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Seminar

JOHAN AXHAMN (ED.)

COPYRIGHT IN A BORDERLESS ONLINE ENVIRONMENT

Copyright law has developed in close connection with technological evolution. This is particularly true of digital technologies, especially the Internet, which, since the mid-1990s, has generated both vast opportunities and enormous challenges for the copyright system. Geographical distance is no longer an obstacle to the dissemination of works, which can now take place at virtually no cost. This has provided creators and their commercial partners with new means to exploit their rights, and it has opened the door to new forms of infringement, some of which have proved difficult to combat.

In October 2011, the Institute for Legal Research (Institutet för Rättsvetenskaplig Forskning) organized a Symposium to explore various aspects of "copyright in a borderless online environment". The Symposium gathered prominent Nordic and International scholars and practitioners in the fields of copyright and international private law. This volume contains the papers presented at the Symposium. Some have been revised to take into account subsequent legal developments.

Johan Axhamn, LL.M. and MSc, is a PhD candidate in intellectual property law at the Faculty of Law, Stockholm University.

JOHAN AXHAMN (ed.)
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ONLINE ENVIRONMENT

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BERNT HUGENHOLTZ, GUNNAR KARNELL,
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Copyright in a Borderless Online Environment – Comments from a Swedish Horizon

Ulf Maunsbach

1. Addressing the problem

In this paper I have a two-fold purpose. Invited to comment on professors Davies¹ and Torremans² presentations I will relate some of my thoughts on their papers. In addition, I would like to take the opportunity to address yet another point. Taking my domicile in Sweden into account, I do think that it is appropriate to incorporate a review of recent Swedish case-law developments on cross-border infringement into my comments and then use that presentation as a starting point for the forthcoming discussion on problems that may arise in relation to copyright infringement in a borderless, online environment.

Before I commence the discussion, I would like to demarcate the kinds of problems that we are discussing. To begin with, the problems here are complex, complicated and quite often ubiquitous. The reason for this is, to put it simply, the nature of the topic.

Intellectual property law may, in general, be regarded as a quite complicated and technical area in itself. Among the intellectual property rights one may think of patent law as the most complicated. However, in relation to the online problems being addressed here, copyright is the most problematic intellectual property right. This, among other things, is due to the fact that there are no registration regimes in the field of copyright and registrations are useful in all kind of situations (including online related), due to their ability to provide an obvious link to a certain jurisdiction and/or

1. See Gillian Davies, *Moral Rights in a Borderless Online Environment*, contribution to this collection, p 37 *et seq.*

2. See Paul Torremans, *Copyright Territoriality in a Borderless Online Environment*, contribution to this collection, p 23 *et seq.*

applicable law. In the field of copyright there are additional problems for instance regarding the assessment of first ownership. Finally, as has been discussed by Professor Davies, copyright is the only intellectual property right that contains protections for moral rights, something very personal and different from economic rights.

From this one must conclude that we have to proceed, keeping in mind the premise that there are complications within the field of copyright. The same complications apply in relation to the online world. I don't think that I have to present a developed discussion on the impact and complications that online activities may bring about. It suffices to say that the online world provides an environment with no borders, ubiquitous transactions and ubiquitous effects.

Copyright and online activities, complex individually, are inseparable from one another. One could hope that the result would, rather, be some kind of stability where the complexity in one field would be settled by complexities in the other field, as if they were like sodium and chloride that, when merged, form stable, symmetric salt crystals. Unfortunately the result is located at the other end of the spectrum, the complexity increases. In particular this is due to the ubiquitous nature of the Internet.

Inevitably this becomes an issue when cases regarding copyright in relation to online situations reach our courtrooms. Here, it is crucial to answer the first two questions of private international law when adjudicating claims that may be raised in relation to the use of copyright in online environments. The question of jurisdiction, or which courts are competent to try the case, and the question of choice of law, or which law is to be applicable in a situation where claims may be connected to different laws in different jurisdictions.

During the symposium in Thoresta some of the problems and some of the possibilities being created in this marriage between copyright and the internet have been addressed. This has included discussions with respect to "new business models",³ e.g. streaming, online licensing⁴ and enforcement⁵.

3. See Jan Rosén, *The Nordic Extended Collective Licensing Model as a Mechanism for Simplified Rights Clearance for Legitimate Online Services*, contribution to this collection, p 65 *et seq.*

4. See Daniel Gervais, *Individual and Collective Management of Rights Online*, p 89 *et seq.*; and Silke von Lewinski, *Copyright in a Borderless Online Environment: EU Cross-Border Licensing of Rights*, contribution to this collection, p 101 *et seq.*

5. See Peter Danowsky, *The Enforcement of Copyright in a Borderless, online environment: A Practitioner's View*, p 127 *et seq.*; and Marianne Levin, *A Balanced Approach on Online Enforcement of Copyright*, contribution to this collection, p 135 *et seq.*

There are several complex private international law questions that may be discussed in relation to all of these topics. During the rest of my comment I will, however, limit myself to issues related to infringement. As noted, private international law questions are relevant to all areas that include cross-border elements, but if we are to delimitate the problems to those that are specific to the online environment it is in relation to infringements that we may find the majority of problems. Other problems, such as initial ownership, transfer of rights and licensing, are more-or-less the same, regardless of whether or not the question relates to online situations. So if we are to choose one area that may be regarded as relevant in relation to jurisdiction and choice of law from an online perspective, infringement becomes of particular interest to analyse.

2. Identifying and exemplifying the problem

If we examine the problems as so demarcated from a Swedish perspective we can see that there are a number of relevant Swedish cases, both decided and pending, which may be used as a benchmark for a developed discussion.

A feasible starting point is with a picture, or to be specific a photo. This photo is in the centre of interest in two different disputes before the same courts in Stockholm, first the District Court and thereafter the appeal in the Svea Court of Appeals. The photo in question illustrates the same Swedish musician Kikki Danielsson used on the cover of a CD, and the photographic rights belong to the same photographer.

In both cases it happens that the unauthorized use of the copyright protected work consisted of making the photo available from homepages in Norway. In Case 1, the newspaper *Arbeidarbladet* published the photo on their web-news service.⁶ In Case 2 the photo was used by a web-based CD-shop, *tylden.musiconline.no*.⁷ Both services were (primarily) directed to Norwegian customers and both cases are addressing the question of jurisdiction in Sweden in relation to actions committed from Norway.⁸

6. Case no. Ö 6063-07 (RH 2008:4) from Svea hovrätt (Svea Court of Appeals) decided February 4, 2008 ("Case 1").

7. Case no. Ö 4891-09 from Svea hovrätt (Svea Court of Appeals) decided March 23, 2010. The case was appealed to the Supreme Court and leave of appeal was granted November 29, 2010. *See* decision of the Supreme Court, in Case no Ö 2256-10, ("Case 2").

8. In relation to the defendants in Norway jurisdiction was – and is – to be assessed under the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial

Initially the main, or at least one of the major issues in relation to assessing jurisdiction, is how to interpret the concept of *damage* within the wording of Article 5(3) of the Brussels I Regulation. In particular this may prove difficult in relation to copyright since this right is elusive in nature and subdivided into economic and moral rights. A borderless online environment adds further complexity. Another interesting fact is that the decisions regarding Swedish jurisdiction in the two different cases, so far, differ. The reason for this is explained by the existence (or lack of) direct infringing effect in Sweden.

The infringement in Case 1 relates to the use of a photo in relation to a review of the CD-record published (together with the photo) in both a Norwegian (physical) newspaper, *Arbeiderbladet*, and on that newspaper's web-based news-service, *Nettavisen*. There was no evidence of use in Sweden but there was evidence that the web-based service had 60 subscribers domiciled in Sweden. The District Court reached the conclusion that this did not amount to an infringement in Sweden and that, therefore, there was no infringing effect in Sweden sufficient to make Article 5(3) of Brussels I applicable.⁹ The District Court case was eventually decided as Case 1 by the Svea Court of Appeals February 4, 2008. The Svea Court of Appeals reached a different conclusion than the lower court. The Appeals Court held that the fact that there were Swedish subscribers indicated use in Sweden. There was no question regarding the existence of copyright protection for the photo in Sweden or that the photo had been made available in Sweden due to the online publication. The fact that the web-based news-service was primarily directed to use in Norway did not change the fact that direct damage could have occurred in Sweden. The presence of subscribers located in Sweden strengthened that conclusion. All in all the Appeals Court in Case 1 concluded that there was sufficient infringing effect for Article 5(3) to come into play, with the result that there was jurisdiction in Sweden for the court to determine the amount of damage occurring in Sweden.

Matters Done at Lugano 30 October 2007, OJ 2007 L 339/3 ("the Lugano Convention"). For the purpose of this paper, however, the assessment of jurisdiction under the Lugano Convention would lead to the same result under Brussels I, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2000 L 12/1 ("Brussels I"). Accordingly all further references herein are to Brussels I.

9. The reasoning from the District Court of Stockholm is included in the case from the Appeals Court, Case no. Ö 6063-07 (RH 2008:4).

Case 2 was decided by the same Court, the Svea Court of Appeals on March 23, 2010. Case 2 was been appealed to the Swedish Supreme Court which, granted leave to appeal on November 11, 2010. It has not yet been scheduled for hearing in the Supreme Court and consequently there is no final decision. It may, however, still be of interest to have a closer look at the decisive arguments in the Appeals Court. In Case 2 the above-mentioned photograph was used for the purpose of marketing the CD by an online Norwegian music store.¹⁰ Both the District Court¹¹ and the Court of Appeals concluded that there was no Swedish jurisdiction under Article 5(3). In other words, here, the use of the photo on a homepage in Norway did not amount to direct infringement in Sweden. The Appeals Court in its reasoning referred to its previous judgment in Case 1 and distinguished it from the situation regarding actual manifested use in Sweden in Case 2. In Case 1 there was proof of subscribers in Sweden however in Case 2 there was no proof that any records had been sold to users in Sweden and no proof that users from Sweden, to any notable extent, had visited the Norwegian homepage. Reading the two cases together one must conclude that an infringing effect sufficient to establish jurisdiction under Article 5(3) of Brussels I, in the minds of these Swedish courts, lies somewhere between no use whatsoever and 60 Swedish subscribers who may have visited a Norwegian homepage.

An earlier case, this time, with respect to parallel cross-border trademark infringements, was decided by the Swedish Supreme Court April 27, 2007.¹² It involves several instances of infringement of the trademark “Fire-Dos” for which the Swedish plaintiff Aredal Foam Systems HB (“Aredal”) held national trademark protection in several EU Member States. The defendant, MSR Dosiertechnik GmbH (“MSR”) was domiciled in Germany. The plaintiff tried to bring the entire infringement case before a Swedish court, arguing that Swedish courts were competent to try all the damages arising in relation to the different infringements. One of Aredal’s arguments was that the right holder was domiciled in Sweden, had its principle place of business here, and had no actual activities, and, as a consequence no assets that could be damaged in other countries. The Swedish Supreme Court, however, held that Swedish Court’s competence in this matter was limited to damage that occurred in relation to the trademark that was sub-

10. www.tylden.musiconline.no which is owned by Tylden & Co. AS.

11. Case no. T 13367-08 from District Court of Stockholm decided May 29, 2009.

12. NJA 2007 s. 287.

ject to protection in Sweden. The direct damage that occurred in Sweden only affected the trademark protected in Sweden and consequently, Article 5(3) of Brussels I only afforded jurisdiction in relation to that damage. As to infringements occurring in other countries in which the trademark was protected, the Supreme Court concluded that any damage in those situations was located in each country of protection. The plaintiff's argument that all assets that could be damaged were located in Sweden was disregarded. In this respect the Supreme Court adhered to the concept that it was actually the trademark right itself that is damaged by an infringement and a trademark right, as such, is definitely located in its country of protection, which in relation to trademarks generally coincides with the country of registration.

As to the choice of law issues dealt with in this conference there are few examples from Swedish case-law. It is on the whole, unusual for foreign law to be applied in Swedish courts. It is, however, possible to use existing case law to highlight some potential choice of law problems. I will settle with one such example, the *Pirate Bay*-case, which has now finally been decided by the Svea Court of Appeals, inasmuch as the Supreme Court denied leave to appeal on February 1, 2012.¹³

Before I briefly present the case it must be stressed that it is primarily concerned with a criminal offence, which is one aspect of Swedish copyright infringement. In accordance with Swedish law civil claims for damages were added to the criminal claims.¹⁴ I shall, henceforth, focus on the civil side of the case since I'm interested in using the case as a benchmark for a choice of law discussion within the field of private law. It is also important to underline that there were no private international law questions raised in the *Pirate Bay* and that the Rome II Regulation,¹⁵ which I discuss below, was not applicable to the questions raised in the case. Taking this into account it is nevertheless possible to use the *Pirate Bay* case in relation to choice of law problems that may arise when courts deal with online copy-

13. Case no. B 4041-09 from Svea Court of Appeals decided November 26, 2010.

14. For an English presentation of the subject matter of the case and a comment on the District Court decision, see Jonas Ledendahl, *Swedish Copyright Law ends the Pirate Bay* in "National Developments in the Intersection of IPR and Competition Law: From Maglite to Pirate Bay", Hans Henrik Lidgard ed. (Oxford, Hart Publishing 2011). See also Michael Bogdan, *Cyberspace Pirates Walk the Plank: Some Comments on the Swedish Judgment in the Pirate Bay Case*, 4 Masaryk U. J. L. & Technology, 113 (2010).

15. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ 2007 L 199/40, ("Rome II").

right infringements. Such problems are ubiquitous in situations that involve infringement, such as in the *Pirate Bay*-case.

The case concerns contributory copyright infringement and the defendants were, at the time, domiciled in Sweden. Without going into details as to the subject matter of the case it may be concluded that a Swedish court in such a situation is competent to make determinations regarding all the damage that occurred as a consequence of the infringing actions. This follows from the principal rule of Article 2 of Brussels I. The question of jurisdiction is consequently not an issue and it would have been fruitless to contest jurisdiction in the case. However, there is a different situation in relation to choice of law.

The verdicts in the case were in line with the plaintiffs' claims and the difference between the District Court and the Appeal Court decisions relate primarily to the criminal law issues. The Appeals Court adjusted the method of calculating the damages in "downloading situations" but in general both the District Court and the Appeal Court used a market price model to fix the level of compensation regarded as proper in relation to the damage.

To put it simply the defendants were held liable for complicity in making accessible a number of different protected works and the model used to calculate damages depended upon the number of downloads (the primary infringement). In this context both the District Court and the Appeal Court made adjustments concerning the total number of downloads, since there was uncertainty as to the precise number of downloads that had actually taken place. The number of downloads in peer-to-peer situations is, indeed, fraught with a large degree of uncertainty depending, among other things, on the technology used. When faced with this problem in the *Pirate Bay* case the courts decided that the relevant number was 50% of the totals that resulted from investigation of the servers used by the *Pirate Bay*. Compensation was, therefore, reduced by 50%. One may have different opinions on how the court handled this question but, to me, it is more interesting to observe a problem that was not addressed at all, the choice of law aspect.

The choice of law question that was not discussed, even if the district court actually seems to have taken account of it, is the fact that a reasonable amount of the total number of downloads, regardless of adjustments due to the uncertainty, were made by computers located in countries other than Sweden. If such a situation were to be brought before a court today that court must, in accordance with Article 8 of Rome II, apply the law in the country of protection (*lex loci protectionis*). Intellectual property rights,

including copyright, are territorial as has been addressed in Professor Torremans' chapter. That principle leads to the application of a number of different copyright laws in situations that involves widespread internet infringement.

If the damage claims in the *Pirate Bay* case, or any other similar case, are to be treated properly today, when Rome II is in effect, the court must take into account the fact that a number of different sets of law are applicable. Faced with that a court would have to either continue to apply a single set of laws, probably the law of the forum, and apportion the relevant measure of compensation to what is relevant in relation to the infringements that took place in the forum country, or to embrace all related infringements, and to apply a mosaic of laws of the different countries for which protection is claimed.

Both scenarios would introduce severe evidentiary problems since either delimitation and/or enlargement of the case would force the court to determine, not only the total amount of relevant downloads, but also to trace each download to a specific country of protection. That is not an easy task, but if the mandatory nature of conflict rules on intellectual property is taken into account it may very well prove to be a task that courts are likely to be faced with and consequently, a job that must be done. Or shall we, private international law addicts in general, keep quiet? No one raised the choice of law issue in the *Pirate Bay*-case even though it could have been an issue notwithstanding that Rome II was not applicable, and we may assume that the parties quietly accepted the application of Swedish law. Such an approach definitely has its benefits but such a freedom of choice would not be in conformity with the wording of Article 8 of Rome II. To the contrary, Article 8 expressly excludes any possibility for party autonomy here.

3. Commenting on the problem

In light of the above, as is also pointed out by Professor Torremans, it is quite clear that the rules applicable in the field of private international law need some adaptation to provide appropriate solutions for the use of intellectual property rights in borderless online environments. This is because use online is likely to lead to omnipresent effects with consequences for both jurisdiction and choice of law. There is, to put it simply, need for efficient solutions, and need for the parties involved to be able to find a proper forum which can deliver justice in those circumstances. Where jurisdiction

is divided among courts in different countries and when multiple sets of laws may be applicable it is likely that right holders will encounter significant difficulties in their attempts to enforce intellectual property rights.

One solution to this dilemma is presented in the principles¹⁶ presented by the European Max-Planck Group on Conflict of Laws in Intellectual Property (“CLIP”).¹⁷ The aim of the CLIP principles is, among other things, to foster a more expedient way of handling international disputes concerned with intellectual property rights while acknowledging the different interest involved. The CLIP principles is quite a comprehensive document covering more or less all issues in the field of intellectual property and private international law. Rather than go into details here I shall comment on some of the suggested solutions, solutions that are also discussed by Professor Torremans. First, however, I would like to underline that the CLIP principles is an important contribution, with creative and thoughtful solutions. There can be no doubt that the proposal will be influential in forthcoming discussions on issues in the fields covered in Europe and elsewhere.

When it comes to solutions regarding ubiquitous infringements Professor Torremans highlights Article 2:203 of the CLIP principles in relation to jurisdiction and Article 3:603 in relation to choice of law. I will comment on both articles but first I would like to address the CJEU’s recent judgment in the *eDate*-case.¹⁸ In *eDate* the CJEU developed the application of Article 5(3) in disputes concerning with personality right infringements. The starting point is the *Shevill*-case in which the CJEU held that Article 5(3) embraces two different jurisdictional heads, one providing for jurisdiction in the country where the action took place and one providing for jurisdiction in the country where effects of the infringing action may appear.¹⁹ In the first situation the court will be competent in relation to all damages that the action caused. In the latter situation the court’s competence will be limited to damage occurring in the forum country.

16. The final text of the Principles on Conflict of Laws in Intellectual Property (the CLIP principles) from December 1, 2011 is published at <http://www.cl-ip.eu/>.

17. More information about the CLIP project is to be found at: <http://www.cl-ip.eu/>. The principles and the work behind them is also thoroughly presented in Fawcett and Torremans, *Intellectual Property and Private International Law*, 2nd ed. (Oxford, Oxford University Press, 2011).

18. Joined Cases C-509/09 and C-161/10, *eDate Advertising GmbH v X and Others*, 25 October 2011 (Grand Chamber), [2011] ECR n.y.r. Available in *EU Private International Law: An ECJ Casebook*, 2nd ed. Michael Bogdan & Ulf Maunsbach eds. (Groningen, Europa Law Publishing 2012), p 523.

19. Case C-68/93, *Shevill and Others v Presse Alliance SA*, 7 March 1995, [1995] ECR I-415. Available in *EU Private International Law*, Fn 18 supra, p 125.

In the *eDate*-case the CJEU concluded that the existing interpretation of Article 5(3) is not well adapted to internet-related infringement situations. The CJEU held that there is need for an additional rule. In this respect the Court introduced the *centre of interest* principle.²⁰ Under the centre of interest principle it is deemed reasonable that a plaintiff whose personality rights has been infringed should be able to try such a claim, in its entirety, in a court located in a country in which the plaintiff has his/hers centre of interest. Professor Torremans mentions the *eDate*-case and concludes that the solution presented is feasible in relation to personality right infringement. He also submits that this new approach should not be extended to the infringement of intellectual property rights. The reason is that it is the intellectual property rights themselves which are in focus in infringement matters and not the status of the right holder or author. Consequently, it would be wrong to use the centre of interest as a benchmark for jurisdiction regarding such rights. Professor Torremans admits that moral rights are more personal but he also concludes that an application of this new jurisdictional head in relation to infringements of moral rights could lead to an undesirable division of copyright cases.

I can see the logic in Professor Torremans argument but at the same time I do think that the ideas in the *eDate*-case presented by the CJEU are very similar to those presented in Article 2:203(2) of the CLIP principles. The CLIP solution to ubiquitous infringement is that a court in the country in which the infringement has had substantial effect should be competent to try not only the local damage but also damage that has occurred within the territory of any other state, provided that those effects are not substantial. A different way of putting this would be to state that general jurisdiction covering all the damage that has occurred due to the infringement of intellectual property rights lies with the courts in the country with the most substantial interest in the dispute (i.e. the country in which the right holder has suffered most from the infringement). This is not so different from the holding in the *eDate*-case and I do think that it may be possible to extend the *eDate* holding to intellectual property right infringements.²¹

One further argument in support of a broad interpretation of the ruling in the *eDate*-case is that Article 5(3) is designed to be used in relation to

20. C-509/09 and C-161/10, Fn 18 supra, paras 42–51.

21. This line of thinking may also be supported by the CJEU's similar reasoning in Case 266/85, *Shenavai v Kreisler*, 15 January 1987, [1987] ECR 239, para 19 where the CJEU observed that "where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction."

torts in general. It is not appropriate to give a general rule a specific meaning for specific factual situations. A better solution would, in my opinion, be to handle all factual situations in a similar way, meaning that the holding in the *eDate* case should be extended to apply in relation to all situations with ubiquitous infringements to the jurisdiction with a prevailing interest in adjudicating the dispute. Regardless of the solution chosen it must be tailored within the framework of Article 5(3) Brussels I because this is the Regulation to be applied. Another solution may be in the form of amendments such as the inclusion of a special provision regarding intellectual property rights, or in the form of case-law interpretations by the CJEU. I tend to think that the latter way of implementing the much needed solution for intellectual property right is more realistic.

If the *eDate* solution is applied to the Aredal case (NJA 2007 s. 287) it is likely that the Swedish Supreme Court would have reached a different conclusion. A centre of interest approach is, at least partly, in line with the arguments presented by the plaintiff in the case that all of the plaintiffs' interest was located to Sweden and that there were no assets outside of Sweden that could have been damaged. The Supreme Court correctly disregarded this in line with the current interpretation of Article 5(3) but with the development of a centre of interest approach a different decision could well have been reached.

In relation to the other Swedish cases discussed above, the *eDate* solution would not provide any useful clarification. Nevertheless, the introduction of interests as significant to the assignment of jurisdiction may be used as a starting point for a more thorough investigation as to when direct effect becomes sufficient for the assertion of jurisdiction. In my opinion it may be appropriate to delimit jurisdiction in infringement cases to disputes that are of real commercial interest. In relation to copyright infringement I think that such arguments could be used as to jurisdiction regarding infringements of economic rights. I don't think that it would be unjust to force a right holder (as in the Swedish cases), to bring potential claims before courts in the country where the action took place or where the defendant is domiciled, particularly not when there is no significant or substantial effect in any other country. This idea of a limited jurisdiction has its drawbacks. It will force courts to investigate the factual subject matter of a dispute before it will be possible for them to decide questions of jurisdiction. It may also be concluded that such a limitation of jurisdiction does not fit equally well in relation to moral rights.

One relevant question in this regard is whether or not there should be a clear distinction between the economic and the moral sides of copyright and if different parameters (e.g. grounds for the assessment of jurisdiction), should be used in relation to the two. I tend to think so. In favour of such a distinction are the different characters of the two rights. The economic side of copyright manages on its own. It can be transferred and must likely be regarded as a form of subject matter that can be divested from the original creator. This is not controversial. One consequence, however, is that damage in relation to such a right occurs where the right is located, not where the right holder might be located. The question in relation to the economic right is therefore rather where the right is located, than where the creator (or current right holder) may have his/her habitual residence.

As to moral rights these are, as pointed out by Professor Davies, more personal. The moral side of copyright is comprised of rights of integrity and rights to respect and the right is closely associated with the original creator. It is also relevant to take into account the fact that modern technology seems to influence the importance of moral rights. My impression is that the moral side of copyright is growing in importance. It may be regarded as a modern trend to publish creations via open-source, without claims for economic compensation in relation to use of the protected creation. The moral rights, however, remain with the original creator and I have seen no tendencies whatsoever that creators are willing to release these rights in any manner comparable to the way in which economic rights are being waived. On the contrary I can see evidence that it is becoming more and more important to be attributed and respected as a right holder, even if you may have chosen not to claim economic compensation for the rights' use.

This leads to the conclusion that we may see infringement disputes in the not so distant future regarding only moral rights. In relation to jurisdiction this will have at least two consequences. First I do think that the *eDate* solution will apply directly in relation to moral rights infringement (which is something very similar to personality rights), meaning that it will be possible to handle ubiquitous infringements of moral rights in one court where the centre of interest is located. This generally will coincide with the domicile of the right holder. Secondly I do think that it will be difficult to delimit jurisdiction with the argument that there is no sufficient or substantial effect in a country where that country also happens to be the domicile of the original creator and consequently, the home of the right holder. In a majority of cases it is likely that the integrity of the work will be most

affected in the country where the right holder is situated and consequently courts in this country will, in principle, have jurisdiction in relation to moral rights infringements.

As to the division between economic and moral rights in general it is interesting to note that, although claimed, there was no distinction developed between the economic and moral side of the copyright regarding the damages assessments in the two Swedish cases discussed above.

In addition to problems that may appear as to jurisdiction in ubiquitous infringement situations there are other questions as to the applicable law. The solutions discussed so far do not solve these problems with respect to choice of law. The starting point for a choice of law discussion in relation to intellectual property rights is the principle that a court shall apply the law in the country for which protection is sought (*lex loci protectionis*). This is a logical starting point, in line with the territorial nature of rights in general, as discussed by Professor Torremans. It is recognized as the principal rule for infringement cases by Article 8 of Rome II.

The inclusion of *lex loci protectionis* in the Rome II is not controversial, but its strict application may lead to difficult situations for courts since it will force courts to apply multiple laws to cases concerned with infringements occurring in more than one country. As has been described in relation to the *Pirate Bay* case (and discussed by Professor Torremans), this is an undesirable situation. It is therefore relevant to discuss potential solutions for ubiquitous cases, even if the principle rule of *lex loci protectionis* will work sufficiently well for most cases.

The solution presented in Article 3:603 of the CLIP principles is similar to the solution suggested for jurisdiction by Article 2:203. In disputes concerned with infringements carried out through ubiquitous media it should be possible for a court to apply one law, namely the law of the country having the closest connection with the infringement. Application of the rule in Article 3:603 to the *Pirate Bay* case would lead solely to the application of Swedish law to the entire infringement. That would avoid the evidentiary problems involved in separating the different infringements and assigning them to separate countries of protection. It would also release a court from the burden of applying several (hundreds), of different copyright laws. Even if ubiquitous infringements, such as the *Pirate Bay* situation, may be regarded as novel there is definitely a need for the possibility to deviate from a strict application of the *lex loci protectionis* rule in exceptional circumstances. The CLIP principles offer such a possibility. Furthermore the

CLIP principles pay attention to an extended need of freedom of choice.²² This is a part of the proposal that I am particularly fond of since it is not the lack of a specific rule addressing ubiquitous infringements that is the major drawback in Rome II, it is rather, the lack of party autonomy.

For inexplicable reasons, the ability of parties involved in an intellectual property infringement dispute to choose the applicable law is expressly exercised by Article 8(3) of Rome II. There is a kind of logic behind this rule related to the historical notion that intellectual property rights are special, and that they differ from other types of property because they have a particularly strong connection to the country (State) of protection. This qualification of intellectual property in relation to other types of property is discussed by Professor Torremans and I agree with his conclusion that ownership in relation to property normally flows from the factual element of physical possession and that intellectual property cannot benefit from this since these rights are immaterial. There is a special nature in intellectual property rights, I agree, but it does not mean that we must apply special treatment. Upholding a perception that intellectual property rights in all situations are to be handled in accordance with the law of the country of protection is in fact a protection of a State interest rather than a protection of right holder interest. In today's increasingly harmonized world I cannot see why it should be so wrong if an intellectual property right, protected in one country, was occasionally to be subject to the similar laws of another country. This would be especially so if that was the solution preferred and chosen by the interested parties. In such situation I do think that the interests of the involved parties should prevail over any interest that may be upheld by the country of protection.

Many of the problems in the field of choice of law could be cured by offering a possibility for party autonomy. An opening for more flexibility could even have the consequence that the principal rule in Article 4 of Rome II could be used in relation to intellectual property rights, thus dispensing with the need to use Article 8. In turn this would lead to the possibility of using Article 4(3) to deviate from the rule of *lex loci protectionis* (which in almost all situations becomes the equivalent of the forum rule in Article 4(1)), in favour of the law of the country to which the case has a manifestly closer connection. The possibility of an extension of Article 4 to include intellectual rights infringements is not meant to be developed further in this paper. That is a question with more than one question mark.

22. See e.g. CLIP principles Articles 2:301, 3:501 and 3:606.

My point here is that a freedom of choice for the parties involved in infringement disputes should be respected as a principal rule, not the other way around.

4. Concluding remarks

As has been illustrated there are problems in relation to copyright in a borderless online environment. Much has been identified and analysed recently in discussions in Europe and elsewhere and, as has been pointed out by Professor Torremans, there are ambitious and useful suggestions that provide many good ideas as to how these problems (and many others), may be tackled.

The on-going debate on private international law and intellectual property is clearly a good development and I will not use my concluding remark to criticise any of the suggested solutions. However, I do have a general observation. I prefer to adhere to a simple philosophy of life. I like to cook with few ingredients. It provides the possibility to distinguish among the different tastes and the dish becomes more enjoyable. For better or worse I bring that philosophy with me into my work as a lawyer and legal researcher, and that may explain the following comment.

If I try to survey all suggestions that address the complexity of intellectual property in relation to online problems I observe that the suggestions tend to be equally complex. We are, in other words trying to solve complex problems with complex and very detailed rules. In my (perhaps naive) world I hope that it is possible to answer complexity with simplicity. Finding the one rule that may be applied in all situations and knowing that it is something of a mission impossible for legislators around the world to keep up with the speed of change of today's world. Perhaps we are better off if we resign ourselves to this state of things, by realizing that it is impossible to construct rules that provide detailed guidance in all situations, and by being satisfied with one or few simple rules flavoured with a large portion of party autonomy. That would be possible if we continue to develop the case-law related to Article 5(3) of Brussels I and if we accept that the time may have come when intellectual property rights must be handled as all other property, making it possible to delegate power to the parties to intellectual property disputes to agree on matters of jurisdiction and choice of law.

