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CHOOSING LAW IN CYBERSPACE: COPYRIGHT CONFLICTS ON GLOBAL NETWORKS

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INTRODUCTION

The universal availability of copyrighted works is integral to the global information infrastructure (GII).[1] Works such as videos, recordings of musical performances, and texts can be posted anywhere in the world, retrieved from any database in a foreign country, or made available by on-line service providers to subscribers on a global scale. Acts that potentially violate exclusive copyrights can instantaneously and simultaneously occur in several countries. Because access to digital networks is universal and interactivity allows receivers and transmitters to change roles, it is difficult to determine the place where a work is created, published or exploited.

This scenario of global, simultaneous exploitation of works of art and literature on digital networks conflicts sharply with the current system of international copyright protection, which is firmly based on national copyright laws with strictly territorial effects and on copyright choice of law rules to determine which national copyright law or laws govern the acts of use. The choice of law rules have worked—and perhaps were not all that important—so long as acts of use such as the distribution of records or the performance of films occurred in discrete geographical areas. This process made localizing potentially infringing acts and applying the appropriate copyright law to such acts relatively simple.[2] Instant and simultaneous worldwide access to copyrighted works over digital networks, however, fundamentally challenges territo-

1. The term "global information infrastructure," also frequently called "cyberspace," stands for the worldwide agglomeration of computer networks that allow decentralized, simultaneous transfer of data in digital form. Computers linked to digital networks allow users to access and disseminate information almost instantaneously. Most significantly from a copyright law point of view, the GII allows users to retrieve information, including online services such as online video or music performances that have been made publicly accessible in remote databases. Another important component are bulletin board systems (BBSs) that function like electronic billboards and allow users to post information on the system or review and download information posted by other users. The existing system of computer networks is only a first stage of what the future might bring. Today's technology does not allow widespread exploitation of copyrighted works, especially with regard to music and films. Broadband technologies, however, may soon make it possible to create worldwide broadband communications networks, commonly referred to as the "information superhighway," which will allow users around the world to disseminate a virtually unlimited range of materials, including video programs. For a description of the technological, institutional, and social environment of digital networks, see ACLU v. Reno, 929 F. Supp. 824, 830–40 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997). *See also* Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993 (1994); EDWARD CAVAZOS & GAVINO MORIN, CYBERSPACE AND THE LAW (1994); Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 1–24 (1993).

2. *See, e.g.*, 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.05 (1996) (stating that conflict of laws problems have rarely proved troublesome in the law of copyright).

riality notions in copyright.[3] Such wide-scale access also challenges traditional copyright choice of law concepts because determining exactly where acts of use occur is frequently unclear.

Several commentators have pointed out that the digital age requires new solutions for more effective international copyright protection, including new choice of law rules.[4] These commentators have argued, in particular, that the current reliance on territoriality as the predominant principle of copyright choice of law rules might not survive in the era of the GII.[5] Other commentators have gone further, suggesting that a fundamental reform of national copyright laws is required.[6] A significant change in the system of international copyright protection may indeed be a desirable solution in the long term. Any agreement about significant changes, however, is unlikely in the short term. Considering the uncertainties produced by rapidly changing technologies and industrial structures, it even may be inappropriate to quickly adopt broad new legal rules. A gradual adjustment may be more

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3. *See, e.g., Reno*, 929 F. Supp. at 881 (finding that to impose traditional territorial concepts on the commercial uses of the Internet has dramatic implications).

Whereas this article focuses on copyright choice of law and the questions in cases concerning more than one country, jurisdiction is a closely related area where the combination of territoriality notions and the technology of digital networks raises significant questions. The issue there is to decide under what circumstances a defendant, by merely conducting business over digital networks, has sufficient contacts to a specific territory or state to be subject to personal jurisdiction in that territory's or state's courts. *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Digital Equipment Corp. v. Altavista Technology, Inc., 960 F. Supp. 456 (D. Mass. 1997); Hearst Corp. v. Goldberger, 1997 U.S. Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997). *See also* Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095 (1996).

4. *See, e.g.*, Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPR. SOC'Y 318 (1995); Paul E. Geller, *The Universal Electronic Archive: Issues in International Copyright*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT (IIC) 54 (1994); Jon Baumgarten, Emerging Conflict of Laws Issues in Private International Copyright Law, Paper presented at the Third Annual Fordham Law School Conference on International Intellectual Property Law (1995); Matthew Burnstein, Note, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L LAW 75 (1996); Paul Katzenberger, Internationalrechtliche Aspekte des Schutzes von Datenbanken, ZEITSCHRIFT FÜR URHEBER-UND MEDIENRECHT, Jul. 1992, at 332. For a discussion of patent law choice of law problems, see Burk, *supra* note 1, at 34.

5. *See, e.g.*, Paul E. Geller, *Conflicts of Laws in Cyberspace: Rethinking International Copyright*, 44 J. COPR. SOC'Y 103 (1996) (favoring most protective copyright law conflicts rules over traditional territoriality-based rules); Ginsburg, *supra* note 4, at 319–20 (questioning whether non-discrimination principle and territoriality concept will continue to exist when works are exploited on the GII).

6. *See, e.g.*, Andrew Christie, *Reconceptualising Copyright in the Digital Era*, 17 EUR. INTELL. PROP. REV. 522 (1995). Some commentators proposed more radical solutions and predicted the total collapse of the entire copyright system in the digital environment. *See*, John Perry Barlow, *The Economy of Ideas; A Framework of Patents and Copyrights in the Digital Age*, WIRED, Mar. 1994, at 84.

desirable in light of the potentially contentious questions arising in connection with the GII.[7]

This article contends that in the digital era, the current system of national, territorially limited copyright laws requires a flexible copyright choice of law regime. To promote certainty and predictability in the choosing of the copyright law applicable to acts of exploitation, choice of law rules should use the location of a user as the principal factor to determine the applicable copyright law. In appropriate circumstances, the choice of law rules should allow the application of a multitude of national copyright laws to single acts of use on digital networks. This article also argues that a broad application of flexible contract choice of law rules that respect agreements about the allocation of rights as much as possible is of preeminent importance in the digital era.

This article's discussion consists of three parts. Part I discusses the role of choice of law analysis on global digital networks. This section first demonstrates that traditional copyright choice of law rules and their strictly territorial conflicts approach are no longer adequate when copyrighted works are exploited on global digital networks that recognize no national borders. Part I then examines suggestions that we should abandon conflicts analysis altogether and adopt alternative ways to protect intellectual property on the GII, but dismisses these suggestions on the ground that none of these alternatives are viable. Part I concludes that use of intellectual property on the GII needs rules that determine which copyright laws apply to acts of use, even though proper choice of law rules for digital environments have yet to be developed.

Part II explores how copyright choice of law rules may be adapted to digital networks. Part II first considers the influence of new technologies on copyright choice of law analysis such as satellite broadcasting on copyright choice of law analysis, which for the first time has made the exploitation of copyrighted works inherently multinational. Part II then examines how choice of law rules, applied to digital networks, can most effectively balance important policy goals such as legal certainty, predictability, and effective enforcement. To this end, Part II proposes a flexible country of origin choice of law regime that is based on a two-step analysis, with a basic rule to determine the applicable law and certain modifications and exceptions. This approach is related to the Second Restatement's most-significant-relationship concept, but seeks a more specific and original adaptation for digital networks. First, Part II

7. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385 (1996) (Breyer J., plurality opinion) (arguing that in light of rapidly changing technology and industry structures it may be unwise and unnecessary to adopt broad rules).

suggests that the user's location provides the best connecting factor to determine the copyright law that governs acts of use on digital networks. Second, Part II argues that the protection of the right holder's interests may require the application of other copyright laws. This requirement appears justified in cases in which the exploitation of works on the GII has an identifiable and significant effect on the right holder's economic interests in several countries. Finally, Part II incorporates a foreseeability defense to ensure fairness toward the defendant.

Part III discusses the important role copyright contract choice of law rules play in a digital era for the international exploitation of works. Acts of use on digital networks almost inevitably implicate a multitude of copyright laws, and contract choice of law rules must protect the interests of lawful users of works to allow an efficient dissemination of works. Part III concludes that contract choice of law rules respecting the user's lawful acquisition of rights in one country must be broadly applied.

I. COPYRIGHT CHOICE OF LAW RULES AND THE CHALLENGE OF GLOBAL DIGITAL NETWORKS

Territorial views have traditionally dominated copyright choice of law analysis, but such views are at odds with the global reach of digital networks. Part I discusses this dilemma in greater detail. After summarizing the existing copyright conflicts rules, this section examines alternatives to choice of law, such as independently created, net-wide accepted norms that protect interests of "cyberspace" users, and prospects for harmonization of national copyright laws. This author submits, however, that avoiding a conflicts analysis on digital networks is not a realistic option. Finally, a review of recent research in the copyright conflicts area demonstrates that persuasive choice of law rules for digital environments have not yet emerged. The overall conclusion is that new efforts are required to make copyright choice of law fit for global digital networks.

A. *Traditional Choice of Law Rules*

If the use of a copyrighted work implicates the copyright laws of more than one jurisdiction, choice of law rules must determine which laws apply. Copyright choice of law rules follow a strictly territorial approach, and courts must look to the location where acts of use

occurred to decide questions of infringement.[8] The same basic copyright choice of law rule has been incorporated into international copyright law. Article 5(2) of the Berne Convention provides that copyright protection "shall be governed exclusively by the laws of the country where protection is claimed."[9]

It is remarkable that territoriality-based choice of law rules continue to be widely accepted in copyright cases even though such rules have fallen in disfavor in other areas.[10] This acceptance can best be explained as a result of the territorial nature of copyright law itself: protection of a copyrighted work exists independently in each country according to that country's grant of rights; protection under one country's copyright laws does not automatically result in the same protection outside that country's territory.[11] Intellectual property rights are therefore always "located" in the country that granted the rights and can be infringed only by acts occurring there.

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8. *See, e.g.*, Paul E. Geller, *International Copyright: An Introduction to International Copyright Law and Practice*, Int'l Copyright L. & Prac. (MB) § 3[1][b][i] (Oct. 1997); EUGEN ULMER, INTELLECTUAL PROPERTY RIGHTS AND THE CONFLICT OF LAWS 13–14 (1978).

9. *See* Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, art. 5(2), UNTS 221, 232 [hereinafter Berne Convention].

This choice of law rule has been complemented by a national treatment obligation. *See id.* art. 5(1); Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, art. 5(1), 33 I.L.M. 85 (1994) [hereinafter TRIPS Agreement]; World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, art. 4(1), WIPO Doc. CRNR/DC/95 [hereinafter WPPT]. National treatment requires that national copyright laws protect works of foreign authors under the same standards as domestic authors' works. In the case of rights of performers and record producers, national treatment refers to the equal treatment of domestic nationals and nationals of other treaty member nations.

National treatment also serves as a copyright choice of law norm because it ensures that the copyright law of the country in which infringing acts take place is always applicable, regardless of the copyrighted work's origin or the right holder's nationality. *See, e.g.*, Geller, *supra* note 5, at 106 (arguing that national treatment obligation is the principal choice of law norm in international copyright). Before national treatment obligations exist, however, infringing conduct must be localized in a certain territory.

10. Modern U.S. choice of law theory has abandoned the mechanical lex loci approach in tort cases in favor of a more flexible system. Choice-influencing considerations include the place with the most significant relationship to a claim, state policies, and affected government interests. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145(2) (1971); EUGENE SCOLES & PETER HAY, CONFLICT OF LAWS 583 (2nd ed. 1992). In European countries, on the other hand, choice of law in tort cases largely rests on the lex loci delicti rule, even though many exceptions from that basic rule exist. *See, e.g.*, MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE 134 (1995). For a discussion of modern choice of law concepts in connection with international patent litigation, see John Thomas, *Litigation Beyond the Technological Frontier: Comparative Approaches to Multinational Patent Enforcement*, 27 LAW & POL'Y IN INT'L BUS. 277, 322 & n.294 (1996).

11. *See, e.g.*, Györy Boytha, *Some Private International Law Aspects of the Protection of Authors' Rights*, 1988 COPYRIGHT 399, 402.

As with real property, intellectual property rights cannot be "moved" across national borders. The territoriality-based choice of law rules in multinational copyright infringement cases therefore resemble lex rei sitae rules to some extent.[12] Another, more widely accepted characterization of the Berne Convention's copyright choice of law rule is that it is an example of a lex loci delicti rule, as it relies on the location of the infringing acts to determine the applicable copyright law.[13]

Copyright choice of law has also seen proponents of a unilateral conflicts approach.[14] Some commentators have argued that Article 5(2) of the Berne Convention requires application of the copyright laws of the country where the litigation takes place (lex fori) even if the allegedly infringing acts occurred in another country.[15] These commentators have reasoned that pursuant to Article 5(2) of the Berne Convention, "protection is claimed" where a copyright infringement action is

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12. The term "lex rei sitae" refers to the law applicable at the place where the property is located. Along the same lines it may be argued that infringing acts must be assessed under the law of the territory where the intellectual property is "located."

13. The choice between lex rei sitae and lex loci delicti as the proper category may mainly be a labeling exercise that has little effect on the practical results. The lex rei sitae characterization is perhaps better able to explain why a strictly territorial approach has survived largely unchallenged in copyright conflicts, even though the First Restatement's territorial approach and the resulting strict lex loci delicti rule in most areas have been fundamentally criticized and no longer play a dominant role in multistate tort cases involving personal injury and damage to movable property. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377–90, 412 (torts); §§ 332, 358 (contracts) (1934). Real property is the only choice of law area where the First Restatement's authority remains intact, and even under the Second Restatement territorial ideas continue to be applied almost exclusively.

In light of the territorial nature of intellectual property and certain similarities with real property, the conclusion that the territorial lex loci rule remains appropriate in international intellectual property cases, even in "modern" choice of law times is hardly surprising. *See* Thomas, *supra* note 10.

14. Under a unilateral conflicts rule, a court would always apply forum law in copyright litigation, even if allegedly infringing acts took place in a foreign country, so long as the forum state had an interest in having its law applied. *See* Jane Ginsburg, *Copyright without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153, 169–73 (1997) (discussing copyright conflicts by examining under which circumstances U.S. courts may apply U.S. copyright law, even to infringing acts that occurred outside the United States).

15. Not all commentators have accepted territoriality or a lex fori approach as the basic choice of law rule. For a dissenting view proposing that the copyright law of a work's country of origin is always the applicable law, see Georges Koumantos, *Private International Law and the Berne Convention*, 1988 COPYRIGHT 415. The only example of such a choice of law rule is the 1994 Uruguay Round Act, P.L. 103–465 (1994), which introduced a choice of law rule into the U.S. Copyright Act in connection with the restoration of copyright protection for foreign works. Section 104A provides, with respect to the restoration of rights, that the initial author of the restored copyright must be determined by the law of the source country. 17 U.S.C. § 104A.

brought.[16] The arguments in favor of a lex fori rule, however, are unpersuasive and have failed to receive widespread support.[17] Most importantly, a lex fori rule invites forum shopping because the outcome of an infringement action depends on where the plaintiff brings the action. This is at odds with fundamental goals of international copyright, such as achievement of uniform results and certainty with regard to the copyright law applied in infringement actions, especially when new technology makes it increasingly likely that acts of exploitation have effects in a multitude of jurisdictions.[18]

Territoriality-based choice of law rules require that a court having been called to decide a multinational infringement case determines where potentially infringing acts occurred. If potentially infringing acts occurred in several countries, a court must apply the copyright laws of each country, even though they may characterize the relevant acts differently.[19] If, for example, video tapes of a film were reproduced in one

16. *See, e.g.*, Ginsburg, *supra* note 4, at 336–37 (favoring the application of the law of the forum country); Ulmer, *supra* note 8, at 10 (arguing that a literal interpretation of Article 5(2) favors application of the lex fori).

17. The Berne Convention's language may be ambiguous, but it does not mandate the application of the lex fori. The purpose of Article 5(2) was to clarify that the protection of a copyrighted work from another Berne Convention country is independent from the protection in the country of origin. Article 5(2) was not intended as a rule mandating the application of forum law. *See* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986 225–26 (1987) (arguing that a literal application of Article 5(2) would produce questionable results and that lex loci delicti rule is equally compatible with Article 5(2), so that copyright law of the country where the infringing acts took place should apply).

18. *See, e.g.*, Berne Convention, *supra* note 9, preamble (referring to uniform protection of copyrighted works).

Increased predictability and the protection of the parties' expectations is also essential with respect to the international exploitation of works when rights acquisition issues are involved. The law governing the acquisition of rights to exploit a work in a specific territory cannot be separated from the law governing infringement actions. Thus, if a license was granted for one country, only that country's copyright law could be applied to determine whether the use was lawful. If a court in another country were called upon to examine the lawfulness of the user's acts in the licensed country, the acts of use would have to be analyzed under the licensed country's copyright laws, i.e. under the lex loci delicti. If a court were to apply forum law it might reach the bizarre result that the user's conduct in the first country was unlawful because the user failed to obtain user rights under the lex fori. *See also* Michel Walter, *Contractual Freedom in the Field of Copyright and Conflict of Laws, in* COPYRIGHT CONTRACTS 224 (Herman Jehoram ed., 1977).

19. The characterization of the general legal nature of the issues litigated before the court is the first step in a choice of law analysis, so that the court can decide which set of choice of law rules it must apply. This first step is necessarily governed by the forum's legal system. *See, e.g.*, Scoles & Hay, *supra* note 10, at 52. If the plaintiff's claims are based on an infringement of (foreign) copyrights, the court would in this first step decide to apply the forum's copyright choice of law rules. The court would then locate potentially relevant acts of use in all countries involved and analyze what acts might trigger liability under the relevant copyright laws. In so doing, the court takes into account each country's scope of rights,

country without the right holder's authorization and then sold and displayed in others, and the copies were then sold in several countries and also used to publicly show the film, the copyright law of the first country would govern the reproduction of the tapes, and the copyright laws of each other country would determine whether the imports, sales, and public performances were lawful.[20]

Not surprisingly, applying strictly territorial choice of law rules to global digital networks creates formidable problems. The practicality of territoriality-based copyright choice of law rules is threatened by technology that allows single acts of use of a copyrighted work to have effects in several countries. It is no longer possible to neatly define where an "act of use" triggering the application of a national copyright law occurred. A person providing access to a copyrighted work on a website, for example, frequently cannot control where viewers and listeners are located. She may have even less control over the location of computers involved in the transmission of copyrighted works. Acts of use that may fall within an exclusive copyright are not only committed by the access-providing person, but they may also be initiated by end users who access the work. For end users, however, it may be equally impossible to identify the location of the source of the work they read and retrieve.

Consider as an illustration the video tape example occurring in a digital environment: The film is uploaded in digital format to a website on the GII, which possibly is located in another country, from where it can be retrieved by users anywhere in the world.[21] In this scenario it be-

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definition of protected works, construction of infringing conduct, and possible distinctions between copyright and neighboring rights. *See, e.g.*, T.G.I. Paris, May 23, 1990, 146 RIDA 1990, 325 (Fr.) (French court applying Italian law to unlawful reproduction in Italy and French law to distribution of copies in France). A court must be flexible enough to analyze allegedly infringing acts within the framework of a foreign copyright, even if the same acts would not trigger liability under the forum's copyright law. It would be insufficient if a court were to characterize the facts before it solely in terms of the forum's copyright law. *See* Geller, *supra* note 8, at 47–48 (arguing that copyright choice of law cases require analysis down to concrete component acts and discussing various methods of characterization).

20. The applicable national copyright laws for each jurisdiction do not only define the scope of rights. They also determine, separately for each jurisdiction, all other issues of substantive copyright law, including the types of works protected, the initial authorship with respect to protected works, recognition of moral rights, exceptions from exclusive rights, and standards of liability. For a discussion of the territoriality notion with respect to intellectual property rights, see Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505 (1997) (concluding that the territorial nature of copyright law does not support the extraterritorial application of U.S. law).

21. Broadcasting on the GII by "webcasters" is still in its infancy, mostly because of limitations imposed by present-day technology. Transferring the content of a video tape is too time consuming with today's commonly available equipment to be widely used. It is

comes an almost impossible task to determine according to strictly territorial criteria under which copyright laws importation rights, distribution rights, reproduction rights, or rights of display or performance may have been infringed.

Another potentially serious problem exists for users who attempt to acquire rights for a lawful exploitation of copyrighted works on the GII. Territoriality-based copyright choice of law rules tend to lead to a multiplicity of applicable copyright laws if works are exploited internationally. On the GII, this appears to be an almost inevitable scenario. As inconsistent standards of protection of copyrighted works persist among national copyright laws, difficulties are likely to arise when works are internationally exploited. The rules concerning authorship, for example, have not yet been harmonized. In some countries, only natural persons, and not corporate entities, can be authors. It is therefore possible that such a country might not recognize a work-for-hire relationship in the country where a work originated and where a corporate employer and producer of the copyrighted work has considered the work's author.[22] If, in addition, the copyright law in the country of exploitation assumes that certain of the initial author's rights—such as the right to oppose significant changes of the original work—are inalienable, the corporate producer's worldwide exploitation strategy may run into serious obstacles. The producer may own all exploitation rights in the country of origin—because the corporate employer holds all rights there—but not in other countries of exploitation, where the author retains inalienable rights.[23] The article's final part discusses conflicts

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foreseeable, however, that the necessary technological improvements will become available on a much broader scale.

22. *See, e.g.*, CA Paris, 1e ch., Feb. 1, 1989, 142 RIDA 1989, 301 (Fr.) (involving a ghostwriter who transferred all rights in a future novel in agreement governed by New York law and never became an author under U.S. copyright law, but was considered co-author for French copyright law purposes and retained certain moral rights in the work); ULMER, *supra* note 8, at 36–39.

If a film were created in the United States, for example, the film producer, as employer, most likely would become the initial owner of the U.S. copyright under the U.S. work for hire doctrine. *See* 17 U.S.C. §§ 101, 201(b) (1994) (codifying work for hire doctrine). A continental European copyright law, however, would still consider the (natural) persons who actually created the film as initial authors. This applies in particular to the director of the film, but perhaps also the script writer or camera man. The film producer may only acquire exploitation rights from them.

23. A person like a film director may therefore be considered an author and initial right holder in a European jurisdiction and may never hold any rights in the film on the other side of the Atlantic. A film director therefore may be able to rely on inalienable rights to oppose significant changes to the film in European countries and prevent the performance of the film on the ground that she never lost the right to oppose such changes under those countries' copyright laws, even though she could not prevent the significantly changed film's exploitation in the United States. *See, e.g.*, Cass. 1e civ., May 28, 1991, 149 RIDA 1991, 197 (Fr.)

problems related to the acquisition of rights and suggests that contract choice of law rules must be applied to address them.[24]

B. *A "New Approach": Avoiding Choice of Law?*

As digital networks progressively undermine territoriality notions, traditional copyright choice of law rules and their strictly territorial approach have come under attack. In an attempt to overcome territorial views and related choice of law concepts, proposals for a new approach to international copyright have emerged. One radical proposal avoids the application of copyright law altogether by creating a "cyber-specific" legal regime to protect intellectual property on the GII. A more conventional alternative is the harmonization of national copyright laws that would make the determination of the applicable law a less significant issue. Realistically, however, neither option is viable.

1. "Cyberlaw"

To avoid the application of national copyright laws and, therefore, choice of law problems in "cyberspace" altogether, commentators have envisaged legal systems that no longer rely on territorially defined rights and instead provide net-specific solutions to balance the interests of right holders and users. One example is the proposition that a legal regime modeled after the system of an international lex mercatoria would be better able to solve international problems of copyright protection.[25] A cyberspace lex mercatoria would presumably replace national copyright laws to provide the legal rules for digital networks that,

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(involving American film director found to hold moral rights in U.S. produced film, even though U.S. copyright law considered the film producer and not the director as author and initial owner of copyright).

To avoid the threat of disruptions and complications in the international exploitation of works it has been suggested to apply a country of origin rule, at least with respect to the issues of initial ownership and where works were created in a work for hire relationship. *See, e.g.*, Jane C. Ginsburg, *Colors in Conflicts: Moral Rights and the Foreign Exploitation of Colorized U.S. Motion Pictures*, 36 J. COPR. SOC'Y 81, 98 (1988); Jane C. Ginsburg, *Conflicts of Copyright Ownership Between Authors and Owners of Original Artworks: An Essay in Comparative and International Private Law*, 17 COL. VLA J.L. & ARTS 395, 411 (1993); Ginsburg, *supra* note 4, at 331–34. This view, however, is arguably inconsistent with international obligations under the Berne Convention. *See supra* note 9 and accompanying text.

24. *See infra* at Part III.

25. The most radical—and least realistic—model would abolish any property rights in connection with digital networks, arguing that the free diffusion of information will become the predominant aspect of the digital era. *See, e.g.*, Barlow, *supra* note 6, at 89. For a brief, but highly persuasive rebuttal of Barlow's ideas that focuses on the economics of information and property rights that apply to digital networks as much as to a real world economy, see Robert Merges, *Intellectual Property and Digital Content: Notes on a Scorecard*, CYBERSPACE LAWYER, June 1996, at 15.

comparable to the lex mercatoria, would be independent from national legal systems.[26]

The cyberlaw approach, however, is not persuasive. Assuming that lex mercatoria rules actually exist in the world of international business transactions,[27] there is no basis for an analogy in cyberspace. First, lex mercatoria rules are built on commonly accepted trade usages among merchants.[28] It is not at all obvious how, by analogy, commonly accepted "cyberusages" will ever develop. The "cybercommunity" is an open-ended group with an exponential growth rate. Such a group is too large and heterogeneous to allow the development of commonly accepted rules. Diametrically opposed interests within the "cybercommunity," between "cyber purists" and content providers, make the emergence of commonly accepted lex mercatoria-like rules that define forms of unauthorized use of copyrighted works almost impossible.[29]

Second, the GII lacks enforcement mechanisms comparable to informal sanctions that help to make trade rules effective among merchants. Merchants comply with trade rules based on custom, in part because they are aware that acting against commonly accepted standards of trade may exclude them from future transactions. Moreover, even though merchants may have opposing views in a specific case, they benefit from complying with the more efficient customary trading rules. The merchants would stand to lose if the system collapsed, and they

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26. *See, e.g.*, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Burnstein, *supra* note 4, at 112 (advocating uniform substantive rules for digital networks). *See also* Legal Advisory Board (LAB), Reply to the Green Paper on Copyright and Related Rights in the Information Society, <http://www2.echo.lu/legal/en/ipr/reply/reply.html> [hereinafter LAB Submissions]. Similarly vague is the suggestion to rely on "netiquette" standards instead of copyright enforcement. *See* Pamela Samuelson, Legally Speaking, *The NII Intellectual Property Report*, COMMUNICATIONS OF THE ACM, Dec. 1994, at 21. Conceptually related is the proposal to adopt a federal common law of BBS libel cases to avoid choice of law situations. *See* John D. Faucher, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045, 1068–72 (1993).

27. Whether such norms of international business transactions that are independent of national laws in fact exist is a matter of serious doubt. *See, e.g.*, Georges Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TUL. L. REV. 575 (1989); Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613 (1989).

28. To develop into commonly accepted standards that govern the relationships between merchants, certain patterns of conduct must be repeated over a sufficiently long period within the commercial community.

29. "Cyberpurists"—today's believers in a free-for-all cyber environment—and commercial content providers, who benefit from and defend strong protection of information and intellectual property, obviously hold very different views. *See* Merges, *supra* note 25, at 15, 18. For a different, perhaps overly optimistic, view concerning the development of standards on the GII that might become generally accepted "cyberrules," see Johnson & Post, *supra* note 26, at 1387; Burnstein, *supra* note 4, at 108–10.

would have to deal with more burdensome general contracts rules. Considering the size and diversity of the "cybercommunity," similar mechanisms cannot develop among users of digital networks.

Third, lex mercatoria proponents disregard that both a real world economy will continue to exist in an era of digital networks and real persons will continue to be the actors asserting their rights in intellectual property.[30] Lex mercatoria rules can apply to transactions within the commercial community only so far as they impliedly become part of contractual arrangements. Like other rules based on custom, lex mercatoria rules cannot bind outsiders who do not usually participate in transactions within the business community. Thus, even if consensus about a cyberspace lex mercatoria develops within a user group in the future, this consensus would have a similarly limited scope of application. If a work has not been created in "net-related commerce," for example, or the right holder's activities are limited to the real world economy, rules based on trade usages on digital networks cannot define the scope of the right holder's property rights in the work.[31]

2. Harmonized Standards of Protection

Uniform standards of copyright protection are a highly desirable response to a technology that ignores territorial boundaries. If national copyright laws provide essentially the same level of protection, the need to localize acts of use exactly and determine the applicable law is much diminished. The most important issue would then become finding the country that provides the most effective means of enforcement.[32]

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30. *See, e.g.*, Merges, *supra* note 25, at 15; Richard Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 346–47 (1996).

31. *See* Hardy, *supra* note 1, at 1037–40 (right holder with no contractual relationship to users cannot be bound by "cyberspace" custom); Burnstein, *supra* note 4, at 114 ("cyberspace lex mercatoria" can apply only between parties that availed themselves of a "law of cyberspace." Traditional choice of law rules must apply in other cases).

The rejection of the cyberspace lex mercatoria concept as a substitute for intellectual property rights and choice of law rules does not mean that customs on digital networks cannot play a role in the appropriate circumstances. Among users of bulletin boards, for example, customs might develop concerning the right to reproduce somebody else's messages and transmit them to other users without copyright infringement. *See, e.g.*, Hardy, *supra* note 1, at 1036–38. Customs can also help to define standards of reasonableness. *Id.* at 1040–41. *See also infra* note 149 and accompanying text (customs on digital networks may help to determine whether effects on right holder's economic interests were significant). The point is that the scope of application of customs on digital networks will be limited to cybercommunities that develop them and cannot replace property rights based on national intellectual property laws.

32. *See* Geller, *supra* note 4, at 56; Paul E. Geller, *New Dynamics in International Copyright*, 16 COLUM.-VLA J. LAW & ARTS 461, 472–73 (1992).

The international copyright community already took important steps toward greater harmonization of national copyright laws by adopting the TRIPS Agreement[33] and two international copyright treaties under the auspices of WIPO.[34] Most importantly, the two 1996 WIPO Treaties for the first time define an exclusive right to control the use of protected works on digital networks by requiring signatory countries to grant right holders the exclusive right to make protected works available to the public, which includes the right to make works accessible on the GII.[35]

The treaty provisions, however, will not harmonize national copyright laws comprehensively enough to render choice of law analysis obsolete.[36] Different implementing provisions are likely, given the conflicting opinions various countries expressed before and during negotiations of the 1996 WIPO Treaties about the characterization of making works available on digital networks. The characterization of transmissions of copyrighted works over digital networks was for several years recognized not only as the key issue in the debate over international copyright protection on the GII,[37] but also as one of the most controversial points of disagreement.[38] The U.S. White Paper's[39]

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33. *See* TRIPS Agreement, *supra* note 9.

34. *See* WPPT, *supra* note 9; WIPO Copyright Treaty, December 20, 1996, WIPO Doc. CRNR/DC/94 (1996) [hereinafter WCT]. For a summary, see, for example, Silke von Lewinski, *WIPO Diplomatic Conference Results in Two New Treaties*, 28 IIC 203 (1997); Thomas Vigne, *The New WIPO Copyright Treaty: A Happy Result in Geneva*, 19 EUR. INTELL. PROP. REV. 230 (1997).

35. *See* WCT, *supra* note 34, art. 8 ("Right of Communication to the Public"; WPPT, *supra* note 9, arts. 10, 14 (fixed performances, phonograms). All three provisions grant the exclusive right to make works (fixed performances, phonograms) available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. The WCT relates the right to the right of communication to the public already granted by the Berne Convention. The WPPT provides a genuine right to control such acts.

36. *See, e.g.* Mihaly Ficsor, The International Digital Agenda and Copyright and Related Rights: An Overview and Analysis, Paper presented at the Fordham Fifth Annual Conference on International Intellectual Property Law and Policy (1997) (stating that treaty provisions represent only an umbrella solution that allows WIPO members to implement the provisions related to the digital communication right through another right or even a combination of rights).

37. *See NII Copyright Protection Act of 1995: Hearing on H.R. 241 and S. 1284 Before the Subcommittee on Courts and Intellectual Property, the House Committee on the Judiciary, and the Senate Committee on the Judiciary*, 104 Cong. 57 (1996) (statement of Mihaly Ficsor, Assistant Director General, WIPO) [hereinafter Ficsor Testimony] (transmissions of electronic copies to the public are commercially important and easier to monitor and control than are reproductions made at home).

38. *Id.* at 60, (discussing points of disagreement among WIPO member countries with regard to the application of copyright laws to the GII).

39. *See* THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE (1995) [hereinafter NII Report].

discussion of transmissions of works, for example, focussed primarily on the right of distribution[40] and the right of reproduction.[41] The European Community's Commission's Copyright and Information Society Green Paper[42] suggested that point-to-point transmissions of works on digital networks fall under the right holder's exclusive rental right.[43] Even within the European Community this view was, and remains, highly controversial.[44] Other countries reportedly rejected the application of distribution rights to transmissions in electronic form and were even more skeptical of the rental right concept. Instead, they favored protection through a "communication to the public" right.[45] There is nothing to suggest that these different views will disappear any time soon. The differences among national copyright laws will actually transcend this narrow characterization issue, given the WIPO Treaties' confirmation that member countries have the right to provide for excep-

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40. *See* NII Report, *supra* note 39, at 213–17. The Report is ambiguous with respect to the question of whether the Copyright Act currently protects transmissions of copyrighted works on digital networks as part of exclusive distribution rights. The Report on the one hand, apparently does not endorse the court's finding in *Playboy Enterprises v. Frena*, 839 F. Supp. 1552 (D. Fla. 1993), that uploading and downloading of works falls under the distribution right. *See* NII Report, *supra* note 39, at 68–69. The Report, on the other hand, states that a suggested amendment to the U.S. Copyright Act, which would explicitly provide for an electronic distribution right does not create a new right. *See id.* at 213.

41. NII Report, *supra* note 39, at 64 (stating that reproduction right will be implicated by most NII transactions). Proposed legislation pending before Congress followed this approach. During the 104th Congress, identical bills were introduced before the House and Senate. *See* H.R. 2441, 104th Cong. (1995); S. 1284, 104th Cong. (1995). Progress on the bills has been stalled, however, and the bills have not yet been reintroduced during the 105th Congress.

42. *See* Green Paper on Copyright and Related Rights in the Information Society, COM(95) 382 final [hereinafter Green Paper].

43. *Id.* at 53–59. Community legislation defines "rental" as making copyrighted works available for use for a limited time and for commercial advantage. *See* Directive on Rental and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, art. 1(2), 1992 O.J. (L 346) 61 [hereinafter Rental Right Directive].

44. The Rental Right Directive's legislative history suggests that the rental right was associated only with tangible copies. *See, e.g.*, Silke von Lewinski, Rental Right, *Lending Right and Certain Neighboring Rights: The EC Commission's Proposal for a Council Directive*, 13 EUR. INTELL. PROP. REV. 117, 119 (1991); Robert Rosenbloum, *The Rental Right Directive: A Step in the Right and Wrong Directions*, 13 LOY. L.A. ENT. L.J. 547, 594 (1995). The extension of rental rights to electronic forms of distribution was criticized by the Commission/DG XIII's LAB. *See* LAB Submissions, *supra* note 26. LAB argues that the rental right approach is methodologically and conceptually flawed because rental right is part of, or exception to, distribution right. As online transmissions do not implicate the distribution right, they should not affect the rental right. Opposition from Member States may force the Commission to abandon the idea of extending rental rights to apply to digital communications to the public. *See* Follow-up to the Green Paper on Copyright and Relatd Rights in the Information Society, COM(96) 586 final at 13–14.

45. *See* Ficsor Testimony, *supra* note 37, at 60. Other countries argued primarily that only the distribution of tangible copies falls under the distribution right.

tions from the exclusive digital communication to the public right. The exceptions may even include statutory licenses.[46]

There are other, perhaps even more significant areas of differences among national copyright laws that make the emergence of a worldwide uniform level of protection of copyrighted works on digital networks unrealistic.[47] For example, national copyright laws might grant exceptions from exclusive rights with a different scope for fair use, private copying, and private communications over the GII, reflecting different ideas about where the dividing line between public interests and the interests of right holders should be drawn. Also, the duration of copyright law protection may differ. European countries have moved toward seventy-year post mortem auctoris ("pma") protection, whereas international treaties require only a fifty-year pma protection period. The crucial issue of online service provider liability appears far from being harmonized.[48] Differences also appear unavoidable with respect to authorship concepts and moral rights—the "wild card" in international copyright.[49]

C. *Searching for New Copyright Choice of Law Rules*

The choice of law conundrum is not going to disappear in the digital networks arena. An international consensus about the appropriate level of harmonization appears unlikely, at least in the foreseeable future, and the development of a "cyber-law" is not a credible alternative. Providing protection through national copyright laws, accompanied by appropriate

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46. *See* WCT, *supra* note 34, art. 10; WPPT, *supra* note 9, art. 16 (contracting parties may provide for limitations or exceptions to rights granted under the treaties); Agreed Statements Concerning the WIPO Copyright Treaty, Dec. 20, 1996, WIPO Docs. CRNR/DC/96 [hereinafter Agreed Statements] (contracting parties not precluded form applying Article 11bis(2) Berne Convention which allows states to determine under which conditions exclusive communication to the public rights may be exercised, which includes the right to grant of non-voluntary licenses).

47. *See* Ficsor Testimony, *supra* note 37, at 60; Geller, *supra* note 5, at 111–12; Ginsburg, *supra* note 4, at 324–26. *See also* François Dessemontet, *Internet, le droit d'auteur et le droit international privé*, 92 REV. SUISSE DE JURISPRUDENCE 285, 285–88 (1996) (arguing that achievement of harmonized international GII-specific standards of copyright protection appears unlikely and discussing differences between copyright laws).

48. *See infra* note 176 and accompanying text.

49. *See* Geller, *supra* note 8, at 246. Moral rights include the right of integrity and the right of attribution. *See* Berne Convention, *supra* note 9, art. 6bis. Moral rights are the "wild card" in international copyright law because they are capable of seriously interfering with the international exploitation of works. *See supra* notes 22–23 and accompanying text.

Other issues where harmonization has not been reached include, for example, standards to define co-authorship, contributory infringement, and margins between derivative works and newly created works, especially in the case of digital sampling and reprocessing. Database protection is also an open issue on the international level.

choice of law rules, therefore, remains the only viable option to protect copyrighted works on digital networks.

Efforts to localize infringing conduct on digital networks may be criticized for being too attached to conventional concepts of territorial laws and not sensitive enough for the non-territorial and extra-national nature of digital networks.[50] This criticism, however, is not justified. Choice of law rules are merely the logical consequence of state-granted property rights. If protection of intellectual property through property rights remains a vital element in digital environments in order to protect economic interests, and those property rights are granted on a country-by-country basis, it must be determined which country's copyright law applies to acts of use, even if real world rules incorporate almost inevitably some degree of arbitrariness when applied to digital networks.[51]

Moreover, even the virtual world of "cyberspace" has several points of attachment to the real world of persons and things. It requires, for example, persons who act, individually or as part of an organization, and who cause certain acts of use on digital networks. Moreover, computers functioning as servers are necessary to access the GII and cause the transfer of digital information between various points on digital networks. At some other points, people benefit from acts of exploitation—for example, customers viewing a film made accessible on the GII, persons using a computer program on a remote site, or discussion group participants reading a message posted on a BBS. The challenge for the conflicts scholar in this situation is to define at what points the virtual world of digital networks and real world of copyright laws and persons exploiting and consuming copyrighted products are reasonably connected to justify the application of a specific national copyright law.

The obvious need to adapt existing choice of law rules to digital environments has already stimulated a debate among copyright scholars. The concluding section of Part II examines two recent proposals that have incorporated interesting GII-related copyright conflicts ideas. The discussion will demonstrate, however, that their suggested conflicts rules are not yet satisfactory for digital environments.

1. Maximum Protection Rules

Paul Geller recently proposed choice of law rules for digital networks that essentially assume an infringement act implicating several copyright laws should be governed by the most protective copyright

50. *See, e.g.*, Burnstein, *supra* note 4, at 93–95. With respect to defamation choice of law problems, see Faucher, *supra* note 26, at 1056–66 (discussing and dismissing all major choice of law concepts to solve choice of law problems in cases of libel on digital networks).

51. *See, e.g.*, Merges, *supra* note 25, at 18–19; Zembek, *supra* note 30, at 346–47.

law.[52] A conflict between two potentially applicable copyright laws therefore would always be resolved in favor of the copyright law that provides the higher level of protection. If, for example, a film is exploited by a U.S.-located user on the GII that is still protected under German copyright law, protected only with respect to moral rights under French law, and no longer protected under U.S. copyright law, the right holder would be able to rely on German copyright law to obtain injunctive relief with worldwide effects. Eventually, the right holder could block exploitation in Germany and restrict exploitation in France even though she has to accept unrestricted exploitation in the United States.[53]

The most protective law approach appears attractive because it purports to provide simple rules and also fully respects the national treatment principle, which is a cornerstone of international copyright. It moreover considers the economic effects of the defendant's unauthorized use in the conflicts analysis, which, in appropriate cases, may be justified and necessary to protect the plaintiff's interests effectively.[54]

Paul Geller's suggested choice of law rules, however, are in the end not entirely persuasive. First, it is questionable whether governing principles of international copyright law really support the policy underlying Geller's proposal—favoring unilaterally and without qualification the highest level of protection of authors.[55] Even though international copyright treaties have been concerned with a gradual strengthening of exclusive rights, these treaties have concurrently accepted that countries have a right to determine exceptions from exclusive rights. The recent WIPO Treaties confirm this view, as they explicitly recognize the WIPO

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52. *See* Geller, *supra* note 5. Paul Geller actually states that courts apply the law(s) of the country(ies) in which remedies or sanctions take effect with regard to the infringing act at issue. *See id.*, at 106. This language may be misleading, however, as he proposes to apply the laws of all countries in which the work disseminated over digital networks is still protected, both with respect to the scope of injunctive relief and amount of damages. *See id.* at 107.

53. *See id.* at 112–14.

54. A second important element in Geller's proposal is his discussion of conflicts rules for copyright contracts. Geller proposes that without explicit agreement between parties, courts opt for the most restrictive construction of contracts to protect authors against arbitrary rights transfers. Presumably, this proposal means that in cases of conflict between two potentially applicable contract laws, courts should always select the law that is more protective of author's rights. *See id.* at 110.

Geller's concurrent consideration of copyright and contract issues is significant. As this article will argue in a later section, both issues form a whole in cases of cross border exploitation of copyrighted works and using appropriate contract conflicts rules is essential in digital environments. It is, however, doubtful whether contract choice of law rules that favor the position of authors against unduly broad rights transfers should be adopted. *See infra* Part III.

55. *See* Geller, *supra* note 5, at 112. He argues that his right holder-favoring rules are justified by international developments because increasing the right holders' protection is generally accepted as the overriding copyright policy in the international community. *See id.*

members' right to provide for exceptions from the newly created exclusive public access right. A country may therefore, within the requirements of the WIPO Treaties, take the deliberate step of favoring consumer interests and public interests over the interests of right holders.[56] The most protective law approach, moreover, finds no support in international copyright if conflicts among copyright laws exist in an area that either is not covered by copyright treaties—for example, conflicts about the identity of an author[57]—or in which one country extended its copyright protection beyond international treaty obligations—for example, by extending the term of protection beyond the fifty-year, pma term required by the Berne Convention.

In areas where international treaties do not define how rights are protected in "as effective and uniform manner as possible,"[58] or where some countries may have deliberately decided against copyright protection to strengthen the public access rights to works, a principle of favoring the most protective copyright law simply does not exist. This raises doubts about choice of law rules that require courts to apply in every case, without any balancing of interests, the copyright laws that are most favorable to authors. This problem especially becomes apparent where a defendant has acted in accordance with domestic law that deliberately provides for exceptions from exclusive rights or complies only with the minimum international obligations, and yet courts are expected to mechanically apply more restrictive laws of a remote jurisdiction, even if the effects there are minimal.[59]

Second, Geller's rules are far from simple despite the fact that simplicity is a declared goal of his conflicts approach.[60] Geller explicitly opposes choice of law rules that result in a multiplicity of applicable copyright laws and enable a plaintiff to opt for the most protective law among all possibly applicable laws, arguing that such rules unnecessar-

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56. *See* WCT, *supra* note 34, arts. 1(4), 8, 10; WPPT, *supra* note 9, arts. 7, 10–11, 14–16; Agreed Statements, *supra* note 46 (confirming that communication to the public right may be subject to limitations and exceptions). Liberal fair use exemptions might be another example where national policies prove incompatible.

57. Countries may disagree, for example, whether in an employment relationship the employer is considered the initial author of works pursuant to a work for hire concept, or whether the employee is the first author who may subsequently transfer exploitation rights to the employer. International copyright treaties provide no conclusive solution of this issue. *See supra* note 22 and accompanying text.

58. Berne Convention, *supra* note 9, preamble.

59. Geller's rule apparently would apply a "foreign" law as soon as a single person in a foreign country accessed the work over the GII. *See* Geller, *supra* note 5, at 106–7. Strict application of a "foreign" copyright law may be justified in some cases but appears unduly strict as a uniform rule. *See also infra* note 140 and accompanying text.

60. *See* Geller, *supra* note 5, at 112.

ily complicate matters.[61] Yet, his own rules achieve exactly this result: they allow a plaintiff to select the most protective law to obtain injunctive relief; they calculate damages based on all countries' copyright laws in which the work was still protected when it was exploited in the GII;[62] and they require carefully tailored permanent remedies that take into account all countries in which continued use on digital network infringes the plaintiff's copyright.[63]

The apparent contradiction between intended and actual results prompts two observations. First, the lack of simplicity in part originates in the failure to consider the one connecting factor that can be used without major complications—the defendant's location. This factor would allow for a straightforward selection of the applicable law by courts and in many cases avoid complicated inquiries in comparative levels of protection. Second, Geller's failed attempt to design simple choice of law rules[64] suggests that such an attempt may be a nearly impossible task because digital networks will almost inevitably involve complicated international fact patterns.

2. Lex Fori-Based Choice of Law Rules

Another set of choice of law rules, proposed by Professor Ginsburg, would essentially direct a court to apply the lex fori to a copyright infringement case, provided that at least one additional connecting factor to the law of the forum exists. The list of such additional factors includes the origin of the infringing act, the defendant's residence or nationality, and the defendant's effective business establishment.[65]

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61. *See id.*

62. *See id.* at 107

63. *See id.* at 114.

64. Paul Geller moreover suggests that choice of law rules requiring courts to localize the place of infringement in specific territories are no longer appropriate in a digital era. *See id.* at 105. His conflicts approach, however, requires exactly the same analysis because courts must determine where works have been received to grant injunctive and permanent relief and calculate damages.

65. *See* Ginsburg, *supra* note 4, at 338. Professor Ginsburg may have reconsidered her position in the meantime. Professor Dessemontet reports in his internet choice of law article about a common position that he and Professor Ginsburg have reached. Their three step model suggests that the injured party's residence or principal place of business should be the principal connecting factor to determine the applicable copyright law. If this place were not foreseeable, the place from which the infringing act originated should be the connecting factor. If both places could not be determined, the defendant's residence or principal place of business should determine the applicable copyright law. *See* Dessemontet, *supra* note 47, at 294. This article will consider aspects of the proposal in the next section.

Professor Ginsburg has developed yet another set of choice of law rules. *See* Ginsburg, *supra* note 14, at 168. She proposes that courts primarily apply the defendant's domicile or the place of the server from which infringing conduct originated. If the copyright laws in these places do not comply with international minimum standards such as those set forth

Professor Ginsburg's proposed choice of law rules are based on a modified emission theory[66] and combine both the benefits typically associated with that theory and the advantages of a lex fori approach. These rules are designed to avoid excessive forum shopping and to preserve the advantage of simplicity by designating only one copyright law to govern alleged multinational infringements.[67] The focus on the lex fori will usually protect the user of works against the application of unanticipated copyright laws, will result in relatively simple rules, and, especially from the court's point of view, will promote a relatively easy determination of the applicable law.[68] Another virtue of these rules is that they encourage litigation before court in the country that provides the copyright law applicable to the dispute. Applying forum law to a defendant who is located in the forum state will make it more likely that courts will grant interim measures and enforce criminal law provisions in copyright laws.[69]

Yet, in a digital environment, lex fori/emission-theory-based choice of law rules raise a number of concerns. First, as Professor Ginsburg

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either in the Berne Convention or in the TRIPS Agreement, courts should apply the copyright law of the countries of receipt. Professor Ginsburg's proposals appear to be somehow mutually incompatible.

66. "Emission theory" is a term used in connection with cross border broadcasts and refers to choice of law rules that determine the applicable copyright law solely according to the place from where the transmission of signals originates. *See infra* note 112 and accompanying text.

67. Ginsburg, *supra* note 14, at 337.

68. A simple lex fori approach will not result in greater predictability concerning the applicable copyright law if a court's jurisdiction over a defendant is based on a long arm statute that requires only minimum contacts to a territory. State long arm statutes have already been applied to digital network cases, sometimes with questionable results. *See, e.g.*, Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (finding sufficient contacts to Connecticut where an out-of-state software producer's website was accessible to Connecticut residents). *See also infra* note 162. Professor Ginsburg's choice of law proposal, however, ensures greater predictability by requiring an additional connecting factor before forum law applies, at least if the defendant's residence or business establishment in the forum are used as connecting factor.

69. A U.S. court faced with claims based on foreign law may, moreover, be inclined to dismiss actions on forum non conveniens grounds. *See, e.g.*, ITSI T.V. Prod. v. California Auth. of Racing, 785 F. Supp. 854 (E.D. Cal. 1992) (plaintiff's claim based on Mexican copyright law dismissed on forum non conveniens grounds), *modified*, 3 F.3d 1289 (9th Cir. 1993); Boosey & Hawkes Music Publishers, Ltd. v. Disney Co., 934 F. Supp. 119 (S.D.N.Y. 1996). This attitude may be deplorable, because it results in inefficient, duplicative litigation, but it is a phenomenon that must be kept in mind when proposing choice of law rules. *See also* Ginsburg, *supra* note 14, at 174 (criticizing *Boosey & Hawkes* court for dismissing foreign copyright claims even though cases had substantial contacts to the forum, and the United States was probably the only forum where all claims could have been litigated). European courts will not usually have the option to dismiss cases on *forum non conveniens* grounds, especially under the mandatory jurisdictional provisions of the Brussels Convention. *See* Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, arts. 2–16, 1968, 8 I.L.M. 229.

herself admits, application of the defendant's forum law allows defendants to manipulate the rules by locating themselves and their activities in countries with low levels of copyright protection and enforcement.[70] Especially in a case, in which the defendant is located in an infringement haven[71] and all acts of exploitation originate from the same country, the defendant could globally exploit works and yet remain outside the reach of any other country's copyright law. Such one-sided and defendant-friendly rules hardly appear justified in digital environments where protection of copyright interests carries great weight.

A second point of criticism is the reference, at least in one alternative, to the technical origin of allegedly infringing acts to determine the applicable law.[72] Relying on this technical aspect is particularly problematic on digital networks, given their decentralized structure, which may make it impossible to determine the location of a server from which a work is made available to the public. If a work is posted on a BBS, for example, it may be impossible for the user to predict the location of the BBS's server. Choice of law rules that rely on this technical aspect are unlikely to accomplish the desired goals of certainty, simplicity, and predictability.[73]

Obviously, both Professor Ginsburg's and Paul Geller's proposed conflicts rules incorporate valuable elements that must be taken into consideration in the discussion in Part II. Neither set of choice of law rules, however, already provides "cyber-proof" results. It has therefore also become clear that further study is needed to develop choice of law rules adequately adapted to digital networks.

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70. Ginsburg, *supra* note 14, at 337.

71. Infringement havens are countries with low levels of protection and ineffective enforcement.

72. *See id.*, at 338, 1st alternative. It would, in this scenario, still be necessary to establish the court's jurisdiction before a court would hear a case and (under Professor Ginsburg's rules) apply forum law. A plaintiff might argue, however, that the defendant's use of a server in the territory where the court is located is sufficient to establish personal jurisdiction over the defendant.

73. Finally, the rules also appear incomplete, as they do not provide a substitute choice of law rule that applies if two connecting factors do not coincide. It may not always be possible to achieve a unity of forum and forum law. If, for example, an infringement action is brought in a country where neither the defendant is present nor infringing acts originated, the rules will fail to determine a copyright law that applies to infringing conduct. *See also*, Dessemontet, *supra* note 47, at 293 (criticizing incomplete nature of Professor Ginsburg's rules and their tendency to unilaterally favor the interests of defendants).

II. ADAPTING CHOICE OF LAW RULES FOR GLOBAL DIGITAL NETWORKS

A. *Satellite Technology and Choice of Law Analysis*

The erosion of territoriality notions is not a completely new phenomenon in international copyright. To some extent, the difficulties arising from the exploitation of copyrighted works on digital networks resemble the situation created by the commercial application of satellite broadcasting technology.[74] Even though satellite broadcasting does not provide a perfect analogy to digital networks,[75] it does raise many issues that are relevant for the discussion of GII-related choice of law rules. Satellite broadcasting demonstrates in particular that copyright conflicts analysis must rely to a greater extent on policy considerations when the mechanical application of territoriality notions becomes less feasible.[76] To explore the effects of inherently multinational forms of exploitation of copyrighted works on conflicts analysis, this article will therefore turn to the conflicts debate related to satellite broadcasting cases.

1. Determining the Applicable Copyright Law(s) in Open Skies

Satellite technology, which allowed a simultaneous multinational exploitation of copyrighted programs, inevitably required new, more flexible, choice of law rules to replace strictly territoriality-based concepts. Some courts, supported by commentators,[77] decided to apply cumulatively the laws of both the country from where the broadcast originated and the country of reception. Under the so-called

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74. *See* Geller, *supra* note 8, at 52 (arguing that satellite broadcasts transmitted across national borders "stretched the notion of territoriality to the breaking point").

75. Even though in both cases the analysis of discrete, neatly separated acts of use in certain territories is an impossible task, GII-related challenges exceed the problems associated with satellite broadcasting. A broadcaster's control of transmitted signals is limited, especially if signals are not encrypted, but at least the countries within a satellite's footprint are determinable. On the GII, however, it may be impossible to anticipate where users that access a work are located. Satellite broadcasting, moreover, is a unidirectional communication that originates from a clearly identifiable source. The GII, on the other hand, allows interactive communication between transmitters and receivers which the receiver may initiate.

76. *See e.g.*, Dessemontet, *supra* note 47, at 188 (emphasizing the important contribution of satellite technology to copyright choice of law analysis); Geller, *supra* note 5, at 106 (arguing that functional copyright choice of law analysis is required where courts can no longer localize infringement in a certain territory). For a summary of copyright choice of law concepts associated with satellite broadcasting, see Laurence Kaplan & Joseph Bankoff, *Of Satellites and Copyrights: Problems of Overspill and Choice of Law*, 7 EMORY INT'L L. REV. 727 (1993).

77. *See, e.g.*, Adolph Dietz, *Copyright and Satellite Broadcasts*, 20 IIC 135 (1989).

"communication theory,"[78] a crossborder transmission was held to implicate the copyright laws of the countries where the program audience was located, and the broadcaster was therefore required to acquire rights for those jurisdictions.[79] As a result, the transmission of a program via satellite had to be cleared in all countries within the satellite's footprint to be lawful. By allowing the application of a multitude of copyright laws to a single act of transmission, courts have ensured broader protection of authors and right holders because they are able to control the acquisition of rights for each territory in which an act of exploitation has economic effects.[80] Enforceability is strengthened also because the cumulative application of the laws of the country of origin and of the countries of reception effectively ensure that the copyright law with the highest levels of protection ultimately determines whether the use of a copyrighted work was lawful.

The European Community's satellite broadcasting directive,[81] on the other hand, opted for the opposite rule with regard to satellite broadcasts originating from a Member State. The Directive's approach resembles

78. This concept was labeled "communication theory" on the ground that is focussed not only on the act of transmission but on the entire communication—from the source to the viewers—as the relevant act that falls under the right holder's exclusive copyright.

79. *See* Oberster Gerichtshof [OGH][Supreme Court] 4 Ob 19/91, *reprinted in* 23 IIC at 703 (1992) (Aus.); Oberlandesgericht Wien [OLG Wien] [Vienna Court of Appeals *reprinted in* GRURInt 537, *aff'd.*, Oberster Gerichtshof [OGH] [Supreme Court] 4 Ob 44/92 (Aus.), *reprinted in* 24 IIC 665 (1993); CAPAC v. International Good Music, Inc., [1963] S.C.R. 136 (Can.) (transborder broadcast from the United States into Canada found likely to infringe Canadian copyright law where 80% of the station's audience was Canadian and much of the advertising originated in Canada).

80. Some U.S. courts have avoided the consequence of a multiplicity of applicable laws. They have found U.S. copyright law to be applicable to the entirety of a multinational infringement claim as long as an initial act of reproduction occurred within the United States. *See, e.g.*, Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940); Update Art., Inc. v. Modiin Publ'g, Ltd., 843 F.2d 67 (2d Cir. 1988); Curb v. MCA Records, Inc., 898 F. Supp. 586 (M.D. Tenn. 1995). The idea of an extended, extraterritorial application of U.S. copyright law, where an initial act was located in the United States (root act approach), appears questionable, however. First, U.S. copyright law is arguably concerned with the U.S. market place. Properly construed, it is not designed to protect economic interests of intellectual property right holders in foreign countries. It therefore appears erroneous for courts to assume that the initial unauthorized act in the United States creates a constructive trust that includes revenues from acts of exploitation outside the United States in favor of the holder of domestic rights. Second, courts ignore the fact that acts of exploitation occur in part under the jurisdiction of a foreign copyright law. By unilaterally extending the reach of U.S. copyright law to acts outside the United States, the courts avoid a choice of law analysis that considers the interests of one of the foreign countries involved. *Cf.* Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1094 (9th Cir. 1994)), *cert. denied*, 115 S.Ct. 512 (1994) (casting doubt on the *Modiin Publishing* line of cases).

81. Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993 O.J. (L 248) [hereinafter Satellite Broadcasting Directive].

the so-called "emission theory" in conflicts analysis,[82] as this approach requires Member States to apply only the copyright law of the country of uplink to the satellite broadcast.[83] By requiring the application of only one copyright law to satellite broadcasts, the directive favors a more efficient exploitation and the uniformity of the applicable law because it allows the parties to settle all aspects of right acquisition under one national copyright law. This reflects the Community's main goal of facilitating rights acquisition and the exploitation of works because it eliminates the need to examine whether the user's acts had consequences elsewhere.

Perhaps surprisingly, a U.S. court recently reached yet another conclusion in a crossborder broadcasting case and found that the infringing act occurred only in the country of reception, whereas the copyright law of the country of emission did not apply at all. Based on this theory, the Ninth Circuit held in *Allarcom Pay Television v. General Instrument Corp.* that the transmission of a copyrighted work from the United States into Canada was governed solely by Canadian copyright law.[84]

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82. The Satellite Broadcast Directive's approach is technically not based on a choice of law concept. This approach adopts an "upstream solution" and defines the act of broadcasting in such a way that the relevant act occurs only in the country from where the signals are sent to the satellite without further modification. *Id.* art. 1(2). A choice among several countries' copyright laws therefore no longer exists as the signals are transmitted only from one country. The Directive's solution is nevertheless substantively equivalent to a choice of law solution: The exploitation of a copyrighted work affects the territories of several countries so that a choice between several potentially applicable laws is necessary. Moreover, the Directive's choice of law approach becomes apparent in a case of broadcasts originating from countries that are not EC Member States. According to Article 1(2), the law applicable to the satellite broadcast depends on the level of protection in the country of origin. Member States may continue to apply their domestic copyright law to broadcasts from third countries where the level of protection does not reach the Directive's standards of protection and no specific link to another Member State exists. In this case the determination of the law that ultimately governs the satellite broadcasts depends on a case specific interest analysis—a typical choice of law approach.

83. Under the definitions in Article 1(2), the act of communication occurs only in the Member State where the signals are introduced into the chain of communication. *See id.*

84. Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381 (9th Cir. 1995) (holding that a transmission of broadcasting signals did not infringe U.S. copyright law, although the broadcasts originated in the United States, and that state law claims related to the unauthorized broadcast from the United States into Canada were therefore not preempted).

It appears that rulings such as in *Allarcom* promote neither efficiency nor enforceability goals. In particular, the *Allarcom* court appears to neglect concerns about the effective enforcement against unauthorized uses of copyrighted works. The most effective remedy against the unauthorized broadcasts arguably existed under U.S. copyright law because it was the forum law and the court had personal jurisdiction over the defendant. Moreover, application of U.S. copyright law would have been in line with generally recognized principles under the Berne Convention and would not have infringed the interests of another country. *Allarcom* is therefore a puzzling decision that appears to be at odds with general principles of international copyright. Perhaps the best explanation for the result in *Allarcom*

2. Lessons from Satellite Broadcasting: Conflicts Policies in Non-Territorial Environments

The erosion of the uniform copyright choice of law framework in connection with satellite broadcasts is significant for several reasons. First, the disagreement over the appropriate choice of law rule for satellite broadcasts demonstrates that the traditional lex loci delicti rule provides no definite answer about the applicable copyright law in hard cases involving crossborder acts of exploitation. The decisions in favor of the communication theory or the emission theory were not simply deduced from the place where an act of infringement occurred, but resulted from additional concerns such as rights enforcement and efficient exploitation. By looking at the economic effects of a crossborder transmission, for example, courts were able to locate acts of use not only in the place where signals originated, but also in places where they could be received.[85]

Second, choice of law rules and the level of harmonization of national copyright laws are interdependent. In the satellite broadcasting context, for example, a prerequisite for adopting the emission theory-based satellite broadcasting rules in the Community was the minimum harmonization of Member State copyright laws in the area of satellite broadcasting. The greater the differences among copyright laws, on the other hand, the more persuasive are communication theory-based choice of law rules that enable right holders to rely on the copyright law that provides them the highest level of protection.[86]

Perhaps the most important general point emerging from the discussion of international satellite broadcasting cases is the crucial role that substantive and choice of law policies play in the formulation of copyright choice of law rules when territoriality concepts as the basis of international copyright protection erode.[87] Exactly the same phenomenon became apparent from the review of Paul Geller's and Professor

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is that it was not based on international copyright policies, but on the court's preemption concerns: as the court found that the U.S. Copyright Act did not apply to the act of transmission, state law was not preempted. The plaintiff could therefore bring an action based on state unfair competition law.

85. *See supra* note 79 (courts applying communications-theory-based choice of law rules) and note 84 (*Allarcom* court locating acts of use in country of reception).

86. *See, e.g.*, Ginsburg, *supra* note 4, at 336.

87. *See* Geller, *supra* note 5, at 105–06 (arguing that choice of law rules that cannot rely on strictly territorial categories must choose law according to certain policy goals such as the effectiveness of enforcement). *See generally* Lea Brilmayer, *The Role of Substantive And Choice of Law Policies in the Formation and Application of Choice of Law Rules*, *in* 252 RECUEIL DES COURS 9, 57 (Hague Academy of International Law ed. 1995) (discussing importance of substantive and choice of law policies in conflicts analysis).

Ginsburg's GII-related choice of law proposals.[88] The list of policies that in one way or another may influence copyright choice of law rules includes enforcement and efficiency concerns, as well as predictability, fairness, and decisional consistency goals. The following discussion explores how these policies can be accommodated by conflicts rules for digital networks.

a. Copyright Policies

Enforcement concerns undoubtedly have a the most prominent influence on copyright choice of law analysis. Communications-theory-based satellite broadcasting choice of law rules, as well as Paul Geller's GII proposal, exemplify this approach.[89] They result in the cumulative application of several copyright laws and therefore prevent the user's escape into "infringement havens."[90] With respect to digital networks, choice of law rules should arguably give substantial weight to the enforcement interests of right holders because copyrighted works are so vulnerable to unauthorized exploitation and because so much uncertainty surrounds the reach of exclusive rights.[91] This suggests that some sort of effects test that considers the economic impact of unauthorized

88. Paul Geller and Professor Ginsburg reached almost opposite conclusions when they considered what choice of law rules are most appropriate for digital networks. *See supra* notes 52–73 and accompanying text. The best explanation for their divergent views is that choice of law rules in each case were based on the author's preference for a single policy concern: Enforceability of rights and the protection of authors and right holders in one case, predictability and protection of the defendant's interests in the second case.

89. *See* discussion of Paul Geller's proposal, *supra* note 52 and accompanying text. For the development and application of the communications theory in satellite broadcasting cases, see *supra* note 78 and accompanying text.

90. Conflicts rules based on a communications theory or Paul Geller's most protective law approach moreover allow courts to assess damages based on infringing uses in several countries. Assessing damages by applying all relevant copyright laws may be especially important when the plaintiff claims statutory damages. If several copyright laws apply, a plaintiff can recover statutory damages under all applicable copyright laws that provide for this form of computing damages. Otherwise, the application of only one law limits the recoverable damages to one copyright law's statutory ceiling. *See* Geller, *supra* note 8, at 51–52. Geller, moreover, argues that the goal of providing effective remedies is best served where the plaintiff can choose between the copyright laws of several countries because injunctions may be more effective under the law of the country where the broadcasts originate, whereas the measure of damages should be controlled by the law of the country of reception.

91. Effective protection of rights is another important consideration outside the area of copyright law. *See, e.g.*, Scoles & Hay, *supra* note 10, at 635 (arguing principal goal of choice of law rules applicable in mass tort litigation cases is protection of plaintiff's rights). Even commentators who are highly critical of GII-related legislative proposals, viewed as unilaterally favoring the interests of right holders, assume that copyright protection is, in principle, necessary for the functioning of digital networks. *See* Marci Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 633; Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19 (1996).

acts of use on various markets and results in the application of a multiplicity of copyright laws may be justified on digital networks in appropriate circumstances, despite possible inconveniences for lawful exploiters of copyrighted works.[92]

Copyright choice of law rules also serve enforcement goals if these rules enable the plaintiff to always rely on the copyright law of the country in which the defendant is located, independent of other possibly applicable copyright laws. In cases in which a plaintiff seeks injunctive relief or enforcement of criminal laws, for example, courts may grant injunctive or criminal remedies only if they apply the lex fori and the court can establish personal jurisdiction over the defendant.[93] Relying on a user's location to determine the origin of infringing acts and the applicable law therefore appears useful, even though it may not be sufficient as the only connecting factor.

Efficient exploitation is another significant copyright policy with potentially great relevance for choice of law purposes. The satellite broadcasting directive is based on this concern.[94] Importantly, however, the directive also shows that the viability of such conflicts rules critically depends on the uniformity of underlying substantive copyright laws. This argument is especially relevant on digital networks so long as levels of protection differ significantly.[95] Thus, in the GII context emission-theory-based choice of law rules are currently not

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92. Users must acquire rights for all relevant countries before they can globally exploit copyrighted works. The practice of licensing online service providers, such as online radio stations, is slowly emerging in the United States and elsewhere. Such practices, however, might turn out to be insufficient for global exploitation. Licensing rights for a transmission on digital networks apparently started in the United States in 1995. *See, e.g.*, *Video 'Netcasting' is Making Strides Online*, BILLBOARD, Mar. 2, 1996, *available in* LEXIS, News library, Curnws file (ASCAP's view that transmission of musical work requires public performance license); *Net.Radio, AudioNet & ASCAP Sign Licensing Agreement*, BUSINESS WIRE, Nov. 20, 1995, *available in* LEXIS, News library, Curnws file (internet music licensing agreement between ASCAP and internet content provider); Edward Silverman, *BMI Songs Are Going On The Internet*, NEWSDAY, Apr. 7, 1995, *available in* LEXIS, News library, Curnws file (BMI performance license to online radio station, believed to be the first of its kind in the music industry). For similar developments in the United Kingdom, see, for example, *Media Futures: Musical Moneyspinners*, FIN. TIMES, Jan. 2, 1995, at 10 (Cerberus, a U.K. based online music service, obtaining license from Mechanical Copyright Protection Society). Under strict territoriality concepts of the communications theory, users that complied with their domestic copyright law and acquired the necessary exploitation rights might unexpectedly become exposed to liability under a foreign copyright law if a choice of law rule determines that certain acts of exploitation on the GII fall, within the right holder's exclusive rights in several countries.

93. *See also infra* note 114 and accompanying text.

94. *See supra* note 81 and accompanying text.

95. *See supra* notes 32–49 and accompanying text (discussing continuing significant differences among national laws in the protection of copyright on digital networks).

attractive for digital networks because they conflict with important enforcement concerns.[96]

b. Conflicts Policies

Predictability, fairness, and decisional consistency are overriding choice of law policies of general application even beyond the realm of copyright.[97] These policies should also play a role also in conflicts situations on digital networks, although accommodating these policies may not always be an easy task. Critics might question, for example, whether choice of law rules in the GII context should specifically address predictability concerns. These critics might argue that someone who makes works publicly available on digital networks must always anticipate that the works can be accessed by viewers throughout the world and therefore that her conduct may be subject to foreign copyright laws. In this situation, there is no need to specifically design choice of law rules—for example, by incorporating a foreseeability defense—that allow users as much as possible to know under which legal regime they operate.

Yet, arguing that every user must assume that her acts are potentially subject to all existing copyright laws because of the GII's global reach appears overly simplistic. That a work becomes globally available on the GII does not necessarily justify the conclusion that it is foreseeable that all possible copyright laws will apply to a single act of use. From a user's perspective, there may be cases where it is not reasonably foreseeable that a significant number of users located in foreign territories will access a work made available on the GII and that her acts also will be assessed also under some foreign copyright law(s). This concern appears especially persuasive if the defendant's acts were lawful under her domestic copyright law, and if she did not specifically target users in other countries. Fairness notions may, in this case, suggest that a foreign copyright law not be applied even though a work was accessible there.[98]

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96. *See supra* note 86 and accompanying text (arguing that harmonization is prerequisite for application of emission theory). *See also* Ginsburg, *supra* note 4, at 335–36 (exclusive application of country of upload's copyright law unsatisfactory absent serious minimum standards of harmonization).

97. *See* Brilmayer, *supra* note 87, at 72 (referring to predictability, decisional consistency, and fairness as methodological or process values in choice of law analysis); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f) (1971).

98. Predictability is closely related to notions of fairness and the protection of rights of individuals. *See, e.g.*, LEA BRILMAYER, CONFLICT OF LAWS 210–30 (1991) (arguing that a country's law that limits rights of an individual or imposes liability should apply only if the individual had sufficient contacts with the country); Brilmayer, *supra* note 87, at 60.

This suggests that GII-related conflicts rules arguably should incorporate foreseeability notions.[99]

Predictability is undoubtedly a crucial element, and perhaps of even greater importance with regard to the acquisition of rights for the "netwide" exploitation of works and the creation of a profitable commercial environment. In this context, predictability requires choice of law rules that minimize interferences with contractual relationships and honor to the greatest possible extent the parties' expectations concerning the transfer of global exploitation rights.[100]

Decisional consistency or uniformity requires that the outcome of a case should not depend on the place in which a court hears a case. A lex fori choice of law rule is generally considered incompatible with traditional copyright choice of law rules because a lex fori choice of law rule is the antithesis of decisional uniformity.[101] It appears undesirable as a principal choice of law rule in a digital environment. This argument is particularly persuasive if courts require only minimum contacts to a territory to establish personal jurisdiction over defendants, as acts of use regularly have some effects in a multiplicity of countries.[102]

Simplicity is also considered an important conflicts policy. Simple rules are important not only to satisfy the parties, but also to make the choice of law job more palatable for courts.[103] In fact, the authors of the above choice of law regimes have each emphasized simplicity as one of their goals, and these authors proposed rules that purported to promote simplicity by avoiding a multiplicity of applicable laws to a single act of use.[104] It is unclear, however, to what extent simplicity can be accommodated as a principal policy in a digital environment. These doubts are

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99. *See* Dessemontet, *supra* note 47, at 291 (emphasizing importance of predictability of applicable law in international context).

100. *See, e.g.*, Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 330 (1990); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. i (1971) (emphasizing importance of predictable results, especially with respect to contracts).

101. *See, e.g.*, Kramer, *supra* note 100, at 312–14 (arguing that *lex fori* choice of law rules neglect multistate policies, encourages forum shopping, and may be against the forum state's own interest).

102. *See, e.g.*, Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164–65 (D. Conn. 1996) (finding sufficient contacts to Connecticut where an out-of-state software producer's website was accessible to Connecticut residents).

103. *See, e.g.*, Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055, 1057 (7th Cir. 1987) (stating that "opponents of mechanical rules of conflict of laws may have given too little weight to the virtues of simplicity"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6(2)(g), 6 cmt. j (1971).

104. *See* Geller, *supra* note 5, at 112; Ginsburg, *supra* note 14, at 169 (speaking of the ever-present desire to keep things simple). *But c.f. supra* note 52 and accompanying text (criticizing Geller's attempt to design simple net-related choice of law rules).

particularly strong when simplicity means applying only a single copyright law to an unauthorized use of copyrighted works on the GII.[105]

In fact, courts have in the past accepted that the application of several copyright laws to crossborder acts of exploitation is a necessary consequence of the territorial nature of copyright laws. This has become most obvious in connection with satellite broadcasting, where courts introduced communications theory-based choice of law rules.[106] Singling out one specific copyright law to apply on digital networks may therefore unnecessarily deprive right holders of meaningful protection that courts are willing to provide under current copyright choice of law standards.

The complex world of "cyberspace," moreover, may make attempts to achieve simplicity unrealistic. Even without a conflicts element, litigation over the exploitation of copyrighted works on digital networks is a complicated matter. For example, determining what events in the course of a digital transmission fall within the right holder's exclusive rights is a highly controversial issue. On the recipient's side, there is considerable disagreement about whether (or to what extent) reading, downloading, or forwarding information received over the GII does (or should) fall within the right holder's copyright. On an international level, using a work on the GII will have effects in many territories and affect these conflicting interests there. Determining in a crossborder context the most meaningful connecting points where the digital and the real worlds intersect therefore becomes an almost inevitably complex task.[107] Moreover, forms of use on the net differ so widely—from customer-targeting web television to the exchange of individual messages—that a single, simple conflicts rule is unlikely to fit all cases. True, choice of law rules should not make an already unwieldy situation worse. Mechanically applying only one copyright law, however, to cases that raise such questions, may be inadequate and may result in covert resistance.[108] Courts may be unwilling, for example, to put pins in maps to choose law according to the place where a keyboard is located. Sim-

105. Applicability of only one law is a desirable goal, but primarily in connection with agreements for the acquisition of rights. *See infra* Part III.

106. *See supra* note 78 and accompanying text (discussing current copyright choice of law rules based on territoriality and national treatment that may result in the application of multiple national copyright laws to infringing conduct).

107. Unless, of course, one concludes that only the location of the user determines the single applicable copyright law—an undesirable rule in digital environments.

108. *See* Russell Weintraub, *Methods for Resolving Conflict-Of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 133 (arguing that attempts to simplify choice of law analysis with rigid rules have not worked before and will not work again, "unless we elect or appoint to our courts people who have room temperature IQS.")

plicity, important as it may be, cannot therefore be the overriding goal on digital networks that trumps all other policy goals.[109]

c. Conclusions

It is obvious that conflicts rules cannot equally pursue all of the above policy goals, which are sometimes conflicting, but have to find the proper policy mix for digital environments. The discussion of conflicts and copyright policy concerns suggests, first, that enforcement concerns are arguably strong enough on digital networks to justify effects tests that result in the application of several copyright laws to acts of exploitation. While in principle it may be attractive, and in certain cases justified, to apply only one copyright law to an act of exploitation, choice of law rules that apply several copyright laws in appropriate circumstances are not necessarily undesirable in the GII context. Second, the copyright law of the defendant's location should be among those copyright laws applicable to acts of use. Third, it is necessary to define cases in which the fairness to the defendant requires that her conduct is not subject to foreign copyright laws. Permitting efficient exploitation of rights should be the principal goal in the formulation and application of contract choice of law rules.[110]

B. *Developing Choice of Law Rules for the GII—Combining Country of Origin-Rules and Effects Tests*

The preceding section has demonstrated that choice of law rules must consider various, sometimes conflicting, interests. In light of the need to balance these interests, it appears that the most promising approach is a set of flexible choice of law rules that take into account the location from which a work was made publicly available on the digital network, but also consider whether the user's acts significantly affected the right holder's economic interests protected by copyright laws in other jurisdictions. This approach is conceptually similar to the approach followed by the Second Restatement,[111] which provides courts with a basic rule referring to the law that has the most significant relationship to acts of exploitation but allows the courts to apply other laws if there appear to be sufficiently strong connecting factors.

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109. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. j (1971) (stating that simplicity should not be overemphasized, even though it provides a goal for which to strive).

110. *See supra* note 98 and accompanying text (discussing need to protect parties' expectations); *infra* notes 223–232 and accompanying text (discussing net-related contract choice of law rules).

111. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (defining most significant relationship rule for tort actions).

1. Determining the Applicable Copyright Law I: The Origin of Acts on Digital Networks

There are several reasons why GII-related choice of law rules should rely primarily on the place from which an act of use originates to determine the applicable law. Applying the copyright law of the country of origin appears justified on conceptual grounds. An act of use of a copyrighted work on the GII occurs in the first place where a work is made available to the public.[112] The 1996 WIPO Treaties confirm this view because they provide for a communication to the public right as the principal right related to digital networks.[113]

A country of origin rule may also serve enforcement concerns because it encourages litigation in a forum that has good access to evidence and provides the law that initially decides whether the defendant acted unlawfully. The most effective remedies, moreover, may exist under the copyright law of the country in which the infringing act originated, especially in terms of discovery of evidence, injunctive relief, and criminal enforcement of copyright laws.[114]

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112. The term "act of use" generally describes the communication of a copyrighted work to the public by a user (including, for example, an information vendor or a private individual). This is in accordance with the 1996 WIPO Treaties, *supra* note 9 and note 34, which provide that making the work accessible to the public falls within the right holder's exclusive rights, but permit WIPO members to achieve the same level of protection through the grant of other rights, such as the rights of public performance, public display, distribution, or communication to the public. The term "act of use" therefore refers to both an active transmission to consumers—for example, if a user sends a message that incorporates a copyrighted work to recipients on a mailing list—and the making available of the copyrighted work to the public, which enables end users to retrieve the work. On access rights and other forms to control the communication of copyrighted works to the public on digital networks see, for example, Raymond Nimmer & Patricia Krauthammer, *Copyright on the Information Superhighway: Requiem for a Middleweight*, 6 STAN. L. & POL. REV. 25, 32–39 (1994) (discussing, under pre-WIPO Treaty circumstances, scope of performance right and right of display to control access to copyrighted works stored in digital form and arguing in favor of exclusive right to control access to information); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 387 (1995); Thomas Dreier, *Copyright Digitized: Philosophical Impacts and Practical Implications for Information Exchanges in Digital Networks*, *in* WIPO WORLDWIDE SYMPOSIUM ON THE IMPACT OF DIGITAL TECHNOLOGY ON COPYRIGHT AND NEIGHBORING RIGHTS 187, 198 (1993) (arguing that making works accessible to the general public becomes most characteristic act when works are used on digital networks).

113. *See supra* note 34 and accompanying text.

114. Injunctive relief will be most effective if granted by the jurisdiction where the defendant is located and where its allegedly infringing conduct occurs. Evidence, like records and witnesses will usually be located there. *See* Creative Technology, Ltd. v. Aztech System Pte, Ltd., 61 F.3d 696, 703 (9th Cir. 1995) (dismissing action between two Singapore-based companies alleging infringement of U.S. copyright law on forum non conveniens grounds, arguing, *inter alia*, that both parties, records, key infringing conduct, and bulk of witnesses were located in Singapore and that the case could therefore best be litigated there).

Provided it incorporates a workable definition of the place from which a communication to the public originates, a country of origin rule also more effectively serves the goals of predictability and ease of determination of the applicable law than do choice of law rules that rely exclusively or predominantly on the economic impact of an act of exploitation. Given the complex task of identifying places in which digital networks and the real word of users of copyrighted works intersect, using a relatively easily identifiable place as the principal connecting factor is crucially important. It can, moreover, be argued that the place where conduct originated, when compared to other places where the conduct had only economic effects, has the most significant interest in determining whether such conduct was lawful, especially if it is the place where the defendant is located.

Fairness notions also support the argument that the origin of an act of use should be the principal connecting factor, and other laws should apply only in specific circumstances. From the user perspective, being subject to the copyright laws of countries in which the work can be retrieved and received appears almost like an extraterritorial application of foreign copyright laws. This does not appear justified as a default rule on digital networks where the effects on other territories and markets are so difficult to control. Relying on the reception of a transmission to the public as a principal rule to determine the applicable law is justifiable in connection with crossborder broadcasts,[115] but this rationale is far less persuasive as a basic choice of law rule where works are used on the GII. The broadcaster at least knows in advance in which territories its transmissions will be receivable, even though it cannot specifically target or exclude certain countries without using encryption technologies. If works are made publicly available on the GII, the user no longer focuses on a specific audience, but makes works accessible for the global, general public. The user no longer actively controls the place of reception that can potentially occur almost everywhere in the world. This level of uncertainty suggests that the economic effects of acts of use should not operate as a principal connecting factor for copyright choice of law purposes.[116]

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115. The "communications theory" relied on the assumption that the act of broadcasting included not only the act of emission, but also the subsequent phase during which the broadcast is communicated to the public, and therefore ought to be subject to the copyright laws in the countries of reception. *See supra* note 78; WIPO, *Audiovisual Works and Phonograms. Preparatory Document for and Report of the WIPO/UNESCO Committee of Government Experts*, 22 COPYRIGHT ¶¶ 85–86, at 231 (1986).

116. This may be the main argument against Dessemontet's GII choice of law rules. *See* Dessemontet, *supra* note 47. Dessemontet's principal connecting factor is the place where unauthorized acts of use affected the right holder's economic interests. He defines this place

Choice of law rules using a country of origin concept must define the place from which the user's acts originate in order to determine which country's copyright law applies. Two criteria might provide connecting factors as the place of origin: the location of the user who causes certain acts on the network and the location of the computer from which works are made publicly accessible.[117] Identifying the country in which a transmission originated by the location of the user who is responsible for an act of use is the most appropriate solution for two reasons. First, it appears reasonable to require a user to comply with the copyright law of the country where he is located. Second, the rule increases certainty because it is relatively easy to identify the user's location, whereas it may be impossible to locate the place of a computer from which an act of use originates. The argument of increased certainty is particularly persuasive where the user is an individual.[118]

If an act of use occurred within a company's organization, it may be more difficult to determine the location of the user who actually caused an act of exploitation on digital networks. In this case, the company's principal place of business appears to be the appropriate factor to determine from which country the act of use originated because it provides the greatest degree of predictability.[119] In the alternative, one might assume that an act of use by a company originates from the place where the single decision about the content and the transmission of a program was taken. This concept, which has been considered in the context of

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as the right holder's residence or principal place of business. Dessemontet recognizes, however, that this place will not frequently be foreseeable for the user and he therefore suggests incorporating a foreseeability defense against the application of that law. The question remarks: how useful is a basic choice of law rule which incorporates a defense that frequently will result in its non-applicability.

117. *See* Ginsburg, *supra* note 4, at 338; Ginsburg, *supra* note 14 (suggesting as one connecting factor in choice of law rules the location of the user or the place of the technical origin of the infringing act).

118. *Cf.* Burnstein, *supra* note 4, at 104 (considering the location of a user's access provider as an appropriate connecting factor). In Burnstein's proposal, the location of the access provider would determine the user's "cyber-domicile," which should be one element to determine the applicable law. *Id.* at 107–08. Burnstein's reference to the access provider's location is ambiguous, however, as the term "location" may have different meanings. At least in one interpretation, Burnstein's proposal may lead to the same result as the rules suggested in this text: Regardless of the access provider's place of business or incorporation, it will usually offer local points of entry to the GII to its customers, even if it operates in several countries. The technical point of entry provided by the access provider therefore will usually point to the same law as the reference to the user's location. This result will not always prevail, however, as users may dial into a remote access provider's system.

119. *See* Ginsburg, *supra* note 14, at 172 (arguing that defendant's domicile should be one of the principal connecting factors to determine the applicable copyright law).

satellite broadcasting,[120] is not suitable for digital networks. The decision-making process in the context of digital networks will frequently be much more decentralized than in the case of a satellite broadcaster, where scheduling, programming, the acquisition of advertising, and the technical environment require long-term planning. It therefore may be difficult and unreliable to look to the place where a corporation decided about a transmission on digital networks.[121]

Selecting the location of the computer or database from which the defendant initiates an infringing transmission or causes an infringing reproduction as a connecting factor to determine the applicable copyright law appears much more problematic.[122] Some commentators have nevertheless considered allowing the plaintiff to elect the country where the database is located as an alternative "country of origin" for choice of law purposes.[123] Two arguments may favor this determination of the place of origin. First, several acts may occur on a server that technically fall under the right holder's exclusive copyright. Works are reproduced when stored on a server, and they are made available to the public there because the server is the place where other users can retrieve the work. Second, from a functional point of view, enabling the plaintiff to rely also on the law of the server's location will improve her position if that copyright law provides for greater protection than the country's copyright law in which the defendant is located. In fact, in some cases it may not be unduly difficult to determine the actual location where a work was made publicly accessible. If a user, for example, transmits a copyrighted work from a remote database, it might be possible to identify the database's location.[124]

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120. *See* Proposal for a Council Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, art. 1(b), 1991 O.J. (C 255) 3.

121. There are alternative ways to define where an act of use within a corporation originates. The EC's Satellite Broadcasting Directive, for example, provides that a broadcast originates in the country where under the broadcaster's control the program-carrying signals enter the chain of communication. *See* Satellite Broadcasting Directive, *supra* note 80, art. 1(2)(a) (communication to the public by satellite means the act of introducing, the program-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth). The exclusive reference to the origin of the act of transmission does not appear useful for digital networks, however, because works can be made available to the public at a remote site and it would therefore be easy to manipulate the applicable law.

122. *See, e.g.*, Ginsburg, *supra* note 4, at 335–36, 338.

123. *See, e.g.*, Dessemontet, *supra* note 47, at 292; Ginsburg, *supra* note 14, at 171.

124. *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996). Patterson was a customer of the Ohio-based service provider CompuServe. The standard CompuServe customer agreement recites that the agreement was made and performed in Ohio and was governed by the laws of the state of Ohio. CompuServe also offers customers the opportunity to exchange shareware. Patterson offered through CompuServe's server software under the

On the other hand, frequently it will be impossible to determine the location of computers involved in an act of exploitation on the GII. Transmissions of copyrighted works on digital networks may originate from a computer site in a different country, or works can be posted and reproduced in a remote computer's memory, and the actual location of such computers remains unclear. Moreover, in the case of distributed processing on networks, infringing acts may occur at several places at once and it may be difficult or impossible to identify the exact location where infringing conduct occurred.[125]

Allowing the plaintiff to rely on the copyright law of the place from which a transmission technically originates would therefore produce fortuitous results in many cases because a copyright law may apply that has no connection with the defendant, and the defendant could not have been aware of a remote site's location.[126] This suggests that some sort of foreseeability defense would be incorporated. If a choice of law rule would select the law according to the server's location in principle, that copyright law should not be applied if the defendant demonstrates that he could not have foreseen where the computer or database site was located.[127] Such a frequently applicable exception would significantly diminish the usefulness of the principal conflicts rule.[128]

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name "Windows Navigator" and sold several copies to customers in and outside Ohio. When CompuServe announced the release of its "CompuServe Navigator" software, Patterson alleged infringement of common law trademark rights. Litigation began when CompuServe brought a suit for declaratory judgment that its "CompuServe Navigator" software did not infringe Patterson's trademark rights. The court reversed the district court's dismissal of the case for lack of personal jurisdiction over Patterson, who was a Texas resident, and held that Patterson had sufficiently strong contacts to Ohio to establish prima facie personal jurisdiction. The issue most interesting from an intellectual property perspective is Patterson's assertion of common law trademark rights. He must have based his claim on the assumption that such trademark rights existed under Ohio law and were infringed in Ohio, apparently because CompuServe's principal place of business was located there. *Id.* at 1267. *See also* Zembek, *supra* note 30, at 363–64.

125. *See, e.g.*, Burk, *supra* note 1, at 39–41.

126. *See id.*, at 39–40. This is probably the main argument against Professor Ginsburg's first choice of law rule, which provides that the law of the forum country applies to define the existence and scope of rights if the infringing acts originated from the that country. *See* Ginsburg, *supra* note 4, at 338.

127. A foreseeability element to protect the defendant's interests can be found in several choice of law models for product liability cases. Similar concepts may be applied to digital networks. *See infra* note 156 and accompanying text.

128. It may be argued that referring to the location of a server as connecting factor is already practiced because the EC satellite broadcasting directive uses a similar concept. The Directive provides that the transmission originates at the location from which the program carrying signals are introduced into an uninterrupted chain of communication to the public. *See* Satellite Broadcasting Directive, *supra* note 81, art. 1(2)(a). This argument overlooks significant differences between satellite broadcasting and GII transmission that render this analogy unpersuasive. In the case of a satellite broadcaster, the selection of the place where program carrying signals are introduced into an uninterrupted chain of communication is the

It can, moreover, be argued that referring to the place of the server would be a pointless exercise because it relies on purely technical events. Choice of law (rules and legal rules in general) should be concerned about human behavior and effects on human lives and economic interests, and these rules should not rely on events that may have no connection whatsoever with the conduct of persons.

Even though one can identify arguments both for and against applying the copyright law of the server's location to acts of exploitation on digital networks, the arguments against applying such a choice of law rule are more persuasive. In most cases, this choice of law rule would not produce useful results in the first place. It may, moreover, create considerable uncertainty if the parties litigate either foreseeability issues or the exact location of computers. Most importantly, enforcement interests do not really warrant using the server's location as a connecting factor. They are much more effectively protected under the following choice of law rule which considers the economic effects of acts of exploitation.

2. Determining the Applicable Copyright Law II: Identifying the Place of Injury and Significant Effects on Economic Interests

Determining the applicable law according to a strict country of origin rule creates risks. Defendants may relocate into countries with low levels of copyright protection and globally exploit copyrighted works, subject only to the country of origin's (perhaps inadequate) copyright law. Inadequate levels of protection would be "exported" to the entire GII.[129] Enforcement interests may therefore justify the application of a multiplicity of copyright laws to alleged infringing acts of use. Such interests are particularly apparent if acts of use in one country impair the right holder's economic interests elsewhere. Effects on the right holder's economic interests in various countries should therefore be relevant for digital network-related choice of law rules. At the same time, choice of law rules ought to protect users against the application of unanticipated foreign copyright laws where the contact to a foreign location is not substantial. Balancing these conflicting concerns require that the impact on economic interests be significant before a right holder may also enforce her rights under "foreign" copyright laws.

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result of a deliberate decision, and the process remains under the broadcaster's control. This element of deliberate and systematic control is in almost all cases absent on digital networks.

129. *See supra* note 113 and accompanying text. Even in cases in which the country of origin's copyright law complies with basic international treaty obligations, significant differences among other countries' copyright laws are still possible—e.g., duration of copyright protection—and a user may attempt to take advantage of these difference by exploiting works from a country with lower levels of protection.

One likely objection to such a concept is that relying on economic effects to determine the applicable copyright law and foreseeability defenses introduces too much uncertainty into the choice of law analysis, especially in a digital environment where the location and identity of users is difficult to determine. While concerns about the lack of certainty and practicality are legitimate, these concerns are not conclusive arguments against the use of an effects test in a copyright choice of law analysis. Evaluation of the overall effects and intensity of use in a specific territory is not a completely unfamiliar concept in the choice of law context. This approach has been used in cases involving copyrights, patent infringement cases, and in areas not related to intellectual property. An effects test was applied in copyright cases to terrestrial broadcasts where the signals were received in a neighboring country's border area, although reception of the signals there was not intended ("non-intentional spill over"). There was consensus that no infringement existed in the second country.[130] Along the same lines, it was suggested that a country's copyright law would not apply where only a very small part of that country came within a satellite's footprint.[131] Similar concepts have been suggested for intellectual property cases in general.[132] Antitrust law is another well-established example in which an effects test is used to determine whether domestic law can be applied to conduct in a foreign country.[133]

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130. *See, e.g.*, Mario Fabiani, *Copyright and Direct Broadcasting by Satellite*, 1988 Copyright 17, 23–24; WIPO, *supra* note 115, ¶ 181; Michel M. Walter, Grundlagen und Ziele einer österreichischen Urheberrechtsreform, *in* FESTSCHRIFT 50 JAHRE URHEBERRECHTSGESETZ 233, 237 (Robert Dittrich ed. 1986).

131. *See, e.g.*, WIPO, *supra* note 115, ¶ 23; Fabiani, *supra* 129, at 24.

132. For a discussion of multinational infringement cases, particularly in the context of patent rights, see Dan Burk, *Transborder Intellectual Property Issues on the Electronic Frontier*, 6 STAN. L. & POL.Y REV. 9, 15 (1994). *See also* Burk, *supra* note 1, at 66 (rejecting to the so-called "temporary presence" doctrine used in patent infringement cases to limit the reach of U.S. patent laws). In *Brown v. Duchense*, 60 U.S. 183 (1857), the Supreme Court held that U.S. patent rights were not infringed where a French vessel carrying a device that fell within the scope of a U.S. patent landed in a U.S. port. The effects on the holder of U.S. patent rights were insufficient to warrant the application of U.S. patent law. *See also* Paris Convention for the Protection of Industrial Property, March 20, 1883, art. 5ter, 828, U.N.T.S. 305, 322 (exceptions from patent infringement where vessels, aircraft or vehicles temporarily or accidentally enter a country's territory).

133. U.S. antitrust laws currently require that the effects of foreign conduct on U.S. trade be substantial and reasonably foreseeable before U.S. law applies extraterritorially. *See* Hartford Fire Ins. Co. v. California, 113 S. Ct. 1891 (1993) (Sherman Act applies to foreign conduct that was meant to produce and did produce substantial effect in the United States). Courts have therefore dismissed cases for lack of jurisdiction where the anticompetitive effects on U.S. commerce were insignificant. *See, e.g.*, National Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981); Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984). The application of antitrust laws to conduct in foreign countries is usually discussed under the label of extraterritorial application of regulatory laws and not as a choice

Another, perhaps more important objection to an effects test in connection with digital networks is that markets and notions of territories where acts of use have economic effects are of no significance in a digital environment.[134] In the end, however, this argument is also unpersuasive. Effects on markets are relevant for copyright law purposes, whether the medium to deliver copyrighted works to a consumer are hard copy books, satellite broadcasts, or digital networks. Copyright, like other property rights in intellectual creations, is mostly about the commercial exploitation of protected works. Copyright grants exclusive rights to exploit works by offering and selling them to consumers and other users. If works are made available through "cyberspace," the same logic applies.[135] The exploitation has "economic effects" somewhere because it interferes with the right holder's exclusive right to offer and sell entertainment products and other copyrighted works to consumers who access the work through digital networks. Conceptually, it therefore appears persuasive to consider whether acts of exploitation caused injury by harming economic interests in certain territories in order to determine the applicable copyright law(s).

To make this idea work and provide courts with operable rules, it is necessary to identify certain standard situations in which such effects on the economic interests of the right holder typically will be significant enough to justify the application of copyright laws outside the country of origin. The following discussion proposes that such effects will typically exist in two cases: exploitation of copyrighted works on the GII where the user has commercial motives, and cases where private, noncommercial use has substantial effects on the right holder's economic interests in other countries.[136]

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of law issue. The two areas share certain similarities, however, as the extraterritorial application of a country's law is not unlike a unilateral choice of law rule. For a discussion of the parallels among extraterritorial application of public, regulatory laws and choice of law rules, see Andreas Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, *in* 163 RECUEIL DES COURS 311, 322–29 (Hague Academy of International Law ed. 1980).

134. *See supra* note 25 and accompanying text (discussing suggestions that cyberspace is separate from the world of property and economic principles).

135. For a discussion of economic principles and the developments of markets in connection with cyberspace, see, for example, Merges, *supra* note 25, at 19–21; Dessemontet, *supra* note 47, at 291, 294 (using an effects test to determine applicable law while suggesting, at least in one alternative, that only the law at the right holder's principal place of business or residence should be applied). *See also supra* note 50 and accompanying text.

136. Commentators have proposed a similar commercial/private use distinction in the context of domestic U.S. copyright law. They have argued that considering the effects on the right holder's economic interests should help to distinguish infringing from non-infringing use. *See generally* Litman, *supra* note 91. Professor Litman admits that implementation of the private/commercial use test would be difficult, but she believes that courts would be able to develop sensible solutions. *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO

a. Commercial Exploitation

A case in which enforcement interests will frequently justify the application of several countries' copyright laws is the commercial use of copyrighted works on digital networks. If a user commercially exploits copyrighted works on digital networks, he must assume that his acts will affect the right holder's commercial interest outside the user's territory, considering the GII's global nature. Certain similarities exist in this case with crossborder satellite broadcasts, where choice of law rules in favor of the application of the countries of reception's copyright laws were based on the assumption that the effects on the right holder's interests were significant in every country situated in the satellite's footprint.[137] Intentional commercial exploitation justified application of the countries' copyright laws where the transmission could be received.

Applying the same rationale to the GII appears persuasive because exploitation of a work on the net for commercial purposes can significantly affect the right holder's economic interests in countries where the work is available.[138] If online service providers, for example, grant customers access to services such as video on demand or online music programs without attempting to geographically limit the group of customers that may receive services,[139] reception of services in other countries is likely.

ARTS & ENT. L.J. 29, 35–36 (1994); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 177–96 (1991). For a more comprehensive, yet largely inconclusive discussion of the related distinction between public and private use in the context of digital networks, see Elkin-Koren, *supra* note 112, at 390–99. The distinction between commercial and non-commercial use is also important, although not conclusive, under the U.S. copyright fair use provision. *See* 17 U.S.C. § 107 (purpose and character of use is one factor to determine availability of fair use defense). *See, e.g.*, Princeton University Press v. Michigan Document Serv., Inc., 99 F.3d 1381, 1386–87 (1996), *cert. denied*, 117 S. Ct. 1336 (1997) (emphasizing effects on potential market for copyrighted works in fair use analysis). European Community, law along the same line, makes a distinction between commercial and non-commercial use. The Rental Right Directive distinguishes "rental" and "lending" with the commercial use criterion and permits certain derogations only from the public lending right. *See* Rental Right Directive, *supra* note 43, arts. 1(2)–1(3).

137. For an argument based on economic interest analysis in favor of the application of the copyright laws of the countries of reception, see Fabiani, *supra* note 130, at 24–25. *See also supra* text accompanying note 131 (noting possible de minimis exceptions).

138. In this case the user acts with the knowledge that his acts will affect the right holder's economic interests in countries other than the user's own so that it appears equitable to require the user's compliance with other countries' copyright laws.

139. A tight control over the geographic location of users on digital networks is impossible. For an explanation, see, for example, Burk, *supra* note 3, at 1112. This article will argue, however, that undertaking reasonable efforts to control the location of customers should be sufficient to avoid the application of certain copyright laws. *See infra* notes 166–168 and accompanying text.

In these cases, plaintiff may rely not only on the copyright law of the country of origin to enforce exclusive rights, but also on other countries' copyright laws. It would be sufficient for the plaintiff to establish that a customer actually received online services in that country.[140] Actively soliciting customers in a certain country to subscribe to an online service, providing passwords on request, or regularly directing advertising toward a certain country would also be sufficient evidence to establish commercial use in the affected countries.[141]

The proposed conflicts concept may be opposed on the ground that it may result in the application of a multiplicity of national copyright laws, thus imposing a heavy burden on the court and defendant. These negative effects will be limited, however. In practice, a plaintiff may select that country's copyright law providing the most effective protection and prove that she is the right holder under that country's copyright law and therefore entitled to recover for unauthorized use of her works.[142]

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140. *See also Digital Technology in the Fields of Copyright and Related Rights*, Submission by the British Copyright Council to the European Commission, *reprinted in* 18 EUR. INTELL. PROP. REV. 52, 54 (1996) (Transmission of works over digital networks should fall under communication right in country of transmission and countries of reception); Geller, *supra* note 5, at 106–07 (arguing that foreign copyright law should apply as soon as transmission of work has been received there).

141. *See, e.g.*, Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996) (Italian internet site operator who solicited U.S. customers to subscribe to online services originating in Italy distributed products in the United States and therefore infringed plaintiff's U.S. trademark rights).

142. As the plaintiff has to prove that she is entitled to recover under a specific law, she has an incentive to limit her claims. Moreover, the plaintiff must demonstrate actual reception of the work in a country before she may invoke that country's copyright law. This will again limit the number of potentially applicable copyright laws, especially if courts do not recognize reception by the plaintiff herself or her agent as relevant for conflicts purposes. *See* Maritz v. Cybergold, 974 F. Supp. 1328, 1330, 1333 (E.D. Mo. 1996) (court distinguishing between contracts to defendant's website by plaintiff as opposed to by independent third parties, for personal jurisdiction purposes). The proposed foreseeability test will further limit the number of applicable copyright laws. *See infra* note 161 and accompanying text.

A partial remedy against the criticism of overly territorial concepts would be the application of an effects test similar to the Second Restatement's choice of law rule for multistate defamation cases. The Restatement suggests that the state with the most significant relationship is usually the state of the plaintiff's residence or principal business. All aspects of the claim resulting from the defamatory publication should be subject to that state's law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 150(2), (3) (1971) (suggesting a single publication conflicts rule that emphasizes the plaintiff's domicile or principal place of business); Dessemontet, *supra* note 47, at 294. A similar rule may appear convenient for copyright GII-cases because it is relatively easy to determine the applicable law. The concept, however, is not necessarily persuasive for multistate copyright cases. First, defamation centers on the personal interest in integrity of the defamed person or corporation. As the personal injury to the plaintiff's reputation and good name is the focus of the inquiry, the state where that person resides usually has the greatest interest in such a case. Copyright, however, is about dispersed property rights, and it may be that property interests outside the

b. Non-Commercial Exploitation with Significant Effects on Economic Interests

Subjecting every non-commercial form of using copyrighted works on digital networks to the same strict conflicts standard—and therefore to several potentially applicable copyright laws—appears disproportionate. In an unprecedented form, cyberspace technology encourages individuals to participate in the exchange and dissemination of information. It is a unique opportunity for a decentralized social dialogue, with the creative process of transformation and modification of works made possible by digital technology.[143] GII-related choice of law rules should respect the important role digital networks might play and recognize that the possibility of being automatically subject to foreign copyright laws may have chilling effects on the the use of digital networks that may not be justified by strong enforcement interests. Conflicts analysis must therefore strike a balance, which is not overly burdensome, among the right holders' enforcement interests and individual and public interests in a broad participation in the "cyberdialogue." Less strict conflicts rules may be appropriate for non-commercial users.

On the other hand, relying solely on a private/commercial use distinction in a digital environment is problematic because commercial exploitation and private use may have increasingly similar effects.[144] Digital technology enables private individuals to make copyrighted

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jurisdiction of the plaintiff's residence are more significantly harmed than inside that jurisdiction, especially where the defendant is an online service provider who targets customers in specific countries. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 cmt. e (1971) (referring to states other than the state of the plaintiff's residence that may have most significant relationship on the ground that defamatory communication caused greatest injury there).

Second, applying only the law of the plaintiff's place of residence (in addition to the place of origin of infringing acts) may deprive the plaintiff of otherwise available legal rights, and it privileges the use of copyrighted works on the internet over other forms of use. This is particularly unjustified if the defendant specifically targets customers in certain countries. Third, a rule from the Second Restatement may have only limited benefits in copyright cases where national laws disagree about the actual right holder in copyrighted works, and where several persons, possibly located in different jurisdictions, may be considered right holders.

Despite these reservations against a single publication conflicts rule, there may be cases where a court may find a similar choice of law rule justified, especially where a commercial user did not target specific customers. *See infra,* note 175.

143. *See, e.g.*, Elkin-Koren, *supra* note 112, at 399.

144. As long as exploitation of copyrighted works occurred outside digital networks, it was safe to assume that acts of use by private individuals would not significantly affect the interests of right holders in countries outside the country where the individual acted. Choice of law questions therefore arose primarily where users controlled the technical and financial means to exploit copyrighted works in a multinational context. Satellite broadcasting exemplifies this.

works available throughout the GII without significant investment, thereby harming the right holder's economic interests. From a right holder's perspective, cases may arise where acts by private individuals significantly affect the right holder's economic interests in several countries, like in a case of commercial use.[145] Overall, this suggests that non-commercial users should in principle be subject only to the copyright law of the user's location. Only if the economic effects of a non-commercial use of a work on the GII reach significant levels should the right holder's enforcement interests prevail.[146]

Applying this test in practice is difficult, but not impossible.[147] The plaintiff, in order to claim protection under that country's copyright law, would bear the burden of proving that the intensity of use in certain countries outside the country of origin was substantial.[148] In multinational infringement cases involving private use of works on digital networks, courts would have to decide whether the effects of the non-commercial use of a copyrighted work outside the country of origin remained within commonly accepted limits or significantly affected the right holder's commercial interests in any given territory. At this point courts could examine, for example, whether customs of reasonable use

145. *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), provides an example for private acts that nevertheless significantly affected right holders' economic interests. David LaMacchia set up a BBS where users uploaded and downloaded commercially used software. The indictment alleged that LaMacchia's acts caused losses of more than one million dollars to right holders. *Id.* at 536–37. If the right holders can show significant interference with their economic interests in other countries, those countries' copyright laws would apply to determine whether LaMacchia's operation was lawful as well as the amount of damages that resulted from the infringement.

146. If such enforcement interests exist, the plaintiff could, in principle, choose among a great number of potential applicable copyright laws, depending on the places in which the work actually has been received. This might be an unsatisfactory solution, particularlu if the defendant had no specific idea about the location of recipients. For a possible solution resulting in the application of (usually) two copyright laws, see *infra* note 175.

147. Courts have applied significant effects test in other areas to determine the applicability of domestic law to foreign conduct. *See, e.g.*, cases cited *supra* note 133 (finding application of U.S. antitrust law only when effects on U.S. commerce are substantial). *See also* Litman, *supra* note 91, at 41 (suggesting that courts should distinguish between "normal" private use cases and private use cases causing "large scale interference" with the copyright holder's commercial exploitation opportunities).

148. U.S. courts have traditionally rejected the use of a substantiality test to determine whether U.S. copyright applies in copyright infringement cases and have relied instead on a strict territoriality test. *See, e.g.*, Zenger-Miller, Inc., v. Training Team, GmbH, 757 F. Supp. 1062, 1071 (N.D. Cal. 1991) (distinguishing jurisdictional tests in trademark and antitrust cases from copyright cases and rejecting balancing test to decide copyright choice of law issue). Digital technology arguably justifies greater flexibility in copyright cases because the place where acts actually occur has become highly volatile and control over the effects of acts is increasingly difficult.

of copyrighted works have developed on the GII.[149] "Internet lex mercatoria" or "netiquette" standards may provide helpful guidance to determine which effects are substantial.[150] Moreover, international copyright law may develop standards to determine when effects on economic interests have been significant that might prove useful in the context of the proposed choice of law rules.[151]

If an individual, for example, acts within a fair use exception or an explicit statutory exception to the right holder's copyright under domestic copyright law, she should have the same right when using global, digital networks. The same applies if a user's conduct falls outside the reach of the user's domestic copyright law that considers her acts as private. Making copyrighted works available on digital networks should be subject only to domestic law, even if these works can be accessed in countries where those acts would fall within exclusive rights, unless her conduct significantly harms economic interests in those countries.[152]

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149. *See* Hardy, *supra* note 1, at 1040–41 (finding customs on digital networks useful to define standards of reasonableness).

150. *See supra* note 31 and accompanying text.

151. *See, e.g.*, TRIPS Agreement, *supra* 9, art. 11 (member countries exempted from obligation to provide for exclusive rental right unless rental has become so widespread that it "materially impairs" right holder's economic interests); WCT, *supra* note 34, art. 7. Similar standards have been part of international copyright for several years. *See* Berne Convention, *supra* note 9, art. 9(2) (exceptions to exclusive reproduction right permissible, provided they do not prejudice authors' legitimate interests). Only the recently created enforcement mechanism, however, in conjunction with the TRIPS Agreement may ensure that internationally accepted standards develop that define at what point the lack of exclusive exploitation opportunities materially affects right holders' interests. *See* Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 81 (1994) (Understanding on Rules and Procedures Governing the Settlment of Dispute); Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT'L. L. 441 (1997) (discussing enforcement of Berne Convention obligations in the framework of TRIPS dispute settlement mechanism).

152. This article does not advocate that every national copyright law should generally exempt all forms of non-commercial use on digital networks from the scope of exclusive rights. Some countries may provide that certain acts by private individuals do fall under the right holder's exclusive copyright, even if of a non-commercial nature. There are in fact strong arguments against a general private use exception such as a possible conflict with obligations under international copyright treaties or the need to ensure a solid basis for the right holders' remuneration. *See, e.g.*, Jane C. Ginsburg, *Putting Cars on the "Information Superhighway:" Authors, Exploiters and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1478–79 (1995). Other commentators disagree and argue that private use should normally fall outside exclusive copyrights. *See supra* note 91. But if a user happens to be in a country that looks more favorably on the freedom to use works on digital networks, this should count also in an international context. This article suggests using the commercial/non-commercial use distinction as a choice of law rule that specifically defines situations in which the application of several copyright laws to a single act of use appears justified. If such a situation does not exist, users should have the right to act under their domestic copyright laws and the standards of liability they define.

3. Foreseeability

Relying on commercial and non-commercial use plus substantial effects alone may not be sufficient to justify the application of copyright laws of countries in which a work was received over the GII. Both copyright choice of law cases and complex conflicts cases outside copyright law suggest that an element of potential knowledge or perhaps even intent must exist before foreign copyright laws are applied to ensure fairness toward the defendant. Incorporating foreseeability safeguards in intellectual property infringement cases appears especially persuasive with respect to digital networks that make it difficult for a user to predict the place where a transmission will be received, retrieved, or viewed. In non-commercial-use cases it may be equally difficult to foresee substantial harm to the right holder's interests.[153]

Using an intent or knowledge element is not unprecedented in copyright choice of law cases. The application of U.S. copyright law in international cases, for example, may depend on the defendant's intention to exploit a copyrighted work within the United States while in a foreign country. Occasionally, U.S. courts have based subject matter jurisdiction under U.S. copyright law over foreign conduct on the defendant's knowledge and intention that its acts abroad would eventually infringe the plaintiff's copyright in the United States.[154] The Canadian Supreme Court considered, along the same lines, the audience targeted by a broadcast that originated in the United States but could also be received in Canada, before it applied Canadian copyright law to the transmission.[155]

The debate over choice of law rules in interstate and international tort cases, particularly product liability cases, also provides useful ideas for copyright infringement cases involving digital networks. Product liability cases are the best example for choice of law rules that incorporate a foreseeability element to limit a defendant's potential exposure to foreign tort laws.[156] As products are frequently distributed on a global

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153. *See* Dessemontet, *supra* note 47, at 291–92 (arguing that foreseeability is an important element in designing copyright choice of law rules for digital networks).

154. *See* GB Marketing USA, Inc. v. Gerolsteiner Brunnen GmbH, 782 F. Supp. 763, 773 (W.D.N.Y. 1991) (sale of copyrighted products in Germany that were designed and specifically prepared for U.S. market sufficient to establish subject matter jurisdiction); Mary Metzke v. May Dep't Stores Co., 878 F. Supp. 756 (W.D. Pa. 1995) (liability under contributory infringement standards where defendant knew or should have known that copies manufactured abroad would eventually reach United States).

155. CAPAC v. International Good Music, Inc., [1963] S.C.R. 136 (Can.).

156. *See, e.g.*, Hague Conference on Private International Law: Convention on the Law Applicable to Products Liability, Oct. 12, 1972, art. 7, 11 I.L.M. 1283 (Law of the state of the place of injury or of the state of the habitual residence of the person directly suffering loss does not apply if the defendant establishes that "he could not reasonably have foreseen

scale and put to use outside the state or country where they were manufactured, defective products may cause damages in geographically dispersed locations—places that the producer sometimes could not anticipate. Choice of law models that determine, as a principal rule, the applicable law according to the place of injury or the plaintiff's habitual residence may expose the manufacturer to standards of liability that he could not have foreseen when he manufactured and marketed a product. To ensure fairness toward the defendant, commentators have suggested foreseeability safeguards which enable a manufacturer to prevent liability under the laws of countries if that defendant demonstrates that he could not have foreseen that products would be marketed or used there.[157] It has, moreover, been suggested that foreseeability standards must be related to the nature of the (defective) product and the defendant's activities. Higher standards of foreseeability should apply if the defendant sells products of a highly mobile character.[158]

The data flow on digital networks shares certain similarities with the flow of goods in international commerce. As in the case of goods, a single event can lead to geographically and temporally dispersed injuries or infringements of rights. The reach of data is foreseeable to an even lesser degree than is the stream of commerce in the case of goods. A

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that the product or his own products of the same type would be made available in that state through commercial channels"); Weintraub, *supra* note 108, at 147. For a similar concept adopted in a statute, see BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT 1987 (Switzerland's Private International Law Statute of 1987), art. 135(1)(b) (products liability cases governed by law of the country where product was acquired, unless defendant can show that the product was marketed there without his consent).

157. *See* Scoles & Hay, *supra* note 10, at 636; Weintraub, *supra* note 108, at 148; Hague Convention, *supra* note 156, art. 7 (rendering the law of place of injury or of plaintiff's habitual residence inapplicable if manufacturer could not reasonably foresee that injury-causing product would be available in those places through ordinary commercial channels); BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT 1987, art. 135(1)(b); Louisiana Choice of Law Statute, LA. CIV. CODE ANN. art. 3545(2) (West 1997). For a criticism of other models and modification of the foreseeability factor, see P. John Kozyris, *Values and Methods in Choice of Law for Products Liability: A Comparative Comment on Statutory Solutions*, 38 AM. J. COMP. L. 475, 501–07 (1990). In Professor Kozyris' proposal, the place of distribution would become the principal connecting factor, instead of being merely a negative factor. *Id.* at 506. This concept is attractive in products liability cases, primarily because it simplifies the analysis by replacing a laundry list of connecting factors and combinations thereof with one single rule and one exception. The concept is not persuasive in copyright infringement cases involving digital networks, however, because a place of intended use usually cannot be localized when the work is made available to the public. Professor Kozyris himself finds that his rules are inapplicable when the use of products is inherently multinational. *Id.* at 506.

158. *See* Willis L. Reese, *The Law Governing Airline Accidents*, 39 WASH. & LEE L. REV. 1303, 1319 (1982) (arguing that an airplane manufacturer has reason to foresee that a plane may be taken to any place in the world, but that reasonable foreseeability exists only if the producer has reason to anticipate that the defective plane—or a similar plane of his own manufacture—would reach a specific place for lease or sale through commercial channels).

user who makes a work accessible to the public on the GII will usually not be able to foresee where other persons receive such works. A foreseeability factor should therefore be a veto against an otherwise applicable copyright law.

The foreseeability test would become relevant only after the plaintiff has established the preconditions for the application of foreign copyright laws—an "injury" in territories outside the country of origin either in a commercial exploitation case or a private use case in which the right holder's economic interests were significantly affected. At this point of the analysis the facts of a case will usually imply that such effects were objectively foreseeable. In other words, if the defendant used a copyrighted work on the GII for commercial purposes, or in such a way that it significantly affected the right holder's interests in another country, a strong assumption exists that the form of use made the effects objectively foreseeable. This suggests that it should be the defendant's responsibility to prove that events triggering the application of a foreign copyright law were not objectively foreseeable.

a. Non-Commercial Use

To begin with the "easier" case, in a non-commercial-use scenario the defendant would have to provide evidence that he could not anticipate significant effects on economic interests in a specific territory. This appears to be a reasonable test. "Significant effects of economic interests" plus their foreseeability is arguably something that courts can decide with some degree of certainty. Courts would have to take into account the level of "activity" on a site, the operator's knowledge about the location of its web site's "visitors," but also the nature of the copyrighted work that is involved in the litigation.[159]

These foreseeability standards leave a large number of non-commercial-use cases in which a foreign country's copyright law does not apply. When a message that incorporates a copyrighted work is uploaded on a bulletin board, for example, or a work is made publicly accessible at a private website so that third parties can retrieve the work, normally only the copyright law of the country of origin controls those acts of use pursuant to the non-commercial use conflicts rule and related foreseeability standards. Another example of crossborder acts that should be subject only to the country of origin's copyright law are point-

159. Providing access to purely textual information may be less likely to cause significant economic harm. If operators will eventually be able to provide access to videos, however, it will be more likely that the significant economic harm threshold will be reached.

to-point transmissions of works between individuals.[160] Libraries would arguably also fall within this group when they use digital networks to exchange documents, similar to inter-library loans or document exchanges. Enforcement concerns do not warrant application of any copyright law other than the country of origin's copyright law. The sender of copyrighted works in these cases must therefore comply only with the standards of the country of origin's copyright laws.

b. Commercial Use

Defining appropriate foreseeability standards is more problematic in the case of commercial use. It is on the one hand inherent in the nature of global digital networks that a work made accessible to the public at one site can be accessed by any other user around the globe. From the defendant's point of view, anticipating the specific location of each such contact between a copyrighted work offered on digital networks and a customer may appear impossible.[161] A right holder, on the other hand, would argue that a user who makes works available on the GII—for example by providing access to software, music, or videos—purposefully takes advantage of the global reach of digital networks and therefore should anticipate that the works may be retrieved from anywhere in the world. In either view, a foreseeability defense may therefore become almost meaningless. Courts may either side with the plaintiff and find that it is always objectively foreseeable that somebody somewhere in the world will access the work over digital networks[162] or favor the de-

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160. Communications of this type might well fall altogether outside the right holder's exclusive rights. According to the WIPO Glossary of the Law of Copyright and Neighboring Rights (1980), a communication to a specific individual belonging to a private group falls outside the right holders exclusive rights.

161. *See, e.g.*, Burk, *supra* note 3, at 1117 (criticizing attempts to transfer actual or potential knowledge concepts on the internet, arguing that the GII pushes the fiction of imputed knowledge about territorial contacts to the point of intellectual bankruptcy).

162. In fact, under state long-arm statutes, some U.S. courts have applied very generous foreseeability standards to Internet cases raising personal jurisdiction issues. The U.S. Courts have held that simply setting up a website and generally soliciting customer contacts may be sufficient to meet the minimum contacts threshold to establish personal jurisdiction over an out-of-state website operator. Holding such activity sufficient to reach the global internet audience, the courts have concluded that the website operator "purposefully availed" himself of the benefits of each forum from which he hoped to attract customers. *See, e.g.*, Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1329–34 (E.D. Mo. 1996); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 163–65 (D. Conn. 1996). *But see* The Hearst Corp. v. Goldberger, 1997 U.S. Dist. LEXIS 2065, at *63 (S.D.N.Y. 1997) (declining to follow *Inset* and *Maritz* decisions); Graphics Control Corp. v. Utah Med. Prod., Inc., No. 96-cv-0459ECF, 1997 U.S. Dist. LEXIS 7448, at *11 (W.D.N.Y. 1997) (following *Hearst* decision). For a court seeking a middle ground, see, for example, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (upholding jurisdiction over out-of- state defendant, after court found that operator of interactive website had contracted with

fendant's position and decide that absent his intention to target a specific country a defendant could not have foreseen where customers will be located and will access works.[163]

The crucial question is therefore how "reasonable foreseeability" standards may be objectively defined. As Professor Burk has argued in his discussion of jurisdictional issues on the internet, "reasonable foreseeability" cannot refer to any possible contact over the GII, but comprises a value judgment based on objective factors.[164] In other words, it is necessary to define which consequences the defendant was expected to anticipate before being subject to a foreign copyright law. It is submitted that for choice of law purposes a workable foreseeability standard would determine whether the defendant could anticipate that its acts of exploitation on the GII would have more than a de minimis effect on the plaintiff's economic interests in a specific country outside the defendant's location.[165] Although this suggested foreseeability standard may at first appear vague, it would produce workable results in

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approximately 3000 customers and several access providers in the forum state). For a critical comment on *Inset* and overly lax foreseeability standards in general, see Burk, *supra* note 3, at 1111 n. 70, 1112–15.

163. In this interpretation, the inquiry into foreseeability comes close to an "intent" test. Relying on the defendant's intent, however, is not useful to establish the application of foreign copyright laws to the commercial user's acts of exploitation. Such a test would, to the detriment of right holders, protect commercial users who globally exploit copyrighted works and intentionally have no intent to target customers in a specific country. Intentional ignorance about the customers' location, however, should not be a per-se defense against the applicability of foreign copyright laws.

164. Burk, *supra* note 3, at 1118.

165. The appropriate standards to establish personal jurisdiction in Internet cases may be stricter. Personal jurisdiction requires that the defendant purposefully availed himself of the opportunity to do business in a specific state before being subject to that state's jurisdiction. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (rejecting foreseeability as insufficient to establish personal jurisdiction). More-than-foreseeable de minimis effects in the forum therefore is required to establish that an out-of-state web site operator is subject to the forum's jurisdiction. *See also* Burk, *supra* note 3, at 1119–23. Professor Burk suggests a cost/benefit test to establish personal jurisdiction. Only if a defendant's benefits in a particular forum exceed the cost of forcing him to defend himself in that forum would personal jurisdiction exist. He argues that users engaged in activity on digital networks will frequently, if not routinely, fail to meet the minimum jurisdictional requirements.

Using different factors for a conflicts analysis, however, is justified. Minimum contacts or minimum foreseeability standards may be different for jurisdiction and choice of law purposes with less strict standards applicable in the conflicts area. *See, e.g.*, Kulko v. California Superior Court., 436 U.S. 84 (1978); Allstate Insurance Co. v. Hague, 449 U.S. 302, 318 n. 23 (1981). A possible explanation that appears especially applicable in intellectual property cases is that fairness toward the defendant is the single most important factor in determining personal jurisdiction, whereas the plaintiff's interests and ability to defend her rights granted under a specific country's copyright law have greater weight in determining the applicable law under choice of law principles.

typical cases involving copyrighted works on digital networks, as the following examples demonstrate.

The form of commercial exploitation on the GII would largely determine whether more than de minimis effects outside the user's location are foreseeable. The first example is a commercial user who receives revenues from online customers in exchange for services. Operating a music on demand pay site that charges a general subscription fee or fees for individual services would fall into this category. The site operator will, to a certain extent, be able to control where customers are located, receive services, or have access to a website. Online methods may provide at least a first screening opportunity.[166] Other commercial users may prefer certain off-line methods like requiring telephone numbers. True, methods to locate customers geographically are imperfect. Some users may be able to "enter" the GII through a remote system that they access by establishing a telnet connection or by using ordinary telephone lines to a remote access provider. Others may circumvent the commercial user's control by using a remailing service.[167] But the concern that such screening is eminently unworkable simply because it does not produce totally reliable results is irrelevant for the suggested foreseeability test. Compared to the total number of internet users, only a small number are able to "conceal" their geographical identity and would try to circumvent off-line methods to determine their location. So long as the commercial user exercises reasonable efforts to control the location of its customers, the commercial exploitation foreseeably has more than de minimis effects only in those territories where he knowingly offers services to customers. The fact that individual customers in other countries manage to receive such services despite reasonable efforts to limit the services' reach should be irrelevant for choice of law purposes.[168]

One could argue that reintroducing geographic limits of real space to legal analysis runs totally counter to the global nature of cyberspace and puts unnecessary burdens on commercial users.[169] The point, how-

166. The customer's domain name may contain such information, or the user may ask for an address, telephone number, or other pieces of information.

167. On various methods to make a user's actual geographical location indeterminable, see, for example, Burk, *supra* note 3, at 1112–14.

168. A similar situation may be found in the area of satellite broadcasting. A broadcaster, for example, may transmit encrypted signals and sell the necessary decoders only in certain countries, deliberately avoiding reception of its broadcasts—and possible copyright implications—by customers in other countries. If a customer or a small number of customers in a non-transmission country is able to obtain decoders sold in other countries and receive the broadcaster's programs, there would arguably still be no copyright violation, provided the broadcaster's efforts to prevent the marketing of decoders were reasonable.

169. *See, e.g.*, Burk, *supra* note 3, at 1112–14.

ever, is that overcoming the geographical indeterminacy of digital networks is in the commercial user's own interest because in that way he is able to limit his exposure to liability under foreign copyright laws.[170] If empirical evidence suggests that online verification methods are too unreliable because an increasing number of internet users operate from remote locations, one can confidently expect industry to develop alterative methods to restrict the territories in which online services are offered.

Under the proposed choice of law rules, the really troublesome foreseeability cases are commercial users that provide free and uncontrolled access to their websites and online services. Some may derive revenues, for example, from publishing third-party advertising on their site; others may simply not control where paying customers are located. But even in these cases the proposed foreseeability standard that examines whether more than de minimis effects on economic interests elsewhere were foreseeable would be helpful. Courts may be able to define cases where website operators provide general access to the public, and yet it is not foreseeable to the operator that his acts will have any effects on the economic interests in other countries that exceed the de minimis threshold. There are numerous other examples of websites that contain information about essentially local events or businesses that will have no foreseeable effects on economic interests elsewhere, even if they incorporate copyrighted information and are accessible from anywhere in the world.[171]

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170. One reason for such attempts might be that the commercial service provider was not able to obtain the necessary licenses for all countries. Or he may prefer to acquire exploitation rights on a limited scale to reduce operating costs. The operator of a U.S. online music web site, for example, may prefer to obtain only licenses limited to performances in the United States, from ASCAP and BMI.

Professor Burk's criticism of the remedy in *Playboy Enterprises v. Chuckleberry Publishing*, 939 F. Supp. 1032 (S.D.N.Y. 1996), in which the court required an Italian website operator to screen out U.S. users to avoid infringement of U.S. trademark rights is therefore not justified. *See* Burk, *supra* note 3, at 1115 n. 83. Even though there were no methods that would absolutely meet this requirement, the court was aware of this fact and the web site operator was required to use its best efforts. He was moreover prevented from receiving payments from U.S. users—arguably a relatively effective method to ensure that economic effects from making the name "playmen" accessible to U.S. users was no more than de minimis.

171. *See, e.g.*, Bensuan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997). The Court held that a website operator who provided information about a local jazz club in Missouri did not have sufficient activities in New York to be subject to the personal jurisdiction of New York courts. Along the same lines, assume that the jazz club's website also incorporates a tune that internet visitors can play on their local computers, which was no longer copyrighted in the United States but still protected under European copyright laws. Even if a website visitor located in Europe downloaded and played the music, a foreign copyright law would not be applicable because more than de minimis effects on the right holder's economic interests are not foreseeable.

For example, compare the situation of two newspapers that operate websites with an online version of their papers available. Assume that a regional or local U.S. paper's site includes a series of photographs that are not protected under U.S. copyright law because their term of protection has expired or they fail to meet minimum originality standards, but that protection exists under European copyright laws.[172] It is highly likely that non-U.S. internet users will occasionally log on to those sites and download information,[173] perhaps including a picture that is copyrighted only in European countries. Yet it appears reasonable to foresee that the effect of the picture's website publications on economic interests in any market outside the United States will be minimal.

The situation may be very different for a national paper that is aware of the international interest in its reports. The New York Times, for example, maintains a website where the "TimesFax," a "light" version of the Time's daily reports, is available free-of-charge non-U.S. customers. Viewers outside the United States at the same time are denied free access to the site's full online edition of the Times. Under the above foreseeability standards, the website's design arguably makes it foreseeable that it will be visited by a substantial number of users from other countries. Foreign copyright laws would, in principle, be applicable if the "light" version incorporated materials that allegedly infringe a third party's copyright.[174]

One might criticize these foreseeability standards as being overly friendly to right holders and not sufficiently cognizant of the defendant's interest in being protected against the application of a foreign copyright law. This criticism, however, is not justified. The above foreseeability rules provide a defense to commercial users who undertake reasonable attempts to control the territories where their services are received. These rules also provide some protection to website operators

172. UK copyright law's originality requirements, for example, are less strict than are the originality requirements under U.S. copyright law. The picture also might be protected under the lower-related-rights standards of German or Austrian copyright laws, which generally require no originality. *See, e.g.*, Bundesgesetz über das Urheberrecht an Werken der Literatur und Kunst und über verwandte Schutzrechte §§ 73–74, BGBl 1936/11 (Austrian Copyright Act). They provide for a fifty year protection for pictures that do not meet the standards of copyrighted works. Austrian or German copyright law, however, would not be applicable, even if in some cases the website was visited from either country, on the ground that more than de minimis effects on economic interests there were not foreseeable.

173. This author, for example, repeatedly visited the Detroit Free Press website in the late spring of 1997 during the Detroit Red Wings's victory in the Stanley Cup finals. Even if a few more Red Wing fans did the same from outside the United States, it is fair to assume that the number of visitors from non-U.S. locations was minimal.

174. It should be added, however, that the New York Time's "light" online version contains no photographs, and the information provided there is so limited that infringement of a third party's copyright appears unlikely.

and online service providers who provide essentially local information or are engaged in other activities where it is reasonably foreseeable that their acts will not affect economic interests outside their own countries beyond a de minimis threshold. These rules do leave a group of internet operators exposed to claims under unforeseeable copyright laws—notably those, who operate on the internet for commercial purposes, purposefully rely on the GII to reach a global audience as widely dispersed as possible, and yet do not control the location of their users and do not bother acquiring exploitation rights in somebody else's copyrighted works. Allowing right holders in these cases to rely on the copyright laws of countries where such activities affect their economic interests appears justified, especially in light of the important policy goal of providing copyrighted works with effective protection.[175]

4. Summary

The conflicts analysis suggested in this section results in the following steps to determine which copyright law(s) apply to acts of exploitation on digital networks:

1. The defendant's residence or place of business generally determines the applicable copyright law;

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175. Perhaps in those cases of the "mindless" commercial user of copyrighted works, courts could develop a rule resembling the single publication conflicts rule that would reduce the number of applicable copyright laws and therefore protect courts against deciding overly complex cases. *See supra* note 142 and accompanying text. Within the flexible country of origin conflicts regime proposed in this text, such a rule would still allow the application of two copyright laws and also include a foreseeability defense. A court could assume that in those cases where users do not target specific customers or customers in specific territories, the places with the most significant relationship are the location of the two parties: In one place the allegedly infringing conduct occurs, whereas in the other the economic effects of the defendant's conduct cumulate. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. f (1971) (discussing intellectual property-like cases where either the defendant's or the plaintiff's location has the most significant relationship). For a similar concept, see Dessemontet, *supra* note 47, at 294.

Thus, in addition to the defendant's domestic copyright law, the copyright law at the plaintiff's residence or principal place of business would be applicable. Cumulative application of copyright laws to crossborder conduct is not unprecedented and is justified here on enforcement interest grounds. *See supra* note 78 and accompanying text. The foreseeability test would inquire only whether the application of a second law in general was foreseeable for the defendant. The relevant question would be whether the defendant's conduct had foreseeable, more-than-de minimis effects on economic interests outside the country where the defendant is located. If foreseeability objectively existed, that the defendant cannot be surprised that another law will be applied to his conduct given that he benefitted from the global reach of the GII. Of course, if the defendant exploited a work in which several persons hold rights, then more than two copyright laws may be applicable, depending on where the plaintiff right holders are located.

2. a. If the defendant's unauthorized use of the copyrighted work was for commercial purposes, the plaintiff may also rely on the copyright laws of the countries in which the work was received;

b. If the defendant's unauthorized use of the copyrighted work was non-commercial, the plaintiff may rely on the copyright laws of only those countries in which the effects on his economic interests were substantial;

3. In cases 2(a) and 2(b), the defendant can avoid the application of foreign copyright laws by demonstrating that he could not foresee that the work's reception would have more than de minimis effects on economic interests in certain countries (Case 2(a)), or that the effects elsewhere on the right holder's economic interests would be substantial (Case 2(b)).

C. *BBS Operator Liability*

Critical for the enforcement of copyright laws on digital networks are the standards of liability imposed on bulletin board ("BBS") operators and other online service providers that, along the same lines, offer their customers a communications platform but do not create or provide information on their own with regard to their customers' infringing acts.[176] BBS operators are easier to identify than are individual users on the GII. The BBS operators are also able to exercise a certain, although limited, control over the content of information exchanged through their bulletin boards. Deep pockets, moreover, may make corporate-owned operators especially attractive targets of copyright infringement actions.[177]

BBS operator liability for copyright infringements is a controversial subject, even in a purely domestic context. Commentators have been sharply divided over this issue, with views ranging from strict liability

176. BBSs consist of electronic storage devices controlled by computers and connected to the GII. They are "public areas" on digital networks where users may post information and read or download information posted by other users. Information may include copyrighted works in digital form such as software, music, or pictures. *See, e.g.*, Elkin-Koren, *supra* note 112, at 347 n. 5; Hardy, *supra* note 1, at 1000. The following text refers to BBS operators, but the analysis equally applies to other online service providers insofar as they play a passive role in the communication among their customers. *See also infra* note 183 and accompanying text.

177. The size of BBS operators can vary significantly. The costs of the necessary equipment—a computer equipped with a modem—are relatively low and permit private individuals to run their own BBS. Examples for large BBS operators are commercial online service providers like America Online.

standards for direct infringement to a complete exemption from liability.[178] Courts have applied different liability standards in the few cases that actually have been litigated. Some U.S. courts held that BBS operators were liable under strict liability standards for direct copyright infringement,[179] others imposed liability for secondary infringement in the form of vicarious or contributory infringement, which requires a higher degree of involvement in the infringing conduct such as control over somebody else's acts or inducement of such acts.[180] In countries outside the United States the finding of copyright infringement by BBS operators will probably depend on a minimum active contribution to the infringing conduct, similar to standards of secondary liability under U.S. copyright law.[181] Given this subject's controversial nature, it is not sur-

178. *See, e.g.*, Hardy, *supra* note 1 (favoring strict liability standards); Andrea Sloan Pink, *Copyright Infringement Post Isoquantic Shift: Should Bulletin Board Services Be Liable?* 43 UCLA L. REV. 587 (1995) (favoring contributory liability when the operator should have known about customer infringing conduct); M. David Dobbins, *Computer Bulletin Board Operator Liability for Users' Infringing Acts*, 94 MICH. L. REV 217 (1995); Adam P. Segal, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L. J. 97, 127 (1996) (discussing vicarious liability); Elkin-Koren, *supra* note 112 (arguing against BBS operator liability unless operator is actively involved in infringing conduct); Susan B. Deutsch, *Super Liability on the Super Highway*, MULTIMEDIA L. REP., Nov. 1994, at 4, 6 (arguing for a passive carrier exemption pursuant to 17 U.S.C. § 111 or a common carrier exemption). For a contribution from a European perspective, see Maurits Dolmans, Copyrights and the Internet, Paper presented at the Fourth Annual Fordham Law School Conference on International Intellectual Property Law and Policy (Apr. 11, 1996) (favoring liability under negligence standards). The NII Report, *supra* note 39, at 114–24, remains undecided, although it does reject the argument that BBS operators be placed in a privileged position with reduced standards of liability.

179. *See, e.g.*, Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding that online service providers may be liable for direct infringement regardless of their knowledge of the infringing activity or their ability to terminate such infringement). In *Sega Enterprises v. Maphia*, 679 F. Supp. 679 (N.D. Cal. 1994), the court first followed the *Playboy* court's approach and granted an interim injunction based on a direct liability standard, but found in the final decision that the defendant was liable only under the concept of contributory liability.

180. *See* Religious Tech. Ctr. v. Netcom Online Communication Serv., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995); *Sega*, 948 F. Supp. at 923. Under U.S. copyright law, vicarious liability exists only if someone has the right and ability to control somebody else's infringing acts. *See, e.g.*, Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963). Contributory infringement can be committed only by someone who had knowledge of the infringing activity and induced, caused, or materially contributed to the infringing conduct. *See, e.g.*, Gershwin Publ'g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971). *See also* NII Report, *supra* note 39, at 109–10.

181. For a discussion of online service provider liability under the Canadian copyright law, see Silke von Lewinski, *Der kanadische Bericht des "Copyright Subcommittee" über Urhebrrecht und die Datenautobahn*, 1995 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT INTERNATIONALER TEIL 851, 852 (rejecting *Playboy v. Frena* standards of strict liability and suggesting that elements of negligence are required under Canadian copyright law to hold service provider liable for copyright infringement). *See also*, Michel Racicot et al., *The Cyberspace Is Not a "No Law Land"* (visited July 15, 1997) <http://

prising that the 1996 WIPO Treaties failed to provide specific rules concerning the liability of BBS operators.[182]

The main reason for the continuing uncertainty over the appropriate standards of liability is the largely passive role BBS operators play. A bulletin board offers the electronic location for an information exchange by its customers and may be the place where infringing acts such as the reproduction and making available to the public of copyrighted works occur. The BBS operator, however, does not actively create or transmit content and therefore does not appear to be directly responsible for infringing conduct, although the BBS operator may exercise a certain degree of control over the information exchanged through a BBS.[183]

Because of the GII's global structure, crossborder activities of its customers may expose a BBS operator to potential liability under a number of foreign copyright laws. For example, a European customer may transmit copyrighted works such as video games without authorization to a BBS located in Canada that has subscribers in the United States who are able to retrieve and download the games. A right holder may attempt to establish the BBS operator's liability under U.S. copyright law, which may be more favorable than is the potentially applicable Canadian copyright law.[184] There is, for example, at least a

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strategis.ic.gc.ca/SSG/it03315e.html> (discussing Canadian concept of "authorization" of infringing acts and suggesting that Canadian law imposes less strict liability standards on passive service providers than U.S. copyright law). *See also* Dolmans, *supra* note 178 (favoring liability under negligence standards).

182. Parties were unable to reach agreement on this controversial subject. Neither the WCT, *supra* note 34, nor the WPPT, *supra* note 9, mention BBS operators or other online service providers in the main text. The agreed statements accompanying the WCT provide that the mere provision of physical facilities for making or enabling a communication to the public does not fall within the treaties' communication to the public right. *See* Agreed Statements, *supra* note 46, art. 8. The Digital Copyright Clarification and Technology Education Act of 1997, S. 1146, 105th Cong. (1997), was proposed in Congress to limit the potential copyright liability of online service providers. *See also* H.R. Res. 2180, 105th Cong. (1997). In light of the opposition by U.S. industry representatives, however, the adoption of either bill appears unlikely. *See Senate Judiciary Considers Online Copyright Infringement*, PAT. TRADEMARK & COPYRIGHT J. (BNA), Sep. 11, 1997, at 385.

183. An essentially passive role with respect to infringing conduct, however, does not necessarily protect against copyright infringement. *See, e.g.*, RCA Records, Inc. v. All-Fast Sys., Inc., 594 F. Supp. 335 (S.D.N.Y. 1984) (providing access to machines capable of making fast speed copies of tapes found to be copyright infringement if store owner had reason to believe that customers used machine to copy copyrighted recordings); Gershwin Publ'g Corp. v. Columbia Artists Management, 443 F.2d 1159 (2d Cir. 1971) (concert promotor found liable under contributory infringement standards for musicians' unauthorized performance of copyrighted music); Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399 (S.D.N.Y. 1966) (radio station that ran advertisements promoting sale of records that included infringing songs held to be contributory infringer).

184. Canadian copyright law would presumably impose liability on BBS operators only when they knew about infringing conduct and failed to prevent infringing activities. *See supra* note 181.

colorable claim that the Canadian BBS operator may be held liable for infringing distribution and display rights under U.S. copyright law.[185] So long as standards of BBS operator liability differ from country to country, significant choice of law questions will arise concerning the law that determines the BBS operator's liability.

The BBS operator's essentially passive role strengthens the arguments raised in the previous section that the copyright law of the country in which the user is located should, in principle, apply to allegedly infringing conduct.[186] A deliberate decision to target customers world-wide, including customers in foreign jurisdictions by transmitting or making available copyrighted works, is notably absent in the case of a BBS operator. As a BBS operator cannot control whether its customers' conduct has effects on the right holder's economic interests in other countries, application of several foreign copyright laws to the BBS operator's conduct does not appear to be justified. The need to find a balance between the right holder's enforcement interests and user interests in fair and predictable rules[187] suggests that a BBS operator should normally be held liable only according to its domestic copyright law.[188]

The GII's enforcement economics suggest the same result. Liability standards affect a BBS operator's conduct on the GII and the way in which it allocates the costs of potential liability. Different standards of care imposed under negligence-based liability systems, for example, also require different levels of scrutiny from BBS operators. As a BBS operator ought to be in the position to anticipate the liability risk to allo-

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185. Under standards established in *Playboy Entertainments v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), and in light of the amendment to Section 602 proposed by the NII Report, *supra* note 39, a foreign BBS operator might arguably be found to infringe the right holder's electronic importation right or U.S. distribution right.

186. *See supra* notes 112–27 and accompanying text.

187. *See* Dessemontet, *supra* note 47, at 291.

188. The BBS operator's country of origin should be determined under the above suggested rules. *See supra* note 117 and accompanying text. If the BBS operator is an individual, the individual's actual location provides the connecting factor. In the case of a corporate defendant, the principal place of business appears to be the most persuasive connecting factor to determine the BBS operator's location. Relying on the BBS operator's principal place of business also helps to decide cases where a BBS operator uses an independent contractor to provide certain services to the BBS customers. CompuServe, for example, relies on the services of third parties to provide certain special service functions, including moderating discussion groups. *See, e.g., NII Copyright Protection Act of 1995: Hearing on H.R. 241 and S. 1284 Before the Subcommittee on Courts and Intellectual Property, the House Committee on the Judiciary, and the Senate Committee on the Judiciary*, 104 Cong. 57 (1996) (testimony by Stephen Heaton, General Counsel, CompuServe Inc.). In such a scenario, choice of law rules would still refer to the BBS operator's principal place of business to determine the applicable law.

In certain circumstances, however, application of several copyright laws might be justified. *See infra* notes 192–194 and accompanying text.

cate costs among its users, choice of law rules should generally allow courts to determine the BBS operator's liability according to the copyright law of the country where it operates. A national copyright law, for example, may impose direct liability standards on BBS operators for infringing acts of their customers. From an economic perspective this law may be justified because it may offer the most cost effective form of monitoring markets and enforcing exclusive rights.[189] If it is held strictly liable under direct infringement rules, a BBS operator might pass on the higher costs to its customers through higher user fees, higher advertising fees, or liability insurance.[190] In a liability regime based on negligence, however, the BBS operator might decide that contractual arrangements and occasional screening of postings by customers are sufficient protection against liability for copyright infringements.

The arguments in favor of applying local law to determine a BBS operator's liability for copyright infringement might even justify a modification of the above choice of law rules that refer to the purpose and character of the GII-related activity in order to determine the applicable copyright law.[191] It may be argued that commercial conduct alone is a less persuasive justification for the application of foreign copyright law because the BBS operator may still not be able to control the loca-

189. *See* Hardy, *supra* note 1, at 1044. For similar arguments in favor of BBS operator liability based on economic criteria, see Henry Perrit, Symposium, *The Congress, the Courts and Computer Based Communications Networks: Answering Questions About Access and Content Control*, 38 VILL. L. REV. 319 (1993) (BBS operator liability justified if defendant's monitoring costs are less than probability of harm to right holder multiplied by gravity of injury that might result). Perrit appears to suggest that liability be imposed on a BBS operator on a case-by-case basis because he refers to information about the nature of the infringed work and its commercial value. It is questionable whether a test that analyzes each concrete case is feasible. Arguably, a more useful approach would be to assume that monitoring and enforcement costs are a necessary part of a property-right-based system (like the system of copyright protection that grants exclusive property-like rights) and ask which liability regime is more efficient because it reduces overall monitoring and enforcement costs. The relevant question is then whether the average value of the works that benefit from a liability regime imposing higher standards of liability on BBS operators exceeds the monitoring and enforcement costs per work. Encouraging the BBS operators to monitor infringing acts of its customers and eventually imposing liability on the BBS operators is arguably an example of a more efficient liability regime, assuming that the operator's special role on the GII makes it the "lowest cost infringement avoider." A case-by-case inquiry into whether the monitoring costs exceed the economic harm to the right holders would defeat the purpose of the entire liability system.

190. The allocation of a BBS operator's liability costs among customers appears justified. Users of bulletin boards benefit from the decentralized exchange of information made possible by BBSs; they should also share costs that result from the information exchange structure that makes control of individual infringing acts almost impossible. On the BBS's "social" role on the GII, see Elkin Koren, *supra* note 112, at 401–04 (discussing the availability of direct, decentralized information exchange on digital networks and the important role of BBSs, which allow broader participation in the communication process).

191. *See supra* notes 136–41 and accompanying text.

tion of its customers. Thus, foreign copyright law should apply only when a BBS results in substantial and systematic copyright infringement in other jurisdictions and the operators know or had reason to know about these effects.[192]

Consistency requires that the above rules be applied equally to determine which copyright law(s) govern a BBS operator's liability for copyright infringement. Commercially operated BBSs, for example, may be able to control the location of their customers at the point where a user subscribes to their service and they provide passwords.[193] If they deliberately decide against exercising some control over their customer's location and yet benefit from extending their activities outside their domestic jurisdiction, it appears justifiable to subject them to the copyright laws of countries where BBS users are located, subject to a foreseeability defense. If, in the course of exchange of information through a BBS, copyright infringement occurs in a foreign country where BBS users are located, the foreign country's copyright law would determine whether, and under what circumstances, the commercially operating BBS operator may be held liable, unless it can demonstrate that more than de minimis effects on the right holder's economic interests there were not foreseeable.

In cases of non-commercially operating BBS operators, however, the applicability of a foreign copyright law would again depend on significant effects on the right holder's economic interests in a foreign country. If a BBS operator, for example, intentionally locates itself in a country with low levels of protection and lax enforcement in order to target customers in another country with higher standards of protection, the BBS operator's liability for the users' actions would be determined according to the copyright law with the higher standards of protection.[194]

III. CHOICE OF LAW RULES AND THE ACQUISITION OF RIGHTS

Designing copyright choice of law rules is not sufficient to address copyright protection and multinational exploitation of copyrighted

192. Similar standards for GII-related patent infringement cases have been suggested by Burk, *supra* note 1, at 66 (arguing that U.S. patent law be applied to extraterritorial conduct by online service providers only when the infringement of U.S. patents is substantial and systematic, and service providers knowingly infringe U.S. patent rights).

193. *See* Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996) (involving a website operator who required customer to fax information for subscription, realized that customers were located in the United States, and electronically distributed products there).

194. For similar standards applied in GII-related patent infringement cases, see, for example, Burk, *supra* note 1, at 66.

works on global digital networks. Choice of law rules applicable to contracts, particularly those contracts for the acquisition of copyrights and exploitation rights, play an at least equally important role in creating a "cyberenvironment" favorable to the exploitation of copyrighted works. These choice of law rules are especially important for lawful commercial users, such as providers of online music services, who play by the rules and acquire rights to exploit copyrighted works.

Obviously, there is an important link between copyright choice of law rules and agreements related to the lawful GII-wide exploitation of copyrighted works. For example, online service providers that provide access to copyrighted works must consider the acquisition the appropriate licenses under the copyright laws that apply to their acts of exploitation. Under the above conflicts rules, this frequently means that they must acquire worldwide exploitation rights.[195] In these circumstances, promoting predictable results and upholding arrangements for the transfer of rights to ensure efficient commercial exploitation of works must be a principal concern of choice of law rules in a digital environment. In other words, if choice of law rules result in a multiplicity of applicable copyright laws, these rules must also ensure that the acquisition of rights will be effective in all concerned jurisdictions.[196]

This article's final part argues that a broad application of contract choice of law rules should be used to protect agreements for the acquisition of rights to the greatest extent possible, even if conflicts exist between the law governing contractual aspects and copyright laws of the countries where protection is claimed.

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195. *See supra* notes 136–141 and accompanying text (proposing net-related copyright choice of law rules that would subject commercial users to a multiplicity of foreign copyright laws and therefore require the acquisition of rights for every country where a work is exploited).

With respect to the acquisition of global exploitation rights, the licensing practice for satellite broadcasting rights developed by European copyright administration societies might be a model for future rights acquisition arrangements. Before the Satellite Broadcasting Directive became effective, reciprocal agreements authorized the society in the country of origin to grant licenses for all countries in the satellite's entire footprint. *See, e.g.*, Jean-Loup Tournier, *Authors' Rights and New Modes of Exploitation*, 16 COLUM.-VLA J.L. & ARTS 441, 445–46 (1992).

196. Commentators have already argued that in light of uncertainties created by the digital environment, a prudent approach is required that does not unnecessarily interfere with private arrangements and lets the market develop its own solutions. *See, e.g.*, Bernt Hugenholtz, *Licensing Rights in a Digital Multimedia Environment* (visited on July 30, 1996) <http://www.echo.lu/legal/en/hugen.htm> (concluding that legislators should adopt a wait and see approach and stimulate experiments with new forms of licensing); Baumgarten, *supra* note 4, at 19–25 (discussing efforts within the TRIPS negotiations to include provisions that would protect contractually acquired rights).

A. *Copyright Conflicts v. Contract Conflicts*

Contract choice of law rules significantly differ from copyright choice of law rules in one important aspect: contract choice of law rules tend to designate one law that governs all contractual elements of an agreement. Questions about the validity of agreements, interpretation of the parties' duties, and the scope of the transfer of rights will in principle be solved according to one contract law.[197]

Although contract choice of law rules are not uniform in all countries, there appears to be general agreement on some basic rules. For example, it is widely recognized that contract choice of law rules should promote the goal of protecting the parties' justified expectations. Thus, if the parties have decided which law governs their contractual relationship, courts will usually uphold those decisions, provided the parties are not of significantly disparate bargaining power.[198] Without agreement between the parties, contract choice of law rules will usually determine that the law that has the closest relationship to the agreement applies.[199]

For example, a film production agreement concerning a U.S.-produced film would most likely be subject to the contract law of the state in which the film is produced regardless of where the film is exploited[200] unless a choice of law clause provides otherwise. In

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197. Modern choice of law concepts tend to avoid applying different laws applicable to various elements of contractual arrangements as proposed by the 1st Restatement, although this is not at all an absolute concept. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 332 (law of the place of making controls issues of contract validity), 358 (law of the place of performance governs performance-related issues) (1934). For a copyright-related case that rejected the 1st Restatement's approach, see *Stillman v. Nickel Odeon, S.A.*, 608 F. Supp. 1050, 1053–58 (S.D.N.Y. 1985) (rejecting the splitting of a film distribution contract into separate elements and applying different laws in favor of applying of one law, determined by interest analysis).

198. *See, e.g.*, CA Paris, 1e ch., Feb. 1, 1989, 142 RIDA 1989, 301 (Fr.) (choice of law clause in favor of New York contract law upheld in publishing agreement between French author and U.S. resident where author was experienced and could not show any elements of fraud); Raymond Nimmer, *Licensing on the Global Information Infrastructure: Disharmony in Cyberspace*, 16 J. INT'L L. & BUS. 224, 240 (1995).

This again contrasts with copyright choice of law rules, where the determination of the applicable copyright law(s) is based on objective factors not within the parties' disposition and therefore could not be changed by agreement between the concerned parties.

199. *See, e.g.*, Rome Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1 ("most closely connected" law); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 188 (1971) (law with "most significant relationship" applies to contracts); BUNDESGESETZ UBER DAS INTERNATIONALE PRIVATRECHT (Switzerland's Private International Law Statute of 1987), art. 117; §§ 35–44 BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT (Austria's Private International Law Act of 1978) BGBl 304/1978.

200. State law governs, in principle, the contractual elements of a license agreement, but federal copyright law might impose certain limitations. *See, e.g.*, Cohen v. Paramount Pictures Corp., 845 F.2d 851 (9th Cir. 1988) (construction of license in light of purpose of

international agreements involving the transfer or license of intellectual property rights, such as publishing agreements, the most-significant-relationship rule frequently will point to the law of the country where the agreement is performed.[201] If an author transfers worldwide rights to a publisher, the exploitation rights in a great number of countries are affected. No foreign country, however, appears to have a specific interest in having its own law applied to the agreement. This suggests that the country in which the publisher is located is the place of performance, and that the agreement has the closest connection with that country.[202] Along the same lines, commentators have contended that courts should apply the law of the country in which the licensee is located if a license agreement covers several countries.[203] According to the most significant relationship rule, a different solution appears to be appropriate where the licensing is the main object of the agreement. For example, if an information vendor "sells" information by granting a licensee the right to access a database protected by proprietary rights, the law of the country where the licensor is located should govern because providing access to protected information appears to be the important aspect of the contract, not the licensee's performance.[204]

Ideally, by following similar choice of law rules, courts should examine an agreement concerning the transfer of copyrights under the same law, regardless of where litigation takes place. Using contract conflicts analysis is therefore more likely to achieve uniform solutions and facilitate international exploitation of works—important goals considering that the acquisition of exploitation rights concerning new media products and their exploitation on the "net" are likely to form the next

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federal copyright law); Vault v. Quad Software Ltd., 847 F.2d 255 (5th Cir. 1988) (federal copyright law preempts state law provision concerning software license).

201. *See* ULMER, *supra* note 8, art. F(2), at 100; Walter, *supra* note 18, at 225–26; REIMANN, *supra* note 10, at 133; Stillman v. Nickel Odeon, S.A., 608 F. Supp. 1050 (S.D.N.Y. 1985). For a different, and most likely incorrect, assessment of copyright contract choice of law rules, see Green Paper, *supra* note 42, at 38 (law of the country where protection is sought applies also to contract). Although commentators criticized the Green Paper's position, the Follow-up Green Paper maintains this position. *Cf.* Thomas Hoeren, *The Green Paper on Copyright and Related Rights in the Information Society*, 17 EUR. INTELL. PROP. REV. 511, 513 (1995) (criticizing contract-related choice of law rule in Green Paper) with Follow-up to the Green Paper and Related Rights in the Information Society, *supra* note 44, at 23 (maintaining lex loci rule to determine copyright law applicable to contracts).

202. *See, e.g.*, CA Lyon, 1e ch., Mar. 16, 1989, 144 RIDA 1990, 114, 227 (Fr.) (publishing contract between French author's British agent, and British publisher subject to English law).

203. *See, e.g.*, ULMER, *supra* note 8, at 48–9; Walter, *supra* note 18, at 225; Paul Katzenberger, *Protection of the Author as the Weaker Party to a Contract under International Copyright Contract Law*, 19 IIC 731, 736 (1988) (law of the place of the exploiter of copyrighted work governs agreements with authors).

204. Nimmer, *supra* note 198, at 242 (referring also to Draft UCC, § 2B-106(a)).

generation of copyright contract disputes.[205] Copyright choice of law rules are fundamentally different in this aspect, as they follow the lex loci principle and permit the application of a multiplicity of national, diverse copyright laws.[206]

Characterizing copyright elements and contract elements in an agreement that provides for the transfer or license of copyright obviously is a crucial step in a choice of law analysis. This especially is true for the transferability of rights, formalities, and the interpretation of agreements, which may be characterized either way. If, for example, rights transfer issues are subject to copyright choice of law analysis, the lex loci rule, in connection with the national treatment principle, determines that the applicable law depends solely on where acts of exploitation occurred irrespective of the parties' choice of the applicable law. Results that are inconsistent with the parties' expectations are likely. Shifting to a contract choice of law analysis, on the other hand, tends to enhance uniformity because all assignment issues would be resolved under the applicable contract law. In a digital environment, where the exploitation of copyrighted works potentially affects a multitude of national copyright laws, this distinction becomes even more crucial.

Assume, for example, that a French author and a British publisher entered into a publishing agreement 20 years ago in which the author transferred all rights in a novel to the publisher. The parties now disagree whether the agreement included online exploitation rights and litigate this issue in France. If the court characterizes the key question of whether exploitation rights can be effectively transferred even though the specific form of exploitation was initially unknown and the transferred rights were not specified as a copyright issue, the court would apply the copyright law or laws that govern the acts of exploitation. Concerning online exploitation in France, for example, French law would govern. Exploitation in Germany would subject this issue to an analysis under German copyright law, and so on. If characterized as a contracts issue, however, every court would resolve this question according to the law governing the parties' contract, most likely British law in this case.[207]

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205. *See* Ginsburg, *supra* note 4, at 328–29. *See also infra* notes 223–232 and accompanying text.

206. *See supra* note 19 and accompanying text.

207. *See* CA Lyon, 1e ch., Mar. 16, 1989, 114 RIDA 1990, 227, 229–30 (Fr.) (in litigation about scope of a rights transfer in a publishing agreement between a French author and a British publisher, court applied English contract law even with respect to rights in France). *See also infra* note 225 and accompanying text.

The characterization as a contractual or copyright issue, however, may not always be totally clear.[208] Courts have therefore reached inconsistent results in cases involving almost identical fact patterns.[209] Arguably, in hard cases interest analysis provides the most effective way for courts to achieve consistent results and promote the efficient exploitation of works. A court may use interest analysis to determine whether a particular rule of national copyright law dealing with copyright agreements and the transfer of rights should be characterized as a contract issue or copyright issue.[210] In the context of copyright agreements,

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208. Sometimes a national copyright law will facilitate the analysis and provide that a certain contract-related provision is not part of the substantive copyright law and applies only to domestic transactions. French copyright law, for example, requires that publishing agreements provide for the author's right to receive a proportional share of the proceeds of exploitation, but French copyright law explicitly exempts from this requirement agreements that transfer rights by or to a person established abroad. *See* Loi no. 92-597 du 1er juillet 1992 relative au code de la propriété intellectuelle (Intellectual Property Code of July 1, 1992), JOURNAL OFFICIELLE DE LA RÉPUBLIQUE FRANÇAISE, 1992, arts L. 132-5, L. 132-6(2); Geller, *supra* note 8, at 238–46.

209. Examples of cases involving international publishing agreements show how courts have reached different conclusions with regard to the contract/copyright delimitation and the applicable law. The court in *Campbell Connelly v. Noble*, [1963] 1 W.L.R. 252 (Can.), examined a publishing contract in which the author transferred all worldwide rights to the publisher where both parties were located in the United Kingdom. Subsequently a dispute arose over the conveyance of the renewal right interest under U.S. copyright law pursuant to § 24 of the 1909 Act. The court followed the lex loci rule and applied U.S. copyright law to decide that the renewal right could, in principle, be assigned. Importantly, however, it interpreted the scope of the publishing agreement pursuant to British contract law. The court reached the conclusion that the language was broad enough under British contract law to include the future interest in the U.S. renewal right. Along the same lines, a French court applied English law to interpret the scope of a rights transfer in a publishing agreement between a French author and a British publisher, even with respect to the transfer of rights in France. *See* CA Lyon, 1e ch., Mar. 16, 1989, 144 RIDA 1990, 227, 229–30 (Fr.).

The Second Circuit reached the opposite, but questionable, result in *Corcovado Music v. Hollis Music*, 981 F.2d 679 (2d Cir. 1993). In this case, a publishing agreement between a Brazilian composer and a Brazilian publisher conferred and assigned all property rights in all countries of the world in several songs to the publisher. The parties' successors in title disagreed whether the initial assignment also included the renewal rights under U.S. copyright law. The Second Circuit determined that the contract had to be interpreted in light of U.S. copyright law and case law concerning the transfer of future renewal rights. The court found that the broad language in the Brazilian publishing contract was insufficient to transfer the interest in the renewal right to the publisher. By applying U.S. case law standards to interpret an agreement between Brazilian parties, the court obviously reached a result that was contrary to the parties' expectations. For a critical comment, see David Nimmer, *Corcovado: Renewal's Second Coming or False Messiah?*, 1 UCLA ENT. L. REV. 127 (1994).

210. *See* NIMMER, *supra* note 2, § 17.11[B][4]; Geller, *supra* note 8, at 232. Interest analysis in this context refers to the interests of states to have their own laws (copyright and/or contract laws) applied to a certain case. *See, e.g.*, Brainerd Currie, *Married Woman's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958). The reference to Currie's seminal article and its discussion of women who were legally incompetent to contract is deliberately chosen here. Copyright conflicts share certain similarities with the married women cases. Some jurisdictions, especially in Europe, protect authors, not by de-

applying interest analysis at an earlier point in the conflicts analysis[211] makes sense because its characterization as copyright issue or contract issue already determines which country's substantive law the court will apply.

For example, in a typical case involving the international exploitation of copyrighted works, a court might confront a choice between a domestic copyright law provision that is more restrictive with respect to rights transfers and a less restrictive provision in a foreign contract law. Characterization as a copyright issue means application of the more restrictive copyright law according to the copyright choice of law rule, regardless of the parties' identities and expectations. Clearly in this scenario it is justifiable to ask at an earlier stage what interests a country may have in having its more restrictive copyright law applied, especially if the parties have no significant contact with the forum other than the fact that the copyrighted work is exploited there.[212]

Provisions for the protection of authors through mandatory contract rules that declare certain rights transfers by authors ineffective are an example of a very similar concept. These provisions arguably reflect inherently local interests to protect weaker parties in a contract situation and local decisions about how to balance conflicting interests. These provisions should therefore be considered contract rules. Protection of authors is a legitimate concern of national copyright laws. But when these rules are indiscriminately applied according to the lex loci rule and the national treatment principle, these provisions reflect misplaced paternalism. Authors from other countries are "protected" even though the laws of their own country would uphold the contract.[213]

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claring them totally incompetent to contract, but by making some of their rights nontransferable or unwaivable. Authors are then legally incompetent to dispose of their rights, particularly moral rights and certain economic rights. Other jurisdictions are less protective of authors. The United States falls into that category. Potential conflicts arise when one jurisdiction invalidates certain rights transfers by authors and attempts to extend that rule to all contracts, regardless of the parties' domicile and the law governing the rights transfer agreement.

211. Interest analysis has originally not been designed to resolve characterization issues but only to decide which of two conflicting laws of the same category should be applied.

212. For a similar analysis with respect to contract conflicts in general, see Kramer, *supra* note 100, at 329–34. In connection with contract conflicts analysis, Kramer first raises the traditional argument that favoring the law that validates agreements usually will reflect the parties' intentions. Secondly, he points out that allowing parties to rely on the less restrictive law is unlikely to threaten the more restrictive law's domestic policy because parties that have true connections with the state having the more restrictive law may find it too costly to go out of state and therefore may avail themselves of a foreign law. Both arguments appear equally applicable on an international level in connection with copyright contracts.

213. *See, e.g.*, RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 439 (3d ed. 1986 & Supp. 1991). *See also* NIMMER, *supra* note 2, § 17.11.[B][4](discussing conflicting state interests in the dissemination of work and in protecting authors); Walter, *supra*

The EC Rental Right Directive raises a similar issue—this time in relation to collectively exercised remuneration rights.[214] The Directive not only grants an exclusive rental right to authors but also grants a right to an equitable remuneration in connection with the rental of the authors' works, which authors retain even after a transfer of their rental right.[215] The provision concerning the unwaivable right of remuneration after the transfer of a rental right might be considered a copyright-related provision.[216] If this view is correct, Member State copyright laws that implement the Directive's remuneration right provisions must be equally considered copyright-related provisions and therefore must be applied also to contracts concluded outside the EC. This would most notably include U.S. film production agreements and would result in a remuneration right for U.S. film directors and performers even though they have not bargained for this remuneration when they entered into the film production agreement. This is a questionable result.[217] Interest

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note 18, at 228 (concerning the transferability of economic rights in particular). Emphasizing mandatory, non-waivable contract rules in the choice of law context effectively blurs the conceptual distinction between provisions considered part of (mandatory) local copyright law and provisions considered part of contract rules. A prominent German copyright conflicts scholar, for example, concurs with the view expressed in this text that transferability provisions should be considered part of contract law and therefore subject to contract choice of law analysis. *See* Paul Katzenberger, URHEBERRECHTSVERTRAGE IM INTERNATIONALEN PRIVATRECHT UND KONVENTIONSRECHT, *in* URHEBERVERTRAGSRECHT 225, at 247 (Friedrich-Karl Beier et al. eds., 1995). In a next step, however, Katzenberger argues that a choice of law analysis must respect mandatory copyright contract rules in favor of authors and therefore courts must always apply the German Copyright Act's copyright contract-related provisions protecting authors, even to contracts between foreign parties. *Id.* at 255. Katzenberger's approach in effect expands the scope of copyright conflicts rules by subjecting contract-related elements in a case to the mandatory application of local copyright law.

214. Rental Right Directive, *supra* note 43.

215. *Id.* art. 4 (author's right to participate in the remuneration from the rental of their works or performances cannot be waived when rental rights are transferred). The same principles (exclusive rental right and, in the case of a transfer, an unwaivable remuneration right) apply to performers with respect to their performances.

216. *See, e.g.*, Panel Discussion, *Developments in EEC Copyright Law*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 51, 53–4 (1993) (Remarks by Jean-François Verstrynge).

217. Proponents of this view rely on the territorial nature of Community law and argue that Community law provisions, particularly the Directive's remuneration provisions and Member State implementing provisions, always apply to foreign copyright contracts. *See id.* This argument is not persuasive. First, the Directive does not require Member States to disregard the parties' choice of the law applicable to their contract. The Directive has not generally abandoned the parties' right to decide which law governs their agreement. It therefore remains necessary to distinguish between contractual aspects and copyright aspects in an agreement. The crucial question is whether the Directive permits the characterization of the remuneration right as a contract claim (which could be governed by a foreign contract law) or requires the characterization as a copyright claim (which must be subject to Member State copyright law). The Directive's text is ambiguous on this point. Interest analysis suggests that Article 4 should be viewed as a contractual provision.

analysis suggests that the Rental Right Directive's remuneration provisions should not be applied to foreign contracts.[218]

B. *Contract Conflicts Analysis on the GII*

The above contract conflicts discussion helps to formulate basic principles that should influence contracts choice of law analysis involving the online exploitation of copyrighted works. First, principal rules about the applicable contract law can be developed if parties enter into license agreements over digital networks. Arguably, the applicable law depends on the rights transfer agreement's main content. If the agreement is about providing access to information, for example, the primary choice is between the countries' laws where the service provider is located and where the information is received. The location of the information itself should be irrelevant.[219] To promote uniformity of agreements and efficient exploitation of copyrighted works, the service

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The argument that Community law may have extraterritorial effects and reach agreements concluded in third countries is not persuasive either. The Court of Justice's decision in an antitrust case that found that foreign agreements were subject to EC antitrust law if they are implemented in the Community, see Cases 89, 104, 114, 116, 117, 125-129/85, *Woodpulp*, 1988 ECR 5193, cannot automatically be applied to foreign film production agreements, as antitrust and copyright law may be subject to different jurisdictional standards. Moreover, even assuming arguendo that *Woodpulp* principles can be applied to foreign copyright contracts, it is not evident that foreign film production agreements meet that jurisdictional test. *Woodpulp* required that an agreement be "implemented" within the Community. An agreement for the production of the film and an agreement for its distribution in Europe are arguably two separate agreements, and only the latter is implemented in the Community. The production agreement, including any allocation of revenues in it, would therefore not be subject to EC law.

218. It is unclear what Community interests are advanced if the Directive indeed mandates the application of the lex loci protections to the remuneration right issue. The Community may decide to protect authors and performers that are Member State nationals. It is not obvious, however, why Community law needs to protect nationals of non-Member States. On the contrary, the interests of European consumers might be most effectively protected if EC rules do not interfere with the distribution of American films in Europe by imposing mandatory rules for the allocation of rental income. The public interest in an increased availability of works arguably should be preferable to the interest in protecting foreign authors and performers. Nor do any legal arguments support the protection of the U.S. performers' remuneration right, despite the recently signed 1996 WPPT, *supra* note 9. In the case of U.S. performers, Member States usually have not granted protection of their performances outside the Community since the United States had not joined the Rome Convention. This situation is bound to change as soon as the United States and EC Member States become party to the 1996 WPPT because Article 4(1) of WPPT introduces the national treatment obligation with respect to rights of performers. This includes the performers' rental right. *See* WPPT, *supra* note 9, art. 9(1). The national treatment obligation, however, extends only to the rights specifically granted under the WPPT and does not include the unwaivable remuneration right.

219. *See supra* note 128 and accompanying text (arguing that location of copyrighted works on servers should not be used as connecting factor in choice of law analysis as it is purely technical and frequently beyond the control of users).

provider should be in a position to design contracts based on a single contract law. The best choice therefore is focusing on the licensor's location as a connecting factor.[220]

If an online agreement is about the further exploitation of copyrighted works by the licensee, on the other hand, the applicable contract law should be determined according to the licensee's location. This will most effectively promote the principles of uniformity and exploitation efficiency. The main argument for these basic rules is that in light of the uncertainty surrounding the exploitation of works on digital networks, contract choice of law rules should help to concentrate the necessary rights in the hands of those who exploit and disseminate works and give licensees greater freedom in the marketing of copyrighted products in accordance with market demands.[221] This view is particularly persuasive when licensees consider the creation and marketing of digital multimedia works and face complex rights acquisition problems.[222]

Perhaps most important, the exploitation of copyrighted works on the GII requires that the number of "mandatory" contract-related rules in national copyright laws that indiscriminately apply to foreign contracts be kept to a minimum. Provisions that invalidate agreements concerning the transfer of rights from authors to users, such as publishers or film producers, may be highly disruptive in cases of international exploitation on digital networks, and will not benefit constituents in the country where protection under the national copyright law is claimed.[223]

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220. *See* Nimmer, *supra* note 198, at 242.

221. Proposals that would unilaterally favor the position of authors are therefore not persuasive. *See* Geller, *supra* note 801, at 110 (suggesting the application of the most restrictive contract law to rights transfer agreements absent choice of law provisions to protect authors). Such a rule would tend to discourage the exploitation of works because licensees who market and disseminate entertainment products and other copyrighted works face additional uncertainty about the scope of acquired rights.

222. The territorial nature of copyright law and related choice of law rules may actually not be the most significant sources of restrictive effects. The creation of multimedia works perhaps creates the greatest challenge in terms of rights acquisition, whatever effects choice of law rules may have. Combining the necessary rights for the creation and exploitation of multimedia works will require new, creative solutions, such as central clearing arrangements or the use of individual licensing through the GII as a substitute for collective rights administration. *See, e.g.*, Simon Jones, *Multimedia and the Superhighway: Exploring the Rights Minefield*, 1 TOLLEY'S COMM. L. 28 (1996). Restrictive interpretation of contracts will only further complicate the necessary acquisition of rights and therefore exploitation of works.

223. *See* Geller, *supra* note 8, at 204; Baumgarten, *supra* note 4, at 10–12 (discussing, under the label "Article X question," U.S. efforts during the TRIPS negotiations to introduce "contractual rights assurances" into the that Agreement through provisions designed to protect acquired rights); Walter, *supra* note 18, at 229–30. *Cf.* North American Free Trade Agreement, Dec. 22, 1991, art. 1705(3)(b), 32 I.L.M. 605 [hereinafter NAFTA] (ensuring right to exercise economic rights acquired through contracts or in a work for hire relationship).

Yet, interfering with foreign contracts appears even less justified than in traditional exploitation cases if the only contact with the country of protection occurs over digital networks. This conclusion applies in particular to alienability rules incorporated in copyright laws to protect authors' rights.

Conflicts analysis may help avoid the disruptive application of national copyright laws to foreign contracts by characterizing rights-transfer-related issues as contract issues and by applying the related contracts choice of law rules.[224] This approach may be applied, for example, to license agreements from a pre-digital era that permitted the exploitation of works but contained no explicit reference to GII-related uses such as use by online service providers. Cases involving such agreements will arguably be very common in the coming years.[225] Assume, for example, that an American producer of a multimedia work has acquired the necessary worldwide license rights for the exploitation of the work on the GII. All license agreements are subject to the contract law of a U.S. state such as California. In some cases, the producer acquired licenses in pre-existing works from other right holders like film producers or music publishers that had originally acquired the rights of authors. When the producer starts exploitation of the work on the GII, the online use of the works would, according to the above suggested copyright conflicts rules, also be subject to foreign copyright laws as customers in foreign countries retrieve the work.[226] If a dispute over the scope of the producer's right arises—for example, because the original authors contend that they never agreed to transfer rights for online use of their works—an infringement action may be brought under any applicable copyright law. In the case of online services, the copyright laws of those countries where the services are received would apply. Clearly, in this scenario it is highly desirable that all jurisdictions concerned recognize to the same extent the producer's acquisition of exploitation

224. *See supra* note 207 and accompanying text. *See also* Walter, *supra* note 18, at 229–30 (arguing that mandatory copyright rules, including provisions referring to copyright non-transferability, must follow the applicable contract law to avoid an intrusion by the country of protection's copyright law into the homogeneous structure of the contractual relationship).

225. *See, e.g.*, Tasini v. New York Times, 972 F. Supp. 804 (S.D.N.Y. 1997) (demonstrating this issue is important not only in crossborder exploitation cases, but also with respect to purely national agreements where freelance authors brought a suit against publishers for putting their articles onto online computer networks); Sidney Rosenzweig, *Don't Put My Article Online!: Extending Copyright's New-Use Doctrine to the Electronic Publishing Media and Beyond*, 143 U. PA. L. REV. 899 (1995); Joanne Benoit Nakos, *An Analysis of the Effect of New Technology on the Rights Conveyed by Copyright License Agreements*, 25 CUMBER. L. REV. 433 (1995).

226. *See supra* notes 136–141 and accompanying text.

rights. Choice of law rules that uniformly refer to one contract law to resolve the rights transfer issue would ensure that outcome.

This view, however, may not automatically prevail in all jurisdictions. Pursuant to § 31(4) of the German Copyright Act, for example, advance transfers for unknown forms of exploitation are invalid.[227] German copyright law may therefore consider the author as the holder of the online rights, not the multimedia work producer. If a German court characterized the transfer of future, unknown rights as copyright law issue, the court would accordingly apply German copyright law. Such decisions might conflict with the result reached under California contract law, where a comprehensive transfer of exploitation rights that includes unknown forms of use is more likely to be upheld.

This divergence can be avoided if courts characterize the transferability of rights as a contract issue.[228] They would then invariably apply the contract law that governs the agreement to determine whether a rights transfer was effective.[229] In the above example, a German court—as well as a French court or a U.S. court—would apply California law to decide whether the transfer of future exploitation rights was effective.[230]

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227. Section 31(4) allows, however, risk bargains. The author may transfer rights in a technically known form of exploitation, even if its economic significance is unforeseeable, provided that the agreement individually refers to the type of use and expressly stipulates its transfer, and that the parties discussed the issue. *See* Judgment of January 26, 1995 (Videozweitverwertung III), Bundesgerichtshof (German Supreme Court), 1995 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 212 (1995). Alternatively, a court may characterize this provision as a contract-related norm, but then consider it a mandatory contract provision in favor of authors. The result—mandatory application of local copyright contract provisions to foreign contracts—would be the same. *See supra* note 213.

228. *See supra* note 207 and accompanying text.

229. *See* Walter, *supra* note 18, at 230 (suggesting that § 31(4) of the German Copyright Act not be applied to contracts not subject to German contracts law). In addition, courts must accept that contract-related provisions may not be imposed on foreign contracts as mandatory contract norms. *See* WEINTRAUB, *supra* note 11.

230. The result under the applicable contract law may not always favorable to licensees, but at least it would be uniform wherever this question is litigated. Even within one country, standards concerning the interpretation of agreements might not be uniform. Several U.S. courts interpreted ambiguous clauses in favor of the acquiror of rights and held that even unknown forms of use were covered by an agreement for the transfer of rights. *See, e.g.*, Bartsch v. MGM, 391 F.2d 150 (2d Cir. 1968); Bourne v. Walt Disney Co., 68 F.3d 621 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1890 (1996); Platinum Records Co. v. Lucasfilm, Ltd., 566 F. Supp. 226 (D.N.J. 1983). Not all courts have followed this user-friendly rule of interpretation, especially in the 9th Circuit. Most notably, Cohen v. Paramount Pictures Corp., 845 F.2d 150 (9th Cir. 1988), applied a more restrictive interpretation that favored the retention of rights by the initial right holder where the form of exploitation was unknown at the time of the grant; Tele-Pac, Inc. v. Grainger, 570 N.Y.S.2d 5212 (N.Y. Ct. App. 1991) (distribution right for film through television broadcasting or similar device did not include videocassette rights); Rey v. Lafferty, 990 F.2d 1379 (1st Cir. 1993) (television rights did not include video cassette rights).

Contract choice of law rules might also help to mitigate the problems of different standards of moral rights protection. Strong protection of moral rights might disrupt the "netwide" exploitation of works, in particular in countries where moral rights are inalienable and indiscriminately "protect" foreign authors.[231] Even countries with a tradition of strong moral rights protection, however, may uphold contractual arrangements that limit the author's right to exercise moral rights after she has transferred her rights. Agreements in which the author partially waives her moral rights to enable the right holder to adapt the work to new forms of exploitation, for example, will frequently be honored. If those countries' copyright laws apply, courts should consider the interests of the countries involved and, instead of applying domestic copyright law, refer to the contract law that governs the agreement to determine to what extent a limitation of moral rights is permitted.[232]

CONCLUSIONS

The erosion of territoriality notions on digital networks requires modified copyright choice of law solutions that respond to the inherent features of the GII and, most importantly, to the possibility of making works simultaneously and instantaneously available throughout the world. From the perspective of copyright conflicts analysis, the greatest challenge arises from the intersection between the global GII and territorial copyright laws. Given the complexity of the issue, the copyright conflicts debate about "cyber" choice of law rules is still in its early stages. What is necessary in this situation is a discussion of policies that: will form the basis of copyright conflicts analysis and suggest certain rules that may contribute to the formulation of an operable copyright choice of law regime for digital networks.

As digital networks allow a broad range of uses, including online video services as well as private exchanges of information, they create a great variety of situations with potentially conflicting interests among a highly heterogeneous group of users of copyrighted works, consumers, and right holders. Copyright conflicts in "cyberspace" are therefore rarely receptive to simple rules, and choice of law rules must be suffi-

231. *See, e.g.*, D.P. I. Mar. 28, 1991, *reprinted in* 23 IIC 702 (Fr.) (French protection of moral rights prevents exploitation in France of colorized U.S. film); Jane Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Colorization Controversy*, 15 COLUM.-VLA J.L. & ARTS 135 (1991).

232. *See* Geller, *supra* note 8, at 242–46 (discussing this and other forms of judicially accommodating interests of the country where the contract was concluded with moral rights protection).

ciently flexible to accommodate various and perhaps conflicting interests.

This article sought to develop flexible rules that balance the need of predictability, enforceability of rights, and respect for local standards of protection. It proposed a flexible country of origin conflicts regime under which the copyright law of the user's location primarily applies to the acts of exploitation. This basic conflicts rule is fair to the defendant, simple to apply for courts, and predictable. To protect right holder interests, however, copyright conflicts rules should also incorporate an effects test that takes into account, in appropriate cases, the impact on other markets in order to determine whether other copyright laws are cumulatively applicable with the law of the country where the user is located. Conflicts rules ought to be right-holder-friendly if applied against user-defendants who exploit copyrighted works on digital networks for commercial purposes. In the case of non-commercial users, on the other hand, conflicts rules should recognize that individual and public interests in a broad and unrestricted use of digital networks are more likely to outweigh the right holder's enforcement interests. Finally, fairness notions may justify permitting the defendant a foreseeability defense. The article has demonstrated that standards can be developed that make a foreseeability defense operable on digital networks.

Concerns about the enforceability of rights cannot uniformly dominate conflicts analysis. Copyright choice of law rules that tend to point to several cumulatively applicable copyright laws, such as the flexible country of origin conflicts regime, must be accompanied by robust contract choice of law rules that protect acquired exploitation rights. Arguably, flexible contract choice of law rules are the key to an efficient exploitation of copyrighted works on the GII. Imposing domestic solutions that define the relationship between authors and users of their works on all contracts throughout the world appears inappropriate in an era where copyrighted works are exploited on a global scale.