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APPLICABLE LAW ASPECTS OF COPYRIGHT INFRINGEMENT ON THE INTERNET: WHAT PRINCIPLES SHOULD APPLY?

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Digital technology, and particularly the Internet, is reducing the cost of publishing works, but has also made the unauthorised copying and distributing of works virtually costless. Despite the level of harmonisation of copyright laws worldwide, achieved through the Berne Convention, the TRIPs Agreement and WIPO Copyright Treaty, such copyright infringements on the Internet still give rise to a number of relevant conflict of laws issues.

This article focuses on the analysis of the applicable law rules provided under the Berne Convention in relation to economic and moral rights in the light of the various technical scenarios of copyright infringement in cyberspace. From this perspective, it also attempts to assess if and to what extent it is possible to attribute a new meaning to too often datable applicable law principles.

I. GLOBAL INTERNET AND TERRITORIAL COPYRIGHT PROTECTION

The fundamental and extremely rapid developments at the end of the millennium in the area of new information technologies only serve to further strengthen the idea that the phenomenon known as globalisation is unstoppable. The Internet is one of the main catalysts to globalisation giving rise to a new dimension of globalised reality, characterised by an absence of physical boundaries and often denoted by its own geographical nomenclature "cyberspace".[1]

The global expansion of this cyberspace and its nature as an information sharing system have impacted upon many fields of law, often highlighting the inadequacy of national laws in terms of their capacity to cope with new supranational issues. *Inter alia*, copyright protection represents an area of law unable to keep pace with the latest information technology developments. The source of this inability lies in the lack of uniform substantive copyright regulation.

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1 The Internet is also referred to as the "Net" and the "Global Information Infrastructure" ("G.I.I.").

Moreover, international uniformity is further weakened as effective harmonization thus far exists only at a regional level. Within the European Union, for instance, the standard of harmonization of copyright law is at a relatively advanced stage. With special attention being paid to the new technologies, the European institutions have granted a level of copyright protection through a number of European Directives.[2] Similarly, in the United States, the harmonisation of copyright protective regulation, with particular reference to the Internet, appears effective, especially following the adoption of the Digital Millennium Copyright Act.[3] However, with the exception of the European Community and the United States, which admittedly constitute the major basins of users of the Internet, international harmonisation is thus far minimal.[4]

The Berne Convention for the Protection of Literary and Artistic Property ("Berne Convention")[5] imposes general obligations upon its member states as opposed to substantive norms. It thus represents a minimal contribution to the harmonisation of copyright law. Furthermore, it provides for applicable law rules which therefore trigger the application of national copyright laws.

Similarly, the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPs Agreement") seems to provide minimal further

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2 See Council Directive 91/250/E.E.C. of 14 May 1991 on the legal protection of computer programmes (*Official Journal of the European Communities* L122 (1991) 42). Directive as amended by Directive 93/98/E.E.C. Council Directive 92/100/E.E.C. of 19 November 1992 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property, in *Official Journal of the European Communities* L346 (1992) 61. Directive as amended by Directive 93/98/E.E.C. Council Directive 93/83/E.E.C. of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, in *Official Journal of the European Communities* L248 (1993) 15. Council Directive 93/98/E.E.C. of 29 October 1993 harmonising the term of protection of copyright and certain related rights, in *Official Journal of the European Communities* L290 (1993) 9. Directive 96/9/E.C. of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, in *Official Journal of the European Communities* L77 (1996) 20. Directive 2001/29/E.C. of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, in *Official Journal of the European Communities* L167 (2001) 10.

3 Enacted by the U.S. Congress on 27 January 1998, H.R. 2281.

4 The slow and uncertain development of what has been called *lex mediatica* (see André Lucas, "Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted through Digital Networks", 25 November 1998, online: World Intellectual Property Organization <http://www.wipo.org/eng/meetings/1998/gcpic/pdf/gcpic_1.pdf>, which seems to address the new legal questions without effective solutions [Lucas].

5 Berne Convention for the Protection of Literary and Artistic Property of 9 September 1886, (completed at Paris on 4 May 1896, revised in Berlin on 13 November 1908, completed in Berne on 20 March 1914, revised in Rome on 2 June 1928, in Brussels on 26 June 1948, in Stockholm on 14 July 1967, and in Paris on 24 July 1971) as last amended on 28 September 1979, online: World Intellectual Property Organization <http://www.wipo.int/treaties/ip/berne/berne01.html>.

contribution to the creation of an international substantive law for the protection of copyright. The TRIPs Agreement obliges W.T.O. member states to adopt the minimum standard of protection provided by the Berne Convention with regards to those aspects of intellectual property that may represent an obstacle to international trade. Further, it contains the principle of "national treatment" which guarantees rightholders from one W.T.O. Member protection under the national law of another W.T.O. Member on a non-discriminatory basis. In relation to copyright, TRIPs Articles 3 and 9.1 (incorporating Berne Convention Article 5(1)) require that "no less favorable treatment of nationals" be accorded to nationals of other W.T.O. Members (with certain exceptions). Moreover, according to the "most favored nation" ("M.F.N.") principle in Article 4, with regard to the protection of intellectual property in general, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members (again with certain exceptions).

Ultimately, then, the substantive regulation applicable to the violation of copyright on the Internet lies in single national legal systems. This creates a legal panorama as a patchwork composed of national norms, which consequently cannot guarantee the level of effective global protection of copyright which is today required due to the proliferation of the new information technologies.

It follows that, in the event of global copyright infringement which may occur through the Internet, a case-by-case determination of the law applicable to its consequences is required. Thus, the effective protection of copyright on the Internet derives from the certainty of the law applicable to the events of infringement, *i.e.* in the first place certainty and efficacy of the applicable law rules.

As aforementioned, the Berne Convention contains the applicable law rules for international copyright infringement. The infringement of copyright may generate a prejudice to two distinct categories of protected interests: these are termed "economic rights" and "moral rights". The Convention reflects this dichotomy and consequently provides two different norms, containing two separate but *prima facie* identical choice of law criteria.

In the following sections I will analyse the two different norms which govern the protection of first economic rights and secondly moral rights.

II. The Law Applicable to International Copyright Infringement: The Violation of the Economic Rights

The economic right, as a whole, is the exclusive right of the author of a work to copy the work, to issue copies of the work to the public, to broadcast the

work or include it in a cable programme service, to make an adaptation of the work or do any of the above in relation to an adaptation. The content of this right encompasses the exclusive right to the economic exploitation of the work.

The applicable law rules regarding copyright, and in particular the infringement of economic rights, is contained in Article 5(2) of the Berne Convention. It provides that ". . . 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". The ambiguous wording of the provision, with the indication of an uncertain *lex loci protectionis*, has serviced at least three different interpretations of the norm.

According to the first theory, Article 5(2) refers to the law of the court where protection is sought, or *lex fori*. To this end, it has been argued that the Berne Convention does not expressly mandate application of the law of each place of infringement.[6] Rather, according to the literal meaning of the wording, the Convention refers to the forum country: it is before the courts of that country that the copyright owner is seeking protection.

Under this interpretation, the single law of the forum would apply in the event of a transnational violation of copyright, even though no infringements have occurred in the country of the forum. Surely then, it constitutes a displacing criterion, particularly in cases where the infringers are sued in the forum in which they are domiciled.[7] Notwithstanding the advantage of the application of a single law, this theory gives the copyright owner the opportunity to forum shop for a favourable jurisdiction. Conversely, the infringer might seek a declaratory judgment in a jurisdiction where his activities are permitted or tolerated (so-called infringement havens) in order to pre-empt the owner's choice.

Regardless of these arguments, the U.S. Courts (especially in the Second Circuit) have often applied the *lex fori* to the entirety of an international copyright infringement claim.[8] However, it has been also pointed out that ". . . although we note that the difficulty of protecting [copyright] abroad

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6 See Ginsburg, "Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure" (1995) 46 Journal of the Copyright Society of the U.S.A. at 334. See also A. Lucas and H. J. Lucas, *Traite de la propriete litteraire et artistique* (Paris: Dalloz, 1994) §§ 1066–1074, (discussing arguments for the application of the *lex fori*, but concluding that Article 5(2) designation of the law of the country where protection is sought must refer to the law of the country where the infringement was committed).

7 See Schlesinger, *Comparative Law: Cases, Texts, Materials* (New York: Foundation Press, 1988) at 383.

8 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 Publishing, Ltd.*, 843 F.2d 67 (2d Cir. 1988); *Curb v. MCA Records, Inc.*, 898 F. Supp. 586 (M.D. Tenn. 1995). See also *ITSI T.V. Productions, Inc. v. California Authority of Racing Fairs* 785 F.Supp. 854, at 866 (E.D.

is a significant international trade problem, the United States Congress, in acceding to the Berne Convention, has expressed the view that it is through increasing the protection afforded by *foreign* copyright laws that domestic industries that depend on copyright can best secure adequate protection."[9]

The law of the country of origin represents the second alternative theory.[10] The place of origin of the copyright "is identified as the place in which the work has acquired, for the first time, a social dimension, that is the place in which it has met the public for the first time".[11] According to this theory, a single applicable law would be determined and this criterion would be resistant to forum shopping practices.

However, in terms of the Internet, the individuation of the country of origin may often be difficult. Furthermore, the same judge may be obliged to apply different laws to different plaintiffs.[12] Finally, there are interpretative reasons that seem to exclude the possibility of supporting this theory: the wording of the first part of paragraph 2, and in particular the statement that ". . . such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work". In fact, it appears to counterpose the country where protection is claimed to the country of origin, which might not provide for copyright protection.

Furthermore, in relation to the Internet, it is submitted that it may not be possible to designate a single law to govern infringements on the Internet. Rather, an approach combining points of attachment may prove more fruitful.

In this sense, the third theory deriving from the interpretation of Article 5(2) seems to provide a more satisfactory solution. According to this interpretation, the *lex loci protectionis* criterion under Article 5(2) corresponds in practice to the *lex loci delicti* rule. Thus, the applicable law is the law of the place where the copyright infringement takes place.

Such an interpretation, which is widely supported, is founded on a number of considerations. Primarily, the nature of copyright infringement is that of

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Cal. 1992) stating that "American courts should be reluctant to enter the bramble bush of ascertaining and applying foreign law without an urgent reason to do so".

9 [Emphasis in original]. *Cf. Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1094 (9th Cir. 1994), cert. denied, 115 S.Ct. 512 (1994) (criticizing the *Modiin Publishing* approach).

10 This interpretation seems to be supported in the French decision of the Cour de Cassation, 1st Civil Chamber, 10 February 1998, in *Revue Critique de Droit International Privé* (1998) 438, regarding the unauthorised insertion of photographs of paintings by the artist Utrillo in a sale catalogue.

11 See Lucas, *supra* note 4 at 16.

12 Such a rule goes against the tradition of the Berne Convention and its preparatory works. See Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (London: Kluwer, 1987) §§5.51–5.69.

a tort or delict, like any other violation of intellectual property rights.[13] Traditionally, the determination of the applicable law in the event of non-contractual wrongful acts finds its basis in the *lex loci delicti* rule.

In the 1972 E.E.C. Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, the *lex loci delicti* principle was chosen as the general rule for wrongful acts.[14] However, the Community experts failed to achieve consensus and ultimately, the provisions concerning torts and delicts were not adopted. Nevertheless, despite the lack of a uniform international rule, a sort of spontaneous harmonisation of the national general provisions on this subject can be observed. Thus, in the European countries choice of law in tort cases largely rests upon the *lex loci delicti* rule, even though many exceptions from that basic rule exist.[15] Nevertheless, as aforementioned,[16] modern U.S. choice of law theory has abandoned the objective *lex loci delicti* approach for more flexible doctrines focusing upon the place with the most significant relationship to a claim, state policies and affected government interests.[17]

Furthermore, it is arguable that according to a systematic logic, an interpretation as such does not appear to contrast with the criterion of determination of the competent jurisdiction provided under Article 5(3) of EC Regulation 44/2001, which states that "[a] person domiciled in a Member State may, in another Member State, be sued . . . in matters relating to tort,

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[13] See in support of this view *Pearce v. Ove Arup Partnership Ltd.* [1999] 1 All E.R. 769, 803–4 (note that the Court of Appeal applies Dutch law where the defendant infringed Dutch copyright laws in the Netherlands); in the same sense with regard to foreign patent infringement *Coin Controls Limited v. Suzo International (U.K.) Limited and Others*, High Court of Justice—Chancery Division, 5, 6, 11 and 26 March 1997, [1997] F.S.R. 660 Ch., at 667.

[14] See, in this sense, Batiffol, Lagarde, *Droit International Privé*, 7th ed. (Paris: Librairie Générale de Droit et de Jurisprudence, 1983) at 241.

[15] See, in support, Reindl, "Choosing Law in Cyberspace: Copyright Conflicts on Global Network" (1998) 19 Michigan Journal of International Law 804; and, generally, *e.g.*: s. 11 of the Private International Law (Miscellaneous Provisions) Act 1995; Article 62 of the Italian Private International Law Act, 31 May 1995, n. 218; Article 10.9 of Spanish Civil Code; Article 133, par. 2, Swiss Private International Law Act, 18 December 1987; Article 38 of German Private International Law Provisions, as reformed on 21 September 1994; Article 3 of French Civil Code, as interpreted by Cour de Cassation, 9 February 1983, *Banque Veuve v. Morin-Pons*, in *Bullettin* (1983) 45; Cour de Cassation, 1 June 1976, *Lucattioni v. Escot, in Dalloz* (1977) 257; Cour de Cassation, 25 May 1948, *Lautour v. Veuve Guirard*, in *Dalloz* (1948) 357.

For the adoption of the rule by Canadian courts, see Tetley, "Choice of law—Tort and Delict", (1993) 1 Tort Law Review 49–50; for Quebec see Article 3126 of the Quebec civil code 1991.

[16] See *supra* note 8 and accompanying text.

[17] For examples of the U.S. *lex loci delicti* approach, see *Lauritzen v. Larsen*, 345 U.S. 571, 583, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); *Hasbro Bradley Inc. v. Sparkle Toys Inc.*, 780 F.2d 189, 192–3 (2d Cir. 1996). As to the new flexible approach, see generally *Restatement (Second) of Conflict of Laws (1971)* s. 6, 145(2) [*Restatement*].

delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".[18]

Likewise, Article 5(3) of the Brussels Convention 1968[19] and of the Lugano Convention 1988 provide as alternative forum to the *forum domicilii* of the defendant in tort the *forum commissi delicti*.[20] It expressly provides that: "A person domiciled in a Contracting State may, in another Contracting State, be sued . . . in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred".[21]

In the light of the preceding considerations, it appears sensible to adhere to the interpretation according to which Article 5(2) of the Berne Convention provides the application of the *lex loci delicti* in the event of international copyright infringement.

III. The "Lex Loci Delicit" Rule on the Internet

When the Berne Convention and its conflicts norm under Article 5(2) were drawn up, the Internet was not even a distant possibility. The Internet and its implications for copyright law have demanded the recognition of full applicability of the Berne Convention to the new digital reality. According to the agreed statements concerning the W.I.P.O. Copyright Treaty[22] adopted by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions and concerning Article 1(4) of the Berne Convention, "[t]he reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."[23]

However, as far as the object of this analysis is concerned, the mere extension of the field of application of the Convention to the digital infrastructure

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18 E.C. Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, in *Official Journal of the European Communities* L12 (2001) 1–23.

19 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 27 September 1968, online: <http://www.curia.eu.int/common/recdoc/convention/en/c-textes/brux-idx.htm>.

20 Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 16 September 1988, online: <http://www.curia.eu.int/common/recdoc/convention/en/c-textes/_lug-textes.htm>.

21 *Ibid*.

22 The Treaty was adopted by the W.I.P.O. Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions in Geneva on 20 December 1996, online: <http://www.wipo.int/treaties/ip/wct/index.html>.

23 The Diplomatic Conference was held in Geneva, 2–20 December 1996, and the final statements were adopted on 20 December 1996.

only marginally contributes to the provision of legal certainty. Instead it raises complex interpretative questions, particularly with regard to the determination of the applicable law. As in relation to other torts, which may occur on and through the Internet (such as defamation, the invasion of privacy, trademarks infringement, *etc.*) the application of the *lex loci delicti* rule, according to its traditional interpretation, to copyright infringement may seem inadequate. The infringement of copyright in the Internet environment is dynamic in its nature, with a multitude of actors involved. In particular, the determination of the place where the tort may occur, necessarily transforms into an investigation of the points of contacts between the "virtual world" and real one. In addition to this, there is a fundamentally problematic contrast between the territorial nature of copyright protection[24] and the ultra-territorial conception of cyberspace.

As regards the aforementioned dynamics, copyright infringement on the Internet, in its simpler form, may solidify into unauthorised file distribution, reproduction or in a mix of the aforesaid activities by either the same or distinct subjects.

Schematically:

(a) Infringements in form of unauthorised distribution:
  – the input of files on the Internet by means of Web sites and Bulletin Boards;
  – the distribution by email;

(b) Infringements in form of unauthorised reproduction:
  – the illegal download of works legally uploaded on the Internet;

(c) Infringement in mixed form of unauthorised distribution and reproduction:
  – the illegal input and consequent illegal downloads;
  – "framing" and other on-line reproductions;[25]
  – illegal file-sharing.[26]

Given the complex panorama outlined here, it appears necessary to proceed to an analysis of the dynamics of the main types of infringement and to a contextual assessment of the functionality of the *lex loci delicti* rule. The analysis will be carried out in the light of both the theories of the classic

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[24] See in support, *e.g., Def Lepp Music v. Stuart-Brown* [1986] R.P.C. 273; *Tyburn Productions v. Conan Doyle* [1991] Ch. 75; *Pearce v. Ove Arup Partnership Ltd.* [1999] 1 All E.R. 769 (C.A.).

[25] Framing is a type of linking incorporating portions of another Web site within the originating Web site, which contains the link by use of multiple "frames". A Web page may consist of a single frame or multiple frames. Where there is more than one frame, the Web page may display information from different Web sites in different frames simultaneously.

[26] File-sharing technologies permit Internet users to download files and to swap them independently of any ISP's activity or co-operation.

controversy: that which advocates the law of the causal event and that which focuses upon the place of generation of the harm.

IV. Unauthorised File Distribution

A. *Diffusion on the Internet by Means of Web Sites and Bulletin Boards*

The input of files on the Internet by means of Web sites and Bulletin Boards ("BBS") represents the most common form of Internet copyright infringement.[27]

The growing number of U.S. cases of infringement of this kind exemplifies the extension of this phenomenon and demonstrates its complex legal consequences.[28] However, these cases involve disputes based on the U.S. Federal Copyright Act[29] and state-law trade secret doctrines. Consequently, in such cases no choice-of-law issue exists with respect to the copyright claims. Nevertheless, the courts must carry out a choice-of-law analysis to determine which state's trade secret law should apply to the trade secret claims. In this regard, the U.S. courts make their choice-of-law decisions in conformity with the principles of the Second Restatement and, in particular, with the "most significant relationship" approach.[30] Thus, the law of the state where the plaintiff is domiciled or where his principal place of business is located is applied.

However, this solution does not appear applicable to copyright infringement on the Internet, since it seems inconsistent with Article 5(2) of the Berne Convention and its suggested interpretation. Therefore, a further analysis of this kind of infringement is required.

With reference to Web sites, files are generally uploaded on Web pages by a subject (either a physical or legal person) who has the exclusive power to perform the upload. In the stage of upload three main operators may be identified, which correspond to three distinct points of contact between Cyberspace and physical space.

In first place there are the users, who upload the files through their own or others' terminal computers. Second, there are the Internet-Service-Providers ("I.S.Ps"), who provide the user with one or more lines of access

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[27] Among the many examples of Web sites of this kind see, for example, http://www.themusicmafia.com, www.navnetwork.net/downloads2.html, http://www.terrorists.cz.

[28] See *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986); *Religious Technology Center v. Lerma*, 908 F. Supp. 1353 (E.D. Va. 1995); *Religious Technology Center v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519 (D. Colo. 1995).

[29] U.S. Copyright Act, 19 October 1976, Pub. L. No. 94/533, 90 Stat. 2541, online: <http://www.copyright.gov/title17/circ92.pdf>.

[30] *Restatement, supra* note 17.

to the Internet, free or against payment. Finally, there are the Host-Providers that are usually companies, which, free or against payment, supply the users with a certain amount of virtual space in their own hard drive systems. Part of the files transferred on that virtual memory by the user are visible on-line and, once stored, constitute the content of Web pages.[31]

The dynamics of the upload may be relatively simple, in the rare case when a user's terminal computer, a Server and a Host-provider are concentrated in a unique operative unit. In this case, they are located in the same place. On the other hand, there may be a coincidence of only two of the three operators, or they may be completely distinct and even all situated in different countries.

In case of Bulletin Boards, the dynamics are almost identical (apart from the fact that usually the user who operated the upload does not own the Internet site hosting the files). Conversely, full freedom to upload is allowed by the Web site owners to any user of the Internet, even though the owners may impose restrictive rules and may reserve powers of control *ex post* for themselves.

In the light of these premises, it is submitted that in the digital environment, location of the action and location of the harm will correspond to the place of input and the place of reception/final upload of the file.

As regards the input, the relevant conduct is represented by command given by the infringer, which in turn can be identified in the material by the pressing of the key of the computer keyboard by the infringer. Therefore, it is supposed to take place where the terminal computer of the user is located. From this perspective, the law of this location might represent a possible alternative in terms of applicable law. However, the application of the law of the place from where the file is inputted does not seem to prove effective.

Such reconstruction of the *lex loci delicti* rule does not seem to provide a sufficient degree of legal certainty. An infringer can utilize a remote access from the Server, which provides the Internet connection, or a Local Access Network ("L.A.N."), proxy to the server. In both cases the place from where the file is "sent" may be merely casual. Furthermore, in terms of the effective protection of copyright, such an interpretation may favour abuses and the race to countries called "infringement havens", from where data can be inputted into the Internet. The place of the input may in fact well be located in any country where the user is physically present in the fraction of time required to give the command to the terminal computer and start the transmission of the data. The possible use of laptops in connection with mobile or satellite renders this element of physical location extremely

[31] Very often, contractual obligations are imposed on the user to prevent the upload of materials infringing copyright. It raises applicable law issues regarding contracts and consumer contracts on the Internet, which falls outside of this work.

mobile. Moreover, neither can the identification of a fixed element of contact rely on the place where the Server which provides access to the Internet is established, to the extent which it does not correspond to the place of input or to the one of reception of the file. This last point appears particularly relevant from the perspective of the application of the law of the place of the harm.

I submit that the mere availability of a work protected by copyright on the Internet in the form of file constitutes economic damage to the copyright owner. In fact, it may constitute a deterrent to buying the original product from the legal market, as on the Internet it is available and free, or at least at a considerably lower price. In this sense, the harm occurs as soon as the transmission and the correspondent upload are completed and the file is "visible" on line.

According to this argument, the place of the harm might be represented by the place where the file is stored to make it visible on-line. That is the place of the Host-provider. *Prima facie*, the application of the law of the place of the Host appears a solid criterion. It identifies a law characterized by proximity to the Host, and this may be useful in terms of effective protection of copyright and granting of orders to close the Web site.

This construction is favoured by the Commission of the European Community. By analogy with the solutions provided for the satellite broadcasting technology in the Directive of 27 September 1993,[32] the Green Paper on Copyright and Related Rights in the Information Society has adhered to this interpretation, mainly for reasons of "economic efficiency".[33]

In addition, a similar reconstruction is advocated by some prominent scholars.[34] In particular, it is maintained, *inter alia*, that it permits the application of a single law to a single act of infringement by the infringer. Further, it is based on a significant point of contact within the dynamics of the violation. However, a deeper analysis shows that, once again, this point

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[32] *Official Journal of the European Communities* L248 (1993) 15.

[33] *European Commission Green Paper on Copyright and Related Rights in the Information Society* of 27 July 1995. Note that that interpretation was criticised and the Commission backed down, limiting itself to releasing a communication on the applicable law. See *Communication from the Commission of the European Communities on the follow up to the Green Paper on Copyright and Related Rights in the Information Society*, COM (96) 508 final, November 20th (1996) 23.

[34] See, for arguments in favour of application of the law of the place of the making available on the Internet, Piette-Coudol, Bertrand, *Internet et la loi* (Paris: Dalloz, 1997) at 55. See also, but limiting the solution to distribution made within the European Union, "Internet et Les Réseaux Numériques", *Rapport du Conseil d'Etat*, Paris *in La Documentation française* (1998) 152 ["Internet et Les Réseaux Numériques"]; Gautier, "Du droit applicable dans le ≪ village planétaire ≫" in *Dalloz* (1996) at 131, note 4, but excluding attachment to the place where the server is established and inserts the works into the network, but agreeing that is "solid" [Gautier].

of contact can be located anywhere on casual basis or, worse still, according to a strategy of abusive exploitation of the digital works in "infringement havens".[35]

Furthermore, the analogy with satellite transmissions is only an oversimplification. The transmission of data on the Internet is not a unidirectional stream of information—it involves activities of numerous users and operators, which may all contribute to the infringement. The foreseeability of the applicable law and its knowledge by users does not operate with Internet as it could do with unidirectional satellite transmissions: there may not be real knowledge of the protective law of copyright, which may constitute an effective deterrent for potential downloaders. In fact, the upload may not occur on a single Web site, but also on its "mirror sites" (identical Web pages which are located on Hosts in different countries and continents with the aim of reducing the "traffic" providing the users with a nearer target site). Apart from the difficulty for Internet users to discover or understand where the site is physically located, the proliferation of mirrors makes such reconstruction practically impossible. In fact, on these bases, it is likely one will identify various laws, all identically applicable to a single infringement.

In the light of these considerations, it is submitted that the interpretation of Article 5(2) of Berne Convention as a *lex loci damni* rule may not be effective.

Some authors have maintained choice of law criteria with stricter reference to the rightholder.[36] In particular, it is suggested that the correct approach is the application of the law of the country in which the rightholder who is victim of the infringement has his domicile, his place of residence or his establishment. This theory, in view of the difficulty of localizing the infringement of the right, may very well be justified because the harm is identified at the place where the interests damaged by the harmful event are located.[37] This has been the reasoning of a large section of the doctrine on infringement of personal rights.[38] This idea is now maintained with regard to copyright.[39]

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[35] See in support of the above the reply of the French Government, as quoted in Lucas, *supra* note 4 at 28, note 125. Dessemontet, "Internet, le droit d'auteur et le droit international privé" in *Revue Suisse de Jurisprudence* (Zurich: Schulthess, 1996) at 285 [Dessemontet]; Gautier, *supra* note 34; Sirinelli, "Internet et Droit d'Auteur", in *Droit et Patrimoine* (1997) 79–80.

[36] See Lucas, *supra* note 4 at 31.

[37] See "Internet et les Réseaux Numériques", *supra* note 34 at 174: "[F]inally, it is indeed at the domicile of the injured person that the whole of the harm is suffered".

[38] See generally Dessemontet, "Internet, les Droits de la Personnalité et le Droit International Privé" in *Le droit au défi d'Internet* (Geneva: Droz, 1997) at 77, note 28; Loussouarn, Bourel, *Droit International Privé* (Paris: Dalloz, 2001) at 274.

[39] See "Internet et les Réseaux Numériques", *supra* note 34 at note 26; see also Dessemontet, "Internet, la Propriété Intellectuelle et le Droit International Privé" in Boele-Woelky,

As such, this reconstruction is not inconsistent with the letter of Article 5(2) of the Berne Convention. It also has the advantage of situating the center of gravity in the person who is the rightholder. Moreover, it would seem to correspond well to the general trend in civil liability.[40]

However, in the field of the economic rights, the harm suffered at the place of domicile is only the patrimonial harm. The European Court of Justice ("E.C.J."), with reference to the competent jurisdiction and Article 5(3) of Brussels Convention 1968,[41] has clearly expressed that the patrimonial harm is only a consequence of the relevant harmful event, which may well have taken place in a distinct country.[42] It is submitted that this view is also valid with reference to the applicable law.

Another alternative theory has been proposed by the District court of The Hague in the case *Scientology v. Karin Spaink and others*.[43] This decision identifies the place where the infringement has taken place as The Netherlands, attributing relevance to the fact that the Hosts were Dutch companies and the infringer owner of the Web pages resided in Amsterdam. By attributing relevance to these elements the court applied the law of the place of domicile/residence/establishment of the infringers.

According to this view, the place of establishment of the person responsible for the distribution has the added advantage of being much easier to determine and the stability of this connecting factor certainly makes it attractive.[44] The proposed rule also draws inspiration from the Hague Convention

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Kessedjan, *Internet, Which Court Decides? Which Law Applies?* (The Hague: Kluwer law International, 1998) at 60: "Finally, infringement of intellectual property rights—of the author or his successors in title, for example—happens in a specific place: that of the economic harm". See also Article 3 of the joint proposal by Ginsburg, in Dessemontet, *supra* note 35 at 293, which sets out the principle that the applicable law is the law of the State on whose territory the harm deriving from the infringement of the author's rights has occurred, before specifying that, as a general rule, for the purposes of application of this Article, the harm is deemed to have occurred in the State in which the injured party has his habitual residence or principal business establishment.

40 "Internet et les Réseaux Numériques", *supra* note 34 at 173. It is noted that the current international discussions on the rules of private international law in this respect, which should lead to the drafting of a new Rome Convention or E.C. Regulation (referred to as Rome II) contain the principle of application of the law of the country that has the closest links with the harm. A presumption anticipates that it corresponds to the place of habitual residence of the victim, and specifies that the same rules would apply for the choice of competent court, the court of the place of domicile being furthermore competent to award compensation for the whole of the prejudice suffered.

41 *Supra* note 19.

42 European Court of Justice, 19 September 1995, C-364/93, *Marinari c. Lloyds Bank and others*, in *ECJ Report*, (1995) I-2719.

43 The District Court of The Hague, Civil Law Sector, Chamber D, *Scientology v. Providers and Karin Spaink*, 9 June 1999, online: <http://www.xs4all.nl/ kspaink/cos/verd2eng.html>.

44 J. Ginsburg, "The Private International Law of Copyright in an Era of Technological Change" (1999) 273 *Recueil des Cours* 239. See, also, proposing to take the country of habitual

on Products Liability[45] and the Restatement the Second of Conflicts.[46] The aforementioned Satellite Directive[47] itself uses this criterion for distribution by satellite emitted from a State that is not a member of the European Community and which does not provide an adequate level of protection.

However, this reconstruction seems to be inconsistent with the *lex loci delicti* rule and the whole of Article 5(2) of the Berne Convention. Moreover, those elements may have no point of contact with the actual act of infringement, since the country of incorporation may be totally independent from the physical location of the Server-Hosts. It is thus possible that the author or the holder of related rights may find themselves subjected to the exclusive application of a law that corresponds to a technical localization of the user, but not a law that arbitrarily attaches the situation to the center of the users' interests.[48]

Further, the I.S.P. and Host might not have actual knowledge of the violation, being merely passive contributors to that activity. In this sense, it appears difficult to transpose the importance of the location of the infringement to such a subjective dimension. Once again this may make the rule susceptible to manipulation by defendants locating themselves or their activities in infringement havens.[49]

It is submitted that an alternative solution may be found on the ground of the *lex loci damni* for these events of unauthorised distribution. An alternative way of determining the applicable law may be represented by a new interpretation of the harmful event, *stricto sensu*.

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residence of the publisher of the content, while suggesting that this connecting factor be limited in the case in point to the European sphere, "Internet et les Réseaux Numériques", *supra* note 34 at 151. With regard to the difficulty of localizing the place of origin of transmission, see Kéréver, "Propriété Intellectuelle, La Détermination de la Loi Applicable aux Transmissions Numérisées" in Frémont, Ducasse, *Les Autoroutes de l'Information : Enjeux et Défis* (Lyon: Les chemins de la Recherche, 1996) at 267, note 58; Fraser, "The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure" (1997) 15 The John Marshall Journal of Computer & Information Law at 785. See, however, a more optimistic Koumantos, "Rapport Général", in *Le Droit d'Auteur en Cyberespace* (Amsterdam: Cramwinckel, 1996) at 264.

45 Hague Conference on Private International Law, Convention on the Law Applicable to Products Liability, online: <http://www.hcch.net/e/conventions/text22e.html>, articles 4–6.

46 *Restatement, supra* note 17, s. 145.

47 Council Directive 93/83/E.E.C. of 27 September 1993, *supra* note 2, on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

48 See Dessemontet, *supra* note 35 at 293, note 41, observing that the system centred on the law of the country of emission and the law of the domicile of the defendant is organized around the interests of the defendant.

49 See Proposal for a Council Directive, online: <http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0292.pdf>.

As previously mentioned,[50] the protected interests of the copyright owner, which are prejudiced by a major act of infringement, are, in the first place, economic rights. From this perspective, the unauthorised input and distribution of files (music, movies, books, computer programs and so on) on the Internet causes a direct harm in the markets where these products are commercialised. Moreover, not only the copyright owner but also all of the market operators dealing with the product are subjected to the consequences of the infringement. Therefore, the market is the actual place of the harmful event. Thus, the laws of these markets will be applicable.[51]

This theory has multiple advantages. Primarily, it does not conflict with Article 5(2) of the Berne Convention as it lies within the *lex loci delicti* rule. Secondly, it reduces the clash between territoriality of copyright protection and the ultra-territoriality conception of cyberspace, since it refers to the market, a concept increasingly independent from national borders (in the case of the E.C. Market, for instance, where in fact a high standard of harmonization of copyright law exists).[52]

This standard of protection is high enough to have been implicitly accepted by authorised distributors by commercialising there their products. Whether the regulated market is national or supranational, the global access to the Internet by users implies a harmful event *also* in that market.

It might be contended that this solution is inequitable for the infringer. However, a person who makes an unauthorised distribution on the Internet perfectly well knows that it would reach all the countries and all the markets, because the digital networks spin their web everywhere in the world. In this sense, the applicable law is foreseeable, and even easily identifiable by all Internet users.

The need of the "chimera" represented by a uniform substantive copyright law is the consequence of the nascent unique global market, which will need regulation. Currently, the only way to protect national markets from

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50 See text accompanying note 7.

51 See, in support, Geller, "International Intellectual Property, Conflicts of Laws and Internet Remedies" in *European Intellectual Property Review* (London: Sweet & Maxwell, 2000) at 128, and the cases there quoted under notes 35–6: *Spindelfabrik Suessen-Schurr v. Schubert & Salzer* 903 F. 2d 1568, 1578 (Fed. Cir. 1990); The Doors case, Bundesgerichtshof, 18 February 1993, in *Gewerblicher Rechtsschutz und Urheberrecht Int.* (1993) 699, excerpts translated in (1995) 26 International Review of Industrial Property and Copyright Law; *Grammophone Co. of India Ltd v. Pandey* [1985] F.S.R. 136 (Supreme Court India), excerpts in (1987) 139 International Review of Industrial Property and Copyright Law.

52 The importance of the protection of intellectual property rights and of its desirable regulation from a market perspective is confirmed not only by the adoption of the TRIPs Agreement, but also by the relevance that it has assumed as one of the policies of development in the European Union (see in particular Article 133(5) of the Treaty of Nice, in *Official Journal of the European Communities* C80 (2001) 63).

international copyright infringement seems to be by using national laws in an extensive and often artificial way.

B. *Unauthorised File Distribution by E-mail*

The distribution of files via email occurs according to a complex, though unidirectional, scheme. Furthermore, when copyright infringement is committed in this form, the principal operators are the same as those considered above. Data is inputted on the Internet through a terminal computer, with access to the Internet (which may be remote or by means of a L.A.N.) provided by an I.S.P. The same data is stored in a virtual mailbox of a distinct user and provided by a Host. The dynamics are similar to those seen above with regard to upload on a BBS: when the command of transmission is given, the files are sent through the Internet and will be stored and recorded in the digital mailbox of other users. The difference lies in the fact that the access to the store files is restricted to the virtual mailbox owners. In this sense, the digital work is not made public, but only distributed to pre-identified users.

Thus, the dynamics of the infringement have the form of a bunch of single unidirectional streams of information, often incredibly numerous. In this sense, the activity of distribution by e-mail has some similarity with satellite transmission: the information is emitted from a single identifiable source, the transmission is unidirectional, and the addressees are mostly predetermined. All these circumstances might entail the application of the theory of the place of emission in the determination of the applicable law. According to this, the law of the place of the input would be applicable to these forms of copyright infringement. As aforementioned,[53] the place of the input may be identified as the place where the infringers are physically located and materially press the key of their terminal computer.

This entails the same problems of abuse and race to infringement havens as mentioned above with regard to the Web site and BBS illegal distribution. Similarly, then, in this case, the application of the law of the place of the action may prove ineffective from the viewpoint of protection.

To some extent, the illegal distribution of digital works by e-mail has similarities with other kinds of torts, which traditionally involve communication across state borders, and in particular with interstate Internet defamation. According to U.S. legal theory, two major doctrines exist for choosing which state's law applies to such interstate tort: the *lex loci delicti* approach and the "most significant relationship" approach.[54] Whilst the second does not

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[53] *Supra*, Part (IV)(A).

[54] See *Restatement*, *supra*, note 17 at 8, s. 6 and s. 6 cmt. c. The state with the most significant relationship will be determined on the basis of four factors, depending on the nature of the

seem consistent with Article 5(2) of the Berne Convention, the first might provide a further alternative interpretation of the traditional *lex loci damni* criterion.

The *lex loci delicti* approach calls for a court to choose the law of the place "where the last event necessary to make an actor liable for an alleged tort takes place".[55] In the context of most publication torts, the last event necessary to make a person liable is the reading of the publication by a third party.[56] In the hypothesis of defamation via e-mail, the place of the harm can be located in the place where the mail comes to knowledge of the recipient. By analogy, with regard to copyright infringement, the place of the harm might be constituted by the place where the e-mail is actually received by addressee.

This criterion appears solid and stable, at least to the extent in which the distribution is limited to a small number of addressees. Each reception may be regarded as a distinct event of copyright infringement. Where they take place in different countries, distinct laws would apply.

It might be contended that under this reconstruction the element of connection appears too weak: the recipient might receive the files without having actual knowledge of the content of the e-mail and without ever using them. Whilst defamation requires the reading of the information, copyright infringement occurs from the mere fact that the file's distribution take place. Thus, when the files are downloaded in the recipients' mailboxes, the distribution and the copyright infringement may be regarded as completed.

The download may occur in any place where the recipients have access to the Internet, virtually in any country, since the mailbox may materially follow its owner. However, the extension of this kind of diffusion is individual and limited in character. In this dimension, the law of the place of the e-mail reception may be applicable.

Indeed, the phenomenon may assume far wider dimensions as for example where a very large number of e-mails with infringed digital works are sent by a single infringer to an equal amount of recipients. This usually

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tort involved:
(a) the place where the injury occurred;
(b) the place where the conduct causing the injury occurred;
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
(d) the place where the relationship, if any, between the parties is centered.
Ibid. s. 145(2).

55 *Restatement, supra* note 17, s. 377.

56 See Reed, "The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet" (1997) 15 John Marshall Journal of Computer and Information Law at 361.

occurs by means of mailing lists,[57] such as to determine an actual harmful event in the relevant markets. Perhaps, in these cases, the application of the law of the market where the harm takes place might constitute an effective solution.

V. Unauthorised Reproduction: Illegal Downloads of Legally-Uploaded Files

Copyright infringement on the Internet may also assume the form of a mere unauthorised reproduction of the protected digital work, initially input on the Internet by the authors or according to their authorisation. In this case, the files are already accessible on-line and the infringers violate authors' copyright by copying the files without authorisation. Regardless of the fact that the access to the files may be authorised or fraudulent, from the copyright protection perspective, the infringement occurs when the copy is saved on a fixed and durable support.

When the user has free access to the files, the place where the infringers send the command to download, by materially pressing the key of their computers, may be regarded as the place of the action. As aforementioned,[58] the access to the Internet may take place by means of a terminal computer remote or in local network with the I.S.P. Only in this last case will it correspond with the place where the I.S.P. is located.

As regards the place of the harm, it is assumed to be the place where the download is completed. In most of the cases this will correspond with the place of the action. In this sense, such coincidence may simplify the question of determining the applicable law, since it avoids an often problematic choice between place of action and place of harm.

When access to the files is not free or authorised but takes place through a fraudulent activity, these conclusions seem to maintain their validity. To some extent, it will entail further consequences in criminal law. Nevertheless, the copyright infringement would be governed by the law of the place of access/ download.

As far as the coincidence between place of access and place of download is concerned, it must be noted that there are software applications which permit a "split up" of the download. Therefore, the download can be completed

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[57] According to Matisse Enzer, *I.L.C. Glossary of Internet Terms* (2002), online: <http://www.matisse.net/files/glossary.html> [Enzer], a "mailing list" is "a (usually automated) system that allows people to send *e-mail* to one address, whereupon their message is copied and sent to all of the other subscribers to the mail-list. In this way, people who have many different kinds of e-mail access can participate in discussions together" [emphasis in original].

[58] *Supra*, Part (IV)(A).

from the same Web source in different periods of time and thus in distinct places.[59]

However, it is submitted that in the event of segmented downloads, any fraction requires the sending of a new order by the infringers to resume the download. Since the file is almost useless until completely downloaded, the last place of access/download may be regarded as relevant to the determination of the applicable law.

The place of download is easily determinable.[60] Given the individual and limited character of this kind of infringement, the application of the correspondent law as *lex loci delicti* seems able to provide sufficient legal certainty in terms of copyright protection.

VI. Mixed Hypotheses of Distribution and Reproduction

A. *Illegal Input and Subsequent Downloads*

The analysis carried out up to this point has identified simple acts of copyright infringement on the Internet. To some extent, this was necessary and instrumental to a better understanding of the dynamics of the violation.

However, in cyberspace, unauthorised uploads and downloads of digital works often take the form of a unique phenomenon of copyright infringement. On the one hand, it has been argued that the act of putting copyrighted files without authorisation on to the Internet is an act of exploitation. On the other hand, these files' distribution on the networks is not only likely, but also corresponds in most cases to numerous reproductions and an actual economic exploitation in the various countries in which users have their Internet connection.[61] Thus, everyday digital works are downloaded and stored in fixed supports, be they computer hard drives, CD-ROMs or DVDs.

The complexity of the copyright infringement practices constituted by the illegal distribution of files and consequent download by Internet users, which are the most diffused on the Internet, impacts on the applicable law

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[59] One of the most common software applications of this kind is called "Get-right", available in freeware and downloadable in few seconds from the Internet, online: <http://www.getright.com>.

[60] Note that the tracing and individuation of Internet users is carried out through the so-called "digitalwatermarkings". They are identification codes, permanently embedded into digital data, carrying information pertaining to copyright protection and data authentication. They represent a valid solution to the copyright infringement problem, since they make it possible to identify the source, author, creator, owner, distributor or authorized consumer of digitized images, video recordings or audio recordings. See generally Eggers, Girod, *Informed Watermarking* (Boston, 2002).

[61] See, in support, Schonnig, "Applicable Law in Transfrontier On-Line Transmissions" (1996) 170 *Revue International du Droit d'Auteur* 46, note 90, who notes that the transmission may readily be replaced, for example, by purchase in the country of reception.

issue. On the side of the upload/distribution, I have submitted the application of the *lex loci damni, i.e.* the law (or laws) of the market where the economic harmful event takes place (that is not necessarily the place where patrimonial loss occurs). Nevertheless, I have also suggested that for a single download/reproduction activity the law of each place where the download takes place should be applied.

In such complex copyright infringement events, which law applies?

I would submit that there is no single law governing the whole infringement event. The law of the place of the harm will apply to the distribution activity (for the injunctions to close the Web site, for instance) and its direct consequences (including the whole patrimonial damage). The many secondary infringements (*i.e.* subsequent downloads) will be governed by the law of each country of download.

The solution may seem complex, but from a copyright protection perspective, it proves effective.

The most effective intellectual property protective measures rest in the field of preventive protection and compensation for damages sustained. At the same time, the most harmful part of the infringement is represented by the upload/distribution, as downloads are mere possible consequences. The application of the law of the place of the harm, with its presumably high standard of protection, to the "root" of the infringement seems a sufficient guarantee for the copyright owner.

Besides, the law of the country of download applies in the legal actions against the secondary infringers. In this sense, this view is supported by several scholars.[62] It has also been adopted by a French court in favour of the application of the French law, as the law of the country of reception, even though this was in a dispute relating to trademark law.[63]

B. *Framing and Other On-Line Reproductions*

A further means of infringement is so-called "framing". To understand the significance of the term "framing", attention must be focused on the World Wide Web dynamics. Web sites are individually accessible through a particular URL-address assigned to them. They are usually written in "Hypertext

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[62] Bercovitz, "Legislation Applicable to Transnational Relations between the Operators of Digital Communication Systems" in *International Unesco Symposium on Copyright and Communication in the Information Society* (Paris: Unesco, 1997) at 208; Dreier, "German National Report" in *Droit d'Auteur en Cyberespace* (Amsterdam: Cramwinckel, 1996) at 303; Gautier, *supra* note 34 at 6, note 29; Lucas, *Droit d'Auteur et Numérique* (Paris: Litec, 1998) at 664; Seignette, "Rapport National Néerlandais" in *Droit d'Auteur en Cyberespace, ibid.* at 316, note 12.

[63] "Tribunal de Grande Instance de Draguignan" (21 August 1997) in *Cahiers Lamy Droit de l'Informatique* (December 1997) 25 (note Nardon).

Mark-Up Language" (or "HTML"). Such a language permits the incorporation of Hypertext References, which are the "links" established to direct the user to other Web sites. The hyperlinks may consist of particular words, sentences or paragraphs, marked as such by underlining, or by an image. By clicking on the hyperlink the web browser loads the URL-address of the linked Web sites and opens the target page enabling the user to view the contents of the linked Web site.[64] Whereas hyperlinks generally just provide a reference point to the document being viewed, through the phenomenon of framing, hyperlinking can determine the incorporation of that document into one's own Web site.[65] It is based on modern Internet browser technology with its ability to open a number of frames on the screen for direct viewing of different Web sites containing text, graphics or other HTML elements.[66] This technique gives the end user the advantage of browsing different Web sites with related information at the same time on the same screen. Moreover, framing enables a Web site operator to incorporate remote Web sites completely into the Web site calling upon the user to terminate the connection to this Web site. Thus, when a framed Web site is called upon by clicking on the hyperlink, the linked Web page may appear in part on screen surrounded by a frame that is provided by the "framing" Web page, which is the Web page the user actually called upon.[67]

This entails various consequences. The frame often shows banners, images and logos uploaded by the author of the framing Web site. A part of the contents of the framed Web site may be covered by the frame and therefore made invisible to the visitor. The layout on the screen may appear to the viewer as if all of the information came from a unique Web site, the framing metasite instead of from the linked site. In addition, the URL displayed in the browser is the framing site's address and not the address of

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64 For a concise description of hypertext reference technology, see Vermut, "File Caching on the Internet: Technical Infringement or Safeguard for Efficient Network Operation" (1997) 4 Journal of Intellectual Property Law 273 at 287; Raysman, Brown, "Dangerous Liaisons: the Legal Risks of Linking Web Sites" (1997) 217 New York Law Journal 3 [Raysman, Brown].

65 "Simply linking does not seem to constitute copyright infringement since a hypertext linked Web site seems to be just an instruction to connect to another work rather than actually use of it. Moreover those who upload information on the World Wide Web implicitly intend to have their documents viewed, therefore uploading documents perhaps grants an implied license to link": see Schlachter, "The Intellectual Property Renaissance in Cyberspace: Why Copyright Law could be Unimportant on the Internet" (1997) 12 Berkeley Technology Law Journal 15; see also O'Rourke, "Fencing Cyberspace: Drawing Borders in a Virtual World" (1998) 82 Minnesota Law Review 658–62; German legal commentators share this interpretation with regard to linking: see Koch, "Grundlagen des Urheberrechtschutz im Internet und in On-line-Diensten" (1997) *Gewerblicher Rechtsschutz und Urheberrecht* at 417.

66 See Raysman, Brown, *supra* note 64 at 3, note 19. This feature is comparable with window's multi-tasking feature, making it possible to run a number of applications on the computer and to display them at the same time.

67 Hereafter, this Web page will be called the "framing" Web page.

the site actually being framed. As a result, it may well constitute a form of copyrighted digital work exploitation.

This was the claim of the plaintiffs in the case of *Washington Post v. Total News* before the U.S. court of the Southern District of New York.[68] They complained that the defendant, Total News, Inc., an Internet content provider, hosted a Web site consisting of framing links to the Washington Post's and other news providers' Web sites, thus infringing, among other rights,[69] authors' exclusive rights.[70] Since no precedent is available,[71] the case shows that framing may represent not only an unsettled area of law, but also a new form of copyright infringement.

As far as the applicable law issue is concerned, the analysis seems more complex than previous cases. The infringers here provide hyperlinking and framing in the structure of their Web sites on their computer and upload the corresponding files. Consequently, the place from where the upload takes place may be regarded as the place of the action generating the infringement.

The determination of place of the harm seems more complex. According to the adopted reconstruction it might be not the place where the Host is located, but the one from which the end user connects. Framing occurs and the harm might take place only if the user clicks on the hyperlink.

It is submitted that a determination of the *lex loci damni* regarded as the law of the place where the user accesses the Internet cannot be maintained. The place of the user has a lax connection with the event of copyright infringement and too many laws would govern the consequences of a single event of violation of copyright.

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68 *Washington Post v. Total News, Inc.*, No. 97–1190 (S.D.N.Y. filed 20 February 1997).

69 Apart from copyright issues, the causes of action in Total News were misappropriation, federal trademark dilution, federal trademark infringement, false designation of origin, false representation and false advertising, as well as trademark infringement, dilution and unfair competition under state law, deceptive acts and practices, and tortious interference.

70 The parties settled the case and the defendants agreed to permanently refrain from causing the plaintiffs' Web site to appear and to cease the practice of framing. However, the parties stipulated that defendants may link to plaintiff's Web sites via hyperlinks consisting of the linked sites in plain text. See *Washington Post v. Total News, Inc.*, No. 97–1190 (S.D.N.Y. 5 June 1997) (stipulation and order of settlement and dismissal), online: <http://www.jmls.edu/cyber/cases/total1.html>. For a concise analysis of the case see Kuester, Nieves, "Hyperlinks, Frames and Meta-Tags: an Intellectual Property Analysis" (1998) 38 IDEA: Journal of Law and Technology at 271.

71 In *Futuredontics Inc. v. Applied Anagramic Inc.*, the defendant Applied Anagramic Inc. allegedly framed the plaintiff Futuredontics's Web site. See No. 97–6691 (C.D. Cal. 30 January 1998) (reported in Patent, Trademark & Copyright Journal, 1998 at 315). The district court rejected the plaintiff's motion for preliminary injunction as well as the defendant's subsequent motion to dismiss finding that plaintiff had sufficiently alleged a claim for copyright infringement. The United States Court of Appeals, Ninth Circuit affirmed. See *Futuredontics Inc. v. Applied Anagramic Inc.*, 152 F.3d 925 (9th Cir. 1998).

Besides, the place of the market theory cannot be applied to the framing of Internet sites as such. This is the case where the framed Web site deals with a product, like the case of a news or information provider. In fact, the user can have access to the same information and news directly from the original Web site. The nature of the infringement may be identified in a diffusion of an unauthorised reproduction of a work, which only entails, in terms of copyright, a possible misattribution of the authorship and modification of the work, and a concrete exploitation of the endeavors of the authors.

On the other hand, the law of the place of the input seems in this case the only solution according to the *lex loci delicti* rule. Consequently, it is submitted that the law of the place of upload should be applied in event of copyright infringement of this kind.[72]

C. *File-Sharing*

The file-sharing software represents a new frontier of copyright infringement. Through this technology, files are no longer uploaded and downloaded on and from Web sites or BBS or traded by e-mails. Internet users feely download on their personal computers special Web clients especially created for the purpose.

Old file sharing software (Napster, for instance) relied on the connection to central servers, which constituted the pillars of the file-trading network on the Internet. Final users, using particular software applications called "clients", could search the file of interest (music, in the case of Napster).[73] The client, through centralised servers, was put in contact with the clients of other terminal users who had the target file stored in their PC. The searchers could then download the file on their own PCs. The system was successful, but it had its weakest link in the existence of central servers. A court order to close such servers could make the file trading system collapse.[74]

The present version of file-sharing software is called KAZAA.[75] The sharing system is constituted by a decentralised network of KAZAA clients,

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[72] As seen above, it may involve risk of manipulation, in terms of race to safe havens by infringers.

[73] According to Enzer, *supra* note 57, a "client" is ". . . a software program that is used to contact and obtain data from a *Server* software program on another computer often across a great distance. Each *Client* program is designed to work with one or more specific kinds of *Server* program, and each *Server* requires a specific kind of *Client*. A Web *Browser* is a specific kind of *Client*."

[74] See King, "Napster Still Playing, in Court", 10 December 2001, online: Wired News <http://www.wired.com/news/mp3/0,1285,48982,00.html>.

[75] Its creator, Niklas Zennstrom, is a Dutch entrepreneur who had licensed the decentralized, file-trading software to United States companies and later sold his company Kazaa to an Australian investment firm. Zennstrom is now facing separate lawsuits in the Netherlands and the United States brought by national music copyright organizations. The Buma Stemra,

without central pillars. Thus, the dynamics of the file trading among users are identical, but the system "floats" in cyberspace, since terminal users' PC hard drives act as servers.

The distribution of the file sharing software applications could be conceived as activity pre-ordered in order to infringe copyright. The determination of the applicable law seems to follow the reconstruction provided for in the case of unauthorised distribution through Web sites and BBS. Therefore, I would submit that the dimension of the phenomenon results in the economic harm taking place in the market where the products are traded, thus the applicable law must be regarded as the law of that market. Apart from the tort liability of the providers of such software applications, attention must also be focused on the single acts of infringement by final users.

In the Napster-like systems, the user's order to download and the material download take place in the country where the terminal user is located. The law of that country seems to be applicable to single download activities, as the law of the place of both of the action and the harm.

A further question may be whether the imposed connection to the pillar-server might identify another relevant element of localisation of the infringement. This could imply a reference to a smaller number of applicable laws or even a single law for copyright infringements by a single user. This would be the law of the country where the server is located. Moreover, the proximity with the servers could be desirable in terms of effective injunctive protection against those servers. However, these elements of connection seem too lax. To some extent they have the same role with reference to the sharing network as the Internet access servers have with the Internet: they are nothing more than passive gateways.

Regarding the remote computers from which the files are downloaded, it is maintained that they have a merely passive role of storage in the dynamics of infringement. Further, files are often downloaded from multiple users simultaneously in order to guarantee fast downloads, rendering these elements of connection ineffective in the determination of the applicable law.

Thus, with regards to a singular act of infringement by individual terminal users the application of the law of the place of download seems preferable, even given the negative consequences in terms of casualness and manipulation. It is submitted that the same conclusion is, *a fortiori*, applicable to the new file-sharing "floating" networks.

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a Dutch copyright "watchdog" organization, is suing Kazaa for distributing the software application and in its suit, the R.I.A.A. named Consumer Empowerment, the licensing arm of Zennstrom's company, for selling the software to American companies (for further information see http://www.bumastemra.nl). Note that, as is with Kazaa, many other file trade systems are provided on the Internet. See King, "File trading instantly is easier" 2 November 2001, online: Wired News <http://www.wired.com/news/mp3/0,1285,48071,00.html>.

VII. Law Applicable to the Violation of Moral Rights

In addition to economic rights, the Berne Convention gives international recognition to the moral rights of an author of a work. In particular, under Article 6-bis (1), it is stated that ". . .independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation".[76]

The norm establishes the existence of two moral rights: the right to be identified as an author, or the "paternity right", and the right to object to derogatory treatments of a work, or the "integrity right".

It is obvious that the aforementioned rights may suffer prejudice from acts of copyright infringement on the Internet. However, there are numerous significant exclusions from the application of moral rights. For example, such rights do not extend to computer programmes and computer-generated works. Furthermore, there are also restrictions on the rights in works made by employees.[77] These limitations have pertinent consequences in terms of this analysis, as a great part of the file infringement on the Internet is constituted by computer programmes and applications. Furthermore, much of the contents of Web pages may well be the fruit of dependent work.

Nevertheless, numerous other acts of infringement taking place on the Internet may involve violation of moral rights. I would suggest that such kinds of violation on the Internet take place only in relation to the diffusion of on-line digital works. Conversely, mere acts of reproduction through download do not seem amenable to a claim of infringement of the moral rights norm.

As far as the nature of moral rights is concerned, it must be discussed whether they form an integral part of the copyright or are to be considered to be a separate right. I would submit that, in spite of their belonging to the general category of copyright, moral rights are different and distinct in nature. They may be considered personality rights, linked with the person of the author of the work. They relate to the protection of artists, since the false

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[76] For the protection of moral rights following the author's death, Article 6-bis(2) states that: "The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained".

[77] Among the other exceptions there are materials used in newspapers or magazines and reference works, such as encyclopedias or dictionaries.

attribution, distortion or modification of his work "mistreats an expression of the artist's personality, affect [the] artistic identity, personality and honor, and thus impairs a legally protected personality interest".[78]

As such, independently, they cannot have economic implications. This entails the express exclusion of such rights from the field of application of the TRIPs Agreement.[79] Consequently, the function of harmonisation provided for by the aforesaid agreement does impact upon the field of moral rights. It follows that choice of law rules acquire even greater importance from the perspective of the effective protection of copyright.

In this regard, the Berne Convention provides under Article 6-bis (3) that "[t]he means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed". This choice of law rule is identical to the one provided for under Article 5(2) with reference to economic rights and, as a corollary, suffers from the same degree of ambiguity.

In addition, within the framework of international choice of law jurisprudence it remains to be seen how moral rights in a "cyberworld of transformable and malleable images" will be enforced.[80] I would submit that, notwithstanding the different nature of these rights, the corresponding interpretation of the *lex loci delicti* rule still seems acceptable. This construction also seems to be supported by the fact that it is the *lex loci delicti* rule that is provided for by national conflict of laws legislation, where specific norms for violations of rights of personality exist.[81]

However, as in the case with economic rights, the theory of the place of the action proves ineffective with regards to moral rights in terms of proliferation of applicable laws and manipulability. In addition, identical problems would remain with the adoption of the *lex loci damni* rule according to its traditional interpretation.

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78 Marryman, "The Refrigerator of Bernard Buffet" (1976) Hastings Law Journal 1027, as quoted by Nielander, "Reflections on a Gossamer Thread in the World Wide Web: Claims for Protection of Droit Moral Right of Integrity in Digitally Distributed Works of Authorship" (1997) 20 Hastings Communications and Entertainment Law Journal 94.

79 Under Article 9(1) of the TRIPs Agreement: "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6-*bis* of that Convention or of the rights derived therefrom". As to the contrast between economic rights and moral rights, see also the E.C.J. decision *Musik-Vertrieb Membran GmbH v. GEMA*, 20 January 1981, in *European Court Report* (1981) 174, where the court notes that moral rights could not be used to restrict trade between Member States.

80 Nimmer, *Information Law* (Boston: Warren, Gorham & Lamont/West Group, 1996) § 4.22.

81 See *e.g.* Article 24(2) of the Italian Law of Reform of Private International Law, 31 May 1995, number 218, and Article 139.1(c) of the Swiss Federal Law of Private International Law, 18 December 1987, number 291.

Nevertheless, the different nature of moral rights may affect the interpretation of the *lex loci delicti* rule as the law of the place of the harm.

Moral rights are granted mainly to the authors of literary, dramatic, musical and artistic works and to film directors. As aforementioned, they consist of, firstly, the right to be identified as the author of the work or director of the film in certain circumstances (especially when copies are issued to the public); and secondly, a recognised right to object to derogatory treatment of the work or film which amounts to a distortion or mutilation or is otherwise prejudicial to the honor or reputation of the author or director. Thus, in contrast to economic rights under copyright, moral rights are concerned with protecting the honor and reputation of authors and directors, which are aspects of their personality.

I would submit that, regardless of the fact that the violation is committed by means of the Internet, the place of the harm may be regarded as the place where the personality suffers prejudice.[82] Thus, the harm takes place where the authors develop their personality and have built their reputation. This may coincide with the place of their habitual residence or domicile.[83]

The application of the law of habitual residence or domicile is not new in the field of the legal protection of rights of personality. Over the years, U.S. courts have suggested numerous different approaches to the question of choice of law in multi-state defamation and privacy cases.[84] Among them, under the influence of the Restatement (Second) of the Conflict of Laws,[85] more recent cases have tended to apply the law of the jurisdiction that, with respect to the particular issue in question, bears the most significant relationship to the occurrence and the parties. In multi-state defamation cases in particular, this is usually the law of the place of the plaintiff's domicile.[86] In fact, the place of the plaintiff's domicile is generally regarded as "the place where most of his reputational contacts are found; therefore, the state of plaintiff's domicile generally has the greatest concern in vindicating plaintiff's good name".[87] Identical considerations may be applied with

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[82] See, in support, *Carter v. Helmsley-Spear, Inc.*, 861 F.Supp. 303, at 323, (S.D.N.Y.,1994) where it is held that the artist's reputation would be prejudiced in the relevant artist's community.

[83] See in this regard the solution provided for by Article 139.1(a) of the Swiss Federal Law of Private International Law, 18 December 1987, number 291.

[84] See generally *Palmisano v. News Syndicate Co.*, 130 F. Supp. 17 (S.D.N.Y. 1955) (listing nine potential choice of law rules); *Dale System, Inc. v. General Teleradio, Inc.*, 105 F. Supp. 745 (S.D.N.Y. 1952) (relying on five different rules).

[85] *Restatement, supra* note 17.

[86] See Sack, *Sack on Defamation: Libel, Slander, and Related Problems* (New York City: Practicing Law Institute, 2001), Chapter 15.3.

[87] *Wilson v. Slatalla*, 970 F. Supp. 405, at 414 (E.D. Pa. 1997). See also *Wells v. Liddy* 186 F.3d 505, 507–09 (4th Cir. 1999); *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490

regard to the violation of moral rights in the event of copyright infringement via the Internet.

I would therefore argue that, in application of the *lex loci delicti* rule provided under Article 6(3) of the Berne Convention, the violation of authors' and directors' moral rights by means of Internet copyright infringement may be governed by the law of the place of their habitual residence or domicile.[88]

VIII. Conclusion

The Internet has been described as a new continent made up of digital data.[89] Better still, as a utopia, in the stricter etymological sense, as cyberspace is nowhere. It is the human perception which designs the magnetic memory of computers and kilometers of wires as a new dimension of space. In reality, the Internet is only a new and extraordinary means of communication of global extent. This characteristic means that effective regulation of its use can only be established by means of international legal instruments. The current lack of uniform international regulation in many fields of law generates wide areas of legal uncertainty, mainly due to the difficulty of adapting the territorial conception of certain rights to the new reality.

In particular, as far as copyright protection is concerned, the global use of the Internet as a means of transmission of digital data and the diminished importance of territoriality in relation to digital networks requires a new interpretation of traditional choice of law solutions.

The old choice of law rules provided for under Article 5(2) and Article 6-*bis*(1) of the Berne Convention, with its ambiguous wording, still proves to be the only applicable rules in the event of international infringement. The traditional interpretation of the norms as *lex loci delicti* rules is maintained with reference to the violation of both economic rights and moral rights.

From this perspective, the most problematic issue arises from the contrast between the global conception of the Internet and the territorial links required for the application of the above rule. As far as economic rights are concerned, the most harmful form of copyright infringement on the Internet seems to be in the form of the unauthorised distribution of files through either the upload of digital works on Web sites and BBS, or the systems of file-sharing. In these cases, a determination of the applicable law is

(D.D.C. 1987); *Fitzpatrick v. Milky Way Prods., Inc.*, 537 F. Supp. 165, 171 (E.D. Pa. 1982). Generally on choice of law and Internet defamation see Waldman, "A Unified Approach to Cyber-Libel: Defamation on the Internet, a Suggested Approach" (1999) 6 Richmond Journal of Law and Technology 9.

88 It is important to note that the *lex domicili* may not coincide with the *lex originis*, since the place of origin of the right "is identified" as the place in which the work has met the public for the first time: *supra* note 11 at 6.

89 See Ballarino, *Internet nel Mondo delle Leggi* (Padova: Cedam, 1998) at 34.

either made with reference to the place of input or to the place of the harm, (understood as the place where the Host is located).[90] Nevertheless, none of the above seems to provide effective protection, as both may be subject to manipulation by the infringer, by the so-called "race to safe havens".

However, another kind of interpretation may be proposed, as the place of the harm, for cases in which the digital works are commercialised as a product. The harmful event can, from this perspective, be seen as a prejudice in the market where the product is traded. In this sense, the law of the market would be applicable, which may not mean the law of a single country. Thus, reference is made to a new concept of territoriality, which may not rely on national borders. Furthermore, the standard of protection is implicitly approved by the rightowner who has chosen to commercialise its products in a particular location or locations.

This construction seems valid also in the event of mass distribution via e-mail. In the more limited cases of distribution via e-mail, the application of the law of the place of input seems preferable.

As regards single acts of unauthorised reproduction through download from the Internet and the storage of a fixed support, I would maintain that it is appropriate to apply of the law of the location of the download. However, in these cases the problem of manipulability occurs.

As far as moral rights are concerned, the nature of the protected interest renders the application of the *lex loci damni* preferable, as a result of a different interpretation of the rule.

In the event of a violation of moral rights, the prejudiced interest is represented by the reputation and the personality of the author. In this regard, the harm may only take place in the place where the author benefits from his reputation and develops his own personality, that is the place of his habitual domicile. In the case of both economic rights and moral rights, the applicable law determined by the aforementioned criteria may contain a low standard of protection, especially due to manipulability and the race to safe havens by infringers.

However, I would submit that in these cases effective protection may be provided for through public policy and by means of the application of mandatory rules.[91]

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[90] Although it may be true that technological implementations (especially technical models for file sharing) change continuously and that, consequently, the rationality of these criteria is bound to appear always debatable, the adoption of different ones, which are less dependent upon technical details, still seems difficult to reconcile with the wording of article 5(2) of the Berne Convention.

[91] Concerning the application of the *lex fori* as "loi d'application imperative" to the violation of moral rights, see the French decision of the Cour de Cassation, Civil 1re, 28 May 1991 in *Clunet-Journal de Droit International* (1992) 133, *Revue Critique de Droti internaional Privé* (1993) 197, with case-note by Raynard. See also the French decisions "Chant du Monde",

In support of this view, it may be argued that material and moral aspects of copyrights are in fact expressly recognised by the Universal Declaration of Human Rights.[92] In particular, Article 27(2) provides that: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".[93]

In addition, Article 1 of the Universal Copyright Convention states that "[e]ach Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture".[94]

The collective invocation of the aforementioned international norms seems to provide a sufficient legal basis upon which to base public policy or mandatory rules issues and thus to guarantee effective protection in the event of copyright infringement in the Internet environment.

In this sense, are choice of law rules, requiring courts to localize the place of infringement in specific territories, still appropriate in a digital era? Should new and more stringent copyright law conflicts rules not be developed to replace traditional territoriality-based rules?[95]

De lege lata, the efforts made towards a creative interpretation of the applicable law rules provided by the Berne Convention must be redimensioned. The *lex loci delicti* rule still represents a valid solution and its application to "cyber-infringements" continues to prove effective. Apart from mass infringement which might be governed by a new *lex loci mercati* (*i.e.* law of the place of the relevant market), in the remainder of the cases the application of the *lex loci acti* or *lex loci damni* (according to the interpretation adopted here), together with consideration of public policy and the application of mandatory rules, may be sufficient in terms of the provision of a high standard of protection for copyright owners.

De lege ferenda, in the long term, the ideal, though radical, solution would be the adoption of a uniform international portfolio of rules for copyright and related rights. Nevertheless, even though the preamble to the Berne

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Cour de Cassation, 1st Civil Chamber, December 22nd, 1959, cit., (applying French law as "loi de police" with regard to the protection of a moral right) and Tribunal de Grande Instance de Paris, 14 February 1977 in *Revue International de Droit d'Auteur* (1978) 179 (expressly referring to "l'ordre public du droit d'auteur").

92 See Tribunal de Grande Instance de Paris, 23 November 1988, in *Revue Critique de Droit International Privé* (1989) 372, (applying the *lex fori* as the interpretative model of Article 27(2) of the Universal Declaration of Human Rights). See also, *contra*, Cour d'Appel de Paris, 6 July 1989, in *Revue Critique de Droit International Privé* (1989) 717, note Edelman.

93 Adopted and proclaimed by the UN General Assembly with Resolution 217 A (III) of 10 December 1948, online: <http://www.unhchr.ch/udhr/lang/eng.pdf>.

94 Signed at Geneva on 6 September 1952 and revised at Paris on 24 July 1971.

95 See, in support of this view, Geller, "Conflicts of Laws in Cyberspace: Rethinking International Copyright" (1996) 20 Journal of the Copyright Society 105.

Convention invites signatory States to do so, stressing the need to "protect in as effective and uniform a manner as possible the rights of authors in their literary and artistic works", the task seems almost impossible.

Other solutions have been prospected on the grounds of private arbitration systems to resolve copyright infringement questions arising from Internet violations. This perspective supports the so-called "Virtual Magistrate Project" at the Center for Information Law and Policy, which, through a Website, provides arbitration for disputes arising through Internet communications.[96]

However, in the short term, the desirable solution may be represented by the adoption of a new Convention on the law applicable to torts and delicts, which fully takes into account digital means of communication. From this perspective, the failure to include applicable law rules governing torts and delicts in the Rome Convention 1980 seems an ironic advantage. The Rome II Convention might constitute the right way to address the questions arising from the technological developments and their legal consequences.[97] Nevertheless, its adoption on a global scale will be a difficult, if not impossible, goal.

Alternatively, restricting the vast Internet legal issues to the copyright infringement question, I submit that an amendment of the relevant ambiguous provisions of the Berne Convention under the auspices of W.I.P.O. would represent a desirable and feasible solution, according to the new ultra-territorial conception of copyright protection. In this regard, new and more flexible choice of law rules seems to be highly desirable.

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[96] See Center for Information Law and Policy, Virtual Magistrate Project, online: <http://www.cilp.org/>.

[97] Note that under the Rome II proposal, parties would be free to choose the applicable law. In the absence of such a choice, the law would be that of the country, which has the strongest link with the act creating the obligation. The Green Paper on Rome II dropped at a first stage due to the opposition of industry and consumer groups (who have suggested that the Commission merely propose the draft Regulation, which may include a differentiation between on- and off-line torts) has been now launched again. See *Brussels Agenda-The Law Societies' Monthly Publication with the Latest EU News* (May 2001) 5, online, <http://www.lawscot.org.uk/pdfs/ba-may01.pdf> and the European Commission Web site, online: <http://europa.eu. int/comm/justice_home/unit/civil/consultation/index_en.htm>.