

COPYRIGHT INFRINGEMENT IN THE INTERNET AGE—PRIMETIME FOR HARMONIZED CONFLICT-OF-LAWS RULES?

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I. INTRODUCTION

The staggering quantity of copyright infringement on the Internet has exposed a fundamental limitation of current international copyright law. A single act of unauthorized uploading of copyrighted material can result in copyright infringements by numerous Internet users in various countries. The following hypothetical shows the legal difficulties that are raised in such situations:

Bill, a United States citizen who resides in Great Britain, uploads digitalized copies of the work of Françoise from his residence to a server in Great Britain. Françoise, a French citizen who lives in Belgium, has published her work solely in France and holds a French copyright. Bill has not obtained permission to publish Françoise's work. The infringing material is then downloaded in Germany, the United States and Great Britain. Françoise sues Bill in Belgium for damages.¹

Determining which law should apply in this situation is a difficult question. A court could apply French law because Françoise is a French citizen holding a French copyright for work published in France, Belgian

1. Inspired by Alexander Peinze, Internationales Urheberrecht in Deutschland und England 119 (2002).

law as Françoise lives in Belgium and sues Bill in a Belgian court, British law as the law of Bill's country of residence and of the place where Françoise's work was both uploaded without permission and subsequently downloaded by Internet users, United States' law because Bill is a U.S. citizen and the infringing work was downloaded in the United States, or even German law as the work was also downloaded there.

International copyright law does not provide a satisfactory resolution for such an international case since the main pillar of intellectual property law—the principal of territoriality—implies nationally limited application of copyright law. Accordingly, the exclusive rights afforded to a copyright owner can only be exercised within the borders of a given country.² This national limitation of copyrights is in pronounced contrast to the universal validity of other rights (e.g., contractual rights).³

In order to decide the above-described case, one must consider not only copyright law, but also conflict-of-laws methods. Traditionally, however, there has been little exchange between conflict-of-laws and intellectual property scholars.⁴ This mutual ignorance stems from the fact that intellectual property law used to reflect the prototypical expression of sovereign or national interests and therefore involves the exclusive application of domestic law. As a result of the growing distribution of copyrighted work over the Internet, however, intellectual property scholars must concern themselves increasingly with conflict-of-laws issues. This Article establishes some common ground for the previously distinct fields of conflict-of-laws and international intellectual property law. Specifically, the Article demonstrates how to apply conflict-of-laws theory to international copyright cases while making allowances for the special character of international intellectual property law.

As the Bill-Françoise hypothetical above shows, there are many laws that could possibly apply to cases of internet copyright infringement. In this context, the following choice-of-law rules are available: *lex fori*, *lex loci delicti*, and *lex protectionis* rule.

The *lex fori* rule postulates application of the law of the country where the court deciding the infringement case is situated (law of the forum).⁵

2. See Richard Fentiman, *Choice of Law and Intellectual Property*, in *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW: HEADING FOR THE FUTURE* 129, 137 (Josef Drexl & Annette Kur eds., 2005).

3. See JAN KROPHOLLER, *INTERNATIONALES PRIVATRECHT* 535 (2004); Fentiman, *supra* note 2, at 138.

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

5. *BLACK'S LAW DICTIONARY* 760 (abr. 8th ed. 2005).

Application of this rule inevitably leads to the court applying its own law.⁶ In contrast, the *lex loci delicti* rule provides for application of the law of the country where the infringing conduct has occurred (place of the wrong).⁷ Application of the *lex loci delicti* may require a court to apply foreign law in cases where courts assume international jurisdiction with regard to infringements of foreign rights.⁸ Finally, the *lex protectionis* rule applies the law of the country for which protection is sought.⁹ Contrary to the *lex fori* rule, the *lex protectionis* rule may give rise to the application of a foreign law.¹⁰ Although the *lex loci delicti* and the *lex protectionis* rules often result in the application of the same law, the *lex protectionis* rule generally tends to be broader, governing many different aspects of copyright law, not necessarily restricted to issues of infringement.¹¹

In the Bill-Françoise hypothetical above, Françoise filed suit in a Belgian court. If the Belgian court applied the *lex fori* rule, the court would apply Belgian law to the dispute. If the court applied the *lex loci delicti* rule, it would have to apply foreign law since none of the downloads occurred in Belgium. Complicating matters further, application of the *lex loci delicti* may require application of laws from multiple countries if the court considered the location of the wrong to be the country where the infringing act had its effect (i.e., where the downloads actually occurred). Under this approach, the court in the Bill-Françoise hypothetical would have to apply German, British, and United States law. Since the Bill-Françoise hypothetical focuses on the infringement aspect of copyright violation, the *lex protectionis* rule would give rise to the same outcome as the *lex loci delicti*.

This plethora of approaches to choice of law in copyright infringement cases still inadequately addresses the challenges posed by the ease of content-distribution through the Internet. In response, multiple possible solu-

6. Choice-of-law rules may refer to application of a country's law either including or excluding the choice-of-law rules of this country. If choice-of-law rules are included in the referral, a mechanism of referring back and forth (*renvoi*) may ensue. For simplification reasons, this Article does not consider whether a particular choice-of-law rule includes a referral to choice-of-law rules or not. Each time the Article states that a choice-of-law rule leads to application of a country's law, either application of the country's substantive law or application of the country's choice-of-law rules can result.

7. See BLACK'S LAW DICTIONARY, *supra* note 5, at 760.

8. See EUGEN ULMER, INTELLECTUAL PROPERTY RIGHTS AND THE CONFLICT OF LAWS 11 (1978).

9. See, e.g., MIREILLE VAN EECHOU, CHOICE OF LAW IN COPYRIGHT AND RELATED RIGHTS 105 (2003).

10. See ULMER, *supra* note 8, at 11.

11. See VAN EECHOU, *supra* note 9, at 105.

tions have recently emerged on the international plane. In the European Union, a new “Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations” (Rome II) now includes a provision relating to the infringement of intellectual property rights.¹² The American Law Institute has drafted its “Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes” (ALI Principles), a comprehensive regulation of conflict-of-laws issues specifically focused on intellectual property rights. The ALI Principles specifically include provisions relating to internet copyright infringement.¹³

The aim of this Article is to explore the best approach to the ever-increasing problem of determining which law to apply to cases of multinational copyright infringement on the Internet. Some critics have tried to dismiss the importance of choice-of-law considerations in copyright, either by claiming that international intellectual property agreements already answer the questions¹⁴ or by pointing to existing consensus in practice.¹⁵ This Article will establish the flippancy of such arguments especially in the light of the incessant distribution of copyright infringing content over the Internet and will emphasize the importance of focusing on the intersection of conflict of laws and intellectual property law. For this purpose, Part II analyzes the status quo of conflict-of-laws rules in international copyright law. It will reveal a portfolio of approaches on the national, regional, and international plane and by using the above-introduced hypothetical illustrate the short-comings of the current legal situation, particularly with regard to multinational internet copyright infringement. Part III will then examine recent and still pending harmonization efforts in the area of choice of law and intellectual property law, evaluate their value for resolving choice-of-law issues in multi-national internet copyright infringement cases, and pave the way for the successful cross-fertilization of these two previously distinct fields.

12. See Council Regulation 864/2007, art. 8, 2007 O.J. (L 199) 40 (EC) [hereinafter Rome II].

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

14. See Dinwoodie, *supra* note 4.

15. See Josef Drexl, *The Proposed Rome II Regulation: European Choice of Law in the Field of Intellectual Property*, in INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW: HEADING FOR THE FUTURE 151, 152 (Josef Drexl & Annette Kur eds., 2005).

II. CHOICE OF LAW AND COPYRIGHT INFRINGEMENT: A PORTFOLIO OF APPROACHES

Harmonization and streamlining efforts aside, United States and European courts tend to approach the issue of conflict of laws in copyright law differently. Even within Europe, there exist remarkable differences. This part of the Article presents the current portfolio of different approaches within the United States and Europe.

A. The Situation in the United States

In the United States, copyright of published and unpublished works is strictly protected by federal law.¹⁶ However, the United States did not join the Berne Convention for the Protection of Literary and Artistic Works,¹⁷ an international instrument establishing minimum standards for copyright protection, until 1989.¹⁸ This long hesitation was due to the fact that Congress considered U.S. copyright law as sacrosanct, taboo for regulation by international law,¹⁹ an attitude which is also reflected in United States jurisprudence. At the beginning of the 20th century, the United States Supreme Court determined that copyright law was strictly territorial.²⁰ As a consequence, common law courts were inclined to invoke *forum non conveniens* when foreign copyright law was involved.²¹ The accession of the United States to the Berne Convention initiated a gradual reconsideration of international copyright law while contemporaneously creating new challenges when foreign copyright law was involved. The Ninth and Second Circuits have taken conflicting approaches to address these challenges. The Ninth Circuit viewed the Berne Convention as requiring a *lex fori* approach, while the Second Circuit ultimately ignored the Berne Con-

16. See U.S. CONST. art. 1, § 8, cl. 8.

17. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 (1986) [hereinafter Berne Convention].

18. See WIPO Administered Treaties: Berne Convention Contracting Parties: Details on United States of America, http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1045C (last visited May 6, 2008).

19. See David E. Miller, *Finding A Conflicts Issue in International Copyright Litigation: Did the Second Circuit Misinterpret the Berne Convention in Itar-Tass?*, 8 CARDOZO J. INT'L & COMP. L. 239, 244 (2000).

20. See, e.g., *United Dictionaries Co. v. G. & C. Merriam Co.*, 208 U.S. 260 (1908) (holding that the American copyright statute does not require notice of the American copyright on books published abroad and sold only for use there).

21. See, e.g., *Subafilms, Ltd. v. MGM-Pathé Comm'n Co.*, 24 F.3d 1088, 1095 (9th Cir. 1994) (en banc).

vention and used a broader interests approach to choose the proper law on a case-by-case basis.

1. *The Ninth Circuit Approach*

In *Subafilms Ltd. v. MGM-Pathé Communications Co.*, the United States Court of Appeals for the Ninth Circuit considered whether United States copyright law applied where the authorization of acts that would lead to copyright infringements abroad occurred in the United States.²² The court held en banc that the U.S. Copyright Act did not apply to cases of secondary infringement where the authorization of infringing acts occurred abroad, even if the acts constituted infringement if committed in the United States.²³ The *Subafilms* decision is thus characterized by a strict understanding of the principle of territoriality.²⁴ The Ninth Circuit based its strict interpretation of territoriality on the importance of comity in international copyright relations. In particular, the court emphasized that the extraterritorial application of U.S. copyright law impaired comity because it imposed application of United States copyright law on issues that would otherwise fall within the sovereignty of another state.²⁵ Accordingly, the Ninth Circuit declined to decide the case on the grounds of *forum non conveniens*.

Such a restrictive approach to conflict-of-laws issues in copyright law will often prove detrimental for the copyright holder as it may bar him from bringing a lawsuit in a country where the copyright infringer has his assets. For example, if in the Bill-Françoise hypothetical, all the courts involved adopted an interpretation similar to the Ninth Circuit, Françoise would not be able to sue Bill in either his home country (United States) or his country of residence (Great Britain). Rather, Françoise would be limited to seeking redress in a French court that would then apply its own law. If Françoise won her lawsuit, she would have to enforce the French judgment in order to collect damages. And if Bill had no assets in France, such enforcement would be complex and possibly warrant further judicial proceedings.²⁶

From a conflict-of-laws perspective, the reasoning of the Ninth Circuit in *Subafilms* is flawed because it combines questions of jurisdiction and

22. *Id.*

23. *Id.* at 1095.

24. *Id.* at 1095-96.

25. *Id.* at 1097.

26. For the enforcement of judgments, see, for example, U.S. Dept. of State, Enforcement of Judgments, http://travel.state.gov/law/info/judicial/judicial_691.html (last visited Feb. 27, 2009).

choice of law. The court based its denial of the claim on the inappropriateness of applying U.S. copyright law extraterritorially.²⁷ This argument already implies that the assumption of subject-matter jurisdiction would inevitably result in application of *lex fori*. Such an approach ignores the two-step analysis fundamental to conflict-of-laws cases, requiring that the questions of jurisdiction and choice of law be decided subsequently.²⁸ If a court has jurisdiction, this does not mean that forum law automatically applies to the case: the determination of the applicable law is another separate issue from jurisdiction.²⁹

Consequently, by asserting *forum non conveniens* due to the lack of extraterritorial application of U.S. copyright law without first determining whether such law would be applicable in the first place, *Subafilms* lacks a clear-cut distinction between jurisdiction and choice of law and, as a result, is inconsistent with conflict-of-laws standards. In other words,

to say that each country is authorised to legislate its own copyright, and that, therefore, it cannot by definition be applied beyond its borders, is to negate the existence of private international law, or less drastically: to reduce it to the maxim that all courts should always apply their own law.³⁰

In addition, the Ninth Circuit appears to suggest that article 5(1) of the Berne Convention—which postulates the principle of national treatment³¹—points to a choice-of-law rule.³² In *Subafilms*, the court states that “[a]lthough the treaties do not expressly discuss choice-of-law issues, it is commonly acknowledged that the national treatment principle *implicates* a rule of territoriality.”³³ This statement indicates that the court considered the national treatment principle to have choice-of-law implications leading to application of the *lex fori* as the most territorial choice-of-law rule.³⁴

27. *Subafilms*, 24 F.3d at 1097-98.

28. See EUGENE SCOLES ET AL., CONFLICT OF LAWS (3d ed. 2000).

29. *Id.*

30. See VAN EECHOU, *supra* note 9, at 97.

31. The national treatment principle stipulates that a country shall treat authors from other member states of the Berne Convention the same as its domestic authors. See, e.g., WIPO, Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), http://www.wipo.int/treaties/en/ip/berne/summary_berne.html.

32. See Graeme W. Austin, *Importing Kazaa Exporting Grokster*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 577, 595 n.76 (2006).

33. *Subafilms, Ltd. v. MGM-Pathé Commc'ns Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994) (emphasis added) (citations omitted).

34. See *Creative Tech. v. Aztech Sys. Pte, Ltd.*, 61 F.3d 696, 700 (9th Cir. 1995).

The character of the national treatment principle, however, has been subject to debate.³⁵ While case law partially supports the view that the national treatment principle constitutes a proper choice-of-law rule,³⁶ many scholars see the issue of national treatment as a precursor to the question of the applicable law.³⁷ On the other hand, another group of intellectual property scholars contend that the national treatment principle merely stipulates a principle of nondiscrimination and has limited choice-of-law implications or even none at all.³⁸ Opponents of the characterization of the national treatment principle as a choice-of-law standard get support from their conflict-of-laws colleagues.³⁹ According to general conflict-of-laws theory, choice-of-law rules determine, among other things, which *law* to apply.⁴⁰ The national treatment principle of the Berne Convention, however, stipulates that each member state should accord foreign authors “the *rights* which their respective laws do now or may hereafter grant to their nationals.”⁴¹ If this is true, then the national treatment principle would only come to play once a suitable choice-of-law rule has determined the applicable law in the first place.

Historical evidence also points away from considering the national treatment principle as a choice-of-law rule.⁴² At the time that Berne was negotiated, copyright law was not expressly classified as public or private law, and a uniform approach to conflict of laws did not exist.⁴³ Furthermore, the Berne Convention was drafted in efforts to harmonize international copyright law, which strongly suggests that the drafters of the Berne Convention did not focus on conflict issues, since the whole study of conflict of laws is based on the diversity of laws, not their harmonization.⁴⁴

There is also a logical argument against applying the national treatment principle as a choice-of-law rule. According to article 5(1) of the

35. See Drexl, *supra* note 15, at 165.

36. See *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996) (citing *Creative Tech.*, 61 F.3d at 700).

37. Drexl, *supra* note 15, at 165 n.64 (referring to Koumantos).

38. See PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 89 (2001); VAN EECHOUD, *supra* note 9, at 107 (limited choice-of-law implications); William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 405 (2000) (no choice-of-law implications).

39. See P.L.C. Torremans, *Intellectual Property and Private International Law: Heading for the Future*, 5 EUR. INTEL. PROP. REV. 312, 469 (2006).

40. *Id.*

41. Berne Convention, *supra* note 17, art. 5(1) (emphasis added).

42. See VAN EECHOUD, *supra* note 9, at 92.

43. *Id.* at 92-93.

44. *Id.* at 93.

Berne Convention, national treatment is only accorded to foreigners and not nationals of the country of origin.⁴⁵ National treatment, however, means that foreigners shall be treated equally to nationals.⁴⁶ For example, suppose that one country applies the *lex fori* rule for its nationals with regards to the law applicable to copyright infringement. An interpretation of the national treatment principle, however, would lead to application of *lex protectionis*. Provided that both conflict rules conform to the minimum standards set by the Berne Convention,⁴⁷ the above-described situation would result in unequal treatment of nationals and foreigners and thus conflict with the idea underlying the national treatment principle.⁴⁸ Thus, there are strong arguments against construing the national treatment principle as a choice-of-law rule, yet courts sometimes decide this question otherwise.⁴⁹

Even if the national treatment principle is considered to be a choice-of-law rule, the exact nature of the rule is not yet established. This problem becomes clear in *Subafilms*. Although the Ninth Circuit states that “the national treatment principle implicates a rule of territoriality,” it is unclear what “rule of territoriality” means for conflicts purposes.⁵⁰ Some argue that such a view leads to application of the *lex protectionis*.⁵¹ Others find that territoriality inevitably implies the *lex loci delicti*, the generally accepted choice-of-law rule for torts.⁵² A third interpretation of the national treatment principle would lead to the *lex fori*.⁵³ This ambiguity further supports the argument against characterizing the national treatment principle as a choice-of-law rule.

45. See Berne Convention, *supra* note 17, art. 5(1).

46. *Id.* (“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, *the rights which their respective laws do now or may hereafter grant to their nationals . . .*”) (emphasis added).

47. Works and rights to be protected and duration of protection. See Berne Convention, *supra* note 17, art. 7 (duration of protection), art. 8-9, 11-12, 14, 14ter (economic rights) and art. 6bis (moral rights). For a list of the minimum standards of protection, see also WIPO, Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Apr. 2, 2009).

48. See VAN EECHOU, *supra* note 9, at 127.

49. See, e.g., *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088 (9th Cir. 1994).

50. Cf. VAN EECHOU, *supra* note 9, at 96 (on the basis of Dutch case law).

51. See Drexl, *supra* note 15, at 166.

52. See Kaspar Spoendlin, *Der internationale Schutz des Urhebers*, 107 UFITA 11, 17 (1988).

53. See *Subafilms*, 24 F.3d at 1097.

In sum, *Subafilms* presents two major challenges from a conflict-of-laws perspective. First, it commingles questions of jurisdiction and choice of law by basing its *forum non conveniens* decision on the lack of extraterritorial application of U.S. copyright law. Second, it suggests that the national treatment principle of the Berne Convention implicates a choice-of-law rule for cases of international copyright infringement, in opposition to arguments against such an interpretation that are expressly contained within the Berne Convention. The following Section illustrates that critics of *Subafilms* are further supported by subsequent case law in the Second Circuit.

2. *The Second Circuit Approach*

Originally, the Second Circuit assumed an approach similar to *Subafilms*. In *Murray v. British Broadcasting Corp.*, the Second Circuit stated that national treatment was a choice-of-law rule.⁵⁴ However, contrary to the Ninth Circuit in *Subafilms*, the Second Circuit in *Murray* clearly acknowledged that interpreting the national treatment doctrine as a choice-of-law rule resulted in application of *lex loci delicti*.⁵⁵ The more definite approach by the Second Circuit was less ambiguous than the Ninth Circuit's decision in *Subafilms*.

The Second Circuit's interpretation of the national treatment principle changed remarkably with its decision in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*⁵⁶ *Itar-Tass* is considered one of the leading United States cases on choice-of-law issues in copyright law.⁵⁷ The case involved the unauthorized distribution, in New York, of newspaper articles that were originally published in Russia. In contrast to the Ninth Circuit in *Subafilms*, the Second Circuit in *Itar-Tass* extensively examined the issue of applicable law. Based on its assessment of the existing federal and state law, the court found no appropriate choice-of-law rule for copyright infringement cases and, therefore, created its own rules.⁵⁸ This implies that the court did not consider the national treatment principle to be a valid choice-of-law rule. Rather, the court found that the "principle of national treatment simply assure[d] that if the law of the country of infringement

54. See *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996).

55. *Id.* at 290, 293.

56. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2d Cir. 1998).

57. See Graeme Dinwoodie, *Resolution through Conflict-of-laws: Remarks by Graeme Dinwoodie*, 30 BROOK. J. INT'L L. 885, 890 (2005).

58. *Itar-Tass Russian News Agency*, 153 F.3d at 90.

applie[d] to the scope of substantive copyright protection, that law [would] be applied uniformly to foreign and domestic authors.”⁵⁹

The court noted that different legal issues warranted different choice-of-law rules.⁶⁰ Such *depeçage*, i.e. the separation of one comprehensive legal relationship to several legal issues to which different choice-of-law rules are applied, is not uncontested among American conflict-of-laws scholars.⁶¹ The Second Circuit distinguished between issues of ownership and infringement for choice-of-law purposes. On the issue of copyright infringement, the court applied the *lex loci delicti*.⁶² Interestingly, the court embedded its application of the *lex loci delicti* in a broader interest analysis.⁶³ The court noted the relevance of determining both the ownership of an interest and the nature of that interest, but concluded that, in the case at hand, application of U.S. law to the infringement issue was an obvious choice since the infringement occurred in the United States and the defendant was a U.S. corporation.⁶⁴

The Second Circuit’s choice of *lex loci delicti* through a broader interest approach is problematic for two reasons. First, a broader interest analysis can lead to legal indeterminacy or even to forum favoritism.⁶⁵ For instance, the Second Circuit in the *Itar-Tass* decision articulated that “United States law would still apply to infringement issues, since not only is this country the place of the tort, but also the defendant is a United States corporation.”⁶⁶ Nonetheless, consideration of state interests in conflict of laws occurs quite frequently in United States courts.⁶⁷

Second, the application of the *lex loci delicti* could lead to a multitude of applicable laws.⁶⁸ This difficulty is best illustrated by applying the *lex loci delicti* to the Bill-Françoise hypothetical. The *lex loci delicti* rule would apply the law of the place of infringement. Yet the location of in-

59. *Id.* at 89.

60. *Id.* at 90.

61. See SYMEON SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 31-33 (2006).

62. See *Itar-Tass Russian News Agency*, 153 F.3d at 91. For the question of copyright ownership, the court determined the law of the country of origin of the copyright to be applicable in this specific case.

63. *Id.*

64. *Id.*

65. See Klaus Schurig, *Interessenjurisprudenz contra Interessenjurisprudenz im IPR —Anmerkungen zu Flessners Thesen*, 59 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 229, 242 (1995) (F.R.G.).

66. *Itar-Tass Russian News Agency*, 153 F.3d at 91.

67. See SYMEONIDES, *supra* note 61, at 373.

68. See Dinwoodie, *supra* note 4, at 440.

fringement is uncertain when Bill uploaded works that infringe on Françoise's copyright from his home computer in Great Britain to a server in Great Britain, and these works are then downloaded in Germany, the United States, and Britain. The location of infringement could be the uploader's country, which may enable citizens of countries with lax copyright laws to abuse copyright. The infringement may also occur in the server's country, potentially allowing server operators to escape liability by choosing a country with lax copyright regulation for their conduct.⁶⁹ Finally, the infringement may also occur in the downloader's country, which here would lead to application of German, United States, and British law or the law of any other country where Françoise's work was downloaded. The location of infringement may also change depending on the theory of infringement: for instance, if Bill is sued for contributory infringement, a court would have to decide if the harm centered on Bill's contribution in Britain or the direct infringement abroad. A trial court would need to sort out these issues and the process could be lengthy, costly, and complicated.

3. Summary

While the Ninth Circuit in *Subafilms* referred to the Berne Convention, the Second Circuit in *Itar-Tass* developed its choice-of-law rule based on general conflict-of-laws theory without seeking inspiration from the Berne Convention. It therefore seems that there are two main approaches: either derive a special conflict-of-laws rule for intellectual property cases from the Berne Convention or apply general conflict-of-laws rules to intellectual property cases. The following Section will examine where the European Union member states stand regarding this bifurcation.

B. The Situation in Europe

Currently, the courts of the twenty-seven member states of the European Union apply their respective national conflict-of-laws rules to copyright infringement cases.⁷⁰ This section will examine the conflict-of-laws approaches of three major players in the European Union—Great Britain, Germany, and France—as well as Belgium, a member state that stands out by recent legislative regulation of conflict of laws in intellectual property.

69. See, James Savage, *The Pirate Bay Plans to Buy Island*, LOCAL, Jan. 12, 2007, <http://www.thelocal.se/6076/20070112/>.

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

1. *Great Britain*

In Great Britain, case law governing copyright infringement is similar to that in the United States. From a choice-of-law perspective, one can discern two distinct periods of thought: the decisions prior to and the decisions after the introduction of the Private International Law (Miscellaneous Provisions) Act of 1995 ("PIL").⁷¹ The first period involved a narrow application of foreign law, while the second period may provide for a broader application of foreign law.

a) Situation Before Introduction of the Private International Law (Miscellaneous Provisions) Act of 1995

Before 1995, British courts usually combined questions of jurisdiction and choice of law when evaluating the possible application of foreign law. This combination grew from tort jurisprudence, where courts rarely applied foreign law. When applied to copyright law, these principles led to a "protection vacuum" where copyright infringement with a foreign element lacked a remedy in the British courts.

Until 1995, British case law in conflict-of-laws cases relating to torts in general was decisively coined by the principle of "double actionability."⁷² According to this principle,

an act done in a foreign country is a tort and actionable as such in England, only if it is both (a) actionable as a tort according to English law, or in other words is an act which, if done, in England, would be a tort; *and* (b) actionable according to the law of the foreign country where it was done.⁷³

This principle reduces choice-of-law questions to jurisdiction questions by eliminating jurisdiction where there is a difference in law.

In copyright law, the principle of "double actionability," together with the strictly territorial character of intellectual property rights, has resulted in a general tendency among British courts to apply domestic law.⁷⁴ For example, in *Def Lepp Music v. Stuart-Brown*, the Chancery Division of the

71. See Private International Law (Miscellaneous Provisions) Act, 1995, c. 42 (U.K.).

72. See W.R. Cornish, *Intellectual Property Infringement and Private International Law: Changing the Common Law Approach*, 4 GRUR. INT'L. 285, 286 (1996).

73. ALBERT V. DICEY ET AL., DICEY, MORRIS AND COLLINS ON THE CONFLICT-OF-LAWS 203 (14th ed. 1993) (emphasis added). The principle was originally formulated in *Phillips v. Eyre*, (1870) L.R. 6 Q.B. 1 (Exch.).

74. See *Def Lepp Music v. Stuart-Brown*, [1986] R.P.C. 273 (Ch.) (U.K.) (referring to the Copyright Act 1956).

High Court considered an alleged infringement of a British copyright by acts committed in Luxembourg and the Netherlands.⁷⁵ The court found for the defendants. In declining to award damages, the court merged the questions of jurisdiction and choice of law instead of following the fundamental conflict-of-laws two-step analysis discussed earlier.⁷⁶ Instead, the court first considered the question of applicability of the British Copyright Act and held that the territorial nature of the Act resulted in its application only within Britain. Furthermore, the judges stressed that only infringement committed in Britain would be actionable under the Act. As a consequence, the court proceeded to the issue of jurisdiction and stated, “acts done outside the United Kingdom cannot be the subject matter of an action for infringement in the English courts.”⁷⁷ On the issue of choice of law, the court referred to the principle of “double actionability” as defined in Dicey and Morris and held that it would generally give “effect to the substantive law of England (*lex fori*) as opposed to the law of the place where the act is committed (*lex loci delicti*).”⁷⁸

Application of the *lex fori* can be very tempting because of its convenience to the local court. In the Bill-Françoise hypothetical, imagine that Françoise brings her case against Bill in a Belgian court. If the Belgian court followed *Def Lepp Music*, it would apply its own law (*lex fori*). This is the most convenient and likely most cost-effective solution since the court will not have to investigate and interpret foreign law. Furthermore, in internet copyright infringement cases, the *lex fori* approach will have the additional advantage of applying the law of a single jurisdiction as opposed to the multiple jurisdictions under the *lex loci delicti* approach.⁷⁹

Yet, the *lex fori* solution also presents a significant disadvantage for the defendant. Generally, the plaintiff will select the forum in which to bring her infringement action. In the hypothetical, Françoise decides to consolidate the case in Belgium, her home country. Belgium, however, has no relations to the copyrights in question, except that the owner lives in Belgium. Suppose, for example, Belgium had extremely strict copyright laws compared to France and Great Britain. The fact that Françoise incidentally chose to live and sue in Belgium would result in a major disad-

75. *Id.*

76. See SCOLES, *supra* note 28, at 3.

77. See *Def Lepp Music*, [1986] R.P.C. 273.

78. *Id.*

79. See *supra* Part I.

vantage to Bill. Such “negative consequences” of the law of the forum state “must be taken very seriously.”⁸⁰

Generally, the parallel between *Def Lepp Music* and *Subafilms* is striking. In both cases, the courts discuss issues of choice of law under the guise of jurisdiction and territoriality. Similar to the Ninth Circuit in *Subafilms*, the *Def Lepp Music* court looks to the principle of territoriality in order to determine whether the British Copyright Act was applicable. Yet, while the court in *Subafilms* explicitly refers to the Berne Convention as a source of a choice-of-law rule, the court in *Def Lepp Music* vehemently denies any such direct effect of the Berne Convention.⁸¹ In fact, the direct application of the Berne Convention to copyright cases is “contrary to the common law mind,”⁸² due to the fact that Great Britain is a dualist system and international treaties never have a direct effect, and instead must be incorporated by legislative act.⁸³

Essentially, the British approach to conflict-of-laws issues in copyright cases before the 1995 introduction of the PIL created a protection vacuum in infringement cases with a foreign element. For infringement of a United Kingdom copyright abroad, courts would resort to the territoriality principle and, thus, refuse to handle these cases as there was no extraterritorial protection of U.K. copyrights.⁸⁴ Further, U.K. copyright law would not provide protection for infringements of a foreign copyright in the United Kingdom.⁸⁵ As cases involving foreign countries became more prevalent, this situation had to be addressed.

b) The Private International Law (Miscellaneous Provisions) Act 1995 and Its Implementation by the British Courts

The PIL has likely decreased the protection vacuum for foreign copyright cases in place prior to 1995. Section 10 of the PIL explicitly abolish-

80. Annette Kur, *Applicable Law: An Alternative Proposal for International Regulation—The Max-Planck Project on International Jurisdiction and Choice of Law*, 30 BROOK. J. INT’L L. 951, 977-78 (2005).

81. See *Def Lepp Music*, [1986] R.P.C. 273 (“I do not understand how the Berne Convention (being simply a treaty obligation) conferred any individual rights on the plaintiff under English law in the absence of any legislation incorporating the Convention into English law.”).

82. Cornish, *supra* note 72, at 287 n.26.

83. See John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310, 319 (1992).

84. See *Def Lepp Music*, [1986] R.P.C. 273; DICEY, *supra* note 73, at 1908-09.

85. See Copyright, Designs and Patents Act, 1988, c. 48 (U.K.); DICEY, *supra* note 73, at 1908-09.

es the “double actionability” rule.⁸⁶ Consequently, a common justification for applying the *lex fori* has been taken away.⁸⁷ Indeed, section 11(1) of the PIL provides for the general application of the *lex loci delicti* in torts.⁸⁸ Nonetheless, several sections of the PIL limit the general application of *lex loci delicti*. While not dispositive, the case law seems to hint that these exception sections do not limit the general applicability of section 11(1) in copyright infringement cases.

Three sections of the PIL potentially limit the general application of *lex loci delicti*. Section 11(2) of the PIL provides a special rule for torts involving multiple countries:

Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—

(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

(c) in any other case, the law of the country in which the most significant element or elements of those events occurred.⁸⁹

Although British legislators stated that section 11(2) of the PIL did not apply to intellectual property infringement cases,⁹⁰ some scholars still advocate its use in infringements covering multiple countries.⁹¹ In such a

86. See Private International (Miscellaneous Provisions) Act, 1995, c. 42, § 10 (U.K.). The provision reads as follows:

The rules of the common law, in so far as they—(a) require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort or delict is actionable . . . , are hereby abolished so far as they apply to any claim in tort or delict which is not excluded from the operation of this Part by section 13 below.

Id.

87. See *supra* discussion II.B.1.a).

88. See Private International (Miscellaneous Provisions) Act, § 11(1) (“The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur . . .”).

89. Private International (Miscellaneous Provisions) Act, § 11(2).

90. See PEINZE, *supra* note 1, at 350; see also J.J. FAWCETT & PAUL TORREMANS, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW 621 (1998).

91. See FAWCETT & TORREMANS, *supra* note 90.

case, the judge would choose the law of the country in which the most significant element of infringement occurred. As is the case with the other two exception sections, English courts have yet to apply section 11(2) to cases involving intellectual property law.

The second exception is in section 14 (4) of the PIL, which provides that it shall not modify “the rules of private international law that would otherwise be so applicable.”⁹² The territorial nature of copyrights could trigger the application of this exception.⁹³ In fact, due to the territorial limitation of substantive intellectual property rules (i.e. British copyright law only protects local copyrights against local copyright infringement), they could be interpreted as mandatory rules of the forum.⁹⁴ Such mandatory rules of the forum are defined as rules of substantive law that “are regarded as so important that as a matter of construction or policy they must apply in any action before a court of the forum, even where the issues are in principle governed by a foreign law selected by choice-of-law rule.”⁹⁵ As a result, British courts would always apply British copyright law. Mandatory rules of the forum most likely play a role in infringement cases, but the extent of their role is unclear.⁹⁶ The definitive decision remains with the courts.⁹⁷

Determining the impact of the PIL on copyright infringement cases poses a challenge to British courts. A major British treatise on conflict of laws finds that “[t]he precise relationship between the protection of intellectual property rights and [the PIL] is not without difficulty.”⁹⁸ Nonetheless, most courts that consider the relationship indicate that the PIL opens the door for broader application of foreign law.

In *Pearce v. Ove Arup Partnership Ltd.*,⁹⁹ the Court of Appeals provided one possible forecast for future implications of the PIL in copyright cases.¹⁰⁰ The case involved a British plaintiff suing several defendants, some domiciled in Britain and some in the Netherlands. The plaintiff claimed that defendants had infringed his British copyright on architectur-

92. Private International (Miscellaneous Provisions) Act, § 14(4).

93. See DICEY, *supra* note 73, at 1907-1908; Cornish, *supra* note 72, at 288.

94. See FAWCETT & TORREMANS, *supra* note 90, at 457.

95. *Id.* at 456-457 (citing Law Commission Working Paper No 87, para 4.5 (1954)).

96. *Id.* at 600.

97. Section 12 of the PIL provides an additional exception to the *lex loci delicti* in cases where application of a different law is “substantially more appropriate.” Private International (Miscellaneous Provisions) Act, § 12. An application of section 12 to copyright infringement cases is, however, unlikely. See Cornish, *supra* note 72, at 287 n.25.

98. DICEY, *supra* note 73, at 1907.

99. See *Pearce v. Ove Arup P’ship Ltd.*, [2000] Ch. 403 (A.C.) (U.K.).

100. *Id.*

al drawings when they constructed a building in Rotterdam (The Netherlands). In dicta, the court indicated that PIL section 11(1) would have led to the application of the *lex loci delicti*, thus requiring application of Dutch law.¹⁰¹

Overall, there only exist a small number of copyright cases in English courts where the question of the applicable law is explicitly examined. Most cases that involve foreign law address those issues at the jurisdiction level, and if foreign law proves decisive, are denied due to lack of jurisdiction.¹⁰² This approach to conflict of laws in copyright law still leaves us with a protection vacuum.¹⁰³ In a more recent case, however, the Chancery Division suggested a shift, which could avoid this vacuum: in *R. Griggs Group Ltd. v. Evans*,¹⁰⁴ a British footwear company sued an Australian footwear company for infringement of its logo. The court suggested that, instead of refusing to deal with infringement cases involving a foreign element at all, judges should apply the conflict-of-laws rules of the 1995 Act. In finding for the British company, the court argued that

[i]n any case the double-actionability rule was abolished by s.10 of the Private International Law (Miscellaneous Provisions) Act 1995, with the effect that, in general, it is now enough to show that the act complained of is actionable according to the law of the country where the event took place. Hence (questions of Convention, comity and forum conveniens apart) it is now sometimes possible to sue in England for infringement of a foreign intellectual property right.¹⁰⁵

While this approach will not completely offer otherwise absent copyright protection to foreign copyrighted works in the United Kingdom, it will at least broaden the horizon by getting English courts to apply foreign law.¹⁰⁶ Such a readiness to apply foreign law has long been present among German courts.

2. Germany

Although Germany is a civil law country, German written law lacks any provision regulating the law applicable to copyright infringement cas-

101. *Id.*

102. *See* DICEY, *supra* note 73, at 1908.

103. *See* discussion *supra* Part II.A.1 on *forum non conveniens*.

104. *See* *R. Griggs Group Ltd. v. Evans*, [2004] EWHC 1088, [2005] Ch. 153 (U.K.).

105. *Id.*

106. *See* DICEY, *supra* note 73, at 1908-09.

es. In other words, the German Copyright Law only contains substantive rules on copyrights and related rights, but no choice-of-law rules.¹⁰⁷ The general choice-of-law rules in Germany do not apply to intellectual property cases.¹⁰⁸ This regulatory gap is due to uncontested case law by the *Bundesgerichtshof* (Federal Court of Justice). During the last revision of the choice-of-law regulations in torts, the *Deutsche Bundestag* (Federal Diet) considered a regulation of the conflict of laws in copyright infringement cases unnecessary due to the overall validity of the so-called *Schutzlandsprinzip* (law of the country for which protection is sought)¹⁰⁹ in the area of intellectual property law.¹¹⁰ As a result of this lack of codification, it is necessary to turn to German case law, in particular copyright infringement cases decided by the *Bundesgerichtshof*.

In 1992, the *Bundesgerichtshof* indicated that the proper law for copyright infringement was the *lex protectionis*, i.e. the law of the country for which protection is sought or *Schutzlandsprinzip*.¹¹¹ According to the court, the *Schutzlandsprinzip* is founded on article 5 (2) of the Berne Convention,¹¹² which reads:

The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, *shall be governed exclusively by the laws of the country where protection is claimed*.¹¹³

It has been suggested that this article 5 (2) of the Berne Convention points to the *lex protectionis*.¹¹⁴ It remains unclear, however, exactly

107. See PEINZE, *supra* note 1, at 117.

108. See, e.g., Bundesgerichtshof [BGH][Federal Court of Justice] Nov. 7, 2002, 152 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 317 (F.R.G.).

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

110. See BTDrucks 14/343, at 10, available at <http://dip.bundestag.de/parfors/parfors.htm>.

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

112. *Id.* at 397.

113. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3, art. 5(2) (1986) (emphasis added).

114. See, e.g., Bundesgerichtshof [BGH][Federal Court of Justice] June 17, 1992, 118 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 394, 397 (F.R.G.).

which law the *lex protectionis* favors and which aspects of copyright law the *lex protectionis* governs.

With regards to the copyright infringement law applicable under the *lex protectionis*, it has been contended that this would correspond to application of the *lex loci delicti*.¹¹⁵ Some even suggest that, in the end, it all boils down to application of the *lex fori*, since an infringement case usually is brought to the court of the country of protection that will apply its own law.¹¹⁶ In the Bill-Françoise example, that means that if Françoise brought a suit in a German court for the infringement of her copyright in Germany, the German court would apply the *lex protectionis* which would lead to application of German law, an outcome synonymous with one stemming from application of either *lex loci delicti* or *lex fori*.

Yet, a study of German case law indicates that the *Bundesgerichtshof* does not endorse either of these two interpretations. In a 1997 case, the court applied foreign copyright law as the *lex protectionis* and, therefore, negated any efforts that would analogize the *lex protectionis* to the *lex fori*.¹¹⁷ Furthermore, in 2002 the court explicitly stated that the ordinary choice-of-law rules do not apply to intellectual property cases.¹¹⁸ This statement seems to imply that *lex protectionis* is distinguishable from *lex loci delicti* because *lex loci delicti* is the standard approach in general choice-of-law cases involving torts.

The extensive application of the *lex protectionis* further corroborates the difference between the *lex loci delicti* and the *lex protectionis*. According to the court, the *lex protectionis* shall govern the extent of a given in-

115. See VAN EECHOU, *supra* note 9, at 105 (“[L]ex protectionis and lex loci delicti are often used interchangeably.”).

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

117. See Bundesgerichtshof [BGH][Federal Court of Justice] 1997, 136 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 380, 385 (F.R.G.). The court stated: Das Berufungsgericht hat die Klageansprüche rechtsfehlerhaft allein nach deutschem Recht beurteilt . . . Die Klägerin hat ihre Ansprüche nur darauf gestützt, dass die Beklagte ausschliessliche Fernsehauswertungsrechte and dem Spielfilm ‘Spielbankaffäre,’ die ihr fuer das Gebiet von Luxemburg zustuenden, verletzt habe. Schutzland ist hier demgemäss Luxemburg. Die Klägerin behauptet nicht, auch fuer das Gebiet der Bundesrepublik Deutschland Fernsehhauswertungsrechte zu besitzen.

Id.

118. See Bundesgerichtshof [BGH][Federal Court of Justice] Nov. 7, 2002, 152 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 317 (F.R.G.).

tellectual property right as well as possible infringement claims.¹¹⁹ Furthermore, the court also held the *lex protectionis* applicable in cases of copyright exploitation.¹²⁰ Such broad interpretation of the *lex protectionis* emphasizes its role as a special choice-of-law rule in intellectual property cases.¹²¹ In contrast, the *lex loci delicti* is more restrictive and only applies to torts.¹²² Thus, German case law implicates a major discrepancy between the *lex protectionis* and the *lex loci delicti*.

Yet despite such discrepancy, application of the *lex protectionis* to internet copyright infringement cases leads to an outcome that is as unsatisfying as the application of the *lex loci delicti*. Thus, in the Bill-Françoise hypothetical, a court endorsing the *lex protectionis* approach would have to apply the laws of each country where Françoise's work was downloaded. Such an approach would lead to the application of numerous laws and could be costly and time-consuming. Because of the ubiquitous nature of internet copyright infringement, courts would benefit greatly from the presence of a single connecting factor in order to streamline judicial procedures. Unfortunately, such rationalization has yet to be introduced into German law. Perhaps German courts can look to their French neighbors' decisions as sources of inspiration.

3. France

France has a long tradition of intellectual property protection.¹²³ Originally, protection in France was limited to works published in France by French authors.¹²⁴ French law gradually expanded to cover works by foreign authors and infringement in foreign territories. When considering infringement cases involving foreign elements, France's highest court, the

119. See Bundegerichtshof [BGH][Federal Court of Justice], June 17, 1992, 118 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 394, 397-98 (F.R.G.).

120. Bundesgerichtshof [BGH][Federal Court of Justice] Nov. 7, 2002, 152 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 317 (F.R.G.) ("Das Recht des Schutzlandes bestimmt, welche Handlungen als Verwertungshandlungen unter ein von ihm anerkanntes Schutzrecht fallen.").

121. Such a broad perception of the *lex protectionis*, however, is problematic in view of the wording of article 5 (2) of the Berne Convention as well as other provisions in the Convention that indicate different laws applicable to different issues of copyright. See SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND 1299 (2006).

122. See VAN EECHOU, *supra* note 9, at 105.

123. See A. Lucas & H.-L. Lucas, *Traite de la Propriete Intellectuelle* 785 (2006); A. Chambellan, *France*, in *Intellectual Property Laws of Europe* 145, 147 (George Metaxas-Maranghidis ed., 1995).

124. See LUCAS & LUCAS, *supra* note 123, at 785.

Cour de cassation, has implicitly adopted a *lex loci delicti* approach.¹²⁵ Yet, it is still unclear how this *lex loci delicti* approach applies to internet copyright infringement cases. This Section will discuss several proposals directed at French courts.

The strictly territorial application of French copyright law was gradually expanded in the nineteenth century. A decree mentioned reconciling reproduction rights of foreign authors with those of their French colleagues for the first time in 1810.¹²⁶ This alignment was gradually extended to other aspects of copyright.¹²⁷ In 1852, the French government adopted a decree that extended copyright protection to works of foreign authors published abroad.¹²⁸ Interestingly, French case law in the area of copyright protection lagged behind statutory development and first consisted of narrow criminal law decisions before involving civil law issues, including choice of law.¹²⁹

When French courts began reconciling the rights of foreign and French authors, they restricted the application of the 1852 decree to reproduction rights.¹³⁰ For example, in the *Verdi* case, the French *Cour de cassation* denied the famous Italian composer copyright protection in France.¹³¹ The court held that in order to be protected in France, first publication of a work by a foreign author had to be in France.¹³² In 1887, the *Grus* case further defined the conditions for protection of a foreign work in France.¹³³ According to the court in *Grus*, a foreign work had to fulfill the requirement of *double protection* in order to be protected in France: i.e. a foreign work was only protected in France if it was also protected abroad.¹³⁴ This *double protection* condition has striking similarities with the British “double actionability” rule.¹³⁵

French courts made further progress in protecting foreign copyrights at the beginning of the twentieth century when they endorsed the principle of

125. See *Cour de cassation* [Cass: 1e civ.][highest court of ordinary jurisdiction], Mar. 5, 2002, Bull. civ. I, No. 75.

126. *Id.* at 736.

127. *Id.*

128. *Id.* at 786-787.

129. *Id.* at 785.

130. *Id.* at 786 and 787.

131. See *Cour de Cassation* [Cass.][highest court of ordinary jurisdiction], 1857, DP 1858, report Ferey (Fr.).

132. *Id.*

133. See *Cour de Cassation* [Cass.][highest court of ordinary jurisdiction], 1887, DP 1888, note Sarrut (Fr.).

134. *Id.*

135. See *supra* Section II.B.1.a).

reciprocity.¹³⁶ This principle made copyright protection of foreign works contingent upon the protection of French works abroad.¹³⁷ Simultaneously, the *Cour de cassation* in the *Leduc* case shifted the attention away from international criminal law aspects and, for the first time, adopted a conflict-of-laws approach dealing with civil law.¹³⁸ The courts further substantiated this new direction by holding choice-of-law rules, particularly *lex loci delicti*, applicable in copyright infringement cases.¹³⁹

In 1959, the French *Cour de cassation* rendered a landmark decision extending French protection to a foreign copyright held by a foreign national.¹⁴⁰ The case involved a Russian copyright that was infringed in France by Fox-USA and Fox-Europe. The court held that the Russian authors could receive damages based on French law. It emphasized that foreigners generally enjoy the same individual rights (*droits privés*) as domestic copyright holders, unless application to foreigners is explicitly excluded.¹⁴¹ As a result, the court applied French law to the infringement of the Russian copyright in France.¹⁴²

Yet, in the *Fox* decision, the *Cour de cassation* applied French law without determining the exact choice-of-law rule applicable to copyright infringement cases. In fact, application of French law in the above case could be the result of choosing the *lex fori*, the *lex loci delicti*, or the *lex protectionis*. The French literature interpreted the approach by the *Cour de cassation* in this case as pointing towards the *lex fori*, which most scholars erroneously equated with the *lex loci delicti*.¹⁴³

French judges, however, have leaned more towards exclusive application of the *lex loci delicti*.¹⁴⁴ In *Sisro*, the *Cour de cassation* upheld the application of foreign laws to infringements committed abroad and French law to infringements committed in France.¹⁴⁵ By upholding this judgment,

136. See LUCAS & LUCAS, *supra* note 123, at 788.

137. *Id.*

138. *Id.*

139. *Id.* at 788-789.

140. See Cour de Cassation [Cass. 1e civ.][highest court of ordinary jurisdiction], Dec. 22, 1959, 1960 REV. CRIT. DE DROIT INT. PRIV. 361 (Fr.).

141. *Id.* at 361.

142. *Id.* at 362.

143. See LUCAS & LUCAS, *supra* note 123, at 813. For an explanation of the difference between *lex fori* and *lex loci delicti*, see *supra* Part I.

144. See LUCAS & LUCAS, *supra* note 123, at 871.

145. See Cour de cassation [Cass. 1e civ.][highest court of ordinary jurisdiction], March 5, 2002, Bull. Civ. I, No. 75.

the *Cour de cassation* adopted a *lex loci delicti* approach based on article 5(2) of the Berne Convention.¹⁴⁶

While the *lex loci delicti* or law of the place of the wrong appears to be the settled approach to conflict of laws in France, no court has yet resolved how this principle applies in presence of the challenge posed by internet copyright infringement cases (i.e. when there are multiple locations related to copying). Scholars in France have proposed several alternatives to the *Sisro* rule that may resolve this issue.¹⁴⁷

Specifically, some have proposed to apply the law of the country where the victim lives in internet copyright infringement cases.¹⁴⁸ In the Bill-Françoise hypothetical, this solution would lead to application of Belgian law because Françoise resides in Belgium. Application of the law of the country where the victim lives avoids conflicts of multiple laws under *lex loci delicti*, yet has two significant drawbacks. First, such a rule would critically depend on a fact possibly unrelated to the actual case. In the hypothetical, Belgium would have no link to the case if Françoise did not live there. Second, the proposed solution unfairly favors copyright owners because they can choose their place of living.

Another suggestion has been to link choice of law to jurisdiction and follow the *lex fori* approach. According to this view, a copyright owner could choose to bring her case in any court with jurisdiction—presumably either in a country where the infringing content was posted to the Internet or in a country where the infringing content was downloaded. The court would then apply its own law.¹⁴⁹ In our hypothetical, under this approach, Françoise may choose whether she would like to bring her case to a French, German, United States, or British court. Françoise would probably settle on the court with the most advantageous law for her case. Such forum shopping, however, disadvantages the defendant and therefore should be avoided. In addition, the linking of jurisdiction and choice of law is contrary to basic principles of conflict of laws.¹⁵⁰

Finally, it has been suggested that internet copyright infringement cases be analogized to broadcasting infringement cases.¹⁵¹ The latter are regulated by the French Intellectual Property Code.¹⁵² Under the code, broad-

146. *Id.*

147. *See* LUCAS & LUCAS, *supra* note 123, at 827-828.

148. *Id.* at 827.

149. *Id.* at 828.

150. *See, e.g.*, ALI, *supra* note 13, at 63.

151. LUCAS & LUCAS, *supra* note 123, at 831.

152. *See* CODE PROPRIETE INTELLECTUELLE [C. PROP. INT.] art. L122-2, available at http://www.legifrance.gouv.fr/html/codes_traduits/cpialtext.htm [English version].

cast infringements are governed by the law of the location where the work was transmitted to a satellite.¹⁵³ In the case of internet copyright infringement, such an approach would apply the law of the country where the infringing content was uploaded to an internet server.¹⁵⁴ In the hypothetical, this approach would lead to the application of British law because Bill uploaded the infringing content in Great Britain. Yet, Bill could have uploaded the work from anywhere and, under an adapted *lex loci delicti* approach, he would probably make sure that the country where he uploaded infringing content had lax copyright protection or even no protection at all (at least if he intended to infringe copyrights on a larger scale). In other words, the adapted *lex loci delicti* approach unjustifiably favors the infringer and, therefore, does not seem to be an ideal approach. Moreover, while satellites are outside all territorial jurisdiction, Bill uploaded the work to a server in a particular country. That country's laws may be better suited to deal with the infringement.

In sum, France's treatment of conflict of law issues in internet copyright infringement cases is no clearer than Germany's. A clarifying decision by the French *Cour de cassation* has yet to come down. Perhaps a look at Belgium, which historically has been a French satellite state, can shed more light on how to solve the pressing issue of determining the law applicable to copyright infringement in the internet age.

4. *Belgium*

Belgian law shares much with French law, but Belgian law has recently diverged from French and moved towards German law by adopting the *lex protectionis* approach to choice-of-law issues. In 2004, the Belgian legislature passed a new law codifying the *lex protectionis* approach to choice of law.¹⁵⁵ The new statute, however, contains several exceptions which have yet to be applied to internet copyright infringement cases. Thus, it remains to be seen how far Belgian law has strayed from its French roots.

Until recently, the conflict-of-laws approach in Belgium strongly resembled that in France. In fact, the Belgian Code Civil is based on the Code Napoleon, which underlies the current version of the French Code

153. See *id.* art L. 122-2, L. 122-2-1, L. 122-2-2.

154. See LUCAS & LUCAS, *supra* note 123, at 831.

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

Civil.¹⁵⁶ In both countries, article 3 of the Code Civil was a key provision for private international law issues, but was limited in scope and had been vastly unchanged since 1804.¹⁵⁷

In Belgium, there used to be little legislative material on choice-of-law issues to complement the rather broadly formulated Code Civil.¹⁵⁸ The resulting gap was sparsely filled by jurisprudence and scholarly work.¹⁵⁹ Overall, there had been a general tendency among Belgian jurists towards applying the *lex loci protectionis* to conflict-of-laws issues of copyright infringement. Yet, there was no written law on this subject.¹⁶⁰ When the lack of codification became noticeable, preparations of a legal text regulating private international law started in Belgium.¹⁶¹

The new law, the *Code de droit international privé* (Code on Private International Law), entered into force in October 2004.¹⁶² It abolished article 3 of the Belgian Code Civil.¹⁶³ The drafters of the new Belgian Code on Private International Law drew inspiration from similar conflict-of-laws codifications in various countries in Europe.¹⁶⁴ Most remarkably, however, the Belgium Code of Private International Law included a provision on the law applicable to intellectual property issues.¹⁶⁵

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

157. CODE CIVIL [C. CIV.] art. 3 (Belg.). states: "Les lois de police et de sûreté obligent tous ceux qui habitent le territoire. Les immeubles, même ceux possédés par des étrangers, sont régis par la loi belge [française]. Les lois concernant l'état et la capacité des personnes régissent les Belges [Français], même résidant en pays étranger." Despite such textual similarity, French and Belgian courts interpreted Code civil provisions differently. See d'Ambra, *supra* note 156, at 18). In Belgium, this provision has been recently abolished.

158. See CE avis no. 2-1225/1, February 12, 2001 (Belg.), available at www.ipr.be. In fact, the provisions of the Code Napoléon were deliberately formulated in a broad way in order to allow for a flexible contemporary interpretation by the courts. See D'Ambra, *supra* note 156, at 18.

159. See Ferdinand Visscher & Benoit Michaux, *Precis du Droit d'Auteur et des Droits Voisins* 631 (2000).

160. *Id.*

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

162. See Loi portant le Code de droit international privé [CDIP] [law establishing the Code of private international law] of July 16, 2004, *Moniteur Belge* [Official Gazette of Belgium], July 27, 2004, p. 57344.

163. *Id.* p. 57373, art. 139.

164. See RIGAUX, *supra* note 161, at 71-72.

165. See CDIP, *Moniteur Belge* [Official Gazette of Belgium], July 27, 2004, p. 57363, art. 93.

Article 93 of the Code on Private International Law sets the *lex protectionis* as the general rule for intellectual property rights infringement cases, but also lays out several exceptions.¹⁶⁶ For example, article 93 provides an exception for cases where parties have stipulated by contract to a different law.¹⁶⁷ Another possible exception of the rule as provided in article 93 is the *ordre public* exception.¹⁶⁸ This exception enables a judge to avoid application of a foreign law if the law would run contrary to fundamental rules of Belgian intellectual property law.¹⁶⁹ It remains to be seen how likely Belgian courts will be to resort to the *ordre public* exception in order to force application of Belgian intellectual property law.

Another possible exception, article 19, provides for application of a law more closely connected to the case at issue than the law applicable according to the general rules of the Code on Private International Law.¹⁷⁰

166. *Id.* The law provides :

Les droits de propriété intellectuelle sont régis par le droit de l'Etat pour le territoire duquel la protection de la propriété est demandée. Toutefois, la détermination du titulaire originaire d'un droit de propriété industrielle est régie par le droit de l'Etat avec lequel l'activité intellectuelle présente les liens les plus étroits. Lorsque l'activité a lieu dans le cadre de relations contractuelles, il est présumé, sauf preuve contraire, que cet Etat est celui dont le droit est applicable à ces relations.

Id.

167. *Id.*

168. *Id.* p. 57347, art. 21. The law reads as follows:

L'application d'une disposition du droit étranger désigné par la présente loi est écartée dans la mesure où elle produirait un effet manifestement incompatible avec l'ordre public. Cette incompatibilité s'apprécie en tenant compte, notamment, de l'intensité du rattachement de la situation avec l'ordre juridique belge et de la gravité de l'effet que produirait l'application de ce droit étranger. Lorsqu'une disposition du droit étranger n'est pas appliquée en raison de cette incompatibilité, une autre disposition pertinente de ce droit ou, au besoin, du droit belge, est appliquée.

Id.

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

170. Article 19 of the CDIP, reads as follows:

Le droit désigné par la présente loi n'est exceptionnellement pas applicable lorsqu'il apparaît manifestement qu'en raison de l'ensemble des circonstances, la situation n'a qu'un lien très faible avec l'Etat dont le droit est désigné, alors qu'elle présente des liens très étroits avec un autre Etat. Dans ce cas, il est fait application du droit de cet autre Etat. Lors de l'application de l'alinéa 1^{er}, il est tenu compte notamment : - du besoin de prévisibilité du droit applicable, et - de la circonstance que la relation en cause a été établie régulièrement selon les règles de droit in-

Such a rule may avoid both the application of the *lex protectionis* and its detrimental effect on the holders of copyrights in cases of internet copyright infringement. It does not, however, determine precisely which rule should apply instead. In the Bill-Françoise-hypothetical, the relevant question is which law is more closely connected to the case than the *lex protectionis*? Belgian law because Françoise lives in Belgium and brings her case in front of a Belgian court? British law because Bill uploaded the infringing content while he was in Great Britain? French law because the work was (first) published in France? The exact implications of article 19 on choice of law in internet copyright infringement cases needs to be further examined by the Belgian courts.

5. Summary

This section of the Article has demonstrated, on the basis of several European member states, that European approaches are divided between the *lex protectionis* and the *lex loci delicti*. This is especially true for cases of internet copyright infringement. While some countries have not yet expressed the approach they favor (e.g., Germany, England and France), Belgium has been more explicit. Thus, Belgium will possibly end up deciding internet copyright infringement cases that involve several laws on a case-by-case basis and apply the law that is most closely connected to the case. Given the staggering number of copyright infringements on the Internet transcending territorial palladia, the current prevailing ambiguity in approaches is no longer viable.

III. TOWARDS HARMONIZATION OF CONFLICT OF LAWS IN INTERNATIONAL INTELLECTUAL PROPERTY LAW

The need for convergence on the law applicable to copyright infringement issues has precipitated two movements toward harmonization of this increasingly important area of law. On the one hand, in the European Union, such efforts have been part of a larger endeavor to create a uniform choice-of-law regime for torts. The *Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations* (Rome II) also provides for cases of intellectual property infringement.¹⁷¹ On the other hand, the American Law Institute has drafted *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and*

ternational privé des Etats avec lesquels cette relation présentait des liens au moment de son établissement.

CDIP, Moniteur Belge [Official Gazette of Belgium], July 27, 2004, p. 57347, art. 93.

171. See Rome II, *supra* note 12, art. 8.

Judgments in Transnational Disputes (ALI Principles), a comprehensive regulation of conflict-of-laws issues specifically focused on intellectual property rights.¹⁷²

It is remarkable that 2007 has seen the adoption of two distinct international instruments, the ALI Principles and Rome II that provide, among other things, choice-of-law rules for cases of intellectual property infringement. Rome II is the long expected harmonization of European choice-of-law rules in the area of non-contractual relationships in general. It includes, however, one specific provision relating to choice-of-law issues in intellectual property infringement. Rome II has the form of a European Union regulation. As a result, it is “binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.”¹⁷³ The ALI Principles, on the other hand, are recommendations regarding the conflict-of-laws aspects of intellectual property rights cases in particular. Though they are not binding, the ALI Principles serve as a guide that could equip courts and legislators to better deal with complex choice-of-law issues pertaining to intellectual property.¹⁷⁴ This Part will analyze, evaluate, and compare both harmonization efforts.

A. Rome II—Harmonization of Choice-of-Law Rules Relating to Torts

In Europe, the drafting of Rome II has taken place over a period of several years. In 2002, the European Commission first presented a preliminary draft of a regulation on choice of law in torts and thereby opened a period of discussion.¹⁷⁵ During this discussion period, Rome II’s extension to intellectual property rights cases was particularly contested.¹⁷⁶ Oppo-

172. See ALI, *supra* note 13.

173. Rome II, *supra* note 171, at 48 (closing sentence); Consolidated Version of the Treaty Establishing the European Community, art. 249(2), Dec. 24, 2002, 2002 O.J. (C 325) 33, 65 [hereinafter EC Treaty].

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

175. See Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (May 2002), available at http://ec.europa.eu/justice_home/news/-consulting_public/rome_ii/printer/news_hearing_rome2_en.htm (last visited May 21, 2008) [hereinafter Rome II Consultation].

176. See Summary and contributions of the consultation “Rome II”: Follow up on ‘Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (“Rome II”)’ (Oct. 2002), available at http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/news_summary_rome2_en.htm (last visited May 21, 2008) [hereinafter Rome II Contributions].

nents argued that intellectual property law was dominated by the principle of territoriality that warrants special rules addressed in a separate instrument on intellectual property law.¹⁷⁷ As a result, major revisions have been made and a separate provision for intellectual property infringements has been added to Rome II.¹⁷⁸ Section 1 examines the *travaux préparatoires* (the preparatory work and the official record of negotiation) of Rome II, in particular the regime relating to intellectual property rights. An in-depth analysis of the current version of Rome II is undertaken in Section 2, followed by an evaluation of the current text and its implications for future copyright infringement cases.

1. *Travaux Préparatoires*

In May 2002, the European Commission first proposed the text for a planned regulation applicable to non-contractual obligations.¹⁷⁹ The regulation was part of an effort to facilitate the free movement of persons¹⁸⁰ by enhancing judicial cooperation in civil matters.¹⁸¹ The proposed preliminary draft of Rome II was a sequel to previous European harmonization efforts in the area of conflict of laws, in particular the “Brussels I” Regulation, which harmonized the areas of jurisdiction, recognition and execu-

177. See, e.g., Comment of European Federation of Pharmaceutical Industries and Associations on the ‘Commission Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (“Rome II”)’ (Sept. 27, 2002) (for a separate regulation of choice of law in intellectual property cases), available at http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/euro_feder_pharma_en.pdf. But see Comment of Institut für ausländisches und internationales Privat- und Wirtschaftsrecht der Universität Heidelberg on the ‘Commission Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (“Rome II”)’ (Sept. 14, 2002), available at http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/universitat_heidelberg_de.pdf.

178. See Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”), COM (2003) 427 final, art. 8 (July 22, 2003), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0427:FIN:EN:PDF> [hereinafter Rome II Proposal].

179. See Rome II Consultation, *supra* note 175.

180. See Consolidated Version of the Treaty on European Union, art. 2, Dec. 24, 2002, 2002 O.J. (C 325) 5 (“The Union shall set itself the following objectives: . . . to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures . . .”).

181. See EC Treaty, *supra* note 173, art. 61(c) (“In order to establish progressively an area of freedom, security and justice, the Council shall adopt . . . measures in the field of judicial cooperation in civil matters as provided for in Article 65(b) . . .”); *id.* art. 65 (“Measures in the field of judicial cooperation in civil matters having cross-border implications . . . shall include: . . . promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction . . .”).

tion of judgments in contracts, torts and trade law,¹⁸² and the “Rome I” Convention, which unified choice-of-law rules in contracts law.¹⁸³

In the preliminary draft of Rome II, intellectual property infringement was neither excluded nor specially addressed.¹⁸⁴ Consequently, choice-of-law questions on intellectual property infringement cases fell into the scope of application of the general choice-of-law provision, which read as follows:

The law applicable to a non-contractual obligation arising out of a tort or delict shall be the law of the country in which the loss is sustained, irrespective of the country or countries in which the harmful event occurred and irrespective of the country in which the indirect consequences of the harmful event are sustained, subject to paragraph 2.

Where the author of the tort or delict and the injured party have their habitual residence in the same country when the tort or delict is committed, the applicable law shall be the law of that country.

However, if it appears from the circumstances as a whole that there is a substantially closer connection with another country and there is no significant connection between the non-contractual obligation and the country whose law would be the applicable law under paragraphs 1 and 2, the law of that other country shall be applicable.

A substantially closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is linked to the tort or delict in question.¹⁸⁵

The following paragraphs will provide a section-by-section discussion of article 3 and its application to internet copyright infringement cases.

182. Council Regulation 44/2001, 2001 O.J. (L 12) 1 (EC).

183. Convention on the Law Applicable to Contractual Obligations 80/934/EEC, *opened for signature* June 19, 1980, 1980 O.J. (L 266) 1.

184. The draft offered the following general provision: “The rules of this Regulation shall apply to non-contractual obligations in any situation involving a choice between the laws of different countries.” Rome II Consultation, *supra* note 175, art. 1(1). It then offered a list of excluded obligations, none of which included intellectual property. Rome II Consultation, *supra* note 175, art. 1(2).

185. Rome II Consultation, *supra* note 175, art. 3.

a) Article 3 Section 1: *Lex loci delicti*

According to article 3(1) of Rome II, the *lex loci delicti* governs choice-of-law issues arising in intellectual property infringement cases.¹⁸⁶ This applicability of the *lex loci delicti* to intellectual property infringement issues has been subject to major criticism, in particular from intellectual property and conflict-of-laws scholars. One contention against the *lex loci delicti* rule was that it had been common state practice to apply the *lex protectionis* to cases of intellectual property infringement.¹⁸⁷ Such argumentation is flawed because the suggested international endorsement of the *lex loci protectionis* does not exist.¹⁸⁸ This argument alone would therefore not suffice to prevent a *lex loci delicti* approach.

A more substantial argument against application of the *lex loci delicti* to intellectual property infringement issues is that the European Commission seemed to interpret the *lex loci delicti* as leading to the application of the law of the place where the direct damage occurred.¹⁸⁹ With this approach, the Commission apparently intended to accommodate tort victims, as the state of direct damage generally coincided with their country of residence.¹⁹⁰ Yet this is not at all advantageous for copyright infringement victims. In fact, due to the territoriality of copyrights, direct damage would be in the country where the infringing act occurred.¹⁹¹ Moreover, as explained above, application of the *lex loci delicti* to internet copyright infringement issues would result in the application of multiple laws.¹⁹² Given these substantive disadvantages, the *lex loci delicti* approach was inadvisable and therefore abandoned in subsequent drafts of Rome II.¹⁹³

b) Article 3 Section 2: Law of the habitual residence

Another possible problem with respect to intellectual property rights was that the preliminary draft version of article 3(2) provided for the law of the habitual residence if both parties were residents of the same place.¹⁹⁴ This rule is contradictory to the principle of territoriality which governs intellectual property law. Specifically, the underlying rationale of article 3(2)—the balancing of the interests involved and affected—

186. *See id.* art. 3(1).

187. *See, e.g.*, Rome II Contributions, *supra* note 176, at 24-25.

188. *See supra* Part II.

189. *See* Rome II Proposal, *supra* note 178, at 11.

190. *Id.*

191. *See* Drexl, *supra* note 15, at 154.

192. *See supra* Section II.A.2.

193. *See, e.g.*, Rome II Proposal, *supra* note 178, art. 8(1).

194. *See* Rome II Consultation, *supra* note 175, art. 3(2).

conflicts with the strictly territorial character of intellectual property rights.¹⁹⁵ Yet, such a deviation from common principles of intellectual property law may be justified because it simplifies lawsuits, particularly in cases of ubiquitous infringement of copyrights on the Internet.

- c) Article 3 Section 3: Law of the country of the substantially closer connection

An alternative exception to applying the general *lex loci delicti* rule to copyright infringement cases could have been provided by article 3(3) of the preliminary draft. This section provided that if a case had a substantially closer connection with a country other than the one selected by *lex loci delicti*, the law of the other country would be applicable.¹⁹⁶ One could argue that the law of the country for which protection is sought would present a “substantially closer connection” in copyright infringement cases.¹⁹⁷ Yet, to avoid uncertainty and differing interpretation by the courts of the European member states, the European Commission cautioned in its revised 2003 proposal that the application of section 3 should be only under exceptional circumstances.¹⁹⁸ Consequently, the repeated application of the *lex loci protectionis* in copyright infringement cases was not an option.

Overall, article 3 of Rome II seems inadequate when it comes to choice-of-law issues in intellectual property cases. Accordingly, critics demanded an article specific to intellectual property infringements that would consider the particularities of intellectual property. The European Commission reacted to these criticisms by adding an article pertaining to infringement of intellectual property rights: Article 8.¹⁹⁹

2. *Analysis of the Current Version of Rome II*

After the initial consultation phase, the European Commission revised its original proposal and incorporated many propositions made by experts and other stakeholders. As for intellectual property infringement, the Commission largely adopted one version of a specific intellectual property article that was proposed by a group of experts.²⁰⁰ Article 8(1) of the revised Rome II Regulation provides the *lex loci protectionis* as the law applicable to intellectual property rights infringement cases in general. Ar-

195. See Drexler, *supra* note 15, at 155.

196. See Rome II Consultation, *supra* note 175, art. 3(3).

197. See Drexler, *supra* note 15, at 155.

198. See Rome II Proposal, *supra* note 178, at 12.

199. See *id.* art. 8; Rome II, *supra* note 171, art. 8.

200. See Rome II Contributions, *supra* note 176.

ticle 8(2) sets forth a specific rule for community intellectual property rights and article 8(3) explicitly excludes party autonomy for cases of intellectual property rights infringement. Beginning with the introduction, article 8(1) reads as follows:

The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country *for which* protection is claimed.²⁰¹

The text of article 8(1) of Rome II has slightly different wording than article 5(2) of the Berne Convention which provides that:

[T]he extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country *where* protection is claimed.²⁰²

Thus, in Rome II the *where* of the Berne Convention has been replaced by *for which*. The reason for this difference is much more than just a matter of style. Instead, with this new language the drafters of Rome II intended to avoid the common confusion that resulted from the ambiguous wording of article 5(2) of the Berne Convention as a choice-of-law rule. In fact, a literal interpretation of article 5(2) would suggest the *lex fori*, i.e. the law of the country where the plaintiff has filed his complaint.²⁰³ Yet, the country of the forum may not have a connection with the copyright at issue: a court may have been chosen merely because the defendant has assets in the forum state, when the copyright infringement occurred in another state. There is no reason for application of the law of the forum state in such a case.²⁰⁴ Consequently, the literary interpretation of article 5(2) of the Berne Convention was largely avoided and the clause was interpreted as pointing towards application of the *lex protectionis*. Some European Member States therefore will have to reassess their approach to choice-of-law issues in intellectual property infringement cases. Yet, as mentioned above, the *lex protectionis* proves to be problematic in internet copyright infringement cases.²⁰⁵

201. Rome II, *supra* note 171, art. 8(1) (emphasis added).

202. Berne Convention, *supra* note 17, art. 5(2) (emphasis added).

203. See VAN EECHOUD, *supra* note 9, at 103.

204. See *supra* Section II.B.1.a); see also VAN EECHOUD, *supra* note 9, at 103-05.

205. See *supra* Section II.B.2.

3. *Evaluation of Article 8(1) of the Rome II Regulation*

That article 8 of Rome II does not provide a special rule for internet copyright infringement cases is deplorable. The omission of a choice-of-law regulation for internet copyright infringement conflicts with Rome II's general goals, i.e. a European harmonization of choice-of-law rules for torts. As noted above, Member States differ substantially on the issue of what law should be applied to internet copyright infringement cases.²⁰⁶ Some endorse the idea of making internet copyright infringement cases more economically efficient by choosing the application of one single law to those cases—either the *lex fori* or the law of the country where the infringing act was committed (perhaps best called a broad conception of *lex protectionis*).²⁰⁷ Others, however, continue to apply the law of the country where the infringing act had its effect (perhaps best called a narrow conception of *lex protectionis*) even if that results in the application of multiple laws by the court seized.²⁰⁸

Under the current article 8 of Rome II, each approach is plausible. Proponents of the *lex fori* probably have the most difficulty explaining their conformity with article 8(1) of Rome II, but might argue that Rome II creates a vacuum to be filled by the most suitable law, i.e. the *lex fori*. In contrast, proponents of the broad and narrow conception of the *lex protectionis* can ground their contentions in article 8(1) of Rome II and its endorsement of the *lex loci protectionis* approach. Either approach results in a sufficient connection to the tort committed. Yet one resounding argument for application of the law of the country where the infringing content was uploaded is that it only points to the law of one country and is therefore more economically efficient for copyright infringement plaintiffs.

All of the above-described approaches are possible under the current version of Rome II. And considering the legal situation in the countries described above, such indeterminacy could lead to diverging jurisprudence on this matter in the various Member States, an outcome that the drafters of Rome II specifically aimed to avoid.

To avoid indeterminacy, a special provision on infringement cases that involve multiple laws would have been prudent. The final Sections of this Article will suggest a cascading approach to internet copyright infringement cases. A possible decision cascade could look like this: first to the law of the common habitual residence; if the parties do not have a common habitual residence, then second to the law of the country where the

206. *See supra* Section II.B.

207. *See supra* Section II.B.3 (France).

208. *See supra* Section II.B.4 (Belgium).

parties had a prior relationship; and if the relationship is not closely connected to the case at hand, then finally to the laws of the States towards which the parties primarily directed their activities.²⁰⁹

4. Comparing Rome II to *Itar-Tass*

A comparison of Rome II with *Itar-Tass*, the prevailing approach to the issue of choice of law in intellectual property infringement in the United States,²¹⁰ demonstrates the Berne Convention's failure to clearly resolve conflicts of law. In *Itar-Tass*, the Second Circuit negated any choice-of-law implications of Berne.²¹¹ The Second Circuit emphasized that it was not bound to any rule that may flow out of the Berne Convention. In fact, the court resorted to general choice-of-law rules, i.e. the laws applicable to torts in general instead of rules specially developed for intellectual property. The court thus achieved application of the *lex loci delicti*.²¹² In Rome II, however, the European Commission asserted that the Berne Convention was based on the principle of the *lex loci protectionis*.²¹³ Such discrepancy in approaches between the United States and Europe is unfortunate. Contrary interpretations of the Berne Convention counteract the very essence of a treaty meant to harmonize a multitude of differing copyright regimes. Therefore alignment of the two approaches should be the ultimate goal.

B. ALI Principles—Harmonization of Conflict-of-laws Rules in Intellectual Property Law on a Global Level?

The adoption of the ALI Principles could result in such alignment of the United States and European approaches.²¹⁴ Efforts to harmonize conflict-of-laws rules governing intellectual property rights on an international level advanced in 2001 when the American Law Institute (ALI) became interested in the project.²¹⁵ Since then, legal scholars and other experts from the United States and abroad have presented several draft proposals of the ALI Principles.²¹⁶ In May 2007, ALI members approved the pro-

209. For further information on the cascading approach to internet copyright infringement cases, see *infra* Section II.B.3.

210. See *supra* Section II.A.2.

211. See *supra* Section II.A.2.

212. See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90-91 (2d Cir. 1998).

213. See Rome II Proposal, *supra* note 178, at 20 (cmt. to art. 8).

214. See ALI, *supra* note 13.

215. See Dessemontet, *supra* note 174, at 850.

216. See Rochelle Dreyfuss, *The ALI Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?*, 30 BROOK. J. INT'L L. 819, 820 (2005).

posed final draft of the ALI Principles. The official text was recently published.²¹⁷ The following Sections briefly explain the nature of the ALI Principles, followed by a discussion of the provisions of the ALI Principles that relate to copyright infringement, and will conclude with an evaluation of the ALI Principles.

1. *Nature of the ALI Principles*

In contrast to Rome II, the ALI Principles lack authoritative force²¹⁸ and do not constitute a Restatement.²¹⁹ They merely propose a set of rules that courts, scholars, and lawyers can resort to in questions on conflict-of-laws issues in intellectual property law. They are aimed at supplementing, rather than changing, national law,²²⁰ and are guided by a vision of cooperation among courts.²²¹ Also, unlike Rome II, the ALI Principles do not regulate conflict of laws in general, but focus on conflict-of-laws issues in intellectual property law.²²²

Yet, close cooperation during the drafting process between intellectual property scholars and conflict-of-laws scholars becomes clear in the dogmatic precision in which the principles are formulated. For example, the ALI Principles clearly state that they refer to the substantive law of a state and not to its choice-of-law rules.²²³ Such clarification is welcome, because choice-of-law rules may possess different functional attributes: they may either refer to the substantive or choice-of-law rules of a given country.²²⁴ The ALI Principles' explicit reference to substantive law therefore advances legal certainty in conflict-of-laws cases. It also prevents *renvoi*, i.e. the referring of an issue back and forth between different choice-of-law rules.²²⁵ The structure of the ALI Principles propagates a clear division between jurisdiction and choice-of-law questions by consecrating each a separate part.²²⁶ In section 103 of the ALI Principles, the drafters

217. See The American Law Institute, <http://www.ali.org/> (last visited Aug. 4, 2008).

218. See Dessemontet, *supra* note 174, at 855.

219. *Id.*

220. *Id.* at 855-856.

221. See ALI, *supra* note 13 at 7.

222. *Id.* at xx.

223. *Id.* at 196. Rome II contains in Article 24 a similar provision that is less remarkable as the whole regulation focused on general choice-of-law theory. Prior case law in the area of international intellectual property, largely connived in the possibility of *renvoi*—if it touched the issue of choice of law at all.

224. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 37 (2006) (illustrative case raising that issue).

225. See SCOLES ET AL., *supra* note 28, at 134.

226. See ALI, *supra* note 13. Part II regulates jurisdiction issues and Part III provides rules for questions of applicable law. *Id.*

explicitly emphasize the distinction between questions of jurisdiction and choice-of-law issues:

(1) Competence to adjudicate does not imply application of the forum State's substantive law.

(2) A court should not dismiss or suspend proceedings merely because the dispute raises questions of foreign law.

The drafters of section 103, therefore, clearly reject decisions similar to *Subafilms* or *Def Lepp Music*.²²⁷ Instead, questions of jurisdiction and choice of law should be considered separately without being interrelated. Apart from this remarkable dogmatic precision, the ALI Principles also entail improvements for choice-of-law rules in copyright infringement cases, which will be examined in the following section.

2. *Analysis of the Final Draft of the ALI Principles*

The ALI Principles build upon the territoriality principle even for complex multinational cases.²²⁸ Section 301 provides:

1) Except as provided in §§ 302 and 321-323, the law applicable to determine the existence, validity, duration, attributes, and infringement of intellectual property rights and the remedies for their infringement is:

...

(b) for other intellectual property rights, the law of each State *for which protection is sought* . . .²²⁹

According to this provision, the general rule for copyright infringement cases is the *lex protectionis*. Notably, the provision also uses the clarified expression "for which" instead of "where."²³⁰ In this regard, the drafters of the ALI Principles explicitly refer to Rome II.²³¹ However, in contrast to the European Commission, the Reporters' notes specify that the Berne Convention (and other international instruments) would not imply a

227. See *supra* Sections II.A.1, II.B.1.

228. See ALI, *supra* note 13, at 3, 193-194.

229. *Id.* § 301 (emphasis added).

230. This language is the same as that of article 8(1) of Rome II, *supra* note 171. See *supra* Section III.A.2.

231. See ALI, *supra* note 13, at xx.

choice-of-law rule.²³² Further, the spectrum of the *lex protectionis* of the ALI Principles is much broader than that of Rome II. While the latter is only concerned with infringements, section 301 applies to issues of existence, validity, duration, attributes, and infringement.²³³ Section 301 of the ALI Principles thus merely provides for the general rule. The exceptions to this rule are contained in section 302 (party autonomy exception), section 321 (ubiquitous infringement exception), section 322 (*ordre public* exception), and section 323 (mandatory rules exception). The next two Sections focus on two exceptions that are of particular interest in the context of copyright infringement on the Internet: party autonomy and ubiquitous infringement.

a) Party Autonomy Exception (section 302)

The ALI Principles allow the parties involved to determine the law applicable to their case:

(1) Subject to the other provisions of this Section, the parties may agree at any time, including after a dispute arises, to designate a law that will govern all or part of their dispute. . . .

(3) Any choice-of-law agreement under subsection (1) may not adversely affect the rights of third parties. . . .²³⁴

According to this rule, parties may choose the law even after their dispute has arisen, provided they do not harm third parties with their choice. To leave to the parties the determination of the law applicable to copyright infringements may prove useful for cases of multi-state infringement (e.g., through the Internet), as the parties could conceivably agree on one single law to be applicable on their case. Yet, in cases of copyright infringement, one choice of law will often benefit one party much more than the other.

Thus, in the hypothetical, Françoise and Bill might simply agree on the application of German law, for instance, because the first infringing downloads occurred in Germany. But what if Germany's copyright law was particularly favorable to copyright owners? *Ex post* party autonomy in copyright infringement cases would prove impracticable because parties simply may not agree on a choice of law as a result of their diverging interests. In the hypothetical, Bill (the copyright infringer) might insist on application

232. *Id.* at 208.

233. Compare *id.* § 301 (general rule for law applicable to existence, validity, duration, attributes, and infringement of intellectual property rights), with Rome II, *supra* note 171, art. 8(1) (solely determining law for intellectual property infringement).

234. ALI, *supra* note 13, § 302.

of the law of the country with the most lenient copyright law, whereas Françoise (the copyright owner) might prefer application of the law of a country with very strong copyright protection. Given the diverging interests of parties on the choice of the law applicable to their case, party autonomy will likely not prove helpful in internet copyright infringement cases.

b) Ubiquitous Infringement Exception (section 321)

None of the above-discussed legal regimes presented a fully satisfactory solution for cases of copyright infringement on the Internet. As such, it is remarkable that the ALI Principles are the first to provide an explicit rule for cases of ubiquitous infringement. Section 321 reads as follows:

(1) When the alleged infringing activity is ubiquitous and the laws of multiple States are pleaded, the court may choose to apply to the issues of existence, validity, duration, attributes, and infringement of intellectual property rights and remedies for their infringement, the law or laws of the State or States with close connections to the dispute, as evidenced, for example, by:

- (a) where the parties reside;
- (b) where the parties' relationship, if any, centered;
- (c) the extent of the activities and the investment of the parties;
and
- (d) the principal markets toward which the parties directed their activities.²³⁵

According to this provision, the judge chooses the law applicable to a case involving multiple laws. In making such choice, the court must determine the law with the closest connection to the case. Section 321 enumerates examples to aid in determining the law with the closest connection and thus the law applicable.

When examining this list, it becomes clear that the ALI Principles do not—at least primarily and explicitly—endorse the law of the country where the infringing work was uploaded (country of origin), although such an approach is taken by some countries and advocated by some scho-

235. *Id.* § 321.

lars.²³⁶ The Reporters' Notes of the ALI Principles discard this type of approach for two legitimate reasons. First, the country of origin might be hard to determine due to the technical complexity of digital information networks.²³⁷ Second, the law of the country where the infringing work was uploaded could unduly benefit a savvy copyright infringer. An infringer could choose a country where copyright protection is relatively weak and upload an infringing work from that country.²³⁸

Consequently, the ALI Principles endorsed their unique approach. In the case of both parties being citizens and residing the same country, the court would be allowed to apply the law of their home country and not of the countries where the infringement may have had its effect. It has been argued that application of the law of the common habitual residence of the parties constituted a major deviation from the general territoriality principle. It may, however, be justified for practicability reasons.²³⁹ Generally, application of section 321 will probably be less an exception to the territoriality principle.²⁴⁰ In fact, it will lead to the application of either the law of the country where the infringement inflicts most harm or the law of the country where the infringing conduct originates (if at all determinable).²⁴¹

If, however, both of these laws differ considerably, the choice may be difficult to make and may be perceived as arbitrary.²⁴² Furthermore, if the best law for the case is not easily determinable, the court will likely lean towards applying its own law (*lex fori*).²⁴³ Application of the *lex fori*, however, would favor the copyright holder as he will most likely have chosen the court.²⁴⁴

Overall, the current version of section 321 of the ALI Principles may not prove sufficient in some cases for copyright infringement on the Internet. The introductory note to Part III of the ALI Principles on the Applicable Law offers a response to this, stating that "the Principles endeavor to set a broad and open-ended framework, rather than, perhaps prematurely, devising a full repertory of specific rules."²⁴⁵ Thus, the provisions aimed at ubiquitous infringement are flexible enough to evolve with time and

236. See, e.g., William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 457 et seq. (2000); see *supra* Section II.B.3 (discussion on France).

237. See ALI, *supra* note 13, at 248.

238. *Id.*

239. See *supra* Section III.A.1.b).

240. See Dreyfuss, *supra* note 216, at 843-844.

241. See Kur, *supra* note 80, at 977.

242. *Id.* at 977-978.

243. *Id.*

244. See *supra* Section II.B.1.a).

245. ALI, *supra* note 13, at 195.

new technological developments. Yet, such flexibility is not necessarily helpful when it comes to streamlining choice-of-law rules for cases of internet copyright infringement.²⁴⁶

c) Comparing Rome II and the ALI Principles

With regard to the proper choice-of-law regime for cases of copyright infringement, the basic provisions of both Rome II and the ALI Principles are consistent. Article 8(1) of Rome II and section 302(1)(b) of the ALI Principles provide for application of the *lex protectionis*, in its unambiguous form.²⁴⁷ Yet, while Rome II provides only a special rule for community rights and explicitly excludes party autonomy, the ALI Principles provide for several exceptions to the general *lex protectionis* rule, among other things, party autonomy and ubiquitous infringement.²⁴⁸ While it is debatable whether a party autonomy provision should have been included in Rome II,²⁴⁹ the complete omission of a rule on ubiquitous infringement is deplorable. It remains to be seen how the ALI Principles will serve their purpose, particularly when it comes to multi-state infringement involving numerous national laws.²⁵⁰

3. Will Courts Adopt the ALI Principles?

The previous Section analyzed and discussed major provisions of the ALI Principles pertaining to the law applicable to intellectual property cases. This Section will evaluate the ALI Principles, with an emphasis on a critical question: whether they are likely to be adopted by courts. To determine the answer, this Article will consider the parallels and differences between the ALI Principles and the intellectual property provision of Rome II. This will lead to a discussion of the question of whether the ALI Principles will serve their purpose.

As discussed above, the ALI Principles do not provide a perfect solution for cases of copyright infringement on the Internet because the drafters of the ALI Principles eventually settled on a stricter concept of territoriality than originally envisioned.²⁵¹ This attenuation occurred mainly for two reasons. First, adoption of a more traditional territoriality approach preserves state sovereignty interests. Second, and a more or less direct consequence of the first point, the endorsement by the ALI Principles of

246. For more on the question whether courts will adopt the ALI Principles, see *infra* Section III.B.3.

247. See *supra* Sections III.A.3, III.B.2.

248. See Rome II, *supra* note 171, art. 8(2); ALI, *supra* note 13, §§ 302, 321.

249. See *supra* Section III.B.2.a).

250. See *supra* Section III.B.2.b).

251. See Dreyfuss, *supra* note 216, at 842-43.

the territoriality principle will probably enhance the willingness of courts to resort to the ALI Principles for guidance.²⁵² Yet, the adoption of a more traditional territorial approach came with the sacrifice of lack of clarity in cases of ubiquitous infringement, as the current version of section 321(1) only gives examples instead of definite rules.

An earlier, less territorial version of the ALI Principles endorsed a so-called “cascading” approach.²⁵³ Its final forbearance is regrettable as the adoption of a decision cascade most likely would have entailed more definite results. Armed with a decision cascade, courts would no longer have the opportunity to make deliberate choices, but would have to follow step-by-step the connecting factors of the decision cascade. Decision cascades are quite common in general choice-of-law regimes.²⁵⁴ On the basis of section 321 (1) of the ALI Principles, a decision cascade for cases of ubiquitous infringement could read as follows:

(1) When the alleged infringing activity is ubiquitous and the laws of multiple States are pleaded, the court shall apply to the issues of existence, validity, duration, attributes, and infringement of intellectual property rights and remedies for their infringement,

(a) the law of the common habitual residence of the parties if the parties had their habitual residence in the same State at the time of the infringement and if at least one of them still lives in that State; otherwise

(b) the law of the State where a pre-existing relationship between the parties was centered if that relationship is closely connected with the infringement; alternatively

(c) the law(s) of the State(s) towards which the parties primarily directed their activities.

In the Bill-Françoise hypothetical, a court applying the proposed provision to the case would decide the case as follows: Françoise lives in

252. *Id.*

253. *See* ALI, *supra* note 13, at 250.

254. On an international level, see Convention on the Law Applicable to Products Liability, art. 3-4, May 4, 1971, 37 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 594. and to some extent Rome II, *supra* note 171, art. 3. On a national level, see, for example, Einführungsgesetz zum Bürgerlichen Gesetzbuche [EGBGB][Introductory Law to the Civil Code] Sept. 21, 1994, Bundesgesetzblatt [BGBl. I] III/FNA 400-1, as amended, art. 40.

Belgium, Bill resides in Great Britain, thus they do not have a common habitual residence and the first section of the proposed rule would not apply. There is also no evidence of any prior legal relationship between Bill and Françoise (e.g., a licensing agreement) that would be closely connected to the case. Consequently, the second section can also be skipped. Françoise, however, designated her work explicitly for the French market, which would lead to application of French law according to the third section of the proposed rule. If Françoise had directed her work at multiple countries, then the primary country would be the country of first publication or largest market size (in the rare cases of simultaneous publication). This solution seems perfectly in tune with general practices in copyright law as well as with common sense. The advantage of a decision cascade is that it provides courts with clear directions to determine the applicable law, which will most likely lead to more harmonized decisions on an international level. Any deviation from the traditional principle of territoriality seems justifiable given the limited applicability of the provision to cases of ubiquitous infringement where territorial consistency is no longer sustainable.

IV. CONCLUSION

The rapid technological progress that characterizes our current times has left the law struggling to keep pace. The recent establishment of the Internet as an integral part of our daily lives has had sweeping consequences for virtually all fields of law. The ease with which copyrighted material can be uploaded and made instantaneously accessible to a global audience requires a revolutionary rewrite of current copyright protection mechanisms. The existing jurisprudence in cases of copyright violations that span several countries is disparate and presents no uniformity on the method to determine the applicable law.

Three diverging methods can be extracted from the cases discussed in this Article: first, the denial of foreign copyright protection on the grounds of *forum non conveniens* and an implied application of the *lex fori* (in the Ninth Circuit in the United States and the traditional approach in Great Britain); second, application of the *lex loci delicti* (in the Second Circuit in the United States, in dicta in a recent decision by a British court, and in a recent French court decision); third, application of the *lex protectionis* (in German courts and in some new Belgian legislation). Yet, none of these countries have presented a convincing solution to the question of which law should be applied to cases of internet copyright infringement that implicate multiple countries' laws.

This Article has shown that the poor and inconsistent application of these choice-of-law rules has added further confusion and legal uncertainty. Therefore, the proper application of conflict-of-laws theory is essential to a satisfactory resolution of internet copyright infringement cases. This requires cross-fertilization of two once independently operating areas of law—intellectual property and conflict of laws. I predict that this will lead to the emergence of a novel interdisciplinary field that will require new collaborations between legal scholars of both camps.

Both the Rome II statute and the ALI Principles may be considered the first developments of such an emerging collaboration. Indeed, the application of either instrument may overcome the previous divergence in choice-of-law rules since they both have settled upon application of the *lex protectionis*. Yet, the fundamental issue of which law to choose when copyright infringement has occurred in several countries remains mostly unresolved. This Article's evaluation of the ALI Principles and the Rome II statute has revealed that the ALI Principles are better suited for the resolution of complex cases of copyright infringement on the Internet. Only the ALI Principles explicitly acknowledge the challenge that internet copyright infringement cases may present to traditional choice-of-law approaches.

Unfortunately, the solution proposed by the ALI Principles is not explicit enough to ensure a uniform approach to conflict of laws in internet copyright infringement cases. The ALI Principles list possible decision criteria without providing clear guidance how to proceed. As a result, the risk of continued confusion and lack of coherence in future jurisprudence is foreseeable.

Despite these more technical concerns, international harmonization of conflict-of-laws rules that target internet copyright infringement cases is a crucial step towards overcoming the limitations of more traditional territorial copyright law. Only the future will show how successful these recent attempts of harmonization will be. It is my hope that this Article provides valuable theoretical and practical guidance for a smooth transition from the current inconsistent and scattered national jurisprudence to an era of more consistent and comprehensive international copyright protection.