JAMIE BREEN

CHOICE OF LAW IN COPYRIGHT DISPUTES IN THE DIGITAL AGE

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FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

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Contents

Abstract

With the rapid advancement of technology and the evolvement into a digitalised world with a global marketplace, the territoriality of copyright protection is being fundamentally challenged. This paper discusses the issues surrounding choice of law when foreign copyright disputes are given jurisdiction. The paper also considers the various existing regulations, suggestions and recommendations of how to address choice of law. Specifically, the paper analyses the American Institute of Law's Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes and the European Max Planck's Conflict of Laws in Intellectual Property CLIP principles and commentary.

Ultimately, this paper emphasises how the territoriality of copyright protection is fundamentally challenged in the globalised market and digitalised world. There needs to be internationally agreed upon standards or guidelines for courts to use when dealing with cross-jurisdictional breaches of copyright.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7250 words.

Subjects and Topics

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Conflict of Laws-Choice of Law

I Introduction

The internet is vast. It spans territories and jurisdictions. Users can access information and materials from any country around the world at any time, blurring social, geographical and political boundaries.[1] Advancement in technologies have also blurred legal boundaries, particularly in legal areas that only operate on a territorial level. One of such law is the law copyright.

When New Zealand copyright is infringed in New Zealand, it is protected by New Zealand laws.[2] This means that New Zealand copyright cannot be infringed in the United States, and United States copyright cannot be infringed in New Zealand. There is no global copyright protection for owners of copyright, just country by country protection. With the increasing rate of technological blurring and the complication and expense associated, it is becoming clear that this territorial limit on protection is being fundamentally challenged.

With the introduction of new technologies and the internet, we now have what is termed a "global market"[3]. Everything can be easily accessed anywhere in any jurisdiction. Intellectual property and their materials can be accessed from any computer using the internet around the world, yet the laws of copyright protection remain territorial. After jurisdiction has been established, and a case for online copyright infringement can be brought, the question arises as to which law applies to govern the case? This issue is what is known as 'choice of law'.

For the purposes of this paper, when referring to disputes as "cross-jurisdictional" and "cross-border" disputes, the paper is referring to an infringement dispute over copyright that involves two or more countries and their jurisdictions. The choice of law issue in cross-jurisdictional breaches is the issue of choosing which law of the countries involved should be applied and to which area of the dispute.

The issue of choice of law for courts in a cross-jurisdictional breach of copyright is one that has been discussed and debated for many years now. How can you enforce copyright protection

[1] Adam Holden "When in Rome (II): Jurisdiction, choice of law and Foreign copyright infringement in New Zealand courts" (2016) 22 Auckl UL Rev 174 at 175.
[2] Berne Convention for the Protection of Literary and Artistic Works 828 UNTS 221 (opened for signature 9 September 1886, as revised at Stockholm, 14 July 1967), arts 5(2) and 5(3).
[3] Holden, above n 1.

over material uploaded in one country through another country's service provider and downloaded without permission by a person in yet another country? Which law applies to protect that property right? Should there be an agreed upon global guiding framework for choice of law within copyright disputes?

This paper discusses the issues surrounding choice of law when foreign copyright disputes are given jurisdiction. The paper also considers the various existing regulations, suggestions and recommendations of how to address choice of law. Ultimately, the paper emphasises how the territoriality of copyright protection is fundamentally challenged in the globalised market and digitalised world. Through this exploration, the need for internationally agreed upon standards or guidelines for courts to use when dealing with cross-jurisdictional breaches of copyright is explored. The American Law Institute principles and the European Max Planck principles discussed in the paper below are appropriate standards courts should be using for these infringements.

II Choice of Law and Online Copyright Issues: Why it is an Issue

Copyright law is territorial, but when the territorial law to apply is not clear, there is a shortcoming that is difficult to solve. At a basic level:[4]

> Questions of jurisdiction and choice of law have become increasingly important in the field of intellectual property law since markets have become increasingly "global", while copyright laws remain basically "territorial".

Currently, one cannot claim domestic protection of copyright beyond one's borders, they must claim protection per country infringed in. "A single use of a copyrighted work might lead to effects in a number of different countries".[5] This is costly, complicated and time consuming. The recent dispute between Apple and Samsung is a clear example of this complexity. In 2010, Apple claimed Samsung had copied their iPhone design. What followed was a cross-jurisdiction intellectual property dispute that resulted in different verdicts for different countries.[6]

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[4] Raquel Xalabarder "Copyright: choice of law and jurisdiction in the digital age" (2002) 8 Ann Surv Intl Comp L 79 at 80.

[5] Kai Burmeister "Jurisdiction, choice of law, copyright, and the Internet: Protection against framing in an international setting" (1998) 9 Fordham Intell Prop Media Ent LJ 625.

[6] Kurt Eichenwald "The Great Smartphone War" *Vanity Fair* (online ed, United States of America, June 2014).

The internet adds even more complexity and confusion to cross-territorial copyright disputes. Online copyright infringement can occur in many different countries at the same time which can be intimidating for both the plaintiff and the court hearing the claim.[7] With the internet facilitating access to copyright protected materials globally, the issue of the choice of law to apply in court is complicated: [8]

> Which is the country of protection when a US copyrighted work has been uploaded without the author's consent onto a website hosted through a German internet service provider ("ISP"), and this site can be accessed from anywhere in the world? Which law decides whether this act constitutes as an infringement? Is it German law, US law, or all the domestic laws where the copyrighted work can be uploaded and/or downloaded?

There are currently no official sets of international or global frameworks to guide courts in their choice of law in copyright infringements due to its territorial nature:[9]

> Countries and their courts have a great deal of discretion to decide issues of jurisdiction, to decide the applicable law for protection of copyrighted works at an international level, and to decide the enforcement of foreign rulings

This discretion can lead to tensions between countries as some countries have more protective rights then others. It can also lead to different results and different levels of protection country to country. Countries may hesitate in applying foreign copyright law if it is contrary to their own laws, so will only apply their laws when it could be argued that another law would have been more appropriate to apply. [10] These issues result in inconsistency between jurisdictions. In the Apple versus Samsung patent dispute, cross-country litigation had varying outcomes with Apple winning in Germany, but losing in Britain.[11] Inconsistency not only be between countries but with the conflicting outcomes of disputes can cause issues:[12]

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[7] Coenraad Visser "Choice of Law in Internet Copyright Disputes" South Afr Merc Law J 268 at 278.
[8] Xalabarder, above n 4, at 83.
[9] At 81.
[10] At 82.
[11] Eichenwald "The Great Smartphone War" above n 22.
[12] Rochelle C Dreyfuss "Enforcing Intellectual Property Claims Globally When Rights Are Defined Territorially" in Susy Frankel and Daniel Gervais (eds) *The Internet and the Emerging Importance of New Forms of Intellectual Property* (Kluwer Law International BV, The Netherlands, 2016) at 17.

> Inconsistency in "the real world" is a problem because the parties have to tailor what they do to the intellectual property law of wherever they are acting. Thus, they may have to suffer the expense of manufacturing different products or engaging in different marketing strategies in each of the locations in which they operate. On the internet the situation is even worse.

As the internet allows people from various jurisdictions to access information simultaneously, copyright infringement can occur in many countries at once and the disputes resulting from infringement could require many complex choice of law and jurisdiction choices to be made, resulting in even further inconsistencies: [13]

> "With the Internet, the concepts of locus and national borders are devoid of any meaning. Copyright works can be disseminated and infringed on the internet at explosive speeds and quality. Legislators did not foresee this problem as evidenced by the choice of law and jurisdiction rules they have enacted prior to the advent of the Internet."

These various issues surrounding the internet advancement and copyright infringement indicate that some change needs to be made in order to avoid these troubles. Choice of law is difficult for judiciaries and they are often deterred from applying foreign law. This deterrence can result in inconsistent outcomes in foreign copyright disputes. With an internationally agreed upon standard or guideline that aids courts with their choice of law issue in foreign copyright disputes, the issues of absurdity, cost, inconsistency will be able to be addressed and hopefully solved.

III What is 'Choice of Law' and how does it affect Copyright law?

To understand the issues of choice of law involved with copyright protection in a global marketplace, the issue of choice of law itself needs to be understood. When a country's court is prepared to hear a foreign case that is extraterritorial to their law, the conflict of what law to apply to the case is 'choice of law'. 'Choice of law' is a subpart of 'Conflict of laws', which is the area of law that attempts to provide clarity in multistate legal disputes. 'Conflict of laws' consists of three areas:[14]

1. Jurisdiction, which deals with the question of which of the involved states' courts may adjudicate the dispute;

[13] Xalabarder, above n 4, at 81.
[14] Symeon C Symeonides *Choice of Law* (Oxford University Press, New York, 2016) at 3.

2. Choice of law, which deals with the question of whether the merits of the dispute will be resolved under the substantive law of the state of adjudication (lex fori) or under the law of another involved state; and
3. Judgment-recognition, which deals with the requirements under which the courts of one state will recognize and enforce a judgment rendered in another state

The issue of choice of law when copyright infringement arises in the determining of which countries' laws to use, assuming jurisdiction is established, when various countries are involved:[15]

> Nonetheless, every time a case has foreign relations or a cross border copyright conflict arises, it is questionable which countries law shall be applied to the dispute

With the internet, copyright infringement becomes a problem that can involve various countries and the choice of which law to apply in court can become very difficult.

IV Current Rules Around 'Choice of Law'

Currently, copyright protection is territorial based. It:

> Derives from two sources: (1) Copyright rules (domestic laws and international instruments on copyright); and (2) Private international law rules (rules on jurisdiction and choice of law provided in domestic laws and international instruments)[16]

There lacks an internationally agreed upon framework of intellectual property law, particularly in copyright. There is also little of any officially agreed upon international guidelines specifically on how to establish jurisdiction or choice of law in international intellectual property disputes. This is because while international protection and harmonisation is a nice, and even practical idea, there are strong advantages to the territoriality aspect of intellectual property protection:[17]

> It provides a way for balancing competing interests and domestic calibration of intellectual property norms to reflect the conditions in each country or region, albeit within a framework of minimum standards. So

[15] Nadine Klass "Choice of law and copyright ownership: an interest-based analysis under special consideration of New Zealand and German law: a thesis submitted to the Victoria University of Wellington in fulfilment of the requirements for the degree of Master of Laws" (LLM, Victoria University of Wellington, 2007).
[16] Xalabarder, above n 4.
[17] Susy Frankel and Daniel J Gervais *Advanced Introduction to International Intellectual Property* (Elgar, Cheltenham, 2016) at 44.

> exceptions appropriate in one country can be enacted and if they are not appropriate in another country they need not be enacted there.

As such, countries are able to control the protection of intellectual property to suit their local needs.[18] There has not been any great desire to establish a total harmonisation of international intellectual property protection due to this. However, as technology develops, and a global marketplace becomes more established, harmonisation, in at least some aspects of copyright law, is needed and should be addressed.

A Current Issues with Territoriality

Various countries embrace the territorial aspect of copyright law, however, this leads to a hindered willingness by their judiciaries to hear foreign copyright infringement cases.[19] This is troublesome for cross-territorial claims, which can and do occur, for there is no universal harmonised protection and will be costly to seek protection in each country infringed in. Because of this, some courts have begun to adapt and recognise exceptions to the territorial scope of copyright because of this:[20]

> United States courts have employed a number of choice of law strategies to enable application of U.S. copyright law to allegations of copyright infringement based on acts that have occurred abroad.

A court in the United States of America ruled that:[21]

> Copyright laws generally do not have extraterritorial application, except when type of infringement permits further reproduction abroad-such as unauthorized manufacture of copyrighted material in United States.

The United States made an exception to the territoriality principle of copyright by allowing for damages to be awarded for foreign infringement where a ‘root copy’, made within the United States, is copied abroad without authorisation[22].

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[18] Frankel and Gervais, above n 17.
[19] Holden, above n 1, at 176.
[20] Graeme W Austin “Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation” Columbia-VLA J Law Arts 1 at 3.
[21] *Update Art v Modiin Publishing Ltd*, 843 F.2d 67, at 68.
[22] Graeme Austin *Private International Law and Intellectual Property Rights: a Common Law Overview* (World Intellectual Property Organization, 2001) at 12.

In Europe, the Rome II Regulation provides a choice of law rule. The 'lex loci protectionis', the law of the place where protection is claimed, is the law that will be applied[23]. This approach follows the 'modern trend' that is in favour of transnational intellectual property protection[24].

New Zealand also has made exceptions to the territoriality restriction of intellectual property by adapting the common law tort established "double actionability" rule. The rule:[25]

> Allows actionability of a tort committed overseas if the tort is actionable both under the law of the country where the court is based (the lex fori), and under the law of the place where the tort was allegedly committed (the lex loci delicti).

As copyright protection is territorial, foreign infringement is never actionable and therefore double actionability will fail each time in foreign copyright disputes. However, courts have applied exceptions to the double actionability rule, ruling that the double actionability rule is able to be displaced by the law with the "significant relationship" to the parties in the dispute and the facts of it.[26] This significant relationship is usually between the plaintiff and the jurisdiction of the place of infringement. The United Kingdom have used this exception, applying Dutch law in their jurisdiction.[27] This exception allows flexibility for the judiciary and offers better and more realistic protections for claimant's copyright.

So, while there is an acceptance to the territoriality principle of intellectual property protection, with advancements in technology and an increasing 'global market', there is a trend, particularly in copyright disputes, to adapt these territorial laws to be more extraterritorial in their protections for the dispute at hand.

B Current Existing International Guidelines and Frameworks

Despite lacking agreed upon rules and guidelines, there are various international instruments that hint at what to do when the issue of choice of law occurs, and provide minimum standards

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[23] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (opened for signature 11 September 2007, entered into force 11 January 2009).
[24] *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39 at [108].
[25] Holden, above n 1 at 193.
[26] *Chaplin v Boys* [1971] AC 356
[27] *Pearce v Ove Armp Partnership Ltd* [2000] Ch 403 (CA)

for protection of international intellectual property. The Berne Convention has two articles on this protection:[28]

> Article 5(2): "The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."
>
> Article 5(3): "Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors"

But these instruments only hint at what to do, providing minimum standards rather than clear cut guidelines for each country on how to decide jurisdiction, let alone choice of law.

There have been various projects and attempts to find solutions to the problems surrounding the tension between territoriality and international infringement of copyright. The American Law Institute created framework to provide solutions to the issues arising under jurisdiction, choice of law and judgements in transnational disputes.[29] The European Max Planck Group drafted principles on the conflict of laws in intellectual property that cover international disputes and jurisdiction. It is important to note that these projects are just guidelines and principles that are not yet accepted internationally or officially used. Below is an analysis and comparison of the two aforementioned projects.

1 The American Law Institute framework

The American Law Institute (ALI) is the "the leading independent organization in the United States producing scholarly work to clarify, modernize, and improve the law."[30] The Institute is made up of judges, lawyers and law professors selected on basis of achievement and

[28] Berne Convention, above n 2, arts 5(2) and 5(3).
[29] American Law Institute and others *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes: as Adopted and Promulgated by the American Law Institute at San Francisco, California May 14, 2007* (American Law Institute, 2008).
[30] "About ALI" The American Law Institute <https://www.ali.org/about-ali/>.

demonstration of improving the law.[31] ALI ultimately provide work and publications that are influential in the courts and legislatures. [32]

In 2008, ALI published a set of principles addressing challenges involved in jurisdiction, choice of law and judgements in transnational intellectual property disputes. This paper focuses specifically on ALI's principles in relation to choice of law in copyright. Their choice of law principles helps address the shortcomings that the internet and technological advances are causing to copyright's territoriality:[33]

> With the advent, first of satellite and later of digital communications, commentators began to question whether it remained desirable or workable to apply a plethora of national laws to an infringement occurring simultaneously across the globe. National legislatures have begun to respond with choice-of-law provisions designed to accommodate conflict of laws in transborder intellectual property controversies. The time is ripe, therefore, to essay a comprehensive treatment of choice-of-law problems that arise in the international dissemination of intellectual property. In the future, substantive law may be more thoroughly harmonized, or an international approach to choice of law may be forged; these Principles are intended to fill the gap and stimulate longer-term efforts in this vein.

While ALI's principles technically depart from the territoriality of copyright, they still respect the reasons for copyright territoriality and the reasons for hesitation of complete global harmonisation. These principles do not set universal strict rules that could hinder local needs, nor do they stray too far away from the territoriality approach to copyright protection, setting "a broad and open-ended framework, rather than, perhaps prematurely, devising a full repertory of specific rules"[34]

The main choice of law guiding principle under the ALI project is under section 321:[35]

> § 321. Law or Laws to Be Applied in Cases of Ubiquitous Infringement
>
> (1) When the alleged infringing activity is ubiquitous and the laws of multiple States are pleaded, the court may choose to apply to the issues of existence, validity, duration, attributes, and infringement of intellectual property rights and remedies for their infringement, the law or laws of the State or States with close connections to the dispute, as evidenced, for example, by:
>
> (a) where the parties reside;
>
> (b) where the parties' relationship, if any, is centred;

[31] "About ALI", above n 30.
[32] "About ALI" above n 30.
[33] American Law Institute and others, above n 29.
[34] American Law Institute and others, above n 29.
[35] American Law Institute and others, above n 29, at 206.

> (c) the extent of the activities and the investment of the parties; and
> (d) the principal markets toward which the parties directed their activities.
>
> (2) Notwithstanding the State or States designated pursuant to subsection (1), a party may prove that, with respect to particular States covered by the action, the solution provided by any of those States' laws differs from that obtained under the law(s) chosen to apply to the case as a whole. The court shall take into account such differences in determining the scope of liability and remedies.

Subsection (1) provides the court with the ability to apply the law of one or more States, while subsection (2) requires the parties to show that the laws of specific jurisdictions differ to the laws of the States that have been chosen.[36] The principle uses the idea of "close connections", which is when choosing the appropriate law to govern the dispute, the court should determine the "place with the most significant relationship to the dispute".[37] The objective of intellectual property is to create incentives to innovate, it is most likely that the State with the closest connection is where the parties reside, where they made investment decisions, where they expected to exploit the work and entered into a commercial relationship.[38] The court is able to:[39]

> choose a single (or reduced number of) applicable law(s), the parties may also demonstrate that for certain States where alleged infringements are occurring, local law would produce a significantly different outcome.

ALI's principles, in their framework of international protection, attempt to meet the territoriality of copyright halfway by seeking:[40]

> to gain the simplification advantages of the single-law approach by identifying the State(s) most closely connected to the controversy, but they also strive to respect the sovereignty interests underlying the territoriality approach.

The protection and the simplification of protection for copyright is increased with these principles, providing an international net for online copyright that is fundamentally challenging the territorial protection of copyright.

2 The European Max Planck Group drafted principles

[36] American Law Institute and others, above n 29.
[37] American Law Institute and others, above n 29.
[38] American Law Institute and others, above n 29.
[39] American Law Institute and others, above n 29.
[40] American Law Institute and others, above n 29.

The European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) is a group made up of scholars of intellectual property and conflict of laws areas who drafted a set of principles on conflict of laws in intellectual property that "cover international jurisdiction, the applicable law, and recognition and enforcement of foreign judgments in the field of intellectual property."[41]

Similar to the ALI principles, CLIP's main principle on choice of law in the technologically advanced market is under article 3:603:[42]

> Article 3:603: Ubiquitous infringement
>
> (1) In disputes concerned with infringement carried out through ubiquitous media such as the Internet, the court may apply the law of the State having the closest connection with the infringement if the infringement arguably takes place in every State in which the signals can be received. This rule also applies to existence, duration, limitations and scope to the extent that these questions arise as incidental questions in infringement proceedings.
>
> (2) In determining which State has the closest connection with the infringement, the court shall take all the relevant factors into account, in particular the following:
>
> (a) the infringer's habitual residence;
>
> (b) the infringer's principal place of business;
>
> (c) the place where substantial activities in furtherance of the infringement in its entirety have been carried out;
>
> (d) the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety.
>
> (3) Notwithstanding the law applicable pursuant to paragraphs 1 and 2, any party may prove that the rules applying in a State or States covered by the dispute differ from the law applicable to the dispute in aspects which are essential for the decision. The court shall apply the different national laws unless this leads to inconsistent results, in which case the differences shall be taken into account in fashioning the remedy.

Under this article, as in ALI's similar article, the right holder is able to claim for remedy under a single law that has the closest connection. The article provides a set of factors to help determine what law this will be. It will most often be the law of the State where the infringer resides or where the place of business is mostly connected. There is an exception to this, the

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[41] "Principles on Conflict of Laws in Intellectual Property (CLIP)" Max Planck Institute for Innovation and Competition <http://www.ip.mpg.de/en/research/research-news/principles-on-conflict-of-laws-in-intellectual-property-clip.html>.

[42] Jürgen Basedow and others *Conflict of Laws in Intellectual Property-The CLIP Principles and Commentary* (Oxford University Press, 2013) at 314.

parties may plead that the law of a State covered by the dispute is inconsistent with the law applied by the court where the court will apply the law pleaded unless this would result in an inconsistent decision and remedy.

CLIP, in their comments of the proposal, felt that the concept of 'ubiquitous infringement' should be understood "strictly and yet without insisting on a perfectly literal interpretation".[43] CLIP believe that it is difficult to define the concept of 'multistate infringement' in a form that the judiciary will be able to use as a guideline in these infringement cases.[44] This could lead to uncertainty.

The European Max Planck Group created their principles to address the difficulty to balance the "interest in efficient enforcement in the volatile environment of digital media with the need to offer safeguards to ensure that alleged infringers' rights are not substantially curtailed."[45] Article 3:603 is able to provide injunctions with a global effect,[46] which provides a strong protection globally to copyright holders.

Below, the paper discusses the similarities and differences between both the ALI and the CLIP articles discussed above. The paper also critiques the articles to suggest if there is a better approach between the two.

3 Which approach, if any, is better and why?

Both the ALI and CLIP proposals do not solve the territoriality of copyright protection completely. There are various reasons for this, and these reasons still apply to online infringement:[47]

> Applying national intellectual property legislation to infringement cases occurring abroad means applying that legislation extraterritorially. Europeans wouldn't like to have U.S. software patent case law applied to activities conducted in Europe. Vice versa, U.S. or Japanese industries wouldn't like to be sued under EC sui generis database protection legislation. Intellectual property legislation is part of the national trade

[43] Basedow and others, above n 42 at 314.
[44] At 322.
[45] At 314.
[46] At 314.
[47] A Metzger "Applicable Law under the CLIP Principles: A Pragmatic Revaluation of Territoriality/A Metzger" (2010) 23 Intellectual Property in the Global Arena–Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US.–Tübingen at 19.

policy and should not cause any repercussions outside the state borders. Applying one law to worldwide infringement cases would lead inevitably to such extraterritorial effects.

Applying one universal law can also negatively affect the interests of the alleged infringer by depriving them from exceptions or limitations of jurisdictions that have lower levels of protection of intellectual property rights.[48] These policy considerations for a territorial approach to protection are still important in the digital age. Instead of getting rid of the territoriality approach, there instead needs to be steps to facilitate the territoriality aspect with the growing need for international protection, which, arguably, the CLIP and ALI principles achieve.

Both the ALI and the CLIP principles contain the "ubiquitous infringement" article for protection of online intellectual property disputes. They are similar for CLIP used ALI's article 321 as a blueprint.[49] CLIP's article 3:603 requires the court to apply one law to issues of infringement or remedy where infringement occurs through "ubiquitous media", such as the internet, and the rights holder may claim for damages and injunctions under the law with the closest connection which is established through various factors.[50] ALI's article 321 uses this concept of "close connection" in choice of law and allows the court to apply a law to issues of infringement or remedy where infringement occurs through "ubiquitous media" also.[51]

Though conceptually similar, there are some differences to ALI's article 321 and CLIP's article 3:603. The fundamental difference is located within the listed criteria to determine the law with the "close connection". ALI's article puts a "stronger onus on the law of the habitual residence of the right-holder".[52] Under this article, as the official comment points out, the right-holders home state's legislation would apply worldwide if (1) the right-holder and the infringer resided in different states and (2) the right-holder has centred their creative activities in their home state.[53] The ALI principles put more emphasis on the law of the plaintiff. In comparison, the CLIP principles are more favourable to the defendant for they compensate them for the privilege the plaintiff has for bringing suit under their applicable law, balancing the plaintiff's

[48] Metzger, above n 47.
[49] Metzger, above n 47.
[50] Basedow and others, above n 42.
[51] American Law Institute and others, above n 29.
[52] Metzger, above n 47.
[53] American Law Institute and others, above n 29.

and the defendant's rights.[54] In this, the CLIP principles would be more appropriate and fair. ALI also only refers to "close" connection, not "closest" which could provide uncertainty as many laws can be argued as "close", leading to potential for "forum shopping" (where the user moves to the country with the lowest protection).

Applying a single law under the CLIP and ALI approaches however can lead to issues as well. This harmonisation into a universal approach would have the benefit of protection from "forum shopping" which can lead to overall lowering of copyright protection, but, as discussed earlier, this can hinder the user unfairly and takes away sovereignty of countries who value different levels of protection.[55] It should be noted that both ALI and CLIP allow for the possibility of several State laws to be used within a dispute. Both proposals refer to "the law or laws of the State or States".[56] What the proposals mean by this is not exactly clear. It's possible to be that courts are able to apply to different issues different laws. It is most probable that when a dispute has a "close connection" with various laws, the court can apply those various laws to the dispute. This suits the innovative nature of the proposals but can weaken the "potential effectiveness of a single law approach – it remains possible that several laws will apply, though it can not be foreseen in what cases and which laws"[57]arguably adding complexity.

The "close connection" concept and criteria is able to eliminate the risk of "forum shopping" and resulting weakening of intellectual property protection by defining their criteria broadly. Infringers are not able to manipulate applicable law by changing their location or conduct as these are not factors.[58] There is also a downside to the "close connection" concept. This concept has the potential to create legal uncertainty. Right-holders are unable to foresee the choice of law a court will make, however if only a "close connection" is required, the courts will most likely apply forum law which the right-holder usually chooses anyway.[59] The defendant, or user, is more likely to suffer with this uncertainty however. The user is unable to foresee the choice of law courts will make which "hampers the development of legitimate

[54] Metzger, above n 47.
[55] Rita Matulionyte "The Law Applicable to Online Copyright Infringements in the ALI and CLIP Proposals: A Rebalance of Interests Needed?" (2011) 2(1) JIPITEC 26 at 28.
[56] American Law Institute and others, above n 29.
[57] Matulionyte, above n 55.
[58] Matulionyte, above n 55.
[59] Matulionyte, above n 55.

online services, as well as reduction of online piracy".[60] So, while the "close connection" concept is able to ensure enforcement of ubiquitous infringements by providing international protection from the choice of a, most likely forum, law that prevents "forum shopping" and keep strong copyright protection where needed. The lack of clarification in the "close connection" concept and the criteria listed for it causes legal uncertainty and lack of foreseeability that is needed to have effect and to help the court.

Both ALI and CLIP principles provide an exception to the "close connection" concept in their articles:[61]

> In short, any party may prove that the law of another state (than the one which law has the closest connection) provides with the solution that differs from that obtained under the law(s) chosen to apply to the case as a whole; this differing law should be taken into consideration when determining the remedy.

It is clear from this exception that both CLIP and ALI respect the territoriality of copyright protection. It is possible however, as noted in the ALI commentary, that the exception "might lead to as much litigation over the content of foreign law as would serial application of the laws of each State for which protection is sought".[62] This exception also clearly favours the defendant allowing them to apply a different law that, because invoked by the defendant, will be lighter on them. As a positive, this exception "decreases the danger of conflicting or overlapping remedies" which sits within the courts obligations.[63] The exception could also be used by the right-holder, for example, to "obtain more extensive damages available in some jurisdictions".[64]

It is unclear how the ALI or CLIP principles would be applied to secondary parties, such as Internet Service Providers (ISPs). Traditionally, courts would subject secondary or indirect infringements to the same law regulating the main infringement.[65]This becomes particularly problematic in regards to ISPs which are mainly involved in secondary infringements:[66]

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[60] Matulionyte, above n 55.
[61] At 31.
[62] American Law Institute and others, above n 29 at 156.
[63] At 31.
[64] At 32.
[65] At 32.
[66] At 30.

> Normally, there are multiple primary infringements by Internet end users, which might be subject to different laws. It is thus not clear the law of which primary infringement will be applied to the secondary infringement. Neither Proposal however clarifies whether secondary infringements "follow" primary infringements or whether they could be autonomously subject to the ubiquitous infringement rule

Again, the ALI and CLIP proposals are unclear as to what law will apply in regards to second party infringements or whether the ubiquitous infringement would apply at all. At a time where online piracy and indirect infringements are occurring, some guidance in choice of law is needed.

While both the ALI and CLIP principles provide stronger international protection, and manage to incorporate the importance of the territoriality of copyright protection, they are merely there for guidance if the court chooses to use them. Neither ALI or CLIP have been agreed upon internationally to be used as guidance for courts when they should be to avoid inconsistencies and complications when these ubiquitous infringements arise. There are also various issues which arise with the lack of clarity the "close connection" concept and criteria cause a lack of foreseeability of the choice of law courts will make for both the user and the rights holder. There is an underlying imbalance of parties' interests under these principles that neither CLIP nor ALI address, but should for these proposals are designed to be used by courts. These two proposals tackle the issues involved in choice of law in a digitalised world. There are various issues with each document, but should these issues be addressed, the proposals could be combined to be used as a single international agreement for jurisdiction, choice of law and recognition of judgement for global intellectual property protection. The interests of the rights holder, the user and the concept of territoriality will be balanced and protected.

V Alternative Theories for Protection of Digital Copyright Internationally

The issues surrounding copyright in the digital age are not going to disappear, if anything, they are more likely to occur as more technology is created and advanced. The most internationally known approaches to choice of law guidance are the ALI and CLIP principles. But there are also other theories and ideas behind international protection of copyright. One radical approach avoids applying copyright law altogether with the creation of an all new "cyber-specific" law that will protect intellectual property on the World Wide Web.[67] Another option this paper has

[67] Andreas P Reindl "Choosing Law in Cyberspace: Copyright Conflicts on Global Networks" (1997) 19 Mich J Intl L 799 .

mentioned previously, is the idea of complete harmonisation of intellectual property but this is not desirable either. This section will provide brief overviews of alternative theories for protecting copyright online internationally.

The idea of an altogether new cyber-specific law would avoid the application of territorial copyright law and therefore completely avoid the issue of choice of law. This idea of a new digital law would be separate to national laws and be its own regime. This has varying levels of radicalness depending on theorists. One suggestion is to "abolish any property rights in connection with digital networks, arguing that the free diffusion of information will become the predominant aspect of the digital era".[68] However the idea of a cyber-specific law is unappealing as the cyber-community is so vast and disjointed that a law could not be developed in agreement.[69] In addition to this, the protection is unlikely to be strong enough to incentivise creation and innovation and the new law would create complications and potential conflicts with intellectual property laws.

There lacks an internationally agreed upon threshold for harmonisation, and the idea of creating a new law is undesirable and complicated, so the best option is to find protection through existing national copyright laws that are accompanied by choice of law rules or guidelines for courts to protect copyright online.

Paul Gellar proposed maximum protection rules for choice of law for copyright infringements in digital networks.[70] His proposition was for the infringement implicating several copyright laws would be governed by the law that was the most protective of the rights-holder. A conflict between two or more potentially applicable copyright laws would be resolved by applying the law that most strongly protected the work infringed. This idea could be favourable for:[71]

> It purports to provide simple rules and also fully respects the national treatment principle, which is a cornerstone of international copyright. It moreover considers the economic effects of the defendant's unauthorized use in the conflicts analysis, which, in appropriate cases, may be justified and necessary to protect the plaintiff's interests effectively.

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[68] Reindl, above n 67, at 809.
[69] At 810.
[70] Paul Edward Geller "Conflicts of Laws in Cyberspace: Rethinking International Copyright Part I" J Copyr Soc USA 103.
[71] Reindl, above n 67, at 816.

However, this proposal also has negatives which seem to outweigh their positives. Protecting the plaintiffs' rights to the highest possibility does not balance the users' interests. The unilateral strengthening of the rights of the plaintiff also do not support the principles underlying the importance of territoriality and sovereignty of countries and the underlying balancing principles of intellectual property itself.

This paper has shown that choice of law guidance must take into account various conflicting interests. The ALI and CLIP principles, with a few fixes, tend to balance these interests well. Reindl also adds a theory to deciding choice of law for digital copyright disputes.[72] Reindl believes the best option is to have a set of flexible choice of law rules that "take into account the location from which a work was made publicly available on the digital network, but also consider whether the user's acts significantly affected the right holder's economic interests protected by copyright laws in other jurisdictions.".[73] Reindl suggests that the most appropriate connecting factor to determine the copyright law that will govern digital infringements is the users location and more specifically, where the transmission of the material originated for these reasons:[74]

> First, it appears reasonable to require a user to comply with the copyright law of the country where he is located. Second, the rule increases certainty because it is relatively easy to identify the user's location, whereas it may be impossible to locate the place of a computer from which an act of use originates. The argument of increased certainty is particularly persuasive where the user is an individual.

This argument is not strong with the ability to hide VPN's and essentially hide the user's location online. It can be difficult to track down a user and if the material is being infringed by several users at once, it is difficult to pin down the original infringement. There is also the ability to "forum shop" here. Reindl's proposal also requires there to be "significant effect on the right holder's economic interests".[75] This requirement can create uncertainty and lack clarity for "economic harm" can be different per jurisdiction. Creating standards of this lessens the flexibility of this choice of law proposal. Overall, though different to ALI and CLIP, Reindl's proposal is the most legitimate, and though it has holes it would need to address before becoming internationally agreed upon rules for courts.

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[72] Reindl, above n 67.
[73] At 836.
[74] At 833.
[75] At 803.

VI Conclusion

There is a clear issue with the application of the law of copyright in a digitalised world with easily accessible materials and information. The territoriality principle of copyright causes inconsistencies between countries and dispute resolutions, especially with the instantaneous upload of information possible through the internet.

When courts have established jurisdiction, the issue then becomes which law to apply to the dispute. There is difficulty in this choice as the infringement can often occur in many different jurisdictions simultaneously.

Currently, there are no internationally agreed upon standards or guidelines that clearly set out how a judiciary should address the issue of choice of law in a copyright dispute. This is resulting in either; courts avoiding the problem altogether, applying only their laws or not hearing the case, or courts adapting and providing exceptions to already established minimum standards and tort rulings.

To avoid inconsistencies in rulings, there should be a change in the way courts are choosing the laws to govern foreign copyright disputes. There is a call for an agreed upon internationally accepted approach to choice of law in copyright disputes. Courts will then be able to find the most appropriate law to apply to the case which should in turn reduce the inconsistencies in rulings.

A start for this change, is for the CLIP and ALI principles to be internationally recognised, either as a reviewed combined document for the courts to use, or to find an alternative view that could be actioned as discussed above. The CLIP and ALI proposals are a start, however, they are merely guidance if the court chooses to use them. Neither ALI nor CLIP have been agreed upon internationally to be used as guidance for courts when they are needed be in order to avoid inconsistencies and complications when these ubiquitous infringements arise. The territoriality of copyright is being challenged as the world becomes more and more technologically advanced. ALI and CLIP are able to address these shortcomings.

Ultimately, a more universal approach will provide better protection internationally for those with copyright interests and will address the shortcomings that have resulted from the internet and its ease of access to materials anywhere at any time.

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