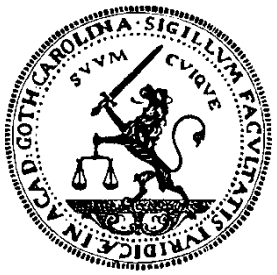

FACULTY OF LAW

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The Conflict of Laws and Jurisdiction

An essay on the connection between Private International Law and Copyright in enforcing online copyright infringements

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Contents

Summary

Since the emergence of the Internet in the early 1990's a lot has changed in the world and the area of law is no exception. Important for this essay is that the internet created a strong connection between the areas of Private International Law and Copyright, mainly since copyright infringements became transnational to a higher extent and happened more through ubiquitous medias. These two legal fields now work together to create rules on enforcement of copyright infringements. However it appears that the effectiveness of enforcement is lagging behind, mainly because of reluctance from the EU to change the rules to better fit the digital climate. These existing rules worked well when they were first introduced, but that was at a time when the nature of infringements was different from today. The issue lies in the rules' dependence on the principle of territoriality, the issue being that it is difficult to regulate a non-territorial infringement with territorial rules.

The new types of infringements cause issues in both the field of jurisdiction and applicable law. These are issues of major importance to solve to be able to effectively enforce infringements and catch infringers globally. But, as this essay will show, the existing rules are inadequate. To create an enforcement process that is not extremely expensive or overly time consuming the rules need to evolve to fit the nature of today's copyright infringements.

Copyrights provide rights for authors and artists in the creative industries, and an ineffective enforcement of those rights could make it hard for those protected to keep creating, leading to fewer artistic works being published. Should this happen it could have devastating consequences not only concerning the viability of businesses and the economy, but also ultimately for culture as a whole.

Sammanfattning

Allt sedan Internet introducerades på 1990-talet har mycket förändrats i världen och juridik är inget undantag. Genom internet skapades en ny koppling mellan copyright och Internationell Privaträtt, detta för att copyrightintrång blev transnationella till en högre utsträckning och började ske genom massmediala kanaler. Sedan denna förändring får nu Copyright och Internationell Privaträtt arbeta tillsammans för att skapa bra regler som gör att rättighetsinnehavare kan ta tillvara sin rätt även i den nya internationella miljön . Tyvärr har dessa regler inte hängt med i utvecklingen då EU inte verkar vara villiga att uppdatera dem till något som fungerar i dagens digitala klimat.
De regler som finns fungerade bra när de först antogs av EU, men då såg intrången inte ut som de gör idag. Problemet ligger i att reglerna är så bundna till territorialitetsprincipen, detta blir ett problem då det är svårt att reglera icke-territoriella intrång med territoriella regler.

Den nya formen av intrång skapar problem både gällande jurisdiktion och tillämplig lag. Dessa frågor är viktiga att ha bra svar på för att man som rättighetsinnehavare på ett effektiv sätt ska kunna ta tillvara sin rätt och de som gjort intrång ska kunna straffas. Som vi kommer se kan dagens regler inte ge oss den effektiviteten. För att skapa en process som inte är orimligt dyr eller tar alldeles för lång tid måste reglerna anpassas för att fungera ihop med dagens Copyrightintrång.

Copyright skapar rättigheter för artister och författare i de kreativa branscherna. En ineffektiv process för att tillvarata dessa rättigheter skulle kunna innebära att de som tidigare har skapat t.ex. musik tappar motivationen till att fortsätta. Detta skulle leda till att färre verk publiceras, något som skulle kunna påverka inte bara ekonomi och affärsverksamheter men hela kulturscenen.

Abbreviations

BC	Berne Convention
IP	Intellectual Property
IPRs	Intellectual Property Rights
WIPO	World Intellectual Property Organization
P2P	Peer-to-peer
PIL	Private International Law
CJEU	European Criminal Court of Justice
CLIP	Max Planck group on Conflict of Laws in Intellectual Property

1 Introduction

1.1 Presentation of subject

In 1962 the first small seed of a phenomenon now called the Internet was planted at the Massachusetts Institute of Technology, but we would have to wait until the 90's before it became available for the public. In the years that followed that little seed grew and eventually came to change the world as we knew it then. The Internet gives almost limitless possibilities for communication and development and it lets people connect with the world without regard to national borders.[1] It is sufficient to say that the Internet and the tech boom that followed in the 90s'[2] affected many areas of law, and whilst it probably has been one of Mankind's greatest inventions it also seems to have caused some unexpected trouble. This thesis will discuss in what ways the Internet caused trouble regarding the effective enforcement of online Copyright infringements and what that means for society today.

Over the 20+ years that Internet has existed the ways infringements occur have changed massively. It is estimated today that a quarter of all internet traffic comes from infringing material.[3] Therefore the aspect that the Internet and technology have changed concerning Copyright law is mainly the

[1] B.M. Leiner, V.G. Cerf, D.D. Clark m. fl," *Brief history of the internet*", < http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet>, published 2012, page 2 and page 18

[2] M. Doms," *The boom and bust in information technology investment",* FRBSF Economic Review, 2004. Page 19

[3] M. Gloglo," Finding *the law: The case of Copyright and related rights enforcement in the digital era",* WIPO Journal 2013 vol.4 issue 2, page. 221

way in which infringements occur. The Napster[4] and Pirate Bay[5]-trials show the emergence of file-sharing and P2P, whilst platforms like YouTube make it extremely easy to upload, watch and listen to infringing material online. Significant for this kind of online infringement is that there is no direct influence from country borders. A user can easily watch Copyrighted material in Sweden, from a British author broadcasted from Spain. So when enforcing this kind of infringement one big question arises. Where can I sue, and how? If the internet is borderless and the infringing material can reach close to every country, how do we know where to sue and what law to apply? It becomes especially difficult when Copyright is based on territoriality but the infringement is not necessarily territorial at all.[6]

1.2 Purpose of thesis

The purpose of this thesis is to investigate the enforcement of Copyright infringements, and specifically what today's extreme online environment does to the effectiveness of enforcement. In this context Effectiveness means how difficult it is to take action against infringements.[7]

This topic is very interesting and relevant since we are working and living in a digital era, an era where the Internet has not only made it very easy for perpetrators to hide behind their computer, but also raises intricate and complicated questions in the area of Private International Law. The connection between Private International Law and Copyright lies in the way infringe-

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[4] K.D. Crews, "*Case summary A&M records inc. V. Napster inc.", < http://variations2.indiana.edu/pdf/AnalysisOfNapsterDecision.pdf >, Page 2,* Retrieved 2016-05-15

[5] Jemima Kiss, "*The Pirate Bay trial: Guilty verdict"* <https://www.theguardian.com/technology/2009/apr/17/the-pirate-bay-trial-guilty-verdict> - Retrieved 2016-05-07

[6] M. Gloglo," Finding *the law: The case of Copyright and related rights enforcement in the digital era",* WIPO Journal 2013 vol.4 issue 2, page 226-227

[7] I consider an effective enforcement to be one that is not unreasonably time consuming and expensive.

ments occur; they are no longer limited to one country alone. The nature of the Internet makes online infringements have wide trans-national span that can reach nearly all countries in the world. This is a situation that domestic rules single- handily have some difficulty addressing.[8] They need some assistance in the form of international regulations which is where Private International Law is helpful. Private International Law helps domestic courts in deciding upon jurisdiction and applicable law, to know who is to make a judgement and with what rules.[9]

This essay aims to explore how Private International Law works with Copyright and if the two together can create an effective enforcement of infringements, because , if the rules deciding upon jurisdiction and applicable law within Private International Law are diffuse and hard to use that will affect the enforcement of Copyright infringement rules. If it is unclear how the enforcement is supposed to happen, probably no one will invest the time and effort into doing it.

It appears that the research status on this topic is unclear, and there also appears to be considerable confusion about how to solve the new problems that are arising. Every scholar and court seem to have their own way of attacking the problems with different methods and principles which makes the legal situation unnecessarily complicated and ambiguous.[10][11] However, it seems that the scholars are not at fault for this dilemma. As we will discover the problem lies in the rules not being adapted to the internationalisation in this area of law, and a clinging on to old principles which are not working anymore. It appears that the rules are out of date, and this forces researchers

[8] See note 9

[9] private international law. (n.d.) *West's Encyclopedia of American Law, edition 2*. (2008). Retrieved 2016-05-15 <http://legal-dictionary.thefreedictionary.com/private+international+law>

[10] Matulionyte R (2015). Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules. JIPITEC, Vol. 6(2). Para. 20

[11] Note 10 in comparison with Case C-170/12 and C-441/13 where the CJEU used a different method for deciding jurisdiction

and courts into making interpretations of them. And interpretations make it difficult to get good predictability.
The objectives of this thesis are to make the current legal situation clearer, shine light on some of the issues and hopefully give some insights as to how the issues could be solved.

To limit the scope of the thesis, it will only cover non-contractual relations, which leads to investigation of the Brussels 1a-regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters as well as the Rome II-regulation on the law applicable to non-contractual obligations. These two will be the basis, but in addition to them it will also consider the CLIP-proposals from Max Planck group on the conflict of laws in Intellectual Property, mainly since they seem to be a better reflection of the direction the legal field is heading, and therefore gives some good pointers. The scope of the thesis is intentionally limited to ubiquitous infringements considering those are what create the bond between Private International Law and Copyright.

1.3 Research question

Does Private International Law and Copyright create an effective enforcement of ubiquitous copyright infringements, or have internationalisation and technological changes in the creative industries made it hard to enforce the rules?

1.4 Method and perspective

To be able to answer the research question, an in depth exploration of both Copyright and Private International Law is needed to understand how they work together, as well as on their own. The use of both scholarly articles, handbooks from WIPO, literature on the subject and case studies will be of big help. The diverse range of sources will hopefully help gaining as wide a

perspective as possible to minimize the risk of missing any important aspects.

Much of the material will come from the online world, mainly because this area of research is fairly recent and is changing at a rapid speed, which means that the Internet and the material it holds, in most cases, is more up to date than the literature on the same subject. Being aware that the Internet is a tricky place to navigate regarding sources, I will do my utmost to make sure that all my material comes from reliable sources such as: IP organisations, IP and PIL lawyers or similar with the same level of authority.

Delving into this topic I knew it was going to be a challenging journey. It is intricate and filled with complicated technical jargon. I will therefore try and make this thesis as explanatory as possible and clarify the many questions.

I am adopting a critical view of the topic, and my criticism targets the legislators for not adapting and updating the current legislation to suit the global environment. I consider the positioning of legal frameworks in the area of Copyright and Private International Law today to reflect a conservative view, reluctant to face the fact that the issues they are supposed to regulate have changed.

1.5 Structure

I will begin with an introduction to the subject, to enable the reader to become comfortable with expressions and terms related to Copyright. I will go through the basic structures and phenomena related to Copyright and neighbouring rights. After this introduction, I will begin by considering enforcement. First there is a walk through of enforcement in general followed by a more in-depth discussion of the Private International Law and Copyright questions. I will review jurisdiction and applicable law in different sections to avoid confusion and finish with an analysis and my conclusions. My wish is that this thesis will be educating and informative whilst investigating some highly relevant issues and offer possible solutions.

2 Basics

2.1 Copyright

Copyright is a branch of the IP-family, closely connected to the creative industries since it concerns protection of artistic work. It should be seen as a group of very exclusive rights belonging to whomever can be seen as the rights' owner. The first right is that the owner has the right to copy the work, but further, Copyright gives the exclusive right to make adaptions of the work, publish, perform and broadcast it. The exclusive character mean that only the rights' owner is entitled to use the work in these ways[12], and his or her exclusive IP-rights are protected by a country and can be seen as "belonging" to that same country. This is now causing some issues as will be described later on.[13] If someone else wants to use the work in a copyrighted way, they will need the authorisation or license from the rights' owner and if they use the work without authorisation it counts as a Copyright infringement.[14]

It is important to note that Copyright is a noun, which means that it is not an action but an object. This is, in some ways, what makes the concept of Copyright so hard to grasp, and why some of the fundamental Copyright problems arise. The trouble lies in that it is an object, but not a physical thing you can touch. It just, exists. And the thing it exists within is called a "work", so when speaking about Copyright one finds the protection within the artistic creation. Copyright cannot exist on its own so without an artistic

[12] Frith, S., & Marshall, L. (2004). *Music and copyright*. Edinburgh: Edinburgh University Press, cop. 2004. Page 7

[13] Fentiman, R, Choice of law and intellectual property in Anette, K, *Studies in industrial property and Copyright law vol. 24,* Oxford and Portland Oregon: Hart Publishing, 2005, Page 132

[14] "*What is Copyright?"* < http://www.wipo.int/copyright/en/#copyright>, Visited 2015-05-14

creation there is no Copyright. Furthermore, for a work to be eligible for the protection of Copyright it must reach the requirement of originality. An original work is simply a work that has not been copied from someone else. It should be the author's own *intellectual* creation. This criterion differs slightly depending on where in the world you are, but the main idea remains the same.[15]

Another important limitation of Copyright is that it does not extend to the ideas themselves but merely the way in which the idea is expressed, so if you have an idea in your head that you do not put down in a medium that can be enjoyed by others you cannot Copyright it.[16] This is a quite obvious limitation since, if the idea has not been expressed in a way that others can perceive, it is impossible to copy it.[17]

2.1.1 Moral rights

The rights that fall under Copyright are divided into two different areas. The first one is the Moral rights to the work and the second the Economic rights. Moral rights exist to protect the artist or author not economically, but for the time and effort the author has put into creating it. These rights cannot be sold or transferred to another person; they belong to the creator of the work, and can only be waivered to some extent. What comes under Moral rights differ from country to country. In Great Britain Moral rights consist of the right to be recognised as the author, the right not to have the work be treated in a derogatory way, the right to not be named the author of a work he or

[15] Frith, S., & Marshall, L. (2004). *Music and copyright*. Edinburgh : Edinburgh University Press, cop. 2004. Page 6-10

[16] Annex 1C of Marrakesh Agreement Establishing the World Trade Organisation, TRIPS agreement, 1994, art. 9(2)

[17] "*Understanding Copyright and related rights", 2005,* < http://www.wipo.int/edocs/pubdocs/en/intproperty/909/wipo_pub_909.pdf>, Visited 2016-04-19

she did not create and the right to privacy.[18] In Sweden the Moral rights are fewer and consist of the right to be named in connection to the work (Namngivelserätt) and the right to have the work treated with respect (Respekträtt).[19]

Regardless of the location, Moral rights might differ, but the purpose behind them is the same; to protect the author.[20]

2.1.2 Economic rights

This is what gives the author the right to make money out of their work, and these are also the rights that give the opportunity to grant or stop use of the work in any way.[21] These rights usually contain the right of reproduction, distribution, public performance, adaption etc.[22] These are most likely the rights we usually think of when speaking about Copyright.

It is these Economic rights that make it possible for an author to claim compensation for infringing acts in the work if they have suffered economic loss from the infringement. This goes back to the principle that one cannot claim damage if one has not suffered economic loss.[23]

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[18] Intellectual Property office, "*The rights granted by copyright", 2015,* <https://www.gov.uk/guidance/the-rights-granted-by-copyright>, Visited 2016-04-28

[19] "*Upphovsrätt",* <http://www.forlaggare.se/upphovsratt>- Visited 2016-04-28

[20] As is evident from the fact that Sweden and the UK have put different content into the moral rights but they aim at doing the same thing.

[21] "Find *out more about your rights",*< http://www.copyrighthub.co.uk/protect/find_out>, Visited 2016-05-10

[22] Intellectual Property office, "*The rights granted by copyright", 2015,* <https://www.gov.uk/guidance/the-rights-granted-by-copyright>, Visited 2016-04-28

[23] Search word: Damages, <https://www.law.cornell.edu/wex/damages>, Visited 2016-04-25

2.2 Neighbouring rights

In legal terms, Copyright is usually referred to as "Copyright and neighbouring rights". These neighbouring rights often belong to the production company that organises and publishes the recording. What they really mean is that the rights holder owns the right to decide when e.g. a sound recording is to be performed in public. Thereby, if someone would like to perform a musical work that is "protected" by Copyright, that person would need a license from the rights holder to perform that song. Basically this group of rights establishes the terms and conditions for legal performances of sound recordings in public. Normally these rights are managed by "neighbouring rights organisations" that handle rights for a lot of different rights holders and make sure the money that comes from royalties etc. goes to the right person.[24]

It is of great importance to keep the Copyrights and the neighbouring rights apart, mainly because of two reasons. First, the rights aim to benefit different parties of the work and therefore one must know which party and which right they are referring to. Secondly, the rights last for different time periods so, to be able to know how long the protection will be there for it is important to know which right is being considered.[25] If the protection has expired, the work changes "owner" and starts belonging to the "public domain". Every work that does not fall under intellectual property protection belongs to the "public domain", that is both Copyrighted works for where the protection has expired and works that were never protected in the first place. What happens in the public domain is that the public owns the right to these works and anyone can use them without the permission necessary for Copyrighted works.[26]

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[24] "*Neighbouring rights FAQ",* < http://www.wixenmusic.co.uk/neighbouring-rights-faq/>, Visited 2016-04-15

[25] (Frith, S, & Marshall, L). Page 8

[26] " Welcome *to the public domain",* Chapter 1, <http://fairuse.stanford.edu/overview/public-domain/welcome/>, Visited 2015-05-14

3 Enforcement

3.1 Enforcing rights

To enforce means "to make sure that people obey a particular law or rule[27]".To enforce intellectual property infringements thus means that you as a rights owner take infringements of your rights to court and demand compensation for the damage the infringement have caused.
The issues discussed in this thesis all lead back to the effective enforcement of infringements. The importance of this lies in that, if there is no efficient system at hand for enforcing rights, the incentive to keep creating works of art could vanish.[28]

In the area of enforcing intellectual property rights, much has happened over the last years, mainly due to two factors. First, is the emergence of new technologies. Secondly, Intellectual Property Rights have assumed a big economic importance in international trade, which alone is a reason for keeping them well administered.[29] There are thus many different reasons as to why players such as the EU already should have solved many of the issues surrounding the enforcement of Copyright but, as we will see that has not been the case.

As was stated in the Gowers Report from the British government in 2006: "Ideas are expensive to make, but cheap to copy[30]" and this is why an efficient system of enforcement is so important. Who would want to invest a

[27] S. Wehmeier, Oxford Advanced Learner's dictionary, sixth edition, Oxford University Press, 2000, "*Enforce",* page 145

[28] "*Copyright and wrong",* The Economist, <http://www.economist.com/node/15868004>, Visited 2015-05-13

[29] "*WIPO intellectual property handbook*", Publication No.489(E), Published 2004 and reprinted in 2008 p.213

[30] "*Gowers Review on Intellectual Property",* 2006, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf>, p. 3, Visited 2015-05-14

significant amount of time and money into creating something if someone else can replicate it and get away with it for a much smaller stake?

3.1.1 Territoriality

The cornerstone of this legal field is the principle of territoriality, and the precise meaning of this principle is that an Intellectual Property right cannot extend to outside the territory of the state that granted it. So if Copyright for a work has been recognized in Sweden, the protection only extends to the Swedish borders. As we will see, the methods used to decide jurisdiction and applicable law is to a large extent based on this very fundamental principle.[31] The key question is whether this is still is a sustainable approach or if it is just a conserved remnant from the days of pre-globalisation.
If one looks in to the meaning of the principle, it becomes quite clear that it does not go well with internationalisation and digitalisation.[32]
Technological advances and globalisation are blurring the lines between country borders and if one looks at the Internet it almost seems as if we now live in a huge global country. So, understandably it becomes difficult applying a principle so deeply connected to territoriality when the Internet does not seem to recognise territorial borders.

There are two different schools or theories regarding territoriality: strong territoriality and weak territoriality. Strong territoriality can be linked to the identity of the applicable law and thus the choice-of-law. Whilst weak territoriality links to the scope of applicable law and thus it is concerned with the content of law. According to Prof. Richard Fentiman, this divided view of the concept of territoriality is why there is a problem with different opinions on the need for special applicable-law rules. The scholars advocating

[31] "*Choice of law in international intellectual property disputes*", < https://www.translegal.com/lesson/6020>, Visited 2016-05-07

[32] P. Drahos mfl., "*The universality of Intellectual Property rights: origins and development*", <http://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_1.pdf >, page 5-6, Visited 2016-05-14

territoriality to be enough of a choice-of-law rule obviously do not see the need for another choice-of-law rule.[33]

3.2 The relationship between Copyright and Private International Law

Most of Copyright disputes today have some type of connection to international law, even though the rules are territorial in their nature.[34] So whether we like it or not, we need to use principles from international law when dealing with Copyright issues that go beyond country borders, such as ubiquitous and transnational infringements.

An issue that was ignored for a long time, and maybe still is to some extent today, is the classical problem with jurisdiction and applicable law that is so well known from Private International Law. An explanation as to why this question was ignored for such a long time is that the territoriality principle was, and still is, considered to be sufficiently clear. The courts decided that the "place of injury" was clear enough which meant that it to became the the country with jurisdiction and applicable law. However, digitalization and new technologies are making it increasingly hard for courts to keep using this approach since infringements happening online have a simultaneous impact on multiple territories.[35]

Due to the fact that state borders became less significant with the emergence of the Internet it is important to have effective rules and procedures to make sure enforcement is possible and that it does not become a process that is

[33] R. Fentiman, Choice of law and intellectual property in *Studies in industrial property and Copyright law vol. 24, ,* Hart Publishing, Oxford and Portland Oregon, 2005 – Page 139

[34] M. Gloglo," *Finding the law: The case of Copyright and related rights enforcement in the digital era",* WIPO Journal 2013 vol.4 issue 2, page. 221

[35] "*The enforcement of intellectual property rights*", third edition, 2012, <http://www.wipo.int/edocs/pubdocs/en/intproperty/791/wipo_pub_791.pdf>, page 33, Visited 2016-05-14

too expensive and time consuming.[36] Since the online environment is borderless and cannot be directly connected to one domestic legal system, because of this, Private International Law as previously mentioned, becomes more important. If the infringement could have been limited to one country the question on jurisdiction and applicable law would already have been answered. But since most infringements nowadays are far from limited to one country we have to rely on rules from Private International Law to decide jurisdiction and applicable law in these situations, and then leave it up to domestic courts to make a final decision.[37]

The main legal frameworks used to decide these questions are the Brussels 1a regulation and Rome II regulation.[38]

In addition to the mentioned EU-regulations a group from the Max Planck institute created and published the "CLIP-proposals" in 2011. This is a collection of principles aimed at improving the legal situation for both defendants and plaintiffs, to improve the legal stability and predictability in courts and provide guidelines for how to handle Intellectual Property rights in today's international climate. The principles are not legally binding, but should be seen as a tool to either adapt or give inspiration to domestic and international legislators when looking into and resolving disputes regarding IP and PIL. The principles offer guidance on both jurisdiction and applicable law and they seem to have been positively received by the IP-community.[39]

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[36] Ansgar Ohly, Choice of law in the digital environment – Problems and possible solutions, in *Studies in industrial property and Copyright law vol. 24, ,* Hart Publishing, Oxford and Portland Oregon, 2005 – Page 241

[37] G. Austin, "*WIPO Forum on Private International Law and Intellectual Property",* 2001, page 2-5

[38] Matulionyte R (2015). Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules. JIPITEC, Vol. 6(2). Para. 1

[39] "*Principles on conflict of laws in Intellectual Property*", CLIP-group, Final text, 2011 < http://www.imprs-ci.ip.mpg.de/_www/files/pdf2/Final_Text_1_December_2011.pdf >, Visited 2016-05-15, p.5-6

3.3 Jurisdiction

The definition of jurisdiction is the "authority of a court to hear and determine cases[40]" which in PIL is a fundamental question since this area of law is designed for transnational issues[41]. The question becomes especially interesting within Copyright law today since the Internet brings in the ubiquitous dimension to the issue and creates intricate problems.

In 2012 the EU gave us the updated Brussels 1a regulation as a tool for solving questions regarding jurisdiction. The main rule is that the defendant's domicile is the correct jurisdiction[42]. In some cases though, it is possible to make an exception to this rule and put the case before another court. For this thesis art. 7.2 is of utmost importance. It deals with damages for non-contractual obligations and it says that in those cases, the place of damage or possible damage is the correct jurisdiction.
Case law from the CJEU says that place of damage can be interpreted in one of two ways, where the damage occurred or the place where the damaging act originated.[43]

3.3.1 The access approach through Peter Pinckney v. KDG Mediatech

This is a ruling that gained massive attention when it came in 2013.[44] It concerned claims of Copyright infringement and the court focused very much

[40] **jurisdiction**. (2016). In *Encyclopaedia Britannica*. Retrieved from **http://academic.eb.com.ludwig.lub.lu.se/EBchecked/topic/308575/jurisdiction,** 2016-05-12

[41] *"Private international law: Jurisdiction rules for civil and commercial jurisdiction",* http://www2.le.ac.uk/departments/law/postgraduate/llm-taught/modules/lw7005, Retrieved 2016-05-17

[42] Art. 4.1 Brussels 1a regulation, No 1215/2012

[43] R. Maier," Where *to sue in online copyright infringements cases", <http://policyreview.info/articles/news/where-sue-online-copyright-infringement-cases/356>,* Visited 2016-05-11

on the scope of art. 7.2 in the Brussels 1a when deciding on place of damage as well as other relating topics.[45]

To begin with, the court concluded that since Directive 2001/29/EC gives automatic protection in all member states, an infringement can occur in all member states in accordance with their domestic laws. The court went on to conclude that the "place of damage" should be interpreted as being any member state where there is a possibility of Internet access i.e.. by the web-site distributing the infringing material and buying/downloading it from there. However the court also emphasised that a member state can only try the damages that have potentially occurred within their territory.[46]

This is an example of the access approach, and the reason why it was so heavily criticized was because it opened up the possibility of forum shopping and because many see the access approach as less efficient than the alternative targeting doctrine. This is because it gives such an extensive selection of courts which the plaintiff could choose from. However, the criticism from the IP-community was also based on surprise since earlier rulings from the CJEU had focused on the targeting doctrine.[47]

3.3.2 Ways of deciding "place of damage"

The key to deciding where jurisdiction falls indisputably seems to be defining the scope of place of damage in art. 7.2 Brussels 1a. After issues started arising in this area two main methods have evolved for solving this, both methods having their own strengths and weaknesses. When discussing these different methods it is important to have in mind, that the most important

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[44] Matulionyte R (2015). Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules. JIPITEC, Vol. 6(2), Para. 6-7

[45] In the ruling they used the Brussels 1 regulation and art. 5.3 which contains the same information as art. 7.2 in Brussels 1a does today.

[46] C-170/12 – "*Pinckney case*", paragraph 39-45

[47] Matulionyte R (2015). Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules. JIPITEC, Vol. 6(2), Para. 7-9

factor is having both the plaintiff and the defendant knowing where they can sue and respectively be sued, that is having predictability.[48]

3.3.2.1 Access approach

As earlier stated, this approach was, to the great surprise of the IP-community, used in the Pinckney case. The principle is based on the place of damage being where the infringing material have been accessible to the public or where damage potentially can occur. The fact that it, with this approach, is sufficient to have a possibility of damage for jurisdiction makes it wide open for the plaintiff to choose freely between a multitude of possible jurisdictions, this if no extraordinary measures have been taken that hinders e.g. a website to reach certain countries in which case these inaccessable countries would be ruled out.[49]

The approach limits these courts' eligibility to only decide upon the damage in their country, meaning they can only make a judgement based on the damage within their territory. But judging the damage in one out of many countries is a tough task taken alone, and question is whether it is really possible.[50]

Criticism on this approach often points out the great possibility of forum shopping if this method is used alone. And forum shopping would create an unwanted imbalance between plaintiffs and defendants. So the conclusion of this is that if this method is to be used, we need to find a way by which the interests are balanced and the parties have the same predictability[51].

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[48] M. Sramek, "*Brussels 1: Recent developments in the interpretation of special jurisdiction provisions for internet torts,* Masaryk University Journal of Law and Technology Vol 9:1, p.166

[49] Matulionyte R (2015). Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules. JIPITEC, Vol. 6(2)., Para. 6

[50] (M. Sramek), p.171

[51] Matulionyte R (2015). Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules. JIPITEC, Vol. 6(2)., Para. 16-19

3.3.2.2 Targeting doctrine

This method has been suggested as an alternative to the access approach and it has been used by CJEU in several rulings before the Pinckney case. Many consider this method better since it limits the number of courts with jurisdiction and targets the really "relevant" courts, which is only the ones in jurisdictions that have been substantially effected by the infringement. It increases predictability especially for defendants and it also makes it easier for the court that is to make the judgement since they have a stronger connection to the infringing act.[52]

The many upsides to this way of solving the jurisdiction dilemma might be why the IP community was so surprised when the CJEU decided to go with the access approach instead in the Pinckney case.
Another benefit from using this method is that it limits the forum shopping possibilities for the plaintiff which make the process clearer and easier for the plaintiff and definitely gives the defendant better predictability. It also makes the balance between the two more even. In addition, the court that tries the case will have a stronger connection to it and therefore possibly make a better, well-grounded judgement. But how do we go about deciding if no countries or all countries can be targeted with this method? Especially the latter one is a possibility when dealing with big, ubiquitous infringements and if so, it seems rather ineffective to use this method. So maybe the targeting doctrine needs to be more specified and the ways of targeting need to be more detailed to narrow its scope. Simply put, before we can use this method we need to clarify exactly what the method does and how it is supposed to be used.[53]

[52] Matulionyte R (2015). Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules. JIPITEC, Vol. 6(2), Para. 20-21

[53] Matulionyte R (2015). Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules. JIPITEC, Vol. 6(2), Para 21-25

3.4 The Conflict of Laws

When a court has to deal with matters relating to one or more countries, a conflict will arise, not only in regards to jurisdiction, but also between applicable laws. To decide upon applicable law means to decide which law the court eligible for jurisdiction should apply to the case. This means that there is no certainty that the court gets to apply its Lex Fori on the case, with the exception of procedural questions. But, for further questions in the case it becomes a conflict between the application of Lex Loci Origins and the well established Lex Protectionis.[54]

The legal framework used in these questions is the Rome II-regulation for non-contractual obligations and it has a special article dedicated especially for Intellectual Property infringements whose content will be discussed further on. [55]

3.4.1 Lex Loci Protectionis

This rule can be found in art. 8(1) of the Rome II-regulation and in art. 3:102 of the CLIP-proposals. It states that the applicable law is the law of the country where protection was sought. When this rule works with territoriality, what happens is that if your rights have been violated in several countries where your work enjoyed protection, all of these countries laws will apply, but only to the extent of the damage caused within their territory.[56] Using this method could force courts within the EU to use as many as 28 different laws for a single infringement.[57] Even though this is the challenge it still is the dominant choice-of law rule for Copyright infringements

[54] UNESCO e-copyright bulletin, October-December 2005, "*Applicable law in copyright infringement cases in the digital environment*", p.2, Visited 2016-05-14

[55] Art. 8, Rome II-regulation, No 864/2007

[56] Gottschalk, E., & Von Mehren, A. T. (2007). *Conflict of laws in a globalized world*. Cambridge : Cambridge University Press, 2007. p. 187

[57] Matulionyte R (2015). Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules. JIPITEC, Vol. 6(2), Para 34

and one can find traces of this in several international treaties and agreements regarding IP-rights.[58]

So if we look into the core foundation of the rule it is a good rule, and it brings some balance to the different parties by limiting the number of possible courts with jurisdiction. Nonetheless for us to be able to keep using it, it needs altering and adapting into something that works for the online world.[59]

3.4.2 Lex Loci Origins

This rule falls on the opposite side of Lex Loci Protectionis, and it means that applicable law is the law of the country of origin i.e. where the work originated from.[60] A problem with use of this rule is that works which exist in the same country could be the subject of different laws, which not only creates great legal uncertainty, but it also goes against the rule of national treatment stated in art. 5 BC.[61]

The good thing about it is that it leads us away from the massive number of laws applicable when using the Lex Loci Protectionis, and allows the courts to use a single rule. But in this case, the fact that it is a single law does not seem to compensate for the downsides judged by the fact that very few countries actually use this rule today.[62]

[58] (Gottschalk, E., & Von Mehren) p. 189

[59] (Gottschalk, E., & Von Mehren, A. T) page 219

[60] (Gottschalk, E., & Von Mehren, A. T.) page 187

[61] (Gottschalk, E., & Von Mehren, A. T.) page 203

[62] (Gottschalk, E., & Von Mehren, A. T.) page 190

3.4.3 Market Impact rule and Closest Connection rule

In addition to the Protectionis and Originis rule there are two other methods available.

One is to use a market impact rule which is stated in the WIPO joint recommendations art. 2.[63]The market impact rule is based on identifying in which countries the use has had commercial effect, and the article is followed by art. 3 which gives guidelines on how to decide what commercial effect is.[64]

Furthermore, the CLIP-proposals offers a solution which appears to me to be the most preferable in this scenario. In art. 3:603 the proposals suggest using a closest connection rule for ubiquitous infringements. Use of this rule leads to one single applicable law and thus makes the enforcement more efficient from the aspect of how many laws the court could be forced to apply.

The CLIP-group suggests that 4 different factors should be taken into account when deciding upon the closest connection; the infringer's habitat, the infringer's place of business, the place where substantial infringements have occurred and last the place where the harm has been substantial in relation to the infringement.[65] I consider the last two connecting factors to be the ones where focus should be. This is because, in my opinion, focus should be on the infringement and not the infringer in these cases. Of course if it is possible to use all of them in combination it would most likely be a very precise judgement of closest connection.

The closest connection rule connects to a universality approach that advocates a single applicable law (basically the solution to the issues using Lex

[63] WIPO, Joint recommendations concerning provisions on the protections of marks and Other industrial property rights in signs on the internet, <http://www.wipo.int/edocs/pubdocs/en/marks/845/pub845.pdf> , Visited 2016-05-09

[64] (Gottschalk, E., & Von Mehren, A. T.) page 216

[65] Art. 3:603 CLIP-proposals

Loci Protectionis)[66]. Having a single law is better for all parties in an IP-conflict since it generates more predictability and legal certainty. But if the rights holder would feel uncertain about which country would be considered to have the closest connection and thus not feel comfortable applying the ubiquitous infringement rule, they should always be able to retreat to Lex Loci Protectionis.[67]

If one breaks down art. 3:603 we will see that two requirements need to be fulfilled for it to be applicable; the infringement must have been through an ubiquitous media and it must have had some sort of worldwide reach. The last requirement could potentially exclude online infringements from geographically limited platforms, and also, even though the infringement might have world wide reach the infringement as such might not be regulated the same in all countries and therefore a court would probably rule out the world wide reach on the grounds that it simply is not seen as a infringement in certain countries. Currently this excludes a lot of online infringements and probably leaves us with extensive online piracy.[68]

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[66] Rita Matulionyte, The Law Applicable to Online Copyright Infringements in the ALI and CLIP Proposals: A Rebalance of Interests Needed? 2 (2011) JIPITEC 26, para. 21.

[67] Rita Matulionyte, The Law Applicable to Online Copyright Infringements in the ALI and CLIP Proposals: A Rebalance of Interests Needed? 2 (2011) JIPITEC 26, para. 35.

[68] Rita Matulionyte, The Law Applicable to Online Copyright Infringements in the ALI and CLIP Proposals: A Rebalance of Interests Needed? 2 (2011) JIPITEC 26, para. 14.

4 Conclusions and Discussion

As already discussed, it is evident that the existing rules were not designed for the type of Copyright infringements we have today in the creative arts/ music industry. They laws and rulings are not adapted to ubiquitous infringements and consequently using them causes unnecessarily time consuming and expensive processes.
What is happening right now is that, instead of looking to the core of the problem, which in my opinion is territoriality, the EU is putting bandage after bandage on the problem in the hope that it will magically disappear. Instead greater ambiguity is being created.

To create the most effective enforcement for ubiquitous Copyright infringements we need to dare to look beyond territoriality and maybe adopt an approach where one and only one country can make a judgement on the full extent of the injury. And maybe we need to recognise the need for a single law applicable to Copyright infringements, one working better than Lex Loci Originis.

It is clear that the nature of this topic is complicated, and no matter how much we try to simplify it, it will continue to be complicated to some extent. Therefore the best thing we can do is try to make the situation for plaintiffs and defendants as predictable and easy as possible and let experts in the field deal with the complicated aspects of the individual cases.
My suggestions for making these changes are as follows. First we need to create a way which allows one country to have jurisdiction over the whole infringement. Whether it is best to make alterations in deciding "place of damage" or not looking at place of damage at all, but instead looking at "origin of damage" or maybe even apply the closest connection rule can be discussed, but the key point is that the number of jurisdictions eligible needs to be narrowed down to one.

The second recommendation is to find a solution concerning applicable law. Lex Loci Protectionis is no way near effective enough on transnational and ubiquitous infringements since it generates a vast array of applicable laws. Therefore, just as it would be preferable to have only one jurisdiction, it would also be good to have one single applicable law.
The Closest Connection Rule is as I see it the best option currently available but the probable explanation as to why it is not being applied today is because Lex Protectionis is given by law whilst the Closest Connection rule is merely given in a non-legally binding form. However if it would be possible to make a special regulation regarding ubiquitous infringements based on the closest connection rule it would do great things for the enforcement of Copyright infringments.

It is recognised that the legal field is not famous for making changes, and especially not quick changes. So, when it encounters an area like technology where changes happen almost instantaneously there are bound to be some disputes.
I believe that the important consideration in this situation is that we do not allow the disputes and debates to go so far as to hurt the creative industries, because the way it looks today, the ineffectiveness in the enforcement rules could do just that.

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