

Bojana Žižić, LL.M.

UDK 347.78:681.3
(прегледни чланак)

Choice of laws regarding copyright infringement occurring over the Internet in the light of international jurisprudence and practice

The false can never grow into truth by growing in power

Rabindranath Tagore

Резиме

Овај рад се бави изучавањем повореде ауторског права које настајућа активношћу преко Интернета. Проблематика која се у детаље разматра су тешкоће при одређивању које би се право требало применити (право које државе) приликом такве повореде.

Рад даље демонстрира да је због саме природе Интернета врло тешко, а понекад и немогуће лоцирати где је повореда ауторског права настала. Због тога је традиционални, на физичкој локацији базиран и широм света прихваћени приступ проблему - *lex loci delicti* неприменљив и неадекватан.

Кључне речи: повореда ауторског права, Интернет, иерархијалности, сукоб закона, надлежности, право земље (месна) где је повореда настала, право земље (месна) где суд заседа

Until very recently, choice of law issues in copyright disputes arising over the Internet have been rarely dealt with by the courts, legislatures and copyright scholars all over the world.

This paper examines choice of laws and related conflict of jurisdiction issues for copyright infringement occurring over the Internet in the light of scarce international jurisprudence and practice under the Berne Convention.

A) The Nature and Origin of the Internet

The Internet (Cyberspace) is a globally and easily accessible new medium defined as a combination of the network, the users, the information and the programs intended for the dissemination of information.¹⁾

Cyberspace, the electronic super-highway or the Internet, as it is commonly referred to in short, even in non-English speaking parts of the world, is a globally networked, computer-sustained, computer-accessed and computer-generated multidimensional virtual reality, the use of which increases tremendously on a day by day basis.²⁾

There are many networks that make up Cyberspace. Each of them is administered and financed separately by governments, universities and different commercial Internet Service Providers.³⁾ In order to access the Internet, the user has to get connected to the network through an Internet Service Provider. The Internet Service Provider enables users to access regional networks and high capacity networks (backbones.) The Internet is, in general, self-governing since there is no global government management of it.⁴⁾

The Internet originated from a military attempt to secure links among computers in order to preserve information and communications in case of a catastrophe. The United States Department of Defence created a computer network in order to make military information easily exchangeable. Soon after that, universities in the US were connected to the network. Lastly, commercial online services started to provide the general population with access to Cyberspace.⁵⁾ Today, millions of people use the Internet all over the world.

At the beginning, the Internet was intended to support research and education. As a result, in its early stage nobody seriously thought about the legal aspects of Cyberspace and its hidden challenges. However, the importance of the Internet grew considerably. This growth is attributable to the Internet becoming more profit and commercially oriented than

1. P. Hoffman., *Internet, Instant Reference* (Alameda: Sybex, 1994) at xi.

2. Katharina Boele-Woelki, "Introduction" in K. Boele-Woelki & Catherine Kessedjian, eds., *Internet, Which Court Decides?, Which Law Applies?* (The Hague: Kluwer Law International, 1998) v.

3. M. Burnstein, "A Global Network in a Compartmentalized Legal Environment" in Katharina Boele-Woelki, "Introduction" in K. Boele-Woelki & Catherine Kessedjian, eds., *Internet, Which Court Decides?, Which Law Applies?* (The Hague: Kluwer Law International, 1998) 23.

4. Ibid.

5. A. Knoll, "Any Which Way but Loose: Nations Regulate the Internet" (1996) 4 Tul. J. Int'l & Comp. L. 275 at 2.

education and research focused.⁶⁾ Advertising, the purchase and sale of goods and services with electronic payment over the Web are examples of booming Internet commercialisation.⁷⁾ The importance of the Internet's legal implications increased exponentially as well.⁸⁾

B) Legal Wrongs Over the Internet: Problems with the Internet and Territoriality

People use the Internet, for among other purposes, to find information, to upload materials, to communicate, to buy, and to sell. Thus, many torts and other wrongs that occur elsewhere now take place over the Internet as well. Legal problems such as defamation, hate speech and pornography occur on the Internet. However, these problems are beyond the scope of this paper which deals only with copyright infringement.

Private international legal problems on the Internet arise largely because of the multinational and simultaneous access which the Internet permits to material on it. Users cannot be expected to know the relevant laws of every country which their Internet use touches and, thus users cannot anticipate which state's law they may violate by using the Internet.

For example, posting something on the Internet in the US might be legal, while the same content in Germany might constitute hate speech.⁹⁾ Posting something on the Internet generally means making the posted content accessible to everyone in the world that has access to the Internet. It can be difficult, costly and sometimes impossible to restrict distribution of materials on the web to selected people or countries.¹⁰⁾

In addition, persons interacting through the Internet are sometimes completely unaware of each other's physical location. Even if an E-mail address suggests a particular physical location, users of the Internet can arrange for e-mail addresses on servers located in countries other than the country in which they are located. As well, the owner of a domain name can request that the domain name be associated with a different machine in another place from that with which the domain name had previously been associated. The domain location on the Internet remains ostensibly unchanged, but the physical location of the computer files associated with that same domain name may be thousands of miles away from where the files were originally located. In this way the domain name owner may, deliberately or inadvertently conceal the physical location of his domain. Again, this

6. See general H. H. Perritt, "Cyberspace and State Sovereignty" (1997) 3 J. Int'l Legal Stud.

7. C. P. Gaumer, "Conflicts, the Constitution and the Internet" (1998) 86 Ill. B. J. Illinois Bar Journal at 2.

8. M. Burnstein, "A Global Network in a Compartmentalized Legal Environment" in Katharina Boele-Woelki, "Introduction" in K. Boele-Woelki & Catherine Kessedjian, eds., *Internet, Which Court Decides?, Which Law Applies?* (The Hague: Kluwer Law International, 1998) 23.

9. H. H. Perritt, "The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance" (1998) 5 Ind. J. Global Legal Stud. 423 at 3.

10. M. Burnstein, "A Global Network in a Compartmentalized Legal Environment" in Katharina Boele-Woelki, "Introduction" in K. Boele-Woelki & Catherine Kessedjian, eds., *Internet, Which Court Decides?, Which Law Applies?* (The Hague: Kluwer Law International, 1998) 23.

explains how it is impossible to be sure of the physical location of the Internet users and sites.

This can lead to unexpected jurisdictional conflicts. For example, a Canadian based company might sell digital books over the World Wide Web, which can be accessed in every country with Internet access. The Canadian company gives access only to books in which copyright in Canada has lapsed. A buyer in Germany might order a book, the distribution of copies of which in Germany infringes German copyright. The Canadian company, aware only of the E-mail address of the buyer, might not realize that the buyer is located in Germany. In good faith, the Canadian seller sells the book to the German buyer.¹¹⁾ Under the copyright law of most jurisdictions a person can be subject to copyright infringement liability despite the fact that he committed a copyright violation without knowing of the protection of the work under copyright.

C) The Courts' Approaches to Choice of Law, Copyright and the Internet

1) Traditional Non-Internet Approach Applied: the Internet and Territoriality

The courts world-wide apply established choice of law (*lex loci delicti*) rules to torts committed via the Internet.¹²⁾ The concept of the national copyright law applying on a territorial basis has been fundamental to the traditional resolution of conflicts of laws problems in copyright infringement cases, as well. The territorial approach is reflected in the traditional place of infringement test of choice of law, and in the controversies about the contexts, if any, in which domestic copyright law can have some extraterritorial application.

As an illustration of traditional jurisdictional approach, Ryan Yagura finds that the Internet has physical locations, i.e., a territory, which permits the application of conflicts and copyright territoriality theory:

Cyberspace does not lack physical location any more than does telephone system. For example, information on the Internet still travels through communication lines and hardware, each with fixed locations around the world. The web sites and information are not stored in "cyberspace," but on tangible computer storage media. Further, users have physical locations from which they connect to the Internet and interact with others. The Internet is basically a technologically advanced communications network and the courts should treat it similarly to other communications systems in their personal jurisdiction analyses.¹³⁾

11. J. L. Goldsmith, "Against Cyberanarchy" (1998) 65 U. Chi. L. Rev. 1199 at 3.

12. C.P. Beall, "The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet," (1997) 15. J. Marshall J. Computer & Info. L. 361 at 1.

13. R. Yagura, "Does Cyberspace Expand the Boundaries of Personal Jurisdiction?" (1998) 38 IDEA: J.L. & Tech. 301 at 1.

However, this paper will show that many commentators dispute this view of the Internet and its implications for choice of law doctrine in Internet copyright infringement cases.¹⁴⁾

2) Conflict of Laws and Copyright Infringement Occurring Through the Internet

In this section the rules applied in determining choice of law issues and related jurisdiction questions in cases of copyright infringement over Cyberspace will be considered.

A hypothetical case will be examined in which a person in the US copies and uploads copyrighted material to a commercial internet service provider whose headquarters and Internet server computers are located in Hungary. From that server in Hungary the copied material becomes accessible world-wide to other Internet users. Persons in Germany and in China download the work.

The copyright owner who is a Russian national wants to bring a suit for copyright infringement. The potential defendants include the US uploader of the work, and Hungarian online service to which the US infringer uploaded the copied work, and which service made the copied work accessible to users and downloaders in places such as Germany and China. Other defendants might be those who accessed and downloaded the work in Germany and in China.¹⁵⁾

Bringing infringement actions against the individual users in Germany, China and other countries may well seem impractical and uneconomic. While the US uploader may be a more viable defendant, it may be difficult to locate the person responsible for the uploading.¹⁶⁾ In addition, there might be concerns about the financial resources of such person, and the plaintiff's ability to collect on a judgement.

Thus, it may often appear that the Internet service provider, in our hypothetical case Hungarian company, is the most obvious defendant to choose. In a single legal action, the plaintiff may be able to hold such a provider financially accountable for the use of the copied work by all Internet users who have accessed and downloaded the work from that server. As a business, the Internet service provider might have a stream of business income and/or assets that could be made subject to judgement enforcement processes. The plaintiff would have to physically locate the Internet service provider, but as a service business the provider may have revealed its physical location as a necessary aspect of doing business.

a) Jurisdictional Problems

A preliminary question briefly noted here is that of jurisdiction; namely, in which forum can the plaintiff bring the suit.

In the hypothetical case, the plaintiff can certainly sue the online service in Hungary, the place of the defendant's corporate domicile. However, since the plaintiff is Russian, he

14. See below.

15. J. C. Ginsburg, "Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure" (1995) 42. J. Copyright Soc'y U.S.A. 318 at 2.

16. See above in this Chapter for reference to the difficulties of identifying the location in which Internet uses are located.

would probably prefer to sue in Russia in order not to be exposed to additional costs by bringing a suit in forum distant from his domicile. Whether he should try this depends in part on whether the Hungarian online service has any property in Russia. If it does, the plaintiff may be able to enforce a Russian court decision against that property.

However, if the online service has no assets in Russia, the plaintiff might have a problem with enforcement of any Russian court judgement. He should look into Hungarian legal rules concerning the enforcement of foreign judgements to see if Hungarian courts would execute a Russian judgement. If Hungarian courts are not prepared to do so, there would be nothing that the Russian court could do to enforce its judgement. Therefore, it would be impractical to sue in Russia under these circumstances.

Suing in Russian court might be not only impractical, but also impossible. This could happen if, according to the Russian law, a foreign entity outside Russia is not amenable to a suit in Russia.¹⁷⁾ In this case, the plaintiff would have to sue either in Hungary, or find some other forum for his action. That could be difficult for a copyright owner who does not have enough resources to pursue a claim in a foreign country. Subsequently, his copyright might remain unprotected due to the lack of an available forum or due to the lack of adequate foreign judgement enforcement provisions.

The Preamble of the Berne Convention states that the countries of the Union have agreed to "protect in as effective and uniform a manner as possible" the rights of copyright owners.¹⁸⁾ In cases such as the above hypothetical, protection may not be "effective". What can be done to secure higher levels of actual copyright protection in such cases of infringement over the Internet?

In order to fight international online piracy in the most effective way, should reception theory (see below) for choice of law be applied to choice of jurisdiction as well? Could copyright infringers be amenable to law suits wherever the infringing emission was or was capable of being received?¹⁹⁾ Since material uploaded on the Internet is very frequently capable of being received in every country with access to the Internet, such a rule would often result in the plaintiff being able to bring an action in his own country.

This would lead to cost and inconvenience for a foreign defendant who would be required to travel to the plaintiff's country to defend the action. However, if the plaintiff is limited to suing in the country of the defendant's domicile, the plaintiff will face added financial hardships which may limit his ability to pursue the claim.

While the issue is beyond the scope of this paper, I would be sympathetic to broad international jurisdictional competencies in copyright related claims regarding the Internet. The plaintiff should not be precluded from pursuing legitimate claims due to insufficient resources to litigate in a foreign country. Rules on costs could discourage plaintiffs' abuses

17. This hypothetical case is not based on the existing legal rules in the mentioned countries. The rules are invented in this particular context in order to bring more flexibility and clarity to the introduced example.

18. Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971).

19. J. C. Ginsburg, "Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure" (1995) 42. J. Copyright Soc'y U.S.A. 318 at 3.

of liberalised jurisdictional rules and protect defendants if the plaintiff's claims prove unsustainable.

A final note is that expanding rules of jurisdictional competence such that the plaintiff's national court is more often competent to hear an extraterritorial copyright case does not solve all of the plaintiff's problems in securing justice with respect to his copyright infringement claim. If the plaintiff does secure a judgement from his national courts he will still face the problem of having that judgement executed against the defendant. If the defendant does not have assets in that jurisdiction, the plaintiff will have to seek enforcement of the judgement in some foreign jurisdiction in which the defendant does have assets. The enforcement of foreign copyright judgement is beyond the scope of this paper. However, it is important to stress that perfecting the choice of law rules alone would not resolve all of the legal and practical problems facing would-be litigants in international copyright infringement cases.

b) Choice of Laws and Copyright Infringement Problems

As Jane Ginsburg has noted, "there is no such a thing as 'international copyright'; instead, there are a multiplicity of national copyright regimes."²⁰ In examining the choice of law problems emerging from copyright infringements occurring through the Internet, note Article 5(2) of the Berne Convention:

Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by **the laws of the country where protection is claimed.**²¹ [Emphasis added]

Article 5(2) vaguely suggests a choice of law rule. The meaning of the wording "the laws of the country where protection is claimed" is subject to various interpretations, and there is no agreement as to what that country is.

i) Forum Law

A logical interpretation of Article 5 might be that the choice of law is that of the country of *forum* since the copyright owner claims protection there. Parant believes that the easiest solution to identify which country's law will apply to the entirety of multinational copyright claims would be to apply the forum law. Some believe that this approach would probably be the most accurate interpretation of the "laws of the country where protection is claimed" in Article 5 of Berne.²² In addition, it would be most convenient for the forum court to apply its domestic law, with which the judges are most familiar to the entire claim. This solution would simplify choice of law problems, though that law could apply even if no copyright violation had taken place in the forum country.

20. Ibid.

21. Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971).

22. V. L. Parant, "Thwarting Internet Pirates in 'Intellectual Property Havens'" (1997) 15-Fall Ent. & Sports Law. 20 at 2.

A choice of law rule which directs the application of the forum law, itself begs the question of what is an acceptable forum in an Internet copyright infringement matter. In the section above on jurisdiction it was noted that the traditional criterion of jurisdiction is that the defendant must be subject to the personal jurisdiction of the court. Under this approach, as Ginsburg has stressed, the choice of forum will be independent of a choice of law considerations.²³⁾

A choice of law rule which applies the law of the forum, may encourage forum shopping among plaintiffs who would seek to bring actions in jurisdictions with the most favourable law for their cases.²⁴⁾ Similarly, there is a possibility of manipulation of the rule by the defendant who might try to preempt the choice of forum and thus of law, by, for example, seeking a declaratory judgement in an "intellectual property haven."²⁵⁾

ii) The Law of the Country Where the Infringement Took Place - Lex Loci Delicti

However, most commentators disagree that Article 5(2) of the Berne Convention points to the *forum* country.²⁶⁾ They claim that "the country where protection is claimed" is "the country for which protection is demanded against infringing acts that are transpiring there." This refers to the place of injury or *lex loci delicti*.²⁷⁾

However, *lex loci delicti* choice of law rule is imperfect, especially in the context of infringement through the Internet, since the rule points to more than one possible country. According to Virginie Parant, the "country where protection is claimed" might be understood alternatively, either as the country of emission,²⁸⁾ or country of upload of the infringing works, or the country of reception, or country of download of the infringing works.²⁹⁾

Defining the *lex loci delicti* as the country of emission or as the country of reception could yield different results in the same circumstances. For example, assume that an Internet user copies copyright protected material and posts it on the Internet in a country A. From country A this copy becomes accessible world-wide. Users in country B accesses this site in country A and receives copies of the work in country B. Assume also, that copyright in the work in the country A has expired. Assume on the other hand, that copyright in the work still subsists in country B.³⁰⁾

23. J. C. Ginsburg, "Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure" (1995) 42. J. Copyright Soc'y U.S.A. 318 at 11.

24. Ibid.

25. Ibid.

26. J. C. Ginsburg, M. L. Janklow, "Group of Consultants on the Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Global Digital Networks" (Geneva, 1998).

27. Ibid.

28. The country of emission approach is incorporated in Satellite Directive by the European Union and European Commission's Green Paper on Copyright and Related Rights in the Information Society.

29. V. L. Parant, "Thwarting Internet Pirates in 'Intellectual Property Havens'" (1997) 15-Fall Ent. & Sports Law. 20 at 2.

30. W. Grosheide, "Experiences in the Field of Intellectual Property" in Katharina Boele-Woelki, "Introduction" in K. Boele-Woelki & Catherine Kessedjian, eds., *Internet, Which Court Decides?, Which Law Applies?* (The Hague: Kluwer Law International, 1998) 35 at 43.

In the hypothetical case, if the law of the country of emission is to be applied, that is country A, the defendant would not be liable for copyright infringement since copyright in the work has lapsed there. However, if the law of the country of reception is applied, that is the law of country B, the defendant would be liable for infringement as copyright still subsists in the work in that country. This example is simplified, of course, in order to illustrate how a different choice of law rule can lead to completely different legal outcomes.

No international convention stipulates precisely what *lex loci delicti* means, and how to identify it. The two approaches to defining *lex loci delicti* in the Internet context, the place of emission or the place of reception, are examined more closely below.

a) The Country of Emission or the Country From Which the Alleged Infringement Originated

Defining the *lex loci delicti* as the country of emission (country of upload or the country of origin) has an apparent advantage of simplicity and relative clarity. The rule suggests that the court will apply only one law in a multinational copyright infringement case, the law of the one country of emission. This approach has an apparent advantage over the defining the *lex loci delicti* as the countries of reception, as under the latter approach a multiplicity of possible choices of law might result from the same act of emitting or uploading the material.³¹⁾

However, the country of emission approach to defining the *lex loci delicti* may have only apparent relative clarity as it is not always easy to identify the country of emission in Internet infringement cases.

Place of Emission as Website of Upload: The Problem of Multiple Upload Sites

An Internet communication can be, and often is provided from many different sites and places. If each such website is a point of origin, the question arises of whether there is the potential for as many choices of law as there are places of such websites.³²⁾ Attempting to limit the number of such choices by, for example, defining the country of emission as the country where the first publication or dissemination of the particular copy of the work occurred, may be of limited success. The copyrighted material may often be uploaded onto multiple websites simultaneously. Do all such sites qualify as the first site of upload and emission?³³⁾ If this is the case, this method has the same disadvantage as the country of reception approach - how to select one out of many potentially applicable laws.

-
31. P. E. Geller, "Conflicts of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World" (1996) 20 Colum. B VLA J. L. & Arts. 571 at 11.
 32. The incidental nature of choosing law on the basis of the place of the particular website used to access the copy of the work is emphasized by the fact that it may be largely coincidence which site a particular user has chosen from which to download the infringing copy. The connection particular place to particular infringing events is coincidental.
 33. P. E. Geller, "Conflicts of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World" (1996) 20 Colum. B VLA J. L. & Arts. 571 at 12.

Place of Emission as Place of Initiation Upload

One of the suggested solutions would be to apply the law of the place where the initiation of the upload of the infringing copy took place.³⁴⁾ For example, in the US, in multinational copyright infringement cases apart from the Internet, there is a so-called "root copy theory." Some courts in the US (as in *Update Art. v. Modiin Publishers*)³⁵⁾ apply US law to the entire international copyright claim, provided that the basic (root) act of infringement took place within the US. The reason for the application of the US law in this case is the belief that extraterritorial infringement is a direct consequence of the originating, or "root", copyright violation which occurred³⁶⁾ in the US. That concept can correspond to the country of the initiation of the upload approach.

The idea behind these theories is to trace the multinational communication of a work to a single originating point. Then, the choice of law is to apply the law of the country of point of departure.³⁷⁾

However, this theory has been attacked by many scholars, including Graeme Austin. Where the US is the place of initiation of the upload of the infringing copy, he has stated that: "US law should be confined to US borders; copies or transmissions received outside the US should be judged by the laws of the countries of receipt."³⁸⁾ Furthermore, some have seen the American courts as ready to manipulate the application of the root copy theory to maximize the application of US law to multinational disputes. The courts, it is said, tend to apply the root copy theory when the root copy originates in the US, which leads to application of the US law by the American court. However, when a root copy appears to have originated in some other country, to enable copies to be made in the US, the American courts appear less ready to apply a root copy theory to justify the application of the foreign law of the place of origin of the root copy. As noted by Professor Janklow:

US courts seem considerably more territorially inclined when applying the law of the country of the initiating act would lead to the application by a US court of a foreign law that would exculpate an act which US law would hold infringing.³⁹⁾

Place of Emission as Nationality of the Author of the Infringed Work

Some writers have suggested tracing the ultimate initiation of course of infringing events to the authoring of the infringed work. Thus, country of emission becomes the coun-

34. J. C. Ginsburg, M. L. Janklow, "Group of Consultants on the Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Global Digital Networks" (Geneva, 1998).

35. *Update Art. v. Modiin Publishers*, 843 F. 2d 67 (2d Cir.1998).

36. J. C. Ginsburg, "Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure" (1995) 42. J. Copyright Soc'y U.S.A. 318 at 10.

37. Ibid.

38. J. C. Ginsburg, M. L. Janklow, "Group of Consultants on the Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Global Digital Networks" (Geneva, 1998).

39. Ibid.

try of origin of the work. An author might produce a work over time while located in several different countries. Thus, some suggest simplifying this approach by referring to the country of nationality of the author of the copyrighted work. However, this choice of law rule may be subject to the objection that the connection between the nationality of the author of the work, and the events of infringing copying and dissemination may be quite remote. As well, a rule of nationality of the author can also point to multiple jurisdictions, if several authors from different countries may author a work of joint authorship over the Internet. Thus, authorship would point to more than one country. The rule of nationality of the author(s) would be further complicated in application as the various national laws of the countries of possible joint authors could define the form of collaboration which yields joint authorship and resulting ownership of copyright differently.⁴⁰⁾ In such a case we would first have to choose a law in order to use a law to determine who is an author of the work. If the choice of law rule is that we use the law of the nationality of the authors, we have a circular logic problem - we can't identify that law until we identify who is an author and we can't choose a law by which to determine authorship until we have identified the author(s).

Country of Emission and Intellectual Property Havens

Copyright infringers may seek to avoid liability by performing their infringing activities in "intellectual property havens."⁴¹⁾ Such avoidance can be practised with respect to infringing activity on the Internet.

If the *lex loci delicti* is clarified by defining it as the country of emission, and if the country of emission is further clarified by defining it as the country of the initiation of the upload, a copyright avoidance strategy is suggested. Would-be infringers who seek to avoid infringement liability might choose to locate in an intellectual property havens, that is, a jurisdiction in which the substantive copyright law, and copyright enforcement processes were most favourable to the uploader.

Virginia Parant has suggested a possible clarification and possible amelioration of the evasion potential in treating the country of emission as the country of initiation of the upload. She suggests defining the country of emission as the country where the service provider, through which access to the infringing copy is provided, is located. Amelioration would occur if intellectual property havens tended to lack sufficient Internet communications infrastructure to be places in which service providers would be likely to locate.

As a last resort, to bypass a choice of law that would grant no copyright protection to the author in the particular case, Parant recommends a public policy approach to choice of law.⁴²⁾ That is, the country of choice of law would be that to which public policy pointed in the circumstances of the case. I think that there could be nothing worse than such a public

40. P. E. Geller, "Conflicts of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World" (1996) 20 Colum. B VLA J. L. & Arts. 571 at 12.

41. For more about this see pg. 86-87.

42. V. L. Parant, "Thwarting Internet Pirates in Intellectual Property Haven" (1997) 15-Fall Ent. & Sports Law. 20 at 2.

policy approach. The meaning of public policy is vague and unpredictable. Such an approach would leave too much room for manipulation of cases in the courts, and would not lead to predictability of outcomes as public policy can be differently construed and can change quickly.

b) The Country of Reception

The law of the country of reception is an alternative interpretation of the Article 5(2) of the Berne Convention as the place in which copyright protection is claimed. The law of each country in which the Internet emission is received would be applied to that reception. Consequently, each and every country would be in a position to apply its laws since the Internet is accessible everywhere.⁴³⁾

Applying the law of each country of receipt would be consistent with a widely-held concept of international copyright law: that there is no international copyright law as such, but rather a collection of national copyright laws, bound by the Berne Convention into a multilateral non discrimination (national treatment) accord.⁴⁴⁾

An argument in favour of the country of receipt approach to choice of law is that the location of the servers of emission might be completely fortuitous in the process of transmissions through the Internet. Thus, the country of origin approach makes no particular sense in terms of connections to the actual infringing uses of the protected work. In contrast, the countries of reception are those in which the effects of unauthorised reception are felt and, thus, this approach is more appropriate to apply.⁴⁵⁾

However, applying the laws of the countries of reception might be seen as creating anomalies. The copyright laws of the various countries of reception might differ considerably. If the law of countries of reception is applied in a single action against defendants located in several different countries, the case becomes more complex, and there may be the disquieting phenomenon of similarly factually situated defendants, except for place of receipt, being subjected to quite different outcomes on the issue of infringement, reflecting the different law applied in the same case. The need to apply the different laws of places of reception might lead to multiple actions in which the differing laws were applied to defendants who were similarly situated but for place of reception.

iii) Author's Residence

There is another possible approach to defining the *lex loci delicti* as denoting the place where the harm was felt. The harm is to, first, the author's personality (violation of moral rights) and second, to his financial situation (infringement upon the economic rights). Both

43. Ibid.

44. J. C. Ginsburg, M. L. Janklow, "Group of Consultants on the Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Global Digital Networks" (Geneva, 1998).

45. Ibid.

of these harms the author feels in the place of his residence. In the case in which the copyright owner is a juridical person, the harm is felt at its principal business establishment.⁴⁶⁾

Most commentators agree that this method is simple, but inappropriate for two reasons. First, it may deprive the parties of being able to predict their liabilities, as the place of residence of the author may be unknown, changing or fortuitous. Second, some find this method somewhat paradoxical as there may be no real connection between the author's place of residence and the place of dissemination, the place of receipt or the place of the forum:

it may be in tension with the law of a forum that has exercised jurisdiction on the basis of a territorial connection between the forum and the claim. On the one hand, the author is asking the forum to exercise jurisdiction over the defendant because the defendant sent the work from or made the work available in the forum. The author will also asking the court to forbid dissemination of the work from or into the forum, and to award damages for any copies already disseminated. But on the other hand, the author would not be asking the court to determine whether defendant's act was wrongful under the forum's law if the forum is not that of the author's residence.⁴⁷⁾

D) Further Comment on Choice of Law Rules and the Internet

Legal writers such as David Johnson and David Post⁴⁸⁾ fear that existing choice of law rules cannot provide appropriate guidance for legal issues concerning Cyberspace.⁴⁹⁾ One of the reasons for their apprehension is the fact that all choice-of-law doctrines rely on physical location and the principle of territoriality.⁵⁰⁾ Subsequently, multinational legal disputes must be regulated by choice of law rules that select a governing law in a particular case (e.g. by *lex loci delicti* or by the law of the country where the parties to the dispute are located.)⁵¹⁾ According to this viewpoint, it is illegitimate for the law of one nation to regulate activities that occur, in whole or substantial part, in another jurisdiction.

This position further finds that it is impossible to detect physical location in the virtual world since the Internet knows no borders.⁵²⁾ Communication through the Internet is not dependent upon transportation and, thus, states cannot stop such communications at the border.⁵³⁾ For example, Internet transmissions are often disseminated simultaneously in

46. Ibid.

47. Ibid.

48. For more see D. R. Johnson and D. Post, "Law and Borders the Rise of Law in Cyberspace" (1996) 48 Stan L Rev. 1367.

49. J. L. Goldsmith, "Against Cyberanarchy" (1998) 65 U. Chi. L. Rev. 1199 at 1.

50. C.P. Beall, "The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet," (1997) 15. J. Marshall J. Computer & Info. L. 361 at 1.

51. J. L. Goldsmith, "Against Cyberanarchy" (1998) 65 U. Chi. L. Rev. 1199 at 1.

52. C.P. Beall, "The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet," (1997) 15. J. Marshall J. Computer & Info. L. 361 at 1.

many different places all over the world.⁵⁴⁾ Jane Ginsburg wonders: "Without physical territoriality, can legal territoriality persist?"⁵⁵⁾

Ginsburg's line of reasoning, therefore, concludes that the lack of a physical location for Internet related legal disputes make traditional conflict of law rules inoperative. Application of traditional choice of law principles would inevitably lead to extraterritorial application of national laws. This would be unacceptable according to the same traditional approach.

Specifically, in a digital environment, while we can make hard copies of works, for example, on disks, tape, or paper, we can also address them as soft data packets to terminals across the world almost instantaneously by giving our computers simple commands. Here courts can no longer play the game of localising infringement under the shell of one national law or another, since the same act can put the same work, not just in one country at a time, but in many countries at once. To choose between such laws when they conflict in cyberspace, courts might consider a more flexible analysis.⁵⁶⁾

As a result of these difficulties, David Johnson and David Post are convinced that governments should not seek to regulate the Internet at all. They argue that Cyberspace should simply be self-regulated by its participants.

A contrasting argument, to the same ultimate effect, is offered by Professor Herbert Kronke who claims that instead of "there is no there, on the Internet,"⁵⁷⁾ the reality is "everywhere is there on the Internet."⁵⁸⁾ If this is true, as I believe it is, this acknowledgement does not simplify, but complicates conflict of laws problems in the context of the Internet.

A further observation made is that regulation of the local effects of Internet activities would extend to other jurisdictions since the uploaded material often appears simultaneously and is equally accessible all over the world.⁵⁹⁾ There is a widely shared opinion among scholars that spillover effects in the other jurisdictions would be negative.⁶⁰⁾

To illustrate this concern, I will refer again to the example of a work being posted on the Internet from Canada, which work is not copyright protected under Canadian law. That

53. K. Aoki, "Considering Multiple and Overlapping Sovereignities: Liberalism, Libertarianism, National Sovereignty, 'Global' Intellectual Property, and the Internet" (1998) 5 Ind. J. Global Legal Stud. 443 at 1.

54. V. L. Parant, "Thwarting Internet Pirates in 'Intellectual Property Havens'" A (1997) 15-Fall Ent. & Sports Law. 20 at 1.

55. J. C. Ginsburg, "Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure" (1995) 42. J. Copyright Soc'y U.S.A. 318 at 2.

56. P. E. Geller, "Conflicts of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World" (1996) 20 Colum. B VLA J. L. & Arts. 571.

57. M. Burnstein, "Conflicts on the Net: Choice of Law in Transnational Cyberspace", (1996) 29 Vanderbilt J. Transn'l L. at 75.

58. H. Kronke, "Applicable Law in Torts and Contracts in Cyberspace" in Katharina Boele-Woelki, "Introduction" in K. Boele-Woelki & Catherine Kessedjian, eds., *Internet, Which Court Decides?, Which Law Applies?* (The Hague: Kluwer Law International, 1998) at 65.

59. J. L. Goldsmith, "Against Cyberanarchy" (1998) 65 U. Chi. L. Rev. 1199 at 3.

60. Ibid. at 1.

work is received and downloaded by an Internet user in Germany where the work is protected by copyright. In this case, the judge has two options: to apply Canadian law that offers no protection to the work, or to apply German law and protect the work. In this hypothetical case there is a legitimate concern that, if German law applies (e.g. if reception theory is adopted), it would extraterritorially regulate the behaviour of the Canadian book company. The Canadian company would at least have to modify its Canadian web site so as to detect and prevent access by Internet users in Germany. Given the difficulties in doing this the Canadian book company might decide that it would be easier and safer to delete the contentious work entirely from its Canadian web site. The German law would then, in effect have restricted the defendant's activities in Canada, since the book company would have stopped selling the work everywhere, even in Canada, due to the chilling effect of the German copyright infringement threat.⁶¹⁾

Finally, some commentators point to a fairness requirement in applying copyright law which requires the parties to have some reasonable opportunity to understand the legal effects their activities have under copyright law, as a condition of liability. When that liability may be incurred in any of the many countries with Internet users, this fairness requirement that potential copyright liability be reasonably predictable or at least reasonably determinable is impossible to satisfy. In the example, the Canadian book company did not know to whom it had sold digital books, and had no opportunity to advert to the possibilities for German copyright liability. Is it not unfair to hold that company liable for a German copyright violation under these circumstances?

Problems with the existing choice of law rules suggest to some commentators that the Internet cannot be effectively regulated by national laws at all. Thus, Cyberspace should remain self-regulated according to some legal thinkers.⁶²⁾ For example, James Boyle argues that no governmental regulation is appropriate to solve Internet related legal disputes.⁶³⁾ However, I believe that this view effectively advocates ignoring disputes which arise over the Internet, rather than proposing an efficient way of alleviating the problems. The effect would not be to accommodate Internet users, but to leave them without adequate means to protect their interests. Instead of controlling infringers, this approach would make them uncontrollable. Why do these commentators urge the abandoning the effort to find a viable legal approach for disputes in Internet's multiterritorial or omniterritorial environment? Does this reflect a belief that no solution can be found or that a satisfactory solution requires a very demanding analysis?

There are other thinkers who, while acknowledging the inappropriateness of the existing choice of law regulations regarding the Internet, disagree with the idea that the Internet should remain self-regulated. They believe that the problems can be solved with new and different rules for the Internet.⁶⁴⁾ Some of these commentators think that the solution

61. J. L. Goldsmith, "Against Cyberanarchy" (1998) 65 U. Chi. L. Rev. 1199 at 3.

62. See general J. L. Goldsmith, "Against Cyberanarchy" (1998) 65 U. Chi. L. Rev. 1199.

63. J. Boyle, "Foucault in Cyberspace: Surveillance, Sovereignty and Hardwired Censors" (1996) 66 U. Cin L Rev 177.

should be sought either in the unification of choice of law rules or in “*lex cyberalty* (a unified, substantive law of the Internet).”

To conclude, it is becoming increasingly obvious that traditional, *lex loci delicti* approach as a choice of law rule in copyright infringement disputes arising over the Internet should be abandoned as inoperative and ineffective solution. It is up to legal doctrine and practice to establish a new rule that would be more appropriate for accommodating the problems of international copyright infringement in the context of the Internet.

(чланак примљен 05. II 2000.)

Bojana Žižić, LL.M.

Choice of laws regarding copyright infringement occurring over the Internet in the light of international jurisprudence and practice

Summary

This paper deals with copyright infringement occurring over the Internet. The problems that are examined in-depth are difficulties that arise in determining which law (the law of which country) should rule such an infringement case.

*The paper further demonstrates that due to the nature of the Internet, it is difficult and sometimes impossible to locate the place where copyright infringement occurred. Therefore, traditional, on the physical location based and world-wide accepted *lex loci delicti* approach is inappropriate and inadequate.*

Key words: *copyright infringement, the Internet, territoriality, choice of laws, jurisdiction, *lex loci delicti*, *lex fori**

64. For example Matthew Burnstein advocates 3 potential solutions to the problem. For more see M. Burnstein, “A Global Network in a Compartmentalized Legal Environment” in Katharina Boele-Woelki, “Introduction” in K. Boele-Woelki & Catherine Kessedjian, eds., *Internet, Which Court Decides?, Which Law Applies?* (The Hague: Kluwer Law International, 1998) 27.