

2015

## The Multiplicity of Copyright Laws on the Internet

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### Recommended Citation

Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 Fordham Intell. Prop. Media & Ent. L.J. 339 (2015).  
Available at: <https://ir.lawnet.fordham.edu/iplj/vol25/iss2/1>

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## **Cover Page Footnote**

Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author thanks Joost Blom, Paul Geller, Paul Goldstein, and Eric Priest for their comments and suggestions, and also thanks the participants of both the 2014 International Intellectual Property Scholars Roundtable and the 14th Annual Intellectual Property Scholars Conference. The author would like to express her gratitude for research support to Andrew Martineau at the Wiener-Rogers Law Library of the William S. Boyd School of Law, the library staff of the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany, and the library staff of the Max Planck Institute for Intellectual Property and Competition Law in Munich, Germany. The author recognizes her colleagues in the International Law Association Committee on Intellectual Property and Private International Law for the continuing inspiration that they provide. The author thanks Gary A. Trimble for his valuable editing suggestions.

# The Multiplicity of Copyright Laws on the Internet

Marketa Trimble \*

## ABSTRACT

*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 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 advanced 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.*

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\* Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author thanks Joost Blom, Paul Geller, Paul Goldstein, and Eric Priest for their comments and suggestions, and also thanks the participants of both the 2014 International Intellectual Property Scholars Roundtable and the 14th Annual Intellectual Property Scholars Conference. The author would like to express her gratitude for research support to Andrew Martineau at the Wiener-Rogers Law Library of the William S. Boyd School of Law, the library staff of the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany, and the library staff of the Max Planck Institute for Intellectual Property and Competition Law in Munich, Germany. The author recognizes her colleagues in the International Law Association Committee on Intellectual Property and Private International Law for the continuing inspiration that they provide. The author thanks Gary A. Trimble for his valuable editing suggestions.

*Other experts have suggested that the multiplicity be addressed by unifying national copyright laws 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 anticipated workings of the proposed solutions.*

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## INTRODUCTION

From the beginnings of the Internet<sup>1</sup> 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.<sup>2</sup> 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 infringements and often also for other copyright-related acts and occurrences)<sup>3</sup> the choice-of-law rule that points to the law of the place of the tortious activity (*lex loci delicti*, *lex loci protectionis*).<sup>4</sup> Unless Internet activities are limited geograph-

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<sup>1</sup> 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. For a discussion of the current use 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 n.25 (2012).

<sup>2</sup> See, e.g., Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 480–81 (2000); Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT’L L. 799, 807–08 (1998) (discussing how different national copyright laws govern a work which has been unlawfully reproduced in one country and made available to the public in another).

<sup>3</sup> See, e.g., Graeme B. Dinwoodie, *Developing A Private International Intellectual Property Law: The Demise of Territoriality*, 51 WM. & MARY L. REV. 711, 729–33 (2009) (reviewing the scope of application of the *lex loci protectionis* rule).

<sup>4</sup> 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*), meaning the law of the country whose law provides copyright protection to the work at issue and in which copyright was infringed. 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 J. COPYRIGHT

ically through geoblocking<sup>5</sup> or some form of censorship that disables access to content on the Internet,<sup>6</sup> the effects of the activities extend to all countries connected to the Internet (those countries where the results 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.<sup>7</sup>

The multiplicity of national copyright laws is problematic because countries' copyright laws continue to differ despite a significant degree of harmonization of national copyright laws in the past

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SOC'Y U.S.A. 318, 336–37 (1995) [hereinafter *Global Use/Territorial Rights*] (noting that the language “where protection is sought” in Article 5(2) of the Berne Convention may not necessarily refer to the law of where the infringement occurred, but rather to the law of the forum country, i.e., *lex fori*); 2 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* § 20.01 (2d ed. 2005) (“[D]eriving from the Berne text supranational choice of law rules is a delicate, if not improbable, operation.”); 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”).

<sup>5</sup> See Trimble, *supra* note 1, at 587–90.

<sup>6</sup> See, e.g., Evgeny Mozorov, *Egypt Action May Spread Internet Kill Switch Idea*, S.F. GATE, (Feb. 6, 2011), <http://www.sfgate.com/opinion/article/Egypt-action-may-spread-Internet-kill-switch-idea-3243860.php>; Christopher Beam, *Egypt Protest Internet Shut Off: How did the Egyptian government turn off the Internet?*, SLATE (Jan. 28, 2011, 4:55 PM), <http://www.slate.com/id/2283000/>; James Crowie, *Egypt Leaves the Internet*, DYN RESEARCH BLOG (Jan. 27, 2011), <http://www.renesys.com/blog/2011/01/egypt-leaves-the-internet.shtml>.

<sup>7</sup> See, e.g., *Global Use/Territorial Rights*, *supra* note 4, at 322 (concluding that effective judicial deterrence of piracy requires that intellectual property rights holders be able to sue infringers in every country that infringing material may be received); Graeme W. Austin, *Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace*, 79 OR. L. REV. 575, 588 (2000) (observing that applying *lex loci* in the digital world involves the challenges of applying multiple copyright laws). This approach to choice of law is also known as the “mosaic approach” and is consistent with the “Bogsch Theory,” named after Arpad Bogsch, a WIPO Director, who advanced the proposition that “any utilisation of a protected work that is relevant from the viewpoint of copyright takes place where the work—through copies, through performance, or through any kind of communication technique—is actually made available to the public.” Mihály Ficsor, *Direct Broadcasting by Satellite and the ‘Bogsch Theory’*, 18 INT’L BUS. LAW. 258, 258 (1990). See also RITA MATULIONYTĖ, *LAW APPLICABLE TO COPYRIGHT: A COMPARISON OF THE ALI AND CLIP PROPOSALS* 126–29 (Edward Elgar 2011); JOSEF DREXL, *INTERNATIONALES IMMATERIAL-GÜTERRECHT*, IN *MÜNCHNER KOMMENTAR ZUM BGB* 251–58 (5th ed. 2010).

130 years.<sup>8</sup> Copyright practice itself does mitigate some of the continuing national copyright law differences when persons or entities pursue multinational and comprehensive copyright strategies in countries with different laws;<sup>9</sup> however, the differences among laws complicate cross-border activities involving copyrighted works,<sup>10</sup> particularly when less sophisticated persons or entities are involved who cannot navigate the differences as effectively (or navigate them at all) as more experienced persons or entities can.

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 post the

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<sup>8</sup> 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, 11850 U.N.T.S. 223 (1986) [hereinafter Berne Convention] (as revised at Paris July 4, 1971 and amended Sept. 28, 1979); Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154 [hereinafter TRIPS Agreement]; WIPO Copyright Treaty, Dec. 20, 1996, WCT, S. TREATY DOC. NO. 105-17. For an overview of flexibilities—both those intentionally introduced in the treaties by treaty negotiators and those unintentionally persisting see, for example, Marketa Trimble, *Advancing National Intellectual Property Policies in a Transnational Context*, 74 MD. L. REV. 203 (2015).

<sup>9</sup> For example, countries may agree that employers should be able to exercise economic rights to works that their employees create in the course of employment. The United States has a work-for-hire doctrine that achieves this result by vesting copyright to the employee's work in the employer; other countries with no work-for-hire doctrine allow for copyright to employee-created works to be subject to an exclusive license that is either granted in an employment contract or created by law. *Compare* 17 U.S.C. §201(b) (2012) *with* Zhonghua Renmin Gonghe Guo Zhuzuo Quan Fa [Copyright Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Sept. 7, 1990, amended Feb. 26, 2010 by the Standing Comm of the Nat'l People's Cong., amendments effective Apr. 1, 2010) art. 16, *available at* [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=186569](http://www.wipo.int/wipolex/en/text.jsp?file_id=186569), *and* CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. L113-9 (Fr.).

<sup>10</sup> *See* discussion *supra* Introduction; *see also* *Global Use/Territorial Rights*, *supra* note 4, at 323–30; Austin, *supra* note 7, at 603–10.

photograph. Alternatively, some Internet actors may mistakenly believe that only the country of their domicile may legitimately regulate their conduct,<sup>11</sup> or that because their acts occur on the Internet no country will or may regulate their conduct.<sup>12</sup>

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 versed in the intricacies of international copyright are exposed to cross-border dealings involving copyright issues. While offline cross-border activities concerning copyrighted works<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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, and may even exceed the costs of assuming the risk of copyright litigation when the Internet actors do not clear copyright

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<sup>11</sup> 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.

<sup>12</sup> See *infra* Part III.A (discussing the unawareness of many Internet actors with respect to the cross-border implications of their conduct).

<sup>13</sup> In this context, cross-border activities concerning copyrighted works do not include *de minimis* importation for non-commercial purposes.

<sup>14</sup> 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).

<sup>15</sup> Dinwoodie, *supra* note 2, at 541 (“The problems of cyberspace bring [conflict-of-laws] questions into sharper focus, and it is there that they appear most acute.”).

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.

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 (under the latter country's law).<sup>16</sup> 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.<sup>17</sup> Germany, however, has no work for hire doctrine;<sup>18</sup> 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.<sup>19</sup> 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 photo-

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<sup>16</sup> 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 these countries as it has in the country of origin (provided that the law of the country of origin is interpreted and applied in the same manner in these countries). *See, e.g.*, Código Civil Português, [C.Civ], Decreto-Lei n.º 47344/66 art. 48 (Port.).

<sup>17</sup> *See* 17 U.S.C. § 201(b) (2012).

<sup>18</sup> 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 instructions from his employer." URHEBERRECHTSGESETZ [UrhG] [COPYRIGHT LAW], Sept. 9, 1965, BUNDESGESETZBLATT [BGBl.] art. 69b(1) (Ger.). This provision is consistent with Directive 2009/24 of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs, 2009 O.J. (L 111) 16, art. 2(3).

<sup>19</sup> German courts will apply German law to determine who the copyright owner is in this case because German courts apply the law of the country where protection is sought to copyright ownership.

grapher—and not the agency—owns the copyright to the photograph.<sup>20</sup>

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 country without permission or a license may require permission or a license in another country.<sup>21</sup> 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;<sup>22</sup> there is a similar enumerated exception in the US Copyright Act, but the US exception does not cover the acts when they concern a stand-alone sculptural work (a sculpture that is not embodied in an architectural work).<sup>23</sup> This difference in national laws means that the posting on the Internet of a photograph of a publicly accessible stand-alone sculpture without permission or a license 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 US copyright law (although the

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<sup>20</sup> If the facts are reversed (if the agency and the photographer were domiciled in Germany), the different scenario would not necessarily create a problem; employment contracts in civil law countries often provide for an exclusive permanent license in favor of the employer. Additionally, US 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) (“[T]he law of the country with the closest relationship to the work will apply to settle the ownership dispute.”). *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 Global Use/Territorial Rights*, *supra* note 4, at 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) (arguing that “there is no Berne Convention requirement to apply national treatment to ownership of copyright”).

<sup>21</sup> *E.g.*, Martin Senftleben, *Breathing Space for Cloud-Based Business Models—Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions*, 4 JIPITEC 87, 91 (2013).

<sup>22</sup> URHEBERRECHTSGESETZ of September 9, 1965, as last amended, art. 59(1).

<sup>23</sup> 17 U.S.C. § 120(a) (2012).

fair use doctrine under US law<sup>24</sup> might provide a successful defense in some cases).<sup>25</sup>

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.<sup>26</sup> Two types of solutions seek to limit the number of applicable copyright laws, but they employ different means to achieve the goal.<sup>27</sup> 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 extranational Internet-specific copyright law (that would be either legislated or developed judicially) or as a uniform copyright law implemented through national legislations.<sup>28</sup> 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 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.<sup>29</sup> So far the two types of proposed solutions have gained little or no support from national governments at the national and international levels,<sup>30</sup> and the

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<sup>24</sup> 17 U.S.C. § 107 (2012).

<sup>25</sup> Theoretically, a US 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. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998).

<sup>26</sup> Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 44 (2000) (“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.”).

<sup>27</sup> *See, e.g.*, Andrea Antonelli, *Applicable Law Aspects of Copyright Infringement on the Internet: What Principles Should Apply?*, 2003 SING. J. LEGAL STUD. 147 (2003).

<sup>28</sup> *See infra* Part I.

<sup>29</sup> *See infra* Part II.

<sup>30</sup> Some courts have referred to the proposals for special conflict-of-laws rules. *See, e.g.*, *Rundquist v. Vapiano*, 798 F. Supp. 2d 102, 132 (D.D.C. 2011); *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, ¶¶ 93–94; *Case C-145/10, Painer v. Standard Verlags*, 2011 ECR I-12533, n.31; *Case C-616/10, Solvay v. Honeywell*, 2012 ECR. 193, n.24 (opinion of AG Villalón); *Case C-170/12, Pinckney v. KDG Mediatech AG*, 2013 ECR, (opinion of AG Jääskinen).

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 fewer challenges on the Internet than critics who perceive a multiplicity problem seem to assume. Some of these limitations arise because of countries' limited abilities to enforce their laws; as Jack Goldsmith noted in 1998 during 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."<sup>31</sup> 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.

Although litigation represents only a small percentage of the enforcement actions that copyright owners employ (only a small percentage of copyright disputes result in court proceedings and enforcements of final judgments), the availability and course of litigation impacts all other enforcement actions. Often the steps that precede litigation will suffice to enforce copyright, and third parties such as advertisers and payment processors may assist in extrajudicial enforcement, although Internet actor behavior and copyright owner negotiating positions will ultimately be affected by the actual ability of copyright owners to effectively enforce their copyrights (i.e. whether copyright laws can and will actually be enforced).<sup>32</sup> Given the global nature of most Internet actions and the persisting differences among countries' copyright laws, conflict-of-laws solutions to the multiplicity problem should assist in making effective cross-border enforcement feasible and thus positively im-

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<sup>31</sup> Jack J. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1220 (1998). These limited abilities are shared by all countries and arise from the general limited abilities of countries to enforce their laws extraterritorially. See Trimble, *supra* note 8, at 11-19 (discussing the difference between the territorial scope of prescriptive jurisdiction and the territorial scope of the actual enforcement power).

<sup>32</sup> E.g., Eric Priest, *Acupressure: The Emerging Role of Market Ordering in Global Copyright Enforcement* (forthcoming).

pact the functioning of copyright laws on the Internet. The question is whether the existing proposals address the practical inefficiencies of cross-border copyright enforcement sufficiently to improve on the status quo; it seems that even if countries were to adopt the conflict-of-laws rules that have been proposed many litigation limitations would persist and continue to limit the number of countries' laws that are de facto regulating conduct on the Internet in particular cases.

This Article begins by analyzing the proposals for solving the multiplicity problem. The first part discusses proposals that seek to achieve single global copyright standards, and the second part 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 part confronts the theoretical concern about the multiplicity of potentially applicable 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. PROPOSALS FOR A GLOBAL COPYRIGHT

The first type of solution proposed to address the multiplicity problem would introduce a single set of global copyright law standards.<sup>33</sup> 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.<sup>34</sup> However, the trajectory might not be so

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<sup>33</sup> *E.g.*, Antonelli, *supra* note 27, at 177 (admitting that “the task seems almost impossible”).

<sup>34</sup> *See supra* note 8 and accompanying text.

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,<sup>35</sup> and some critics flatly reject the utility of a uniform global copyright law.<sup>36</sup>

#### A. *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.<sup>37</sup> For these Internet exceptionalists, the process of creating a new legal order would 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 extranational 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 se-

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<sup>35</sup> See, 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, 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, *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).

<sup>36</sup> 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 23, 35 (Johan Axhamn ed., 2012).

<sup>37</sup> 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 Mefford, *Lex Informatica: Foundations of Law on the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 211, 222, 236–37 (1997).

lect countries; indeed, the approach worked for technical Internet architecture-specific issues such as standard setting and regulation of the domain name system, including the ICANN dispute resolution mechanism. 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 requisite global legitimacy. If national courts were to follow Graeme Dinwoodie's proposal and devise a special regime through their decisions, the special regime would alleviate the concern about legitimacy (perhaps in some countries more than in others), but the judicially-created system certainly would not eliminate the concern.<sup>38</sup>

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 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' reve-

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<sup>38</sup> Dinwoodie, *supra* note 2, at 542–43 (“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].”). For Dinwoodie's response to the legitimacy problem see *id.* at 575–77. Annette Kur asserted 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.” EUROPEAN MAX PLANCK GROUP ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, CONFLICT OF LAWS IN INTELLECTUAL PROPERTY: THE CLIP PRINCIPLES AND COMMENTARY art. 3:603 n.7 (2013) [hereinafter CLIP PRINCIPLES]. For Dinwoodie's response to concerns about legal certainty see Dinwoodie, *supra* note 2, pp. 571–75. See also Reindl, *supra* note 2, at 810–11 (criticizing “cyberspace *lex mercatoria*”); Joanna Kulesza & Roy Balleste, *Signs and Portents in Cyberspace: The Rise of Jus Internet as a New Order in International Law*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1311, 1345 (2013) (proposing a similar framework not limited to copyright law); Jane C. Ginsburg, *The Private International Law of Copyright in An Era of Technological Change*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 239, 376–408 (Martinus Nijhoff Publishers ed., 1998).

nues, together with countries' tax revenues and other interests.<sup>39</sup> An Internet-specific legal regime inconsistent with a country's own copyright law<sup>40</sup> would destabilize the delicate balance that the country strives (or should strive) to achieve with its copyright policies.

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 also been subject to Internet-specific legislation, including in the area of copyright law.<sup>41</sup> Some Internet-specific regulation that addresses the technical infrastructure is subject to extranational regulation (e.g., again the domain name system); other Internet-specific regulation, such as limitations on the liability of Internet service providers, is governed by national laws.<sup>42</sup> However, even in the limited areas governed by extranational Internet-specific regulation countries maintain their right to have input into the final decisions.<sup>43</sup>

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

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<sup>39</sup> Peter K. Yu, *Towards the Seamless Global Distribution of Cloud Content in PRIVACY AND LEGAL ISSUES IN CLOUD COMPUTING* (Anne S. Y. Cheung & Rolf H. Weber eds.) (forthcoming 2015).

<sup>40</sup> 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.

<sup>41</sup> See, e.g., 47 U.S.C. § 230 (2012); 17 U.S.C. § 512 (2012).

<sup>42</sup> In the EU, the provisions on the limitation of ISP liability are subject to very general harmonization through Articles 12–15 of 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, 2000 O.J. (L 178) [hereinafter EU E-Commerce Directive].

<sup>43</sup> See, e.g., 15 U.S.C. § 1114 (2012) (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).

to property).<sup>44</sup> Countries could in theory, by adopting an international copyright law regime, address the need for an Internet-specific copyright regime without outsourcing the regime to a non-state body. An international law solution would 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.<sup>45</sup> 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.

### *B. Uniform National Copyright Laws*

A cursory review of the history of treaties on copyright law might suggest a trajectory of gradually deepening harmonization of

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<sup>44</sup> *E.g.*, Charter of Fundamental Rights of the European Union, art. 17(2), 2010 O.J. C 83/02, at 395; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.), art. 14 (interpreted by German courts as covering intellectual property). For IP-specific provisions in national constitutions, see U.S. CONST. art. I, § 8, cl. 8; The Czech Republic's Charter of Fundamental Rights and Freedoms, Article 34; Constitution of the Republic of the Philippines, Section 13; Constitution of the Democratic Republic of Timor-Leste, Section 60.

<sup>45</sup> Graeme Dinwoodie has 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, *supra* note 2, at 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 power often achieve their goals. The situation may be different if governments (or some factions in the governments) used 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 id.* at 499–501 ("The relationship [of national, regional, and international developments] is increasingly complex and multidirectional.").

national copyright laws, but while the impression is accurate with respect 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,<sup>46</sup> 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 Treaty<sup>47</sup> with great concern as to whether the Treaty, which solidifies certain exceptions and limitations to copyright in favor of access for the visually impaired,<sup>48</sup> could become a Trojan horse for a future weakening of copyright protection through international treaties.<sup>49</sup>

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 na-

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<sup>46</sup> TRIPS Agreement, *supra* note 8.

<sup>47</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 31, 2013, WIPO Doc. VIP/DC/8, available at [http://www.wipo.int/edocs/mdocs/copyright/en/vip\\_dc/vip\\_dc\\_8\\_rev.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf) [hereinafter Marrakesh Treaty].

<sup>48</sup> The Marrakesh Treaty does not impose exceptions and limitations that go beyond the existing three-step-test framework. *See id.* at art. 1 and the Agreed Statement Concerning Article 4(3).

<sup>49</sup> *See, e.g.,* William New, *Negotiators, Stakeholders Tell Tale of WIPO Marrakesh Treaty Negotiation, Look to Implementation*, INTELL. PROP. WATCH (Sept. 20, 2013), <http://www.ip-watch.org/2013/09/20/negotiators-stakeholders-tell-tale-of-wipo-marrakesh-treaty-negotiation-look-to-implementation/>.

tional IP legislation<sup>50</sup> and argued in favor of greater use of existing treaty flexibilities to tailor IP regimes to countries' unique circumstances. Historical, cultural, sociopolitical, 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.<sup>51</sup>

Even if countries could agree on a uniform set of copyright law standards, some national differences would persist and/or develop over 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. 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.<sup>52</sup>

## II. PROPOSED CONFLICT-OF-LAWS SOLUTIONS

If national courts adjudicate cases that involve parties from different countries and/or implicate different national copyright laws,

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<sup>50</sup> *E.g.*, Dinwoodie, *supra* note 2, at 518–21.

<sup>51</sup> *E.g.*, Ruth Okediji, *Legal Innovation in International Intellectual Property Relations: Twenty One Years of the TRIPS Agreement*, 36 U. PA. J. INT'L LAW (forthcoming 2015).

<sup>52</sup> 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, 321–22 (Toshiko Takenaka ed., 2013).

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.<sup>53</sup> The more deeply that national laws are harmonized, however, the less significant will be the consequences of the choice-of-law analysis;<sup>54</sup> if copyright laws were uniform, choice of law, at least as to the applicable copyright law, would be unnecessary.<sup>55</sup> 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 (in some countries upon fixation, in other countries upon creation), at a minimum, all 168 countries that are parties to the Berne Convention.<sup>56</sup> 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 countries' laws differ, and there can be no infringement committed in countries where the work falls outside copyright protection (because of the subject matter of the work,<sup>57</sup> its author,<sup>58</sup> or the expiration of its copyright term<sup>59</sup>), or in countries in which the act is not considered infringing

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<sup>53</sup> See also Goldsmith, *supra* note 31, at 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.”).

<sup>54</sup> See Trimble, *supra* note 8 (discussing the relationship between substantive law and choice of law rules).

<sup>55</sup> 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, at 812.

<sup>56</sup> *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 Jan. 6, 2015).

<sup>57</sup> E.g., because of different requirements for originality.

<sup>58</sup> E.g., works by the US federal government in the United States.

<sup>59</sup> 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

(because of a different interpretation of the particular right 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.<sup>60</sup>

Existing rules of personal jurisdiction and choice of law do not provide relief from the multiplicity problem, at least not in theory. Courts of general jurisdiction<sup>61</sup> 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,<sup>62</sup> meaning that the courts could decide worldwide copyright infringements

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Convention, *supra* note 4, at art. 7; TRIPS Agreement, *supra* note 8, at art. 12; Beijing Treaty on Audiovisual Performances, June 24, 2012, WIPO Doc. AVP/DC/20, *available at* [http://www.wipo.int/edocs/mdocs/copyright/en/avp\\_dc/avp\\_dc\\_20.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_20.pdf). Also, copyright terms to the same work may expire at different times under the laws of the United States and other countries, including the country of the work's origin, because of the copyright term restoration provisions of the US Copyright Act. 17 U.S.C. § 104A (2012).

<sup>60</sup> See *supra* note 5 and accompanying text (discussing geoblocking—the possibility of limiting the accessibility of content on the Internet and thus the number of countries whose laws apply to the content).

<sup>61</sup> 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 principal place of business. See, e.g., Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), 2012 O.J. (L 351) 1, 7, 18, arts. 4, 63 [hereinafter Brussels I Regulation (recast)]. In the United States, general jurisdiction exists in the forum state when a corporation's "affiliations with the State are so 'continuous and systematic' as to render [the corporation] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

<sup>62</sup> See *London Film Productions Ltd. v. Intercontinental Communications, Inc.*, 580 F. Supp. 47, 49 (S.D.N.Y. 1984); *Creative Technology Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 702 (9th Cir. 1995); *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39; *Jedis Ltd. v. Vodafone New Zealand Ltd.* [2012] NZHC 2448, ¶ 39. See also *infra* notes 200 and 201 and accompanying text. Cf. *Gallo Africa Ltd. v. Sting Music* 2010 (6) SA 329 (SCA) (pre-dating the UK Supreme Court decision in *Lucasfilm*).

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 typically exists in 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 may have specific jurisdiction<sup>63</sup> (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 part 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-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.<sup>64</sup> 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 re-

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<sup>63</sup> Cf. *infra* Part III.B.

<sup>64</sup> The discussions of this approach mirror the general debates about tort localization. See, e.g., 2 ERNST RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 233 (1947); 3 ALBERT A. EHRENZWEIG & ERIK JAYME, *PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, INCLUDING THE LAW OF ADMIRALTY* 64 (1977); C.G.J. MORSE, *TORTS IN PRIVATE INTERNATIONAL LAW* 113 (1978).

lieve 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.<sup>65</sup>

#### *A. 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”<sup>66</sup>—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 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

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<sup>65</sup> The proposal to draft a convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters began to be discussed by the Special Commission on General Affairs and Policy of the Hague Conference in 1994. In 2002 The Hague Conference decided to postpone work on the draft and ordered a new draft to be prepared that would avoid conflicts among countries on rules of jurisdiction. The Hague Conference reopened the project for a general convention on jurisdiction and recognition and enforcement in 2012. *See* The Judgments Project, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, [http://www.hcch.net/index\\_en.php?act=text.display&tid=149](http://www.hcch.net/index_en.php?act=text.display&tid=149) (last visited Feb. 20, 2015).

<sup>66</sup> AM. LAW INST., INTELLECTUAL PROP.: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES § 321 n.1 (2008) [hereinafter ALI PRINCIPLES].

activity is the place in which the entire harm is concentrated—the place where the harm is internalized by the copyright owner.<sup>67</sup>

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 protection (the weakest protection being caused by either less copyright owner protective legislation or ineffective enforcement), while copyright owners will relocate to jurisdictions with the strongest copyright protection.<sup>68</sup> 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. Some persons and entities will indeed relocate to a particular jurisdiction solely or primarily because of the favorable legal environment that the jurisdiction offers, which may include weaker copyright protection.<sup>69</sup> The question is whether choice-of-law rules are the proper vehicle for countries to address problems with a jurisdiction that 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 follow-

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<sup>67</sup> 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.” The approach may or may not lead to a limitation on the number of applicable laws. Jane Ginsburg proposed that in some circumstances courts should 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. See also *infra* note 83 and the accompanying text.

<sup>68</sup> *Global Use/Territorial Rights*, *supra* note 4, at 336; Ginsburg, *supra* note 26, at 44; ALI PRINCIPLES, *supra* note 66, § 321 cmt. 1 and Reporter’s Notes; DREXL, *supra* note 7, at 291–96; CLIP PRINCIPLES, *supra* note 39, at art. 3:603 cmt. 7.

<sup>69</sup> *E.g.*, Kazaa was based in Vanuatu; Megaupload Ltd. is incorporated in Hong Kong.

ing sections discuss additional advantages and disadvantages presented by the two localization rules.

### 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 national copyright policies of the countries are different, the copyright policies of the alleged infringer’s jurisdiction to the detriment of the policies of the copyright owner’s jurisdiction.<sup>70</sup> 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 the jurisdiction’s law provides for them),<sup>71</sup> but it might also protect Internet actors’ 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.<sup>72</sup> Naturally, an inability to promote certain interests in cross-border scenarios will be mitigated when 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,<sup>73</sup> 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 an actor’s conduct. The rule is disadvantageous to copyright owners because they cannot predict which copyright laws will govern Internet ac-

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<sup>70</sup> Ginsburg, *supra* note 26, at 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.”).

<sup>71</sup> Punitive damages in copyright are not awarded only in common law jurisdictions; some civil law jurisdictions also provide for punitive damages. *See, e.g.*, Copyright and Related Rights Act of 1995 (as last amended on Dec. 15, 2006) (in force Jan. 13, 2007), art. 168 (Slovn.), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=180840](http://www.wipo.int/wipolex/en/text.jsp?file_id=180840).

<sup>72</sup> Ginsburg, *supra* note 26, at 44.

<sup>73</sup> The determination could be complicated if the location of the conduct is disputed. *See infra* notes 92–100 and accompanying text.

tors' 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.<sup>74</sup> 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 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.

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;<sup>75</sup> 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.

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<sup>74</sup> See *supra* note 61 and accompanying text for an explanation of general jurisdiction.

<sup>75</sup> See Ginsburg, note 67, at 172 (noting that “to some extent, the ‘point of origin’ approach and the defendant’s domicile may converge”).

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 Directive<sup>76</sup> and in the EU E-Commerce Directive.<sup>77</sup> 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”;<sup>78</sup> 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.<sup>79</sup> While the EU Satellite and Cable Directive concerns neighboring (“copyright-related”) rights,<sup>80</sup> the EU E-Commerce Directive makes the emission principle inapplicable to “copyright, neighboring rights, . . . and . . . industrial property rights.”<sup>81</sup>

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.”<sup>82</sup> Other commen-

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<sup>76</sup> 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 1993 O.J. (L 248) 15 [hereinafter EU Satellite and Cable Directive].

<sup>77</sup> EU E-Commerce Directive, *supra* note 42.

<sup>78</sup> EU Satellite and Cable Directive, *supra* note 76, at art.1(2)(b).

<sup>79</sup> EU E-Commerce Directive, *supra* note 42, at art. 3(1) & (2).

<sup>80</sup> EU Satellite and Cable Directive, *supra* note 76, at art. 5.

<sup>81</sup> EU E-Commerce Directive, *supra* note 42, at art. 3(3) & Annex.

<sup>82</sup> *Global Use/Territorial Rights*, *supra* note 4, at 338; *see also* Ginsburg, *supra* note 67, at 171, 173 (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 US law should apply to all unauthorized copies, wherever communicated” and for defendants who are not domiciled in the United States and who

tators 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.<sup>83</sup> Mark Kightlinger proposed the EU E-Commerce Directive approach as a model for international internet regulation.<sup>84</sup>

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 US courts have adopted; under that approach “the extraterritorial infringements are all the direct consequences of a local US infringement.”<sup>85</sup> However, in the cases cited for this proposition, US courts have not applied US law to activities abroad but they have applied US 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.<sup>86</sup> The results of the application of the root copy approach are similar to the results that US courts would have achieved if they had applied US 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

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acted from outside the United States, proposing that US courts apply “either . . . the law of the place of the server or of the defendant’s domicile.”); Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT’L L. 587, 600 (1997).

<sup>83</sup> See generally Austin, *supra* note 7, at 592.

<sup>84</sup> See 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).

<sup>85</sup> *Global Use/Territorial Rights*, *supra* note 4, at 335.

<sup>86</sup> *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 48-52 (2d Cir. 1939) (“[A]n infringer . . . is like any other constructive trustee. . . . 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 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 . . .”). See also *Update Art, Inc. v. Modiin Publ’g, Ltd.*, 843 F.2d 67 (2d Cir. 1988); *LA News Serv. v. Reuters Television Int’l*, 340 F.3d 926 (9th Cir. 2003).

later.<sup>87</sup> The results, however, are not identical. It appears that US courts will award profits lost because of the activities abroad but not damages attributable to the activities abroad;<sup>88</sup> also, only profits linked to a specific type of infringement in the United States will be recoverable,<sup>89</sup> and statutory damages will not be available for acts committed outside the United States.<sup>90</sup> Additionally, 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.<sup>91</sup>

Some commentators have argued that the localization approach, when its use is based on any act occurring on the Internet, is unfit for the ubiquitous medium that the Internet represents;<sup>92</sup> for example, the ALI Principles contend that the point of origin can be difficult to identify on “digital networks, particularly in the context of peer-to-peer exchanges.”<sup>93</sup> Undeniably, acts on the Internet can often be localized in multiple places;<sup>94</sup> the localization can fo-

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<sup>87</sup> See *infra* Part III.A.

<sup>88</sup> See, e.g., *LA News Serv. v. Reuters Television Int'l*, 340 F.3d 926 (9th Cir. 2003).

<sup>89</sup> See, e.g., *Robert Stigwood Group Ltd. v. O'Reilly*, 530 F.2d 1096, 1101 (2d Cir. 1976) (“It is only when the type of infringement permits further reproduction abroad that its exploitation abroad becomes the subject of a constructive trust.”).

<sup>90</sup> Courts award statutory damages per infringed work; statutory damages cover only works infringed under the US Copyright Act. 17 U.S.C. § 504(c) (2012).

<sup>91</sup> 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.

<sup>92</sup> Reindl, *supra* note 2, at 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 extranational nature of digital networks.”); Dinwoodie, *supra* note 2, at 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.”).

<sup>93</sup> ALI PRINCIPLES, *supra* note 66, § 321 cmt.1.

<sup>94</sup> Some US 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, e.g., *Kernal Records OY v. Mosley*, 794 F. Supp. 2d 1355 (S.D. Fla. 2011). *But cf.* *Moberg v. 33T LLC*, 666 F. Supp. 2d 415 (D. Del. 2009); *Rogers v. The Better Business Bureau of Metropolitan Houston, Inc.*, 887 F. Supp. 2d 722 (S.D. Tex. 2012). See also Thomas F. Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 MINN. L. REV. 1724, 1747-50 (2008); Dinwoodie, *supra* note 2, at 537

cus 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 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).<sup>95</sup>

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.<sup>96</sup> For example, when a user posted a work online while the user was in Canada, a US 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.<sup>97</sup> Places through which the data might have traveled 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.<sup>98</sup>

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(“[I]n a digital world . . . publication may occur simultaneously in a number of countries.”).

<sup>95</sup> For a discussion of localization of acts on the Internet see Trimble, *supra* note 1, at 607–10.

<sup>96</sup> 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.”); *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, ¶146 (“[T]he injunction would compel Google to take steps in California or the state in which its search engine is controlled.”).

<sup>97</sup> See, e.g., *Shropshire v. Canning*, 809 F. Supp. 2d 1139, 1145–47 (N.D. Cal. 2011).

<sup>98</sup> DAN JERKER B. SVANTESSON, PRIVATE INTERNATIONAL LAW AND THE INTERNET 356–57 (2012). Cf. Ginsburg, *supra* note 67, at 173 (proposing that “the law of the place of the server” should apply in some circumstances) and JANE C. GINSBURG, WIPO, PRIVATE INTERNATIONAL LAW ASPECTS OF THE PROTECTION OF WORKS AND OBJECTS OF RELATED RIGHTS TRANSMITTED THROUGH DIGITAL NETWORKS 45 (1998), available at [http://www.wipo.int/edocs/mdocs/mdocs/en/gpic/gpic\\_2.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/gpic/gpic_2.pdf).

The “server test” established for personal jurisdiction in *Perfect 10 v. Google Inc.*, concerned the incorporation of content that is posted by a third party (hyperlinking) and prefers the human aspect approach, which leads to the party that posted the content on

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 to be.<sup>99</sup> It may be difficult to localize an Internet user at the particular moment when the user engaged in a specific activity on the Internet, but in most cases localization is possible, albeit with costs that might be higher than the costs would be for localization in the offline environment.<sup>100</sup>

## 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<sup>101</sup>—the country can effectively legislate for the copyright owner's compensation and influence prospective copyright owner conduct in a manner consistent with the country's copyright policies. If the interests of the countries involved are dif-

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the Internet. The term “server test” is derived from “serving the content.” The test does not create personal jurisdiction in the jurisdiction where the servers are located; it points to the party that *serves* the infringing content on the Internet as the infringer. 416 F. Supp. 2d 828, 839, 843 (9th Cir. 2006). *See also* Case C-523/10, Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH, 2012 E.C.R. 90, ¶ 36 (“[T]he place of establishment of [a search engine] server cannot, by reason of its uncertain location, be considered to be the place where the event giving rise to the damage occurred for the purpose of the application of Article 5(3) of Regulation No 44/2001.”).

US courts have found jurisdiction based on the place of a server—for example when the server itself was the location of the tortious conduct or of its effects, e.g., the location of misappropriation of trade secrets that were stored on the server, such as in *MacDermid, Inc. v. Deiter*, 702 F.3d 725, 726–27 (2d Cir. 2012), or the location of the unauthorized use of the server that resulted in damages, such as in *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244, 1246 (10th Cir. 2000).

<sup>99</sup> *E.g.*, *Global Use/Territorial Rights*, *supra* note 4, at 320; Ginsburg, *supra* note 67, at 153. *Cf.* Rothchild, *supra* note 96, at 926–29 (commenting on the “ease of evading detection”); Dinwoodie, *supra* note 2, at 535 (referring to the digital world as a world “where geography holds less significance”). *See also* Goldsmith, *supra* note 31, at 1203–26 (arguing that cyberspace is not a borderless medium and discussing filtering in 1998 as a “technology [that] is relatively new and still relatively crude”).

<sup>100</sup> *See* Goldsmith, *supra* note 31, at 1235–36 (pointing out that difficulties with localization 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, 25 (1999) (“[I]n transnational law, the concept of the place of harm is relatively easy to manipulate.”).

<sup>101</sup> The policy includes the country's decision on who the copyright owner is.

ferent, 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.

If countries view only one person or entity as the owner of a particular copyright and agree on the location of his or its domicile,<sup>102</sup> the rule of the copyright owner's domicile 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.<sup>103</sup> An additional complexity arises when multiple owners of the same copyright exist because of countries' differing rules on copyright ownership.<sup>104</sup> Provided that all jurisdictions agree on who the copyright owner is and where the copyright owner is domiciled, once the Internet actor determines the country where the copyright owner is domiciled the actor 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 is 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, the court most familiar with the applicable law—the court of the country of the copyright owner's domicile—has

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<sup>102</sup> Countries' rules governing copyright ownership and domicile may differ. *See supra* Introduction.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

only specific 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 of applying a single country’s law to cover infringements worldwide exists under this rule just as it does under the rule that localizes infringement in the place of origin of the alleged infringement, 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).”<sup>105</sup> Graeme Austin characterized the rule as the result of “a reconceptualization of transnational copyright infringement as harm to domestic economic interests,”<sup>106</sup> 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”<sup>107</sup> of copyright infringement.

A rule that would point to the law of the place of the origin of the work<sup>108</sup> 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, the principle of country of origin appeared in one international copyright treaty, the Convention of Montevideo on Literary and Artistic Property of

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<sup>105</sup> *Global Use/Territorial Rights*, *supra* note 4, at 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*, 173 REVUE INTERNATIONALE DU DROIT D’AUTEUR 85, 135 (1997) (“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.”).

<sup>106</sup> Austin, *supra* note 100, at 26; see also Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L. J. 883, 920 (2002).

<sup>107</sup> Guzman, *supra* note 106, at 920.

<sup>108</sup> Austin, *supra* note 7, at 592.

11 January 1889, which today has been superseded by other more widely-adopted copyright treaties.<sup>109</sup> 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”).<sup>110</sup> 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.”<sup>111</sup>

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,”<sup>112</sup> 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.”<sup>113</sup> 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; the single publication rule is a rule that resembles the law of the place of a copyright owner’s domicile.<sup>114</sup> 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

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<sup>109</sup> See SILKE VON LEWINSKI, *INTERNATIONAL COPYRIGHT LAW AND POLICY* 7 (2008).

<sup>110</sup> Commentators have debated whether Article 5(2) of the Berne Convention is a choice-of-law provision. See e.g., PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 129 (2010).

<sup>111</sup> Berne Convention, *supra* note 8, art. 5(2).

<sup>112</sup> David Rolph, *Splendid Isolation? Australia as a Destination for “Libel Tourism”*, 19 *AUSTL. INT’L L.J.* 79, 85 (2012).

<sup>113</sup> *RESTATEMENT (SECOND) OF TORTS* § 577(1) (1965).

<sup>114</sup> See, e.g., David A. Anderson, *Transnational Libel*, 53 *VA. J. INT’L L.* 71, 78 (2012).

publication.<sup>115</sup> 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,<sup>116</sup> 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.<sup>117</sup>

A sign has emerged that the “single publication rule” (or the single place of harm rule) might be 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 US Court of Appeals for the Second Circuit in *American Buddha*,<sup>118</sup> held that in a case of copyright infringement that occurred on the Internet the location of the copyright owner’s injury was the residence or location of the principal place of business of the copyright holder.<sup>119</sup> 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,”<sup>120</sup> 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 its principal place of business) to be the only place of injury in an online copyright infringement case.

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<sup>115</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150(2)–(3) (1971). 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.”

<sup>116</sup> 9C U.L.A. 173 (1952).

<sup>117</sup> RESTATEMENT (SECOND) OF TORTS § 577A(4) (1965). For a discussion of the “single publication rule” in the United Kingdom and Australia see, for example, MATTHEW COLLINS, *THE LAW OF DEFAMATION AND THE INTERNET* 346–47 (3d ed. 2010).

<sup>118</sup> *Penguin Grp. v. American Buddha*, 921 N.Y.S.2d 171 (2011).

<sup>119</sup> *Id.* at 174. On the limitation of the holding to cases of uploading content on the Internet, see *Troma Entm’t, Inc. v. Centennial Pictures Inc.*, 729 F.3d 215, 220 (2d Cir. 2013) (declining to extend the holding in *American Buddha* to a case in which no uploading or making available on the Internet was alleged).

<sup>120</sup> *American Buddha*, 921 N.Y.S.2d at 176.

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 the additional safeguards that the personal jurisdiction inquiry in the United States involves.<sup>121</sup> On remand one of the additional safeguards (the requirement of substantial revenue drawn from interstate or international commerce) prevented the court in the copyright owner's principal place of business from having personal jurisdiction.<sup>122</sup> The outcome in *American Buddha* was therefore consistent with the current US court practice (discussed later)<sup>123</sup> of limiting personal jurisdiction in cases involving acts on the Internet.<sup>124</sup>

The Court of Justice of the European Union ("CJEU") has also attempted to pinpoint the place of injury on the Internet. In *eDate* and *Martinez*<sup>125</sup> 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."<sup>126</sup> Additionally, the plaintiff can sue in courts of specific jurisdiction (where "content placed online is or has been accessible"),<sup>127</sup> but only as to the damage caused in the country of that court. Commentators questioned whether the approach that the CJEU adopted in the cases concerning personality rights could also apply in cases of copyright infringement on the Internet<sup>128</sup> and open up the possibility of general jurisdiction in the place of the copyright owner's domicile. A sub-

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<sup>121</sup> *Id.* at 177.

<sup>122</sup> *Penguin Grp. (USA), v. American Buddha*, No. 09 CIV. 528 RA, 2013 WL 865486, \*7 (S.D.N.Y. Mar. 7, 2013).

<sup>123</sup> *See infra* Part III.B.

<sup>124</sup> *Cf. American Buddha*, 921 N.Y.S.2d at 176 ("[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.").

<sup>125</sup> *Joined Cases C-509/09 & C-161/10, eDate Adver. GmbH v. X; Martinez v. MGN Ltd.*, [2011] E.C.R. I-10269.

<sup>126</sup> *Id.* ¶ 1.

<sup>127</sup> *Id.*

<sup>128</sup> There is precedent for extending CJEU rulings concerning personality rights to copyright infringement cases. *See Case C-68/93, Shevill v. Presse Alliance SA*, 1995 E.C.R. I-00415.

sequent CJEU decision in a trademark case<sup>129</sup> did not answer the question for copyright cases; in *Wintersteiger* the CJEU ruled that the approach adopted for infringements of personality rights did not apply in cases concerning infringements of a registered trademark.<sup>130</sup>

Two CJEU cases have raised the issue of localization of copyright-infringing acts on the Internet. *Pinckney*, decided by the CJEU in 2013, concerned the sale of CDs on the Internet and confirmed that specific jurisdiction exists based on the accessibility of copyright infringing content on the Internet.<sup>131</sup> In *Pinckney*, the jurisdiction where the content was accessible also happened to be the domicile of the copyright owner; however, the CJEU rejected the proposition that the damage caused could be the sole basis for general jurisdiction.<sup>132</sup> In *Hejduk*,<sup>133</sup> a case pending before the CJEU, the plaintiff is asking the CJEU to augment its *Pinckney* decision by recognizing that some damages on the Internet cannot be localized—such as the damages in the plaintiff’s case in which photographs were posted on the Internet without the plaintiff’s permission or a license<sup>134</sup>—and that a copyright owner should have the option, as a plaintiff does in a personality right suit under *eDate*, to bring a suit in the place of his own domicile for all damages caused. Whether the CJEU will depart from *Pinckney* for the purposes of damages that are not localizable remains to be seen; the Advocate General assigned to the case recommended that there not be an extension of the *eDate* approach to copyright.<sup>135</sup>

Even if the place of the copyright owner’s domicile is considered to be the place of injury for purposes of jurisdictional analysis, and even if courts in that place are allowed to serve as courts of general jurisdiction, this result does not automatically mean that

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<sup>129</sup> Case C-523/10, *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH*, 2012 E.C.R. 90.

<sup>130</sup> *Id.* ¶ 24. The trademark owner can sue in the country of the trademark registration or in the place of the defendant’s domicile.

<sup>131</sup> Case C-170/12, *Pinckney v. KDG Mediatech AG*, 2013 E.C.R. 400 ¶ 45, 45.

<sup>132</sup> *Id.*

<sup>133</sup> Case C-441/13, *Hejduk v. EnergieAgentur.NRW GmbH*, 2014 E.C.R. ¶ 2212 16, (opinion of AG Villalón).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* ¶ 27.

the courts would 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”;<sup>136</sup> US courts will apply the law of the country with “the most significant relationship to the occurrence and the parties.”<sup>137</sup> Arguably, both of these rules could be interpreted in a manner that would allow 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 must apply a single copyright law to infringements worldwide.

### B. Factors Approach

Under the factors approach, courts determine applicable law by weighing multiple factors;<sup>138</sup> the approach was developed in response to criticism of rigid choice-of-law rules, such as *lex loci delicti*. The Restatement (Second) of Conflict of Laws adopted this approach<sup>139</sup> but US courts have not applied the approach to copyright infringements, resorting instead to the traditional *lex loci delicti* rule.<sup>140</sup> However, two sets of proposed principles for conflict-of-laws rules in IP cases—the ALI Principles<sup>141</sup> and the CLIP Principles<sup>142</sup>—suggest that courts follow a factors approach in cases of

<sup>136</sup> Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) art. 8(1) [hereinafter Rome II Regulation].

<sup>137</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971).

<sup>138</sup> Other rules may involve multiple factors but not their weighing. *See supra* note 82 and accompanying text for the rule proposed by Jane Ginsburg that involves multiple factors that affect the choice of applicable law but does not require a court to weigh the factors.

<sup>139</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

<sup>140</sup> *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998) (“On infringement issues, the governing conflicts principle is usually *lex loci delicti*, the doctrine generally applicable to torts.”).

<sup>141</sup> The American Law Institute’s *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* were adopted and promulgated in 2007. *See* ALI Principles, *supra* note 66.

<sup>142</sup> The Max Planck Institute Group on Conflict of Laws in Intellectual Property published its Principles (the “CLIP Principles”) in 2013. *See* CLIP PRINCIPLES, *supra* note 38.

copyright infringement and use the approach to narrow the number of applicable copyright laws in cases of infringements occurring in multiple countries.<sup>143</sup> 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,<sup>144</sup> suggested that the focus of the choice-of-law analysis be on "consequences for judicial remedies"<sup>145</sup> and lead to the application of the law of the "country of the targeted market."<sup>146</sup> 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 on the Internet.<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup> A comment on the CLIP Principles' provision explains that the provision was motivated by situations that arise on

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<sup>143</sup> Because the focus of this Article is 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 principles for jurisdiction, choice of law, and the recognition and enforcement of foreign judgments, the proposals present coherent conflict-of-laws systems with their own sophisticated internal consistency, and therefore an analysis of any individual provision of the proposals must take into consideration the entire system in which the provision ought to operate. For a comprehensive and detailed analysis of the ubiquitous infringement provisions of the two sets of principles see MATULIONYTĖ, *supra* note 7, at 166–202.

<sup>144</sup> Geller, *supra* note 67, at 125. For a critique of Geller's proposal from 1996, see Reindl, *supra* note 2, at 815–18.

<sup>145</sup> Geller, *supra* note 67, at 125.

<sup>146</sup> *Id.* at 129.

<sup>147</sup> ALI PRINCIPLES, *supra* note 66, § 321 ("Law or Laws to Be Applied in Cases of Ubiquitous Infringement"); CLIP PRINCIPLES, *supra* note 38, at art. 3:603(1).

<sup>148</sup> "[The term 'ubiquitous'] is clearly expected to cover Internet infringements." MATULIONYTĖ, *supra* note 7, at 178.

<sup>149</sup> ALI PRINCIPLES, *supra* note 66, § 321 cmt. a.

the Internet;<sup>150</sup> another comment lists the Internet as the only example of ubiquitous media to which the provision applies,<sup>151</sup> 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.<sup>152</sup>

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.”<sup>153</sup> A comment on the provision explains that the choice of factors reflects that the purpose of IP rights is “to create incentives to innovate”<sup>154</sup> and that the factors should therefore lead to the countries “most closely connected to that objective.”<sup>155</sup> 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.<sup>156</sup>

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.”<sup>157</sup> 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

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<sup>150</sup> 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, *supra* note 38, at art. 3:603 cmt. 3:603.C02.

<sup>151</sup> *Id.* at art. 3:603 cmt. 3:603.C09.

<sup>152</sup> *Id.* at art. 3:603 n.3:603.N19.

<sup>153</sup> *Id.*

<sup>154</sup> ALI PRINCIPLES, *supra* note 66, § 321 cmt. a.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> CLIP PRINCIPLES, *supra* note 38, at art 3:603(2).

where the harm caused by the infringement is substantial in relation to the infringement in its entirety.”<sup>158</sup>

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; the escape clause allows the parties to prove for any country covered by the action that the law in that country differs from the selected law.<sup>159</sup> 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.”<sup>160</sup> 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.”<sup>161</sup>

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”<sup>162</sup> and the state of which the defendant is not a resident) to cases in which the alleged infringer “directed those activities to that State.”<sup>163</sup> 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

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<sup>158</sup> *Id.*

<sup>159</sup> For a detailed analysis of the escape clauses in the Proposals see MATULIONYTĖ, *supra* note 7, at 183–86.

<sup>160</sup> ALI PRINCIPLES, *supra* note 66, § 321(2).

<sup>161</sup> CLIP PRINCIPLES, *supra* note 38, at art. 3:603(3).

<sup>162</sup> ALI PRINCIPLES, *supra* note 66, § 204(2).

<sup>163</sup> *Id.* § 204(2). The commentary first 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 then the commentary provides examples of facts that may evidence the defendant’s directing his acts at the forum. *See id.* § 204 & cmt.

or further the infringement and her or his activity cannot reasonably be seen as having been directed to that State.”<sup>164</sup>

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 that the alleged infringer committed anywhere in the world, not only in the countries where the courts sit. The ALI Principles provide an exception in cases where there is no WTO member state (membership in the WTO ensures a certain level of copyright protection)<sup>165</sup> 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.”<sup>166</sup> 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” were performed entirely in the court’s country or the harm caused there is “substantial in relation to the infringement in its entirety.”<sup>167</sup>

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 steered 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 more impaired if its law were not

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<sup>164</sup> CLIP PRINCIPLES, *supra* note 38, at art. 2:202. The targeting approach to the limitation of personal jurisdiction is consistent with court practices in a number of countries, as discussed *infra* in Part III.B.

<sup>165</sup> TRIPS Agreement, *supra* note 8.

<sup>166</sup> ALI PRINCIPLES, *supra* note 66, § 204(3).

<sup>167</sup> CLIP PRINCIPLES, *supra* note 38, at art. 2:203.

applied.<sup>168</sup> It can be debated whether the results are different when courts use the factors approach instead of rigid rules based on localization.<sup>169</sup> 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 law of the country that best reflects the courts' own policy preferences.<sup>170</sup> For these critics, factors approaches merely legitimize the outcomes of the courts' actual decision-making processes.<sup>171</sup>

The two sets of Principles explored in this section show different policy emphases.<sup>172</sup> The ALI Principles emphasize that the choice of applicable law provides legal certainty for parties with a pre-existing relationship;<sup>173</sup> 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.<sup>174</sup> The emphasis on incentives to innovate (or create) reflects the common-law utilitarian notion of copyright as expressed in the IP clause of the US Constitution, according to which copyright should "promote the progress of science and useful arts."<sup>175</sup>

The CLIP Principles do not declare a preference for a law that provides the most effective incentives to create, which is unders-

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<sup>168</sup> On the attempts to draft choice-of-law rules or factors in a policy-neutral fashion see generally Trimble, *supra* note 8.

<sup>169</sup> Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337, 380 (2012) (showing that "[t]he [studied] cases [decided by courts that have abandoned the lex loci delicti rule] are almost evenly split . . . between applying the law of the place of conduct and the law of the place of injury.").

<sup>170</sup> *See id.* at 381 (comparing how the decisions by courts that have abandoned the lex loci delicti rule would have been different "[i]f the . . . cases had been decided under the traditional lex loci delicti rule.").

<sup>171</sup> "[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 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 191 (1993).

<sup>172</sup> *See supra* notes 144 & 145 and accompanying text (detailing Paul Geller's preference for effective enforcement, which translates into his approach's focus on the "consequences for judicial remedies").

<sup>173</sup> *See* ALI PRINCIPLES, *supra* note 66, § 321 cmt. a.

<sup>174</sup> *Id.*

<sup>175</sup> U.S. CONST. art. I, § 8, cl. 8.

tandable 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 to apply 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,<sup>176</sup> and therefore the factors resemble the rule that localizes the infringement in the place of the alleged infringing activity's origin.<sup>177</sup> Their 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";<sup>178</sup> in this manner the Principles presumably allow sufficient leeway for courts to instill in their choice-of-law analyses the IP philosophy of their particular 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, may share this flaw; 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.<sup>179</sup> 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,

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<sup>176</sup> CLIP PRINCIPLES, *supra* note 38, at art. 3:603(2).

<sup>177</sup> *See supra* Part II.A.1.

<sup>178</sup> CLIP PRINCIPLES, *supra* note 38, at art. 3:603(2).

<sup>179</sup> *See supra* Part II.A.1 & II.A.2.

provides as much flexibility for a court's 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 either of the Principles with the rules of 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,<sup>180</sup> 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,<sup>181</sup> 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 claim<sup>182</sup> 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.<sup>183</sup> 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.<sup>184</sup> Choice-of-law analyses in courts of general and specific jurisdiction applying the CLIP Principles would likely have the same outcomes,<sup>185</sup> if courts use the CLIP Principles they will also likely apply the law with which they are most familiar—the forum law.

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<sup>180</sup> See Th. M. De Boer, *Facultative Choice of Law: The Procedural Status of Choice-of-Law Rules and Foreign Law*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 393–94 (1997) (discussing the "co-ordination—or rather subordination" of the choice of law to the choice of jurisdiction).

<sup>181</sup> See CLIP PRINCIPLES, *supra* note 38, at art. 3:603.N19–20 (explaining that 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).

<sup>182</sup> ALI PRINCIPLES, *supra* note 66, § 204(2).

<sup>183</sup> See CLIP PRINCIPLES, *supra* note 38, at art. 3:603.N19–20.

<sup>184</sup> See ALI PRINCIPLES, *supra* note 66, § 204(3).

<sup>185</sup> See *supra* notes 157 & 158 and accompanying text (on the CLIP Principles' choice-of-law rules), note 164 (on the CLIP Principles' limitation of specific jurisdiction), and note 167 (on the CLIP Principles' exception to the territorial limitation on specific jurisdiction).

Finally, factors approaches are not immune to the same criticism that pertains to the localization approaches: problems with localizing facts and occurrences on the Internet.<sup>186</sup> However, localization problems—to the extent that they do arise—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 occurrences.<sup>187</sup> Additionally, as noted earlier, concerns about localization may be waning in light of technological developments.<sup>188</sup>

### C. *Copyright Infringement as a Single-Place Tort*

The primary hurdle for the proposed conflict-of-laws solutions to the multiplicity problem is countries' aversion to the notion of copyright infringement as a single-place tort, i.e., 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.<sup>189</sup> 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' in-

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<sup>186</sup> See *supra* notes 92–100 and accompanying text.

<sup>187</sup> Even localization approaches may offer alternatives to particular places that courts cannot localize—for instance, some jurisdictions may enable courts to localize domicile in multiple 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., Brussels I Regulation (recast), *supra* note 61, at art. 63 (providing three possible definitions of a domicile of “a company or other legal person or association of natural or legal persons”).

<sup>188</sup> See *supra* notes 99 and 100 and accompanying text.

<sup>189</sup> It is important to remember that “copyright infringement” in this context describes a single act resulting in the violation of the 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, and/or public performance, and/or public display. For the difference between a *multi-place* tort and a *multiple* tort, see MIREILLE VAN EËCHOUD, CHOICE OF LAW IN COPYRIGHT AND RELATED RIGHTS 216 (2003) (explaining how a situation can be regarded both as a multi-local tort and a multiple tort).

juries 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).<sup>190</sup>

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;<sup>191</sup> 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 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 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.<sup>192</sup> 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 pre-

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<sup>190</sup> 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's law that will apply to any given act and fact.

<sup>191</sup> Another term used to describe this characteristic is "multi-local tort." See VAN EECHOU, *supra* note 189, at 215.

<sup>192</sup> PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 99 (2013); see also Trimble, *supra* note 8 (discussing the difference between the reach of a country's prescriptive jurisdiction and the effective territorial scope of the country's substantive laws).

scriptive jurisdiction; copyright thus operates as a piece of virtual immovable property<sup>193</sup> that stretches across the entire territory of the country's prescriptive jurisdiction.<sup>194</sup> 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,<sup>195</sup> so have courts applied the law of the protecting country—the law that created 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.<sup>196</sup>

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 border (and very few might extend over two national borders) and therefore two (or three) countries' laws might apply to the property, 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 proposition that certain tort claims concerning

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<sup>193</sup> Cf. *Equustek Solutions Inc. v. Jack*, [2014] BCSC 1063, ¶ 26 (Can.) (“The plaintiffs’ intellectual property at the heart of the underlying action is movable property.”).

<sup>194</sup> Cf. 3 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.01[C] (“[A] copyright . . . has no situs apart from the domicile of its proprietor.”); James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 170–71 (2014) (“[I]n a sense, one may say [copyright and patent] are governed by a situs rule, and their situs is federal territory.”).

<sup>195</sup> See 1 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 609 (8th ed. 2001); G.C. CHESHIRE, PRIVATE INTERNATIONAL LAW 1199 (14th ed. 2008).

<sup>196</sup> See, e.g., Peter D. Trooboff, *Intellectual Property*, in TRANSNATIONAL TORT LITIGATION: JURISDICTIONAL PRINCIPLES 125 (Campbell McLachlan & Peter Nygh eds., 1996).

immovable property are transitory causes of action,<sup>197</sup> and modern choice-of-law approaches have departed from the traditional strict *lex rei sitae* rule for some claims involving immovable property.<sup>198</sup>

Some relaxation of the rules has also occurred for copyright, although the relaxation happened later for copyright than it did for immovable property.<sup>199</sup> First, some courts have accepted the notion that copyright infringement is a transitory cause of action. In 1984 in *London Film* the US 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.<sup>200</sup> The UK Supreme Court cited *London Film* for its finding in its 2011 *Lucasfilm* judgment that copyright is a transitory cause of action in England.<sup>201</sup> 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.<sup>202</sup> Finally, countries have recently agreed to recognize, in limited circumstances, the status of a work or a copy of a work based on a foreign country's law. The 2012 EU Orphan Works Directive<sup>203</sup> provides for mutual recognition of the orphan work status in all EU member countries once the

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<sup>197</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 87 (1971); see also, e.g., Stephen Lee, *Title to Foreign Real Property in Transnational Money Claims*, 32 COLUM. J. TRANSNAT'L L. 607, 641–57 (1995) (analyzing ways in which tort claims involving immovable property can be reframed to become transitory causes of action).

<sup>198</sup> E.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 147 (1971); Rome II Regulation, *supra* note 136, at art. 4(3), 7.

<sup>199</sup> See also Rita Matulionytė, *Calling for Party Autonomy in Intellectual Property Infringement Cases*, 9 J. PRIVATE INT'L L. 77, 84 (2013).

<sup>200</sup> *London Film Productions Ltd. v. Intercontinental Communications, Inc.*, 580 F. Supp. 47, 48–50 (S.D.N.Y. 1984); see also *Creative Technology Ltd. v. Aztech Sys. PTE*, 61 F.3d 696, 702 (9th Cir. 1995).

<sup>201</sup> *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, ¶ 84, 109.

<sup>202</sup> BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, as amended July 1, 2013, art 110(2) (Switz.); Law of the Application of Law for Foreign-Related Civil Relations of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective April 1, 2011), art. 50. *But cf.* Rome II Regulation, *supra* note 136, at art. 8(3) (prohibiting an agreement from derogating from the applicable law selected).

<sup>203</sup> Council Directive 2012/28, of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5.

status is established for a work in one of the EU member countries.<sup>204</sup> The 2013 Marrakesh Treaty<sup>205</sup> provides for cross-border exchange of “accessible format copies”<sup>206</sup> for use by the visually impaired,<sup>207</sup> 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.<sup>208</sup>

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.”<sup>209</sup> He notes that UK 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.<sup>210</sup> The UK Supreme Court decision in *Lucasfilm* could indeed be interpreted as a natural consequence of UK 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*. 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.<sup>211</sup> Finally, the importance of the EU Orphan Works Directive and the Marrakesh Treaty as mi-

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<sup>204</sup> *Id.* at art. 4.

<sup>205</sup> Marrakesh Treaty, *supra* note 47.

<sup>206</sup> *Id.* at art. 2(b).

<sup>207</sup> *Id.* at art. 5.

<sup>208</sup> See generally Marketa Trimble, *The Marrakesh Puzzle*, 45 IIC 768 (2014) (analyzing the Treaty and discussing possible implementation tools to help executive and legislative experts implementing the Treaty).

<sup>209</sup> 7 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 25:105 (2013).

<sup>210</sup> See *id.*

<sup>211</sup> See also *infra* Part III.A for a discussion of choice-of-law practice and the possibility that parties to a dispute will not invoke or plead foreign law, thereby agreeing de facto on the forum law.

lestones 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 costly cross-border transactions. As Graeme Austin predicted, the desiderata will play important roles as countries decide whether to change choice of law for copyright infringements, particularly as they face the additional multiplicity problem challenges on the Internet.<sup>212</sup> If the developments concerning immovable property teach a lesson, it seems that another development is necessary to convince countries to relax choice-of-law rules for copyright infringements: countries would need to relinquish their paternalistic approach to copyright in order to accept the concept of copyright infringement as a single-place tort.<sup>213</sup>

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<sup>212</sup> Austin, *supra* note 7, at 582 (cautioning 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”).

<sup>213</sup> See 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.”); Richard Fentiman, *Choice of Law and Intellectual Property*, in INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW – HEADING FOR THE FUTURE 129, 148 (Josef Drexler & Annette Kur eds., 2005) (“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.”); Graeme W. Austin, *Copyright Across (and Within) Domestic Borders*, in INTERNATIONAL INTELLECTUAL PROPERTY AND THE COMMON LAW WORLD 105, 115 (Charles E.F. Rickett & Graeme W. Austin eds., 2000) (“The development of private international law theories that seek to loosen the connection between copyright and the

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. 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 fundamental rights.<sup>214</sup>

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 that would be 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.<sup>215</sup> 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.<sup>216</sup>

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nation state also have much in common with the shift towards the privatisation of copyright regulation through the institution of contract.").

<sup>214</sup> 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 more deeply) 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 yet fully harmonized but that do not exhibit a friction of fundamental rights, meaning a space in which no harmonization (or no deeper harmonization) has occurred but a space in which countries are willing to recognize and enforce foreign judgments based on a foreign country's law that differs from their own.

<sup>215</sup> *Fisher v. Va. Elec. & Power Co.*, 243 F. Supp. 2d 538, 547 (E.D. Va. 2003).

<sup>216</sup> Under the Berne Convention, countries must require no formalities for copyright protection. *See* Berne Convention, *supra* note 8, at art. 5(2).

One case, *Viewfinder*,<sup>217</sup> suggests that the concern about enforcement might be justified in copyright cases; in *Viewfinder* a French court applied the law of a single country—France—to copyright infringement that arguably could have been claimed to have occurred in multiple countries simultaneously, including in the United States.<sup>218</sup> While the French court did not explicitly apply French law to acts that had occurred in the United States, its judgment de facto did apply French law to acts in the United States because the posting of the photographs at issue on a website had occurred in the United States and the injunction that the French court granted based on French law was therefore directed at activities in the United States. The plaintiff sought to have the resulting French judgment recognized in the United States and enforced against US defendants; however, the US Court of Appeals for the Second Circuit held that the public policy exception prevented the recognition of the judgment in the United States if the cause of action would violate the First Amendment.<sup>219</sup>

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; however, 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 (with respect to both scope and depth, and the number of countries with harmonized copyright laws) should enhance countries' amenability to shifting to copyright infringement as a single-place tort.<sup>220</sup> The more that copyright laws are harmonized, the fewer will be the differences that will persist in the poli-

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<sup>217</sup> *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474 (2d Cir. 2007).

<sup>218</sup> *Id.* at 477.

<sup>219</sup> *Id.* at 481.

<sup>220</sup> Countries' willingness to relax *lex rei sitae* in cases of environmental torts may be influenced by a high degree of environmental law harmonization in the countries. *See* Rome II Regulation, *supra* note 136, at art. 7.

cies that countries promote and the less it will be that countries will be concerned that foreign law might apply in some cases. While copyright law might not soon reach a sufficiently deep global harmonization that would lead to a single global copyright standard (the standard that some commentators have seen as a promising solution to the multiplicity problem),<sup>221</sup> the law could much sooner 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.<sup>222</sup> It is important to remember though, that as opposed to the single global copyright law approaches, 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 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.<sup>223</sup> However, unless major changes in conflict of laws are undertaken by all or a significant number of countries in concert, Internet actors will continue to face the multiplicity problem.

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<sup>221</sup> See *supra* Part I.B.

<sup>222</sup> See *supra* Part I.A (discussing countries' involvement in shaping international law).

<sup>223</sup> See *supra* note 30 (referring to court decisions that cited the ALI and CLIP Principles).

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 suggests that the multiplicity threat has not materialized, at least not in the form of Internet actors facing global enforcement campaigns pursued simultaneously under the laws of all countries connected to the Internet. The reasons that Internet actors are not being exposed to global copyright litigation mayhem dwell in the realities of cross-border copyright litigation, which limit the territorial extent of manageable copyright enforcement, at least for disputes that are litigated, and which are the “mysterious mechanisms” that Peter Swire observed “are reducing the actual conflicts to a handful of cases.”<sup>224</sup> The following sections discuss the litigation realities that concern choice of law and personal jurisdiction, and that affect plaintiffs’ strategies for claiming applicable law and choosing litigation fora; the realities also affect Internet actors’ level of compliance with copyright laws on the Internet.

#### *A. Limitations on Choice of Applicable Law*

Notwithstanding the ubiquitous nature of most activities on the Internet, relatively few disputes advance 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 are rare in copyright cases, including cases involving the Internet, and why choice-of-law issues involving more than two countries are even rarer.

Perhaps the most mundane reason for the low frequency of copyright cases that raise choice-of-law issues is that the issues do 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” and, as a result, “the problem as such escapes him.”<sup>225</sup> We might expect better awareness from lawyers, who should be more cogni-

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<sup>224</sup> Peter P. Swire, *Elephants and Mice Revisited: Law and Choice of Law on the Internet*, 153 U. PA. L. REV. 1975, 1975 (2005).

<sup>225</sup> De Boer, *supra* note 180, at 298.

zant than the 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 IP law practice has traditionally not been viewed as 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.<sup>226</sup> Notwithstanding the fact that as early as 1889 a conflict-of-laws expert authored a comprehensive study of conflict-of-laws issues in IP,<sup>227</sup> and his work was not the only or the last to address the issues,<sup>228</sup> courts and academics at the end of the twentieth and the beginning of the twenty-first century have noted the relative novelty and uniqueness of conflict-of-laws analyses focused on IP cases.<sup>229</sup>

The second limitation that might explain why at least some lawyers are not particularly aware of choice-of-law issues in IP cases, and therefore do not always recognize or utilize choice-of-law

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<sup>226</sup> See Paul Edward Geller, *How To Practice Copyright Law Internationally in Perplexing Times?*, 60 J. COPYRIGHT SOC'Y U.S.A. 167, 183-85 (2013) (discussing the need to "map out arguable infringement worldwide").

<sup>227</sup> 2 CARL LUDWIG VON BAR, *THEORIE UND PRAXIS DES INTERNATIONALEN PRIVATRECHTS* 231-91 (1889).

<sup>228</sup> Examples of the twentieth century literature on the topic include ALOIS TROLLER, *DAS INTERNATIONALE PRIVAT- UND ZIVILPROZESSRECHT IM GEWERBLICHEN RECHTSSCHUTZ UND URHEBERRECHT* (Verlag für Recht und Gesellschaft, 1952); 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, *supra* note 38, at 239-406.

<sup>229</sup> "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* 3 (Carl Heymanns Verlag, 2010) "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.* at 60.

issues in copyright infringement cases, is the same limitation that exists in other areas of law and is associated with the general plight of conflict of laws as a subject in US law schools. Although globalization generates more cross-border legal issues today than it ever has before, and conflict of laws should be one of the most important tools in the toolbox of a modern lawyer,<sup>230</sup> only about half of the US state bar associations test conflict of laws on their bar examinations; with few exceptions conflict of laws courses cover primarily interstate and federal-state conflicts.<sup>231</sup> Although courses on transnational litigation and comparative procedure are helpful additions to the traditional US conflict-of-laws curricula,<sup>232</sup> the courses are too few to educate a sufficient percentage of future lawyers in the very important field and sensitize them to international issues and 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.<sup>233</sup>

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<sup>230</sup> See Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction (Hague Academy Lectures)*, 167 RECUEIL DES COURS 311, 321 (1979) (“[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.”); Carolyn B. Lamm, *Internationalization of the Practice of Law and Important Emerging Issues for Investor-State Arbitration: Opening Lecture, Private International Law Session* 354 RECUEIL DES COURS 9, 25 (2011) (“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.”).

<sup>231</sup> 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. 1309–36 (1999).

<sup>232</sup> Cyberlaw (or Internet Law) courses also tend to cover some jurisdictional issues. On the challenges of dealing with copyright cases involving multiple countries’ laws see Geller, *supra* note 226.

<sup>233</sup> PAUL GOLDSTEIN & MARKET TRIMBLE, *INTERNATIONAL INTELLECTUAL PROPERTY LAW, CASES AND MATERIALS*, (3d ed. 2012); DANIEL C.K. CHOW & EDWARD LEE, *INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES AND MATERIALS* (2d ed. 2012); GRAEME B. DINWOODIE ET AL., *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY* (2d 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* (3d ed. 2010); FREDERICK M. ABBOTT ET AL., *INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY* (2d ed. 2007).

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.<sup>234</sup>

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, or certainly in a manner that would result in the application of the laws of multiple countries, because litigating under the laws of multiple countries is challenging and expensive. Whether the rules of procedure require parties to plead and prove foreign law, invoke foreign law, submit foreign law for judicial notice,<sup>235</sup> or whether courts have an obligation to ascertain foreign law on their own,<sup>236</sup> the inclusion of claims under multiple countries' laws puts additional pressure on resources that the parties must expend in litigation. It is likely that parties will have to hire foreign law experts to analyze foreign law, and sometimes to present the law to the court.

Another reason lawyers might pause before they file a case under multiple countries' laws is that courts have a natural hesitancy to apply the laws of multiple countries in one lawsuit. This 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 suffi-

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<sup>234</sup> SOFIE GEEROMS, *FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS* 41 (Oxford Univ. Press ed., 2004) ("Foreign law cannot get into court if neither the judge nor the parties suggest its relevance to the case at issue."). 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. See Carlos Esplugues, *General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe*, in *APPLICATION OF FOREIGN LAW* 18–22 (Carlos Esplugues, José Luis Iglesias & Guillermo Palao eds. 2011) (on the mandatory and non-mandatory character of choice-of-law rules).

<sup>235</sup> Geller, *supra* note 20, at 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.").

<sup>236</sup> On different approaches to foreign law in courts see, for example, De Boer, *supra* note 180, at 258–66; Esplugues, *supra* note 234, at 22–30; RICHARD FRIMPONG OPPONG, *PRIVATE INTERNATIONAL LAW IN COMMONWEALTH AFRICA* 12–26 (2013); MARTIN WOLFF, *PRIVATE INTERNATIONAL LAW* 218–23 (2d ed. 1950).

ciently, 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.<sup>237</sup>

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<sup>238</sup> 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 statutory damages that the adjudicating court would be willing to award,<sup>239</sup> the plaintiff will also have to prove his lost profits and/or damages in the foreign country.<sup>240</sup>

Whether a party brings a claim under multiple countries' laws should depend on the result of a careful cost/benefit analysis. The cost analysis should consider not only litigation expenses<sup>241</sup> but also strategic and reputational costs vis-à-vis the particular 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 rewards<sup>242</sup> should be tempered by an assessment of potential difficulties that could be associated with the enforcement of the rewards, particularly if the enforcement might

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<sup>237</sup> 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.

<sup>238</sup> A "de minimis" infringement is "a technical violation of a right so trivial that the law will not impose legal consequences." *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

<sup>239</sup> *See, e.g., Austin, supra* note 100 (arguing that remedies should be governed by the laws of the country in which the infringement occurs).

<sup>240</sup> 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.

<sup>241</sup> *Austin, supra* note 7, at 590.

<sup>242</sup> *Id.*

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,<sup>243</sup> 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.<sup>244</sup> Courts, when faced with foreign law insufficiently invoked, pleaded, and/or proven will resort to applying the forum law under the presumption that the foreign law is identical to the forum law;<sup>245</sup> 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.<sup>246</sup>

<sup>243</sup> De Boer, *supra* note 180, at 391–93, 402–03; RICHARD FENTIMAN, FOREIGN LAW IN ENGLISH COURTS 24 (1998); Dinwoodie, *supra* note 2, at 530–31; Symeonides, *supra* note 169, at 380 (noting that “[a]lmost two thirds of the [studied] cases . . . have applied the law of the forum state”).

<sup>244</sup> See CLIP PRINCIPLES, *supra* note 38, at art. 3:603 cmt. 3:603.C14 (“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.”); Austin, *supra* note 100, at 2 (“United States courts have employed a number of choice of law strategies to enable application of US copyright law to allegations of copyright infringement based on acts that have occurred abroad.”); Dinwoodie, *supra* note 2, at 533 (“[T]o the extent that US 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 US law.”); Austin, *supra* note 213, at 112. On courts’ preference for forum law in general see, for example, 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*, 14 EUR. Y.B. OF PRIVATE INT’L LAW 1, 3 (2012) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2187449](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187449).

<sup>245</sup> See De Boer, *supra* note 180, at 313–16. The Reporter’s Note to the ALI Principles explains 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, *supra* note 66, § 321.

<sup>246</sup> See ALBERT A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS LAW, INCLUDING THE LAW OF ADMIRALTY 181 (1967) (“American courts have, in innumerable cases, shown their willingness to accept the parties’ express or implied choice of the *lex fori*, whether that

When facing cases involving multiple countries' laws, common law courts that apply the *forum non conveniens* doctrine may apply the doctrine to dismiss the case as better suited for another, more suitable forum.<sup>247</sup> 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, and under the laws of, the countries where infringement is claimed.

Unintentionally overlooking or intentionally avoiding a choice-of-law issue that could lead to the application of the laws of multiple countries 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 in multiple countries. The doctrines of secondary infringement can cover acts that occur 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 US copyright law and as such also infringed US copyright law.<sup>248</sup> 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 US 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 occurring outside the United States while bringing the action only under US law.<sup>249</sup>

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choice is made prior to or during litigation."); *see also supra* note 202 and accompanying text on the Chinese and Swiss acts on private international law.

<sup>247</sup> *See, e.g., Global Use/Territorial Rights, supra* note 4, at 334 (noting that litigants in the United States may argue for dismissals for *forum non conveniens* if foreign law has to be interpreted); Austin, *supra* note 100 (analyzing *forum non conveniens* issues as they arise in cross-border copyright cases); FENTIMAN, *supra* note 243, at 24; Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co., 145 F.3d 481, 492 (2d Cir. 1998) ("While reluctance to apply foreign law is a valid factor favoring dismissal . . . standing alone it does not justify dismissal."); *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 (1981) (affirming previous Supreme Court jurisprudence that there is "a local interest in having localized controversies decided at home.").

<sup>248</sup> *See also* Austin, *supra* note 100, at 9.

<sup>249</sup> *See supra* notes 85–91 and accompanying text for a discussion of the possibility of receiving an award of foreign profits.

In many instances remedies obtained in a single country under that country's law will provide as much redress as is feasible under the circumstances and serve the deterrence function. Annette Kur notes that decisions rendered by one court that apply a single country's law "more often than not entail *global effects*, even where they only purport to pertain to the national territory."<sup>250</sup> 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 serve the deterrence function globally.<sup>251</sup> To the extent that an infringer's assets are limited, damages awarded for infringement in one country, if they match or exceed the infringer's assets, may entail all that (or more than) the plaintiff is realistically likely to recover.

#### *B. Limitations on Personal Jurisdiction*

The multiplicity problem is also mitigated by the fact that courts in at least some countries 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 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 scenario would require that the court apply multiple copyright laws—a situation that is associated with the various limitations discussed in the previous section. In the second scenario, the copy-

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<sup>250</sup> CLIP PRINCIPLES, *supra* note 38, §§ 320–21.

<sup>251</sup> The deterrence function might be served if the law provides for and the court awards punitive damages. *See supra* note 71 and accompanying text. 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.

right 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 based on the accessibility of the work, which accessibility would also make all the countries the places of the tortious activity.

Many of the reasons for the low incidence of lawsuits that claim infringements under the laws of multiple countries (discussed in the previous section) are the same reasons for which the filing of lawsuits in multiple countries has not been rampant. Many clients might not even think of the possibility of filing in a foreign court, and lawyers might not see simultaneous filings in the courts of multiple countries as practical; few clients can afford to file in multiple countries or are willing to expend the resources necessary to litigate in multiple countries.<sup>252</sup> Not only do the costs of litigation in individual countries add up, but parties must allocate additional resources to the coordination of enforcement because litigation in various countries may require the same witnesses and evidence to be presented in each of the courts and in each language.

Some courts have placed an important limitation on the specific jurisdiction for cases involving activities 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 for activities on the Internet in some manner has been clear since the beginnings of the Internet. In the United States, the *Zippo* test<sup>253</sup> 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 potential jurisdiction of courts worldwide.<sup>254</sup> More recent approaches used in the United States seek to limit jurisdiction by requiring that a defendant have

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<sup>252</sup> Austin, *supra* note 100, at 5 (“The prospect of initiating parallel proceedings in each of the territories in which the infringements took place will likely prove prohibitive in many instances.”).

<sup>253</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

<sup>254</sup> *Illinois v. Hemi Group LLC*, 622 F.3d 754, 758–59 (7th Cir. 2010); *Case C-585/08, Pammer v. Reederei Karl Schlüter GmbH & Co KG*, 2010 E.C.R. I-12530 ¶ 79 (noting that the distinction between “interactive” and other websites “is not decisive”).

actual contacts with the forum;<sup>255</sup> under these approaches the mere possibility of contacts—i.e. pure accessibility alone, even if combined with interactivity—does not create personal jurisdiction.<sup>256</sup>

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;<sup>257</sup> geolocation and geoblocking technologies enable Internet actors to delineate their 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 and

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<sup>255</sup> Tracie E. Wandell, *Geolocation and Jurisdiction: From Purposeful Availment to Avoidance and Targeting on the Internet*, 16 J. TECH. L. & POL'Y 275, 280–83 (2011).

<sup>256</sup> Teresa Scassa & Robert J. Currie, *New First Principles? Assessing the Internet's Challenges to Jurisdiction*, 42 GEO. J. OF INT'L L. 1017, 1049 (2011) (“The fact that a website might be accessed by residents of one jurisdiction does not necessarily mean that it has been . . . .”); *see also, e.g.*, *Perfect 10, Inc. v. Yandex N.V.*, No. C 12-01521 WHA, 2013 WL 4777189, at \*4 (N.D. Cal. Sept. 6, 2013); *Case C-585/08, Pammer v. Reederei Karl Schlüter GmbH & Co KG*, 2010 E.C.R. I-12530 ¶ 64; *Case C-173/11, Football Dataco Ltd. v. Sportradar GmbH*, 2012 E.C.R. I, ¶ 36 (examining these issues in the context of *sui generis* database protection); *Equustek Solutions Inc. v. Jack* (2014), 374 D.L.R. 4th 1063 ¶ 36 (Can. B.C. Sup. Ct.) (“[T]he ability of someone in British Columbia to open a website created by a person in another country does not of itself give this Court jurisdiction over the creator of that website.”); Anderson, *supra* note 114, at 92–95 (examining these issues through the lens of defamation); Laura E. Little, *Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States*, in 14 EUROPEAN YEARBOOK OF PRIVATE INTERNATIONAL LAW 4 (2012). For an early prediction of this outcome see Goldsmith, *supra* note 31, at 1218 (“[T]here is relatively little reason at present, and 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.”). *Cf.* *Case C-170/12, Pinckney v. KDG Mediatech AG*, 2013 E.C.R. 400 ¶ 42 (“Article 5(3) [of the Brussels I Regulation] does not require . . . that the activity concerned . . . be ‘directed to’ the Member State in which the court seised is situated.”); *Case C-441/13, Hejduk v. EnergieAgentur.NRW GmbH*, 2014 E.C.R. ¶ 31, (opinion of AG Villalón).

<sup>257</sup> Goldsmith, *supra* note 31, at 1218–19 (“[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 cyberspace activities will become functionally identical to personal jurisdiction over real-space activities.”).

geoblocking 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.<sup>258</sup> 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 only one country (often 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.<sup>259</sup> 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.<sup>260</sup> 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—the country of their own domicile or the country of the copyright owner's domicile; in either place 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 infringers located in different countries, with varying laws being implicated by infringers' acts and varying standards and practices of enforcement existing in the countries where the infringers are domiciled, the places where they act, and the places where their actions reach (where the content at issue can be viewed, downloaded, and/or streamed). Enforcement through In-

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<sup>258</sup> See Trimble, *supra* note 1.

<sup>259</sup> Whether such bias exists is a different question; the parties' concern that such bias exists or may exist is sufficient to impact the parties' behavior.

<sup>260</sup> See *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39 (demonstrating that 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).

ternet 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, particularly in a cross-border context; for example, the law in the jurisdiction of the service provider's domicile might not view the content as infringing, and the filing of a request for a takedown with the service provider may prompt an alleged infringer to file a declaratory judgment action in a jurisdiction that is foreign to the copyright owner.<sup>261</sup>

A part of the copyright enforcement problem on the Internet is that countries continue to adhere to the principle of *lex loci protectionis* for choice of law in copyright cases; the adherence means that a copyright owner facing a multi-country infringement of his copyright should file claims under the laws of all those multiple countries to obtain redress for the infringements in all those countries. Although theoretically a copyright owner can file a lawsuit 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 that country's courts), practical limitations discussed in Part III constrain the copyright owner's ability to do so. In most cases the copyright owner would probably select only one country or only a small number of countries in which and/or for which he would file his claims. The litigation constraints affect the copyright owner's position in negotiations and in other extra-judicial enforcement efforts.

The limitations that complicate enforcement for copyright owners, however, serve Internet actors well, including the 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 activities on

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<sup>261</sup> Before filing a request with a foreign service provider, a copyright owner should consider whether he can and is willing to 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. *See, e.g.,* *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).

the Internet, and because of the practical constraints on cross-border enforcement, Internet actors enjoy some degree of certainty as to which laws will likely be held to govern their activities.<sup>262</sup> Although exceptions will exist, 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 laws of one of the two countries, depending on where he files suit. Narrowing the number of potentially applicable copyright laws in most cases to two is not an insignificant achievement.<sup>263</sup>

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 somewhat workable system for Internet actors. Future proposals should improve enforcement but not lower the degree of legal certainty that Internet actors enjoy under the current approaches and rules. The existing conflict-of-laws proposals analyzed in Part II, if adopted, would help copyright owners in their cross-border enforcement efforts, and in circumstances involving ubiquitous infringement the proposals 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, invoke and/or plead (and in some courts prove) multiple foreign laws, and engage legal experts for multiple countries.

While making some aspects of enforcement easier, the existing proposals would not affect many of the practical limitations that were discussed in Part III. Although the proposals are already helping to increase 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 lawyers and judges become com-

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<sup>262</sup> That the certainty is not absolute but exists only as a degree of likelihood should not be surprising; frequently, "legal certainty" is no more than a lawyer's best estimate of likelihood.

<sup>263</sup> The number of laws can be narrowed to two only if all countries' laws identify the same person or entity as the copyright owner of a particular work.

fortable with claims of copyright infringements brought under multiple copyright laws. Copyright owners' public relations costs may continue to be significant if owners opt for territorially large-scale enforcement strategies. Most importantly, even assuming the adoption of the existing proposals copyright owners would still have to prove infringements in all of the countries in which they claimed 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 be law abiding when acting on the Internet, we also have to recognize that many Internet actors know little about the copyright laws of any particular country and make no attempts to learn about the laws. As they do with other legal issues, many Internet actors rely on their best guess about what is permissible,<sup>264</sup> 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 all countries—perhaps with some awareness that minor differences among countries could exist. Of course best guesses are shaped by social norms which, as the Internet proves, can depart from the law; the future will expose the durability of the social norms that developed in the Wild West days of the Internet.<sup>265</sup>

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<sup>264</sup> 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.”).

<sup>265</sup> 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 Z HÁBITOS DE CONSUMO DE CONTENIDOS DIGITALES 2013, 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 10 (2013), available at [http://americanassembly.org/sites/default/files/download/publication/copy\\_culture.pdf](http://americanassembly.org/sites/default/files/download/publication/copy_culture.pdf).

The existing proposals for conflict-of-laws rules for IP disputes and other ongoing initiatives in this area will contribute to awareness in the legal community about cross-border issues as the issues arise in the context of IP enforcement, and will also provide an academic foundation for future national and international actions to improve cross-border enforcement of IP. The solutions that the proposals seek for infringements on the Internet (also referred to as ubiquitous infringements) might be the most difficult parts of the proposals and initiatives to propagate given that countries are currently adhering to the territoriality principle, and given that their interests lie in having their own laws applied to copyright infringements that occur in their territory. This Article suggests that some of the concerns that guide countries' approaches to cross-border enforcement may be weakening, or at least be subject to debate.

The proposals and initiatives should benefit from the continuing development of technological and business solutions that can enhance both cross-border access to copyright-protected works and cross-border enforcement; some of the solutions could make the adoption of the proposals more palatable. Technological and market solutions will continue to assist copyright owners in addressing the inefficiencies of enforcement and excesses in transaction costs.<sup>266</sup> 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 could also lower litigation costs and make it feasible for more copyright owners to bring claims that arise in multiple countries in one court, and online access to legal resources and the presentation of evidence in multiple countries will play an important role in the further internationalization of copyright litigation.

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<sup>266</sup> See Priest, *supra* note 32 (discussing examples of extra-legal enforcement measures facilitated by technological solutions and evolving business models).