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**PRIVATE INTERNATIONAL LAW ASPECTS OF THE PROTECTION OF  
WORKS AND OBJECTS OF RELATED RIGHTS TRANSMITTED  
THROUGH DIGITAL NETWORKS  
(2000 UPDATE)**

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## INTRODUCTION: SCOPE OF UPDATED REPORT

1. This updated Report covers judicial developments in the United States following the submission in late 1998 of the prior report on “Private International Law Aspects of the Protection of Works and Related Rights Transmitted Through Digital Networks.” I will address case law concerning both the exercise of judicial competence (jurisdiction over the parties and over the claim, as well as *forum non conveniens*), and of legislative competence. The cases in the intervening years show U.S. courts’ increased willingness to adjudicate claims involving foreign copyright laws -- at least where foreign laws do not displace otherwise applicable U.S. copyright law. At the same time, however, the cases also show an increased tendency to affirm the applicability of U.S. copyright law in multiterritorial disputes. I will conclude with a revised recommendation on the law applicable to multiterritorial infringements.

### I. JUDICIAL COMPETENCE IN THE UNITED STATES OF AMERICA

#### A. Jurisdiction over the parties

2. U.S. courts exercise jurisdiction over non resident defendants on the basis of either “general jurisdiction,” or “specific jurisdiction.” In the former instance, the defendant’s contacts with the forum are so substantial, continuous, and systematic, that it is appropriate to compel the defendant’s appearance whether or not the claim arises out of the defendant’s contacts with the forum. This kind of jurisdiction is often referred to as “doing business” jurisdiction. In the copyright infringement context, the court would have power over a defendant who “does business” in the forum even if the defendant did not reproduce, perform or distribute plaintiff’s work in the forum. A court exercises “specific jurisdiction,” by contrast, when the claim arises out of the defendant’s contacts with the forum. Thus, a court adjudicating an infringement claim would have power over a defendant who allegedly reproduced or sent infringing copies into the forum. Where multiterritorial infringements are concerned, a court exercising “general” jurisdiction may hear claims involving infringements committed outside as well as inside the forum, while a court exercising specific jurisdiction should limit its inquiry to claims arising out of forum-related activity. Recent U.S. copyright cases have presented examples of both general and specific jurisdiction.

#### General Jurisdiction

3. Because communication of copyrighted works over digital networks makes the work available simultaneously in many countries, one can see why a copyright owner would seek to consolidate many territorial claims before a single court. To do so, however, the plaintiff would require a forum competent to hear all territorial claims, a forum with general jurisdiction over the defendant. If the defendant resides in the forum, the court will have general judicial competence over the defendant. If the defendant “does business” in the forum, the same result obtains. By contrast, if the defendant is neither resident, nor doing business in the forum, the court may have jurisdiction over a claim relating to an infringement committed within the forum, but not with respect to infringing acts committed outside the forum.

4. Does a foreign defendant “do business” through maintenance of continuous, substantial, and systematic contacts with the forum, when the principal forum contact is the forum accessibility of defendant’s website? U.S. courts generally have rejected the “doing business” characterization when the website is merely “passively accessible,” that is, when forum residents can access the website, but cannot order goods or download from the site into the forum, and when the website operator lacks other continuous and substantial contacts with the forum. (Similarly, if the website does not communicate interactively with forum residents, U.S. courts tend not to find specific jurisdiction either, since there are insufficient forum-related acts out of which the claim arises.) For example, in *Westcode v. RBE Electronics*,<sup>1</sup> the court rejected the assertion of general jurisdiction over a promotional website that did not propose online sales to the forum, and that did not otherwise systematically conduct transactions with the forum. In copyright terms, a website operated by a non resident defendant that simply advertises infringing copies, but does not offer the option of downloading those copies, would not suffice for general jurisdiction. It is unclear whether the operator of a website that permitted downloading would be amenable to general jurisdiction; most likely, it would be necessary to show a continuous and very substantial pattern of in-forum downloading before general - as opposed to specific - jurisdiction would be appropriate.

5. A court may find that a defendant has been “doing business” in the forum sufficient to justify general jurisdiction if the defendant foreign corporation has a local subsidiary whose operations the foreign parent effectively controls. For example, in *World Film Services v. RAI Radiotelevisione Italiana*,<sup>2</sup> the defendant Italian television broadcasting service transmitted in Italy a game show allegedly infringing the U.S. plaintiff’s game show. RAI did not directly broadcast the program to the U.S., so jurisdiction could not be based on U.S.-based activities involving the show. For the New York federal court to have jurisdiction, RAI must have been found to be “doing business” in New York to an extent sufficient to justify the assertion of jurisdiction with respect to a claim that did not arise in the forum. The relationship between RAI and its New York subsidiary, RAI Corp., was held to meet that standard.

#### Specific jurisdiction: Making a work available in the forum

6. When the claim arises out of infringing acts committed in the forum, the court will have jurisdiction as to that claim. When the infringing act entails reproducing or publicly performing the work in the forum, the court’s jurisdiction is clear. Because the author’s exclusive rights also comprehend the right to distribute the work in copies, U.S. courts have asserted jurisdiction on the basis of the unauthorized distribution of even a single copy of the work in the forum.<sup>3</sup> Under this standard, website entrepreneurs who make works available for downloading may be amenable to suit on the basis of a single forum download, since the making available is generally considered to effect a distribution of copies of the work.<sup>4</sup>

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<sup>1</sup> 2000 U.S. Dist. LEXIS 815 (E.D. Pa. Feb. 1, 2000).

<sup>2</sup> 50 U.S.P.Q.2d 1187 (S.D.N.Y. 1999).

<sup>3</sup> See, e.g., *Blue Ribbon Pet Prods. v. Hagen Corp.*, 66 F.Supp.2d 454 (E.D.N.Y. 1999); *Cordon Holding B.V. v. Northwest Publishing Corp.*, 49 U.S.P.Q.2d 1697 (S.D.N.Y. 1998).

<sup>4</sup> See, e.g., *Playboy Enters., Inc. v. Webworld, Inc.*, 45 U.S.P.Q.2d 1641 (N.D. Tex. 1997). See also *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997).

7. But what if the non resident party did not itself offer the work to the public in the forum, but rather enabled another's in-forum infringing distribution? Sending copies from out of the forum to a distributor located in the forum may make the sender amenable to suit as a contributory infringer, as two federal district courts recently reiterated.<sup>5</sup> In the Internet context, this would mean that the operator of a website that made works available in the forum would be amenable to suit as a direct infringer, and that a person who posted a work to that website would be subject to suit in the forum as a contributory infringer.

## B. Jurisdiction over the Claim

8. In the U.S., copyright infringement is considered a "transitory cause of action" that may be heard before the courts of a country other than the one in which the infringement allegedly occurred.<sup>6</sup> The federal courts exercise exclusive jurisdiction over federal copyright actions.<sup>7</sup> A claim alleging infringement of a foreign copyright law, however, does not present a federal question. As courts of limited jurisdiction, federal courts, therefore, are not competent to hear foreign copyright infringement claims unless they are "supplemental" to the federal claim, or unless the parties are citizens of different states, or of one state and a foreign country ("diversity jurisdiction").<sup>8</sup> Federal courts that can exercise supplemental or diversity jurisdiction over foreign copyright claims have shown an increasing willingness to do so. This marks an important shift away from U.S. courts' earlier reluctance to adjudicate claims requiring the application of foreign copyright laws. In the past, courts sometimes concluded that they lacked subject-matter jurisdiction over foreign copyright law claims,<sup>9</sup> or, even if the court acknowledged its authority to adjudicate, sought to dismiss those claims on the basis of *forum non conveniens*.<sup>10</sup> This doctrine permits a court to dismiss a case in favor of its adjudication in a court bearing a closer and more convenient relationship to the parties, the witnesses, and the claim.<sup>11</sup> In practice, however, *forum non* dismissals sometimes occurred because it was inconvenient for the U.S. court to apply a foreign copyright law.

9. In 1998, in *Boosey & Hawkes v. Disney* (discussed in the 1998 WIPO Report), the Second Circuit reversed the district court's *forum non* dismissal of a claim that would have

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<sup>5</sup> See *Blue Ribbon*, supra (goods sent from Canada to distributor in U.S.); *Armstrong v. Virgin Records*, 91 F. Supp. 2d 628 (S.D.N.Y. 2000) (discussed infra).

<sup>6</sup> See, e.g., *London Film Prods. v. Intercontinental Comm.*, 580 F.Supp. 47 (S.D.N.Y. 1984).

<sup>7</sup> See 28 U.S.C. § 1338.

<sup>8</sup> Compare *Shaw v. Rizzoli*, 51 U.S.P.Q.2d 1097 (S.D.N.Y. 1999) (no jurisdiction over Italian infringement claim; no other source of federal jurisdiction) with *Worldfilm v. RAI*, 50 U.S.P.Q.2d 1187 (S.D.N.Y. 1999) (jurisdiction over Italian infringement claim supplemental to jurisdiction over U.S. infringement claim) and *Armstrong*, supra (jurisdiction over U.K. infringement claim exercised on the basis of diversity jurisdiction) and *Carrell v. Shubert Org.*, 104 F.Supp.2d 236 (S.D.N.Y. 2000) (jurisdiction over Australian, Canadian, Japanese, and U.K. infringement claims exercised on the basis of both diversity and supplemental jurisdiction).

<sup>9</sup> See, e.g., *ITSI TV Prods. v. California Auth. Of Racing Fairs*, 758 F.Supp. 854 (E.D. Cal. 1992), *aff'd in part, rev'd in part*, 3 F.3d 1289 (9th Cir. 1993).

<sup>10</sup> See, e.g., *Boosey & Hawkes v. Disney*, 934 F. Supp. 119 (S.D.N.Y. 1996), *revd.*, 145 F.3d 481 (2d Cir. 1998).

<sup>11</sup> See, e.g., *Gulf Oil v. Gilbert*, 300 U.S. 501 (1947); *Alfadda v. Fenn*, 159 F.3d 41 (2d Cir. 1998).

require the district court to apply the copyright laws of 18 foreign countries. The appellate court emphasized that disinclination to apply foreign law did not justify dismissing the case, especially when the forum was the only court before which all territorial infringement claims could be consolidated.<sup>12</sup> Since that decision, lower federal courts have more often recognized and retained jurisdiction over claims asserting the violation of foreign copyright laws. For example, in the 2000 decision in *Armstrong v. Virgin Records*,<sup>13</sup> the plaintiff, a U.S.-resident performing artist, brought a copyright infringement action against British performers and record producers, alleging that defendants' work unlawfully "sampled" his recorded performances. Defendants' recordings had been distributed in the U.K. and the U.S., but were made in the U.K. The defendants moved to dismiss for lack of subject matter jurisdiction, on the ground that U.S. copyright law did not apply to the making of the recordings in the U.K, and that the U.S. court lacked jurisdiction to apply English copyright law to the acts committed in the U.K. The court agreed that, absent a "predicate act" in the U.S. (See 1998 WIPO Report, parts V.B.1; V.B.2.a), U.S. copyright law did not reach U.K. acts. Nonetheless, the court ruled that it was competent to hear plaintiff's claim regarding alleged copyright infringements in England. The court acknowledged that although "certain courts have, at times, demonstrated their reluctance to 'enter the bramble bush of ascertaining and applying foreign law without an urgent reason to do so,' there is no principled reason to bar, in absolute fashion, copyright claims brought under foreign law for lack of subject matter jurisdiction. Not only is this Court called upon to enter bramble bushes, briar patches, and other thorny legal thickets on a routine basis, but a number of persuasive authorities and commentators have also indicated that the exercise of subject matter jurisdiction is appropriate in cases of transnational copyright infringement."<sup>14</sup>

## II. CHOICE OF LAW: COPYRIGHT INFRINGEMENT

### A. Territoriality and its Variants

10. While U.S. courts appear more amenable to applying foreign copyright laws, they also have reaffirmed the conditions under which U.S. copyright law will apply to a claim presenting a transnational dimension when there is a significant U.S. point of attachment. These cases have concerned both copyrightability and infringement. In, *Bridgeman Art, Inc. v. Corel, Inc.*, the court, after some initial confusion, ruled that, with respect to infringing acts allegedly committed in the U.S., U.S. law applies not only to determine whether the acts were in fact infringing, but also to determine whether the work is protectable as an original work of authorship.<sup>15</sup> The case concerned photographic reproductions of two-dimensional works of art in the public domain. The plaintiff's slide reproductions were created in the U.K. and allegedly scanned onto CD-ROMs and posted to a website in Canada, whence they were made

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<sup>12</sup> Boosey & Hawkes, *supra*. This case is discussed in greater detail in the 1998 WIPO Report.

<sup>13</sup> 91 F. Supp. 2d 628 (S.D.N.Y. 2000).

<sup>14</sup> 91 F.Supp. 2d at 637. The court cited the treatises of Professors Nimmer and Goldstein. See, e.g., 3 Goldstein § 16.2 ("Causes of action for copyright infringement are transitory and may be brought in any court that has jurisdiction over the defendant. Subject to jurisdictional requirements, a copyright owner may sue an infringer in United States courts even though the only alleged infringement occurred in another country. Under the territoriality principle, the copyright law of the other country, and not United States copyright law, will govern the action in the United States.").

<sup>15</sup> 25 F.Supp.2d 191 (SDNY 1999), *aff'd on reconsideration*, 36 F.Supp.2d 191 (SDNY 1999) .

available in New York. On that basis, the plaintiff asserted a violation of U.S. copyright law. The Canadian defendant asserted that the reproductions lacked originality, and therefore were not protected in the U.S. Because the plaintiff's works were first produced and published in the U.K., the trial court initially applied U.K. law to determine the originality of the photos. Following strong criticism of its initial opinion,<sup>16</sup> the court amended its decision to apply U.S. copyright law to the issue of originality. In this, the court was correct: the Second Circuit had earlier clarified the applicability of U.S. law to the predicate issues of copyrightability of foreign works when infringements in the U.S. are alleged.<sup>17</sup>

11. With respect to the law applicable to infringements, when the act of reproduction or public performance takes place in the U.S., application of U.S. law is uncontroversial. When the act takes place in the U.S. and abroad, U.S. courts have typically localized a violation of the reproduction right in the U.S. if the initial or root copy was made there.<sup>18</sup> By contrast, it appeared that a violation of the public performance right would not be localized in the U.S. unless the performance was received by the U.S. public.<sup>19</sup> Thus, a public performance initiated in the U.S. but culminating outside the U.S. would have been considered outside the scope of U.S. law.

12. A 2000 decision of the Second Circuit Court of Appeals appears to reject, or at least substantially modify that approach. In *National Football League v. PrimeTime 24*,<sup>20</sup> the defendant satellite retransmission service captured plaintiff's U.S. broadcast signals in the U.S., but sent the retransmitted signals to Canadian households. Primetime 24 asserted that its service of Canadian households fell outside the scope of the U.S. copyright act because the signals were received in Canada. Accordingly, urged the defendant, no "public performance" occurred in the U.S., and U.S. copyright law does not apply to Canada. The Second Circuit disagreed with the geographic characterization of defendant's acts. Reviewing U.S. cases on cable and satellite retransmission (albeit not involving extraterritorial diversion of the signals), the court observed that "a transmission need not be made directly to the public in order for there to be a public performance or display. Congress intended the definitions of 'public' and 'performance' to encompass each step in the process by which a protected work wends its way to its audience. . . . [T]he definition of transmit 'is broad enough to include all conceivable forms and combinations of wired or wireless communications media.' . . . Under that analysis, it is clear that PrimeTime's uplink transmission of signals captured in the

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<sup>16</sup> See 36 F.Supp.2d at 192-93 (referring to the letter of Professor William Patry).

<sup>17</sup> See *Hasbro-Bradley v. Sparkle Toys*, 780 F.2d 189 (2d Cir. 1985) (work first published in Japan).

<sup>18</sup> See 1998 Report, part V.B.1.

<sup>19</sup> See *Robert Stigwood Group Ltd. v. O'Reilly*, 530 F.2d 1096, 1100 (2d Cir. 1976) (distinguishing a "root copy" case on the ground that it involved a U.S. reproduction further reproduced in Canada, while case at bar concerned live performances in Canada); *Gasté v. Kaiserman*, 683 F. Supp. 63, 65 (S.D.N.Y.), *aff'd*, 863 F.2d 1061 (2d Cir. 1988) (no recovery for infringing performances abroad, unless plaintiff can show that these performances "resulted from the reproduction of recordings originally made in the United States"). *Accord*, *Allarcom Pay TV Ltd. v. General Instrument Corp.*, 69 F.3d 381, 387 (9th Cir. 1995) (in a controversy concerning diversion of cable signal to Canadian viewers, *held* that it made no difference whether the U.S. defendant had authorized Canadians to appropriate the signal, or had instead itself broadcast the signal from the United States to Canada. "In either case, the potential infringement was only completed in Canada once the signal was received and viewed.").

<sup>20</sup> 211 F.3d 10 (2d Cir. 2000).

United States is a step in the process by which NFL's protected work wends its way to a public audience."<sup>21</sup>

13. Under the Second Circuit's approach, then, initiating, or perhaps simply relaying, transmissions from or through the U.S. constitutes a public performance in the U.S. that is subject to U.S. law, even though the "public audience" is not located in the U.S. This holding is potentially significant because the communication of works from the U.S. to points off-shore, whence they are received by a public audience, would require the U.S. copyright owner's authorization. By contrast, in *L.A. News v. Reuters*,<sup>22</sup> discussed in the 1998 Report, the Ninth Circuit indicated that the unauthorized transmission of film footage from New York to Europe and Africa would violate no rights under U.S. law because those transmissions would not constitute "a completed act of infringement" within the U.S.<sup>23</sup> (The Ninth Circuit nonetheless awarded damages for the extraterritorial transmissions because those transmissions were made from unauthorized copies of the footage that had been made in New York, following an unauthorized transmission of the film from Los Angeles to New York; these acts did "complete" infringements within the U.S.) Under the *Primetime 24* analysis, both the transmission from Los Angeles to New York and from New York to points outside the U.S. would be infringing.<sup>24</sup>

14. With respect to digital network transmissions, the implications could be even more striking. Because of the architecture of the Internet, a digital communication may transit through U.S. servers without reaching a U.S. public, and without initiation from the U.S. If one takes literally the Second Circuit's "each step of the process" standard, then even these communications would come within the scope of the U.S. Copyright Act. When one recalls the context of the decision, however, it becomes possible to limit the reach of the court's holding to communications intentionally initiated from the U.S. As a result, the automatic transiting of communications through computers located in the U.S. should not, standing alone, constitute a public performance in the U.S.

15. Taken together with the "root copy" approach to localizing violations of the reproduction right (see 1998 Report) *Primetime 24*, by localizing copyright infringing acts in the country of initiation, suggests a broad choice of law principle – or at least a broad principle justifying application of U.S. copyright law to transnational infringements. The

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21 Id at 12-13, citing *David v. Showtime/The Movie Channel, Inc.* 697 F.Supp. 752, 759 (S.D.N.Y. 1988).

22 *L.A. News Serv. v. Reuters Television*, 149 F.3d 987 (9th Cir. 1998).

23 Id. at 991.

24 *Primetime 24* might at first seem inconsistent with prior Second Circuit decisions in *Stigwood* and *Gasté*, supra note 19. Those cases rejected application of U.S. copyright law to public performances occurring abroad, when acts preparatory to the effecting of the performance occurred in the U.S. The principal difference *Primetime 24* presents with these decisions is the continuous nature of the acts of performance, all of which occurred by transmission. *Stigwood* concerned live performances in Canada; *Gasté* concerned public performances in Europe that could not be traced back to a U.S.-made copy or transmission. For the same reasons *Primetime 24* is not in tension with the Ninth Circuit's decision in *Reuters*, because there was not a continuous series of transmissions from Los Angeles to New York to Europe and Africa; rather there was one transmission from Los Angeles to New York, followed by acts of copying the tape in New York, and then another transmission from New York to points outside the U.S.



country of initiation approach does not necessarily repudiate an alternative or additional localization in the country of receipt.

16. While the *Primetime 24* court localized the act of public performance on U.S. territory by holding that each step in a continuous process of communication to the public constituted a public performance (even if the ultimate public was located outside the U.S.), another U.S. court applied U.S. law in a scenario showing the reverse side of the *Primetime 24* coin. In the recent controversy provoked by the Canadian website iCraveTV<sup>25</sup> the communications began in Canada and were received in the U.S. (And also in Canada). From its Toronto headquarters, iCraveTV converted into videostreaming format the broadcast signals from Canadian programs, and from U.S. television programming received across the border, and made the programming available via its website. iCraveTV claimed that its capture, conversion, and redistribution of the U.S. programming was lawful under Canadian law concerning secondary transmissions of broadcast performances.<sup>26</sup> In theory, iCraveTV restricted access to its website to Canadian users; accordingly, asserted iCraveTV, only Canadian law should apply to the controversy. In fact, the screening method employed was easily circumvented: iCraveTV requested proof of the websurfer's residence by requesting the surfer's telephone area code; only respondents giving Canadian area codes would be granted access to the site. It was not difficult to identify and supply a Canadian area code, particularly when iCraveTV's own Toronto area code was posted on the site. Moreover, once a surfer had gained initial access to the site, iCraveTV did not require entry of a Canadian area code for subsequent access. As a result, iCraveTV's transmissions were accessible throughout the U.S.

17. The producers brought suit in the Western District of Pennsylvania, where iCraveTV's President and its International Sales Manager resided. With respect to the Canadian business entities, the court found general personal jurisdiction over the non-resident defendants on the basis of their continuous and systematic contacts with Pennsylvania.<sup>27</sup> Among the contacts the court identified were: sales of advertising out of a Pittsburgh office, employment of an agent in Pittsburgh to work in that office, and domain name registration for iCraveTV.com in the U.S., with technical and billing contacts listed in Pennsylvania. The court further found that defendants' activities in Pennsylvania were "integrally a part of the activities giving rise to the cause of action asserted."<sup>28</sup> Finally, the court noted that defendants had streamed plaintiffs' programming to U.S. citizens throughout the U.S. overall, and had attempted to sell advertising throughout the U.S. through agents in New York and Pennsylvania.

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25 Twentieth Century Fox Film Corp. v. iCraveTV, No 00-121 (W.D. Pa. filed Jan. 20, 2000); National Football League v. TV Radio Now Corp. d/b/a iCraveTV, No. 00-120 (W.D. Pa. filed Jan. 20, 2000). (Case settled Jan. 28, 2000).

26 See Complaint at ¶ 48, Twentieth Century Fox Film Corp. v. iCraveTV, No 00-121 (W.D. Pa. filed Jan. 20, 2000), *reprinted in* (visited Aug. 20, 2000) <[www.mpa.org/Press/iCrave\\_complaint.htm](http://www.mpa.org/Press/iCrave_complaint.htm)>.

27 The court applied Fed.R.Civ.P. 4(e), and the Pennsylvania long-arm statute, 42 Pa.C.S.A. §5322(b) (Purdons 1981), which permits Pennsylvania courts to exercise personal jurisdiction over out of state defendants to the full extent permitted by the Constitutional due process clause. *Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197, 200 (3d Cir. 1998).

28 Twentieth Century Fox Film Corp. v. iCraveTV, No. 00-121, 2000 U.S. Dist. LEXIS 11670 (W.D. Pa. Feb. 28, 2000) (adopting Plaintiffs' Proposed Findings of Fact and Conclusions of Law with Respect to Issuance of Preliminary Injunction at ¶ 13, *reprinted in* (visited Aug. 20, 2000) <[www.mpa.org/Press/iCrave\\_findings.htm](http://www.mpa.org/Press/iCrave_findings.htm)>.

18. On choice of law, the court found sufficient points of attachment with the U.S. to apply the U.S. Copyright Act to defendants' activities. The court found that the alleged infringement occurred in the United States when U.S. citizens "received and viewed defendants' streaming of the copyrighted materials,"<sup>29</sup> without plaintiffs' authorization, even though the streaming began in Canada. The receipt of the transmissions in the U.S. constituted public performances under U.S. copyright law. Moreover, the transmissions to the U.S. accounted for a substantial portion of icraveTV's total business. For example, on January 17, 2000, an iCraveTV employee reported that log books monitoring traffic showed that approximately 45% of icraveTV's traffic was from U.S.-based users; a January 25, 2000 report from a "private ad serving system" counted 1.6 million impressions from U.S. visitors (second only to Canadian visitors); "Real Video" logs of Internet addresses showed "substantial numbers of persons in the U.S. received the streaming of programming."<sup>30</sup> The court ordered icraveTV to cease retransmitting U.S. television programming. Following initiation of a suit in Canada alleging that icraveTV's retransmissions were not permitted under Canadian law either, icraveTV and the producers settled, and iCraveTV has ceased retransmitting U.S. television programming.<sup>31</sup>

19. The choice of law approach followed by the U.S. court, and urged by the producers, privileged territorial contacts with the U.S.: U.S. law applied to transmissions received on U.S. territory, regardless of their legitimacy in the country of origin of the transmission. On the facts of the case, the territorial connection was far from slight or fortuitous: U.S. viewers made up close to half of icraveTV's audience, and the large number of U.S. viewers attracted advertisers. And much of the programming retransmitted by icraveTV originated in the U.S. A harder case might have been presented had the U.S. nexus been weaker.

20. Arguably, a territorialist approach disfavors, or at least encumbers, Internet commerce. Where the territory whose law is applied, however, has so many contacts with the defendant's enterprise as to appear the true target of the off-shore defendant's acts (as plaintiff's argued was the case with icraveTV), the call for seamless Internet commerce through application solely of the law of the point of departure loses some appeal. In the absence of targeting, a choice of law approach that looks only to the law of the country of origin of the communication does have the considerable merit of simplifying Internet transactions. Nonetheless, it poses some problems. First, if the country of origin is a "copyright haven," i.e. a country with substandard copyright laws, then one may fear that the point of origin approach will spark a "race to the bottom" for Internet entrepreneurs. Second, when there are significant substantive variations between different countries' copyright laws (even among members of the Berne Union), the point of origin approach has the effect of extruding the country of origin's copyright policy choices, to the detriment of copyright policies in the other countries of receipt. Suppose, for example, that Canada has enacted a very liberal cable and satellite retransmission policy, because it wishes to stimulate investment in bringing television

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29 *Id.* at ¶ 8.

30 *Id.* at ¶ 21. icraveTV used a "RealVideo" server to stream the programming.

31 *See* (visited Apr. 2000) <<http://www.icravetv.com>> – clicking on "Watch TV" now reads "Yes, the rumours are true. Our television rebroadcasting service is offline." *See also* John Borland, *icraveTV.com exec discusses his start-up's short life*, CNET NEWS.COM (Feb. 29, 2000) <<http://www.news.cnet.com/news/0-1004-200-1560999.html>>.

programming to remote areas in the far North.<sup>32</sup> Canadians and other copyright owners who exploit the Canadian market may in effect be subsidizing access to programming in Nunavut. That is a political and social policy choice open to Canadians. It does not follow that entrepreneurs may or should set up shop in Canada, claim the benefit of the Nunavut retransmission rates, and then disseminate the programming not only to Nunavut but also, and especially, to the U.S. – in competition with U.S. licensees of the programming who are paying full price (or at least a higher statutory retransmission rate) for their licenses.<sup>33</sup>

21. Ideally, a choice of law rule that designated the law of a single country to govern the ensemble of Internet copyright transactions would considerably simplify the legal landscape, and thus promote Internet commerce. In the realm of negotiated licensing, this result may be achieved by contractual choice of law.<sup>34</sup> In the context of infringement claims, however, so long as significant substantive differences persist in national copyright laws, a choice of law rule that designates a single applicable law risks vesting legislative competence in laws that are either relatively underprotective or, for that matter, relatively overprotective (depending on the choice of forum and its choice of law rules) compared with the laws of other affected countries.

#### B. Revised Recommendation for Law Applicable to Infringement

22. Those considerations prompt further reflection on the choice of law rule to recommend with respect to the law applicable to multinational infringements. Review of the *lex loci delicti* and initiating act approaches suggests that the most satisfying analysis would not fix exclusively on either the point of departure or the point of receipt, but would underscore the relationship between the potentially applicable law and the harm suffered. Because these rules designate a single national law applicable to the full territorial extent of the alleged infringement, it is important to recognize that these rules would best be given effect in a forum competent to adjudicate the full territorial extent of the claim.

23. The law applicable to the entirety of a defendant's alleged Internet infringement is:

(a) If the allegedly infringing content is found on a website, the law of the country in which the operator of the website has its residence or principal place of business, so long as this country's domestic copyright law is consistent with the Berne Convention, WTO [and WCT] norms; or

(b) If the allegedly infringing content is not found on a website, the law of the country of the residence or principal place of business of the person or entity that initiated the

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<sup>32</sup> Barbara L. Waite, *Communications and Copyright in Canada and the U.S.: A Survey of Current Law and Proposals for Change*, 1 TRANSNAT' L LAW 121, 155 (1988).

<sup>33</sup> For a fuller discussion of the domestic policy implications of choice of law rules favoring the law of a single country over the laws of the countries of receipt, see Graeme Austin, *Domestic Law and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J. L. & THE ARTS 1(1999).

<sup>34</sup> At least where the author can grant world wide rights, and the grantee is not bound by agreements with analogous entities (such as performance rights societies) in other countries to limit licensing to its local territory, leaving the other territories to its co-contractants.

communication, so long as this country's domestic copyright law is consistent with the Berne Convention WTO, [and WCT] norms.

24. If the law of the country identified in paragraph 23 does not conform to the Berne Convention, WTO [and WCT] norms, then the law applicable to the entirety of the defendant's alleged Internet infringement is the law of the country in which the server that hosts the alleged infringing content is located, so long as this country's domestic copyright law is consistent with the Berne Convention, WTO [and WCT] norms.

25. Notwithstanding paragraph 23 and paragraph 24, if a third country is shown to have a more significant relationship with the controversy- for example, if a third country is shown to have been the principal target of the infringing communication, then the law applicable to the entirety of the defendant's alleged Internet infringement is the law of that third country, so long as this country's domestic copyright law is consistent with the Berne Convention, WTO [and WCT] norms.

26. In the absence of a Berne Convention, WTO, [and WCT]-compliant country having a significant relationship with the controversy, then the law applicable to the entirety of the defendant's alleged Internet infringement is the law of the forum, so long as the forum is a member of the Berne Union or WTO [or WCT].

27. In fashioning any remedies, the court may take into account the extent to which, for particular countries in which acts alleged to be infringements occurred, the domestic law is substantially either more or less protective than the copyright or related rights law of the law chosen in accordance with paragraphs 23-26.

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