries A, B, and C, and the parties incurred additional costs associated with the accident in countries A and B, such as the repair or replacement of their cars).¹⁷⁶

As opposed to negligence leading to a car accident or the intentional tort of battery, which are single-place torts, copyright infringement is traditionally a multi-place tort; if an act causes effects in multiple countries, the law of each country where the effects accrued – where copyrights under the countries' laws were infringed – applies to the act (or its effects) within that country. As opposed to the car accident and battery, which create an obligation considered to have vested in a single place (in a single country), an act of copyright infringement causes harm in multiple places (countries) and creates obligations in each of the multiple countries. Only if

¹⁷³ Even localization approaches may offer alternatives to particular places that courts cannot localize – for instance, some jurisdictions may enable courts to localize domicile in various places (e.g., general jurisdiction over businesses and legal entities) and courts can accept various acts to determine the location of the infringing activity (e.g., in cases of sales on the Internet courts may select multiple places as places of infringement). *See, e.g.*, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters (Brussels I Regulation recast), Article 63.

¹⁷⁴ *See supra* notes 98 and 99 and the accompanying text.

¹⁷⁵ It is important to remember that “copyright infringement” in this context describes a single act resulting in violation of laws of multiple countries. For example, the posting of a work on the Internet may be, depending on the country, the infringing act of making available to the public, public performance, or public display.

¹⁷⁶ More than one country's law may apply in the case if the court uses *depeçage* and applies different countries' laws to certain acts and facts. However, each time it will be only one country law that will apply to any given act and fact.

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countries were to agree to re-conceptualize copyright infringement as a single-place tort could the conflict-of-laws solutions in the previous sections succeed; only then could courts choose and apply one country's law to acts of copyright infringement with effects everywhere and decide the remedies for the harm suffered everywhere.

The reason commentators give for copyright infringement being a multi-place tort is that the principle of territoriality so dictates. Under the territoriality principle a country's copyright law governs copyright matters only within the reach of the country's prescriptive jurisdiction.¹⁷⁷ This principle does not distinguish copyright law from other types of national laws – including general tort laws – which typically also do not reach beyond a country's own prescriptive jurisdiction. What makes copyright law different from other types of national laws is that it creates an intangible object of property that, because of the principle of territoriality, extends *everywhere within* the reach of an individual country's prescriptive jurisdiction; copyright thus operates as a piece of virtual immovable property that stretches across the entire territory of the country's prescriptive jurisdiction.¹⁷⁸ Just as courts under traditional choice-of-law rules have applied the law of the country of the place of immovable property (*lex rei sitae*) in cases of torts that caused injury to the property,¹⁷⁹ so have courts applied the law of the protecting country – the law that creates the violated copyright at issue and thus where the copyright was infringed – to copyright infringements. Consistently with the view that copyright was akin to immovable property courts also considered copyright infringement to be a local and not a transitory cause of action, and therefore they refused to adjudicate copyright infringement claims arising under foreign laws.¹⁸⁰

There are two problems with using the traditional choice-of-law rule for immovable property in cases involving copyright. The first problem is that, because of its intangible nature and its international harmonization, copyright as an object of property typically exists simultaneously in multiple countries. While a few pieces of immovable property might stretch across a national

¹⁷⁷ PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 99 (2013). On the difference between the reach of a country's prescriptive jurisdiction and the effective territorial scope of the country's substantive laws see Trimble, *Advancing*, *supra* note 8,

¹⁷⁸ Cf. 3-12 Nimmer on Copyright 12.01[C] (...) (“[A] copyright ... has no situs apart from the domicile of its proprietor.” *Id.*). Also cf. James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 170 – 171 (2014) (“[I]n a sense, one may say [copyright and patent] are governed by a situs rule, and their situs is federal territory.” *Id.*)

¹⁷⁹ STORY, CONFLICT OF LAWS (8 ed.), Section 447; CHESHIRE, PRIVATE INTERNATIONAL LAW 536 (2d ed. 1938).

¹⁸⁰ See, e.g., Peter D. Trooboff, *Intellectual Property* in TRANSNATIONAL TORT LITIGATION: JURISDICTIONAL PRINCIPLES (Campbell McLachlan & Peter Nygh eds. 1996), pp. 125 - 154.

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border (and very few might extend over two national borders) and therefore two (or three) countries' laws might apply to the property parts located in different countries, copyright as an object of property almost always exists simultaneously in multiple countries. Not surprisingly the rule designed for immovable property does not function well under the conditions of a multiplicity of possibly applicable laws that typically arise in cases of copyright infringements on the Internet. The second problem is that choice-of-law rules concerning immovable property have evolved: Courts have accepted the position that certain tort claims concerning immovable property are transitory causes of action,¹⁸¹ and modern choice-of-law approaches have departed from the traditional strict *lex rei sitae* rule for some claims involving immovable property.¹⁸²

Some relaxation of the rules has also occurred for copyright, although the relaxation happened later for copyright than it did for immovable property. First, some courts have accepted the notion that copyright infringement is a transitory cause of action. In 1984 in *London Film* the U.S. District Court for the Southern District of New York found that it had jurisdiction over claims of copyright infringement that arose under the copyright laws of foreign countries. The U.K. Supreme Court cited *London Film* for its finding in its 2011 *Lucasfilm* judgment that copyright is a transitory cause of action in England.¹⁸³ Second, some countries have undertaken small departures from the dictate of *lex loci protectionis* – the copyright version of *lex rei sitae*: new acts on private international law in China and Switzerland now allow parties to a copyright infringement dispute to agree (after an occurrence of infringement) on the law applicable to the infringement.¹⁸⁴ Finally, in some limited circumstances countries recently agreed to recognize the status of a work or a copy of a work based on a foreign country's law. The 2012 EU Orphan Works Directive¹⁸⁵ provides for mutual recognition of the orphan work status in all EU member countries once the status is established for a work in one of the EU member countries.¹⁸⁶ The

¹⁸¹ See Restatement (Second) of Conflict of Laws, §87. See also, e.g., Stephen Lee, *Title to Foreign Real Property in Transnational Money Claims*, 32 COLUM. J. TRANSNAT'L L. 607, 641 – 657 (1995) (also analyzing ways in which tort claims involving immovable property can be reframed to become transitory causes of action).

¹⁸² E.g., Restatement (Second) of Conflict of Laws, §147; Rome II Regulation, *supra* note 127, Articles 4(3), 7.

¹⁸³ *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, par. 106.

¹⁸⁴ Bundesgesetz über das Internationale Privatrecht (Switzerland), December 18, 1987 (as of July 1, 2013), Article 110(2); Law of the Application of Law for Foreign-Related Civil Relations of the People's Republic of China, Article 50. *But cf.* Rome II Regulation, *supra* note 127, Article 8(3) (prohibiting an agreement from derogating from the applicable law chosen based on Article 8).

¹⁸⁵ Directive 2012/28/EU of the European Parliament and of the Council of 15 October 2012 on certain permitted uses of orphan works ("EU Orphan Works Directive").

¹⁸⁶ *Id.*, Article 4.

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2013 Marrakesh Treaty¹⁸⁷ provides for cross-border exchange of “accessible format copies”¹⁸⁸ for use by the visually impaired,¹⁸⁹ and while the Treaty does not use the words “mutual recognition,” it seems that the system of exchange implies a mutual recognition of the copies’ status as established in other countries – parties to the Treaty.¹⁹⁰

Some critics may doubt the importance of these developments for advancing the relaxation of choice-of-law rules in copyright. William Patry considers *London Film* an erroneous decision and charges that “[i]t is completely wrong to assert that copyright is a transitory tort.”¹⁹¹ He notes that U.K. courts have been influenced by the EU rules that, consistent with civil law practice, allow jurisdiction (competence) over copyright infringements arising under other countries’ laws.¹⁹² The U.K. Supreme Court decision in *Lucasfilm* could indeed be interpreted as a natural consequence of U.K. membership in the EU and a reflection of the influence of EU rules on the English legal system. While the acceptance of copyright infringement as a transitory cause of action can be viewed as an important step in the departure from the rules that resemble rules on immovable property, the fact that copyright infringement is a transitory cause of action does not mean that the choice-of-law rule governing copyright infringement will automatically change from *lex loci protectionis*.¹⁹³ Allowing parties to select the law applicable to infringement, as the Chinese and the Swiss acts do, could be critically viewed as no more than a move to extend a concept familiar in arbitration to the civil litigation realm.¹⁹⁴ Finally, the importance of the EU Orphan Works Directive and the Marrakesh Treaty as milestones in the process of changing views on choice of law in copyright could also be questioned; the two instruments do not state explicitly that they seek to influence choice-of-law rules, and they provide for mutual recognition in very limited and arguably highly harmonized spheres.

Notwithstanding these objections the developments described above can be taken to be signs of a trend towards relaxation of choice-of-law rules for copyright; the developments are emerging while there is a need for more efficient cross-border enforcement and a desire for easier and less

¹⁸⁷ The Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, signed at Marrakesh on June 27, 2013 (the “Marrakesh Treaty”).

¹⁸⁸ *Id.*, Article 2(b).

¹⁸⁹ *Id.*, Article 5.

¹⁹⁰ Marketa Trimble, *The Marrakesh Puzzle, ... IIC ...* (2014) (forthcoming).

¹⁹¹ WILLIAM F. PATRY, PATRY ON COPYRIGHT (2013), §25:105.

¹⁹² *Id.*

¹⁹³ *See supra*...

¹⁹⁴ *See also infra* section ... for a discussion of the choice-of-law practice and the possibility that parties to a dispute will not raise foreign law, thus de facto agreeing on the forum law.

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costly cross-border transactions. As Graeme Austin predicted, these circumstances will play an important role as countries decide whether to change choice of law for copyright infringements, particularly as they face the additional multiplicity problem challenges on the Internet.¹⁹⁵ If the developments concerning immovable property are a lesson, it seems that another circumstance would influence countries' willingness to relax choice-of-law rules for copyright infringements: countries' relinquishing their paternalistic approach to copyright.¹⁹⁶

For copyright infringement to be treated as a single-place tort, with the result that a single country's law could apply to the infringement worldwide, it would be necessary for countries to consent to have their copyright policies yield, from time to time, to the copyright policies of other countries. Countries' objection will be that copyright policies embed a particular balance of fundamental rights that countries must not allow to be endangered by permitting foreign copyright laws to apply.¹⁹⁷ A counter-argument might be that other laws that apply to single-place torts also reflect fundamental rights and that it is the public policy exception that provides an escape valve that in conflict of laws (both in choice of law and the recognition and enforcement of foreign judgments) protects a country's fundamental rights.¹⁹⁸

¹⁹⁵ Austin, *Social Policy Choices*, *supra* note 7, 582 (Graeme Austin cautions that "[d]evising a conflict of laws regime for cyberspace copyright infringement needs to be seen as a task that involves an important social policy choice, one that requires weighing the advantages of single governing law approaches – such as more efficient enforcement and licensing of copyrights – against the costs of allowing domestic copyright laws to be overridden by the copyright laws of other nations." *Id.*).

¹⁹⁶ June F. Entman, *Abolishing Local Action Rules: A First Step Toward Modernizing Jurisdiction and Venue in Tennessee*, 34 U. MEM. L. REV. 251, 260 (2004) ("In addition to, and perhaps underlying, nineteenth century notions of state court territorial jurisdiction, courts may have feared loss of local control and ensuing confusion in land titles if judgments were permitted to directly affect land titles in other states. Insistence upon a state's exclusive power to dispense remedies respecting land within its borders provided the states with protection from sister state adjudications that refused to apply, or misapplied, situs law." *Id.*). Richard Fentiman, *Choice of Law and Intellectual Property*, in *Intellectual Property and Private International Law – Heading for the Future* (Josef Drexler and Annette Kur eds., Hart Publishing, 2005), pp. 129 – 148 ("The character of rights in intellectual property as state-protected rights, which are both exclusive and economically sensitive, gives the law in this area a regulatory character, and ensures that every state has a legitimate interest in the protection of intellectual property rights according to its laws." *Id.*, 132.)

¹⁹⁷ See *supra*...

¹⁹⁸ Critics could argue that the issues in which countries' copyright laws differ are often (if not always) precisely those issues that countries cannot harmonize (at all or deeper) because the issues reflect differences in the countries' notions of fundamental rights. The practice would have to show whether any space remains for issues that are not fully harmonized yet but do not present a friction of fundamental rights, meaning a space in which no harmonization (or no deeper harmonization) has occurred but in which countries are willing to recognize and enforce foreign judgments based on a foreign country's law that differs from theirs.

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Countries may also hesitate to accept the notion of copyright infringement as a single-place tort because they might be concerned about enforcement of judgments based on a single country's applicable law. This is a concern that countries share for immovable property; the concern has been one of the rationales for the local action doctrine, which prevented a court from issuing a judgment that the court could not enforce because the court lacked physical power over the immovable property.¹⁹⁹ The concern is certainly warranted in cases of registered intellectual property rights that require a registration by a country's agency for their existence. There should be less reason for this concern in cases of unregistered intellectual property rights, such as copyright.²⁰⁰

One example, the case of *Viewfinder*,²⁰¹ suggests that the concern about enforcement might be justified in copyright cases; in the case a court applied the law of a single country to copyright infringement that arguably might have been claimed to have occurred in multiple countries simultaneously. The U.S. Court of Appeals for the Second Circuit denied the recognition and enforcement of a French judgment; the French judgment applied French law and granted an injunction that required enforcement in the United States. The public policy exception prevented the recognition of the judgment in the United States because it would have violated the First Amendment. While the French court did not explicitly apply French law to acts in the United States, its judgment did de facto because the posting of the photographs at issue on a website occurred in the United States and the injunction was therefore directed at activities in the United States. The outcome in *Viewfinder* can be interpreted as confirming countries' concerns about treating copyright as a single-place tort and facing the resulting enforcement difficulties; the outcome can also be interpreted as proving that the public policy exception is an effective escape valve for the protection of fundamental rights and other significant public policies. The existence of the exception should make it easier for countries to accept copyright infringement as a single-place tort while assuring countries that they will not have to compromise their fundamental rights.

The degree of harmonization of copyright law at the international level (both in terms of the degree of harmonization – as far as the scope and depth – and the number of countries with harmonized copyright laws) should enhance countries' amenability to shifting to copyright

¹⁹⁹ Fisher v. Virginia Elec. & Power Co., 243 F. Supp. 2d 538, 547 (E.D. Va. 2003).

²⁰⁰ Under the Berne Convention, countries must require no formalities for copyright protection. Berne Convention, Article 5(2).

²⁰¹ Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474 (2d Cir. 2007).

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infringement as a single-place tort.²⁰² The more that copyright laws are harmonized, the fewer will be the differences that will persist in promoted policies and the less it will be that countries will be concerned that foreign law might apply in some individual cases. While copyright law might not reach a sufficiently deep global harmonization any time soon to achieve a single global copyright standard (the standard that some commentators have seen as a promising solution to the multiplicity problem),²⁰³ the law could much earlier reach a level of harmonization that would make countries comfortable with a shift to the notion of copyright infringement as a single-place tort.

Finally, some critics might argue that conflict-of-laws approaches would lead to a result that is worse than a single global copyright solution because the approaches allow one country to dictate copyright law for other countries without allowing the other countries to shape the law.²⁰⁴ It is important to remember though that as opposed to the single global copyright law solutions, conflict-of-laws approaches affect only cross-border scenarios; domestic scenarios continue to be governed by the national laws of individual countries. Comity should ensure that countries will see their laws applied whenever there is a legitimate reason for the laws to apply, and the public policy exception safeguards countries' fundamental rights and other significant public policies.

III. Realities Affecting the Multiplicity of Copyright Laws on the Internet

The existing proposals that attempt to address the multiplicity of copyright laws on the Internet have not found their way into national legislation or international treaties, but some courts have already looked at the proposals when deciding cases involving the multiplicity problem and have benefited from the wealth of analysis that the proposals include.²⁰⁵ However, unless major changes in conflict of laws are undertaken in concert by all or a significant number of countries, Internet actors will continue to face the multiplicity problem.

Commentators have predicted that the multiplicity problem would be a major hurdle for activities on the Internet, but a cursory review of copyright cases from the past two decades shows that the multiplicity specter has not materialized, at least not in the form of Internet actors facing global enforcement campaigns led simultaneously under the laws of all countries

²⁰² Countries' willingness to relax *lex rei sitae* in cases of environmental torts may be affected by a high degree of environmental law harmonization in the countries. See Rome II Regulation, *supra* note 127, Article 7.

²⁰³ See *supra* Part I, Section 2.

²⁰⁴ See *supra* Part I, Section 1 for a discussion of countries' involvement in shaping international law.

²⁰⁵ See *supra* note ... (referring to court decisions that cited the ALI and CLIP Principles).

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connected to the Internet. The reasons that Internet actors are not being exposed to global copyright enforcement mayhem dwell in the realities of cross-border copyright litigation, which limit the territorial extent of manageable copyright enforcement, at least for litigated cases, and which are the “mysterious mechanisms” that Peter Swire observed “are reducing the actual conflicts to a handful of cases.”²⁰⁶ The following sections discuss the litigation realities that concern choice of law and personal jurisdiction and that affect plaintiffs’ choices for claimed laws and litigation fora, and consequently also affect Internet actors’ compliance with copyright laws on the Internet.

1. Limitations on Choice of Applicable Law

Notwithstanding the ubiquitous nature of most activities on the Internet, relatively few cases make it to courts in which copyright owners claim copyright infringement in multiple countries and therefore raise infringement claims under the laws of multiple countries. There are several explanations for why choice-of-law issues seldom arise in copyright cases, including cases involving the Internet.

Perhaps the most mundane reason for the lack of copyright cases that raise choice-of-law issues is that the issue does not seem to be recognized by many clients or their counsel. For clients, Ted De Boer’s observation is fitting that “the average citizen, lacking experience in dealing with multistate legal problems, is not very sensitive to the problems and solutions of choice of law”²⁰⁷ and, as a result, “the problem as such escapes him.”²⁰⁸ We might expect better awareness from lawyers, who should be more aware than an average citizen of the possibility that the laws of multiple countries could be implicated in a dispute; however, two important limitations exist.

The first limitation is IP-specific and arises from the fact that the area of IP law has traditionally not been viewed as an area prone to complex choice-of-law problems; the territoriality principle seemed to clearly delineate the applicability of IP laws, leaving little if anything to choice-of-law analysis.²⁰⁹ Notwithstanding the fact that as early as 1889 a conflict-of-laws expert authored a

²⁰⁶ Peter P. Swire, *Elephants and Mice Revisited: Law and Choice of Law on the Internet*, 153 U. Pa. L. Rev. 1975, 1975 (2005).

²⁰⁷ Th. M. De Boer, *Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law*, Recueil des Cours, Hague Academy of International Law, 1997, p. 298.

²⁰⁸ *Id.*

²⁰⁹ See Paul Edward Geller, *How To Practice Copyright Law Internationally in Perplexing Times?*, 60 J. Copyright Soc’y U.S.A. 167, 182 ff. (2013) (discussing the need to “map out arguable infringement worldwide”).

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comprehensive study of conflict-of-laws issues in IP,²¹⁰ and his work was not the only or the last to address the issues,²¹¹ courts and academics at the end of the 20th and the beginning of the 21st century have noted the relative novelty and uniqueness of conflict-of-laws analyses focused on IP cases.²¹² Anecdotal evidence suggests limited awareness about choice-of-law issues among IP lawyers.²¹³

The second limitation that might explain why lawyers are not particularly aware of choice-of-law issues in IP cases, and therefore do not always recognize choice-of-law issues in copyright infringement cases, is the same limitation that exists in other areas of law and that is associated with the general plight of conflict of laws as a subject in U.S. law schools. Although globalization generates more cross-border legal issues today than it did ever before and conflict of laws should be one of the most important tools in the toolbox of a modern lawyer,²¹⁴ only about half of the U.S. state bar associations test conflict of laws on their bar examinations; with

²¹⁰ CARL LUDWIG VON BAR, *THEORIE UND PRAXIS DES INTERNATIONALEN PRIVATRECHTS* (Hahn'sche Buchhandlung, Hannover, 1889), Volume Two, pp. 231 – 291.

²¹¹ Examples of the 20th century literature on the topic include Alois Troller, *Europäisierung des Patentrechts und Gerichtsstand*, 1955 GRUR INT. 529; Friedrich Groß, *Wie mache ich im Inland Ansprüche aus Schutzrechten geltend, deren Verletzung im Ausland erfolgt ist?*, 1957 GRUR INT. 346; Otto-Friedrich Frhr. von Gamm, *Die internationale und örtliche Zuständigkeit im gewerblichen Rechtsschutz*, 50 MITTEILUNGEN DER DEUTSCHEN PATENTANWÄLTE 212 (1959); Heinz W. Auerswald, *Können Ansprüche wegen Verletzung eines ausländischen Patents vor deutschen Gerichten verfolgt werden?*, in *FESTSCHRIFT WERNER VON STEIN* 8 (1961); W. R. Cornish, *Intellectual Property Infringement and Private International Law: Changing the Common Law Approach*, 1996 GRUR INT. 285; Paul Edward Geller, *Conflicts of Laws in Cyberspace: Rethinking International Copyright*, 20 COLUM.-VLA J.L. & ARTS 571 (1996); JAMES J. FAWCETT, PAUL TORREMANS, *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW* (1998); Ginsburg, *The Private International Law of Copyright*, *supra* note 36, pp. 239-406.

²¹² “The rarity of coordinated studies of copyright and private international law is often deplored by legal writers representing both these disciplines.” STIG STRÖMHOLM, *COPYRIGHT AND THE CONFLICT OF LAWS*, Carl Heymanns Verlag, 2010, p. 3. “In spite of that oft complained scarcity of major contributions to the meeting of intellectual property and private international law, a complete study of modern legal writing on this topic would demand a very substantial chapter.” *Id.*, p. 60.

²¹³ On a similar situation in China *see* Ning Zhao, *Choice-of-law in Cross-border Copyright and Related Rights Disputes*, Ulrik Huber Institute for Private International Law, Groningen, 2012 (“[S]ome People’s Courts and practitioners are not, or are less, aware of choice-of-law issues...” *Id.*, p. 184.).

²¹⁴ “[T]he study of public international law and the study of private international law are not just two elements in a well balanced curriculum, comparable to anatomy and physiology for a medical student.” Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction (Hague Academy Lectures)*, 1979, p. 2. “The growing interdependence of legal systems has significantly increased the relevance of private international law and the need for lawyers to acquire international and comparative law skills.” Carolyn B. Lamm, *Internationalization of the Practice of Law and Important Emerging Issues for Investor-State Arbitration*, opening lecture, *Recueil des Cours, Académie de Droit International*, 2011, Tome 354, 2012, pp. 9 – 64, at p. 25.

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few exceptions conflict of laws courses cover mostly interstate and federal-state conflicts, leaving international conflicts to special chapters (“special” in this context appears to mean “unusual”) at the end of the course.²¹⁵ Although courses on transnational litigation and comparative procedure are helpful additions to the traditional U.S. conflict-of-laws curricula,²¹⁶ the courses are too few to educate a sufficient percentage of future lawyers in the very important field and sensitize them to international conflicts. A number of law schools now offer a course in international intellectual property law; however, only some of these courses cover conflict-of-laws problems in any significant detail.²¹⁷ If neither lawyers nor their clients recognize a cross-border issue, they will not bring claims under foreign laws and the issue will not exist.²¹⁸

A different question is whether lawyers who identify cross-border issues in copyright cases choose to inform their clients about the existence of the issues and face the possible consequences. Regardless of what the rules of professional ethics might tell a lawyer to do, the lawyer might decide not to mention the existence (or the potential of the existence) of a cross-border issue to her clients because she might be concerned that she would eventually have to refer the client to foreign counsel. Some lawyers may even feel uncomfortable with the idea of admitting to their clients that their ability to provide legal advice is limited, even though the cross-border issue concerns copyright law – their expertise. Not all clients will readily understand the intricacies of dealing with various countries’ copyright laws and the need to consult or engage foreign counsel.

²¹⁵ Friedrich Juenger cautioned in 1999: “The fact that our discipline has been preoccupied with domestic choice-of-law problems ought to be of some concern to law teachers, now that ‘globalization’ has become the cliché of choice and acronyms such as EU, NAFTA, and WTO are bantered about daily by the media.” Friedrich K. Juenger, *The Need for A Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309-1336 (1999).

²¹⁶ On the challenges of dealing with copyright cases involving multiple countries’ laws see Geller, *How To Practice Copyright Law*, *supra* note 209.

²¹⁷ PAUL GOLDSTEIN & MARKETA TRIMBLE, *INTERNATIONAL INTELLECTUAL PROPERTY LAW, CASES AND MATERIALS*, (3rd ed., 2012); DANIEL C.K. CHOW & EDWARD LEE, *INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES AND MATERIALS* (2nd ed. 2012); GRAEME B. DINWOODIE ET AL., *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY* (2nd ed. 2008). Conflict-of-laws issues are also covered to a lesser extent or in a cursory manner in MARGO A. BAGLEY ET AL., *INTERNATIONAL PATENT LAW AND POLICY* (2013); JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* (3rd ed. 2010); FREDERICK M. ABBOTT ET AL., *INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY* (2nd ed. 2007).

²¹⁸ SOFIE GEEROMS, *FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS*, Oxford University Press, 2004 (“Foreign law cannot get into court if neither the judge nor the parties suggest its relevance to the case at issue.” *Id.*, p. 41). Even if a court has an obligation to conduct a choice-of-law analysis on its own (which is the case in some jurisdictions) the court will not do so unless the parties raise claims that implicate a choice-of-law issue.

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Even when a lawyer identifies a cross-border issue and informs the client about its existence and potential consequences, the lawyer may advise against filing a case in a manner that would present a choice-of-law issue because litigating under the laws of multiple countries is challenging and expensive. The first reason is the cost of litigation: Whether the rules of procedure require parties to plead and prove foreign law, submit foreign law to judicial notice,²¹⁹ or whether courts have an obligation to ascertain foreign law on their own,²²⁰ the inclusion of claims under multiple countries' laws puts additional pressure on resources that the parties have to expend in litigation. It is likely that parties will have to hire foreign law experts to analyze foreign law, and sometimes present the law to the court.

The second reason lawyers might pause before they file a case under multiple countries' laws is courts' natural hesitancy to apply the laws of multiple countries in one lawsuit. The hesitancy is understandable; it can be sufficiently complex for a court to apply foreign law instead of forum law, and dealing with multiple countries' laws in a single litigation complicates and prolongs the proceedings. Sometimes a court may wonder whether litigating under the laws of fewer countries would serve the plaintiff sufficiently, and whether the plaintiff is making claims under multiple countries' laws to pursue indirect strategic goals. By bringing lawsuits under the copyright laws of too many countries a lawyer may risk alienating the court from the outset.²²¹

The third reason for lawyers to limit the number of laws that they claim will apply to the case is that concentrating litigation under the laws of multiple countries in one venue does not relieve the plaintiff of the responsibility to prove infringements in all countries where the plaintiff claims infringements to have occurred. The laws of most countries require the plaintiff to prove that the alleged acts were greater than *de minimis* infringements in order for a court to find the acts in violation of a country's law, and unless the particular foreign country's law provides for

²¹⁹ Geller, *Conflict of Laws in Copyright Cases*, *supra* note 18, 333 (“[T]he failure to plead the copyright law of each country impacted by the transactions at issue may preclude a claimant from relying on this law at a later stage of suit.” *Id.*).

²²⁰ On different approaches to foreign law in courts *see, e.g.*, MARTIN WOLFF, *PRIVATE INTERNATIONAL LAW*, Clarendon Press, Oxford, 1950, 2d ed.. pp. 218 – 223.

²²¹ If a plaintiff decides not to claim copyright infringement under the laws of foreign countries in a lawsuit, his decision should not mean that he waives any claims for infringements in the foreign countries. Not bringing a lawsuit under the law of a foreign country does not preclude the bringing of a separate (parallel or subsequent) lawsuit in the foreign country under that foreign country's law.

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statutory damages that the adjudicating court would be willing to award,²²² the plaintiff will also have to prove his lost profits and/or damages in the foreign country.²²³

Whether a party brings a claim under a foreign copyright law and/or under some number of countries' laws should depend on the result of a careful cost/benefit analysis. The cost analysis should consider not only litigation expenses²²⁴ but also strategic and reputational costs vis-à-vis a court, and – given the recently increased public sensitivity to large-scale copyright enforcement efforts – also the costs to the image of the copyright owner and his public relations. For the benefit analysis the prediction of possible rewards²²⁵ should be tempered by an assessment of potential difficulties that could be associated with the enforcement of the rewards, particularly if the enforcement might require the recognition and enforcement of the resulting judgment in a foreign country outside the adjudicating court's jurisdiction.

Courts do not necessarily shy away from conflict-of-laws issues; they address these issues regularly and from time to time also apply foreign law. However, courts generally prefer to apply forum law,²²⁶ the law with which they are most familiar; it is a natural tendency for courts to apply – whenever possible – choice-of-law rules in a manner that results in the courts applying forum law.²²⁷ In common law countries the courts, when faced with foreign law insufficiently pleaded and/or proven will resort to applying the forum law under the presumption that the

²²² Graeme Austin advanced the position that remedies should be governed by the law of the country in which infringement occurred. Austin, *Domestic Laws and Foreign Rights*, *supra* note 99.

²²³ Some countries that do not provide for statutory damages have other alternatives to actual damages, but for these alternative damages some proof may also be necessary.

²²⁴ Austin, *Social Policy Choices*, *supra* note 7, 590.

²²⁵ *Id.*

²²⁶ Dinwoodie, *A New Copyright Order*, *supra* note 2, 530-531; RICHARD FENTIMAN, *FOREIGN LAW IN ENGLISH COURTS*, Oxford University Press, 1998, p. 24.

²²⁷ See CLIP Principles, Article 3:603, Comment 3:603.C14, p. 318 (“It is not unrealistic to submit that courts have a certain natural tendency to assume that the law having the closest connection to a case is the law of the forum.” *Id.*); Austin, *Domestic Laws and Foreign Rights*, *supra* note 99 (“United States courts have employed a number of choice of law strategies to enable application of U.S. copyright law to allegations of copyright infringement based on acts that have occurred abroad.”); Dinwoodie, *A New Copyright Order*, *supra* note 2, 533 (“[T]o the extent that U.S. courts have been willing to localize an international dispute in a single country, they have invariably localized to the United States and thus have applied U.S. law.” *Id.*, p. 533.). On courts' preference for forum law in general see, e.g., Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. National Australia Bank*, 92 B. U. L. Rev. 535, 556 (2012); Laura E. Little, *Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States*, European Yearbook of Private International Law, Vol. 14, 2012, p. *3.

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foreign law is identical to the forum law;²²⁸ in such a situation the outcome is identical to the outcome that would occur if the parties were to agree to have the forum law apply to their case – notwithstanding the fact that most countries’ laws do not permit parties to agree, post-infringement, on the law that will be applicable to their copyright infringement case.²²⁹ When facing cases involving multiple countries’ laws, common law courts that apply the *forum non conveniens* doctrine may more likely apply the doctrine to dismiss the case as better suited for another, more suitable forum.²³⁰ It is therefore not surprising that when plaintiffs have a choice of forum they tend to file infringement cases in the courts of the countries whose laws the plaintiffs want to apply; the practicalities thus promote the choice-of-law rule of *lex loci protectionis* and the filing of cases in the countries where the infringement is claimed.

Unintentionally overlooking or intentionally avoiding a choice-of-law issue does not have to be detrimental to the client’s desire for redress; there are tools that help capture some or all of the acts abroad. The doctrines of secondary infringement can cover acts that occurred outside the protecting country; for example, instead of claiming that a defendant’s acts infringed the copyright law of a foreign country, a plaintiff may be able to claim that the acts induced infringement of copyright under U.S. copyright law and as such also infringed U.S. copyright law.²³¹ While induced infringements must occur in the United States, the associated acts of inducement can occur outside the United States and still be subject to U.S. copyright law. Requesting profits arising from foreign acts that can be traced to an infringement in the United States is another way that plaintiffs can obtain redress (even if not complete redress) for acts

²²⁸ The Reporter’s Note of the ALI Principles submits that “it may often be fair and reasonable for the court to presume that the relevant States’ norms are the same as those of the State whose law is chosen to apply” because of the “increasing harmonization of national intellectual property laws.” ALI Principles, §321, Reporter’s Notes, p. 155. “American courts have, in innumerable cases, shown their willingness to accept the parties’ express or implied choice of the *lex fori*, whether that choice is made prior to or during litigation.” ALBERT A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, INCLUDING THE LAW OF ADMIRALTY, A.W. Sijthoff, Leyden, 1967, p. 181.

²²⁹ “American courts have, in innumerable cases, shown their willingness to accept the parties’ express or implied choice of the *lex fori*, whether that choice is made prior to or during litigation.” ALBERT A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, INCLUDING THE LAW OF ADMIRALTY, A.W. Sijthoff, Leyden, 1967, p. 181. *See also infra* ... on the Chinese and Swiss acts on private international law.

²³⁰ *See, e.g.,* Ginsburg, *Global Use/Territorial Rights*, *supra* note 4, 334 (on litigants in the U.S. arguing for dismissals for *forum non conveniens* if foreign law has to be interpreted); Austin, *Domestic Laws and Foreign Rights*, *supra* note 99 (an analysis of *forum non conveniens* issues as they arise in cross-border copyright cases); RICHARD FENTIMAN, *FOREIGN LAW IN ENGLISH COURTS*, Oxford University Press, 1998, p. 24.

²³¹ *See also* Austin, *Domestic Laws and Foreign Rights*, *supra* note 99.

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occurring outside the United States while bringing the action only under U.S. law.²³² Annette Kur notes that decisions rendered by one court that applied a single country's law "more often than not entail *global effects*, even where they only purport to pertain to the national territory."²³³ Whether it is indeed "more often than not" is an empirical question worth its own study, but many decisions indeed have global effects. Injunctions granted by courts applying even a single country's law may stop acts worldwide, for example by ordering the takedown of a work from the Internet. Monetary damages can have global deterrence effects even if they are awarded for infringements in a single country; although such damages do not remedy harm caused in other countries, they might be sufficiently high to dissuade an infringer from further similar acts and thus the damages serve the deterrence function globally.²³⁴ To the extent that an infringer's assets are limited, damages awarded for infringement in one country, if they exceed the infringer's assets, may entail all that (or more than) the plaintiff is realistically likely to recover.

2. Limitations on Personal Jurisdiction

The multiplicity problem is also mitigated by the fact that courts have limited specific jurisdiction over an Internet actor because courts have circumscribed personal jurisdiction based on acts committed on the Internet. Multiplicity critics have assumed that Internet actors would be exposed to multiple copyright laws in two possible scenarios: In the first scenario, a copyright owner would bring claims of copyright infringement under multiple copyright laws in the court of an Internet actor's domicile (as long as the court considers the claims to be transitory causes of action it will entertain the action under foreign countries' laws). This possibility would require that the court apply multiple copyright laws – a scenario that is associated with the various limitations discussed in the previous section. In the second scenario, the copyright owner would bring claims in all countries where the allegedly infringing work was accessible, and would bring the claims under all the respective copyright laws, thus utilizing the specific jurisdiction that the courts in these countries would have had, based on the accessibility of the work, which would also make all the countries the places of the tortious activity.

Many of the reasons discussed in the previous section explain why the filing of lawsuits in multiple countries has not been rampant, as the multiplicity critics feared. Many clients and

²³² See *supra* ... (for a discussion of the possibility of receiving an award of foreign profits).

²³³ CLIP Principles, Article 3:603, Note 3:603.N04, pp. 320 – 321.

²³⁴ The deterrence function might be served if the law provides for and the court awards punitive damages. See ... However, even when a country's law does not provide for punitive damages, the amount of compensatory damages might be sufficiently high to serve the deterrence function.

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lawyers might not even think of the possibility of filing in a foreign court, or might not see such a filing as practical; few clients can afford to file in multiple countries or are willing to expend the resources necessary to litigate in multiple countries.²³⁵ Not only do the costs of litigation in individual countries add up, but parties must allocate additional resources to the coordination of enforcement²³⁶ because litigation in various countries may require the same witnesses and evidence to be presented in each of the courts and in each of the languages.

Courts have placed an important limitation on the specific jurisdiction on the Internet by requiring that the jurisdiction be based on a defendant's actual contacts with the forum. That court jurisdiction would have to be limited on the Internet in some manner has been clear since the beginnings of the Internet. In the United States, the *Zippo* test²³⁷ placed a limit on jurisdiction based on activities of Internet websites that were interactive; under the test, courts denied jurisdiction in cases of websites that were purely passive. Although the test helped to limit jurisdiction, the limitation was insufficient because interactive websites remained exposed to the jurisdiction of courts worldwide. More recent approaches used in the United States and other countries seek to limit jurisdiction by requiring that a defendant have actual contacts with the forum; under these approaches the mere possibility of contacts – i.e. pure accessibility alone, even if combined with interactivity – does not create personal jurisdiction.²³⁸

Technological advancements assist Internet actors in limiting their exposure to the jurisdiction of foreign courts and the applicability of foreign laws, if the actors are interested in limiting their exposure;²³⁹ geolocation and geoblocking technologies²⁴⁰ enable Internet actors to delineate their

²³⁵ Austin, *Domestic Laws and Foreign Rights*, *supra* note 99 (“The prospect of initiating parallel proceedings in each of the territories in which the infringements took place will likely prove prohibitive in many instances.” *Id.*).

²³⁶ On the expenses associated with the coordination of multiple-country suits in a patent law context *see* MARKETA TRIMBLE, *GLOBAL PATENTS: LIMITS OF TRANSNATIONAL ENFORCEMENT* ... (2012).

²³⁷ *Zippo* ...

²³⁸ Teresa Scassa & Robert J. Currie, *New First Principles? Assessing the Internet's Challenges to Jurisdiction*, 42 *Georgetown J. of Int'l L.* 1017, 1049 (2011) (“[T]he fact that a website might be accessed by residents of one jurisdiction does not necessarily mean that it has been.” *Id.*). *See also*, e.g., *Perfect 10, Inc. v. Yandex N.V.*, N.D.Cal., No. C 12-01521 WHA, September 6, 2013, *4. In the context of defamation *see* Laura E. Little, *Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States*, *European Yearbook of Private International Law*, Vol. 14, 2012, p. *4. For an early prediction of this outcome *see* Goldsmith, *supra* note 29, 1218 (“[T]here is relatively little reason at present, an even less reason in the near future, to believe that the mere introduction of information into cyberspace will by itself suffice for personal jurisdiction over the agent of the transmission in every state where the information appears.” *Id.*).

²³⁹ “[F]iltering and identification technology promise greater control at less cost. In cyberspace as in real space, the ultimate meaning of ‘purposeful availment’ and ‘reasonableness’ will depend on the cost and feasibility of information flow control. As such control becomes more feasible and less costly, personal jurisdiction over

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activities on the Internet in a manner consistent with countries' physical boundaries by identifying Internet users' physical locations and disabling the users' access to the content if the Internet actors do not want the users connecting to the Internet from outside of particular countries to access the content. Of course technological advancements in geolocation are mirrored by advancements in virtual private network technologies that enable Internet users to evade geolocation and avoid geoblocking, which undermines the effectiveness of geolocation.²⁴¹ However, installing *bona fide* and relatively effective geolocation and geoblocking technologies should help Internet actors protect themselves from the jurisdiction of courts located in geoblocked countries.

A litigation cost/benefit analysis will lead many small copyright owners to sue in the country of their own domicile so that they may enjoy the benefit of local counsel, litigation with familiar rules of procedure, and proceedings in their own language with a potentially sympathetic judge or a jury, and not have to fear bias in a foreign court against them as a foreign copyright owner (particularly if the owner were to pursue the infringer in the country of the infringer's domicile).²⁴² Copyright owners with more resources may opt to litigate where they can inflict the greatest pain on an alleged infringer, which will usually be in the place of the alleged infringer's domicile.²⁴³ When the results of the limitations discussed in the previous section are combined with jurisdictional limitations, it is unsurprising that many, if not most, Internet actors face litigation in only one of two places – either the country of their own domiciles or the country of the copyright owner's domicile; in either place the Internet actors typically face claims raised only under one copyright law – the copyright law of the forum.

Conclusions

Copyright enforcement on the Internet is challenging. Copyright owners face infringements by infringers located in different countries, with varying laws being implicated by the infringers' acts and varying standards and practices of enforcement existing in the countries of the

cyberspace activities will become functionally identical to personal jurisdiction over real-space activities.”

Goldsmith, *supra* note 29, 1218-1219.

²⁴⁰ See *supra* note ...

²⁴¹ Marketa Trimble, *The Future of Cybertravel*, *supra* note 1.

²⁴² Whether such bias exists is a different question; the parties' concern that such bias exists or may exist suffices to impact the parties' behavior.

²⁴³ As the *Lucasfilm* case has shown, obtaining a default judgment in a court of specific jurisdiction with a plan to have the judgment enforced in the country of the defendant's domicile might not be the best strategy. See *supra* ...

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infringers' domiciles and places of acting. Enforcement through Internet service providers who can take down allegedly infringing content may help copyright owners take swift enforcement action, but the takedown method is not without pitfalls in a cross-border context; before filing a request with a foreign service provider, a copyright owner should consider whether he can continue enforcement in a foreign court if the alleged infringer objects, and whether he can defend his copyright in a potential declaratory judgment suit that the alleged infringer could bring in a foreign jurisdiction if the copyright owner's request creates a ground for personal jurisdiction over the owner in the foreign jurisdiction.²⁴⁴

A part of the copyright enforcement problem on the Internet is that countries continue to adhere to the principle of *lex loci delicti* or *lex loci protectionis* for choice of law in copyright cases, which mean that a copyright owner facing a multi-country infringement of his copyright has to file claims under multiple countries' laws. Although theoretically a copyright owner can file under multiple copyright laws (either claims under all the countries' laws simultaneously in the court of general jurisdiction, or claims under each country's law in the respective country's court), practical limitations discussed in Part III constrain the copyright owner's ability to do so. Therefore, in most cases the copyright owner must select only one country or only a small number of countries in which and/or for which he can file his claims.

The limitations that complicate enforcement for copyright owners, however, serve well those Internet actors who strive to comply with the multiplicity of copyright laws on the Internet. Because of the inefficiencies caused by the myriad of conflict of laws rules and approaches that apply to the activities on the Internet, and because of the practical constraints on cross-border enforcement, Internet actors enjoy a certain degree of certainty as to which laws will likely be held to govern their activities. That the certainty is not absolute should not be surprising; frequently, "legal certainty" is no more than a lawyer's best estimate of the likelihood that his client will or will not be sued. Although exceptions do prove rules, it is most likely, as the analysis in Part III suggests, that a copyright owner will sue an Internet actor either in the place of the Internet actor's domicile or in the place of the copyright owner's domicile, and that the copyright owner will claim infringement under the law of one of the two countries, depending on where he files the suit. Narrowing the number of potentially applicable copyright laws in most cases to two is not an insignificant achievement.

²⁴⁴ See, *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008). See also Marketa Trimble, *Setting Foot on Enemy Ground: Cease and Desist Letters, DMCA Notifications, and Personal Jurisdiction in Declaratory Judgment Actions*, 50 IDEA 777 (2010).

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Discussions about the improvement of conflict-of-laws rules for IP cases should appreciate the fact that the inefficiencies resulting from the current myriad of conflict-of-laws rules and approaches fashion a workable system for Internet actors. The new proposals should improve enforcement but not lower the degree of legal certainty that Internet actors enjoy under the current approaches and rules. The existing proposals analyzed in Part II would help copyright owners in their enforcement efforts because they would enable worldwide enforcement of copyright in one action filed in a court of general jurisdiction under a single copyright law. The proposals would eliminate most of the costs that copyright owners would otherwise incur because of the need to ascertain multiple foreign copyright laws, plead (and in some courts prove) multiple foreign laws, and engage legal experts for multiple countries.

While making some aspects of enforcement easier, the proposals would not affect many of the practical limitations that were discussed in Part III. Although the proposals are already helping to improve the awareness of IP lawyers of cross-border issues in copyright merely by making a wealth of information on the issues available, it may take time before IP lawyers and judges become comfortable with claims of copyright infringements brought under multiple copyright laws. Copyright owners' public relations costs may continue to be significant if owners opt for a territorially large-scale enforcement effort. Most importantly, even with the proposals in place copyright owners would have to prove infringements in all of the countries in which they claim infringements had occurred – if not for the purposes of identifying the territorial scope of their claims, then for the determination of their remedies. Given that many of the practical limitations would persist even if the proposals were adopted it seems likely that litigation would remain primarily in the same countries where cross-border copyright litigation tends to occur today and that courts would apply in the litigation the same countries' copyright laws that they do today.

Looking at the multiplicity problem from the point of view of Internet actors who want to abide by laws on the Internet, we also have to recognize that many Internet actors know little about the copyright law of any particular country and make no attempts to learn about the law. As they do with other legal issues, many Internet actors rely on their best guess about what is permissible,²⁴⁵ and when they act on the Internet they assume (just as they do when they travel to foreign countries) that their best guess is equally applicable in other countries – perhaps with some awareness that minor differences among countries could exist. Of course best guesses are shaped

²⁴⁵ Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 571 (1992) (“Uninformed individuals act based on their best guess about how the law will apply to their contemplated conduct.” *Id.*).

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by social norms which, as the Internet proves, can depart from the law; the future will expose the durability of the social norms that have developed in the Wild West days of the Internet.²⁴⁶

Technological developments and market solutions will continue to assist copyright owners in addressing the inefficiencies of enforcement and transaction costs. Geolocation, content ID (digital watermarks), and the celestial jukebox are among the tools and solutions that can facilitate easier cross-border transactions in copyright-protected materials. Technology should also lower litigation costs and make it feasible for more copyright owners to bring claims that arise in multiple countries in one court. Online access to legal resources and evidence in multiple countries will play an important role in the further internationalization of copyright litigation.

²⁴⁶ According to a study, 84% of content accessed on the Internet by Spanish users is pirated. Héctor Jimenez. Borja Martin, Iñigo Palao, Observatorio de Piratería y Hábitos de Consumo de Contenidos Digitales 2013, p. 17, *available at* <http://lacoalicion.es/wp-content/uploads/Observatorio-pirater%C3%ADa-2013-Ejecutivo.9-abril-2014.pdf>. According to another study, “15% of the UK population has engaged in ‘illegal downloading.’” Joe Karaganis & Lennart Renkema, Copy Culture in the US & Germany, The American Assembly, 2013, p. 10.

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