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PRIVATE INTERNATIONAL LAW ASPECTS OF THE PROTECTION OF WORKS AND OF THE SUBJECT MATTER OF RELATED RIGHTS TRANSMITTED OVER DIGITAL NETWORKS[*]

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[*] Due to time constraints the footnotes that exist in the original (French) text have not been incorporated. A revised English version with footnotes will be issued in due course.

INTRODUCTION

1. As stated in the title, which is exactly the title given in the commissioning letter from the Assistant Director General of WIPO on August 21,1998, this study restricts itself to those aspects of private international law that concern copyright and neighboring (or related) rights in the digital environment. It does not therefore approach the overall problems of substantive law raised by the adaptation of intellectual property law to this new situation. It also leaves on one side those issues of private international law that do not concern copyright or related rights and therefore disregards the transversal approach that leads certain writers to raise an overall problem of the law applicable to the dissemination of unlawful content whether that unlawfulness derives from the infringement of an intellectual property right or from ignorance of the rules governing libel, pornography, revisionism, and the like. Such comparisons are certainly feasible and fruitful, but the special nature of copyright and related rights gives good reason for the scope of this analysis to be restricted in that way.

The report will deal more with copyright than with related rights, simply because it is on the basis of copyright that international thinking has been conducted and is still being conducted. Despite that, the overall approach adopted by WIPO is coherent. It is not only works that circulate on the networks, but also performances and recordings belonging to the holders of related rights. And this extension of our approach is perhaps not without consequence, particularly since analyses that have been carried out in the area of copyright, and have been centered on the personal nature of that right, may prove difficult to transpose to those related rights whose dimensions are essentially, if not to say exclusively, of an economic nature.

2. The “reference framework” attached to the above-mentioned letter from the Assistant Director General suggests that the accent be placed on conflict of laws, but also that attention should be paid to issues of jurisdictional competence.

3. The other pillar of private international law constituted by the status of foreigners, is not mentioned. Some preliminary remarks are nevertheless required due to the confusion that has been caused and continues to be caused with respect to copyright and related rights, a confusion that clouds the boundary between conflicts of law and the status of foreigners and thereby complicates an issue that is already redoubtable in itself. To simplify somewhat, we may say that in fact frequently the reasoning that has been carried out on the basis of the statement, made implicitly (and sometimes even explicitly), that a foreigner who is enabled to assert his copyright in a given country may only be subject to the law of the court of that country. What has been criticized as being “an ancient temptation to lump together the status of foreigners and the conflict of laws” has weighed heavily, and still does so, on the interpretation to be given to what is known as the principle of national treatment contained in Article 5(1) of the Berne Convention and adopted in many other international instruments. Despite the fact that this principle aimed to protect authors from any discrimination they may suffer in their capacity as foreigners, many people claim to discover therein a principle of the conflict of laws applicable to works, since, they affirm, assimilation of a foreigner to a national can only lead to application to foreign works of the *lex fori*. That explains why the application of the law of the country of origin, that is sometimes provided for by the Convention, for example the principle of comparison of terms set out in Article 7(8), referred to as the principle of “reciprocity,” is frequently described as a misuse of national treatment.

4. This ambiguity is again to be found in the TRIPS Agreement in which Article 3.1 states that the aim of national treatment is the “protection” of intellectual property and explains in a

note that the term "protection" includes *inter alia* "matters affecting the use of intellectual property rights." The assimilation of foreigners to nationals derives from the principle of "enjoyment" of the rights, and the reference to "the use" of those rights is liable to encourage the drift of the status of foreigners towards the conflict of laws. This is corroborated by the fact that Article 3.2 tolerates exceptions to national treatment by referring to the content of local rules, as also the link made in the Agreement between national treatment and most favored nation treatment (which is referred to in Article 4), whereby this latter can in no way be limited to the sole field of the status of foreigners.

5. It nevertheless seems essential for the clarity of the concepts to make a clear distinction between the two types of concern. Obviously, in practice, the choice of applicable law may prove more or less advantageous to a foreigner. We may indeed acknowledge that the cumulative application of the law of the country of protection and the law of the country of origin, as in the machinery for comparing terms laid down by Article 7(8) of the Berne Convention, will more frequently operate against foreign authors which, we may remark, gives reason for it to be criticized as indirect discrimination under Article 12 of the EC Treaty, as interpreted by the Court of Justice of the European Communities in the *Phil Collins* case in 1993.

Nevertheless, this fact is not enough to overshadow one of the basic principles of private international law that the issue of enjoyment of rights by a foreigner does not take precedence over that of the choice of the law applicable to the substance. It is one thing for a foreigner to be permitted to assert a right in a given country, but it is another thing to know which law the court will apply. It is indeed altogether conceivable, as we shall see, that the court hearing a case may apply a law other than its own.

6. A further ambiguity, of a terminological nature, must also be raised beforehand with regard to the question of "territoriality". The framework set out for this study by the Assistant Director General specifies that attention should be attached to the "coexistence or not of the principle of territoriality of copyright with the global nature of digital networks." This word indeed is frequently spoken and written in the field of the international law of literary and artistic property. However, it is capable of many different acceptation's, and that invites us to be circumspect. Territoriality may simply extend to a territorial attachment that derives from the choice of applicable law (place of publication, place of infringement of the right). Similarly, it has rightly been said of the law of the country of origin that it possesses a "territorial basis." In that acceptation, it already raises difficulties since certain persons consider that the universal nature of digital networks makes this type of attachment artificial, but it is altogether compatible with the concept of a conflict of laws.

The word is also frequently used in the field of intellectual property in order to accommodate the tendency to draw up as a principle that the court hearing a case may apply no law other than its own. Therefore it becomes obvious that this approach is tantamount to a simple denial of the conflict of laws, thus enabling us to avoid any reflection in this field, but derives from a narrow nationalist concept bringing us back, on the threshold of the new millennium, to the feudal age.

Certainly, the territoriality of intellectual property rights, which has its origins in history (both for copyright and for patents), continues to reflect substantive law. It is this factor, in particular, that justifies refusal of international exhaustion of the right of distribution. It is indeed interesting to note that European Community law does not really depart from this

approach since, although it imposes such exhaustion, it is only within the territorial sphere of the Community.

However, that which has been referred to as the "so-called principle of territoriality" does not exclude the conflict of laws. Thus, it may well be said, and is frequently said, that Article 5(2) of the Berne Convention is based on a territorialist approach since it provides that "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," but that does not constitute exclusive application of the *lex fori*. Indeed, the expression "laws of the country where protection is claimed" is generally considered as referring to the law of the country for which protection is claimed, which amply demonstrates that the court may indeed be required to apply, notwithstanding the sovereignty of the State, a law other than its own, a law which hypothetically, will enjoy extraterritoriality. For example, if a French court applies Italian law to an infringement that has occurred in Italy it is not easy to see where the interest lies in saying that the dispute will be governed by the principle of territoriality.

7. It is doubtlessly due to this basic equivocacy that the science of conflict of laws has been rather neglected, we are obliged to say, in the field of copyright and related rights. The Berne Convention, and those that followed it, are altogether discreet in this respect and the rare provisions that they devote to this issue are in fact subject to diverging interpretation.

A loophole of this kind would not be too serious if the national instruments contained rules of substantive law capable off lifting any uncertainty arising from the international dimension of the use of works. However, such is not the case.

8. It is indeed the great achievement of Internet, after satellites, to have created an obligation to rediscover the international aspects of this discipline, too long masked, by overshooting the timid territorialism that had been inherited from the regal tradition of privilege. To quote the words of Batiffol, it is vain to wish to remove the problems of conflict of laws on the grounds that they are too complex, since "reality will take upon itself the task of demonstrating that problems cannot be resolved by ignoring them if they are real problems."

9. However, at the same time, the fact that the digital networks throw up again the old issues that have not been resolved or have been ill-resolved, shows full well that one should not fall all too rapidly (and perhaps that one should resist) to the temptation of believing that they make it necessary to rethink the whole system. Not only is there still place for the rules of law, particularly the rules of international law, in the digital environment, even if that does not please the pioneers of Internet inspired by the libertarian tradition of the beginnings, who would like to have us believe that the planetary dimension of the networks implies a sidereal legal vacuum, but there is no reason to set up as a principle, as an evident postulation, that the new technical situation requires a complete break with the past. It is in this spirit of prudence and of "scientific doubt" that this present study will be conducted.

10. If we analyze more concretely the challenges raised for international law specialists by digital technology, we of course think of the issue of localization of the harmful act in digital transmission that has been at the heart of the controversy for some time already. This will be the subject of a second chapter. However, the scope of the study set out in the commissioning letter from the Assistant Director General first requires that the current situation be reviewed by identifying in what way the new digital situation affects the principles applicable for determining the law that governs copyright.

## I. PRINCIPLES APPLICABLE FOR DETERMINING THE LAW GOVERNING COPYRIGHT AND RELATED RIGHTS

11. It would be indeed arduous to review all the theories that have been pronounced on the topic of the law applicable to copyright (whereby related rights have been somewhat neglected until now). Since convention law is somewhat lacking, as we have mentioned, in clarity, it is necessary to look at the national systems of private international law. However, the reply differs from one system to the other. They differ also within each system, since the discipline is very "doctrinal" and case law frequently uncertain. This paper therefore cannot claim any exhaustive nature on this issue. In fact, it is focused on the impact of digital networks and does not set out to give an answer to all the controversies. At most, it will attempt to reflect the main concepts that have been developed.

12. If we wish to review these concepts, it will be necessary, after having described the part played by the *lex contractus* (Section 1), to examine the various attachments that have been suggested for determining the law applicable to copyright: personal law (Section 2), *lex fori* (Section 3), law of the country of protection (Section 4), law of the country of origin (Section 5).

### Section 1. *Lex Contractus*

13. No one denies that the law of the contract has an important part to play in copyright and related rights. We may even foresee that this part will be capital in the digital environment. It is, however, excessive to proclaim that the conjunction of the contract and of technical protection will make the exclusive right superfluous. However, the virtues of a contract, particularly valued in the common law tradition, and thereby in the international tradition, raise hopes of the development, together with electronic commerce, of conventional usage that will give birth to a kind of "*lex mediatica*" as a new *avatar* of the *lex mercatoria* so well known to international lawyers, with the same facility for evading the problems of conflicts of law.

14. Until such time as this optimistic forecast comes about, we have to raise the question of the determination (1) and the field (2) of the *lex contractus*.

#### A. Determination of the *Lex Contractus*

15. I shall not dwell on this classic issue, which would not seem to have been really renewed by the digital environment. The question is above all how to determine the law of the contract in those cases where the parties have not expressed themselves.

16. Article 4(1) of the Rome Convention on the law applicable to contractual obligations, signed on June 19, 1980, by the Member States of the European Community, provides in such cases that "the contract shall be governed by the law of the country with which it possesses the closest links" and the following paragraph adds the presumption that "the contract possesses the closest links with the country where the party that is to furnish the characteristic service had his habitual place of residence or, in the case of a firm, association, legal person, his central administration at the time of conclusion of the contract." This presumption may be ignored, according to Article 4(5), "where the overall circumstances show that the contract possesses closest links with another country."

17. This concept of characteristic service, based on Swiss law, has already raised considerable controversy with regard to contracts that assign or license authors' rights and related rights. If we wish to emphasize the fact that such contracts are normally intended for organizing the exploitation of works and performances we would be inclined to use, failing any other indication, the place of residence or establishment of the user, unless we refer to the law of the place of residence or establishment of the assignor or licensor if the contract does not place an obligation to exploit on the assignee or the licensee. If we wish to focus on the subject matter of the right that has been assigned or licensed, without which no exploitation would be possible, we will say that it is the holder of the copyright or of the related right that provides the characteristic service.

18. It would perhaps be useful, within the framework of a possible international convention dealing with the private international law aspects of copyright and related rights, to clarify the situation by setting out a number of guidelines. Each proposition can be backed up by valid arguments. However, it would seem that the place of establishment of the user would correspond to a center of gravity more easily accepted by all legal systems.

B. Field of the *Lex Contractus*

19. The issue of the field of application of a contract for exploiting copyright or related rights gives rise to considerable controversy. Although it is true that in practice the *lex contractus* and the law applicable to the right (the law of the right) sometimes coincide, such a situation cannot constitute a rule and it is therefore necessary to determine the aspects that depend on each of them.

20. No one denies that it is the *lex contractus* that must govern the conditions for establishing a contract and the personal obligations of the parties. When applied to copyright, this means, for example, that this law only may be interrogated to determine how to interpret the contract or determine the mode of remuneration (proportional or lump sum).

21. There can also be no debate on the fact that the *lex contractus* cannot claim to govern the conditions for access to protection or the content of the rights since, indeed, it is the prerogative of the parties to determine for their purposes the copyright of the related rights. From that point of view, the European Commission Green Paper on copyright and related rights in the information society goes too far in that it would appear to place as limits on the *lex contractus* solely "certain conditions for application" that may be imposed by "the law of the country where the use of the work takes place."

22. There nevertheless exist areas of shadow due to the very nature of intellectual property rights although it is not easy to make the distinction, that is traditional for contracts concerning material goods, between the material effects of the contracts, subject to *lex situs*, and the personal effect that fall under the *lex contractus*. The prevailing opinion is that the assignability of the right (or of a component of the right) is part of its essence and should therefore be governed by the law applicable to the right, which is indeed quite logical.

The most important thing is to know as from when it is to be of application. There can be some uncertainty, for instance, in case of the rules governing the assignment of rights in future works. It can be claimed, in favor of application of the law of the right, that the rights related to such works are so to speak withdrawn from legal commerce, which would therefore appear to affect their status. This argument only apply if the law of the right prohibits as a principle any assignment of a future work. Such is not generally the case; either (as is the

case in France) the law limits the possibilities of assignment, which is not the same thing as a prohibition, or (as is the case in Germany) it aims to protect the rights of the assigning author by permitting him to recover his freedom under certain conditions, which is a product of a logic totally foreign to that of the assignability of the right.

In same way, we may consider subjecting the formalism of assignments, which require the parties to determine the rights assigned, to the law of the right, by transposing the admitted solution for material goods, according to which it is the *lex situs* that gives us the conditions for transfer of ownership, but it would not be unreasonable to abandon the issue of the *lex contractus* in view of the fact that these rules concern the nature of the "tenor" of the rights.

23. Whatever the hypothesis, we have to take into account the classic remedies constituted by the directly applicable regulations and by the reservation of international public policy. There again, concepts may vary from one country to another. In Germany, for instance, it is generally held that contractual law cannot override the provisions of the 1965 Copyright Law that protects the author as the person deemed the most vulnerable through the prohibition of licensing a right of use for unknown types of use, the rule under which the scope of a license is restricted to the types of use implied by the nature and purpose of the transaction, the right of a licensing author to obtain an amendment to the contract, where the agreed remuneration is manifestly disproportionate to the profits obtained from use of the work, enabling him to share equitably in those profits taking into account the circumstances, the right of an author to terminate contracts licensing rights in future works that are not determined or are determined only as to their type or the right of withdrawal in event of failure to use by the licensee or the right of withdrawal where the author reconsiders.

It is probable that less radical solutions would be reached in other countries. In France, for example, Debois, although he taught that international public policy should require a return to the *lex fori* for the complete assignment of future works "incompatible with individual freedom," did not go as far as to state as a principle that the *lex contractus* should be excluded to the benefit of all the protective provisions in the French law, accepting, for example, that the *lex contractus* may provide for lump sum remuneration in cases where the French law sets out the principle of proportional remuneration. It may be observed in passing that Article 16 of the above-mentioned Rome Convention advocates a measured approach since it provides for exclusion of the designated law only where its application "is manifestly incompatible with the public policy of the forum."

There remains the question, which is essential in practice, whether the principle that exists in the very great majority of countries according to which copyright can be generated only in respect of the natural person who has effectively created the work, may be removed by the *lex contractus*. In France, the Huston decision means that we must say no with respect to moral right. It would seem logical to extend its scope to the economic rights since authorship cannot be divided up. However, this discussion has not yet been decided by the courts.

24. These uncertainties warrant resolution within the framework of the international convention referred to above. It is indeed highly damaging for the security of transactions with respect to literary and artistic property that a problem as crucial as the field of *lex contractus* should be left to fluctuating case law and divided doctrine. The way could be to lay down the principle that this law would be applicable to govern all hypothesis where the nature and content of the right were not concerned, but to set up a limitative list of exceptions in which recourse would be left to the law of the right, subject to those cases, also

exceptional, in which the States would be free to apply the reservation of directly applicable regulations or that of international public policy.

Section 2: Personal Law

25. In view of the traditionally acknowledged personalistic dimension of copyright, the personal law, understood as the law of the nationality of the author, or again the law of his domicile or place of residence could have obtained the favors of case law and of legal writings. However, such has not been the case.

26. It is only for unpublished works that attachment to the national law of the author has been proposed, frequently without any enthusiasm, but rather for want of anything better, as a result of the impossibility of localizing on the basis of publication.

27. This argument cannot suffice alone to convince those who wish to submit the whole of copyright to the law of the place of protection. Doubtlessly, the proposal is based rather on the implicit proposition that the author's economic rights originate only as from disclosure, which therefore makes it impossible to have recourse to ordinary attachment. However, begging such a question, which is supported by no text, is hardly convincing.

28. We would add that the solution of personal law is altogether difficult to translate into practice for works created by more than one author, that have a tendency to increase in numbers in the digital environment, and that it would have no justification with respect to related rights, particularly those of an economic nature, afforded to producers and broadcasting organizations.

Section 3: *Lex Fori*

29. The *lex fori* or law of the forum has of course its traditional part to play, and no one disputes that fact, for matters of procedure and for provisional measures. It suffices to refer to the decisive importance of what the TRIPS Agreement calls the procedures for "enforcement of intellectual property rights" to which it devotes a large number of detailed provisions.

30. The essential question is whether it is that law that is referred to by Article 5(2) of the Berne Convention when it talks of "laws of the country where protection is claimed."

31. The predominant opinion is that the phrase "country <u>where</u> protection is claimed" is to be understood as the "country <u>for which</u> protection is claimed".

32. Nevertheless, we are obliged to acknowledge that Article 5(2) is presented, at least implicitly, as designating the *lex fori.* This deviation may be explained in three ways. Firstly, it complies with an old and recurring tendency to set up the principle of a court applying only its own law to copyright, which on occasion leads the court to apply *lex fori* with no explanation.

Secondly, the explanation given by the text that it is for the law of the country where protection is claimed to govern "the means of redress afforded to the author" one may, if using the narrow acceptation of the term "means of redress," be inclined to think that it is the *lex fori* that is thereby designated.

Finally, the "short cut" is based on the very frequent statistical conjunction of two localizations (the author appeals to the court of the country in which his right has been infringed), which was the very fact that led the drafters of the Berne Convention to mention within the same sentence "the extent of protection" and the "means of redress".

33. Nevertheless, this confusion still must be denounced. Apart from the fact that the means of redress referred to in Article 5(2) (as also those enumerated in the TRIPS Agreement) are not exclusively judicial, the text also subjects in the same breath "the extent of protection" to the law of the country where protection is claimed, thus sufficing to clarify the confusion.

As to the factual conjunction of the *lex fori* and the law of the country of protection, this is in no way unavoidable. An author may very well appeal to a court other than that of the country of infringement, for example by claiming a privilege of jurisdiction, or by applying the laws of international competence for taking action in the country in which the infringer has property. In that case, the application of the *lex fori* is no longer justified. It doubtlessly facilitates the task of the court, but is no longer acceptable in the age of digital networks.

Section 4: Law of the Country of Protection

34. This is the law of the country of protection, in the sense of the country for which protection is claimed, designated as we have just seen by Article 5(2) of the Berne Convention.

35. The solution is frequently based on a territorial approach. This remark is justified to the extent that determination of the applicable law depends on a territorial localization. It is no longer justified if we aim at the strict territoriality that would require a court never to apply a foreign law.

36. In any event, no one denies that this law has a part to play. The controversy concerns the scope of that part, certain maintaining that the ownership, or even the existence of the right, must remain subject to the law of the country of origin, an attachment that we must now look into.

Section 5: Law of the Country of Origin

37. The Berne Convention itself gives competence in certain cases to what it calls "the law of the country of origin of the work," understood as the law of the country of first publication.

38. The question that is raised is whether we must go further and subject to that law, on principle, the existence or ownership of the right. In the case of ownership, Article 14*bis*(2)(a) of the Convention applies clearly in the negative by stipulating that "ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed". However, we may always be tempted to argue *a contrario* in order to deduct that in other hypotheses it should be a matter for the law of the country of origin to govern the issue of ownership of the right.

39. This is the opinion defended by certain writers, who teach that Article 5(2), by subjecting "the extent of protection, as well as the means of redress afforded to the author to protect his rights" to the law of the country of protection, has taken sides only with respect to the sanctions under the right.

40. It would nevertheless appear rather difficult to reconcile with the letter of Article 5(2) since the expression “extent of protection” cannot be read, without artifice, as referring solely to the consequences of infringement of the exclusive right, and even less with its spirit, since everything would indicate, despite unhappy drafting, that it is indeed a general rule of conflict that had been intended by the drafters.

41. The controversy exceeds the framework of convention law. The argument that the law of the country of protection has a vocation, by principle, to govern all questions affecting rights (copyright or related rights) is expressly confirmed by certain national laws and is frequently accepted in other places, both in case law and in legal writings.

42. However, it does not enjoy unanimity. Indeed, an idea is frequently advocated that if the law of the country of protection is to govern the consequences of infringement of the right, it is for the law of the country of origin to say who is the owner and even, for some, simply whether a right exists. Article 67 of the Greek Copyright Law of 1993 goes a lot further in this direction since it sets out the principle that “copyright in published works shall be governed by the law of the State in which the work has been lawfully made accessible to the public for the first time” and stipulates that the law thus applicable governs “the definition of the owner of the right, its subject matter, its content, its term and the restrictions relating to it.” Numerous authors follow this tendency by subjecting to the law of the country of origin the ownership, a solution that is sometimes adopted by legislation or by case law, or even the very existence of the right.

43. This latter approach would appear more coherent. It is indeed difficult to understand why interrogation of the law of the country of origin should be limited to ownership. Logic would have it that the solution be extended to determining the existence of a work and its original character and even to the duration of rights.

44. The arguments in favor of the law of the country of origin are well known. I shall simply refer to the main argument, which is that it favorizes the dissemination of works by providing security to the interested parties who can then, for example, more readily identify the owner of the right, in the knowledge that the matter has been settled once and for all, before the work crosses frontiers.

45. In reality, apart from the existence of a long chain of contracts that may complicate the situation by creating uncertainty, the security bound to the stability of attachment would only be an advantage if the country of origin can be readily identified. Such is not the case. If we refer to publication within the meaning of Article 3(3) of the Berne Convention (manufacture of a sufficient number of copies to satisfy the reasonable requirements of the public), this aspect is hardly satisfactory. Already with regard to its principle, although the capital role placed on the act of publication from the point of view of conflict of laws may be explained by the notion that “the law of 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 to say the place in which it has met the public for the first time,” it is difficult to understand why simple communication to the public should be deprived of any effect in that respect.

46. However, it is above all the implementation of this solution that will raise practical difficulties for distribution on the digital networks. If we maintain the materialist concept of publication under the Berne Convention, it would seem logical to consider that such distribution does not constitute publication, since the simple making available cannot

constitute, without an abuse of language, the manufacture of copies. This is tantamount, however, to adopting the assumption that a work disclosed for the first time on a network has not been published despite the fact that it may be received (and also reproduced) over the whole planet, which, I may add, is not easy to comprehend for the man in the street, and which, in any event, does not enable a country of origin to be found. The result is most unfortunate since, as has been said, it is then the personal law that will apply in very many hypothesis, which is generalizing a solution generally put forward as being "for want of something better."

47. We may of course imagine an extension of the definition to encompass disclosure by the intermediary of a network. But again it would be necessary to localize that disclosure. The place of insertion, which is capable of all types of manipulation, does not give adequate security. It is more attractive to designate the place of establishment of the operator responsible for the site. However, the Internet is not a structured network and it is more difficult to localize operators, who may be of very small size, than it is to identify the headquarters of the producer of a cinematographic work from which may be determined, by applying Article 5(4) of the Berne Convention, the country of origin of a work. To make it a matter for the court to determine the country of origin by "taking into account the circumstances of the case" excludes any predictability. There remains the domicile or place of residence of the author, but this solution is not easy to apply to those, very frequent, cases where there is more than one author.

48. On the other hand, the concept of application of the law of the country of protection to the whole of the right does not create an insecurity as great as has been claimed. We must be wary of exaggerating the differences that exist between national laws with respect to originality or initial ownership, which are doubtlessly less than those concerning the content of the rights and of the exceptions thereto. Subsequently, the theory of acquired rights, that has indeed been expressly cited in the past by various authors to justify recourse to the law of the country of origin, may, where it is not possible to command the choice of applicable law, correct some of its effects. Certainly, it is not possible to apply the solutions found with respect to "mobile conflicts" where tangible objects cross frontiers, since there is no displacement properly speaking. However, it is possible, it would seem, to use the same thinking in order to acknowledge in a given country the effects of an assignment that has taken place in another country, including the first assignment agreed to by the author, and even the effects of the legal attribution of the right.

49. Furthermore, application of the law of the country of origin raises a considerable objection. It has been said that in the logic on which it is based, it is not only ownership that would be subject to that law, but also the existence of the right and its duration. However, it becomes difficult to understand in such case why we should stop at that point. Why not apply the same law to the very content of the right, for example to the exceptions? This is indeed, in any event, the conclusion to which we are led by the claim that choice of the law of the country of origin is justified by the notion that "it is rational that the State of the place of publication should regulate the respective rights of the author and of the public." If such is the case, it would be the whole of the matter that would be governed by that law, with the sole reservation of the sanctions. This idea has been adopted by the 1993 Greek Copyright Law. However, it has not had much success, since users no longer know who to turn to if infringement of copyright or a related right on one territory has to be judged differently depending on the country in which the right was generated, and which, in any event, could not be imposed on the criminal court.

50. In reality, the dismembering of copyright resulting from the proposed analysis is not tenable. The ownership of the right, as we have mentioned, is not separable from its subsistence, but is also not separable from its content. For instance, what would be the coherence of a system in which one applied the rules that protect the author, defined as a natural person, to a legal entity designated as the author by a foreign law? In the same way, moral rights are inseparable from economic rights and it is difficult to imagine them being subject to differing laws.

51. Certainly, it happens in other fields of private international law that the application of the substantive law is proceeded by examination of another law. For instance, reference may be made to the national law for establishing affiliation before applying the law of succession. But that is because, in such cases, there are two distinct categories of attachment. Such is not the case with copyright, which differs in that respect from other material or personal subjective rights, except where the principle is determined that enjoyment of a right depends on a category that is different from its exercise, which has never been admitted for other subjective rights, for example in the case of chattels.

52. More concretely, we have to ask the question whether there is any sense, in a digital environment, of giving a role to the law of the country of origin. The temptation to have recourse to that law bases on the proposition that the choice of the place of publication reflects the will of the author to "naturalize" his work. However, this reasoning, which has indeed itself been criticized, falls flat in the case of global networks. To publish a work for the first time in a given country and in a given language may be interpreted as the wish to create a link with that country. To meet an indistinct public on the Internet may no longer have that meaning. The materialist and "nationalist" approach is in fact completely outdated.

53. This is even more true in the field of related rights where attachment to the law of first fixation appears entirely arbitrary. However, though it is true that nothing requires the same solutions to be adopted for copyright and for related rights, it has to be admitted that a difference in treatment does not improve the legibility of law.

54. As to the alternative solution offered by the place of residence or establishment of the author or operator, this breaks completely with traditional logic, but without offering a different basis that would enable the proposed attachment to be justified. In the case of an operator, it indeed openly contradicts the personalistic dimension of copyright.

55. The concept that refers the existence and ownership of the right to the law of the country of origin originally fitted perfectly in with the requirement of "double protection" that was long held in the Berne Convention and has served in the past to exert pressure on States to persuade them to raise the level of protection. One may ask whether this form of "reciprocity," which thrives on a degree of protectionism and which in a certain manner takes the holders of rights "hostage," is not outdated.

56. The law of the country of protection, for its part, offers obvious advantages. It is more logical to apply the same law to all infringements suffered in the same country. That is also more simple in practice where that law is also the *lex fori*, which, as we have said, is a frequent case. On the other hand, the law of the country of origin is frequently difficult for the court to know "and therefore provides great latitude for the better pleader".

57. The major objection raised is that it, in fact, brings us back to the *lex loci delicti*, which takes into account only infringements of a right. However, this right exists prior to any

infringement and it is essential to know from the very beginning which law is to govern it, without having to wait for it to be ignored. We may reply that the expression "law of the country of protection" indeed enables this very equivocacy to be clarified. It is not a question only of the law applicable to the civil liability action following infringement, but also the law applicable to the use of the right in any form, even if, in practice, it is the right to prohibit and not the right to authorize (to use the classic formulation, which is nevertheless open to criticism) that will lead to problems.

58. This discussion may seem theoretical. It was until quite recently. The advent of digital networks has given it an indisputable practical dimension. It is indeed of capital interest to know which law is to determine the ownership of rights in works and performances disseminated on the Internet. It is therefore necessary to clarify, there again, to ensure that operators are not left in a state of uncertainty. A concept that subjects the whole of the right to the law of the country of protection would appear the easiest to generalize. What is essential, in any event, is to take a decision.

Conclusions

59. The difficulty encountered in adapting private international law to the digital environment in the field of copyright and related rights derives doubtlessly less from the break that this environment would imply with a territorialism that is indeed impossible to define than from the inability of lawyers to agree on clear conceptual bases.

60. From that point of view, it would seem opportune to take a stance, possibly in an international instrument, on at least two sets of fundamental issues:

- determination of the *lex contractus* and its role in relation to the law governing the right;
- the advisability of referring certain issues, such as the existence of the right, its ownership, its duration, to the law of the country of origin.

61. On the first issue, it could be decided that, failing a choice made by the parties, the *lex contractus* would be determined by reference to the place of establishment of the user and that it would apply in all those hypotheses where the nature and content of the right was not in question. Perhaps it would be even possible to envisage a rule that would place emphasis on the need to maintain within strict limits the corrective measures constituted by the immediately applicable regulations and the reservation of international public policy. As for the second issue, it would seem more in line with the development of international law, particularly of the Berne Convention, to favor the application of the law of the country of protection to all questions raised by copyright or by related rights, and by excluding recourse to the law of the country of origin (apart from the cases explicitly provided for by the international conventions). It would be advisable to specify that rights properly acquired in a country other than the country of protection should be taken into account, particularly on the basis of the suggestions made by Ulmer for works created under an employment or commission contract.

## II. LOCALIZATION OF THE HARM IN DIGITAL TRANSMISSION

62. Whatever the relevant field of the law of the country of protection and the law of the country of origin, we still have to ask the question, to apply the former, of the localization of

the harm in relation to worldwide distribution on digital networks. This is currently the "hottest" issue in international literary and artistic property law, and one which has indeed somewhat masked the other issues.

63. This is a very old debate for international law experts. It is not altogether new either for intellectual property specialists, who have already had to exercise their wits with regard to satellites. Nevertheless, there is a difference of degree and perhaps of nature. What is involved is not the archer's arrow that crosses a frontier, nor a satellite covering several countries at once, but distribution capable of causing a harm in each of the countries of the world and falling under highly different laws. We must therefore be wary of underestimating the change. It is also true that we must avoid the opposite excess. Not only must we reject the fallacy that cyberspace is lawless space, particularly one without private international law, but also the proposition that the dematerialization implied by digital technology makes any territorial attachment obsolete, which, as we will see, does not stand the test. To give but a single example, the making available of works and performances on a digital network requires, in the present state of the art, a prior fixation that incontrovertibly constitutes a reproduction, capable of being localized in the same way as any other manufacture of copies.

64. As suggested in the commissioning letter from the Assistant Director General, it is necessary to analyze the matter from the point of view of international competence (Section 1) and from that of the conflict of laws (Section 2), whereby these two aspects have to be distinguished despite the links that bind them.

Section 1: Jurisdictional Competence

65. The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, concluded between the States of the European Community, of which the scope was extended by the 1998 Lugano Convention to the Member States of the European Free Trade Association, and which is applicable with respect to intellectual property, gives a victim the possibility of choosing between the jurisdiction of the State of residence or headquarters of the defendant (general competence deriving from Article 2) or the court of the place "where the harmful event has occurred" (delictual or quasi-delictual competence deriving from Article 5(3)).

66. Article 5(3) gives no further details on what is to be understood by this latter expression and the Court of Justice of the European Communities has therefore, in its *Mines de potasse d`Alsace* decision, given the victim the choice between the place of the causal event (or originating act) and the place in which the harm had occurred. However, it remains to see how the rule can be applied where there is a plurality of harms in differing countries. The uncertainty has been removed in the Fiona Shevill case where the Court held that the expression "place in which the harmful act occurred" was to be interpreted, in the case of libel by means of a press article disseminated in various Contracting States, to mean that "the victim may institute proceedings for damages against the publisher either before the courts of the Contracting State of the place of establishment of the publisher of the defamatory publication competent to make good the totality of the prejudice resulting from the libel or before the courts of each Contracting State in which the publication was distributed and in which the victim claims to have suffered injury to her reputation, competent to hear only the prejudice caused in the State of the court applied to".

67. The French Court of Cassation reached a similar finding in proceedings for compensation of prejudice deriving from infringed copyright. The Paris Court of Appeal had

decided that the proceedings instituted by the authors against the English publisher could not prosper as long as they claimed compensation for the damages resulting from the infringement incurred in France and had referred them for better satisfaction to the English courts in order to obtain damages for the whole prejudice. The referral criticized the decision for having thus deprived the victim of the option of competence provided by Article 5(3) of the Brussels Convention. Not at all, replied the Court of Cassation. That option should mean, in relation to infringement, "that the victim may institute proceedings for damages either before the court or the State of the place of establishment of the author of the infringement competent to make good the whole prejudice suffered or before the court of the Contracting State in which the infringing subject matter was distributed, competent only to hear proceedings for damages suffered in that State.

68. The idea is to avoid universal competence of the court applied to when the causal event is able to have effect in a very large number of countries without, however, sacrificing the rights of the victim, who may always choose, if he wishes to obtain compensation for his whole damages at one go, to apply to the court of the causal event, that court being situated at the place of establishment of the publisher responsible for the libel or the infringement.

69. This solution enables the plaintiff, in practice, to apply to a court in any country since the network spins its web across the whole planet, whereby of course if he wishes to obtain compensation for his total prejudice at one go, he will have to apply to the court of the causal event. If that court is not a court of the country in which the "author of the infringement" is established, its competence will be limited to the damages suffered on its territory, thus "presupposing that the individual connections to the server are accurately identified".

70. And again, this case only regulates the question of compensation. The victim of infringement, however, would also like to obtain the cessation of the infringement. We must therefore ask what measures can be taken in that respect by each of the competent courts. We are tempted to suggest, symmetrically, that contrary to the court of the place of establishment of the server, which may certainly prohibit the making available to the public, the courts of the various countries where distribution has taken place would only be able to order prohibitions limited to their territory. However, it is not certain that such restriction could in all cases be implemented from a technical point of view, at least for the present. In any event, it restricts the value for the victim of the option made available to him.

71. This fractionization of the proceedings is not, we must admit, altogether satisfactory. In order to improve the machinery, an official French report has suggested that the harmful effects to the victims of infringement be corrected to enable them to "appeal to a court other than that of the place of emission which would be recognized to be competent to make good the full prejudice suffered at worldwide level." Such tribunal would be "that having the closest link with the prejudice," a presumption being taken in favor of the court within whose jurisdiction the victim has his habitual place of residence (for a natural person) or his principal establishment (for a legal person); that presumption would be simple and could be reversed as a function of the "special circumstances," particularly "if the major part of the prejudice was suffered in a single country."

72. This proposal, which moderates the refusal of the *forum actoris* principle contained in Article 3 of the Brussels Convention, meets the views of those authors who consider that for violation of private life committed by means of the press, the court of the victim's domicile should be recognized as competent "as the place in which the tort has occurred as a whole". It has also been advocated with respect to copyright. It of course meets the concern for

protection of the victim, which is an element to be taken into account when deciding the competent jurisdiction, even if concern for the good administration of justice remains the main criterion.

73. The same report puts forward the idea that, within the framework of the current drafting of the Directive on copyright and related rights in the information society and also within the framework of the renegotiation of the Brussels Convention, it could be assumed, in the European Union (or even in the European Economic Area), that the country having the closest link with the prejudice is the country of emission, understood as the country where the publisher of the contents concerned has his habitual residence" and not the country where his victim lives. This rule could not, however, be extended beyond the European framework since it presupposes the existence between the States concerned of a level of harmonization that precludes the risk of delocalization.

74. It may further be noted that, under Article 24 of the Brussels Convention, the provisional or withholding measures provided by the law of a Contracting State may be ordered by the court of that State even if it is the court of another Contracting State that is competent to hear the substantive dispute. This solution is of great practical importance, particularly if we admit that a court may thus order measures that have effect outside its competence which, truly, is not altogether certain.

75. In any event, it is not sufficient for the victim of the infringement to obtain a decision in his favor. He must also be able to have it recognized and enforced in another country, for example to obtain the closure of the infringing site. The Brussels Convention contains liberal provisions in that respect. Article 26(1) indeed lays down the principle that "decisions given in a Contracting State shall be recognized in the other Contracting States without it being necessary to have recourse to any procedure" and Article 31(1) provides that authority to enforce the judgment is obtained on a simple request.

76. Things are obviously less simple in common law since each country sets its own conditions. As a general rule, we may doubt the possibility of the victim of infringement obtaining in the country of emission, in which the infringer generally resides, authority to enforce a sentence obtained in one of the countries of reception in cases where the act is not considered an infringement of copyright or related rights in that country of emission. Likewise, difficulties are to be expected where the court that has given the decision has held itself competent under an attachment of jurisdiction.

77. The situation is therefore not very encouraging. A strengthening of international cooperation with regard to infringement, to which WIPO could contribute, would be welcome, for example in order to facilitate and accelerate the enforcement authorization procedures. It has been noted that an international copyright convention would not be appropriate to examining these transversal questions of procedure. However, it is possible to claim, on the contrary, that it is urgent to take measures capable of ensuring the effectiveness of the exclusive right in the digital environment.

Section 2: Applicable Law

78. The problem of the law applicable to copyright or related rights is not without a link to that of competence of jurisdiction, but the two must nevertheless be carefully separated. Attention has become focused on two laws that are in competition, and that it is usual to

designate as the law of the country of emission and the law of the country of reception (1). However, we must look further, since other attachments have been proposed (2).

A. Law of the Country of Emission and Law of the Country of Reception

79. The law of the country of protection, which should, according to a widely held view and one to which this study adheres, govern the whole of copyright and related rights, represents in practice a form of *lex loci delicti.* But we are aware of the classic controversy which opposes, when determining the latter law, those who favor the law of the causal event and those who advocate application of that of the place of generation of the harm. It is therefore not surprising to find the same controversy on the special issue of localization of the harmful event in digital transmission, except that instead of speaking of the causal event and the generation of the harm, reference is made to emission and to reception.

80. The parameters of the debate still have to be identified, however. Agreement is unanimous on the fact that the law of the country of emission has a part to play. The argument concerns principally the issue whether this part should be exclusive or whether room should be made for the law of the country of reception, it being understood that, if such is the case, the plural (the laws of the countries of reception) is essential since the nature of digital networks is to distribute throughout the whole world. These two positions will be examined one after the other.

A(1) Exclusive Application of the Law of Country of Emission

81. The law of the country of emission, understood as that in which the signal has been "inserted" into the network, initially found favor with the Commission of the European Community. By transposing machinery that had been used for satellite broadcasting in the Directive of 27 September 1993, the Green Paper on copyright and related rights in the information society suggested that the principle be established, for reasons of "economic efficiency," of the application of "the law of the Member State of origin of the service." However, that suggestion was criticized. The Commission then backed down, limiting itself to announcing a communication on the applicable law, that we are still waiting for.

This solution is sometimes also advocated in legal writings.

82. It may be based on several arguments. Firstly, it would seem logical that the single act of exploitation performed by a single distributor should be governed by a single law.

Secondly, it is the place of insertion that would seem to offer the most significant point of contact with the legal relationship.

Thirdly, if we accept the idea that making available to the public on the network itself constitutes an act of exploitation subject to authorization by the right holder, we shall also find it natural that this act alone be taken into account for determining the applicable law.

Finally, the choice of the law of the country of emission also makes it possible to give digital network operators a much clearer vision of the right, which is essential for the harmonious development of the information society. The imperative nature of the attachment being foreseeable, which plays an essential part in copyright, generally advocates in favor of applying the law of the place of the causal event since "normally, it is in respect of that law that the defendant will have asked himself whether he was acting correctly or not". This

argument has weighed heavily in Community law with respect to satellites. And it is tempting to extend it to insertion into the network..

83. None of these arguments is decisive. There is nothing illogical (even if it is less simple) in a single act of exploitation having its consequences in several countries being governed in a distributive manner by the laws of those countries. That is indeed what happens in the case of conventional publishing, without anyone having any objections.

To state that the place of insertion into the network has the most significant relationship with the situation created by digital transmission is also begging the question. One could indeed just as well hold that this place is irrelevant and that the reason for the distribution is the dialogue with the downstream user.

As to the opinion that putting into the network as such is an act of exploitation, again it is not sufficient to justify the exclusive competence of the law of the country of emission. It is one thing to qualify an act from a technical point of view with respect to the definition of the right of communication to the public. It is another to localize the exploitation from an economic point of view, as that derives from the justification of the law of the country of protection, which, as we have seen, must be regarded as the law applicable to the exploitation of the right in all its forms. However, it is difficult to deny that distribution on the networks corresponds to an economic exploitation in the various countries in which users are connected.

Finally, the idea that the distributor is best placed to know the contents of the law of the country of emission and to adapt his behavior as a consequence does not justify the claim that he may disregard completely the laws of the countries in which the information is liable to cause a harm. Since that fact may (and should) also be foreseeable after all.

84. We should not be abused by the precedent of satellites. The major difference is that distribution on digital networks is not a unitary process. In traditional broadcasting, the decisive action is that of emitting. However, that presentation is no longer relevant on the Internet. Whereas programs distributed by satellite follow the same path at the same time in order to reach passive customers, works and performances travel the information highways at the request of the consumers and indeed follow itineraries that it would be impossible to retrace in detail (the mode of operation of a network is such that the itinerary is irrelevant). Furthermore, each user is himself potentially an emitter. These special features make it "hardly conceivable that reception can be declared foreign to exploitation".

85. From a practical point of view, the most serious objection to the exclusive application of the law of the country of emission is the risk of delocalization towards countries of emission having a lower level of protection. This risk is indeed real in view of the considerable differences that exist between national laws, particularly with regard to the exceptions to the exclusive right, and of the extreme ease with which the place of insertion can be manipulated on the digital networks. The European Directive has been able to get around this fact by dint of harmonization (although incomplete) between the Member States, however, this safeguard disappears once we think on a planetary scale.

86. In reply to this objection, we may think of using, instead of the place of physical insertion, the place of the establishment of the person responsible for the distribution, that is less amenable to such manipulation, and has the added advantage of being much easier to determine. The aforementioned Directive 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.

The stability of this attachment certainly makes it attractive. On the one hand, we must remember that the circulation of works on digital networks is not, most frequently, and will doubtessly be less and less the act of true operators, thus calling into question the pertinence of that approach and, in any event, complicating the implementation of the rule. On the other hand, exclusive application of the law of the country in which the person responsible for making the emission is situated permits that person to export towards the whole world the law concerned, which is quite difficult to accept for authors and holders of related rights, and for States jealous of their sovereignty, who are well aware that such a system would favor the developed countries in which the distributors are most frequently established.

A(2) Cumulative Application of the Law of the Country of Emission and the Laws of the Countries of Reception

87. Application of the laws of the countries of reception with respect to local harms is approved by the majority of writers. The solution, included in the general tendency of private international law to give preference, for civil liability, to the law of the place where the harm has been suffered, as may be seen from the draft instrument of the law applicable to non-contractual obligations, known as Rome 2, joins that adopted by the Court of Justice of the European Communities in the *Fiona Shevill* case. Admittedly, this decision simply resolves an issue of jurisdictional competence, and expressly refers to the substantive law designated by the rules of conflict of laws of the national legislation of the court hearing the case for the conditions for assessing the harmful nature of the fact in dispute and the conditions for proving the existence and the extent of the prejudice, but it is easy to see that "it will be similar criteria that will be implemented to determine both the competence and the material law," since each of the courts competent under Article 5(3) of the Brussels Convention will apply its own substantive law.

88. The major drawback of a distributive application of the laws of various countries of reception is that it makes it possible to apply, not only a number of laws, as in the analogue environment, but potentially all laws of the planet.

Obviously, we must not darken the picture, in practice the harm will be suffered in a certain number of countries only, whose legislation will frequently be similar. To which we may add that, if we accept the idea, set out above, the forum of the domicile of the victim be recognized as competent to compensate the full prejudice suffered at a world-wide level, that court could quite easily be informed, through international cooperation, which could be assisted by WIPO, on the content of the various foreign laws that it would have to apply.

Despite that, the compensation due to the victim will be complicated thereby and possibly even compromised by risk of contradiction and failure to enforce the decision abroad. And the person responsible himself will claim that it is not reasonable to oblige him to adapt his behavior to such a large number of laws at once. As has been justifiably observed, "a legal system is not a good one if it places the person subject to the law in a situation in which, without being able to do anything about it, he will be at fault or even delinquent".

89. To avoid application of the law of the country of reception leading to results that are not equitable for the emitter, we may consider subjecting their application to the condition

that the emitter must be able (or should have been able) to reasonably foresee the occurrence of the harm in the country of reception. This reservation is a traditional one. It is to be found in national laws or in international conventions, and is welcomed by legal writers in the general field of civil liability. It is therefore not surprising that it has been served on here.

90. However, we may question its possible scope in the digital environment. If it is simply a matter of ensuring the fact the person who has taken the initiative of the distribution could (or should) know that such distribution would reach a different country, then it is easy to reply that the person concerned knew very well (or at least should know) in advance that digital networks spin their webs around the world. If it is a matter of subjecting the liability to the demonstration that he could (or should) have foreseen that a copyright or a related right would be infringed in a given country, this additional criterion will regain interest. For example, it would enable a law to be ignored that rejected the principle of any exception to exclusive rights or which would extend the term of protection beyond the time limits usually provided.

However, it would be unreasonable to go as far as to link the success of proceedings to the condition that the act should also be unlawful under the law of the country of emission, as used to be the case in English law in respect to civil liability before it changed in that respect. At most, we could envisage requesting the judge to take into account such law in order to assess the "behavior of the defendant", as is provided for by Article 7 of the 1971 Hague Convention on the law applicable to road traffic accidents.

B: Other Attachments

91. As often in private international law, the difficulty of opting on principle for one attachment has led to suggesting multiple attachments "in cascade" or as alternatives. It is impossible to exhaustively analyze the numerous "bouquets" of applicable laws that may be gathered.

92. These formulas, based on the doctrine of searching for the "best law" and which is translated by the pronouncement of a rule of conflict that is substantive in part, have their merits, which makes plain why they have been adopted in certain laws and in certain international conventions. However, we may question whether they are well-adapted to the planetary dimension and the complexity of the problems we have to resolve. Multiple attachments are indeed difficult to handle, a weakness which proves particularly inconvenient in the digital environment where the legibility of the rule is a major requirement both for operators and right holders, with the result that they are difficult to set up as models.

93. In any event, it would not seem desirable to leave it to the right holder himself to choose in the bouquet the law which is the most favorable to him since this is arbitrary and would imply for operators and right holders an excessive degree of unforeseeability. To the let court make this choice, as was proposed by the "Bogsch theory" for determining the law applicable under copyright to satellite broadcasting, is also hardly satisfactory. Comparison may indeed prove altogether difficult, since the concept of "level of protection" is indeed vague.

For the same reason, it seems difficult to enter into the logic of a system that claims to break with any territorial attachment and would leave it to the court, after a functional analysis, to decide which law protects most effectively the work in question, taking into account certain preferential principles.

94. From the point of view of method, we again have the classic controversy as to the comparative merits of objective localization based on abstract criteria and the search for the "proper law" having the closest links with the specific situation. The first approach, to be found in the French tradition, takes better account of the need for foreseeability, where the second approach, popular in the United States, has the advantage of flexibility. Perhaps one of the compromise solutions would be to designate a law presumed to be the best adapted and to leave it to the parties to overthrow it by demonstrating the existence of other points of contact.

95. The ideal, and most radical, solution would of course be to adopt a uniform international set of rules for copyright and related rights. Such has been achieved by States in the past for the law of transport. It is quite conceivable that they could show the same lucidity for this new form of communication constituted by the digital networks. The preamble to the Berne Convention invites them to do so and places emphasis on the "desire" of the signatories to "protect in as effective and uniform a manner as possible the rights of authors in their literary and artistic works"."

The development of a "*lex mediatica*" could play a useful part, from this point of view, by arousing awareness of the need to eliminate distortions that are incompatible with the circulation of works and services on the digital networks. However, apart from the fact that it must be ensured that the interests of the users are not sacrificed all too rapidly by the generalization of leonine accession contracts, it is unreasonable to hope that such norms could become reality in the near future.

96. In the medium or short term, it is only in the geographical sphere within which harmonization of national laws is fairly advanced that it would be realistic to think of applying the law of the country of emission. Such is the solution suggested for the European framework by the above-mentioned report of the French Council of State, by proposing the idea, which could take form once the ongoing harmonization process has achieved a "satisfactory level"(that does not mean that the condition is not already met today), of a "single European legal area in terms of applicable law." This would be to apply the law of the country of emission where the "person responsible for the contents" is established in a country of the European Union (or possibly of the European Economic Area).

97. However, it is easy to see that a solution restricted to such a limited space would not be of great practical interest in view of the planetary dimension of the digital networks. It nevertheless has the advantage of indicating the path by placing the emphasis on the prior condition of substantial progress in the approximation of national laws. This approximation should go well beyond the minimum to be found in the TRIPS Agreement and the 1996 WIPO Treaties, which have set their sights too low, particularly since they do not deal substantively with the capital problem of exceptions to the exclusive right.

98. In the immediate future, if we wish to avoid entering into the logic of "cascade" or alternative attachment, the best solution, or the least bad, would still be that of distributively applying, for each of the harms suffered, the law of the countries of reception, except that application of the law of the country of reception would be conditional on the inventor having been able (or expected) to reasonably foresee the occurrence of the harm in that country.

99. Finally, if the true wish was to apply a single law, that of the country of which the holder of the right who was the victim of the infringement, has his domicile, his residence or his establishment would appear to have greater entitlement to be applied of the law of the

country in which the signal has been inserted or in which the emitter is established (although still subject to the foreseeability of the harm for the latter). Doubtlessly, it does not in itself have a direct link with the situation. However, apart from the fact that attachment is practical, in view of the difficulty of localizing the infringement of the right, it may well be justified on the grounds that the harm is identified at the place where the interests damaged by the harmful event are located. This is the reasoning of a large section of the doctrine on infringement of personal rights. This idea has also made progress with respect to copyright. Literally, it is not incompatible with the letter of Article 5(2) of the Berne Convention in respect of the "country where protection is claimed" and it has the advantage of situating the center of gravity in the person of the right holder. Moreover, it would seem to correspond well to the general trend in civil liability.

Conclusions

100. The holder of copyright or related rights should be able, in event of infringement of his rights, to apply to the courts of each of the countries in which he has suffered a prejudice and, if he prefers, require damages for the whole of his prejudice in the court that "has the closest links" with his prejudice, whereby the simple presumption exists in favor of the court within the jurisdiction of which he has his habitual residence or his principal establishment.

101. In the present state of substantive law and taking into account the significant differences that exist between the national laws in respect of copyright and related rights, the applicable law cannot be that of the country of emission, which does not constitute an appropriate attachment for localizing the harmful event in digital transmission. The place of establishment of the person responsible for the distribution provides a much more stable attachment, but the corresponding law cannot have the vocation to govern alone an infringement of copyright or related rights. The least debatable solution consists in applying the law of the country of emission, in order to remedy the whole damages, and the distributive application of the laws of the various countries of reception, in order to remedy the damages suffered in each of those countries, subject the requirement that the emitter has been reasonably able (or should have been able) to foresee the occurrence of a harm in those countries.

102. It should become absolutely necessary to apply a single law, the center of gravity represented by the domicile, residence or establishment of the injured rightholder would provide a more appropriate attachment than the place of emission in the technical sense or the place of establishment of the emitter.

## III. GENERAL CONCLUSIONS

103. It would not be realistic to deny that the digital networks call for new thinking on the law applicable to copyright and related rights. Last century's territorial concept, which has been placed at the service of a nationalism that has been haughty in its unceasing confusion between the status of foreigners and the conflict of laws and which has led to the principle, at least implicit, that a national court could but apply its own law, is henceforth outdated.

104. It would be the opposite excess to believe that the ubiquity of works and performances in the new technical environment prohibited any territorial attachment. There is nothing new in works ignoring frontiers. And even if there is a difference of degree, or even of nature in certain aspects, between conventional broadcasting and digital transmission, we have to admit

that what is of interest to the public is not a virtual and intangible reality, but indeed the works and recordings which, at one time or another, take form in a receivable and therefore material reality. It is therefore not absurd, whatever has been said, to consider attachments related to the place of emission or to the place of reception. To which it must be added that emission is an act of the operator and that reception may infringe the exclusive right of an author or the holder of related rights, persons who may all be quite well localized at the place of their domicile, residence or establishment.

105. An international instrument, under the aegis of WIPO, could usefully specify that the *lex contractus* is to be determined, failing a choice made by the parties, by reference to the place of establishment of the operator and that it is overridden by the law applicable to copyright or related rights where the nature and content of such rights are concerned.

106. The same instrument should provide that the law of the country of protection governs all the issues raised by copyright or related rights, whereby recourse to the law of the country of origin will be admitted only in the cases expressly provided for in the international conventions, except for account to be taken of the rights regularly acquired in a country other than the country of protection.

107. As for localizing the infringement of the right, it is not the impossibility of territorial attachment that raises a problem, but rather the difficulty of making a choice between attachments of which each has its own logic and which may be unendlessly combined. Despite its advantages, the law of the country of emission has to be excluded, whether the emission is considered from a technical point of view (place of material insertion) or from the legal point of view (place of establishment of the emitter). The solution that is the most respectful of principles, taking into account the specific nature of copyright and related rights, consists in applying the law of the country of emission, for compensating in full the harm, and in the distributive application of the laws of the various countries of reception, for compensating the damages suffered in each of those countries. The above mentioned international instrument could provide that definition.

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