Loyola University Chicago International Law Review

Volume 12 | Issue 2 Article 5

2015

The Tangled Web: Cross-Border Conflicts of Copyright Law in the Age of Internet Sharing

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I. Introduction

In today's day and age of social media and constant information sharing, the Internet has become the world's most powerful information expressway. Across the globe, people of all ages are uploading photographs, publishing songs, posting poetry, live-streaming concerts and displaying art all over the Internet. Even the world's foremost art museums, such as Paris' Louvre and New York's Museum of Modern Art, offer virtual visits to their art exhibits.[1] Such universal access to published works permits Internet users to view artwork or listen to music being exhibited on the other side of the world. In fact, the quick and easy accessibility of newspapers, radio shows, and magazines via the web has displaced television viewership.[2]

However, such far-reaching Internet access comes with a price. One major disadvantage of the web's reach is the lack of global harmony in copyright laws. The following hypothetical illustrates the legal dilemma that results from the lack of international copyright law:

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[1] *See e.g., Le Louvre – Virtual Visit*, http://www.louvre.fr/en/visites-en-ligne (last visited Jan. 14, 2014) (offering a virtual tour of select art collections); *MoMa – The Collection*, http://www.moma.org/collection/browse (last visited Jan. 14, 2014) (offering over 46,000 photographs of the museum's art collection, accompanied by written commentary as well as an audio tour).

[2] Marty Beard, *Study: TV Losing Viewers to Web*, MEDIA LIFE MAGAZINE, (JAN. 14, 2014), http://www.medialifemagazine.com:8080/news2001/dec01/dec03/2_tues/news4tuesday.html.

> Jorge, a Netizen[3] and Mexican citizen who resides in Spain, uploads digitalized copies of Pierre's photograph from his residence in Madrid to a server in Spain. Pierre, a French citizen who lives in Switzerland, has published his work only in France and is the owner of a valid French copyright. The infringing material is then downloaded by Netizens in the United States, Italy, and Australia. Pierre takes legal action against Jorge by filing a lawsuit in Switzerland.

Which law applies? What jurisdiction governs? The answers to these questions are about as infinite as the Internet itself. International copyright law does not provide a consistent and satisfactory resolution for such issues. This is largely due to the fact that the main facet of intellectual property law – territoriality – limits application of copyright law to national law. Thus, the rights afforded to a copyright owner can only be implemented within the confines of the country of registry.[4] Further, only said country's laws may be applied to the conflict.[5] In reference to the above-mentioned hypothetical, if a judge were only to apply the law of the transmitting country, Spain, then Jorge could market Pierre's work throughout any other country with impunity. If the law of each of the other receiving countries applied to the distribution and publicity of the photograph, it would force Pierre to obtain protectionary rights to market the work, country by country.

In order to bring some clarity to the above-mentioned hypothetical, judges throughout the world will need to take into consideration not only intellectual property law, but also conflict-of-laws methods. To date, there is very little guidance on the reconciliation of conflict-of-laws issues pertaining to intellectual property.[6] However, given the rapid rate at which copyrighted work is being distributed through the Internet, intellectual property attorneys and judges are increasingly faced with conflict-of-laws issues.

The goal of this article is to investigate the most effective approach to harmonizing the law in order to best address the ever-increasing problem of choice-of-law conflicts resulting from trans-national copyright infringement by means of the Internet. The lack of international copyright law creates a grey area allowing for cross-border copyright infringement to flourish with no legal recourse. Section II will examine the history of copyright law and compare the European and American approaches to copyright infringement. Section III will examine the current state of copyright on the Internet and how different areas of the world are grappling with new mediums. Section IV will analyze various choice-of-law regimes and examine several recent proposals for harmonization of multinational intellectual property law in cyberspace. Section V endorses a modification of the

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[3] Netizen Definition, *Merriam-Webster Dictionary, available at* http://www.merriam-webster.com/dictionary/Netizen.

[4] *See* RICHARD FENTIMEN, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW; HEADING FOR THE FUTURE 137 (Josef Drexl & Annette Kur eds., 2005).

[5] *Id.*

[6] *See* Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM J. COMP. L. 429, 429 (2001).

ALI Principles of choice-of-law for determining the legal consequences of Internet infringement. Section VI will conclude the comment.

II. History of Copyright Law in United States vs. Europe

Historically, Europe and the United States have taken divergent approaches to conflicts-of-law issues resulting from copyright disputes. Setting aside the fact that the United States has adopted common law while Europe has adopted civil law, there exist multiple approaches within Europe alone. This portion of the article will outline the various approaches between Europe and the United States.

A. Copyright Law in Europe

First and foremost, it is of great importance to note that the states of the European Union do not themselves have harmonized copyright law.[7] They apply their respective national conflict-of-laws rules to resolve issues of copyright infringement.[8] A few countries in particular – Germany, France, and Belgium – have implemented unique legislation in order to regulate conflicts of law that result from copyright infringement.

1. German Copyright Law

German law stands out in a particular way because German Copyright Law only contains substantive regulations on copyrights and related rights.[9] German law does not, however, include and choice-of-law regulations.[10] Although German law does have choice-of-law regulations to govern other conflicts, no such law may be applied to issues relative to intellectual property.[11] The Bundesgerichtshof (the German Federal Court of Justice) has ruled that in cases of intellectual property infringement, the conflict-of-laws regulations are superseded by the *Schutzlandsprinzip* (law of the country in which protection is sought).[12]

Accordingly, much like American law, German law requires attorneys and judges to turn to German case law for answers. German courts, relying on their interpretation of Article 5(2) of the Berne Convention,[13] have stipulated that the

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[7] This situation is bound to change: The Regulation of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations ("Rome II") will be applied after January 11, 2009 to cases that have arisen after August 20, 2007.

[8] *Id.*

[9] Anita B. Froblich, *Copyright Infringement in the Internet Age - Primetime for Harmonized Conflict-of-laws Rules*, 24 BERKELEY TECH. L.J. 851, 853 (2009).

[10] *Id.*

[11] Bundesgerichtschof [BGH][Federal Court of Justice] Nov. 7 2002, 152 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 315 (F.R.G.).

[12] BTDrucks 14/343, at 10, available at http://dip21.bundestag.de/dip21/btd/14/003/1400343.pdf.

[13] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 331 U.N.T.S. 217, as last revised at the Paris Universal Copyright Convention, July 24, 1971, S. Treat Doc. No. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention]. Article 5(2) of the convention states:

> [A]part from the provision of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

appropriate law to govern disputes of copyright infringement is the *lex protectionis* i.e. the law of the country in which protection is sought.[14] If one were to apply German law to the Jorge-Pierre example in the introduction of the article, that means that if Pierre brought a copyright infringement suit against Jorge in a German Court for the infringement of a German copyright, the German court would apply *lex protectionis* i.e. German law, the law in the court of the country of protection.[15] German law has, however, very broadly and inconsistently applied *lex protectionis*.

The German application is problematic because such a broad interpretation of Article 5(2) of the Berne Convention creates major discrepancy between the *lex protectionis*, and more restrictive law, such as *lex loci delicti* (the law of the place where the wrong was committed), a more limiting law that only applies to torts.[16] Due to such discrepancy, the only consistent and appropriate way for a German court to address an issue of Internet copyright infringement would be to apply the national law of each country where the protected work was downloaded. Such a lawsuit would be incredibly expensive and drawn out. German courts would benefit greatly from more streamlined and straight-forward laws, such as those implemented in France.

2. *French Copyright Law*

French law relies on a culture of placing the author's rights on a more elevated level of intellectual property protection.[17] France offers its copyright authors rights pertaining to the integrity and acknowledgment of their works.[18] Such rights are commonly referred to as the *droit moral*.[19] The 1985 Amendment to France's Copyright Act of 1957 allowed for protection of audiovisual works and computer software.[20] It also implemented criminal penalties for copyright infringement.[21] Today, the *Code de la Propriété Intellectuelle* ("I.P. Code"), in effect as of July 1, 1992, is the basis for French copyright law as a whole.[22] The I.P. Code grants not only moral rights, but also economic and intellectual rights

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[14] Bundesgerichtschof [BGH][Federal Court of Justice] June 17, 1992, 118 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 394 (F.R.G.).

[15] *See* K. Lipstein, *Intellectual Property: Parallel Choice of Law Rules*, 64(3) CAMBRIDGE L.J. 593, 607 (2005).

[16] *See* SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND 1299 (2d. ed. 2006).

[17] Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 370 (1998).

[18] RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS 944-49 (2d. ed. 1998) (analyzing the effects of *droit moral* on the laws of various European countries).

[19] ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 477 (4th ed. 1993).

[20] Law No. 85-660 of July 3, 1985 J.O., July 4, 1985, p. 7495; 1985 D.S.L. 357.

[21] *Id.* at tit. I, art. 1, V.

[22] UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, COPYRIGHT LAWS AND TREATIES OF THE WORLD, France (Supp. 1991-1995) [hereinafter I.P. CODE].

to "work[s] of the mind . . . by the mere fact of the creation."[23] The I.P. Code does not explicitly define a 'work of the mind;' however, French courts have accepted any work produced as a result of individual intellectual efforts as qualified for copyright protection.[24] Sculptures, architecture, paintings, sermons, books, dramatic works, musical compositions, drawings, lectures, creative titles, and choreographic works are all copyrightable works pursuant to the French I.P. Code.[25]

The I.P. Code interpretation of copyright boasts two main forms of protection, personal and economic.[26] The personal rights, *droit moral*, are what have drawn much attention and fame to French copyright law. Pursuant to the *droit moral*, authors of copyrightable works are afforded rights of disclosure (*droit de divulgation*), rights of authorship (*droit à la paternité*), rights of integrity (*droit au respect de l'oeuvre*), and the right to withdraw a work from publication or modify it (*droit de retrait ou de repentir*).[27] Such rights extend to all copyrightable works and are referred to in the code as "perpetual, inalienable and imprescriptible."[28] French economic rights, on the other hand, afford authors the protection of public performance, display and reproduction.[29] The duration of economic rights is the author's life plus 70 years.[30]

French courts acknowledge and endorse the principle of reciprocity — meaning that copyright protection of foreign works in France is contingent upon the protection of French works abroad.[31] French judges have leaned towards exclusive use of the *lex loci delicti* in determining choice-of-law issues applicable to cross-border copyright infringement.[32] Such verdicts can impose both civil and criminal penalties for copyright infringement, ranging from the confiscation of works to two years of imprisonment and a fine of 1,000,000 Euro.[33] While this method has been applied consistently to conflict-of-laws issues in France, the country has not yet resolved how *lex loci delicti* will be enforced in the challenges posed by Internet copyright infringement cases.

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[23] *Id.* at art L. 111-1.

[24] Paul Edward Geller & Melville B. Nimmer, International Copyright Law and Practice § 2[1][b] at FRA-16 (1998).

[25] *See* I.P. Code, *supra* note 22, at art. L. 112-2.

[26] *See* Geller & Nimmer, *supra* note 24, at § 1[2] at FRA-13.

[27] *See* I.P. Code, *supra* note 22, at. arts L. 121-1, L. 121-2, L. 121-4.

[28] *Id.* at art. L. 111-1, 121-1.

[29] *Id.* at art, L. 122-2 to 122-3.

[30] Law No. 97-283 of Mar. 27, 1997, J.O., Mar. 28 1997 p. 4813; 1997 D.S.L. 213 (implementing Council Directive No. 93/83 of Sept. 27, 1993, J.O., (L 248/15) and Council Directive No. 93/98 of Oct. 29, 1993, J.O., (L 290/9)).

[31] A. Lucas & H.-L. Lucas, Traite de la Propriete Intellectuelle 788 (2006).

[32] *See id.* at 813.

[33] See I.P. Code, supra note 22, at arts L. 332-1, 335-4 to 5.

3. *Belgian Copyright Law*

Belgian copyright law has many similarities to French law, but seems to have become somewhat of a road between the French and German approaches. In 2004, Belgium enacted legislation identifying the *lex protectionis* approach as the designated method to resolve choice-of-law issues.[34] Belgian law has not, however, determined a way to apply *lex protectionis* legislation to the challenges posed by Internet copyright infringement cases. Due to the fact that Belgian law is founded on the Napoleonic Code - which also forms the basis for the current version of the French Code - Belgium's conflict-of-laws approach closely mirrored France's for quite some time.[35]

However, the new 2004 *Code de droit international privé* (Code on Private International Law), abolished article 3 of the Code Civil, the provision of the code closely resembling France's conflict-of-laws legislation.[36] The 2004 code filled the gaps where the previous codification had not regulated conflicts-of-law issues of private international law in Belgium.[37] The drafters of the 2004 Code took into consideration conflict-of-laws codifications from various countries throughout Europe, and included a provision on the regulations applicable to intellectual property issues.[38] Article 93 of the Code on Private International Law designated the *lex protectionis* as the primary approach to infringement cases pertinent to intellectual property.[39] However, the legislation is laden with exceptions such as in the case of forum selection clauses[40] or *order public*, where a judge can override the application of a foreign law if it is contrary to the fundamental provisions of Belgian intellectual property law.[41] The most important exception of the Code on Private International Law is found in article 19, which provides that the law most closely connected to the case at issue prevails over the law applicable according to the Code.[42] Thus, as it pertains to the Jorge-Pierre hypothetical, the most relevant issue in Belgium would be which country's law is more closely connected to the case than the *lex protectionis*? Would it be French law because the work was created and protected in France? Swiss law because Pierre lives in Switzerland? Or Spanish law because Jorge uploaded the infringing photograph from Spain? The current state of Belgian law does not provide a clear answer.

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[34] Loi portant le Code de droit international privé [CDIP] [Law establishing the Code of private international law], Moniteur Belge [Official Gazette of Belgium], July 27, 2004, p. 57344.

[35] Dominique d'Ambra, *La Fonction Politique du Code Civil pour la France, in* LE CODE CIVIL FRANÇAIS EN ALSACE, EN ALLEMAGNE ET EN BELGIQUE: REFLEXIONS SUR LA CIRCULATION DES MODELES JURIDIQUES 9, 10 (Dominique d'Ambra et al. eds., 2006).

[36] *Id.* at 18; CODE CIVIL [C. CIV] art. 3 (Belg.).

[37] *See* François Rigaux & Marc Fallon, Droit International Privé 71 (2005).

[38] *See id.* at 71-72; *see also* CDIP, Moniteur Belge [Official Gazette of Belgium], July 27, 2004, p. 57363, art. 93.

[39] *See* Moniteur Belge, *supra* note 38, at art. 93.

[40] *Id.*

[41] *See Proposition de loi portant le Code de droit international privé,*[Draft law on the Code of private international law], 3-27/1 SE (2003) (submitted by Ledouc et al.), p. 120 (Belg.).

[42] Moniteur Belge *supra* note 38, at art. 19.

B. Copyright Law in the United States of America

Despite the fact that protection of copyrighted works was originally enacted by the U.S. Congress "not primarily for the benefit of the author, but primarily for the benefits to the public,"[43] the monopolistic rights of copyright are considered to be a necessary evil.[44] Originally, the Copyright Act of 1909 governed the protection of copyrightable works in American jurisprudence.[45] It applies to works created earlier than January 1978.[46] The 1909 Act was replaced by the Copyright Act of 1976, which is the current body of law presiding over federal copyright protection.[47] The Copyright Act of 1976 controls all works created on or after January 1, 1978.[48]

Pursuant to the Copyright Act of 1976, U.S. law protects any and all "original works of authorship fixed in any tangible medium of expression, now known or later developed."[49] All literary, pictorial, graphic, sculptural and sound recording works are offered protection under the federal statute.[50] However, the fixation requirement differentiates those works that are suitable to receive federal statutory protection from those which are only afforded state common law copyright protection.[51] Conversely, the Copyright Act of 1909 listed fourteen categories under which a work had to fall in order to be deemed eligible for copyright protection.[52]

Unlike in Europe, the United States places a strong emphasis on economic rights afforded to a copyright owner. Section 106 of the 1976 Copyright Act provides authors with the exclusive rights to reproduce, distribute, publicly perform, publicly display, and prepare derivative works of any copyrighted work.[53] Still, the rights of distribution, public display and public performance are contingent on certain categories of the copyrighted work – the work must be literary, pictorial, graphic, musical or dramatic in nature.[54] Economic rights last for the life of the author plus seventy years.[55]

The greatest difference between European and U.S. copyright law, however, comes in the implementation of moral rights. Although the United States has, by technicality, enacted moral rights by signing onto the Berne Convention, moral

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[43] H.R. REP. No. 60-2222, at 7 (1909).

[44] *See* GORMAN & GINSBURG, *supra* note 19, at 477.

[45] 17 U.S.C. §§1-32 (superseded 1976).

[46] *Id.*

[47] 17 U.S.C. §101-1111 (2012).

[48] *Id.* at §302.

[49] 17 U.S.C. §102 (2012).

[50] *See Id.*

[51] H.R. REP. No. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

[52] 17 U.S.C. §4 (superseded 1976).

[53] *See* 17 U.S.C. §106(1)-(6) (2012).

[54] *Id.*

[55] *See* Sonny Bono Term Extension Act § 102 (amending 17 U.S.C. §§ 301-304).

rights are nowhere featured in U.S. law.[56] The most similar legislation available in the United States is the Visual Artists Rights Act of 1990 ("VARA").[57] VARA does not encompass all the rights provided by, for example, the French moral rights. VARA does not provide a right of disclosure, a right to withdraw a copyrighted work, or a right to reconsider, as does the European I.P. Code.[58] VARA prohibits the "intentional distortion, mutilation or other modification" of any visual art.[59] Works of visual art are defined, however, by the Copyright Act of 1976, as single or limited edition works of 200 copies or less of a sculpture, print, drawing, or painting.[60] VARA only extends protection to the author of a work of visual art and excludes works made for hire from any type of moral rights.[61] Despite its existence, courts have very cautiously and reluctantly enforced VARA rights.[62]

A copyright owner in the United States is afforded a variety of options for taking legal action against anyone who violates his or her rights to a work. Any violation of a § 106 right qualifies as copyright infringement.[63] The forms of recourse include obtaining an injunction against the infringer, obtaining damages, or a combination of both.[64] Damages are awarded based on how willful, commercially driven and fraudulent the infringement is — all parameters set forth by the Copyright Act of 1976.[65] If a judge determines that an infringing party acted willfully, the court may enforce punitive damages of up to $150,000.[66] Finally, if the court determines that willful infringement was driven by commercial purposes or based in fraudulent misrepresentation, criminal penalties may be appropriate.[67]

III. Copyright Infringement on the Internet – How Europe & the USA Have Tackled the Issue

The infinite, global and instantaneous nature of the Internet has altered the nature of international copyright law. Today, Netizens can access copyrightable works uploaded to the Internet from all corners of the globe.[68] The very same qualities that make the Internet so unique and cutting-edge also act to foster the Internet copyright infringement epidemic. Once an image or drawing is uploaded

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[56] *See* Berne Convention *supra* note 13.

[57] 17 U.S.C. §§ 106, *supra* note 53, *at* A(a)(3)(A) (2012).

[58] *See* I.P. CODE, *supra* note 22.

[59] 17 U.S.C. §§ 106, *supra* note 53, at A(a)(3)(A).

[60] *See* 17 U.S.C. § 101 (2012).

[61] 17 U.S.C. §106A(a) (2012).

[62] *See e.g.*, English v. BFC & R. E. 11th St. LLC, No. 97 Civ. 7446 (HB), 1997 WL 7464444, at *4 (S.D.N.Y. Dec. 3 1997).

[63] 17 U.S.C. § 115(c)(4) (2012).

[64] *Id.* at §§ 502, 504.

[65] 17 U.S.C. § 504(a) (2012).

[66] *Id.* at § 504(c)(2) (2012).

[67] *Id.* at § 506.

[68] LERNER & BRESLER, *supra* note 18, at 1501.

to the web, it can be infringed upon in several different countries simultaneously with just a couple quick clicks.[69] Further, the issue remains that due to the virtual and anonymous nature of the Internet, infringers can usually go about their illegal business with impunity.[70] In fact, many Netizens have a strongly misguided idea that posting copyrighted material to the Internet is admissible, and that they have implied license to do so as web users.[71] Accordingly, it is imperative that copyright laws worldwide become harmonized and increasingly stringent in order to protect authors and publishers while prosecuting online infringement.

A. European Steps to Combat Online Infringement

The most significant step Europe has taken to combat online copyright infringement came in the form of a directive issued by the European Council, called the Commission of European Communities Green Paper "Copyright And Related Rights in the Information Society" ("Green Paper"). The Green Paper advocates for the free movement of goods while also addressing numerous legal issues affected by new technology.[72] The Green Paper underscores the vital importance of harmonizing world copyright laws, but acknowledges that no such solution is impending.[73] Until then, the Green Papers encouraged Member States to harmonize their own copyright laws.[74]

The Commission noted the ease with which piracy has become a systemic online copyright issue, and the need to introduce new techniques to limit and combat copying.[75] To increase copyright author protection on the Internet, the Green Paper proposed the option of realizing one multi-purpose body that could educate copyright holders in regards to licensing fees and agreements while also assisting them in managing any works integrated into multimedia designs.[76] The Commission also insisted that all copyrighted works on the Internet be compiled and merged in a "digital catalogue" complete with identification numbers to foster quick and easy royalty distribution to copyright holders.[77]

The Green Paper has received both accolade and strong critique.[78] Regardless, the Green Paper served as the stimulus for the Florence Conference of 1996. Over 250 authors, artists, performers and international organizations came to-

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[69] *See* 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, 155 (1997).

[70] *See* BRUCE A. LEHMAN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 131 (1995) *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/ [hereinafter WHITE PAPER].

[71] ONLINE LAW 171 (Thomas J. Smedinghoff ed., Addison-Wesley Publishing Co. 1996).

[72] *See Copyright and Related Rights in the Information Society: Green Paper from the Commission to the European Council*, at 10, COM (1995) 381 final (July 1995) [hereinafter GREEN PAPER].

[73] *Id.* at 42.

[74] *Id.* at 52, 54, 58.

[75] *Id.* at 28.

[76] *Id.* at 76-77.

[77] *See id.* at 79.

[78] *See* Patrick F. McGowan, *The Internet and Intellectual Property Issues*, 455 PRACTICING L. INST./PAT. 303, 349 (1996), *available in* WESTLAW, 455 PLI/Pat 303 (concluding that the Green Paper exhib-

gether to discuss the Green Paper's propositions.[79] While the delegates concluded that member state harmonization has no legal merit if not complemented by legal harmonization at the global level, they did discuss the advantages and disadvantages of all the paper's proposed initiatives.[80] To date, unfortunately, the European Community has not implemented any of the proposals set forth in the Green Paper.

B. Steps to Combat Online Infringement in the United States

Conversely, the United States has been very steadfast and effective in the implementation of legislation to combat online copyright infringement. Under President Clinton in 1993, the Information Infrastructure Task Force ("IITF") developed and published a study called the White Paper to analyze whether the Copyright Act of 1976 provided adequate copyright protection to online artists in light of the new "information superhighway."[81] The White Paper concluded that the current copyright law was, with a few minor adjustments, equipped to handle conflicts resulting from Internet infringement.[82] The IITF made a few proposals aimed at improving the scope of protection afforded to copyright owners in the United States. Said proposals included criminalizing unauthorized transmissions as violating both the rights of reproduction and rights of public distribution,[83] expanding the legislative definition of publication to include the distribution of copies of the work to the public by means of online transmission,[84] extending the right of public performance to performers and copyright owners of sound recordings,[85] and asking Congress to implement laws prohibiting technological systems that circumvent the unauthorized use of digital media so that it can be uploaded to the Internet.[86] The White Paper acknowledged the French *droit moral* and concluded that such rights were not desirable in the American legal system; however, the IITF acknowledged that it may be essential to harmonize copyright laws and create a uniform level of protection for copyrights among various different legal systems worldwide.[87] Congress, online users and artists alike reacted ner-

its "a certain amount of naiveté regarding the technical implications of how information is carried over the Internet").

[79] *Id.*

[80] *See id.*

[81] *See* WHITE PAPER, *supra* note 70, at 1.

[82] *Id.* at 64 ("For the most part, the provisions of current copyright law serve the needs of creators, owners, distributors, users and consumers of copyrighted works in the [current Internet] environment. In certain instances, small changes in the law may be necessary to ensure public access to copyrighted works while protecting the rights of the intellectual property owner").

[83] *Id.* at 215.

[84] *Id.* at 219.

[85] *Id.* at 221-26.

[86] *See* WHITE PAPER, *supra* note 70, at 230.

[87] *Id.* at 54 ("Careful thought must be given to the scope extent and especially the waivability of moral rights in respect of digitally fixed works, sound recordings and other information."); *See also id.* at 148.

vously and critically to the White Paper; consequently only few proposals have been enacted to date.[88]

Perhaps the most powerful and legitimate expression of Congress's validation of the White Paper is the Digital Millennium Copyright Act of 1998 ("DMCA"). The DMCA criminalized both manufacturing and importing any devices used to override encryption shields.[89] Exceptions to the legislation include any decoding used in libraries or schools or in any works of "criticism, comment, news reporting, teaching, scholarship or research."[90] Accordingly, the DMCA provided more stringent protection to copyright owners while still ensuring scholarly secondary users that the fair use defense would remain unharmed. The DMCA also shielded Internet Service Providers from being held liable for the transmission of any information that could be associated with copyright infringement.[91] Under the DMCA, Internet Service Providers are also absolved of any liability in connection with users' infringing postings, or sharing and storage of infringing copyrighted material.[92] The DMCA serves as a first step in the effort to attack online copyright infringement in the United States.

IV. Choice of Law Regimes & Underlying Theory

The analysis of various legal systems and their choice-of-law legislation makes it clear that online copyright infringement prompts questions of private international law.[93] Due to the fact that both the United States and most European countries are signatories to the Berne Convention, it follows that countries must first and foremost look to the treaty in order to determine which national law should control in a cross-border copyright infringement case. Unfortunately, however, the Berne Convention provides little to no guidance, as it provides only that a copyright owner shall receive the full extent of protection and recourse of the laws of the country in which protection is claimed.[94] The lack of clarity in the language of article 5(2) of the Berne Convention, referencing the "laws of the country where protection is claimed,"[95] is flawed and creates too much room for differing interpretations on how to approach conflict-of-laws issues in cases of

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[88] *See* Julie C. Smith, Comment, *The NII Copyright Act of 1995: A Roadblock Along the Information Superhighway*, 8 SETON HALL CONST. L.J. 891, 913 (1998) ("The White Paper focused almost entirely on the protection of owners' proprietary interests, and neglected to discuss the public benefit portion. . ."); *see also* Naoi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1237 n.139 (1997) (stating that "[m]any copyright owners argue that even the NII White Paper did not go far enough in terms of protecting interests of copyright owners").

[89] *See* 17 U.S.C. § 103, 112 Stat. 2863, 2864.

[90] *Id.*

[91] *Id.* at § 202, 112 Stat. 2877-80.

[92] *Id.*

[93] GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 17 (3d. ed. 1996) (defining private international law as a "body of national law applicable to disputes between private persons . . . arising from activities having connections to two or more nations").

[94] *See* Berne Convention, *supra* note 13, at art. 5(2).

[95] *Id.*

multinational copyright infringement. It follows that other regimes could possibly be useful in harmonizing conflict-of-laws regulations.

The Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") is one possible choice-of-law regime that provides for cases of intellectual property infringement.[96] Because Rome II is a European Union regulation, it acts as binding law on all the member states.[97] After much discussion and revision, a separate provision for intellectual property infringements has been added to Rome II.[98]

Article 8(1) of Rome II provides that the *lex loci protectionis* (law of the country in which protection is sought) is the law applicable to cases relative to the infringement of intellectual property rights.[99] Article 8(3) explicitly excludes party autonomy for cases of intellectual property right infringement, slightly altering the language used in Article 5(2) of the Berne Convention to read:

> The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country *for which* protection is claimed.[100]

To be clear, while the Berne Convention reads "*where* protection is claimed," Rome II reads "*for which* protection is claimed." This difference is noteworthy because in changing the wording, the Council of the European Union intended to avoid the previously mentioned confusion resulting from the Berne Convention's choice-of-law clause in article 5(2). A literal reading of article 5(2) would suggest the use of the *lex fori* (the law of the country where the plaintiff has filed his complaint) to govern choice-of-law issues.[101] However, such logic is flawed because often the country of forum may not be related to the copyright at issue; a court may have been selected by one of the parties simply because the copyright owner has assets in said state, despite the fact that the copyright infringement occurred elsewhere.[102] There is absolutely no reason to apply the law of the forum state in such circumstances.[103] It is for this reason that Article 5(2) of the Berne Convention was cast aside and interpreted as suggesting the application of the *lex protectionis*.[104] It follows that by implementing Article 8 of Rome II, some European Member States will need to reassess their approach to choice-of-law issues in intellectual property infringement cases, as their national law may

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[96] *See* Commission Regulation 864/2007, 2007 O.J. (L 199) 40 (EC) [hereinafter Rome II].

[97] *Id.* at 48 (stating that Rome II is "binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community").

[98] *See Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II")*, at art. 8, COM (2003) (July 22, 2003), *available at* http://eur-lex.europa.eu/procedure/EN/184392.

[99] *Id.*

[100] *Id.* at art. 8(1) (emphasis added).

[101] *See, e.g.*, MIRIELLE VAN EECHOUD, CHOICE OF LAW IN COPYRIGHT AND RELATED RIGHTS 103-05 (2003).

[102] *Id.*

[103] *Id.*

[104] *See* Berne Convention, *supra* note 13, at art. 5(2).

conflict with the provisions of Article 8. However, use of the *lex protectionis* is heavily defective as mentioned above, and Article 8 provides a more clear cut answer than the *lex protectionis* in regards to Internet copyright infringement cases.[105]

Article 8 of Rome II is also flawed because it does not provide a deliberate choice-of-law rule in regards to Internet copyright infringement cases. Enforcement of Article 8 will force Member States to change their laws, in direct contrast with the harmonization goal of the European Council in writing Rome II.[106] The lack of designation of either *lex fori* or *lex protectionis* will likely result in Member States choosing which law they deem most appropriate, which only reinforces the splintered European legal approach to online copyright infringement that existed prior to Rome II's drafting.[107] Under the current Article 8 of Rome II, the *lex fori, lex protectionis,* and *lex loci delicti* interpretations are all plausible. In fact, states could even make the argument that application of the law in the state which the infringing content was eventually uploaded is the most effective approach because it only implicates the law of one country and is financially efficient for the party bringing the copyright infringement action.[108] However, the vast nature of the Internet debunks this too – within seconds, content can make its way to all four corners of the globe, leaving courts world-wide with the same daunting dilemma of forum selection.

Finally, Rome II cannot effectively be applied in the United States, as the Second Circuit has ruled that it was not bound by any law stemming from the Berne Convention.[109] Thus, the court implemented the application of the *lex loci delicti* (place where the wrong was committed).[110] Such divergence between Europe and the United States makes Rome II an unfit choice-of-law theory as it does not assist in promoting harmonization of conflicts-of-law legislation pertinent to online copyright infringement.

While neither the Berne Convention nor Rome II are suitable choice-of-law regimes, the United States has developed a choice-of-law regime that, with some further development, could serve to align worldwide approaches to online copyright infringement. The following section will discuss and analyze the American Law Institute Principles and propose amending them in order to find harmonization of online copyright infringement laws between Europe and the United States.

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[105] *See* Anita B. Frohlich, *Copyright Infringement In the Internet Age —Primetime For Harmonized Conflict-of-laws Rules?,* 24 BERKELEY TECH. L.J. 852, 885 (2009).

[106] *See supra* Section IV.

[107] *See supra* Section II(a)(i-iii).

[108] *See* Frohlich, *supra* note 105, at 886.

[109] *See Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90-91 (2d. Cir. 1988).

[110] *Id.*

V. A Proposal for Global Harmonization: The ALI Principles

Global implementation of the American Law Institute ("ALI") principles would bring harmony between the European and American approaches.[111] Although the ALI principles are not binding, they are aimed at supplementing, rather than supplanting, existing national law.[112] Further, the ALI principles were drafted with the goal of multi-national judicial cooperation in mind.[113] The ALI principles are an appropriate band-aid for the wound of assorted global online copyright infringement regulations, because they provide a uniform approach without interfering with national law.

The ALI principles clearly refer to the substantive law of a state, leaving behind choice-of-law regulations.[114] Such clarification is vital as it creates certainty about what law to use and avoids issues of *renvoi*, i.e. the bouncing of an issue back and forth between various choice-of-law regulations.[115] In fact, the ALI principles have gone so far as to designate separate sections to jurisdiction and choice-of-law issues.[116] Section 301 of the ALI principles provides the same "for which" language, rather than "where,"[117] reflecting to the principles of Rome II.[118] Moreover, the ALI drafters' notes make clear that international regulation will not designate a choice-of-law rule.[119] The ALI principles provide a much wider lens through which to view the *lex protectionis*. They expand their view beyond intellectual property infringement, dealing also with issues of validity, duration, infringement, and existence.[120] While Section 301 sets forth a general approach to interpreting such issues, there remain multiple exceptions outlined in the remainder of the ALI principles.

Section 302 of the ALI principles outlines a party autonomy exception, stipulating that parties to a dispute may choose the law that will apply to the action, even after it has arisen.[121] The only stipulation is that such a choice may not

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[111] *See* THE AMERICAN LAW INSTITUTE, INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (PROPOSED FINAL DRAFT 2007) [hereinafter ALI].

[112] *See* François Dessemontet, *A European Point of View on the ALI Principles –Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*, 30 BROOK. J. INT'L. L. 849, 855 (2005).

[113] *See* ALI, *supra* note 111, at 7.

[114] *Id.* at 196.

[115] *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 37 (2006).

[116] *See* ALI, *supra* note 111 (Part II regulates jurisdiction issues and Part III addresses rules for conflicts-of-law).

[117] *See* Rome II, *supra* note 96 (the language of article 8(1) reflects the wording here); *see also supra* Section IV.

[118] *See* ALI, *supra* note 111, at 26.

[119] *Id.* at 208.

[120] *Id.*at § 301.

[121] ALI, *supra* note 111, at § 302 (*stipulating that* "(1) subject to the other provisions of this Section, the parties may agree at any time, including after a dispute arises, to designate a law that will govern all or part of their dispute").

adversely affect the rights of third parties.[122] Such a method could prove incredibly useful as it provides parties to multi-national copyright infringement cases the opportunity to uniformly agree upon one body of law together. However, such autonomy could simultaneously be detrimental, as in most circumstances the selection of one body of law benefits one party much more than the other. For example, one country's copyright law could be much more lenient than the others, or perhaps one party is a resident and therefore has assets in one country, while the other party resides and has assets in the other. Due to the inherent fact that inherently parties to a lawsuit have conflicting interests, party autonomy in choice-of-law issues afforded by §302 could result as both a blessing and a curse.

Section 321 of the ALI principles, however, provides what is referred to as "Ubiquitous Infringement Exception."[123] This exception explicitly stipulates that in cases of ubiquitous infringement, the court may choose to apply the laws of the state with the closest connections to the dispute, keeping in consideration the residence, relationship, extent of activity and principal markets of the parties and the infringement.[124] This exception will likely lead to courts applying either the law of the country where the infringement originated (i.e., where the infringing material was uploaded), as §321 will not likely be an exception to the principle of territoriality.[125] However, if the location of the infringement origination is undeterminable, courts are likely to apply their own national choice-of-law legislation i.e. *lex fori.*[126] This is problematic because application of *lex fori* will usually favor the copyright holder because that party will likely have chosen the court.

Although far from perfect, the ALI principles prove most sufficient to address copyright infringement on the Internet. It would be sensible to provide a level of specificity to the ubiquitous infringement exception, so as to at least provide a roadmap approach for cases where it is abundantly evident that there has been copyright infringement. It appears that the ALI principles are aimed at setting a broad framework that can evolve alongside the field of intellectual property and its technological demands and developments.[127]

One other possible approach could be to combine the ALI principles with the *lex loci rei sitae approach.* This approach refers to the law of the place where a property is situated.[128] Under this theory, a court would implement whichever body of law provided the most protection to the author, analyzing: "(1) the coun-

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[122] *Id.* ("Any choice-of-law agreement under subsection (1) may not adversely affect the rights of third parties . . . .").

[123] *Id.* at § 321.

[124] *Id.* ("(1) When the alleged infringing activity is ubiquitous and the laws of multiple states are pleaded the court may choose to apply . . . the law or laws of the State or States with close connection to the dispute, as evidenced . . . by: (a) where the parties reside; (b) where the parties relationship, if any, is centered; (3) the extent of the activities and the investment of the parties; and (d) the principal markets toward which the parties directed their activities.").

[125] Rochelle Dreyfus, *The ALI Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?,* 30 BROOK. J. INT'L L. 819, 843-44 (2005).

[126] ALI, *supra* note 111, at 195.

[127] *Id.*

[128] BLACK'S LAW DICTIONARY 923, 924 (9th ed. 2009).

try from which the infringing act or acts originated; or (2) the country in which the alleged [infringer] resides; or (3) the country in which the alleged [infringer] maintains an effective business establishment"; or (4) the location of the server from which infringer is uploading his illegal content.[129] The final consideration confines the infringing conduct to one forum location, by zooming in on the location of the server the infringer is utilizing.[130]

These considerations, when coupled with the ALI principles could heavily simplify the choice-of-law analysis posed by multi-national copyright infringement issues. If the American Legal Institute could incorporate the *lex loci rei sitae* approach into the ALI principles, it could streamline choice-of-law harmonization. However, indisputably, the issue of global harmonization in choice-of-law regulations remains. Ideally, Europe would adopt the ALI principles in some form, bringing at least some semblance of harmonization to choice-of-law issues worldwide. Only the future of intellectual property law and the advances of technology will show whether such principles can be effectively implemented across the globe.

VI. Conclusion: The Challenge That Remains

Coupling the ALI Principles with the *lex loci rei sitae* approach harmonizes the importance of protecting both the copyright owner as well as the rights of the alleged infringer. The law that would apply would depend on a series of considerations, based on both the copyright owner and the infringer's residence, business and conduct. Accordingly, whatever law the courts choose, both the right holder and the defendant will be afforded the maximum protection of the law.

Currently, there is no harmonized or uniform set of copyright regulations. Thus, infringement on the Internet will continue to create crippling conflicts, permitting infringers to rampantly distribute illegal content with impunity. Until countries around the world decide to work together to implement a satisfactory body of laws, the infinite reach and perpetual sharing of the Internet era will continue to pillage the essence of intellectual property protection. While the current proposals have considered and attempted to give some shape to resolving conflict-of-laws disputes, most proposed regulations benefit the interests of one group more than another. Further, due to the lack of harmony in global law, most proposed approaches to conflict-of-laws issues in online copyright infringement are either too broad, or far too stringent.

The ALI principles seek to provide a spectrum within which to form harmonized regulation. The *lex loci rei sitae* approach combined with the ALI principles would create a stable and effective framework from which multi-national online copyright infringement laws could be based. Although it is not a one-size-fits all solution, and would likely force many nations to amend their national laws, it is a good start in the direction of global harmonization in intellectual property protection. Today, the solutions on the table have become a web of

[129] Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. Corp Soc'y 318, 330 (1995).

[130] *Id.*

sorts, with many tangled ideas that stop short of an effective resolution to the ever-growing online copyright infringement epidemic. Only through compromise and global cooperation will scholars, authors and attorneys worldwide be able to untangle the web.