

March 2012

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Recommended Citation

Ted Solley, *The Problem and the Solution: Using the Internet to Resolve Internet Copyright Disputes*, 24 GA. ST. U. L. REV. (2012).
Available at: <https://readingroom.law.gsu.edu/gsulr/vol24/iss3/5>

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THE PROBLEM AND THE SOLUTION: USING THE INTERNET TO RESOLVE INTERNET COPYRIGHT DISPUTES

INTRODUCTION

The Internet poses a fundamental challenge to copyright protection worldwide because “[t]he foreign market is no longer a serial extension of the domestic market; they are one and the same.”¹ Intellectual property industries blame worldwide piracy, particularly Internet-related piracy, for billions of dollars in annual losses: the Motion Picture Association of America estimates 2005 losses of \$2.3 billion from Internet piracy alone.² “In China, 90% of available music and movies are pirated copies.”³

Because the Internet renders works of authorship “pervasively and simultaneously accessible throughout the world,”⁴ international copyright law and Internet copyright law are inextricably linked.⁵ The Internet’s explosive growth demonstrates that current legal regimes are ill equipped to handle the corresponding explosion of copyright infringement.⁶

1. Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 479 (2000).

2. MPAA, Internet Piracy, http://www.mpaa.org/piracy_internet.asp (last visited Mar. 24, 2008); see also RIAA, Piracy: Online and On the Street, <http://www.riaa.com/physicalpiracy.php> (estimating annual economic losses of \$12.5 billion due to global music piracy) (last visited Mar. 24, 2008); SECOND ANNUAL BSA AND IDC GLOBAL SOFTWARE PIRACY STUDY 9 (2005), <http://w3.bsa.org/globalstudy/upload/2005-Global-Study-English.pdf> (estimating over \$32 billion of illegal software installation in 2004).

3. Susan Butler, *Crackdown in China: U.S. Eyes Baidu Copyright Suits*, BILLBOARD, Oct. 1, 2005, at 6, available at <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4555325-1.html> (describing a Chinese crackdown to protect music industry copyrights).

4. Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPYRIGHT SOC’Y U.S.A. 318, 319 (1995).

5. Silvia Plenter, *Choice of Law Rules for Copyright Infringements in the Global Information Infrastructure: A Never-ending Story?*, 23(7) EUR. INTELL. PROP. REV. 313, 313 (2001) (noting that “because of the trans-national character of the [Internet], an increasing number of international copyright questions also arise.”).

6. Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT’L L. 799, 800 (1998) (“[G]lobal, simultaneous exploitation of works of art and literature on digital networks conflicts sharply with the current system of international copyright protection . . .”); see also Ginsburg, *supra* note 4, at 319 (arguing that the Internet undermines basic premises of international copyright law); Michael J. O’Sullivan, Note, *International Copyright: Protection for*

Nearly every nation is committed to international treaties and organizations that purport to govern copyright protection.⁷ However, “[a]s a result of its backward-looking character, public international lawmaking adopts a codifying rather than dynamic character.”⁸ Thus, there is increasing need for a dynamic dispute resolution system that is available internationally to enable copyright holders to protect their interests from being infringed on the Internet, whether domestically or internationally.⁹ To succeed, such a forum must be economical, efficient, internationally available, and consistent, in order to further the original principles of copyright protection (rewarding creators and benefiting the public) and to support economic and social development.¹⁰

Part I of this Note briefly reviews the historical development of copyright law, focusing on its territorial nature and the resulting obstacles to harmonizing international law.¹¹ Part II then discusses how American courts struggle with the structural challenges created by the Internet, and the resulting unsettled law and legal uncertainty.¹² Part III evaluates current choice of law theories.¹³ In the absence of an existing solution, Part IV proposes the creation of a new online forum specifically for resolution of Internet copyright disputes.¹⁴

Copyright Holders in the Internet Age, 13 N.Y. INT'L L. REV. 1, 8–9 (2000) (“Because the Internet allows access to copyrighted works with a single keystroke, immediate advancements are necessary in the realm of copyright law.”).

7. See, e.g., Berne Convention for the Protection of Literary and Artistic Property (Berne Convention), Sept. 9, 1886, 828 U.N.T.S. 221 (as amended); Convention Establishing the World Intellectual Property Organization (WIPO), July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1197 (1994) [hereinafter TRIPs]; Ginsburg, *supra* note 4, at 319 (defining national treatment principle of international law as “non discrimination between domestic and foreign works from member countries.”).

8. Dinwoodie, *supra* note 1, at 472.

9. See *id.* at 483 (“The rapidity of current technological change, promoted in particular by widespread popular use of the [I]nternet, requires a copyright lawmaking process receptive to constant adaptation.”).

10. See discussion *infra* Part IV.

11. See *infra* Part I.

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

I. "COPYRIGHT IS TERRITORIALLY-BASED . . . CYBERSPACE IS NOT"¹⁵

"It is well established that copyright laws generally do not have extraterritorial application."¹⁶ In the Internet context, this principle raises several difficult issues.¹⁷ When works are uploaded, downloaded, or transmitted simultaneously via computers in multiple countries (which may have little or no significant relation to the actual creation or publication of the works themselves), it is difficult to determine a work's country of origin.¹⁸ Determining a work's country of origin affects the choice of applicable law, which in turn determines whether the work is entitled to copyright protection, who has ownership rights, and the substantive content of those rights.¹⁹ However, because cyberspace is not its own jurisdiction, legal authority to settle copyright disputes must be derived from individual nations.²⁰

A. *Copyright Law Developed Nationally*

Although international agreements have been in place since 1886,²¹ copyright protection developed primarily as national law.²² In the United States, copyright protection is available pursuant to the Constitution granting Congress power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and

15. Jane C. Ginsburg, *The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 185, 185 (2003).

16. *Update Art, Inc. v. Modiin Publ'g, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988).

17. *See infra* Part I.

18. Ginsburg, *supra* note 15, at 187.

19. *Id.* at 187-88.

20. *Id.* at 187.

21. Berne Convention for the Protection of Literary and Artistic Property (Berne Convention), Sept. 9, 1886, 828 U.N.T.S. 221 (as amended).

22. *See infra* Part I.A.

Discoveries.”²³ Since 1790, Congress has passed a series of Acts consistently expanding copyright protection.²⁴

Until the late 19th Century, the United States granted copyright protection only to works created and published within the U.S.²⁵ Even under the 1891 Act, it was difficult for foreign authors to satisfy the statutory requirements necessary for protection.²⁶ Problems for foreign rights holders in American courts persist today.²⁷ Other nations’ copyright laws developed along similar paths, focusing on national interests rather than international standards.²⁸

Under the Berne Convention, member nations commit to minimum standards of copyright protection and to the national treatment principle—“if the law of the country of infringement applies to the scope of substantive copyright protection, that law will be applied uniformly to foreign and domestic authors”²⁹—but the Convention does not itself create an international copyright law.³⁰ Rather, “the principle of territoriality upon which the Berne Convention is

23. U.S. CONST. art. I, § 8, cl. 8.

24. See, e.g., Copyright Act of May 31, 1790, 1 Stat. 124 (1790); Act of Apr. 29, 1802, 2 Stat. 171 (1802) (adding protection for prints); Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831) (adding protection for musical compositions); Copyright Act of 1865, 13 Stat. 540 (1865) (adding protection for photographs); Copyright Act of 1909, 35 Stat. 1075 (1909) (granting protection upon publication rather than at time of filing, extending renewal term); Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2000); see also *Eldred v. Ashcroft*, 537 U.S. 186, 194-96 (2003) (discussing history of copyright term extensions).

25. Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1054 (1968).

26. International Copyright Act of 1891, 26 Stat. 1106 (1891) (granting copyright protection to foreign authors, but only upon entry of title, notice, deposit, and American manufacture of “any book, photograph, chromo or lithograph”).

27. Hamilton Atsumi Lau, *Role Reversal and the Piracy of Chinese-Language Films in the United States: Does the Rights Holder Have a Realistic Opportunity to Obtain Relief Under the Federal Copyright Act?*, 38 COLUM. J. TRANSNAT’L L. 169, 181-86 (1999) (questioning whether foreign individual rights holders have realistic opportunity to obtain protection in American courts).

28. Ringer, *supra* note 25, at 1051-52 (noting that 1852 French extension of copyright to foreign works departed from tradition and “did not set a pattern”); see generally Graeme W. Austin, *Intellectual Property Politics and the Private International Law of Copyright Ownership*, 30 BROOK. J. INT’L L. 899, 912-13, 915-19 (2005) (discussing sovereignty concerns in development of Anglo-American intellectual property law).

29. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 89 (2d Cir. 1998).

30. Dinwoodie, *supra* note 1, at 532-33.

founded requires courts to apply national laws even to international disputes.”³¹

B. The Internet Challenges the Territoriality Principle

When an allegedly infringing act implicates multiple countries’ copyright laws, courts must apply choice of law rules to determine which countries’ laws apply.³² “Territoriality-based choice of law rules require that a court . . . determines where potentially infringing acts occurred. If potentially infringing acts occurred in several countries, a court must apply the copyright laws of each country, even though they may characterize the relevant acts differently.”³³

For example, unauthorized reproduction of a film would be governed by the copyright law of the country where the reproduction occurred.³⁴ If unauthorized copies were then sold in multiple countries, each country’s copyright law would determine whether such importation and sale was unlawful.³⁵ However, “[t]he practicality of territoriality-based copyright choice of law rules is threatened by technology that allows single acts of use of a copyrighted work to have effects in several countries.”³⁶ It may be impossible to control the location of computers transmitting copyrighted works, or the location of users accessing the works.³⁷ In other words, digital, rather than physical, copying of the same film makes it nearly impossible to identify and apply all the “importation rights, distribution rights, reproduction rights, or rights of display or performance [that] may have been infringed.”³⁸

With so many sovereigns and choices of law potentially involved in a single act of copyright infringement, the Internet creates

31. *Id.* at 533.

32. Reindl, *supra* note 6, at 803.

33. *Id.* at 806.

34. *Id.* at 806–07.

35. *Id.*

36. *Id.* at 807.

37. *Id.*

38. Reindl, *supra* note 6, at 808.

concerns regarding forum shopping,³⁹ jurisdiction,⁴⁰ and choice of law.⁴¹

1. *Forum Shopping*

A single act on the Internet can impact numerous countries.⁴² If an act occurs in multiple countries, a plaintiff could potentially choose where to bring an action.⁴³ Likewise, potential defendants could migrate to copyright havens.⁴⁴ Even if national copyright laws became so harmonized as to render choice of law obsolete, procedural and practical differences between forums would still encourage forum shopping.⁴⁵

2. *Personal Jurisdiction*

Personal jurisdiction is a prerequisite to a valid judgment.⁴⁶ The territoriality principle presumes that personal jurisdiction is properly exercised over parties whose actions violate copyright law within a given state.⁴⁷ In cases against defendants not physically present in the forum state, personal jurisdiction is analyzed under the minimum contacts standard:

The Due Process Clause of the Fourteenth Amendment permits the exercise of personal jurisdiction over a nonresident defendant when (1) that defendant has purposefully availed himself of the

39. See *infra* Part I.B.1.

40. See *infra* Part I.B.2.

41. See *infra* Part II.

42. See Ginsburg, *supra* note 4, at 319 (“A key feature of the [Internet] is its ability to render works of authorship pervasively and simultaneously accessible throughout the world.”).

43. Reindl, *supra* note 6, at 806 (arguing that applying forum state law has not received widespread support because it invites forum shopping).

44. See Ginsburg, *supra* note 15, at 192 (“[W]hat if it turns out that Freedonia [Ginsburg’s hypothetical nation] is to copyright law what the Cayman Islands are to tax law?”).

45. Reindl, *supra* note 6, at 811-12.

46. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

47. Ginsburg, *supra* note 4, at 319 (“One of these [underlying] premises [for applying traditional personal jurisdiction principles in international copyright] . . . is that international infringements will occur sporadically . . . as works move relatively slowly from one Berne member to another.”).

benefits and protections of the forum state by establishing “minimum contacts” with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend “traditional notions of fair play and substantial justice.”⁴⁸

The Internet challenges traditional personal jurisdiction analysis.⁴⁹ Early courts and commentators suggested that the mere existence of a website could be sufficient to support general jurisdiction over a content provider.⁵⁰ More recently, courts have considered the nature of the online activity and focused on whether conduct was targeted at the forum state and had effects in the forum state.⁵¹ However, there is no clear rule for finding personal jurisdiction when contact with the forum is made solely via Internet.⁵² Rather, “personal jurisdiction analysis regarding Internet activities is highly uncertain and unpredictable . . . [t]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the activity that the defendant conducts over the Internet.”⁵³

Thus, while it is argued that the traditional framework for personal jurisdiction analysis is adequate for copyright infringement on the Internet,⁵⁴ there remains an uncertainty caused by varying state long-arm statutes and discretionary application of “traditional notions of

48. *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) (quoting *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945)).

49. Christian M. Rieder & Stacy P. Pappas, *Personal Jurisdiction for Copyright Infringement on the Internet*, 38 SANTA CLARA L. REV. 367, 367 (1998) (“[T]he Internet, more than any other medium, will challenge the determination of personal jurisdiction in both the national and international context.”); see also O’Sullivan, *supra* note 6, at 32-33 (“Courts are split over Internet activity that is sufficient to justify jurisdiction”).

50. Rieder & Pappas, *supra* note 49, at 381-83 (citing *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) and *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D.Conn. 1996)); see also Ginsburg, *supra* note 4, at 322 (“[E]ffective judicial pursuit of international online piracy may require that infringers be amenable to suit in every country in which the infringement is capable of being received . . .”).

51. See *Revell v. Lidov*, 317 F.3d 467, 470-76 (5th Cir. 2002).

52. Rieder & Pappas, *supra* note 49, at 416.

53. *Id.*

54. *Id.* at 369.

fair play and substantial justice.”⁵⁵ Furthermore, other countries focus on effects or assets in the forum state as the basis for jurisdiction (both in the Internet context and in traditional torts), and would in many situations exercise jurisdiction that would be unconstitutional in the United States.⁵⁶ For example, French law:

[E]nables French plaintiffs to sue anyone in French courts whether or not the dispute has any connection with France. At the same time [French law] provides that Frenchmen can only be sued in France. Although this blatant jurisdictional chauvinism has been criticized in and outside France, several European nations have copied the French scheme in one form or another.⁵⁷

“A finding of jurisdiction over an out-of-state or foreign Internet user skyrockets the cost of a lawsuit by forcing a defendant to litigate in an unfamiliar forum.”⁵⁸ Conversely, where a court fails to find personal jurisdiction, a plaintiff is left with unattractive and expensive options for litigating.⁵⁹ This is particularly likely in the realm of Internet copyright infringement, where the parties involved may be located worldwide and the defendant may not be directly involved in the copyright infringement.⁶⁰

55. *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

56. See Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1204 (1984); Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 122–23 (1992).

57. Juenger, *supra* note 56, at 1204–05 (citations omitted); see also *id.* at 1204 (noting that German Civil Code allows personal jurisdiction over nonresident defendants who own any assets in Germany, without limiting judgments to the value of the assets).

58. Rieder & Pappas, *supra* note 49, at 367.

59. *Id.* at 367–68.

60. *Id.* (identifying Internet service providers as likely “deep pockets” defendants that may be too remote from plaintiff’s injury to properly exercise jurisdiction).

II. CURRENT PROBLEMS CREATE LEGAL UNCERTAINTY

In addition to forum shopping and personal jurisdiction issues, the Internet creates conflict of laws and choice of law issues.⁶¹ Choice of law principles based in territoriality face a difficult task due to a lack of harmonization.⁶² For example: if an American uploads a French poem on his website without permission and a “German [I]nternet user then saves the poem on to her personal computer,” the copyright regulations of three different countries could be applicable to determining the case.⁶³

A. *Unsettled Law Creates Uncertainty*

Differences in treatment of works created within the scope of employment and differences in categorizing uploading and downloading as infringing acts mean that conflict of laws and choice of law issues become increasingly important and difficult to apply as more parties and acts are involved.⁶⁴ Choice of law questions must be addressed at the national level, because “as to most questions of copyright ownership, the Berne Convention does not clearly designate any choice of law rule.”⁶⁵

1. *United States Jurisprudence is Unclear Regarding Choice of Law and Extraterritorial Application of the Copyright Act.*

“[I]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only

61. See discussion *infra* Part II.A.

62. Reindl, *supra* note 6, at 806–08; see also Dana Stringer, *Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way*, 44 COLUM. J. TRANSNAT’L L. 959, 959 (2006) (noting that Brazilian civil law jurisprudence forbids contractual choice-of-law clauses, fostering legal uncertainty and increasing transaction costs).

63. Plenter, *supra* note 5, at 313.

64. See Reindl, *supra* note 6, at 808.

65. Ginsburg, *supra* note 4, at 331.

within the territorial jurisdiction of the United States.”⁶⁶ The 1976 Copyright Act did not abandon this principle, but slightly expanded “territorial application of [the Copyright Act] by declaring that the unauthorized importation of copyrighted works constitutes infringement, even when such copies were lawfully made abroad.”⁶⁷ Thus, the presumption that the Copyright Act applies only within the United States remains intact.⁶⁸ Courts and commentators have been inconsistent in addressing choice of law and extraterritorial application issues in international copyright cases.⁶⁹

a. Choice of Law

The U.S. Copyright Act’s Berne Convention implementation provides that “rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, *shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.*”⁷⁰ For copyright infringement on the Internet, courts must consider not only the Copyright Act but also potential obligations under the Berne Convention and traditional choice of law rules.⁷¹

i. The Closest Relationship Test

Choice of law is critical where copyright ownership depends upon the applicable law.⁷² For example, applying the American work-for-hire doctrine tends to assign exclusive copyright ownership to the

66. Robert H. Thornburg, *Choice of Law in International Copyright: The Split of Authority Between the Second and Ninth Circuits Regarding Extraterritorial Application of the Copyright Act*, 10 J. TECH. L. & POL’Y 23, 24–25 (2005) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)) (internal quotation marks omitted).

67. *Id.* at 25.

68. *Id.*

69. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 88–89 (2d Cir. 1998).

70. 17 U.S.C. § 104(c) (2000) (emphasis added).

71. *See Itar-Tass*, 153 F.3d at 88–91.

72. *Id.* at 88.

employer, not the employee.⁷³ Some countries, however, reject the work-for-hire doctrine and are likely to assign copyright ownership to the employee.⁷⁴ Since exclusive copyright ownership is a requirement for standing under the U.S. Copyright Act, the choice of law could determine whether a party has any rights in U.S. courts regarding works created in foreign countries by employees of foreign corporations.⁷⁵

Noting that some U.S. courts applied foreign law to determine copyright ownership in international copyright cases while others applied U.S. law, the Second Circuit sought to develop federal common law for choice of law in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*⁷⁶ In an action for unauthorized reproduction in the United States of newspaper articles published in Russia, the Court distinguished between ownership and infringement issues and reached differing choice of law conclusions.⁷⁷ Because the Berne Convention leaves choice of law to the forum state legislation, and the Copyright Act “contains no provision relevant to the pending case concerning conflicts issues,” the court turned to the Restatement (Second) of Conflict of Laws.⁷⁸ Under the Restatement, the law of the state with “the most significant relationship” to the property and the parties determines property interests.⁷⁹ Therefore, Russian law determined ownership rights in works “created by Russian nationals and first published in Russia.”⁸⁰ With respect to infringement issues, however, the court gave primary weight to the *lex loci delicti* (the law of the place where the acts giving rise to liability occurred).⁸¹

73. See 17 U.S.C. § 101 (2000) (“A ‘work made for hire’ is—(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned . . .”).

74. *Itar-Tass*, 153 F.3d at 89.

75. *Id.* at 91; see also 17 U.S.C. § 501(b) (“The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement . . .”).

76. *Itar-Tass*, 153 F.3d at 88-90 (“We therefore fill the interstices of the Act by developing federal common law on the conflicts issue.”) *Id.* at 90; see also Austin, *supra* note 28, at 911.

77. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 84-85, 90-91 (2d Cir. 1998) (“[The] choice of law applicable to the pending case is not necessarily the same for all issues.”).

78. *Id.* at 90.

79. *Id.*

80. *Id.*

81. *Id.* at 91 (citing *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953)).

Because the infringement occurred in New York, United States copyright law applied to infringement issues.⁸²

However, the “closest relationship” test faces challenges in the Internet context.⁸³ The country of first publication would have “the most significant relationship to the work” under a traditional approach.⁸⁴ For works published online, identifying the country of first publication by the location of first upload or download or the location of the web server would lead to arbitrary results because users may upload or download from anywhere.⁸⁵ Additionally, increased international collaborations and author mobility could render the fact-based *Itar-Tass* approach unpredictable and uncertain.⁸⁶ Even for films, the one medium on which Berne is clear that ownership “shall be a matter for legislation in the country where protection is claimed,”⁸⁷ it is unclear whether the Copyright Act’s statutory language and the recent case law would result in application of American or foreign law.⁸⁸

ii. *Forum Non Conveniens*

The Second Circuit’s application of Russian law to determine copyright ownership signaled a shift in jurisprudence: “[U]ntil recently If U.S. law did not apply, the complaint was dismissed. Many other countries adopted a similar approach to the (non-) application of foreign law.”⁸⁹ Indeed, the *forum non conveniens* doctrine remains a possibility even where infringing acts occur inside the United States, particularly for non-U.S. parties.⁹⁰ In *Creative*

82. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998).

83. Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMP. L. 429, 440 (2001) (“I have serious doubts about the cogency of the [*Itar-Tass*] approach, especially when pushed to the limits by digital uses . . .”).

84. Ginsburg, *supra* note 15, at 189.

85. *Id.* at 188-90.

86. Austin, *supra* note 28, at 914.

87. Lau, *supra* note 27, at 183.

88. *Id.* at 183-84; *see also Itar-Tass*, 153 F.3d at 88-89; Ginsburg, *supra* note 15, at 188-95.

89. Dinwoodie, *supra* note 83, at 440 (citation omitted).

90. *See Creative Tech., Ltd. v. Aztech System PTE, Ltd.*, 61 F.3d 696, 704 (9th Cir. 1995); *see also* Lau, *supra* note 27, at 186 (arguing that U.S. forum accessibility for foreign plaintiffs “is largely

Tech., Ltd. v. Aztech System PTE, Ltd.,⁹¹ the Ninth Circuit affirmed dismissal of a copyright infringement action where both parties designed, developed, and manufactured computer sound cards in Singapore for sale within the United States.⁹² Although the plaintiff held United States copyrights to works first published in the United States and offered evidence of infringing distribution in the United States,⁹³ the majority concluded that Singapore represented an adequate alternative forum and that a balance of private and public interest factors supported designating Singapore the appropriate forum.⁹⁴ Although *forum non conveniens* is relatively rare, its potential application contributes to legal uncertainty.⁹⁵

b. Extraterritorial Application of the Copyright Act

A related area of unsettled law that goes to the heart of the sovereignty debate is the application of one country's copyright law to actions occurring in another country or countries.⁹⁶ With no clear choice of law rule, the two leading copyright law circuits reached an apparent split in authority.⁹⁷

i. The Predicate Act Theory

In 1988, the Second Circuit held that where a defendant commits an infringing act within the United States that facilitates foreign infringements, a U.S. court may apply U.S. law to provide monetary relief for copyright infringements that occur abroad.⁹⁸ The rationale

contingent upon international diplomatic and political forces"); Ginsburg, *supra* note 4, at 334 ("[L]itigants have argued, and some courts have agreed, that a claim requiring the interpretation of foreign law should be dismissed on *forum non conveniens* grounds, in favor of pursuing the action before the courts whose national laws are to be construed.").

91. 61 F.3d 696, 698-704 (9th Cir. 1995).

92. *Id.*

93. *Id.* at 705 (Ferguson, J., dissenting).

94. *Id.* at 703 (majority opinion).

95. See Ginsburg, *supra* note 4, at 334.

96. See *infra* Part II.A.1.b.

97. See generally Thornburg, *supra* note 66; see also *infra* Part II.A.1.b.

98. *Update Art, Inc. v. Modiin Publ'g, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988); Austin, *supra* note 28, at 915 n.78.

was that when a defendant performs an infringing act, the copyright owner acquires an equitable interest in the infringing work that “attache[s] to any profits from its exploitation” (including profits realized abroad).⁹⁹ This approach conflicts with the sovereignty concerns expressed in “the traditional extraterritorial limitation pronounced in the Ninth Circuit”¹⁰⁰ as well as a recent Supreme Court decision denying application of U.S. antitrust law to alleged conduct in foreign territories.¹⁰¹ “The Court’s vehement championing of sovereignty interests may, however, hint at an emerging concern to confine U.S. laws within their proper territorial scope.”¹⁰²

ii. *The Ninth Circuit*

The Ninth Circuit held that “mere authorization” within the U.S. of infringing activities (creating and distributing a film) occurring outside the U.S. fails to implicate U.S. copyright law.¹⁰³ The Court noted that “Congress chose in 1976 to expand one specific ‘extraterritorial’ application of the Act . . . [h]ad Congress been inclined to overturn the preexisting doctrine that infringing acts that take place wholly outside the United States are not actionable under the Copyright Act, it knew how to do so.”¹⁰⁴ While that decision expressly reserved the question of damages for infringing acts abroad awarded by the Second Circuit in *Update Art*,¹⁰⁵ the Ninth Circuit subsequently ruled that a party could recover statutory damages or profits attributable to extraterritorial infringement, but not actual damages for injuries the infringements caused overseas.¹⁰⁶

99. Thornburg, *supra* note 66, at 28 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939)).

100. *Id.*; see *infra* Part II.A.1.b.ii.

101. Austin, *supra* note 28, at 904 (citing *F. Hoffman-La Roche Ltd. v. Empagran*, 542 U.S. 155 (2004)).

102. *Id.* at 904.

103. *Subafilms, Ltd. v. MGM-Pathe Commc'ns, Co.*, 24 F.3d 1088, 1099 (9th Cir. 1994); see also Thornburg, *supra* note 66, at 26-27.

104. *Subafilms, Ltd.*, 24 F.3d at 1096.

105. *Id.* at 1098-99.

106. *Los Angeles News Serv. v. Reuters Television Int'l Ltd.*, 340 F.3d 926, 927-28, 932 (9th Cir. 2003).

In sum, U.S. law is unclear as to what law will apply to international copyright disputes,¹⁰⁷ whether the United States is an accessible forum for foreign plaintiffs,¹⁰⁸ and what acts are sufficient to support application of the Copyright Act to infringing acts occurring outside the United States.¹⁰⁹

2. *Current International Law Does not Resolve Choice of Law Conflicts*

International law is equally unclear, for the same reasons that choice of law is unsettled in American courts.¹¹⁰ With the exception of cinematographic works, the Berne Convention does not provide a choice of law rule for determining copyright ownership.¹¹¹ Uniform resistance to significant changes to domestic laws resulted in the Convention agreeing on minimum standards and committing to national treatment (treating authors and works from other signatory countries equally with domestic authors and works), rather than implementing a universal approach to copyright.¹¹² Member nations remain free to develop their own national copyright policies, with widely differing results.¹¹³

More recently, the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) incorporated the Berne Convention copyright protection standards.¹¹⁴ Requiring WTO members to commit to international copyright protection is significant because “the economic benefits that accrue from [WTO] membership . . . are often highly prized and almost

107. See *supra* Part II.A.1.a.

108. See *supra* Part II.A.1.a.ii.

109. See *supra* Part II.A.1.b.

110. Ginsburg, *supra* note 4, at 330 (“[T]here is no such thing as ‘international copyright’; instead, there are a multiplicity of national copyright regimes.”).

111. Ginsburg, *supra* note 4, at 331.

112. Dinwoodie, *supra* note 1, at 490-94.

113. *Id.* at 492 (“For example, U.S. copyright law accords users broad latitude under the rubric of fair use to make unauthorized parodies of copyrighted works . . . Civil law countries tend to favor . . . narrow exceptions tailored to [their] own social and economic priorities.”) (citations omitted).

114. TRIPs, *supra* note 7, at 1201 (“Members shall comply with Articles 1 through 21 of the Berne Convention”); see also Lau, *supra* note 27, at 180-81 (discussing TRIPs incorporation of Berne).

irresistible.”¹¹⁵ However, the WTO is not intended nor equipped to settle general choice of law or individual copyright conflicts.¹¹⁶ In addition to not specifying a choice of law, the WTO dispute resolution mechanism is unavailable to private parties or individuals.¹¹⁷ Moreover, while the WTO represents a shift from power-based to rule-based international dispute settlement, it lacks representational legitimacy and would be “likely to produce norms of copyright law skewed in favor of particular values and interests”¹¹⁸ To better address copyright problems in the digital environment, the WTO turned to the World Intellectual Property Organization (WIPO), which in turn produced the WIPO Copyright Treaty.¹¹⁹ While hailed for establishing crucial rights including “distribution, rental, and communication to the public,”¹²⁰ the Treaty “left significant gaps in the law which must be resolved by national legislation.”¹²¹ Specifically, national legislation will be left to provide enforcement provisions and definitions of limitations and exceptions.¹²² Negotiations also failed to standardize definitions of the place of publication for works transmitted digitally and to include all forms of temporary reproduction (e.g., loading a software program into a computer’s memory during runtime) in the right of reproduction.¹²³

The Berne Convention, TRIPs, and the WIPO Copyright Treaty represent the current status of international copyright law.¹²⁴ While each plays a significant role in copyright law, none is able to eliminate the legal uncertainty that frequently arises in international and Internet copyright disputes.¹²⁵

115. Lau, *supra* note 27, at 180.

116. *See id.* at 187-88.

117. *Id.* at 187.

118. Dinwoodie, *supra* note 1, at 502-03.

119. Dinwoodie, *supra* note 1, at 498-99; O’Sullivan, *supra* note 6, at 12-18.

120. Susan A. Mort, *The WTO, WIPO & The Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 198-99 (1997).

121. *Id.* at 196.

122. *Id.* at 199-201.

123. *Id.* at 202-03.

124. *See id.*

125. *See generally* Reindl, *supra* note 6, at 812-15 (describing the legal uncertainty).

B. Legal Uncertainty Hinders Development of International Trade and E-Commerce.

Technological advances have made foreign and domestic markets indistinguishable in terms of producers' abilities to control dissemination.¹²⁶ Resulting uncertainty and inadequate protection leads to risk premiums passed on to all users of copyrighted works, not only in the pricing of works intentionally distributed via the Internet but, because analog works can be so easily digitized, in the pricing of all copyrighted work.¹²⁷ On a worldwide scale, then, "failure of other nations to protect intellectual property can be rationalized as an intrusion upon free trade."¹²⁸

Individual actors also suffer from inhibited or decreased exploitation and license fees where "an unclear legal framework dissuades at least small and medium enterprises from publishing works online, because these enterprises are not able to fund an extensive legal services department to deal with all the resulting questions."¹²⁹ Thus, the current status of copyright law may keep useful works unavailable to the public, and limit the productivity of individuals and companies.¹³⁰ "Moreover, the chilling costs of uncertainty may also settle (although with more questionable practical effect) on certain users of copyrighted works, who cannot be

126. Dinwoodie, *supra* note 1, at 479 ("[P]roducers of copyrighted works are largely unable to resist expansion to the international stage of product exploitation simply because a protective legal framework is not yet in place abroad.").

127. Dinwoodie, *supra* note 1, at 480-81; *see also* Stringer, *supra* note 62, at 959 (uncertain choice of law in civil law societies such as Brazil increases transaction costs); Alan N. Sutin, *Roadblocks Stall Electronic Commerce; Legal Obstacles Hinder International Trade in Cyberspace*, N.Y.L.J., July 13, 1998, at S6 ("To impose long-lived legal regimes of questionable efficacy on developing technologies runs the risk of inhibiting the further development of new electronic trading systems.").

128. Dinwoodie, *supra* note 1, at 482.

129. Plenter, *supra* note 5, at 315; *see also* Dan Jerker B. Svantesson, *Borders On, or Border Around—The Future of the Internet*, 16 ALB. L.J. SCI. & TECH. 343, 351 (2006) ("[W]ebsite operators are forced to take measures to avoid contact with those jurisdictions they do not wish to be legally exposed to.").

130. *See generally* Plenter, *supra* note 5, at 315.

sure of the applicable rules governing their conduct in the inherently international environment of the world wide web [sic].”¹³¹

III. CURRENT CHOICE OF LAW SOLUTIONS

Scholars addressing the copyright issues raised by international law and the Internet frequently propose one of two solutions: a national choice of law theory to accommodate international and Internet copyright disputes,¹³² or a universal “cyberlaw”¹³³ or international norms¹³⁴ to bypass choice of law problems. Each approach faces significant challenges due to the complexity of copyright law and international law.¹³⁵

A. National Law Approaches

1. The Country of Origin Method

Recognizing that “traditional copyright choice of law rules and their strictly territorial conflicts approach are no longer adequate”¹³⁶ and that significant change in the system of international copyright protection is unlikely in the short term, legal scholar and professor Andreas Reindl advocates a flexible copyright choice of law.¹³⁷ A national approach, he argues, is “the only viable option to protect copyrighted works on digital networks” because TRIPs and the WIPO treaties cannot harmonize national copyright laws enough to dispense with choice of law analysis.¹³⁸ Citing policy concerns including “enforcement and efficiency . . . as well as predictability,

131. Dinwoodie, *supra* note 1, at 481 (footnote omitted); see also Plenter, *supra* note 5, at 315 (“[S]ome argue that a lack of legal certainty hinders the development of e-commerce.”).

132. See *infra* Part III.A.

133. See *infra* Part III.B.

134. See *infra* Part III.B.

135. See *infra* Part III.A-B.

136. Reindl, *supra* note 6, at 802. See generally Plenter, *supra* note 5, at 314-16, for discussion of traditional copyright choice of law rules.

137. Reindl, *supra* note 6, at 801-02.

138. *Id.* at 812-15.

fairness, and decisional consistency goals,”¹³⁹ Reindl proposes a simple choice of law analysis in which the “defendant’s residence or place of business [would] generally determine[] the applicable copyright law . . .” unless the use was commercial and foreseeably received in another nation, or non-commercial but having a foreseeable and substantial economic impact in another nation.¹⁴⁰ In the latter situations, a plaintiff could “rely on the copyright laws of the countries in which the work was received”¹⁴¹

Under this approach, Reindl argues that the goal of enforcement is served by encouraging litigation in the forum with best access to the evidence and the ability to levy injunctive relief or criminal charges.¹⁴² Additionally, focusing on the country where infringing acts originated furthers fairness (by not subjecting defendants to the copyright laws of numerous and unknown countries) and promotes decisional consistency as to choice of law.¹⁴³ However, if a plaintiff prefers not to litigate in a foreign forum, the enforcement benefit would be mitigated.¹⁴⁴ Also, any choice of law approach must be careful not to “formulate a choice of law rule that will encourage Internet entrepreneurs to migrate to ‘copyright havens.’”¹⁴⁵

2. *The Substantive Law Method*

Choice of law theory addresses two competing concerns: “avoidance of forum shopping and aptness of results.”¹⁴⁶ Utilizing four general sources of law,¹⁴⁷ Professor Dinwoodie proposes an ad-

139. *Id.* at 825.

140. *Id.* at 852-53. *But see* Ginsburg, *supra* note 4, at 336 (arguing that a work’s country of origin, i.e., its author’s residence or place of business, is an unlikely basis for an Internet choice of law approach due to potential difficulty in ascertaining country of origin and divergence from the “hundred-plus year tradition of the Berne Convention.”).

141. Reindl, *supra* note 6, at 853.

142. *Id.* at 831.

143. *See id.* at 831-32.

144. Rieder & Pappas, *supra* note 49, at 368.

145. Ginsburg, *supra* note 15, at 192.

146. Dinwoodie, *supra* note 1, at 547.

147. *Id.* at 552 (“international agreements and practices; national and regional laws; developing post-national groupings; and conflicts values”).

hoc substantive law method for international copyright cases, analogized to the approach of modern judges in purely domestic and multistate cases in the United States.¹⁴⁸ Courts would consider each choice of law by textual analysis and underlying policies, and develop solutions that best accommodate all interests.¹⁴⁹ This approach would “reflect[] a growing social reality that citizens of the global community will achieve input into international norms . . . [and] be no more offensive to national sovereignty than the wholesale application of foreign law.”¹⁵⁰

Unfortunately, an international system of nationally appointed, reviewed, and influenced courts legislating from the bench is impractical.¹⁵¹ The analogy to a U.S. court balancing competing interests in deciding whether to apply U.S. or a foreign country’s copyright law fails because U.S. courts are constrained by legislation and binding precedent.¹⁵² Even if U.S. courts did have legislative or judicial authority to adopt a test balancing foreign law against domestic law, such an approach would create an unpredictable legal quagmire.¹⁵³ Dinwoodie argues in support of his “preference for new issues of copyright law to be addressed by courts rather than legislatures”¹⁵⁴ that some loss of certainty would be a worthwhile short-term cost of developing international norms.¹⁵⁵ He fails to

148. *Id.* at 542–58.

149. *Id.* at 561–69.

150. *Id.* at 577.

151. Dinwoodie, *supra* note 1, at 578–79 (recognizing the critique that “the necessarily random manner in which issues come to courts precludes a comprehensive systematization of appropriate conduct in new fields of activity; this is a matter that legislatures do better.”).

152. Absent congressional mandate or Supreme Court order, American courts are not free to choose whether to apply foreign or domestic law based on the merits of an individual case. *See* 20 AM. JUR. 2D *Courts* § 129 (2006) (“The doctrine of stare decisis is crucial to the system of justice because it ensures predictability of the law and the fairness of adjudication.”) (citation omitted).

153. *See* Dinwoodie, *supra* note 1, at 573 (arguing that such uncertainty would be “an inevitable, but worthwhile, short-term cost”). For the proposition that short-term uncertainty is necessary to achieve “the next stage in the evolution of the law,” Dinwoodie relies on a New York decision adopting a new ad hoc choice of law approach to replace an old approach in tort law. *Id.* at 573 (quoting *Neumeier v. Kuehner*, 31 N.Y.2d 121, 128 (N.Y. 1972)).

154. Dinwoodie, *supra* note 1, at 577.

155. *See id.* at 571–73. However, there is no guarantee that international norms would develop quickly enough to establish certainty: “Technology . . . has yoked the content of copyright law to fast-changing developments.” *Id.* at 477.

address, however, the possibility that a fact-based inquiry into every international copyright action might well result in courts distinguishing precedent at will, without developing international norms.¹⁵⁶ Furthermore, Dinwoodie cites a common problem in copyright scholarship—making token acknowledgment of the need to address copyright issues in a worldwide context but proceeding to “perform a purely domestic analysis of those issues”¹⁵⁷—and proceeds to commit the same misstep in proposing that national courts create global norms.¹⁵⁸

B. Cyberlaw and International Norms

Simply stated, a universal copyright law, though appealingly simple in theory, is an impractical ideal.¹⁵⁹ Substantively, copyright law’s territoriality-based development has resulted in irreconcilable differences between national laws.¹⁶⁰ Attempts to normalize such differences may be viewed as attacks on sovereignty and domestic property.¹⁶¹ As a practical matter, the WTO, with near-universal membership and expansive power over international trade, is firmly embedded in international copyright law and would necessarily be implicated in any attempt to create universal copyright law.¹⁶² However, a universal copyright law would necessarily encompass matters that do not implicate the WTO, such as domestic disputes and actions between private parties.¹⁶³ Also, there are concerns, particularly among developing countries, about the legitimacy of the

156. See Dinwoodie, *supra* note 83, at 436 (“[E]ven identical rules of law may lead to different results when applied in different social contexts by different tribunals.”).

157. See Dinwoodie, *supra* note 1, at 471.

158. *Id.* at 558-69 (noting that “it is difficult to predict how judges in a range of countries will develop [a different copyright choice of law] approach,” but analyzing the “thought process for which it calls” solely from an American perspective). *Id.* at 558.

159. See discussion *supra* Part I.A.

160. See *id.*

161. Austin, *supra* note 28, at 915 (quoting an English trial judge: “[T]he concept of a world wide copyright is not acceptable as a matter of law.”).

162. See *supra* note 114 and accompanying text.

163. See discussion *supra* Part II.A.2.

WTO itself and its dispute resolution procedures.¹⁶⁴ WIPO would be another logical promulgator of universal copyright law but lacks enforcement capability.¹⁶⁵

For the same substantive reasons described above, it is equally unlikely that universal copyright standards will be implemented for the Internet.¹⁶⁶ While the Internet poses new challenges, it is unlikely to find treatment as a separate jurisdiction so long as traditional legal structures are able to adapt.¹⁶⁷ States may “be unwilling to give up their jurisdictional claims over the Internet, and Internet activity,”¹⁶⁸ and in fact may not need to where technology enables imposition of Internet “borders.”¹⁶⁹

IV. CHERRY PICKING: A NEW ONLINE FORUM

The approaches described above provide valuable insight into the state of international copyright law and its relationship to the Internet.¹⁷⁰ However, modern approaches to settling copyright disputes need not be restricted to scholarly journals and traditional judicial forums.¹⁷¹ They can be applied to a new initiative for online copyright dispute settlement, for which there is a pressing need because “even identical rules of law may lead to different results when applied in different social contexts by different tribunals.”¹⁷² Just as e-commerce thrives on identifying and accommodating users’ desires (e.g., ebay.com), international copyright law is capable of

164. Michael P. Ryan, *Knowledge, Legitimacy, Efficiency and the Institutionalization of Dispute Settlement Procedures at the World Trade Organization and the World Intellectual Property Organization*, 22 NW. J. INT’L. L. & BUS. 389, 389 (2002).

165. See *supra* text accompanying notes 119–122.

166. See *supra* text accompanying note 161; see also Svantesson, *supra* note 129, at 358 (“Any attempt to turn the Internet into a totally separate legal space would be highly complex.”).

167. Rieder & Pappas, *supra* note 49, at 377 (“Despite all the concern that the current set of laws would be inadequate to meet the demands of today’s technology, the existing laws regarding personal jurisdiction are more than suitable to adapt to the needs of the Internet . . .”).

168. Svantesson, *supra* note 129, at 352.

169. *Id.* at 355–58 (discussing geo-location technologies that provide “an educated guess as to the access-seeker’s location,” allowing access to be granted or denied accordingly).

170. See *supra* Part III.

171. See *infra* Part IV.A-C.

172. Dinwoodie, *supra* note 83, at 436.

leveraging technology to improve dispute resolution by using the Internet as a tool rather than an obstacle.¹⁷³

A. Step 1: Borrowing Liberally

Professors Lemley and Reese propose that rather than shutting down peer-to-peer file sharing services, “[I]t would be preferable to lower enforcement costs for copyright owners by making dispute resolutions by copyright owners against direct infringers quick and cheap”¹⁷⁴ That rationale has merit in the wider context of all copyright infringements propagated through the Internet, not just peer-to-peer file sharing.¹⁷⁵ Countless copyright owners would presumably enforce their rights if provided an option that did not involve distant forums, complex choice of law analysis, and the resulting extensive legal fees.¹⁷⁶ Of course, an Internet forum creating or enforcing a rigid, universal copyright standard is as impossible as any imposition of universal international or cyberlaw discussed above.¹⁷⁷ However, there are existing ideas and forums that could expand to provide widespread copyright enforcement capability on a scale to compete with Internet copyright infringement.¹⁷⁸

Lemley and Reese propose a system modeled on the Uniform Dispute Resolution Policy (UDRP) used for domain name trademark disputes.¹⁷⁹ Their system, implemented through a proposed amendment to the Copyright Act, would make dispute resolution faster and cheaper by allowing evidence and arguments to be

173. See *infra* Part IV.A-C.

174. Mark A. Lemley & R. Anthony Reese, *A Quick and Inexpensive System for Resolving Peer-To-Peer Copyright Disputes*, 23 CARDOZO ARTS & ENT. L.J. 1, 1 (2005).

175. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1373 (2004) (noting that “a fundamental shift in the economics of copyright infringement in the digital environment” dissuades copyright owners from suing infringers).

176. *Id.* at 1405 (“Suing most or all direct infringers currently isn’t attractive because litigation is so expensive and time-consuming. If enforcement is quick, cheap, and certain enough, the sanction for infringement doesn’t need to be very high in order to achieve the same deterrent effect.”).

177. See *supra* Part III.B.

178. See Lemley & Reese, *supra* note 174.

179. Lemley & Reese, *supra* note 174, at 1-2.

presented online and requiring decisions from administrative law judges in the United States Copyright Office within two months of filing the dispute.¹⁸⁰ However, their proposal presumably applies only to American parties, is limited to “a certain category of cases of copyright infringement over [peer-to-peer] networks,” and stops short of advocating online settlement of legal and factual disputes.¹⁸¹

The UDRP “resolved about 7,500 domain name trademark disputes in its first four years, at a cost of \$1200-\$1500 each and an average resolution time of a little more than a month.”¹⁸² While the efficiency serves as an excellent model for application to copyright law, the forum itself is unavailable to Internet copyright disputes; the Internet Corporation for Assigned Names and Numbers (ICANN), which controls all domain names, contractually imposes the UDRP on domain name registrars.¹⁸³ In other words, a party registering a domain name must agree to resolve any subsequent complaints brought by trademark owners under the UDRP, which has the power to enforce its decisions by instructing ICANN to transfer or terminate domain name registrations.¹⁸⁴ There is no comparable contractual agreement or enforcement mechanism for Internet users in general.¹⁸⁵

For international copyright disputes, WIPO offers fixed-cost mediation and arbitration.¹⁸⁶ While this may often be preferable to traditional litigation, it requires both parties’ consent, and the minimum fee for expedited arbitration is \$22,000.¹⁸⁷ Thus, the WIPO arbitration process would not be available or attractive to a large

180. *Id.* at 1–9.

181. *Id.* at 1–3; *cf.* Dinwoodie, *supra* note 83, at 447–450 (discussing development of autonomous substantive trademark law through dispute resolution panels).

182. Lemley & Reese, *supra* note 174, at 2 (citing UDRP website, <http://www.icann.org/cgi-bin/udrp/udrp.cgi>).

183. *Id.* at 2–3; Dinwoodie, *supra* note 83, at 447–48.

184. Lemley & Reese, *supra* note 174, at 2–3.

185. *Id.* at 3 (“There is no central authority that contracts with Internet users generally.”).

186. Ryan, *supra* note 164, at 415–16.

187. See generally <http://www.wipo.int/amc/en/> (last visited Feb. 9, 2008) for WIPO arbitration fees and procedures, including “indicative” hourly arbitration rates of \$300-\$600/hour in addition to minimum fixed cost of \$4000 for non-expedited arbitration; see also Robert A. Badgley, *Improving ICANN in Ten Easy Steps: Ten Suggestions for ICANN to Improve its Anti-Cybersquatting Arbitration System*, 2001 U. ILL. J.L. TECH. & POL’Y 109 (2001).

number of copyright holders due to the consent requirement and the associated cost. Trade-related disputes between countries may be settled in WTO Dispute Settlement Body panels, which are available only to national parties and take three to six months to issue a report.¹⁸⁸

B. Step 2: Putting It Together

Using the TRIPs Agreement and WIPO Copyright Treaty as fundamentals of international law,¹⁸⁹ all but the most complex disputes could be settled online upon establishing a *prima facie* copyright infringement case and jurisdiction over the defendant.¹⁹⁰

1. Prima Facie Case

a. Ownership

A party seeking redress must possess the right(s) sought to be enforced.¹⁹¹ Due to territoriality and national sovereignty concerns dictating that national ownership laws must be respected,¹⁹² contested *ownership* should not be decided in the proposed Internet forum except where consideration of relevant facts and law satisfies a standard based on the U.S. summary judgment rule—where there is no conflict of laws and no genuine issue of material fact regarding copyright ownership.¹⁹³ Rather, to promote efficiency, copyright registration in any country would create a rebuttable presumption of ownership.¹⁹⁴ If complex questions of national law or directly

188. Ryan, *supra* note 164, at 402.

189. See Dinwoodie, *supra* note 1, at 499 n.91 (“In essence, the WIPO is recognizing that its objectives might better be pursued by the creation of ‘soft law’ than by conclusion of formal treaties.”).

190. See *infra* Part IV.B.1-2.

191. Cf. 17 U.S.C. § 501(b) (“The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement . . .”).

192. See *supra* Part II.A.

193. See FED. R. CIV. P. 56(c) (“[J]udgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”).

194. Cf. Lemley & Reese, *supra* note 174, at 4 (“[C]omplaining party would need to show that it had registered claims of copyright in the works in question and provide a sworn statement that it still owns the copyright.”).

incompatible choice of law issues are raised such that the court identifies a genuine dispute as to the law governing ownership of the copyright, the court should dismiss the claim without prejudice rather than attempt to forge a universal law that would impede sovereignty.¹⁹⁵

b. Infringement

Due to the dynamic nature of the Internet, a plaintiff would be required to establish two infringement elements: (1) publication and dissemination on the Internet, i.e., “evidence that the works complained of were available for downloading from a particular IP address at a particular date and time;” and (2) evidence that the IP address alleged to have infringed was assigned to the party against whom the complaint is brought.¹⁹⁶ A party properly alleging both copyright ownership and infringement would qualify for adjudication, subject to judicial discretion¹⁹⁷ and a finding of personal jurisdiction over the defendant.¹⁹⁸

2. Jurisdiction

Challenges to jurisdiction threaten the speed, economic efficiency, and enforceability of dispute resolution.¹⁹⁹ One model proposes a three-step test to determine the appropriateness of jurisdiction based on cost, complexity, and likelihood of prejudice.²⁰⁰ Although the Internet increases the challenge of determining personal jurisdiction, the existing minimum contacts framework can adequately adapt to the needs of the Internet in the context of copyright infringement:

195. *Cf. id.* (stating that “proceeding would be available only for relatively straightforward claims of copyright infringement”).

196. Lemley & Reese, *supra* note 174, at 4-5.

197. *See* Lemley & Reese, *supra* note 174, at 7 (allocating judicial discretion to reject claims not involving “fairly clear cases of infringement, [and] it may be useful for the statute to specify certain cases that the judge *must* reject.”).

198. *See infra* Part IV.B.2.

199. John Yukio Gotanda, *An Efficient Method for Determining Jurisdiction in International Arbitrations*, 40 COLUM. J. TRANSNAT’L L. 11, 12-13 (2001).

200. *Id.* at 15.

“the likelihood that personal jurisdiction can be constitutionally exercised by the courts is directly proportionate to the nature and quality of the activity the defendant conducts over the Internet.”²⁰¹

Legitimate jurisdiction hinges not only on the facts specific to individual parties involved in a dispute but also on the legitimacy of the forum itself.²⁰² The WIPO arbitration forum is widely accepted because it is a United Nations agency with a “record of delivering fair, independent dispute settlement decisions.”²⁰³ By contrast, the UDRP, though efficient and successful, is criticized for lacking due process protections and an administrative appeals process.²⁰⁴ WTO dispute settlement is likewise criticized for being “far removed and insulated from appropriate democratic pressures”²⁰⁵ The proposed copyright forum must, either by new international mandate or by association with existing organizations, achieve legitimacy to be successful.²⁰⁶

3. Remedies

The primary type of remedy in this proposed forum would be a monetary damages award.²⁰⁷ Although successful complainants would incur expenses enforcing awards, “enforcing a judgment is usually simpler and cheaper than litigating a civil case to judgment in the first place.”²⁰⁸ Additionally, the proposed copyright forum could include two alternative forms of relief. First, a decision on the merits could result in an unsuccessful defendant’s official designation as a

201. Rieder & Pappas, *supra* note 49, at 377.

202. Ryan, *supra* note 164, at 392-93.

203. *Id.* at 393.

204. Lemley & Reese, *supra* note 174, at 2.

205. Dinwoodie, *supra* note 1, at 503; *see also id.* at 505-10 (discussing problems in panel selection and tension between developed and developing countries).

206. Ryan, *supra* note 164, at 399 (“Public organizations value fairness, integrity, independence, and responsiveness because their legitimacy depends on whether they behave that way.”) (citation omitted).

207. *See* Lemley & Reese, *supra* note 174, at 9 (“Monetary penalties should be sufficiently large . . . to deter others from engaging in [copyright infringement].”).

208. Lemley & Reese, *supra* note 174, at 11 (noting that plaintiff copyright owners could join a single complaint, thereby “sharing the costs of each administrative adjudication,” and reducing “the likelihood that an uploader would have to face repeated claims from multiple copyright owners based on the same course of conduct”).

copyright infringer.²⁰⁹ In the United States, the Digital Millennium Copyright Act provides “safe harbors to [Internet Service Providers] only if they have in place and reasonably implement a policy for terminating the accounts of ‘repeat infringers’”²¹⁰ Second, implementation under or in collaboration with ICANN would create the potential to transfer or shut down domain names operated by copyright infringers.²¹¹

C. Benefits

Although, as Professor Ginsburg noted, “cyberspace is not *yet* its own jurisdiction,”²¹² utilizing Internet technology for dispute resolution in all areas of law will create beneficial efficiencies and increased fairness and access to justice. Copyright law is an obvious leadership candidate because “it is a truism that contemporary problems in copyright law demand international solutions.”²¹³ A consolidated forum applying a clear set of rules is best suited to adapt to technological advancements and new and changing industries.²¹⁴ Although the preceding discussion focuses on international copyright disputes, the efficiency and consistency benefits apply equally to entirely domestic copyright disputes.

D. Objections

Objections to the proposed forum are likely to be both substantive and procedural. Substantively, any international copyright forum will be controversial because “[t]here are fundamental philosophical

209. Lemley & Reese, *supra* note 174, at 12.

210. *Id.*

211. Dinwoodie, *supra* note 83, at 447–48 (describing how ICANN imposed the UDRP dispute settlement procedure on domain name registrants, enabling settlement of trademark disputes by transfer of domain names); see also *id.* at 448 (arguing that “[t]he potential . . . of UDRP-like systems as a means of resolving conflicts issues on the [I]nternet is worth sustained analysis”).

212. Ginsburg, *supra* note 15, at 187 (emphasis added).

213. Dinwoodie, *supra* note 1, at 471.

214. *Id.* at 502–03 (noting the appeal of WTO enforcement mechanisms that “would appear to permit the TRIPS system to evolve beyond the 1994 text, and thus to address in a dynamic fashion new technological issues as they arise”).

differences on central matters of copyright protection throughout the world.”²¹⁵ However, if the international community created the proposed forum with sufficient legitimacy, it should be able to efficiently resolve significant numbers of copyright disputes without violating state territoriality principles discussed earlier.²¹⁶

Procedurally, it is unclear how the proposed forum would be best integrated with existing international organizations.²¹⁷ ICANN possesses the strongest enforcement mechanism—control over Internet domain names—but cannot exercise that control over copyright infringers in the absence of a contractual relationship.²¹⁸ Existing dispute resolution forums within ICANN, the WTO, and WIPO provide guidance but also exhibit procedural obstacles.²¹⁹

CONCLUSION

The Internet not only raises novel issues in copyright law, it challenges copyright law’s traditional, territoriality-based framework.²²⁰ Copyright infringement now occurs on a scope and frequency never imagined when copyright law developed.²²¹ Additionally, the international dimension of the Internet-enabled explosion in copyright infringement raises complex choice of law and sovereignty issues.²²² Courts and scholars considering these issues have reached differing conclusions, resulting in unsettled law and uncertainty.²²³

This proposed forum is less about reacting to problems and issues caused by technology than about utilizing technology to promote more efficient and accessible copyright protection:

215. Dinwoodie, *supra* note 83, at 443.

216. *See supra* Part II.A.

217. *See supra* Part II.A.2.

218. *See supra* text accompanying notes 182–183.

219. *See supra* text accompanying notes 203–205.

220. Ginsburg, *supra* note 4, at 319.

221. *Id.*

222. *See supra* Part II.B.

223. *See supra* Parts II.A, III.

[T]here is not cyberspace without real space as far as private international law is concerned. Acts are always committed somewhere and their effects occur somewhere in real space The general principles that govern the allocation of international jurisdiction have not changed. Minimum contacts between the parties and the forum, effective access to justice, and equality between the parties constitute the fundamentals of any rules on international jurisdiction and should always guide their interpretation and application.²²⁴

Ted Solley

224. Mario J.A. Oyarzábal, *Jurisdiction Over International Electronic Contracts: A View on Inter-American, Mercosur, and Argentine Rules*, 19 TEMP. INT'L & COMP. L.J. 87, 88 (2005) (footnotes omitted).