IT'S A SMALL WORLD AFTER ALL: CONFLICT OF LAWS AND COPYRIGHT INFRINGEMENT ON THE INFORMATION SUPERHIGHWAY

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All the world's a stage, and all the men and women merely players . . . .[1]

We are just beginning to grapple with the question of what it means to collect and archive work that is based in such a fluid substrate.[2]

1. INTRODUCTION

On any given day, the Internet[3] has the power to become the world's stage. The Internet is a showcase for over 14,000 digital art galleries.[4] Premier art museums, including the Louvre and the Museum of Modern Art, exhibit their treasures online.[5] With a

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[1] WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7 (G. Blakemore Evans ed., Houghton Mifflin Co. 1974) (1599).

[2] Steve Dietz, Director of New Media Initiatives, Walker Art Museum, *WAC| Gallery 9| Digital Arts Study Collection | Introduction* (visited May 18, 1999) <http://www.walkerart.org/gallery9/dasc/gp_dasc_intro.html>.

[3] For a description of the Internet, see Needham J. Boddie, II, et al.,*A Review of Copyright and the Internet*, 20 CAMPBELL L. REV. 193, 194-206 (1998); Guy Basque, *Introduction to the Internet*, *in* THE ELECTRONIC SUPERHIGHWAY 7, 8-15 (Ejan Mackaay et al. eds., 1995).

[4] On January 2, 1999, a search using the terms "Internet or digital 'art gallery'" using the Yahoo! search engine generated 14,062 Web page matches.

[5] *See, e.g.*, *Le Louvre - Virtual Visit* (visited Jan. 2, 1999) <http://www.smartweb.fr/louvre/globale.htm> (offering a virtual tour of the Louvre col-

few clicks of a button, a Netizen— "cyberspeak" for a member of the Internet community— can be part of the audience for a performance in Australia, Miami's South Beach, or Bulgaria.[6] Author Stephen King treated his fans to a preview of a collection of short stories by posting an excerpt online.[7] With such diverse and rich offerings, the Internet may stand to displace television and books as the entertainment medium of choice.[8] Furthermore, the Internet stage spans the four corners of the world,[9] enabling online artists[10] to tap an audience of an estimated 165 million.[11]

One drawback of reaching a global audience is the inconsistency in national copyright laws. Each system of copyright law reflects a country's unique perception of artists' rights and the importance of public access.[12] Traditional copyright law is prem-

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lection); *MoMA | menu* (visited Jan. 2, 1999) <http://www.moma.org/docs/menu/index.htm> (providing an overview of the collection of the Museum of Modern Art, New York, complete with oral and written commentary).

[6] *See, e.g., 3AK-1503* (visited Jan. 3, 1999) <http://www.3ak.com.au/> (Australian magazine-format radio station); *Attach to the Womb Internet Radio in Real Audio Video South Beach* (visited Oct. 15, 1999) <http://www.thewomb.net/30.html> (South Beach underground electronic music audio/video radio station); *BulgarVoice Radio* (visited Jan. 3, 1999) <http://www.bulgarvoice.com> (Bulgarian Internet radio station).

[7] *See* DON TAPSCOTT, THE DIGITAL ECONOMY 19 (1996). Stephen King's story remains on the Internet at *Umney's Last Case* (visited Jan. 3, 1999) <http://www.mzk.cz/navod/king/king1.html>.

[8] *See* The Strategis Group, Inc., *Press Release – "Internet Users Spend Less Time Watching TV"* (last modified June 29, 1998) <http:// www. strategisgroup.com/press/pubs/Internetuser.htm> (reporting that Internet users spend less time watching television and reading in favor of spending time online). *But see* Nielsen Media Research, *Overall Household TV Tuning Levels Steady in Homes with Internet Access* (Nov. 11, 1998) <http:// www. nielsenmedia.com/newsreleases/releases/1998/Hhtuning.html> (indicating that Internet access has little impact on television watching).

[9] *See Nua Internet How Many Online* (visited May 18, 1999) <http://www.nua.ie/surveys/how_many_online/index.html> (displaying results of a survey compiled by Nua Ltd., an Internet consulting company, estimating Internet usage as of May 1999) [hereinafter *Nua Internet*]. According to the Nua Internet Survey, U.S. and Canadian Internet users total 90.63 million. European and Asian users follow with 40.09 and 26.97 million users, respectively.

[10] "Artist" and "author" are used interchangeably throughout this Comment.

[11] *See Nua Internet*, *supra* note 9.

[12] In this Comment, "public access" is defined as the ability of one artist to borrow from an earlier work without infringing its copyright. *See, e.g.*, Zechariah Chaffee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945) ("The world goes ahead because each of us builds on the work

ised on the concept of territoriality,[13] which allowed different systems to co-exist with minimal friction. The Internet, and its absence of discrete geographical borders, defies this fundamental principle. Cyberspace "is indifferent to the *physical* location . . . and there is no necessary connection between an Internet address and a physical jurisdiction."[14] Thus, when copyright infringement occurs on the Internet or involves protected material posted on the Internet, it is not clear which nation's laws dictate the legal consequences.[15]

The best place to begin our journey along the information superhighway is the award-winning ParkBench Web site,[16] a source of live, innovative digital performance art. "Cybergalleries," as such sites are called, are of particular significance to the conundrum of Internet copyright. First, these galleries are rapidly populating the cyberspace frontier.[17] Second, the galleries often

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of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his [creative work].") (citation omitted).

[13] *See* Jane C. Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153, 154 (1997) ("Traditionally copyright protection has been territorial. That is, national law will apply to acts of infringement committed in a particular country, regardless of the national origin of the work infringed.") [hereinafter Ginsburg, *Copyright Without Borders?*]; *see also* Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 803 (1998) ("Territorial views have traditionally dominated copyright choice of law analysis . . . .").

[14] David R. Johnson & David Post, *Law and Borders— The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1371 (1996).

[15] *See generally* Ginsburg, *Copyright Without Borders?*, *supra* note 13. Moreover, "[t]he applicable national copyright laws . . . do not only define the scope of rights. They also determine . . . all other issues of substantive copyright law, including the types of works protected, . . . recognition of moral rights, [and] exceptions from exclusive rights . . . ." Reindl, *supra* note 13, at 807 n.20.

[16] ParkBench is an artistic collaboration between multimedia artists Nina Sobell and Emily Hartzell. In addition to broadcasting live performances by Sobell and Hartzell, the ParkBench Web site features projects that are considered cutting-edge multimedia endeavors. To learn more about ParkBench, see *ParkBench* (visited Feb. 6, 1999) <http://www.cat.nyu.edu/parkbench>.

[17] *See* Steven Henry, *Online: It's Where Art Museums Are Virtually Infinite*, FRESNO BEE, Jan. 17, 1999, at H5, *available in* 1999 WL 4008568 ("Jonathan Bowen, Web master of the Virtual Library's museum pages, claims that a new museum is added to its own lists on an average of one a day, every day."); *theglobe.com Announces Launch of Interactive Digital Art Gallery*, BUS. WIRE, Jan. 5, 1999, *available in* LEXIS, Nexis Library, Curnws File (announcing the recent development of "a rotating digital art gallery dedicated to the explora-

contain multimedia[18] works, combining the talents of artists in different media. Uniting diverse media in a single work entangles the legal rights associated with discrete artistic endeavors.[19] Furthermore, in contrast to traditional museums, many of these galleries are interactive: a user can alter the characteristics of the work.[20] Nor does the manipulation of multimedia works require prohibitively expensive equipment that once prevented an average user from exploiting the work.[21] While an American domiciliary with all relevant contacts based in the United States would almost certainly be judged according to U.S. copyright laws if he or she infringed a ParkBench creation, would a French infringer also be accountable under American law? What are the consequences for an American who downloads the image to a server

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tion of art, technology and interaction"); Matthew Mirapaul, *The Year in Digital Art: Museums, Money and the Mainstream*, N.Y. TIMES (last modified Dec. 31, 1998) <http://www.nytimes.com/library/tech/98/12/cyber/artsatlarge/31artsatlarge.html> (reporting that the Guggenheim Museum plans to launch its "Virtual Museum" in the first quarter of 1999).

[18] *See* Mark Radcliffe, *Legal Issues in New Media Technologies*, COMPUTER LAW., Dec. 1995, at 1 ("[T]he term 'multimedia' refers to works that combine audio, video, graphics, and text.").

[19] *See id.* at 4 ("The difficulty of obtaining the necessary legal rights is increased because the copyrightable works which are combined into a multimedia work (text, photographs, film, and music) arise in separate industries. These industries have developed their own legal customs and traditional license terms.").

[20] *See id.* ("Multimedia works tend to be interactive, while traditional copyrightable works such as books and films are passive. Such works are not changed by the action of the 'viewer'."); *see also* 2 RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS 1486-87 (2d ed. 1998) ("Interactive artworks invite the observer not only to view the work but to touch it and be a part of the creative process by selecting images, coordinating colors, pushing buttons, and letting the computer combine its selections to come up with a new image.") (endnote omitted).

[21] *See* Radcliffe, *supra* note 18, at 4 ("[N]ew technologies make digital works very easy to manipulate and, thus, present new risks of unauthorized exploitation. For example, video effects, which once required a studio with $500,000 of equipment to create, can now be developed using a Video Toaster or similar device which only costs several thousand dollars.") (endnote omitted); *see also* Tilman Streif, *Web's Use as Giant Copying Machine Influences New U.S. Copyright Law*, DEUTSCHE PRESSE-AGENTUR, Oct. 13, 1998, *available in* LEXIS, News Library, DPA File (quoting Trotter Hardy, a legal scholar, as stating that "[p]ublicly accessible photo copiers and video recorders in private homes [have] made 'copying far cheaper and more widespread than once was the case'").

located in France? Variations on the choice of law question are as boundless as the Internet itself.

Only complete harmonization of national copyright laws would provide absolute certainty as to the legal remedies for online infringement. However, in spite of isolated steps toward unifying national copyright laws,[22] many legal commentators[23] believe that harmonization of laws is difficult to achieve at the present time. Working from this premise, Section 2 compares two different approaches to copyright infringement: France's *droit moral* and the United States' economic rights approach. Section 3 examines the current state of copyright on the Internet and how France and the United States have grappled with the new medium. Section 4 compares the choice of law regimes adopted by France and the United States to examine the principles that underpin each system. After summarizing the different trends in determining choice of law in cases of extraterritorial infringement, Section 5 examines several proposals for determining copyright liability on the Internet. Section 6 ultimately endorses a modification of the lex fori theory of choice of law proposed by Jane Ginsburg for determining the legal consequences of online infringement. Section 7 concludes the Comment.

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[22] Most notably, on October 27, 1998, President Clinton approved the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298 §§ 102-06, 112 Stat. 2827, 2827-37 (1998) (to be codified at 17 U.S.C. §§ 301-04 (1994)) [hereinafter Sonny Bono Term Extension Act]. Under the new law most copyright owners will receive an additional 20 years of protection. In addition to formidable pressure from U.S. lobbyists, part of the impetus for term extension in the United States came from abroad. The signatories of the Berne Convention and virtually all European Union members have adopted copyright terms that last for the life of the author plus 70 years. *See, e.g.*, Franklin Bruno, *Rhapsody in Green*, NEW TIMES L.A., Dec. 17, 1998, *available in* LEXIS, News Library, Curnws File (acknowledging that "international standards" may have been one factor in the passage of the U.S. copyright term extension); Jonathan P. Decker, *Of Mice and (Congress)Men*, FORTUNE, Nov. 23, 1998, at 44 (discussing Congressional motives for extending copyright protection, including international standards).

[23] *See* Jan Corbet, *The Law of the EEC and Intellectual Property*, 13 J.L. & COM. 327, 369 (1994) ("It is clear that harmonizing the [intellectual property] laws of the several states subject to the EEC Treaty is a formidable task . . . . Only time will prove if harmonization can be achieved."); Stephen Edwards, *Copyright in Cyberspace*, JURISTE INT'L, Oct. 1997, at 31, 33 ("The [European Commission] Green Paper . . . recognised that worldwide harmonisation . . . was not a present possibility."); Joseph A. Lavigne, Comment, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 333 (1996) ("Achieving harmony among international [copyright] laws is an unattainable goal . . . .") (footnote omitted).

2. FRANCE AND THE UNITED STATES: A GAUGE OF COMPARISON

Since France and the United States have embraced different frameworks for defining artists' rights, a comparative analysis of the two systems underscores the challenges associated with choice of law on the Internet. France has adopted an author-centric system of copyright protection.[24] Like other civil law countries,[25] France affords authors rights in the integrity and attribution of their work.[26] This cluster of rights, known as *droit moral*, protects the author's personality as embodied in his artistic expression.[27] In the United States, copyright exists not to protect the integrity of the author, but "to promote the Progress of Science and useful Arts."[28] Under United States copyright laws, a monopoly is tolerated only to the extent that it offers benefits to the public.[29] Congress and the federal courts have interpreted the "copyright clause" of the Constitution as granting limited economic rights.[30]

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[24] *See* Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 370 (1998) ("A key difference between post-revolutionary French and common law copyright is that in France, the revolutionary laws placed authors' rights on a 'more elevated basis' than the English had in their copyright law."); Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 42-43 (1997) ("[T]he moral rights of attribution and integrity that developed in post-Revolutionary France are now firmly entrenched in international law."). *But cf.* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 1023 (1990) ("Contemporary authorities certainly also recognized authors' claims of personal rights arising out of their creations, but the characteristic modern portrayal of French revolutionary copyright as an unambiguous espousal of an author-centric view of copyright requires substantial amendment.") (footnote omitted) [hereinafter Ginsburg, *A Tale of Two Copyrights*].

[25] *See generally* LERNER & BRESLER, *supra* note 20, at 944-49 (examining the impact of *droit moral* on copyright laws in various countries including Brazil, Germany, Italy, and Spain).

[26] *See id.* at 846.

[27] *See generally* ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 477 (4th ed. 1993).

[28] U.S. CONST. art. I, § 8, cl. 8.

[29] *See generally* Ginsburg, *A Tale of Two Copyrights*, *supra* note 24, at 993.

[30] *See* 17 U.S.C. § 106(1)-(5) (1994). *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); Benjamin R. Kuhn, *A Dilemma in Cyberspace*

2.1. *French Copyright Law*

During the Revolution, France enacted copyright statutes in the Laws of 1791 and of 1793.[31] Each of these copyright statutes accounted for no more than one page of text.[32] Until the 1957 Copyright Act, the French courts fashioned copyright law, distinguishing between public use and private use, and developing the concept of *droit moral*.[33]

The 1957 Copyright Act[34] essentially codified the case law that evolved from the Laws of 1791 and 1793.[35] However, new technologies gradually eroded the statute, giving rise to the 1985 Amendment Act.[36] The 1985 Amendment Act incorporated protection for audiovisual works and computer software.[37] The new law also imposed criminal penalties for copyright infringement.[38] Presently the *code de la propriété intellectuelle* ("I.P. CODE") embodies French statutory copyright law in its entirety. The I.P.

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and Beyond: Copyright Law for Intellectual Property Distributed over the Information Superhighways of Today and Tomorrow, 10 TEMP. INT'L & COMP. L.J. 171, 193 (1996) ("U.S. copyright law focuses on the economic right of the copyright holder to exercise his or her rights to control the distribution or reproductions of creative original works."); Jonathan Stuart Pink, Comment, *Moral Rights: A Copyright Conflict Between the United States and Canada*, 1 SW. J.L. & TRADE AM. 171, 191 (1994) ("The U.S. copyright approach emphasizes the author's economic right to profit from the commercial exploitation of his or her work.").

[31] 1 PAUL EDWARD GELLER & MELVILLE B. NIMMER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 1[1] at FRA-9 (1998).

[32] *See id.*

[33] *See id.* at FRA-9 to FRA-10.

[34] Law No. 57-803 of July 19, 1957, J.O., July 20, 1957, p. 7172; 1957 D.L. 219 ("Instituting a limitation on garnishments with respect to authors' rights.").

[35] GELLER & NIMMER, *supra* note 31, § 1[1] at FRA-9.

[36] Law No. 85-660 of July 3, 1985, J.O., July 4, 1985, p. 7495; 1985 D.S.L. 357. For example, the new law introduced subtle modifications such as changing "*oeuvre cinématographie*" (cinematographic work) to "*oeuvre audiovisuelle*" (audiovisual work) and explaining that "an audiovisual work is considered finished when the final version has been established by a mutual consent of, on one hand, the director, or, possibly, the co-authors and, on the one hand, the producer." *Id.* tit. I, arts. 2, 3 (translation by the author).

[37] *See id.* tit. I, art. 1, V.

[38] *See id.* tit. VI, art. 58 ("The infringement of copyright in France of works published in France or in foreign countries is punishable by imprisonment of three months to two years and by a fine of 6,000 francs to 120,000 francs, or by one of those two penalties exclusively.") (translation by the author).

CODE, which went into effect on July 1, 1992,[39] has been amended several times since its initial codification, usually in response to European Community Directives.[40]

2.1.1. Works Protected Under the I.P. CODE

The I.P. CODE grants an author intellectual, personal, and economic rights to a "work of the mind . . . by the mere fact of its creation."[41] Although the I.P. CODE does not define "works of the mind," any perceptible work borne of individual intellectual efforts generally qualifies for protection.[42] Among the categories of protected works are books, dramatic works, musical compositions, drawings, paintings, architecture, and sculptures.[43] The I.P. CODE does not require that the work be fixed in a tangible or perceptible medium to receive statutory protection.[44] Thus, lectures, sermons, and choreographic works also receive copyright protection.[45] Even titles may be afforded copyright protection if sufficiently original.[46]

2.1.2. Moral and Economic Rights Under the I.P. CODE

The I.P. CODE embodies a "dualist" conception of copyright, offering an author both personal and economic rights.[47] How-

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[39] Law No. 92-597 of July 1, 1992, J.O., July 3, 1992, p. 8801; 1992 D.S.L. 343, *translated in* 2 UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, COPYRIGHT LAWS AND TREATIES OF THE WORLD, France (Supp. 1991-1995) [hereinafter I.P. CODE].

[40] *See, e.g., infra* note 52 and accompanying text.

[41] I.P. CODE, art. L. 111-1.

[42] *See* GELLER & NIMMER, *supra* note 31, § 2[1][b] at FRA-14.

[43] *See* I.P. CODE, art. L. 112-2.

[44] *See* GELLER & NIMMER, *supra* note 31, § 2[1][a] at FRA-13.

[45] *See* I.P. CODE, art. L. 112-2, Nos. 2, 4. Although Art. L. 112-2 specifies that "[c]horeographic works . . . the acting form of which is set down in writing" are eligible for protection, French courts have generally interpreted this language as an evidentiary rule. *See* Versailles, 1e ch., July 9, 1991, *Revue Internationale du Droit d'Auteur* 1993, No. 158, 208 (extending copyright protection to a character created by a mime) (cited in GELLER & NIMMER, *supra* note 31, § 2[2][b] at FRA-26 n.87).

[46] *See* Paris, 1e ch., Dec. 18, 1990, 1993 D.S. 442, note Edelman, appeal rejected Cass. 1e civ., May 5, 1993, *Revue Internationale du Droit d'Auteur* 1993, No. 158, 205 (granting copyright protection to a title that recalled central elements of a character in a series of novels) (cited in GELLER & NIMMER, *supra* note 31, § 2[4][a] at FRA-30 n.127).

[47] *See* GELLER & NIMMER, *supra* note 31, § 1[2] at FRA-11; LERNER & BRESLER, *supra* note 20, at 944 ("The dualist view prevailed in France, where to

ever, the prominence of personal rights, also known as *droit moral*, is the distinguishing feature of French copyright law. Under French law, the author has exclusive rights of disclosure (*droit de divulgation*), of authorship (*droit à l paternité*), and of integrity (*droit au respect de l'oeuvre*) as well as the right to withdraw a work from publication or to make modifications of the work (*droit de retrait ou de repentir*).[48] These rights are "perpetual, inalienable and imprescriptible."[49] *Droit moral* extends to all works enumerated in Art. L. 112-2.[50]

Economic rights include the exclusive rights of public performance, public display, and reproduction.[51] In March 1997, France extended the term of economic rights to the author's life plus seventy years.[52] The I.P. CODE applied this term extension retroactively,[53] thus reviving the copyright of works that had fallen into the public domain during the relevant time period.[54]

2.1.3. Musical Works and Sound Recordings Under the I.P. CODE

The I.P. CODE affords protection to both "[m]usical compositions with or without words" and "dramatico-musical works."[55] French courts have examined melody, harmony, and rhythm in determining whether the musical composition is sufficiently original to qualify for copyright protection.[56] Since the I.P. CODE

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this day the author's rights are viewed as an incorporeal cluster of prerogatives separable into moral and patrimonial rights.").

[48] *See* I.P. CODE, arts. L. 121-1, L. 121-2, L. 121-4.

[49] *Id.* art. L. 121-1.

[50] *See id.* art. L. 111-1.

[51] *See id.* art. L. 122-1 to 122-3.

[52] *See* Law No. 97-283 of Mar. 27, 1997, J.O., Mar. 28, 1997 p. 4813; 1997 D.S.L. 213 (implementing Council Directive No. 93/83 of Sept. 27, 1993, J.O., (L 248/15) and Council Directive No. 93/98 of Oct. 29, 1993, J.O., (L 290/9)).

[53] The author's life plus 70 provision became effective July 1, 1995. *See id.*

[54] The term "public domain" refers to works (1) whose original copyright has expired; (2) whose authors have abandoned the copyright; and (3) created by the U.S. federal government. *See* ONLINE LAW 178 (Thomas J. Smedinghoff ed., Addison-Wesley Publishing Co. 1996).

[55] I.P. CODE, art. L. 112-2.

[56] *See, e.g.*, Trib. Com. Nanterre, 7e ch., June 25, 1996, *Revue Internationale du Droit d'Auteur* 1997, No. 171, 402, note A. Kéréver (deeming distinctive percussion combinations sufficiently original) (cited in GELLER & NIMMER, *supra* note 31, § 2[2][c] at FRA-27 n.95).

dispenses with the fixation requirement, both written musical works and improvisational performances receive protection.[57]

In contrast, the I.P. CODE does not extend copyright protection to sound recordings.[58] Rather, sound recordings are covered by a distinct body of law called "neighboring rights."[59] Neighboring rights "provide a strengthened protection against certain acts of unfair competition which can very loosely be associated with copyright infringements."[60] These rights last for fifty years beginning from the year the work is first communicated to the public or performed.[61]

Performance artists receive both limited *droit moral* protection and economic rights.[62] According to the I.P. CODE, neighboring rights give artists the exclusive right to authorize through a signed contract the fixation and reproduction of their performances.[63] The I.P. CODE also specifies schedules of remuneration in absence of express contractual provisions compensating the author.[64] Producers of sound recordings are also accorded legal recognition, based on their "initiative and responsibility for the

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[57] *See* GELLER & NIMMER, *supra* note 31, § 2[3][a] at FRA-27 to FRA-29.

[58] *See, e.g.*, CA Paris, 4e ch., Oct. 6, 1979, D. 1981, 190, noteplaisant (ruling that the "1957 Copyright Act does not protect phonographic recordings") (translated by the author).

[59] *See generally* I.P. CODE, art. L. 211-1 to 216-1. The term "neighboring rights" refers to "rights neighboring to copyright." Bonnie Teller, *Toward Better Protection of Performance in the United States: A Comparative Look at Performer's Rights in the United States, under the Rome Convention*, *in* INTERNATIONAL INTELLECTUAL PROPERTY LAW, 97 (Anthony D'Amato & Doris Estelle Long, eds., 1997).

[60] Teller, *supra* note 59, at 98.

[61] *See* I.P. CODE, art. L. 211-4.

[62] *See id.* art. L. 212-2.

[63] *See id.* art. L. 212-3 to 212-4; *see also* Cass. 1e civ., Jan. 4, 1964, 1964 Bull. Civ. I, No. 7 ("An artist who performs a musical work has the right to prohibit any use of that performance other than those he has authorized.") (translation by the author).

[64] *See* I.P. CODE, art. L. 212-5. According to the statute,

> [w]here neither a contract nor a collective agreement mentions the remuneration for one or more modes of exploitation, the amount of such remuneration shall be determined by references to the schedules established under specific agreements concluded, in each sector of activity, between the employees' and employers' organizations representing the profession.

Id.

initial fixation."[65] If the sound recording has been fixed in France, then public broadcasts entitle both the performance artist and the producer to equal remuneration.[66]

2.1.4. Penalties for Infringement Under the I.P. CODE

France imposes civil and criminal penalties for copyright infringement. At the request of an author or his heirs, protected works may be confiscated if they are used to perpetuate infringing activities.[67] Currently, the criminal penalty for copyright or neighboring rights infringement is two-years imprisonment and a fine of 1,000,000 FF.[68] However, if the alleged infringer repeatedly flouts intellectual property laws, these penalties may be doubled.[69] A repeat infringer also faces the risk that a court will shut down his business for up to five years if the business is a mechanism for the infringing activity.[70]

2.2. United States Copyright Law

In essence, the "distinctly 'American way' of approaching copyrights seems to be . . . through the pocketbook."[71] Copyright, as a monopoly, is considered a necessary evil. As stated in a House Report on the 1909 Copyright Act, Congress enacted copyright protection "not primarily for the benefit of the author, but primarily for the benefits to the public."[72] Even these limited economic rights have been granted grudgingly.[73]

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[65] *Id.* art. L. 213-1.

[66] *See id.* arts. L. 214-1 to 214-2. Collecting societies oversee the collection and distribution of royalties. *See id.* art. L. 321-1.

[67] *See id.* art. L. 332-1. Note, however, that this provision applies only to works with copyright protection. *See id.* Works protected by neighboring rights do not receive the same safeguards.

[68] *See* Law No. 94-102 of Feb. 5, 1994, J.O., Feb. 8, 1994, p. 2151; 1994 D.S.L. 339 (translation by the author) (amending Law No. 92-597 of July 1, 1992, J.O., July 3, 1992, p. 8801; 1992 D.S.L. 343).

[69] *See* I.P. CODE, art. L. 335-5.

[70] *See id.*

[71] David Nimmer, *Time and Space*, 38 IDEA 501, 510 (1998) (citation omitted).

[72] H.R. REP. NO. 60-2222, at 7 (1909).

[73] *See* GORMAN & GINSBURG, *supra* note 27, at 6 (noting that with respect to the first U.S. copyright statute "[i]t is not clear why it was deemed necessary to shift the burden from those who might want to use the work to those who created it, but presumably it was because copyright is in the nature of a monopoly and, therefore, 'odious in the eye of the law.'") (citation omitted).

Currently, federal copyright protection derives from one of two statutes: the Copyright Act of 1976[74] ("1976 Act") or the Copyright Act of 1909[75] ("1909 Act"). The 1976 Act covers works created on or after January 1, 1978.[76] The 1909 Act applies to works created earlier than the January 1978 threshold date.[77]

2.2.1. Works Protected Under U.S. Copyright Law

Under the 1976 Act, all "original works of authorship fixed in any tangible medium of expression, now known or later developed"[78] are eligible for federal statutory protection, including literary works, pictorial, graphic and sculptural works, and sound recordings.[79] The fixation requirement distinguishes those works eligible for federal statutory protection from those receiving state common law copyright.[80] The 1976 Act allows limited restoration of copyright protection for foreign works that have fallen into the public domain.[81]

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[74] 17 U.S.C. §§ 101-1101 (1994).

[75] 17 U.S.C. §§ 1-32 (superseded 1976).

[76] *See* 17 U.S.C. § 302 (1994).

[77] Under the Sonny Bono Term Extension Act, the 1909 Act will retain its vitality in American copyright law until 2003. *See* Sonny Bono Term Extension Act § 102 (amending 17 U.S.C. §§ 301-304 (1994)).

[78] 17 U.S.C. § 102 (1994).

[79] *See id.*

[80] H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

The fixation requirement also applies to digital communications and the Internet. "[F]loppy disks, compact discs (CDs), CD-ROMs, optical disks, compact discs-interactive (CD-Is), digital tape, and other digital storage devices are all stable forms in which works may be fixed and from which works may be perceived, reproduced or communicated by means of a machine or device." *See* BRUCE A. LEHMAN (CHAIR), INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 26 (Sept. 1995) (available at <http://www.uspto.gov/web/offices/com/doc/ipnii/>) [hereinafter WHITE PAPER] (citing Stern Electronics, Inc. v. Kaufman, 669 F.2d 852, 855 (2d Cir. 1982)). However, "[a] transmission, in and of itself, is not a fixation . . . . Therefore, 'live' transmissions via the [Internet] will not meet the fixation requirement, and will be unprotected by the Copyright Act, unless the work is being fixed at the same time as it is being transmitted." *Id.* at 27.

[81] *See generally* 17 U.S.C. § 104A (1994). Section 104A revives copyright protection for original works of authorship, subject to the requirements of § 104A(a), which are not in the public domain in the source country but have fallen into the public domain in the United States because the author failed to comply with formalities required under the 1976 Act before the United States

In contrast, the 1909 Act lists specific categories of works eligible for protection. According to Section 4 of the 1909 Act, those registering a work for copyright protection had to specify which of fourteen categories encompassed the work.[82] The 1909 Act does not extend renewed protection to works in the public domain as of July 1, 1909 under any circumstances.[83]

2.2.2. *Economic and Moral Rights Under U.S. Copyright Law*

In the United States, economic rights last for the life of the author plus seventy years,[84] and moral rights endure for the life of the author.[85] Economic rights are the cornerstone of U.S. copyright law. Under § 106, an author has the exclusive rights to reproduce the copyrighted work and to prepare derivative works based on the copyright work.[86] Depending on the category of the copyrighted work, the author also has the exclusive rights of distribution, public performance, and public display.[87]

Although the United States recently enacted a moral rights statute to comply with Berne Convention requirements,[88] it does

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became a signatory to the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 331 U.N.T.S. 217, as last revised at the Paris Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

[82] *See* 17 U.S.C. § 4 (superseded 1976). Under Section 4, works registered must qualify as books, periodicals, works of art, sound recordings, or another specified form of expression.

[83] *See* 17 U.S.C. § 8 (superseded 1976).

[84] *See* Sonny Bono Term Extension Act § 102 (amending 17 U.S.C. §§ 301-04).

[85] *See* 17 U.S.C. § 106A(d)(1) ("[T]he rights conferred by [§ 106A(a)] shall endure for a term consisting of the life of the author.").

[86] *See* 17 U.S.C. §§ 106(1)-(2) (1994).

[87] *See* 17 U.S.C. §§ 106(3)-(5) (1994).

[88] All signatories to the Berne Convention recognize that

> [i]ndependently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

See Berne Convention, *supra* note 81, art. 6*bis*.

Pursuant to Article 6*bis*, Congress enacted the Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990)(codified at 17 U.S.C. § 106A (1994)) [hereinafter VARA]. Before VARA, artists had no judicial recourse for acts that compromised their reputation. *See* Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947) (dismissing a photographer's claim alleging

not feature prominently in U.S. copyright law. The Visual Artists Rights Act of 1990 ("VARA") prohibits "any intentional distortion, mutilation or other modification" of a work qualifying as "visual art."[89] Section 101 of the 1976 Act defines a work of visual art as either a single copy or limited edition of 200 copies or fewer of a painting, drawing, print, or sculpture.[90] Only the author of a work of visual art may claim the rights conferred by §106A(a).[91] In deference to the principle of economic authorship, VARA specifically exempts works made for hire from moral rights protection.[92]

In spite of Congressional encouragement, courts have applied VARA protections sparingly.[93] The case of *Carter v. Helmsley-*

misattribution on grounds that "moral rights . . . [have] not yet received acceptance in the law of the United States. No such right is referred to by legislation, court decision or writers."). *But see* Gilliam v. American Broad. Cos., Inc., 538 F.2d 14, 24 (2d Cir. 1976) (arguing that although the United States had not formally codified a moral rights statute, artists had remedies for misrepresentation or mutilation of their works through other causes of action such as breach of contract or the tort of unfair competition).

[89] 17 U.S.C. §§ 106A(a)(3)(A) (1994). Unlike French copyright laws, VARA does not recognize an author's *droit de divulgation* or *droit de retrait ou de repentir*. *Compare* 17 U.S.C. §106A *with* I.P. CODE, arts. L. 121-1, 121-2, 121-4.

[90] *See* 17 U.S.C. § 101 (1994) (defining a "work of visual art").

[91] *See* 17 U.S.C. § 106A(a) (1994).

[92] *See id.* (providing that "[a] work of visual art does not include . . . any work made for hire"). In accordance with the idea of copyright as a bundle of economic rights, the 1976 Act awards the party bearing the economic risks of creation and production the title of "author." *See* GORMAN & GINSBURG, *supra* note 27, at 246. Copyright vests initially in the author or authors of an original work, regardless of whether the author qualifies as a sole craftsman or a corporate entity. *See* 17 U.S.C. §§ 201(a)-(b) (1994). Thus, under 1976 Act the intellectual creator and the economic patron vie for copyright ownership. *See* GORMAN & GINSBURG, *supra* note 27, at 246.

A work for hire, which rewards the economic "author" of a work with copyright, exists when (1) an employee prepares a work within the scope of his or her employment; or (2) the work contributes to one of nine enumerated works and the author transfers his rights through a written instrument. *See* 17 U.S.C. § 101 (1994) (defining a "work made for hire"). In Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), the Supreme Court articulated a test for works not covered by 17 U.S.C. § 101. Based on the RESTATEMENT (SECOND) OF AGENCY (1958), the Reid test used several factors—ranging from tax treatment of the artist by the employer to overall control of the project—to assess whether the employer or the creator of the work could claim copyright privileges. *See* 490 U.S. at 751-52.

[93] *See, e.g.*, English v. BFC & R. E. 11th St. LLC, No. 97Civ. 7446(HB), 1997 WL 746444, at *4 (S.D.N.Y. Dec. 3, 1997) ("VARA is inapplicable to art-

Spear, Inc.[94] in particular reflects the judiciary's ambivalence toward VARA. In that case, artists known as the "Three-J's" obtained a preliminary injunction from the District Court when Helmsley-Spear purchased a building and decided to remove the artists' walk-through sculpture, which comprised almost the entire lobby of the building.[95] The Second Circuit Court of Appeals reversed the lower court and vacated the injunction, citing the work for hire exception[96] to VARA. In spite of the artists' complete "artistic freedom with respect to every aspect of the sculpture's creation"[97] and the skill required,[98] the Court found that the other factors of the *Reid* test, specifically the employer's payroll deductions and benefit plans, indicated that the artists qualified as employees and therefore were not protected under VARA.[99]

2.2.3. *Musical Works and Sound Recordings Under U.S. Copyright Law*

Since the 1909 Act, U.S. copyright law has distinguished between musical works and sound recordings.[100] Though maintaining the distinction, the 1976 Act does not define "musical works,"

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work that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question."); Pavia v. 1120 Ave. of the Americas Assocs., 901 F. Supp. 620, 628 (S.D.N.Y. 1995) (rejecting an artist's claim that the improper display of his sculpture constituted "ongoing mutilation" and thus came within the scope of VARA).

[94] 71 F.3d 77 (2d Cir. 1995), *aff'g in part and rev'g in part*, 861 F. Supp. 303 (S.D.N.Y. 1994).

[95] *See* Carter, 71 F.3d at 80.

[96] *See id.* at 88.

[97] *Id.* at 86.

[98] *See id.*

[99] *See id.* (maintaining that "the provision of employee benefits and the tax treatment of the plaintiffs weigh strongly in favor of employee status"). For a critique of the "lamentable" *Carter* decision, see Recent Case, *Second Circuit Holds Sculpture to be Unprotected "Work for Hire":* Carter v. Helmsley-Spear, Inc., 109 HARV. L. REV. 2110, 2112, 2115 (1996) (criticizing the *Carter* court's approach for "favor[ing] precisely those factors bearing upon the economic aspects of the artists' relationship to the hiring party over those involving the *artistic*, or 'creative,' engagement that the artists displayed in relation to their work.").

[100] *See* 17 U.S.C. §§ 5(e), 5(n) (1909) (superseded in 1976) (distinguishing between "musical compositions" and "sound recordings").

presuming that the term had a "fairly settled" meaning.[101] On the other hand, the 1976 Act does define sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds."[102]

The distinction is relevant to the exclusive rights awarded in § 106. The copyright holders of musical works receive the exclusive rights of reproduction, distribution, public performance, and the right to prepare derivative works based on the musical composition.[103] Those who have rights in sound recordings have the exclusive rights of reproduction, distribution, public performance by means of digital audio transmission, and the right to prepare derivative works with the sound recording.[104] Thus, the copyright owner of a sound recording does not obtain rights in the underlying musical composition by recording it. Furthermore, the copyright owner of a sound recording has no right to control or be compensated for the broadcast or other public performance of a sound recording.[105] However, the rights associated with both musical compositions and sound recordings are subject to limitations enumerated in the 1976 Act.

2.2.4. Limitations on the Exclusive Rights in Musical Works

The exclusive rights in nondramatic musical works recorded on phonorecords are limited by § 115, which mandates a compulsory license once the copyright holder authorizes the making of a phonorecord and distributes it.[106] In exchange for granting a

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[101] *See* H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666-67.

[102] 17 U.S.C. § 101 (1994) (defining "sound recordings"); *see also* 17 U.S.C. §§ 5(e), 5(n) (1909) (superseded in 1976) (distinguishing between "musical compositions" and "sound recordings").

[103] *See* 17 U.S.C.S. §§ 106(1), (2), (3)-(5) (1994).

[104] *See* 17 U.S.C.S. §§ 106(1), (2), (3), (6) (Supp. 1999).

[105] *See* 17 U.S.C.S. § 114(a) (Supp. 1999) ("The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).").

[106] *See* 17 U.S.C.S. § 115(a)(1) (Supp. 1999) ("When phonorecords of a nondramatic musical work have been distributed . . . . under the authority of the copyright owner, any other person . . . may . . . obtain a compulsory license to make and distribute phonorecords of the work."). Upon receiving the compulsory license, the licensee may alter "the work to the extent necessary to conform it to the style or manner of interpretation of the performance in-

compulsory license, copyright owners are entitled to royalties established by the Library of Congress.[107]

2.2.5. *Limitations on the Exclusive Rights in Sound Recordings*

Section 114 limits the exclusive rights in sound recordings to the "actual sounds fixed in the recording."[108] According to the explicit language of the statute, the right of reproduction and the right to prepare derivative works do not prevent "the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."[109]

2.2.6. *Penalties for Infringement Under U.S. Copyright Law*

A violation of § 106 rights constitutes copyright infringement.[110] The copyright owner can obtain either an injunction, damages, or both.[111] Courts award damages based on actual damages or profits or according to specific parameters established by the 1976 Act.[112] If the court determines that the defendant willfully infringed plaintiff's copyright, the court may impose damages of up to $100,000.[113] Additionally, the 1976 Act imposes criminal penalties where the court finds willful infringement for purposes of commercial advantage or infringement based on fraud or false representation.[114]

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volved, but the arrangement shall not change the basic melody or fundamental character of the work." *Id.* § 115(a)(2) (1994).

[107] *See* 17 U.S.C. § 115(c)(4) (1994).

[108] *Id.* § 114(b).

[109] *Id.*

[110] *See id.* § 501(a).

[111] *See* 17 U.S.C. §§ 502, 504 (1994 & Supp. 1999).

[112] *See* 17 U.S.C. § 504(a) (1994).

[113] *See id.* § 504(c)(2).

[114] *See id.* § 506.

3. COPYRIGHT ON THE INTERNET

3.1. What's Different about Copyright on the Internet

The Internet has raised the stakes in the international copyright[115] debate. Copyrightable images and text posted on Web sites may be accessed all over the world.[116] Web site postings are constantly copied and forwarded to online travelers.[117] The dy-

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[115] *But see* Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. CORP. SOC'Y 318, 330 (1995) [hereinafter Ginsburg, *Global Use/Territorial Rights*] ("In principle, there is no such thing as 'international copyright'; instead, there are [sic] a multiplicity of copyright regimes. An author and international copyright owner possesses no supranational rights . . . .").

[116] *See* LERNER & BRESLER, *supra* note 20, at 1501; *see also* Reindl, *supra* note 13, at 800 ("Works such as videos, recordings of musical performances, and texts can be posted anywhere in the world, retrieved from any database in a foreign country, or made available by [online] service providers to subscribers on a global scale.").

[117] *See* Paul Edward Geller, *Conflicts of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World*, 20 COLUM.-VLA J.L. & ARTS 571, 572 (1996) ("[A] work in digital format, once received at a computer terminal, can be reworked and retransmitted to one or any number of other terminals anywhere. Thus digital media allow transmitters and receivers to switch roles interactively, and to be linked among themselves in fluid and variegated patterns."); Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1467 (1995) [hereinafter Ginsburg, *Putting Cars on the "Information Superhighway"*] ("The prospect of pervasive audience access to and ability to copy and further disseminate works of authorship challenges the traditional roles not only of information providers – be they publishers, motion picture producers or record producers – but of the individuals who create the works.") (footnote omitted). *See, e.g.*, Edwards, *supra* note 23, at 32 ("[A]ll activity on [the Internet] involves copying, both when material is put into the Net and when it is accessed. And because the Internet operates in digital form, perfect quality reproduction is possible."); Roberta R. Katz, *At a Crossroads: Law, Courts, and Legal Practice at the End of the 20th Century*, COMPUTER LAW., Apr. 1998, *available in* LEXIS, News Library, Curnws File; Wendy Leibowitz, *The Sound of One Computer Copy*, NAT'L L.J., Nov. 2, 1998, at A16 (describing the prevalence of computer copying and summarizing legislation aimed at curbing its abuse); Streif, *supra* note 21 ("Whether it is blatant theft or just 'fair use' of publicly available material – copying texts is a common practice on the Internet, where millions of documents are available to any Web surfer for free.").

In her article, Ms. Katz provides a concise, non-technical description of another way in which the Internet challenges the traditional concept of the author's exclusive rights of reproduction:

> The Internet is a series of connected servers that receive and then pass on digital communications. In the process, copies are made of these

namics that make the Internet valuable and unique, such as global access and effortless copying, fuel the dilemma surrounding choice of law on the Internet. On the Internet, copyright infringement can occur in several different places simultaneously.[118] Moreover, the vast expanse of the Internet and virtual anonymity of infringers exacerbates the thorny issue of legal enforcement.[119]

Furthermore, the online community has adopted norms and customs that cast off the shackles of copyright legislation. However misguided the perception, most Netizens consider the mere act of posting material on the Internet equivalent to an implied license.[120] Others believe that the doctrine of fair use[121] exempts

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> communications. This copying is just a function of how the network is set up. In addition to these networked copies, which are essentially hidden from view, there are also copies made and stored in your desktop computers through a function called "caching." Caching makes it possible for you to store images in the computer rather than constantly having to return to the network. It's essential to having the World Wide Web run efficiently; without caching, traffic jams on the Web would be the norm.

Katz, *supra*, at 14.

[118] *See* Ginsburg, *Copyright Without Borders?*, *supra* note 13, at 155 ("[D]igital networks make possible multinational infringements that are simultaneous and pervasive."); Reindl, *supra* note 13, at 807 (noting that Internet "technology . . . allows single acts of use of a copyrighted work to have effects in several countries").

[119] *See* Copyright and Related Rights in the Information Society: Green Paper from the Commission to the European Council, COM(95)381 final at 4 [hereinafter EC Green Paper] (acknowledging "the difficulty of verifying the use made of a work" in the information society); WHITE PAPER, *supra* note 80, at 131 (describing the difficulty in determining where and when copyright infringement occurs).

[120] *See* ONLINE LAW, *supra* note 54, at 171. As Smedinghoff explains,

> well-recognized online customs and practices have been established that . . . are so prevalent that copyright owners might be presumed to understand them and agree to them in certain cases . . . . Posting an e-mail message to a listserv is an example. Since the author of the copyrightable message knows that the listserv will automatically copy and redistribute the message to all the subscribers of the listserv, the author presumably grants an implied license for such copying.

[121] *See* 17 U.S.C. § 107 (1994). According to § 107, otherwise infringing conduct may qualify as fair use depending on:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;

online infringers from statutory restrictions.[122] In the name of the "free flow of ideas,"[123] an increasingly vocal faction of Netizens opposes the intrusion of even minimal copyright standards on the Internet.[124] From the vantage point of these Netizens, any restraint imposed on the flow of information or ideas threatens to alter the fundamental character of the Internet.[125] Naturally,

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(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

France has codified a fair use provision at I.P. CODE, art. L. 122-5. The I.P. CODE exempts "[c]opies or reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created." I.P. CODE, art. L. 122-5, 2°.

[122] *See* ONLINE LAW, *supra* note 54, at 173 ("Many people mistakenly believe that fair use applies so long as the resulting product is not marketed commercially . . . . However, it is reasonable to expect that courts will approach claims of fair use online just as they do in traditional environments.").

[123] Yong-Chan Kim, *Copyright and Internet: Social Claim and Government's Intervention* (Dec. 1996) (paper by Ph.D. student at the Annenberg School for Communication, University of Southern California) (available at <http://www.msu.edu/user/kimyong2/copy&int.htm>).

[124] *See, e.g.*, Karen Coyle, *Copyright in the Digital Age*, Remarks at the San Francisco Public Library (Aug. 7, 1996) (transcript available at <http://www.kcoyle.net/sfpltalk.html>) (acknowledging "the present and growing attitude of many citizens that works should be free for the taking in the electronic environment") (citation omitted); Daniel Grant, *Art Theft, Computer-Style*, NEWSDAY, Apr. 27, 1997 at A45, A45, *available in* 1997 WL 2692255 (explaining that "[p]roponents of traditional copyright protections are met by advocates of free access to information, who believe that more information disseminated widely is a public good, and that it should be encouraged rather than impeded by antique legal concepts of limiting the use of intellectual property," and summarizing the objectives of the Digital Future Coalition, an organization dedicated "to lobby[ing] Congress to craft legislation which does not overly limit transmission of information over the Internet").

[125] *See, e.g.*, Reindl, *supra* note 13, at 809 n.25 (noting that "the most radical – and least realistic – [cyberlaw] model would abolish any property rights in connection with digital networks, arguing that the free diffusion of information will become the predominant aspect of the digital era"); Coyle, *supra* note 124 ("If you accept that each 'viewing' is a transmission, and each transmission makes a copy, then you can reasonably conclude that the copyright holder should get paid 'per viewing' – meaning that if you access the same document twice, you may be asked to pay twice.").

authors and publishers may advocate more stringent copyright laws to prevent online infringement.[126]

3.2. Measures France Has Taken to Deal with Online Infringement

3.2.1. The European Community Green Paper

As a member of the European Community, France is affected by any Directives issued by the European Council. One of the Community's most significant attempts at grappling with Internet copyright was the Commission of European Communities Green Paper "Copyright and Related Rights in the Information Society" ("EC Green Paper"). The EC Green Paper emphasized that "copyright and related rights [will] guarantee the free movement of goods and the freedom to provide services."[127]

Generally, the EC Green Paper summarized the questions to be addressed instead of offering specific solutions.[128] The EC Green Paper reviewed the different components of copyright, including discrete economic rights and moral rights, and concluded the commentary with a series of issues to be addressed in light of the new technology.[129]

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[126] *See* Ginsburg, *Putting Cars on the "Information Superhighway,"* *supra* note 117, at 1467 ("If all kinds of authorship, particularly those of intense creativity and imagination, are to embark willingly on the cyber-road, then authors require some assurance that the journey will not turn into a highjacking."); April M. Major, *Copyright Law Tackles Yet Another Challenge: The Electronic Frontier of the World Wide Web*, 24 RUTGERS COMPUTER & TECH. L.J. 75, 105 n.5 (1998) ("Creators, publishers and distributors of works will be wary of the electronic marketplace unless the law provides them the tools to protect their property against unauthorized use.") (citations omitted).

[127] EC Green Paper, *supra* note 119, at 10.

[128] *See* Stephen Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 759, 783 (1997) ("The EC Green Paper's foremost purpose appears to be the solicitation of comments from interested parties over how copyright law should be extended to the [Internet] in the E.U."); *see also* Alexander A. Caviedes, *International Copyright Law: Should the European Union Dictate Its Development?*, 16 B.U. INT'L L.J. 165, 228 (1998) ("In the face of the new services being developed and offered to the public, the Community recognized the need to address old copyright constructs and to determine if they are still valid means of protecting creators in the future.") (citation omitted).

[129] *See generally* EC Green Paper, *supra* note 119, 49-68.

Throughout the EC Green Paper, the Commission emphasized the need for harmonization of laws, though conceding that worldwide harmonization of substantive copyright laws is not an imminent solution.[130] In absence of worldwide harmonization, the Commission advocated that the Member States harmonize laws on reproduction, public performance, and public distribution rights.[131] However, as the Commission noted, Member harmonization solves only part of the problem since directives do not impact copyright law beyond the Member States.[132]

In a significant departure from the cautious, exploratory tone of the EC Green Paper, the Commission questioned whether, given technological advances, fair use can continue to exempt private use:

> The criterion of strictly private use is becoming more fluid and difficult to apply. Digital technology could make home copying into a fully-fledged form of exploitation. A work can be reproduced systemically and any number of times without loss of quality. The danger of piracy and improper use without payment to the rightholders will increase. There may be a growing need for arrangements at a *community level* to *remunerate* rightholders, and for the

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[130] *See id.* at 42 ("Of course a worldwide solution would be desirable, but that will be possible only if there is an agreement on the substantive law of copyright and related rights which ensures a high level of protection and a sufficient measure of harmonization. There is certainly no such agreement at present.").

[131] *See id.* at 52, 54, 58. Although all of the Member States are signatories to the Berne Convention, the Treaty allows signatories to implement different levels of protection provided that the laws honor certain minimal standards. *See, e.g.*, Berne Convention, *supra* note 81, art. 9(2) ("It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."). Thus far, EC law has had limited success in harmonization of laws. Only the Computer Programs Directive and the Rental Right Directive have standardized Member States' laws. *See* EC Green Paper, *supra* note 119, at 51. The Member States have not presented a united front on the definition of "communication to the public" or the right of digital transmission or dissemination. *See id.* at 54-55, 57.

[132] *See id.* at 16 ("[A] response to the challenges of new technology which is limited to the Member States of the Community will deal with only part of the problem.").

progressive introduction of techniques to limit copying of this kind.[133]

To increase artists' protection on the Internet, the EC Green Paper proposed implementing a "one stop shop" that would give authors, performers, and other right holders information about licensing and fees and also manage copyrights for works incorporated into multimedia creations.[134] The EC Green Paper also recommended that all copyrighted works on the Internet be incorporated into a "digital catalogue" which would consist of marking each work with an identification number— similar to the ISDN system for literary works— to facilitate collection and distribution of royalties to copyright holders.[135]

The EC Green Paper generated mixed responses from commentators. The report has alternately been lauded as a major development[136] and dismissed as naïve.[137] Nonetheless, the report was the catalyst behind the Florence Conference from June 2-4, 1996.[138] The Conference convened over 250 authors, performance artists, representatives of Internet users, and international organizations to discuss the EC Green Paper.[139] These delegates reiterated one of the predominant themes of the EC Green Paper: harmonization at the Community level lacks legal significance unless it is accompanied by harmonization at the international

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[133] *Id.* at 28.

[134] *See id.* at 76-77.

[135] *See id.* at 79.

[136] *See* Caviedes, *supra* note 128, at 229 ("Rather than merely building upon what TRIPs would dictate, the EC took a leading role . . . and in the process saved itself significant administrative effort and confusion by passing its laws as complements to the new world order in the field of intellectual property."). *But see* André Lucas, *Copyright Law and Technical Protection Devices*, 21 COLUM.-VLA J.L. & ARTS 225, 230 (1997) (describing the EC response to technological protections as "noncommital . . . merely conclud[ing] that the question is controversial").

[137] *See* Patrick F. McGowan, *The Internet and Intellectual Property Issues*, 455 PRACTICING L. INST./PAT. 303, 349 (1996), *available in* WESTLAW, 455 PLI/Pat 303 (concluding that both the U.S. White Paper and the EC Green Paper "exhibit a certain amount of naivete regarding the technical implications of how information is carried over the Internet"); Pamela Samuelson, *Intellectual Property Rights and the Global Information Economy*, 38 COMM. ACM at 23, Jan. 1, 1996, *available in* 1996 WL 9011795 ("Very little technical sophistication can be found in the various Green and White Papers. . .").

[138] *See* McGowan, *supra* note 137, at 349.

[139] *See id.*

level.[140] To date, the European Community has not adopted any of the EC Green Paper proposals.

3.3. Measures the United States Has Taken to Deal with Online Infringement

3.3.1. The United States White Paper

In 1993, President Clinton commissioned the Information Infrastructure Task Force ("IITF") to study the new frontier called the "information superhighway."[141] In the White Paper, the IITF examined whether the 1976 Act could provide adequate copyright protection to both online artists and users. After summarizing the 1976 Act, the White Paper delved into the core issue: how the Internet has impacted copyright law. With a few notable exceptions, the IITF concluded that current copyright law could accommodate the new medium.[142] However, the IITF proposals as embodied in these "exceptions" generally favored increased copyright protection over user access. The IITF suggested that: (1) unauthorized transmissions implicated both the exclusive rights of reproduction and public distribution where appropriate;[143] (2) the statutory definition of publication should be expanded "to recognize that a work may be published through the distribution of copies of the work to the public by transmission;"[144] (3) the exclusive right of public performance should be extended to the performers and copyright owners of sound recordings;[145] and (4) Congress should enact legal prohibitions against technological

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[140] *See id.*

[141] *See* WHITE PAPER, *supra* note 80, at 1.

[142] *See id.* at 64 ("For the most part, the provisions of current copyright law serve the needs of creators, owners, distributors, users and consumers of copyrighted works in the [Internet] environment. In certain instances, small changes in the law may be necessary to ensure public access to copyrighted works while protecting the rights of the intellectual property owner.").

[143] *See id.* at 215 ("Because transmissions of copies may constitute both reproduction and distribution of a work, transmissions of copies should not constitute the exercise of just one of those rights . . . . [However], not all transmissions of copies of copyrighted works will fall within the copyright owner's exclusive distribution right.").

[144] *Id.* at 219.

[145] *See id.* at 221-25.

processes and systems "that defeat technological methods of preventing unauthorized use" of digital media.[146]

Though endorsing increased protection for copyright holders, the IITF hedged on the issue of *droit moral*. The IITF did not offer any specific recommendations on *droit moral* in digital media.[147] However, the White Paper implied that the IITF did not necessarily view *droit moral* for works on the Internet as desirable.[148] Within this context, the IITF briefly addressed conflict of laws regarding online infringement. Though the IITF seemed to reject expanding *droit moral* protection, it did concede that "it may be necessary to harmonize levels of protection under disparate systems of copyright, authors' rights and neighboring rights. . . to bridge the gaps among these systems."[149]

Netizens heralded the White Paper with mixed reactions. Online users vehemently criticized most proposals.[150] Even the artists and authors that the White Paper seemed to protect reacted ambivalently.[151] Congress has likewise proffered a mixed re-

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[146] *Id.* at 230.

[147] *See id.* at 154.

[148] *See id.* More specifically, the IITF took this position about *droit moral* on the Internet:

> Some believe that the ability to modify and restructure existing works and to create new multimedia works makes strengthening international norms more important than ever before. Others take the view that any changes to international norms for the protection of moral rights must be carefully considered in the digital world. The United States agrees with this view. Careful thought must be given to the scope, extent and especially the waivability of moral rights in respect of digitally fixed works, sound recordings and other information products.

Id.

[149] *Id.* at 148.

[150] *See* David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 U.S.F. L. REV. 1, 42 (1998) (observing that many criticized the WHITE PAPER for its "high-protectionism" of copyright owners) (citation omitted); *see also Intellectual Property Crimes*, 35 AM. CRIM. L. REV. 899, 923 n.175 (1998) (citing several commentators as "criticiz[ing] the authors of the White Paper for overbreadth and lack of technical knowledge").

[151] *See* Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1237 n.139 (1997) (summarizing the White Paper as "expanding copyright owner's right in the digital environment . . . by proposing modification of the first-sale doctrine so that copyright owners maintain control of works that are transmitted electronically" and stating that "[m]any copyright owners argue that even the NII White Paper did not go far enough in terms of protecting interests of copyright owners"). *But see* Timothy L. Skelton, Com-

sponse, implementing some recommendations and disregarding others, at least for now.

3.3.2. The Digital Millenium Copyright Act

The Digital Millenium Copyright Act ("DMCA")[152] is the legislative embodiment of those White Paper proposals which Congress chose to endorse. The DMCA banned the manufacture or import of devices primarily used to circumvent encryption shields.[153] It also imposed civil and criminal penalties upon users who decode encryption technology used to limit access to online works.[154] As specified by the law, the prohibition against decoding does not apply to libraries or schools for works that the Library of Congress classifies as exceptions. These exceptions include works of "criticism, comment, news reporting, teaching, scholarship or research."[155] Thus, the DMCA, while strengthening authors' rights, ensures that fair use remains intact for educational institutions. Additionally, the DMCA insulates Internet Service Providers ("ISPs") from liability for copyright infringement where they would be implicated for simply relaying the transmission.[156] To protect the free flow of information on the Internet, Congress exonerated ISPs where the infringing transmission is initiated by an Internet user.[157] Nor will ISPs be liable for subscribers' infringing postings or reproduction and storage of infringing material based on caching.[158]

Perhaps because of its recent enactment, the response to the DMCA has been limited. The provisions regarding encryption

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ment, *Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative*, 35 SAN DIEGO L. REV. 219, 266 n.173 (1998) ("Some authors have supported the White Paper as a balanced treatment of the issues.") (citations omitted); Julie C. Smith, Comment, *The NII Copyright Act of 1995: A Roadblock Along the Information Superhighway*, 8 SETON HALL CONST. L.J. 891, 913 (1998) ("The White Paper . . . focused almost entirely on the protection of owners' proprietary interests, and neglected to discuss the public benefit portion of the [Copyright Clause].").

[152] Digital Millenium Copyright Act, Pub. L. No. 105-304, 112Stat. 2863 (to be codified at 17 U.S.C. §§ 1201-1301).

[153] *See* 17 U.S.C. § 103, 112 Stat. 2863, 2864.

[154] *See id.* This provision of the DMCA will take effect in the year 2000.

[155] *Id.*

[156] *See generally id.* § 202, 112 Stat. 2877-80.

[157] *See id.* § 202(a), 112 Stat. 2878.

[158] *See id.* For an explanation of the caching process, see *supra* note 117.

technology and fair use have attracted the most attention.[159] At least one legal commentator has suggested that the narrow exceptions for fair use run counter to the policies underpinning the Copyright Clause of the Constitution.[160] However, thus far, the DMCA has not been challenged as unconstitutional.

4. CHOICE OF LAW ANALYSIS

Typically online copyright infringement involves questions of private international law. Private international law refers to the "body of national law applicable to disputes between private persons . . . arising from activities having connections to two or more nations."[161] As signatories to the Berne Convention, both France and the United States first consult that treaty to determine which law should be applied to multinational infringement cases. Beyond the Berne Convention, French courts primarily look to the *Code civil* for general guidance on choice of law issues. In contrast, the RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("RESTATEMENT") guides U.S. courts in determining the relevant law for multinational legal issues.[162]

4.1. The Berne Convention for the Protection of Literary and Artistic Works

The Berne Convention provides only that the author of a copyright work receive "the extent of protection [and] means of redress [offered] by the laws of the country where protection is claimed."[163] This provision of the Convention (Article 5, Section

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[159] *See Educators, Libraries Win Limited Fair Use Privileges for Encrypted Material*, YOUR SCHOOL & THE LAW, Dec. 11, 1998, *available in* LEXIS, Nexis Library, Curnws File (reporting various criticisms of the fair use exceptions of the DMCA within the educational system).

[160] U.S. CONST. Art. I, § 8, cl. 8; *see* Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1142 n.200 (1998) (noting that although "[e]fforts to amend [the DMCA] to make fair use an outright defense to a charge of tampering with or circumventing digital rights management were unsuccessful . . . such a defense may be constitutionally mandated").

[161] GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 17 (3d ed. 1996).

[162] *See id.* ("In the United States, [choice of law is] dealt with by 'Conflict of Laws' treatises and the American Law Institute's RESTATEMENT (SECOND) CONFLICT OF LAWS.") (citation omitted).

[163] Berne Convention, *supra* note 81, art. 5(2). As noted by Professor Ginsburg, "the Berne Convention imposes a floor, but member countries may vary the height of the ceiling." Jane C. Ginsburg, Study for the World Intel-

2) articulates what is known as the principle of national treatment.[164] However, the Berne Convention's cryptic reference to the "laws of the country where protection is claimed" has given rise to varying interpretations.[165]

4.2. The French Approach – Code Civil and Case Law

Similar to its EC counterparts,[166] France primarily consults its own statutes when dealing with conflict of laws. Generally, European nations have adopted a rule-based approach that varies according to the legal issue addressed.[167] Following this European tradition, the *Code civil* contains choice of law provisions for marriage, divorce and separation, and estates and wills.[168]

In spite of its specific provisions, the *Code civil* actually offers limited guidance for resolving choice of law issues. Article 3 stipulates that French law regarding the status and capacity of persons will apply to nationals living abroad.[169] Similarly, Article

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lectual Property Organization: Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks 5 (1998) (unpublished paper submitted to the World Intellectual Property Organization) (on file with the author) [hereinafter WIPO Paper].

[164] *See* GORMAN & GINSBURG, *supra* note 27, at 878 ("With regard to the legal regime of protection, in most instances, the [Berne Convention] operate[s] on the principle of National Treatment . . . . As a result, . . . the law applicable to determine the scope of protection is the law of the . . . forum."); LERNER & BRESLER, *supra* note 20, at 844 ("The doctrine of national treatment provides that authors receive in other countries the same copyright protection for their works 'as those countries accord their own authors.' Therefore, when the copyright owner of an artwork painted by a United States national sues for acts of infringement occurring in France, French law with all of its rights and remedies, not United States law, governs the lawsuit.") (citation omitted).

[165] *See* discussion *infra* Sections 5.1-5.2.

[166] *See* MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE 4 (1995) ("[A] European conflicts lawyer seeks rules primarily in conventions and statutes . . . .").

[167] *See id.* at 102. ("Europeans like to make choice of law decisions under precise provisions that lead, at least in theory, to clear results, while Americans tend to favor more open-ended processes that give greater weight to the individual circumstances of a dispute.").

[168] *See* CODE CIVIL [C. CIV.] arts. 3 (choice of law based on personal status), 170 (marriage), 310 (separation and divorce), 999-1000 (disposition of estates and wills) (Fr.), *translated in* JOHN H. CRABB, THE FRENCH CIVIL CODE, REVISED EDITION (AS AMENDED TO JULY 1, 1994) (1995).

[169] *See* C. CIV. art. 3 ("Laws concerning the status and capacity of persons govern Frenchmen, even if residing in a foreign country."), *translated in* CRABB, *supra* note 168, at 2.

310 accords French judges broad leeway in adjudicating separations and divorces.[170] The *Code civil* does not address under what circumstances, if any, foreign law rather than French law would govern a case.[171]

Although European conflicts law is rooted in the civil law culture that dominates the European Community,[172] case law also provides a significant source of guidance in resolving conflict of laws issues. The French judicial system has favored the lex loci delicti doctrine[173] in resolving choice of law issues. The lex loci delicti choice of law doctrine applies the law of the place where the crime or wrong took place. A recent decision of the *Cour de cassation*, the highest court in France's judicial system, reaffirmed France's commitment to the lex loci delicti doctrine.[174] However, the lex loci delicti rule, with its strict emphasis on the site of harm, flounders on the Internet where there are no boundaries to demarcate the site of harm.[175] Returning to the ParkBench hypothetical,[176] it is unclear, under lex loci delicti rules, whether the site of harm would be the nation where the ISP is located, the countries where users can view infringing copies, or the country where the alleged infringer was located when he violated the copyright. Additionally, the lex loci delicti rule, which was

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[170] *See* C. CIV. art. 310 ("Divorce and judicial separation are ruled by French law: when both spouses are of French nationality; when the spouses each have their domicile on French territory; when no foreign law recognizes competence for itself and French courts are competent to determine divorce or judicial separation."), *translated in* CRABB, *supra* note 168, at 58.

[171] *See* REIMANN, *supra* note 166, at 59.

[172] *See id.* at 3. According to Reimann, "[t]he reason is not only that in Europe, the common law countries are in the minority, but also, and more importantly, that the continental conflicts regimes were already firmly in place on the European level at the time of the common law members' integration into the EC." *Id.*

[173] Lex loci delicti literally means the "place of the wrong." *See* BLACK'S LAW DICTIONARY 923 (7th ed. 1999); *see also* FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 51 (1993).

[174] Cass. 1e civ., Feb. 8, 1983, 1983 Bull. Civ. I, No. 51 (ruling that the law of the territory where the harm occurred would determine civil liability where the contract did not have a choice of law clause) (translation by the author); *see also* William Tetley, *New Development in Private International Law: Tolofson v. Jensen and Gagnon v. Lucas*, 44 AM. J. COMP. L. 647, 663 (1996) ("France continues to cling tenaciously to the pure *lex loci delicti* doctrine.") (footnote omitted).

[175] *See* JUENGER, *supra* note 173, at 51 (discussing the shortcomings of the lex loci delicti doctrine).

[176] *See supra* note 16 and accompanying text.

thought to advance the goals of efficient judicial administration and consistency of outcome, may lead to different legal consequences depending on whether the legal harm is characterized as a tort or a contractual dispute.[177]

4.3. The U.S. Approach: Restatement (Second) of Conflict of Laws

Like copyright laws, traditional U.S. choice of law doctrines assumed that territorial boundaries would clearly delineate where one country began and another ended.[178] Perhaps in response to changes in modes of communication and transportation, U.S. choice of law analysis has shifted away from the territoriality presumption toward a more flexible legal framework.[179] As the product of evolving U.S. common law, statutory provisions and legal theories, the RESTATEMENT represents the most cohesive treatise on the U.S. approach to choice of law issues.

The RESTATEMENT begins by acknowledging that "[t]he world is composed of territorial states having separate and differing systems of law."[180] The rules proffered by the RESTATEMENT

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[177] *See* JUENGER, *supra* note 173, at 51.

[178] *See* RESTATEMENT OF CONFLICT OF LAWS § 1 (1934) ("No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law.");*see also* BORN, *supra* note 161, at 550 ("The territoriality presumption was invoked by U.S. courts throughout the 19th and into the 20th century.") (citing MacLeod v. United States, 229 U.S. 416, 434 (1913); United States v. Bowman, 260 U.S. 94, 98 (1922); New York Cent. R.R. Co. v. Chisholm, 268 U.S. 29 (1925)).

[179] *See* Lazard Fréres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1539 (2d Cir. 1997) ("Until the latter part of this century, New York courts employed a 'traditional, "territorially oriented" approach to choice-of-law issues which applied the law of the geographical place where one key event occurred . . . .' More recently, however, New York courts . . . abandoned these rigid rules in favor of a more flexible approach.") (citations omitted); Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1495-96 nn.6-7 (D.D.C. 1987) ("'The District of Columbia Court of Appeals has adopted the approach of the Restatement (Second) Conflict of Laws' . . . . District of Columbia courts have used a variety of different phrases to describe this approach . . . . '[t]he state most concerned with the claim . . . . [t]he more significant relationship . . . . [t]he most significant interest.'") (citations omitted). *But see* Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc., 133 F.3d 1405, 1409 n.2 (11th Cir. 1998) ("Along with Georgia, fifteen other states still adhere to the strict application of *lex loci delicti*, a choice of law provision that some commentators have branded 'outdated territorialism.'") (citations omitted).

[180] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971). "State" in this context does not refer to a "politically sovereign unit." *Id.* § 3 cmt. c. Rather, it denotes "any territorial unit with a distinct body of law." *Id.* § 3

strive to accommodate both "the relevant local law rules" and "general policies relating to multistate occurrences."[181] Section 6(2) of the RESTATEMENT enumerates seven specific concerns in fashioning choice of law decisions:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[182]

Predictability, fairness, and decisional consistency rank among the most important policy considerations.[183] Nonetheless, the RESTATEMENT stresses that these values can be purchased at too great a price, for "[i]n a rapidly developing area, such as choice of law, *it is often more important that good rules be developed than that predictability and uniformity of result should be assured* through continued adherence to existing rules."[184] Clearly, for the purpose of considering choice of law for online copyright infringement, the certainty of results, the protection of justified expectations, the ease of judicial administration and the basic policies underlying the particular field of law raise the most compelling questions.

Under the RESTATEMENT, a secondary, though important, concern is the simplicity of conflicts rules, both for the benefit of litigants and in the interest of judicial administration.[185] From the

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cmt. e. For the purposes of this Comment, "state" refers exclusively to national territories.

[181] *Id.* § 5.

[182] *Id.* § 6(2)(a)-(g).

[183] *See id.* § 6 cmt. g & cmt. i; *see also* Reindl, *supra* note 13, at 827 (citing Lea Brilmayer, *The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules, in* 252 RECUEIL DES COURS 9, 57 (Hague Academy of International Law ed. 1995)).

[184] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. i (emphasis added).

[185] *Id.* § 6 cmt. j. ("Ideally, choice-of-law rules should be simple and easy to apply. This policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results.").

vantage point of the RESTATEMENT'S drafters, "it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state."[186] Nonetheless, in the case of online infringement, it is conceivable that an alleged infringer possesses a certain degree of sophistication that would alert him to consequences of his actions. The RESTATEMENT addresses these equity considerations, noting that

> [t]here are occasions . . . when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question.[187]

The RESTATEMENT also heeds basic policies that underlie the particular field of law.[188] The drafters observed that "[t]his factor is of particular importance in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules."[189] This issue highlights the dilemma plaguing online copyright issues. As signatories to the Berne Convention, both France and the United States have endorsed the same minimum standards of copyright protection. However, the differences between the French *droit moral* approach and the U.S. economic rights system have significant implications on any choice of law analysis.

Finally, the RESTATEMENT breaks from its earlier territorial emphasis by acknowledging that a defendant risks becoming subject to another state's laws when his conduct causes effects in the other state.[190] An individual may waive his rights when he acts with the intention of causing effects in the state or when he could

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[186] *Id.* § 6 cmt. g.

[187] *Id.*

[188] *See id.* § 6(2)(e).

[189] *Id.* § 6 cmt. h.

[190] *See* PETER STONE, THE CONFLICT OF LAWS 2-3 (1995) ("Most conflict rules specify a connecting factor . . . . Choice of law rules typically refer a specified type of issue to a law with which, or the law of a country with which, a specified connection exists.").

have reasonably expected his acts to have effects in other states.[191] The ambiguous parameters of acts "reasonably expected to have effects in other states" complicate choice of law analysis on the Internet since acts occurring in cyberspace plausibly affect all countries where Internet communication occurs without necessarily intending to do so.

5. CHOICE OF LAW IN COPYRIGHT

5.1. The French Approach: Choice of Law in Copyright

To give life to the author-centric emphasis of the I.P. CODE, French courts usually apply French copyright law to decide both rights of ownership and penalties for infringement.[192] In the famous *Huston* case, the heirs of John Huston, co-creator of the film *Asphalt Jungle*, sued Turner Entertainment Company, the producer of the film, when it released a colorized version of *Asphalt Jungle*.[193] The *Cour de cassation* ruled that French law applied to all issues concerning moral rights in France, even though ownership of the copyright was based on U.S. copyright and contract law.[194] From the vantage point of the *Cour de cassation*, the I.P. CODE had *application impérative*, mandatory application, without reference to the Berne Convention or other copyright treaties.[195] Accordingly, moral rights vested in Huston and Huston's heirs could enjoin further distribution of the colorized film.[196]

In a more recent case, the *Tribunaux de grand instance* of Paris, one of France's lower courts, found that copyright term extensions enacted in France during World War II[197] applied to THE

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[191] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. e (1988). However, Comment e of the Restatement suggests "[t]he fact that the effect in the state was only foreseeable will not of itself suffice to give the state judicial jurisdiction over the defendant. Judicial jurisdiction is likely to exist in such a case, however, if it was somewhat more than merely foreseeable that the defendant's act would cause the particular effect in the state."

[192] *See* Cass. 1e civ., May 28, 1991, 1991 Bull. Civ. I, No. 172.

[193] *See id.*

[194] *See* GELLER & NIMMER, *supra* note 31, § 6[1][b][i] at FRA-85.

[195] *See id.* at FRA-86.

[196] *See* Cass. 1e civ., May 28, 1991, 1991 Bull. Civ. I, No. 172.

[197] *See* I.P. CODE, art. L. 123-9. According to theI.P. CODE,

GREAT GATSBY by F. Scott Fitzgerald. The copyright holder of the novel sued when an unauthorized translation was released in France.[198] The court ruled that the French copyright term law extended the date that the work became part of the public domain from 1990 to 1999, thus preserving the copyright for fifty-nine years after the author's death.[199]

The law of the country of origin enters the analysis only as a default position, when the I.P. CODE does not address a specific issue of the case.[200] In 1948, the *Cour de cassation* in its *Iron Curtain* decision granted recognition to a work copyrighted under the law of the Soviet Union.[201] However, penalties for infringement were assessed according to French law.[202] The underlying message of *Iron Curtain* was that once valid copyright is established, rightholders will be afforded the fullest protection available, typically the protection accorded under the I.P. CODE.

5.2. The U.S. Approach: Choice of Law in Copyright

In *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, the Ninth Circuit was the first U.S. court to confront copyright choice of law issues.[203] In that case, the court faced "the 'vexing question' of whether a claim for infringement [could] be brought under the Copyright Act . . . when the assertedly infringing conduct consists solely of the authorization within territorial boundaries of the United States of acts that occur entirely

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> The rights afforded . . . to the heirs and successors in title of the authors, composers and artists shall be extended for a period equal to that which elapsed between September 3, 1939, and January 1, 1948, for all works published before that date and which did not fall into the public domain on August 13, 1941.

Id.

[198] *See* T.G.I. Paris, Dec. 9, 1992, *Revue Internationale du Droit d'Auteur*, 1993, No. 158, 279 (as cited in GELLER & NIMMER, *supra* note 31, § 6[1][a][i] at FRA-81).

[199] *See id.*

[200] *See* Cass. 1e civ., July 27, 1948, D. Jur. 1948, 535 (as cited in GELLER & NIMMER, *supra* note 31, § 6[1][b][i] at FRA-86).

[201] *See id.* § 6[1][a][i] at FRA-81. At the time of the *Iron Curtain* decision, France and the Soviet Union were not signatories-in-common to any copyright convention. *See id.*

[202] *See id.* § 6[1][b][i] at FRA-86.

[203] 24 F.3d 1088 (9th Cir. 1994), *rev'g en banc*, 988 F.2d 122 (9th Cir. 1993).

abroad."[204] Subafilms, Ltd. ("Subafilms") and Hearst Corporation ("Hearst") entered into an agreement with United Artists Corporation to distribute The Beatles' *Yellow Submarine* film.[205] In 1987, MGM/UA Communications Co. ("MGM/UA"), the successor to United Artists Corporation, authorized its home video division and Warner Bros., Inc. ("Warner Bros.") to distribute videocassettes of the film both domestically and internationally.[206] Subafilms and Hearst sued MGM/UA, Warner Bros., and their subsidiaries alleging copyright infringement under the 1976 Act.

The plaintiffs asserted that since authorization of the infringing conduct occurred within the United States, they had a claim actionable under U.S. copyright law. The court disagreed, holding that merely authorizing infringing acts within the United States did not violate the 1976 Act. According to the Ninth Circuit, "[b]ecause the copyright laws do not apply extraterritorially, each of the rights conferred under the five section 106 categories must be read as extending 'no farther than the [United States'] borders.' . . . [T]herefore, there can be no liability for 'authorizing' such conduct."[207]

Several years later, *Subafilms* was challenged in the Sixth Circuit. The district court in *Curb v. MCA Records, Inc.*[208] declined to extend the holding of *Subafilms* to an analogous set of facts. In *Curb*, MCA Records, Inc. sued its venture partner Curb Records, Inc. ("Curb") when Curb allegedly violated its license agreement by releasing recordings beyond the three nations specified in their agreement.[209] Though acknowledging the *Subafilms* court decision, the *Curb* court ruled that "domestic violation of the authorization right is an infringement, sanctionable under the Copyright Act, whenever the authorizee has committed an act that would violate the copyright owner's § 106 rights."[210] The *Curb* court also challenged the territorial emphasis of *Subafilms*:

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[204] *Id.* at 1089 (citing PAUL GOLDSTEIN, COPYRIGHT PRINCIPLES, LAWS AND PRACTICE § 6.1 at 705 n.4 (1989)).

[205] *See id.*

[206] *See id.*

[207] *Id.* at 1094 (citations omitted).

[208] 898 F. Supp. 586 (M.D. Tenn. 1995).

[209] *See id.* at 592.

[210] *Id.* at 595.

> *Subafilms* ignores . . . economic reality, and the economic incentives underpinning the Copyright Clause designed to encourage creation of new works, and transforms infringement of the authorization right into a requirement of domestic presence by a primary infringer. Under this view, a phone call to Nebraska results in liability; the same phone call to France results in riches. In a global marketplace, it is literally a distinction without a difference.[211]

In 1998, the Third Circuit revisited the issue addressed in the *Subafilms* and *Curb* decisions.[212] In *Expediters International of Washington, Inc. v. Direct Line Cargo Management Services., Inc.*, plaintiff ("EI") acquired copyright in freight consolidation software programs from Direct Line Cargo Management Services, Inc., based in Taiwan ("CMS-Taiwan").[213] CMS-Taiwan had previously licensed Direct Line Cargo Management Services, Inc. ("DLCMS-USA") and its Asian affiliates to use the software.[214] When DLCMS-USA and its affiliates continued to use the program after the licensing agreement expired, EI filed suit.[215] According to EI, DLCMS-USA authorized its Asian affiliates to use the programs and was therefore liable for infringement under U.S. copyright law.[216]

The district court endorsed "*Curb's* literal interpretation of Section 106, which clearly lends 'the owner of a copyright . . . the exclusive rights *to do and to authorize*' the reproduction and distribution of copyrighted materials."[217] Policy concerns convinced the court to favor *Curb* over *Subafilms*. The court feared the *Subafilms* decision would erode the protections of the 1976 Act.[218]

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[211] *Id.*

[212] *See* Expediters Int'l of Wash., Inc. v. Direct Line Cargo Management Servs., Inc., 995 F. Supp. 468, 476 (D.N.J. 1998) (citing Subafilms, Ltd. V. MGM-Pathe Communications Co., 24 F.3d 1088 (9th Cir. 1994) and Curb v. MCA Records, Inc., 898 F.Supp. 586 (M.D. Tenn. 1995)).

[213] *See id.* at 470-71.

[214] *See id.*

[215] *See id.* at 473.

[216] *See id.*

[217] *Id.* at 476 (citing 17 U.S.C. § 106 (emphasis in original)).

[218] *See id.* at 477 ("To allow an entity to curtail this right by merely directing its foreign agent to do its 'dirty work' would be to hinder the deterrent effect of the statute and to thwart its underlying purpose.").

New technologies only heightened this concern. As the court noted, "the policy observations set forth in *Curb* . . . appear more closely adapted to our modern age of telefaxes, Internet communication, and electronic mail systems."[219]

5.3. *What Does Choice of Law Mean for Protecting Copyright on the Internet?*

5.3.1. *Fixation Requirement*

Returning to the ParkBench Web site,[220] consider the implications of infringing a work of digital art within a choice of law analysis. In France, a transmission need not be fixed in order to receive protection under the I.P. CODE.[221] However, fixation is a necessary predicate for copyright protection under the 1976 Act.[222] Unless the ParkBench performances are recorded as they are transmitted over the Internet, they would qualify for protection under the I.P. CODE, but not the 1976 Act.

5.3.2. *Moral Rights*

The French I.P. CODE extends moral rights protection to virtually all copyrightable works.[223] Accordingly, most ParkBench creations would receive full *droit moral* protection under the French regime. However, in the United States, the infringement would not be actionable under VARA, since VARA only protects paintings, drawings, and sculptures. [224]

5.3.3. *Sound Recordings and Musical Works*

Likewise, the different protection afforded to musical works and sound recording rights has choice of law implications. In

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[219] *Id.* at 476-77.

[220] *See supra* note 16 and accompanying text.

[221] *See supra* note 44 and accompanying text.

[222] *See supra* note 80 and accompanying text.

[223] *See supra* note 50 and accompanying text.

[224] *See supra* notes 88-89 and accompanying text; *see also* LERNER & BRESLER, *supra* note 20, at 1495 (emphasizing that "VARA excludes from protection motion pictures, audiovisual works, posters, *electronic publications*, magazines, newspapers, works of applied art, [and] *digitally altered works that are incorporated into a different context in any of the foregoing forms.*") (emphasis added).

France, sound recordings do not receive copyright protection; they are covered under the narrow neighboring rights rubric, which lasts for the author's life plus fifty years.[225] The underlying musical composition receives copyright protection lasting the author's life plus seventy years.[226] In the United States, copyright protects both sound recordings and musical compositions for the author's life plus seventy years, subject to the statutory limitations placed on § 106 rights.[227] Furthermore, different rightholders are entitled to different remedies under the I.P. CODE and the 1976 Act.[228]

5.3.4. Fair Use

At the present time, fair use as it has traditionally existed remains intact on the Internet. Whether it will continue to do so is questionable. The authors of the EC Green Paper seemed especially troubled by the present application of fair use to the Internet.[229] Congress also recently struggled with the issue of fair use limits and encryption technologies in ratifying the DMCA.[230] Unless the European and U.S. developments keep pace with one another, a schism between French and U.S. fair use privileges may be imminent.

5.3.5. Liability of ISPs

Neither the European Commission nor France has resolved the issue of ISP liability in the event a subscriber violates copyright laws.[231] The United States recently exempted ISPs from li-

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[225] *See supra* note 59 and accompanying text.

[226] *See supra* notes 52-54 and accompanying text.

[227] *See supra* notes 78-79, 106-09 and accompanying text.

[228] *See supra* notes 67-70, 110-14 and accompanying text.

[229] *See supra* note 133 and accompanying text.

[230] *See supra* notes 152-53 and accompanying text.

[231] Although ISP liability for copyright infringement has been discussed, the European Commission has not endorsed a Directive which would clarify the issue. However, the general trend in Europe is to shieldISPs from liability. *See* José I. Rojas, *Liability of ISPs, Content Providers and End-Users on the Internet, in* 18TH ANNUAL INSTITUTE ON COMPUTER LAW, at 1009, 1029 (PLI Pats., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. 507, 1998); *see also* Jeffrey P. Cunard & Albert L. Wells, *The Evolving Standard of Copyright Liability Online, in* LITIGATING COPYRIGHT, TRADEMARK AND UNFAIR COMPETITION CASES FOR THE EXPERIENCED PRACTITIONER 1997, at 365, 394-94 (PLI Pats., Copyrights, Trademarks, and

ability for a subscriber's transgression in the DMCA.[232] Whether ISPs will face drastically different legal consequences based on a subscriber's conduct remains unclear.

5.4. How Copyright Choice of Law Analysis Should Work on the Internet

"The challenge for the conflicts scholar in this situation is to define at what points the virtual world of digital networks and real world of copyright laws and persons exploiting and consuming copyrighted products are reasonably connected to justify the application of a specific national copyright law."[233] Rising to this challenge, several prominent legal scholars have developed choice of law doctrines for online infringement.

5.4.1. Paul Geller's Theory of Maximum Protection

Paul Geller suggests that issuing a preliminary injunction for digital copyright claims according to whatever national law affords an author greatest protection among the countries which have access to the network disseminating the infringing material.[234] The injunction gives the court time to explore solutions that accommodate the different systems of national treatment.[235] However, the maximum protection "solution" merely postpones grappling with the choice of law dilemma. The proposal does not address the underlying issue: which system of laws should determine whether the conduct constitutes infringement or how to calculate damages when the infringement occurs under laws that promote radically different interests through copyright legislation.

Literary Prop. Course Handbook Series No. 497, 1997) (noting that even with the DMCA, ISPs face an uncertain legal environment due to the lack of uniform international standards).

[232] *See supra* note 156 and accompanying text.

[233] Reindl, *supra* note 13, at 815.

[234] *See* Geller, *supra* note 117, at 599.

[235] *See id.*

5.4.2. Satellite Broadcasting as a Model

Several legal theorists[236] have advocated applying one of the satellite broadcast theories to the Internet. Similar to the Internet, satellite broadcasts "[provide] people the world over with instantaneous access to the same information and images."[237] Consequently, the same concerns plague copyright owners transmitting their works through a Direct Broadcast Satellite ("DBS").[238]

5.4.2.1. The Country of Origin Theory

In September 1993, the Council adopted a Directive on copyright and related rights as they pertain to satellite and cable broadcasts.[239] The EC Satellite Directive proposed that if a satellite transmission infringed a copyrighted work, the law of the nation where the physical uplink occurred would determine the legal penalties for infringement.[240] As applied to the World Wide Web, the country of origin theory proposes that choice of law could be determined according to the law of the country where the Internet server is located. Perhaps the most compelling argument for the country of origin theory is its simplicity: ISPs would negotiate one contract which would be governed by the

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[236] *See* Reindl, *supra* note 13, at 821-27 ("Even though satellite broadcasting does not provide a perfect analogy to digital networks, it does raise many issues that are relevant for the discussion of [Internet] choice of law rules."); Helmut Kohl, *Comment: Harmonization of Intellectual Property Laws in Federal Systems*, 2 COLUM. J. EUR. L. 511, 515 (1997) (asserting that the Satellite Directive was the first step toward the erosion of the territoriality of intellectual property rights); Ginsburg, *Global Use/Territorial Rights*, *supra* note 115, at 335-36 (discussing the "country of upload" theory).

[237] Iris C. Geik, Note, *Direct Broadcast Satellites and the Determination of Authors' Rights Under the Berne Convention: Lucy in the Sky Without Rights?*, 15 SUFFOLK TRANSNAT'L L.J. 563, 563 (1992).

[238] The growth of low-cost and rapidly increasing access to satellite broadcasts parallels the explosion of the Internet, reinforcing the analogy between satellite and online communications. *See id.* at 439 (noting that "size and cost effectively precluded the general public's ownership and use of satellite antennae. . . . New unobtrusive and low-cost DBS antennae have been gaining in popularity in Europe, adding to the rapidly expanding number of homes receiving DBS television broadcasts").

[239] *See* Council Directive No. 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 1993 O.J. (L 248) 15.

[240] *See id.* ¶ 15.

laws of a single jurisdiction.[241] However, skeptical commentators counter that the emission approach may impede authors' rights. ISPs will conduct operations in fora that afford authors' minimal protection just as businesses have relocated abroad to take advantage of more favorable labor laws.[242] However, this concern seems unfounded.[243] The country of origin theory of copyright protection may actually provide an author-centric approach to copyright protection, allowing the author to publish electronically in the forum that affords him the most protection.[244]

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[241] *See* Laurence G.C. Kaplan & Joseph R. Bankoff, *Of Satellites and Copyrights: Problems of Overspill and Choice of Law*, 7 EMORY INT'L L. REV. 727, 741 (1993); *see also* Reindl, *supra* note 13, at 832 ("Provided it incorporates a workable definition of the place from which a communication to the public originates, a country of origin rule also more effectively serves the goals of predictability and ease of determination of the applicable law than do choice of law rules that rely exclusively or predominantly on the economic impact of an act of exploitation.").

[242] *See* Kaplan & Bankoff, *supra* note 241, at 742 (citing Geik, *supra* note 237, at 563, 586 n.77 & 599 n.129 (1992); Anne Moebes, *Copyright Protection for Audiovisual Works in the European Community*, 15 HASTINGS COMM. & ENT. L.J. 399, 404 (1993)).

[243] On February 27, 1999, a search using the terms "Europe and 'Internet Services'" using the Yahoo! search engine displayed six category and 78 Web page sites. The Yahoo! listing of access providers listed 21 international and 169 U.S. ISPs. *See Yahoo! Business and Economy: Companies: Internet Services: Access Providers* (visited Feb. 26, 1999) <http://dir.yahoo.com/Business_and_Economy/Companies/Internet_Services/Access_Providers>.

Likewise, the concern has proven to be unfounded for satellite broadcasts. The United States has three up-link stations. *See* Richard R. Peterson, *Direct Broadcast Satellite: A Consumer's Guide* (paper by the President of The DBS Connection in North Saint Paul, MN) (last modified June 18, 1999) <http://www.dbsdish.com/dbs/a0.html>. European nations, including France, also have proved hospitable for DBS satellite companies. *See Satellites: Nine European Countries Give Go-Ahead to EUROPESAT*, TECH EUROPE, Jan. 1, 1991, *available in* LEXIS, Eurcom Library, Eurtch File ("Nine European countries (Germany, Austria, France, Italy, the Netherlands, Portugal, Sweden, Switzerland and Yugoslavia) have signed a protocol agreement giving Eutelsat the go-ahead (European satellite telecommunications organisation) to prepare the request for proposals for the EUROPESAT construction contract.").

[244] *But see* Reindl, *supra* note 13, at 832 ("From the user perspective, being subject to the copyright laws of countries in which the work can be retrieved and received appears almost like an extraterritorial application of foreign copyright laws.").

5.4.2.2. The Bogsch Theory[245]

Another proposal dominating the DBS discussion is the Bogsch theory. In contrast to the emission theory, the Bogsch proposal exposes alleged infringers to liability in every country that can access the Internet.[246] Thus, authors would have protection and rights of remuneration in virtually every nation.[247] Furthermore, the Bogsch theory of liability would apply copyright laws cumulatively and jointly.[248] To protect itself from unbounded liability, a user would need to obtain authorization from relevant parties in the country of upload as well as the different nations receiving the transmission.[249]

Though shielding copyright holders from the throes of forum shopping, the Bogsch theory threatens the free flow of information and ideas. By imposing liability according to the standards of each country receiving transmission, the Bogsch theory imposes an enormous burden on Web casters. To avoid liability, a simple Web page posting could conceivably require protracted negotiations with each party remotely connected to the copyrighted transmission.[250] Due to the inconvenience and expense associated

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[245] The Bogsch theory of copyright liability derives its name from Dr. Arpad Bogsch, former General-Director of the World Intellectual Property Organization. *See* Marc E. Mayer, *Do International Internet Sound Recording Infringements Implicate U.S. Copyright Law?*, COMPUTER LAW., May 1998 at 11, 14.

[246] *See id.* at 14 (noting that under the Bogsch theory "an infringing transmission is actionable at any place of receipt, regardless of where the transmission takes place").

[247] *See* Kaplan & Bankoff, *supra* note 241, at 742.

[248] *See id.* at 743.

[249] *See id.* at 742.

[250] *See id.* at 744-45. In their article, Kaplan and Bankoff succinctly explain the practical disadvantages of the Bogsch theory of liability:

> While the author enjoys the advantage of a right to remuneration and protection in every state within the DBS transmission footprint, the corresponding disadvantage to the broadcaster is inevitable. The user of a work might have to acquire and observe the applicable laws for several nations cumulatively. One can envision a scenario in which the user of a work will have to negotiate, acquire, and observe the copyrights for several countries simultaneously . . . . Another practical consideration, flowing from the broadcaster's need to observe the copyright laws of all receiving nations, is that the failure of one contractual relationship puts the entire satellite transmission at risk.

Id. (citations omitted).

with obtaining contracts from parties all over the world, Netizens will either opt out of the market or pass the costs on to other users, possibly making it prohibitively expensive to browse the Internet.

The drawbacks of the Bogsch theory are even more pronounced on the Internet because works posted on the Internet can be accessed all over the globe.[251] Through encryption technologies, authors can prevent direct access by users who are located in countries lacking certain minimal copyright standards.[252] However, encryption identifies users according to the location of the server, thus granting or disallowing access based on where the ISP, and not the user, is located.[253] Moreover, encryption technology does not prevent an authorized user from duplicating the work and forwarding it to users in prohibited countries,[254] though such conduct would obviously violate copyright and contract laws.

5.2.3. The Lex Fori Approach

Lex fori refers to "[t]he law of the forum, or court; that is, the positive law of the state, country, or jurisdiction of whose judicial system the court where the suit is brought or remedy sought."[255]

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[251] *See* discussion *supra* pp. 101-2.

[252] *See* Marci A. Hamilton, *The Top Ten Intellectual Property Law Questions that Should be Asked about Any Merger or Acquisition*, 66 U. CIN. L. REV. 1315, 1319 (1998) ("[W]ithout adequate safeguards [such as encryption] works on the web can travel into countries that are the intellectual property sieves of the world and permit mass pirating.").

[253] "Every computer connected to the Internet is assigned a numeric address, with which other computers on the network use to communicate, yet the address is better known to the public by its domain name." Hon. Howard Coble, *The Spring 1998 Horace S. Manges Lecture— The 105th Congress: Recent Developments in Intellectual Property Law*, 22 COLUM.-VLA J.L. & ARTS 269, 352 (1998). "[M]any Internet uniform resource locators outside of the United States indicate the country in which the computer is located," thus allowing encryption technologies to block access to certain countries. DavidWille, *Personal Jurisdiction and the Internet— Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 108 n.46 (1998-99). However, if "someone in China [uses] a computer in Great Britain to access another computer in Texas, filtering access based upon one's Internet domain name would likely not allow complete control over what country's citizens access a Web page. Still, some control is possible." *Id.*

[254] *See* Reindl, *supra* note 13, at 832 (noting that an online user "no longer actively controls the place of reception that can potentially occur almost everywhere in the world").

[255] *See* BLACK'S LAW DICTIONARY, *supra* note 173, at 920.

The lex fori theory, as articulated by Professor Ginsburg, suggests that digital copyright infringement controversies be resolved according to the law of the forum, as long as the forum is: "[1] the country from which the infringing act or acts originated; or [2] the country in which the [alleged infringer] resides . . .; or [3] the country in which the [alleged infringer] maintains an effective business establishment."[256]

As described by Professor Ginsburg, the strengths of the lex fori approach are predictability, simplicity, and protection of justified expectations— factors that the RESTATEMENT considered paramount in resolving conflict of laws.[257] However, it does not incorporate the lex loci delictus philosophy favored by France. Additionally, the current lex fori approach neglects the author's rights, emphasizing the defendant's rights without mentioning equitable considerations to the author.[258] Nonetheless, Professor Ginsburg has laid the groundwork for a regime that can accommodate the competing interests of the French and the U.S. legal systems.

6. THE LEX LOCI REI SITAE THEORY: BALANCING THE EQUITIES OF AUTHORS AND INFRINGERS ON THE INTERNET

Under most current choice of law rubrics, online copyright protection represents nothing less than a zero-sum conflict between end-users' rights and authors' rights. Any leeway granted to end-users inevitably results in less protection for online authors and publishers.[259] An equitable and efficient approach for determining the consequences for online infringement would balance

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[256] Ginsburg, *Global Use/Territorial Rights*, *supra* note 115, at 338. Professor Ginsburg may have modified her position since publishing her 1995 article. *See* Reindl, *supra* note 13, at 818 n.65 (describing a new proposal for Internet choice of law formulated by Jane Ginsburg and François Dessemontet).

[257] *See* Reindl, *supra* note 13, at 819 ("The focus on the lex fori will usually protect the user of works against the application of unanticipated copyright laws, will result in relatively simple rules, and, especially from the court's point of view, will promote a relatively easy determination of the applicable law.") (citation omitted).

[258] *See id.* at 820 (arguing that the lex fori "one-sided and defendant-friendly rules hardly appear justified in digital environments where protection of copyright interests carries great weight").

[259] *See* Reindl, *supra* note 13, at 829 ("Singling out one specific copyright law to apply on digital networks may therefore unnecessarily deprive right holders of meaningful protection that courts are willing to provide under current copyright choice of law standards.").

the interests of protecting artists and treating defendants fairly,[260] while providing clear rules for judges administering the law. Building on Professor Ginsburg's proposal, the choice of law model that best satisfies the interests of French and U.S. copyright and conflict of laws regimes is a general approximation of the lex loci rei sitae theory. Lex loci rei sitae, also known as lex situs, refers to "[t]he law of the place where a property is situated."[261] Under the lex loci rei sitae theory, courts would apply the law offering the most protection to the author among: "(1) the country from which the infringing act or acts originated; or (2) the country in which the alleged [infringer] resides; or (3) the country in which the alleged [infringer] maintains an effective business establishment;"[262] or (4) the location of the server the infringer used for his illegal conduct. The fourth possible location confines or limits the effects of infringing conduct to a single place, the location of the server the perpetrator uses to infringe the copyright, which simplifies the choice of law analysis.

6.1. Multiple Points of Attachment Consistent with Different Conflict of Laws Regimes

The lex loci rei sitae doctrine conforms with the most important policy concerns of both France's lex loci delictus doctrine and the RESTATEMENT. To the extent that the Netizen's server is a proxy for the site of the harm, the lex loci rei sitae model incorporates the French choice of law structure. Perhaps more importantly, the lex loci rei sitae model advances authors' rights, the paramount concern of the French I.P. CODE,[263] though it does so without sacrificing the defendant's rights.

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[260] *See* Bruce G. Joseph, *The New WIPO Copyright and Phonograms Treaties: Twenty-One Days in Geneva and the Return to Washington*, *in* GLOBAL TRADEMARK AND COPYRIGHT: PROTECTING INTELLECTUAL PROP. RTS. IN THE INT'L MARKETPLACE, at 371, 435 (PLI Pats., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G4-4019, 1997) (arguing that without "balanced legislation that creates fair boundaries of copyright liability, the growth and development of the Internet will be jeopardized by legal uncertainty and burdensome litigation").

[261] BLACK'S LAW DICTIONARY, *supra* note 173, at 923-24. For purposes of this Comment, lex loci rei sitae includes any country in which the infringer is "present" by virtue of his physical being, residence, business establishment, or infringing conduct.

[262] Ginsburg, *Global Use/Territorial Rights*, *supra* note 115, at 338.

[263] *See* discussion *supra* pp. 110-12.

In terms of accommodating U.S. law, the lex loci rei sitae doctrine provides as much predictability, fairness and decisional consistency as can be achieved in the absence of clearly delineated territorial boundaries. Although the RESTATEMENT safeguards the rights of a defendant, it tolerates uncertainty when predictability, fairness and consistency would lead to an inequitable result. Allowing an infringer to escape liability because he has the good fortune to be physically located in an infringement haven[264] at the time he violates the copyright would lead to perverse results that the RESTATEMENT seeks to avoid. Furthermore, on the Internet there can be no question that an infringer should anticipate that his conduct might have effects in nations with more stringent copyright laws, even if he cannot predict precisely which laws would apply. Finally, the lex loci rei sitae rules are also consistent with the trend of allowing extraterritorial application of copyright laws, as seen in the *Curb* and *Expediters International* decisions.[265]

6.2. Authors' Rights

Unless authors can be assured of adequate legal recourse for online infringements, they may stop publishing works on the Internet.[266] To avoid this outcome, authors should have access to the most effective remedy available, subject to the constraints imposed by notions of fairness to the defendant. Applying the most stringent penalties from one of four nations to which an infringer's activities can be linked safeguards authors' rights while eliminating the risk that an infringer will find himself subject to

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[264] "Infringement havens are countries with low levels of [copyright] protection and ineffective enforcement." Reindl, *supra* note 13, at 820 n.71. *See supra* note 244 and accompanying text; *see also* Lucas, *supra* note 136, at 231 ("The primary and most spectacular effect of technology is to reinforce 'legal exclusivity' with 'technical exclusivity' . . . . Restricting access or use allows copyright owners to consolidate the law with the facts.").

[265] *See* discussion *supra* pp. 149-51.

[266] *See* Boddie, *supra* note 3, at 269 ("The purpose of copyright is to allow an author to share works while receiving royalties for the time, effort and creativity embodied in the work. If the Internet were to take the meaning out of copyright works, then authors would lose some of the incentive to publish."); Jonathan B. Ko, Note & Comment, *Para-Sites: The Case for Hyperlinking as Copyright Infringement*, 18 LOY. L.A. ENT. L.J. 361, 362 (1998) ("Although increased protection may impede the progress of the Internet . . . offering better copyright protection to authors will increase the use of the Internet as a medium of expression.").

the laws of a country with which he has no relationship. Encryption technology fills in any gaps in legal protection that the lex loci rei sitae theory creates. For if an author considers certain nations to be veritable infringement havens, encryption technology enables him to block access to servers located in those countries.

6.3. Foreseeability

The lex loci rei sitae model avoids unfairly surprising an infringer by subjecting him to legal consequences only in those nations in which he has established a presence or where his infringing conduct has had a direct effect. Prosecuting an infringer according to the law of the location of the server is the most tenuous link of the four possible choices. However, the most destructive online infringers are sophisticated parties,[267] cognizant of the legal consequences of their copyright infringement but who nonetheless choose to disregard them. Furthermore, if the lex loci rei sitae theory gains acceptance, the more stringent penalties may deter online infringement.

6.4. The Character of the Internet

Unless authors have access to meaningful legal remedies, the current state of the Internet is at risk. As one commentator stated, "if . . . creators do not believe that their works will be protected when they put them on-line, then the Internet will lack the creative content it needs to reach its true potential."[268] In contrast, the burdens placed on alleged infringers do nothing to compromise the free flow of information on the Internet.

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[267] *See* Alice Rawsthorn, *Surfing Detectives on Lookout for Digital Pirates*, FIN. POST (Toronto), Aug. 28, 1997, at 53, *available in* LEXIS, News Library, Curnws File (discussing the proliferation of copyright infringement on the Internet, due in part, to the presence of youngNetizens who are often knowledgeable about computer technology); *see also* Steve Anderson, *Copyright and Digital Reproduction in Cyberspace*, INFO. OUTLOOK, June 1997, at 14, *available in* LEXIS, News Library, Curnws File (noting that "recent advances in digital technology" caused the proliferation of Internet copyright infringement).

[268] Jesse M. Feder, *Copyright Office, Congress and International Issues*, *in* ADVANCED SEMINAR ON COPYRIGHT LAW 1998, at 373, 495 (PLI Pats., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. G4-4035, 1998) (statement of Rep. Bob Goodlatte (R-Va.)).

7. CONCLUSION

The lex loci rei sitae proposal balances the importance of authors' rights with fairness considerations to the defendant. For example, in the ParkBench hypothetical, exactly which law would apply to an infringement of a ParkBeach creation under the lex loci rei sitae rules would depend on the several locations where the defendant has a significant presence— either in terms of his residence, his business, or his conduct. Whatever laws come into play, the rightholders are guaranteed the maximum protection available in those fora.

Until there are uniform copyright standards, copyright infringement on the Internet will continue to vex authors, users, and courts. Several legal scholars have proffered interim solutions. Thus far, most of the solutions proposed have championed the interests of one group while disregarding the interests of other concerned parties. Nor have the proposals considered the different methods of resolving conflict of laws issues.

The lex loci rei sitae proposal seeks to balance authors' rights against defendants' rights in addition to accommodating legal systems with competing interests. However imperfect the proposed system is, it highlights one important aspect of any viable international solution: compromise. In a world that has become infinitely smaller and closer than the drafters of the Berne Convention envisioned, the disparate laws and legal philosophies that once independently coexisted. In this spirit, the lex loci rei sitae proposal represents one step toward an international solution short of worldwide harmonization of laws.