



**EU and US
jurisdiction and conflict-of-laws rules
in cross-border on-line copyright infringement litigation**

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Abstract

This thesis provides a description and assessment of *status quo* jurisdiction and conflict-of-law rules in the EU and US. With regard to European Union, it deals with the application of Brussels I Regulation and Rome II Regulation to copyright infringement cases in cross-border context providing closer focus on relevant case law given by Court of Justice of the European Union in its preliminary rulings. As to the United States, more detailed description and analyses of case law regarding specific personal jurisdiction and conflict-of-laws given by federal courts is provided. Consequently, the approaches in both areas are assessed and compared.

Introduction

Hundreds of years from now, students will read in their history books about the 21st century as an age of Internet. With information travelling at enormous speeds from one continent to another in matter of seconds, enabling people from different countries to communicate and transfer data, the world has shrunk. Information exchange has become so easy that distance is no longer an issue (remember postal mail, and later telegraphs?). This shift is a truly evolutionary step and an era-dividing milestone.

This phenomenal changeover of communication has, however, brought new challenges. There is a number of emerging issues that have arisen in the field of intellectual property law due to a vast technical advancement and popularization of the internet (as part of cyberspace) which lawmakers, judges and lawyers have to deal with.

As vast amounts of internet-transferred data are literary, photographic, musical and visual works, copyright infringement has become international in nature. Yet, while substantive international intellectual property law has reached an advanced level of international harmonization, the procedural international intellectual property law, despite some efforts, remains rather untouched.

Among procedural issues, private international law and cross-border enforcement by individuals has not yet been adequately addressed on an international level. Questions of filing a lawsuit in the correct venue, choice of law, and recognition and enforcement of judicial decisions are of primary interest of every rights owner whose copyright has been infringed abroad. Without a clear and effective regulation of private international law issues, intellectual property

protection will remain weak, for as in every field of private law, enforcement by private individuals as part of *vigilantibus iura* principle¹ is fundamental.

Realizing that the internal market cannot function properly, and that intellectual property cannot be promoted without effective procedural trans-border conflict-of-laws and jurisdiction rules², the European Union has established common rules for all the Member States.³ These rules, in order to be applied uniformly, are interpreted on request⁴ by the Court of Justice of the European Union (CJEU) which gives preliminary rulings based on Article 267 of the TFEU. This paper takes into account and further analyzes both the Regulations resolving jurisdictional and choice-of-law conflicts between individual territorial laws of Member States and the respective case law of CJEU.

The European Union is predominantly a continental-law-tradition influenced country.⁵ In contrast, the United States despite legislative activities of Congress remains a common law country relying on case law. This difference is especially noticeable in the area of private international law. On a federal level, due to the absence of any particular statute, the US jurisprudence developed a case law of personal jurisdiction and conflict-of-laws rules. These traditional principles were later adjusted to internet contacts.

¹ The laws are of those who are vigilant.

² Article 81 (2) of the Treaty of Functioning of the European Union

³ with exception of Denmark. “In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application” (Recital 40 of Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II).

⁴ By Member States courts.

⁵ It is opinion of the Author of this paper that European Union with the Treaty of Functioning of the European Union became a federation (although with certain sui generis attributes).

The aim of this paper is to provide the reader with a *status quo* description and assessment of a legal regulation of jurisdiction and conflict-of-law rules in cross-border copyright infringement litigation within two major jurisdictions – EU and US.

To achieve these goals, this paper has been divided into three parts. Starting with a general summary, the first chapter highlights the dependence of private enforcement on private international law rules. The second part addresses issues of jurisdiction in the EU and US. Starting point for the EU is the recently amended Brussels I Regulation followed by the relevant case law of the Court of Justice of the European Union (CJEU). Regarding the US, this part provides development of specific personal jurisdiction on case-by-case basis. The third part is dedicated to EU/US conflict-of-laws methodology approaches.

1. From Infringement to Lawsuit

1.1 Private International Law Considerations

In every tort law case, the same string of events occurs and the same criteria (with small deviations) have to be fulfilled. Most fundamentally, for anybody to be found liable for civil delict, first there must be a breach of substantive law norm – in this case copyright infringement.

Copyright infringement can only be assumed when there is a law which prohibits certain actions which are deemed illegal and must concern one of the exclusive rights owned by the potential plaintiff. Then, if no other means of dispute settlement, threads of proceedings or measures such as web-site blocking are applied, the alleged infringement constitutes a cause of action and a lawsuit may be filed.

Since the internet is not limited to borders of sovereign countries and copyright infringement very often happens outside the territory of rights-owners domicile, private international law issues such as jurisdiction and conflict-of-laws become highly relevant.

In any cross-border conflict, the question of jurisdiction and venue must be taken into consideration. After the proper venue is established, determination of applicable law comes into play. At this point, it is very important that the plaintiff is aware of the law by which alleged infringement shall be approached, evaluated, and resolved as to the remedies.

And finally, if plaintiff is successful and a judicial decision is rendered, one must also consider recognition and enforcement issues. In cross-border disputes, this question is very frequently raised. However, as the volume of the thesis does not allow for further elaboration on recognition

and consequent enforcement of foreign judicial decisions in a different state, only jurisdiction and conflict-of-laws issues in the EU and US shall be examined.

1.2 Place of Infringement

In order to determine the jurisdiction and the choice-of-law questions, first, we must know where the alleged infringement took place. This question is more complicated than it appears since the internet as an open space – cyberspace, may be accessible from any place and thus infringement may occur everywhere. In theory, there are several main possible approaches toward this issue.

Firstly, it may be the country in which the individual uploaded or transmitted the copyright infringing material or operates website with infringing material. Secondly, in correlation to the first possibility it may also be the country within which the material was consequently downloaded, received or viewed. Thirdly, both of these actions may be considered as individual acts of infringement. Or fourthly, in the case of host providers, jurisdiction of a country in which the server is physically located may be considered.⁶

As a result, several theories addressing this problem have been developed. However, only the following two are the most frequently used.

In the European Union, in Article 1(2)(b) of Satellite and broadcasting Directive,⁷ the so-called **Emission theory** has been introduced. This theory considers the action of infringement to be constituted when a person broadcast or transmit information.⁸ This approach may be also applicable to online copyright infringement. Thus, the place of transmission or uploading the

⁶ Robitaille, Matt, *The principle of territoriality in the digital environment*, Available At: www.translegal.com/exercise/6022, downloaded: 13 February 2014

⁷ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

⁸ Groves, Peter, *Dictionary of Intellectual Property Law*, Available At: dictionaryofiplaw.blogspot.hu/2011/01/emission-theory.html, downloaded: 20 February 2014

copyright protected data is the place of infringement. Some claim that this theory appears to be fair in respect to the parties and state interests and only one law may be applicable to the case which makes it restrictive.⁹

Another theory – the **Bogsch theory**, is more extensive and thus more favorable to the right owners.¹⁰ According to, “when the content is made available over the internet, *lex loci protectionis* allows the right holder to pursue the infringement under the law of each country where the work has either been uploaded or could be potentially accessed (downloaded, viewed, listened to, etc.).”¹¹ Based on this approach, right holder may choose between laws possible the most protective one. “Meanwhile the user (both an intermediary service provider (ISP) and a private consumer) who makes the works available online should adhere to each law where the work can be potentially accessed.”¹²

The question of the primary place of copyright infringement in cyberspace is a key issue. However, no consensus among the scholars and the courts exists. Therefore, clear clarification either through the way of legislative instruments or case law must be reached in order for the European and American courts to apply the same decisive approach toward this important question.

⁹ Matulionyte, Rita, *Law Applicable to Copyright: A Comparison of the ALI and CLIP Proposals* (2011), p. 88

¹⁰ *Id.*

¹¹ *Law Applicable to Online Infringements in CLIP and ALI Proposals: A Rebalance of Interests Needed?*, Available At: www.atrip.org/Content/Essays/Rita%20Matulionyte%20Essay%20for%20ATRIP.pdf, downloaded: 15 February 2014, p. 3

¹² *Id.*

2. Jurisdiction to Adjudicate

The primary attribute of the internet is the fact that it is *deterritorialized* – it does not exist exclusively within the borders of one country. Therefore, in a globalized world where information placed on the internet can be accessed from virtually everywhere, questions such as law governing its operation, contracts conducted within, or law applicable to torts and criminal activities emerge. In case of litigation, administrative or criminal proceedings, questions of jurisdiction arise as well.

The notion of jurisdiction refers to “whether a court of law has the authority to hear a legal case in relation to specific people and activities (subject matter).”¹³ Jurisdiction of every state court has nevertheless its boundaries. It is the **principle of territoriality** as a leading principle of international law which limits possibilities of one country and its authorities to take part in cases involving matters which occurred, are located, exist or are connected to territories of another state.

Proper venue is a serious legal question as it is part of fundamental human rights – the right to a fair process.¹⁴

The court which assumes its jurisdiction then in accordance with *lex fori* principle (law of the court forum) carries out the respective procedure steps as set forth by norms of civil litigation.

In some cases, as shown in the following case law, multiple jurisdictions are available. In such a case, it is important for the potential plaintiff to consider the following questions:

¹³ Sampsun Xiaoxiang Shi and Brian Fitzgerald. *Civil Jurisdiction, Intellectual Property and the Internet*, Sydney University Press, (2008). Available at: <http://works.bepress.com/sampsun/3> p. 1

¹⁴ Article 6 of European Convention on Human Rights provides that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

- How quickly can be the judicial decision delivered?
- Comfort of home court proceedings vs. foreign trial with better consequent enforcement of the judgment procedure.
- Costs and expenses.
- Possible appeals.¹⁵

2.1 Jurisdiction of EU courts

“Private international law rules have classically been rules of local law, not international law.”¹⁶ However, after the World War II, on the European continent independent countries began to realize that the best way to prevent future armed conflicts is to co-operate on a much closer level. In that time, first steps towards what is now European Union were made.

At first, European countries in Western Europe started to co-operate on purely economical level through coal and steel regulations. Soon, also legal aspects of economic cooperation had to be taken into account. Initially, this was navigated within the field of customs and tariffs. Today, the European Union is *de facto* a federation consisting of 28 Member States which maintain and further develop close economic, political, social, and legal ties.

One of the essential aspects of co-operation is judicial. As stated in Article 81 of the Treaty of Functioning of European Union, judicial cooperation in civil matters having cross-border implications is recognized as one of the main objectives necessary for the proper functioning of

¹⁵ Patrick Wautelet, *Cross-Border Jurisdiction Over Intellectual Property Rights Disputes – an Overview* (2010), p. 47, Available At: orbi.ulg.ac.be/bitstream/2268/71152/1/Cross%20Border%20IP%20Disputes.pdf, downloaded: 8 February 2014

¹⁶ Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?* (2009), Available At: <http://scholarship.law.wm.edu/wmlr/vol51/iss2/12>, downloaded: 8 February 2014, p. 723

the internal market. In order to maintain a high level of co-operation, the following measures must be ensured:

- “(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (...)”

As a result, among others, **Brussels I Regulation** (44/2001), later replaced by **Regulation** (1215/2012) *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* and **Rome II Regulation** (864/2007) *on the law applicable to non-contractual obligations* have been introduced.

The following text reflects changes introduced by Regulation (1215/2012) while addressing the said Regulation as “Brussels I” in order to respect continual usage of this term in practice.

2.1.1 Brussels I Regulation

Under the general jurisdiction rule of Article 4, “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.” Provided that defendant is not domiciled in the Member State, “the jurisdiction of the courts of each Member State shall (...) be determined by the law of that Member State” (Article 6).

This rule in practice means that copyright infringer domiciled or established (for instance) in the United States of America can be subjected to national rules of private international law of the respective EU Member State in which the plaintiff decides to file a lawsuit.¹⁷

However, “in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued in another Member State’s court for the place where the harmful event occurred or may occur.” This rule established in Article 7 (3) of the Regulation constitutes special jurisdiction rule which is subject to exception from the general jurisdiction principle. Since application of this rule to the digital environment turned out to be problematic in the practice of European courts, it gave rise to the case law of the Court of Justice of the European Union as the courts asked for interpretation.

2.1.2 Relevant Case Law of CJEU

case C-509/09 eDate Advertising GmbH v X

In 2008, Mr. X, sentenced to life imprisonment for the murder of a well-known actor, was released on parole. Domiciled in Germany, Mr. X sued eDate Advertising, which is established in Austria and operates an internet portal at a German court. Mr. X was seeking a judgment ordering eDate Advertising to refrain from using his full name when reporting about him in connection with the crime committed. eDate contested court’s jurisdiction over the case.

After action being successful in both lower courts, eDate Advertising filed an appeal to the German Federal Court of Justice. Since the legal dispute was dependant on whether the German

¹⁷ Wimmer, Kurt, *International Jurisdiction and the Internet* (2006), Available At: euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/InternationalJurisdiction.pdf, downloaded: 8 February 2014, p. 6

courts did have jurisdiction over the case, the Court referred to Court of Justice of the European Union the following preliminary question:

“Is the phrase “the place where the harmful event... may occur” in Article [7](3) to be interpreted as meaning, in the event of (possible) infringements of the right to protection of personality by means of content on an internet website, that the person concerned may also bring an action for an injunction against the operator of the website, irrespective of the Member State in which the operator is established, in the courts of any Member State in which the website may be accessed?”¹⁸

In the preliminary ruling, the CJEU held that the person claiming his personality rights were infringed on the web-site can bring an action before the court of establishment of the web-site publisher, before the court where the “centre of his interests” is based, or also before the court of each European Union court of law from where the internet content is accessible. In the latter case, the court will, however, have only limited, partial jurisdiction, since it can only adjudicate damages caused in the territory of the Member State.^{19 20}

case C-173/11 Football Dataco Ltd and Others v Sportradar GmbH

This case concerns alleged infringement by Sportradar of the *sui generis* right to the database²¹ of football league matches in progress called “Football Live” (which is a compilation of goals and goal scorers, yellow and red cards, penalties and substitutions) owned by Football Dataco

¹⁸ Para. 24 of the decision.

¹⁹ Lovells, Hogan, *Recent clarifications concerning the jurisdiction of the courts over torts allegedly committed on the internet* (2012), Available At: www.lexology.com/library/detail.aspx?g=c150e90f-2642-481a-97f4-0190e63a7d03, downloaded: 8 February 2014

²⁰ Full text of the decision is available here:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0509:EN:PDF>

²¹ By definition in Article 1(2) of Directive (96/9/EC) on the legal protection of databases the term “database” means “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.”

Ltd and others, all established in the United Kingdom. Sportradar, a German company, operates a web-site betradar.com which provides results and statistics relating to English football matches. As proven, this web-site was targeting United Kingdom-based internet users who were downloading the *ad rem* football-related information.

Alleging that Sportradar extracted information from their database, Football Dataco brought a lawsuit at the High Court of Justice in the United Kingdom. Sportradar then challenged the jurisdiction of the English court to hear the case. The High Court ruled that it had jurisdiction to hear the action concerning the joint liability of Sportradar and its UK customers using its website but declined jurisdiction over primary liability of Sportradar for such an infringement. Both parties appealed.

The Court of Appeal of England and Wales, not satisfied with ‘*emission*’ theory (“an act of transmission occurs only in the place from which the data is sent”²²) advocated by Sportradar, decided to stay the proceedings and referred the following preliminary question to CJEU:

“Where a party uploads data from a database protected by the sui generis right under Directive 96/9/EC ... onto that party’s web server located in Member State A and in response to requests from a user in another Member State B the web server sends such data to the user’s computer so that the data is stored in the memory of that computer and displayed on its screen:

(a) is the act of sending the data an act of “extraction” or “re-utilisation” by that party?

(b) does any act of extraction and/or re-utilisation by that party occur

²² Para. 16 of the decision.

- (i) in A only,
- (ii) in B only; or
- (iii) in both A and B?”²³

In its decision, the CJEU held that sending of information from a database protected by the *sui generis* right by means of a web server located in Member State A by one person, to another person’s computer located in Member State B at his request, so he can store the information and display it on his screen, “constitutes an act of ‘re-utilisation’²⁴ of the data by the person sending it. That act takes place, at least in Member State B, where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public in Member State B, which is for the national court to assess.”^{25 26}

case C-170/12 Pinckney v KDG Mediatech AG

The Court de Cassation of France requested a preliminary ruling concerning the interpretation of Article 7(3) of the Brussels I regulation after a dispute over alleged copyright infringement arose between Mediatech AG and Mr. Pinckney, French citizen, the author, composer and performer of 12 songs. These songs were without his knowledge and consent reproduced on CDs in Austria by Mediatech AG, marketed by companies Crusoe or Elegy (both from the United Kingdom) online.

Mr. Pinckney brought an action at a regional court in France. Mediatech then challenged the jurisdiction of that court. This plea of lack of jurisdiction was dismissed and decision in favor of

²³ Para. 17 of the decision.

²⁴ According to Article 7 of Directive (96/9/EC) on the legal protection of databases, “*re-utilisation*” is understood to be “any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission.”

²⁵ Para. 48 of the decision.

²⁶ Full text of the decision is available here:

<http://curia.europa.eu/juris/document/document.jsf?text&docid=128651&pageIndex=0&doclang=EN&mode=lst&dir&occ=first&part=1&cid=609927>

Mr. Pinckney was rendered. Court of Appeal then overruled the judgment for “lack of jurisdiction on the ground that the defendant is domiciled in Austria and the place where the damage occurred cannot be situated in France.”²⁷

The Court de Cassation, after Mr. Pinckney brought an appeal in cassation, referred the following preliminary question to Court of Justice of the European Union:

“Is Article [7](3) of ... [the Regulation] to be interpreted as meaning that, in the event of an alleged infringement of copyright committed by means of content placed online on a website, – the person who considers that his rights have been infringed has the option of bringing an action to establish liability before the courts of each Member State in the territory of which content placed online is or has been accessible, in order to obtain compensation solely in respect of the damage suffered on the territory of the Member State of the court before which the action is brought, or – does that content also have to be, or to have been, directed at the public located in the territory of that Member State, or must some other clear connecting factor be present?

Is the answer to Question 1 the same if the alleged infringement of copyright results, not from the placing of dematerialised content online, but, as in the present case, from the online sale of a material carrier medium which reproduces that content?”²⁸

In its ruling, the CJEU confirmed the jurisdiction of the French courts holding that Article 7(3) of the Regulation must be interpreted as allowing any court to hear the case of copyright infringement occurring on the web-page which is accessible from the jurisdiction of that

²⁷ Para. 13 of the decision.

²⁸ Para. 15 of the decision

respective court. In other words, the CJEU made it clear that Article 7(3) makes it possible for right holders to sue in front of any European Union court, and thus enabled an EU-wide forum shopping for online copyright infringement.²⁹

Interestingly, the CJEU did not mention the limitation of damages to respective territories as it did in eDate Advertising case and also abandoned the former requirement of targeting users in the territory of Member State where the action was brought set down by previous database case, and thus lowered the criterion to the mere accessibility of a web-site.

2.2 Jurisdiction of US courts

In the United States, preponderance of case-law creating sets of rules over regulation through legislative body, such as joint legislative procedure of Council and European Parliament or Congress in the USA, is characteristic.

In order for a court of law to have jurisdiction to adjudicate, it must have two types of jurisdiction:

- a) Subject Matter Jurisdiction, and
- b) Personal Jurisdiction over the parties.

Subject Matter Jurisdiction

State courts have a **general (non-limited) subject matter jurisdiction** which gives them authority to hear vast majority of cases. Federal courts have, on the other hand, **exclusive (limited) jurisdiction**. This jurisdiction allows United States District (federal) courts to hear cases which are “exclusively” entrusted to them by Congress.

²⁹ Full text of the decision is available here:
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=142613&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=699417>

Under 28 U.S. Code § 1338(a)

“the district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.”³⁰

Personal Jurisdiction

Within personal jurisdiction, the US courts have developed doctrine of general and specific jurisdiction. General jurisdiction is established when the defendant is in systematic and constant contact with the state of the forum. For instance, if the defendant in the respective state resides or conducts business there, the Court will have jurisdiction over him.

In case of specific jurisdiction, a purposeful act of infringement toward the forum state done by the defendant is required. However, the Court shall have jurisdiction only over deeds constituting infringement which took place within the territory of the forum. Any infringement outside the forum falls outside the jurisdiction of the court of specific jurisdiction.³¹

Therefore, a US court shall have personal jurisdiction over a defendant residing in the forum who has, for instance, been sharing copyright protected works through peer-to-peer software. In the latter case of personal jurisdiction, the Court may hear a case of infringement allegedly committed by defendant who operates a website from which internet user residing within the forum are downloading copyrighted works.

³⁰ U.S. Code › Title 28 › Part IV › Chapter 85 › § 1338

³¹ Xalabarder, Raquel, *Copyright: Choice of Law and Jurisdiction in the Digital Age*, Annual Survey of International & Comparative Law: Vol. 8: Iss. 1, Article 5 (2002). Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol8/iss1/5>, p. 91

The assessment and presence of specific jurisdiction is highly important especially in so-called long-arm jurisdiction cases in which one³² of the parties is a foreigner (coming either from different state within the federation, or outside United States). Supreme Court of the United States has only once found jurisdiction over defendant who was not resident and that was in the case of *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).³³

Since there is no federal statute in the United States which would deal with personal jurisdiction, the federal district courts apply state “long-arm” statutes³⁴ limited by federal due process.³⁵

Since the United States is a common law country, case law of the higher courts plays an important role when it comes to decision making of lower courts, including the question of jurisdiction. Its binding character *de facto* creates laws applicable to same or similar cases. It is always, however, up to the Court to assess the personal jurisdiction in every single case individually.

³² or both

³³ Cited in *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, No. 09-56134, 2011 BL 204489 (9th Cir. Aug. 8, 2011)

³⁴ For example Pennsylvania long-arm statute 42 Pa.C.S.A. § 5322 (Bases of personal jurisdiction over persons outside this Commonwealth)

“(a) General rule.--A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.”

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

(v) The ownership, use or possession of any real property situate within this Commonwealth.

(b) Exercise of full constitutional power over nonresidents.--In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.”

³⁵ As stated in *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, No. 09-56134, 2011 BL 204489 (9th Cir. Aug. 8, 2011)

In the following text, development of doctrine of personal jurisdiction applicable to copyright infringement and other torts in the context of internet contacts shall be addressed on case-by-case basis.

2.2.1 Minimum Contact Test

International Shoe Co. v. Washington, 326 U.S. 310 (1945)

As well as in the European Union, in the United States the question of proper venue and jurisdiction over the defendant is closely connected to the fundamental right of due process (in Europe more commonly addressed as “fair trial”). In this landmark decision, the United States Supreme Court held that jurisdiction over the parties is an obligatory requirement of due process under the fourteenth Amendment to the United States Constitution and thus for personal jurisdiction to be established at least “*minimum contact with the forum*” must be present so “maintenance of the suit does not offend traditional notions of fair play and substantial justice”.

In order for minimum contact to be present, the Court defined three criteria which have to be fulfilled:

- 1) “defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state,
- 2) the cause of action must arise from the defendant’s activities there,
- 3) the act of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.”³⁶

³⁶ Cited from *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 39 U.S.P.Q.2d (BNA) 1502 (6th Cir. 1996)

Metro-Goldwyn-Mayer Studios Inc., et al. v. Grokster, Ltd., et al.

CV 01-08541-SVW (2003)

Metro-Goldwyn-Mayer Studios and other copyright owners sued Grokster, Sharman Network, a company based in Australia, LEF Interactive and others for copyright infringements committed by users of free peer-to-peer software products called Kazaa, “alleging that they knowingly and intentionally distributed their software to enable users to reproduce and distribute the copyrighted works in violation of the Copyright Act.”

Although this case is highly relevant for its impact on file sharing via peer-to-peer architecture, and represents one of the landmark copyright-related decisions of the United States Supreme Court, it nevertheless also pushes forward copyright infringement personal jurisdiction issues. This question was, however, dealt with by District Court and never reached the Supreme Court.

Defendant Sharman Network, a company based in Australia, filed a motion to dismiss for lack of personal jurisdiction. The plaintiff, since the burden of establishing whether jurisdiction exists lies on him, provided a wide range of defendant’s contacts with the forum:

- a) around two million of forum residents have downloaded and launched the software from by Sharman operated website,
- b) use of forum agent to promote the software in the forum,
- c) inclusion of forum and other US state choice of law provisions in license agreements.

The District Court found that general jurisdiction does not exist in the case of these defendants for lack of “continuous and systematic” contact with the forum. Thus, specific jurisdiction had to be looked at.

Since general jurisdiction was not able to be asserted, in above mentioned case *International Shoe Co. v. Washington* the due process requirement of “*minimum contact with the forum*” had to be established in order for the Court to have specific jurisdiction. Nevertheless, the Court in this case used the prevailing doctrine of the United States Court of Appeals of Ninth Circuit³⁷ formulated in *Ochoa v. J. B. Martin & Sons Farm* which is basically the “*minimum contact test*”. Under this three-element test, the personal jurisdiction is established where a nonresident defendant:

- 1) “purposefully avails itself of the privilege of conducting activities in the forum state, thereby invoking the protections of its laws;
- 2) the plaintiff's claims arise out of the defendants' forum-related activities; and
- 3) jurisdiction over defendant is reasonable.”

To fulfill these requirements, the Court found that the defendant had purposefully availed of doing business in the forum since over 2 million of the software users were residents coming from that particular area. Despite software being distributed free of charge, it generated profit from advertisement and thus represented commercial activity. Furthermore, the license agreement forum-users had to enter into with the defendant constituted a further connection. Based on these conclusions, the Court found jurisdiction to be presumably reasonable.

To further support its findings on the jurisdiction issue, the Court also applied the “*Calder effect test*” (which is further dealt with in the following text). Despite the defendants well-founded argument that the effect test requires him to cause “*tortious effect*” within the forum, and since the case was raised from infringement committed by software users and not him, the effect test

³⁷ See *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182 (9th Cir. 2002)

should not apply. The Court nonetheless established specific jurisdiction and such motions were denied.³⁸

2.2.2 *Calder Effect Test*

Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804, (1984)

This case sets a standard which is now applied by courts for determining jurisdiction in tort-like conducts in intellectual property-related disputes in cyberspace. The plaintiff, a resident of California filed a lawsuit at Californian court for defamation resulting from an article describing her as a person with drinking problems. This article was published in the newspaper “National Enquirer,” distributed in California. Mr. Calder who was responsible for the article, however, lived in Florida and thus challenged the jurisdiction of the court.

To consider personal jurisdiction over the defendant, the Court developed what later became known as the “*Calder effect test*” or simply “*effect test*”. According to this test, personal jurisdiction is established if the defendant who is non-resident engages in

- 1) “intentional actions,
- 2) expressly aimed at the forum state,
- 3) causing harm, the brunt of which is suffered – and which the defendant knows is likely to be suffered – in the forum state.”³⁹

Ultimately, the Supreme Court of the United States held that (specific) jurisdiction over petitioners in California is proper because it meets the criteria set out in the test. It was found, that their intentional conduct in Florida was meant to cause injury to defendant in the forum

³⁸ The decision of the District Court available here:

https://w2.eff.org/IP/P2P/MGM_v_Grokster/20030111_kazaa_jurisdiction_order.pdf

³⁹ Cited in *Metro-Goldwyn-Mayer Studios Inc., et al. v. Grokster, Ltd., et al. CV 01-08541-SVW*

state. Next, that the actions were expressly aimed at the place where the plaintiff lives and works. Finally, that harm did occur in the forum state.

This exact test is nowadays used by some US courts to determine the existence of personal jurisdiction over defendant. Case of copyright infringement where this test was applied follow.

Mavrix Photo, Inc. v. Brand Technologies, Inc., No. 09-56134, 2011 BL 204489 (9th Cir.

Aug. 8, 2011)

Mavrix Photo, a celebrity photo agency established in Florida, filed a lawsuit against Brand Technologies, an Ohio corporation, and Brad Mandell, the CEO of the company, in the District Court of California for unauthorized posting of Mavrix's photographs on Brand's website, thus infringing its copyright.

Mavrix Photo has an office in California, employs local professional photographers and pays taxes there. As a primary business, Mavrix Photo license and sells photos of famous personalities to newspapers and magazines. Brand Technologies runs a website called celebrity-gossip.net, one of the most popular website worldwide, containing photos, videos, articles about famous people from entertainment industry. Although the website has an audience not limited just to California, a specific connection to California does exist. Namely, Brand Technologies earns money on third-party California-related advertisements placed on its website, does business with several California-based companies, a certain California company maintains the website, and it has entered into an agreement with a California-based national news site to mutually promote top stories.

A dispute arose after Mavrix Photo, having registered its copyright, posted photographs of a well-known singer on its website. Shortly after, Brand Technologies had allegedly taken these

pictures and reposted them on celebrity-gossip.net without authorization and therefore committing copyright infringement.

After the suit was filed, Brand Technologies moved to dismiss for lack of personal jurisdiction. The motion was granted and Mavrix Photo appealed.

Mavrix Photo was asserting general jurisdiction over Brand Technologies (since the plaintiff bears the burden of establishing personal jurisdiction). Based on the connections described above, the Court of Appeal, however, did not find continuous and systematic contact with the forum state. Alternatively, Mavrix Photo argued that Brand Technologies had sufficient “*minimum contact*” with the forum state to exercise specific jurisdiction. Out of three requirements set out in the minimum contact test (see *International Shoe Co. v. Washington*), the Court examined only the first one, since the second (forum-related activities) was established by website celebrity-gossip.net with infringing material accessible from the forum state, and the third was not challenged by defendant.

The Court reminded that

“[i]n tort cases, we typically inquire whether a defendant ‘purposefully direct[s] his activities’ at the forum state, applying an ‘effects’ test that focuses on the forum in which the defendant’s actions were felt, whether or not the actions themselves occurred within the forum.”⁴⁰

Applying the “*Calder effect test*”, the Court found, firstly, that Brand Technologies committed an intentional act by reposting the copyrighted photographs on its website. Secondly, that the

⁴⁰ Cited in *Yahoo! Inc. v. La Ligue Contre le Racisme* 433 F.3d 1199, 1206 (9th Cir. 2006)

defendant was expressly aiming at the forum state by operating a website focusing on entertainment industry located in California. And thirdly, that by allegedly infringing Mavrix Photo's copyright, the defendant caused harm to plaintiff which he knew or could have foreseen that it would have an impact on the forum state.

Holding that specific jurisdiction over Brand Technologies was established, the Court of Appeals reversed and remanded district court's decision.

2.2.3 Zippo Sliding Scale Test

Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997)

In this case of trademark infringement, Zippo Manufacturing, a Pennsylvanian corporation, well-known tobacco lighters producer, sued Californian company Zippo Dot Com, internet news website operator which is owner of registered zippo.net and zipponews.com domains.

Zippo Dot Com does business from California where its office and employees are located. The website is accessible to everybody, thus also to Pennsylvanians and approximately 3 000 of its customers are, indeed, paying subscribers from Pennsylvania. Zippo Dot Com also entered into contracts with several internet access providers in Pennsylvania to make available its services to Pennsylvanian residents.

In determining personal jurisdiction over Zippo Dot Com, the Court introduced a "*sliding scale test*" for internet contacts dividing them into three categories.

- The first category of internet contact represents "situation where a defendant clearly does business over the Internet [by] enter[ing] into contracts with residents of a foreign

jurisdiction that involve the knowing and repeated transmission of computer files over the Internet.” If this is the case, then personal jurisdiction is established.

- In contrast, the second category encompasses “situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions.” Such a passive website does not constitute reasonable grounds for the Court to exercise of personal jurisdiction.
- Finally, there is a middle category which represents situations falling somewhere between the first and second categories

“[w]here the defendant's website is neither highly interactive nor entirely passive.”⁴¹ According to the Court, in such cases the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”⁴²

Jagex Limited v. Impulse Software 750 F. Supp. 2d 228 (2010)

In this case of copyright infringement, the “*Zippo sliding test*” was used to determine specific jurisdiction over defendants (Impulse Software, Eric Snellman and Mark Snellman owners of the said company and residents of Florida) who were sued by Jagex Limited, a corporation established in the United Kingdom and owner of a very popular online multi-player computer game called “*Runescape*”.

The computer game is built on a role-playing principle where players situated in a fantasy world operate a customizable their personal avatars.⁴³ “Players interact with one another by trading,

⁴¹ 1. Jeffrey M. Jensen, VI. *Personal Jurisdiction in Federal Courts over International E-Commerce Cases*, 40 Loy. L.A. L. Rev. 1507 (2007). Available at: <http://digitalcommons.lmu.edu/llr/vol40/iss4/6> p. 1515

⁴² The decision available here: http://apps.americanbar.org/litigation/litigationnews/top_stories/docs/zippo.pdf

⁴³ Avatar is a virtual character.

chatting or participating (cooperatively or combatively) in mini-games and challenges,” improving the attributes of their avatar to make it better compared to other avatars.

The defendants have developed a software program called “iBot” “enable[ing] Runescape users to advance their characters through the game with little or no human participation”⁴⁴ which they were later offering for sale on their website. Such software represented a great advantage over the players who have not been using it. Consequently, as stated by the plaintiff, this made some players stop playing and prevented others from signing up.

As a result, “Jagex filed a four-count complaint against the Snellman brothers alleging 1) copyright infringement, 2) violation of the Digital Millennium Copyright Act, 3) trademark infringement under the Lanham Act and 4) violation of the Computer Fraud and Abuse Act” at District Court of Massachusetts. The defendants moved to dismiss for lack of jurisdiction and improper venue.

The Court, applying the “*minimum contact test*” employed the “*Zippo sliding test*” in order to satisfy the second requirement (purposeful availment):

“In this case, the defendants operate interactive websites that allow Massachusetts users to exchange payment information for software codes that enable the Bots to function. Although the defendants do not specifically seek out Massachusetts customers, they do not bar them or discourage them from purchasing Bots. Moreover, the defendants' websites are not “passive” in nature and Massachusetts residents use the websites to sign electronic agreements with the defendants and to purchase and

⁴⁴ The cheating software was automatically fulfilling designated tasks while the gamer was away from his computer.

use their products. Accordingly, the defendants have purposefully availed themselves of the privileges of conducting business in Massachusetts.”⁴⁵

2.2.4 Five-part Test

Dudnikov v. Chalk & Vermilion, 514 F.3d 1063 (10th Cir. 2008)

In this case, the Court of Appeals of the Tenth Circuit in a copyright dispute over an eBay auction formulated and applied innovative personal jurisdiction test in internet contacts which is now known as the “*Five-part test*”.

Starting with factual background, plaintiffs Dubnikov and Meadors were producing fabrics in Colorado and selling them on eBay auction website. The dispute arose over two prints displaying artwork of famous designer Erté to which copyright was held by Chalk and Vermilion Fine Arts, an agent for UK corporation SevenArts. When the defendants found out about this, they asked eBay to suspend the auction. Additionally, the threatened Dubnikov and Chalk with a lawsuit. Disagreeing with the claim, the plaintiffs filed an action seeking a judgment declaring their prints as not infringing the defendants' copyright. The defendants moved to dismiss for lack of personal jurisdiction. The motion was sustained and plaintiffs appealed.

The Court of Appeals heard the case *de novo*, first examining existence of any federal statutory rule applicable to personal jurisdiction. Finding there is regulation of such a matter, the Court moved to the United States Supreme Court due process requirements of “*minimum contact*”, focusing on the “*Calder effect test*” in satisfying “purposeful direction” of the minimum contact test and act-related injuries in the forum jurisdiction. The Court found these elements being present by concluding that the “[d]efendants did not merely inform plaintiffs of their rights and

⁴⁵ Full text of the decision is available here: <https://www.courtlistener.com/mad/dEU/jagex-limited-v-impulse-software/?q=%22circuit%25&page=1971>

invite settlement discussions prior to potential litigation, but took affirmative steps with third parties that suspended plaintiffs' ongoing business operations” aiming at the forum state and causing harm to plaintiffs.

Combining US Supreme Court cases and other case law, the Court introduced a new five-step test focusing on the following factors:

- (1) “committed an intentional action,
- (2) expressly aimed at the forum state,
- (3) with knowledge that the brunt of the injury would be felt in the forum state,
- (4) the plaintiff's injuries arose out of the defendant's forum-related activities, and
- (5) the traditional notions of fair play and substantial justice are not offended.”⁴⁶

Finding that all the criteria of the test were satisfied, the Court reversed the judgment of the District Court and remanded for further proceedings.⁴⁷

2.3 Comparison and Assessment of EU/US Jurisdictional Approaches

In the EU, rules of jurisdiction common to all the Member States of the Union are codified. Jurisdiction-determining criterion of the place where harm occurred in tort cases is justifiable and should remain unchanged. In terms of copyright infringement, the issue of proper forum has been settled by recent CJEU preliminary ruling in *Pinckney v KDG Mediatech* to satisfactory of both justice and practice.

In the US, the federal courts have developed several personal jurisdiction tests as to determine whether the venue is proper so that the court can execute jurisdiction over the defendant. It is

⁴⁶ Berkeley Technology Law Journal, *Dudnikov v. Chalk & Vermilion*, 24 Berkeley Tech. L.J. 657 (2014). Available at: <http://scholarship.law.berkeley.edu/btlj/vol24/iss1/26>, downloaded: 21 February 2014

⁴⁷ The full text of the case available here: <https://www.casetext.com/case/dudnikov-v-chalk-vermilion-fine-arts-inc#.UweII2JdVXs>

obvious that traditional tests of jurisdiction are increasingly difficult to apply in cyberspace-related disputes. Although, it appears that compared to the EU, the US case law is more dynamic and thus more suitable to keep phase with developing communication technologies, too broad tests allowing courts to assume jurisdiction over non-residents may lead to lower legal certainty due to higher chance of *forum shopping*. Additionally, unjustified jurisdiction may lead to unenforceability abroad as the recognition might violate the public order upon which the respective legal system relies. It is, therefore, the responsibility of the courts to adequately question its jurisdiction by considering

- (1) “the burden on the defendant,
- (2) the forum state's interests in resolving the dispute,
- (3) the plaintiffs interest in receiving convenient and effectual relief,
- (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and
- (5) the shared interest of the several states [or foreign nations] in furthering fundamental social policies.”⁴⁸

In case there is a forum which has a closer connection to the case or should the lack one of the above mentioned factors “offend traditional notions of fair play and substantial justice,”⁴⁹ the trial court has to declare *forum non conveniens*.

⁴⁸ *Dudnikov v. Chalk & Vermilion*, 514 F.3d 1063 (10th Cir. 2008)

⁴⁹ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)

3. Conflict of Laws

After the court of law which has jurisdiction over the alleged infringement is determined, the next step of ascertaining the decisive substantive law by the conflict-of-law rules of the forum may be taken.

“With copyright law well established in most countries of the world, but territoriality still firmly in place, international copyright today resembles a “patchwork” of independent national laws, each with its own rules on subject matter, ownership of rights, and scope, and each exacting certain requirements of foreign works as a condition of protection.”⁵⁰

Therefore, in the context of cross-border private enforcement, questions of

- a) law applicable to the alleged infringement and
- b) law applicable to sanctions which may be imposed upon defendant once the infringement is elucidated arise.⁵¹

In theory, there are multiple solutions regarding choice-of-law technique for copyright infringement in cross-border cases. Namely:

- 1) *lex fori*
- 2) *lex loci protectionis*
- 3) *lex loci delicti*
- 4) *lex loci damni*

Starting with most simple one, *lex fori* provides for application of the substantive law of the forum state. In the case of *lex loci protectionis*, the Court using this rule applies the law of the country for which the plaintiff is seeking protection. As a result, the Court usually applies

⁵⁰ *Principles of International Copyright*, Available At:

www.ivir.nl/publications/hugenholtz/Goldstein_Chapter_1.pdf, downloaded: 12 February 2014, p. 7

⁵¹ Engelen, Th.C.J.A. van, *Jurisdiction and Applicable Law in Matters of Intellectual Property* (2010), Available At: www.ejcl.org/143/art143-19.pdf, downloaded: 10 February 2014, p. 12

foreign law to determine substantive copyright infringement law questions. Very similarly for copyright infringement, *lex loci delicti* favors application of law of the place of the wrong (i.e. country where the infringement occurred). Finally, *lex loci damni* indicates law of the country in which the damage occurs.⁵²

3.1 International Conflict-of-Laws Provisions

Since the 1886 Berne Convention is the primary source of copyright law, it is naturally understandable to look for such provisions there. From the wording of **Article 5(1)** of the Convention

“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”

which establishes an important principle of national treatment, it may be understood that the Convention is covering choice of law based on the principle of territoriality. This interpretation was assumed by some scholars and also courts of law (see below US conflict-of-laws dedicated subchapter). However, the sole purpose of national treatment is merely to protect copyright holders from discriminatory treatment which they might face as foreigners rather than to introduce a conflict of laws rule.⁵³

⁵² Froblich, Anita, *Copyright Infringement in the Internet Age - Primetime for Harmonized Conflict-of-Laws Rules?* (2009) Available At: <http://www.btlj.org/data/articles/24-2-d-Frohlich.pdf>, downloaded: 12 February 2014, p. 854

⁵³ Lucas, André, *Applicable law in copyright infringement cases in the digital environment* (2005), Available At: portal.unesco.org/culture/en/files/29336/11338009191lucas_en.pdf/lucas_en.pdf, downloaded: 12 February 2014, p.

Article 5(2) of the Convention provides that “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.” Thus, law applicable to the infringement dispute is *lex loci protectionis* (law of the place where protection is sought).⁵⁴

3.2 Conflict-of-Laws Rules in the EU

One of the main objectives of the EU is to develop a free, open, and fully functioning internal market without national obstacles.⁵⁵ In order to achieve these goals, the following are necessary:

- “improvement of the predictability of the outcome of litigation,
- certainty as to the law applicable and
- the free movement of judgments, for the conflict-of-law rules in the Member States.”⁵⁶

To fulfill this need, the **Rome I Regulation** (593/2008) *on the law applicable to contractual obligations* and the **Rome II Regulation** (864/2007) *on the law applicable to non-contractual obligations* have been introduced by European Parliament and of the Council.

3.2.1 Rome II Regulation

This Regulation is a directly applicable set of conflict-of-laws rules involving non-contractual obligations in civil and commercial matters⁵⁷ within the whole European Union except Denmark.⁵⁸ *Ratio personae* of Rome II is not limited only to people domiciled in the European

⁵⁴ Graeme, *supra* note 14, p. 719

⁵⁵ See Article 26 of the Treaty of Functioning of the European Union

⁵⁶ Recital 6 of the preamble to Rome II Regulation

⁵⁷ Article 1 of Rome II Regulation

⁵⁸ “In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the

Union, but applies without exception to everyone. Additionally, Rome II is “universally applicable” in a way that it is not limited to any EU Member State law.^{59 60}

As a general rule set out by Article 4 of the Regulation, “the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred (...)”. There are however, some exceptions to this principle of *lex loci damni*⁶¹ in the Regulation. Especially relevant to copyright infringement is Article 8 of the Rome II Regulation which provides that “the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right⁶² shall be the law of the country for which protection is claimed.” In other words, the *lex loci protectionis* principle, which is already incorporated in the 1886 Berne Convention, is recognized and remains unchanged in European Union legislature.⁶³ The second paragraph of this Article follows that “in the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.” Unfortunately, at this moment, there is no unitary copyright for the whole EU, so only the first paragraph for the time being shall apply.

adoption of this Regulation, and is not bound by it or subject to its application” (Recital 40 of the preamble to Rome II Regulation).

⁵⁹ “Any law specified by this Regulation shall be applied whether or not it is the law of a Member State” (Article 3 of Rome II Regulation).

⁶⁰ Engelen, Th.C.J.A. van, *Jurisdiction and Applicable Law in Matters of Intellectual Property* (2010), Available At: www.ejcl.org/143/art143-19.pdf, downloaded: 10 February 2014, p. 13

⁶¹ “Before Rome II came into force, virtually all member states applied the principle of ‘lex loci delicti commissi’ as the basic rule for deciding what was the applicable law for disputes arising out of non-contractual obligations.”

Governing law and jurisdiction: Rome II, Available At: www.out-law.com/en/topics/dispute-resolution-and-litigation/arbitration-and-international-arbitration/governing-law-and-jurisdiction-rome-ii/, downloaded: 12 February 2014

⁶² “For the purposes of this Regulation, the term ‘intellectual property rights’ should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights” (recital 26 of preamble to Rome II Regulation).

⁶³ “Regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved” (recital 26 of preamble to Rome II Regulation).

Lex loci protectionis under this Regulation basically means that the law of the Member State in which the infringement occurred, shall be applicable to the dispute as to assess whether a wrong was committed. The law of the country where protection is claimed, however, applies not only to the assessment of alleged infringement, but also to remedies available to the plaintiff.⁶⁴

The reason why *lex loci damni* does not apply in case of a copyright infringement is, as the European Commission has stated in its Explanatory Memorandum to Rome II Regulation Proposal, because “this solution confirms that the rights held in each country are independent (...) as the “territorial principle” enables each country to apply its own law to an infringement of an intellectual property right which is in force in its territory.”⁶⁵

3.2.2 E-commerce Directive

case C-509/09 eDate Advertising GmbH v X

This important case was earlier mentioned in the section dedicated to jurisdiction. Since it deals also with conflict-of-laws question regarding internet, it shall be analyzed separately.

In short, in this case the plaintiff brought action at a German court against a defendant established in Austria for personality rights infringement allegedly committed on a web-site operated by defendant.

The CJEU in a preliminary ruling held that the German court does have jurisdiction to hear the case. Additionally, the German court also referred to the CJEU a question concerning applicable law to liability of internet service provider for such infringement. In particular, it asked for an

⁶⁴ Engelen, Th.C.J.A. van, *Jurisdiction and Applicable Law in Matters of Intellectual Property* (2010), Available At: www.ejcl.org/143/art143-19.pdf, downloaded: 10 February 2014, p. 15

⁶⁵ European Commission, Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“ROME II”) (2003), Available At: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0427:FIN:EN:PDE>, downloaded: 12 February 2014

interpretation of Article 3 of the Directive (2000/31/EC) on electronic commerce as if it has, despite recital 22⁶⁶ in the preamble of the said Directive which does not have a binding nature, conflict-of-laws character.

The CJEU held that Article 3 “must be interpreted as not requiring transposition in the form of a specific conflict-of-laws rule.” Thereinafter, “the provider of an electronic commerce service is not made subject to stricter requirements than those provided for by the substantive law applicable in the Member State in which that service provider is established.”⁶⁷

As a result of this case, it has been clarified that the plaintiff may bring an action against an internet service provider not only in the Member State where the provider is established, but also in the Member State where the plaintiff has his center of interests, or any other Member State in which the content may be accessible (in this case only with damages limited to that territory). In any case, however, the internet service provider’s liability shall be subject to the domestic law of the country of establishment.⁶⁸

3.3 Conflict-of-Laws Rules in the US

Unlike in Europe, where the tradition of private international law rules and application of foreign law governing the substantial part of the dispute by the Court were well established for a long time, and over past few decades strengthened firstly by Conventions⁶⁹ and later more intensively by generally applicable Regulations throughout European Union, “[u]ntil recently, U.S. courts

⁶⁶ “This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.”

⁶⁷ Full text of the judgment:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0509:EN:PDF>

⁶⁸ Moscona, Ron, *The appropriate forum and applicable law in claims against ISPs in the EU* (2011), Available At: <http://www.lexology.com/library/detail.aspx?g=344392fb-58bc-4799-8666-5ea68d2d1272>, downloaded: 10 February 2014

⁶⁹ e.g. Brussels Convention of 1968, or Rome Convention of 1980

were extremely reluctant to adjudicate claims of infringement arising under foreign intellectual property laws and if U.S. law did not apply, the complaint was dismissed” on the grounds of *forum non conveniens*.

In determining the reach of copyright law in *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U.S. 260 (1908), the Supreme Court of the United States held “that the statute does not require notice of the American copyright on books published abroad and sold only for use there.” By doing so, the Court limited the reach to strictly territorial.⁷⁰

Later, dealing with the question of extra-territorial reach of another federal statute (Civil Rights Act) in the case *Equal Employment Opportunity Commission v. Arabian American Oil Company Co.*, 499 U.S. 244 (1991), the United States Supreme Court has held in that “even statutes that contain broad language in their definitions of “commerce” that expressly refer to “foreign commerce” do not apply abroad (...) because there was not “any specific language” in the Act reflecting congressional intent to do so.” Following these precedents, the US courts were, at first, generally speaking reluctant to apply the domestic Copyright Act to infringements occurring abroad⁷¹ invoking *forum non conveniens*.⁷²

The change of this approach took place after the United States Congress has ratified the Berne Convention in 1988 (more than a hundred years after its creation) and enacted The Berne Convention Implementation Act. In its appendix K, Congress nevertheless stated that “[t]he Convention (...) and all acts, protocols, and revisions thereto (...) are not self-executing under the Constitution and laws of the United States [and that] [t]he obligations of the United States

⁷⁰ Froblich, Anita, *Copyright Infringement in the Internet Age - Primetime for Harmonized Conflict-of-Laws Rules?* (2009) Available At: <http://www.btlj.org/data/articles/24-2-d-Frohlich.pdf>, downloaded: 12 February 2014, p. 856

⁷¹ Yu, Peter, *Conflict of Laws Issues in International Copyright Cases* (2001), Available At: <http://www.peteryu.com/gigalaw0401.pdf>, downloaded: 12 February 2014, p.1

⁷² Froblich, Anita, *Copyright Infringement in the Internet Age - Primetime for Harmonized Conflict-of-Laws Rules?* (2009) Available At: <http://www.btlj.org/data/articles/24-2-d-Frohlich.pdf>, downloaded: 12 February 2014, p. 856

(...) may be performed only pursuant to appropriate domestic law.” The US courts must, therefore, consult copyright issues with the US Copyright Act. And since the Act does not provide for conflict-of-laws rules, the question of applicable law becomes inconveniently difficult for the courts which must find another ways how to deal with private international law copyright matters.

American Legal Institute publishes Restatements providing model law for all major legal fields. The Restatement (Second) of Conflict of Laws provides guidance for the courts to follow when determine the law applicable:

- (a) “the place where the injury occurred (*lex loci damni*),
- (b) the place where the conduct causing the injury occurred (*lex loci delicti*),
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties (*lex loci rei sitae*), and
- (d) the place where the relationship, if any, between the parties is centered.”⁷³

This basically means, unlike in the European Union, applying just one conflict-of-laws principle (*lex loci protectionis*). This Restatement model law is nevertheless not binding and represents mere suggestions for the courts to follow. This lack of clear and uniform conflict-of-law rules in respect to copyright (infringement) naturally has led to creation of different approaches throughout the whole US judicial spectrum. Based on the research conducted for this thesis, the main approaches may be categorized as follows:

- 1) Application of U.S. Copyright Act as *lex fori* conflict-of-laws methodology principle in cases where at least one infringing act must happen entirely within the United States.

⁷³ Restatement of the Law Second Conflict of Laws 2d Chapter 7. Wrongs Topic 1. Torts Title A. The General Principle Copyright (c) 1971, The American Law Institute

- 2) Classical tort law approach of *lex loci delicti* for copyright infringement completed entirely outside the United States.

3.3.1 Application of U.S. Copyright Act as *lex fori*

Subafilms, Ltd. v. MGM-Pathe Communications, Co. 24 F.3d 1088 (1994)

In this case, the U.S. Court of Appeals for the **Ninth Circuit** heard a dispute between Subafilms and Hearst and MGM/UA, Warner Bros. and their subsidiaries. Subafilms entered into a joint venture with Hearst for the purpose of producing animated film. Under the agreement, this film was later distributed by UA in theaters and on television. After the advent of video cassettes, UA refused to license the film having doubts about the agreement covering this method of distribution. Despite this, UA's successor MGM/UA entered through its subsidiary into license agreement with Warner Bros. stating that the film on videocassettes could have be distributed worldwide. Subafilms and Hearst protested and later filed a lawsuit for copyright infringement. The District Court found it had subject matter jurisdiction, heard the case, and consequently the defendants were found liable for the infringement. After that, an appeal was filed. The Court granted the appellant's petition for rehearing en banc. Regarding the question of applicable law, the Court

“conclude[d] that there can be no liability under the United States copyright laws for authorizing an act that itself could not constitute infringement of rights secured by those laws, and that wholly extraterritorial acts of infringement are not cognizable under the Copyright Act, we overrule Peter Starr⁷⁴ insofar as it held that allegations

⁷⁴ “[A]n infringer is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner.”
Cited from *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

of an authorization within the United States of infringing acts that take place entirely abroad state a claim for infringement under the Act.”

The Court has asserted *forum non conveniens*, refusing to apply the U.S. Copyright Act extraterritorially based on the national treatment principle introduced by the Berne Convention. Some commentators assume that the Court considered Article 5 (1) of the Berne Convention to be a *lex fori* choice-of-law provision⁷⁵ based on the following statement of the Court: “[a]lthough the treaties do not expressly discuss choice-of-law rules (...), it is commonly acknowledged that the national treatment principle implicates a rule of territoriality.”

Subafilms case is, nevertheless, binding only in the Ninth Circuit. In conclusion, the Court of Appeals stressed that it was intent of the Congress for the U.S. Copyright Act not to have an extraterritorial reach, unless the infringing act occurred within the territory of the United States. The Court did not apply any foreign law.

Los Angeles New Service v. Reuters Television International, Limited 340 F.3d 926 (9th Cir. 2003)

Later, the same court heard in merits a very similar case in which Los Angeles News, the copyright owner sought damages under the U.S. Copyright Act against unauthorized exploitation of audiovisual work abroad of copyrighted work by Reuters and others.

Los Angeles News had produced and broadcasted a video footage which was then licensed to the National Broadcasting Company (NBC). This company later transmitted the video to Visnews, a joint venture of Reuters, NBC, and the British Broadcasting Company (BBC) to New York

⁷⁵ Frohlich, Anita, *Copyright Infringement in the Internet Age - Primetime for Harmonized Conflict-of-Laws Rules?* (2009) Available At: <http://www.btlj.org/data/articles/24-2-d-Frohlich.pdf>, downloaded: 12 February 2014, p. 858

City under a news supply agreement. From there, the video was copied and consecutively broadcasted to Europe without proper authorization.

After the District Court dismissed the claim with respect to extraterritorial infringement, the plaintiff appealed. The Court of Appeal recalled the *Subafilms case*, reminding that U.S. Copyright Act does not apply extraterritorially. However, “[f]or the Act to apply, at least one alleged infringement must be completed entirely within the United States.”⁷⁶ Accepting the appellants argument that “the unauthorized copying of its works in the United States enabled further exploitation abroad” supported by Second Circuits conclusions in *Sheldon v. MetroGoldwyn Pictures Corp.*,⁷⁷ the Court found that the appellant may recover damages resulting from exploitation of his work abroad.

3.3.2 *Lex loci delicti*

London Film Productions, Ltd. v. Intercontinental Communications, Inc., 580 F. Supp. 47

(1984)

London Film Productions is the first case in which “a federal district court for the first time accepted jurisdiction over an action for foreign copyright infringement.”⁷⁸ The case is, however, rather important from the conflict-of-laws point of view since the Court here favored and applied foreign copyright law.

The British corporation London Film Productions, the plaintiff in this case, filed a lawsuit at New York District Court against Intercontinental Communications, corporation established in

⁷⁶ *Allarcom Pay Television Ltd. v. General Instrument Corp.*, 69 F.3d 381, 387 (9th Cir. 1995)

⁷⁷ *Sheldon v. MetroGoldwyn Pictures Corp.*, 106 F.2d 45, 52 (2d Cir. 1939)

⁷⁸ Toraya, David, *Federal jurisdiction over foreign copyright infringement actions – an unsolicited reply to professor Nimmer* (1985), Available At:

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New York, alleging that his British copyright in certain motion pictures had been infringed in several South American countries (Chile, Venezuela, Peru and others) by the defendants conduct. The films in stake “[were] protected by copyright in Great Britain as well as in Chile and most other countries (but not in the United States) by virtue of the terms and provisions of the Berne Convention.”

The defendant had moved to dismiss the claim for lack of jurisdiction arguing that “plaintiff has not alleged any acts of wrongdoing on defendant's part that constitute violations of United States law, and, therefore, defendant claims that this Court lacks a vital interest in the suit.” The Court denied the motion, finding personal jurisdiction over the defendant after no more convenient forum has been referred to. The Court also noted that “the need to apply foreign law is not in itself reason to dismiss or transfer the case.”

As to the applicable law, the Court accepted the plaintiff’s argument that “[s]ince, under the Berne Convention, the applicable law is the copyright law of the state in which the infringement occurred, (...) the laws of several countries [shall be applied].” This court’s conclusion implies the interpretation of Berne’s Article 5(2) as *lex loci delicti*.

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

This case *offer[s] one of the most detailed [conflict] of law analyses seen in modem copyright cases*.⁷⁹ Here, the Court of Appeal for the Second Circuit dealt with a dispute between a Itar-Tass Russian News Agency, a wire service and news company from Moscow and Kurier, a Russian newspaper distributed in New York area. Itar-Tass alleged that Kurier, by unauthorized copying and subsequent republication of about 500 news articles, infringed his copyright.

⁷⁹ Graeme, *supra* note 14, p.12

The Court noted that “[conflict] of law issues in international copyright cases have been largely ignored in the reported decisions and dealt with rather cursorily by most commentators.” Denying the use national principle of Berne Convention as a choice-of-law rule, the Court moved to other possible sources. Finding that neither Copyright Act provided guidance, the Court took into account the Restatement (Second) of Conflict of Laws §222.⁸⁰

In determining ownership of the copyright, the Court used “the most significant relationship” criterion finding that since the literary works were originally created and published in the Russian Federation by a Russian national, the most significant relationship gave rise to application of Russian law.

Switching to the applicable law of copyright infringement, the Court observed that the governing principle is predominantly *lex loci delicti*. Having found that the alleged infringement took place in the United States, the Court applied U.S. Copyright Act.

3.4 Comparison and Assessment of EU/US Conflict-of-Laws Approaches

The European Union and the United States have chosen diametrically different approaches when it comes to conflict-of-laws rules in copyright infringement cases. While the EU has enacted a uniform set of rules applicable throughout whole federation (Rome II Regulation) consistent with Berne’s *lex loci protectionis*, the US has not clarified this issue by enacting statutory provisions, but left the policy making up to the common law federal courts. United States courts are therefore free to choose one of the above mentioned approaches towards applicable law to

⁸⁰ “The interests of the parties in a thing are determined, depending upon the circumstances, either by the “law” or by the “local law” of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6.”

the copyright infringement cases which are heard by them. This, indeed, raises a great deal of legal uncertainty. The parties are facing unpredictable decision which must be taken by a court, based on its discretion and arguments presented by the parties, in order to determine the substantive law of one particular country.

Additionally, with the USA being a signatory country to the Berne Convention, *lex loci protectionis* may be also applied. The courts, however, have been unwilling to apply this principle when resolving conflict-of-laws issues. Instead, the US courts either apply *lex fori* or *lex loci delicti*. Change of this approach and acceptance of this rule in the US would be a step towards common principles of private enforcement of copyright.

Conclusion

The primary objective of this thesis was to provide an overall description and consequent assessment of current state of jurisdiction and conflict-of-law rules in the EU and US with respect to copyright infringement on the Internet.

As to the (personal) jurisdiction, the continual development of case law of US federal courts and the Court of Justice of the European Union, especially in light of recent clarification of specific jurisdiction in *Pinckney v KDG Mediatech*, are appropriate enough to meet criteria of due process and sufficiently effective to meet challenges of cross-border copyright infringement litigation. However, too broad application of jurisdiction tests by US courts may put legal certainty into question. On the other hand, declaring *forum non conveniens* which would lead to *denegation iustitiae*⁸¹ is no less undesirable. It is, therefore, the role of the courts of law to guard, adhere to, and promote justice by finding a fair balance between the justified interests of a plaintiff and predictability and fairness for a defendant.

Regarding conflict-of-laws rules, the EU and US approaches are substantially different. Unlike the US, the EU chose to address the issue at stake by adopting *lex loci protectionis* regime contained in Article 8 of Rome II Regulation, a uniform conflict-of-laws rule for intellectual property rights infringement which is generally applicable and “binding in its entirety and directly applicable in all Member States.”⁸² Although this rule is, indeed, of much help, the said law, however, does not content a specific provision regarding copyright infringement in internet contacts. Such an omission should be corrected in the next recast of the Regulation together with

⁸¹ Denial of justice.

⁸² Article 288 of the Treaty of Functioning of the European Union.

clarification of the place of harm in cyberspace. An issue which turned out to be a primary problem is determination of place of infringement.

The question of identifying the place of infringement casts difficulties in choosing the proper applicable law based on conflict-of-laws rules and thus jeopardizing the whole procedure, especially the ultimate outcome – the decision, which traditionally in cross-border litigation has to be later recognized and enforced in a country different from the forum state. Here, the principle of *ordre public* comes into consideration when recognition of the decision has been applied for. And should the jurisdiction or conflict-of-laws rule be wrongly applied and thus potentially violating fundamental legal principles of the recognizing country, the decision may very well not be enforced, causing serious inconvenience to the plaintiff.

In America, either the United States Congress should consider enacting the Private International Law Act which would address at least conflict-of-laws issues to secure unified application throughout the federation, or the courts, preferably Supreme Court of the United States, should accept and apply Berne Convention's conflict-of-laws provision of Article 5(2) as *lex loci protectionis* rule.

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