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REEVALUATING THE FORUM NON CONVENIENS DOCTRINE IN MULTITERRITORIAL COPYRIGHT INFRINGEMENT CASES

Brenda Tiffany Dieck

Abstract: The tension between the internationalization of copyright and the territorial remedies national laws provide is illustrated when the same infringer infringes a copyright in multiple countries. The copyright owner can bring suit in each country separately or attempt to consolidate all claims into one forum. Commentators have identified that in consolidated suits, even if jurisdiction over the foreign claims is proper, the discretionary forum non conveniens doctrine remains a "wild card." This Comment explores in greater depth why the doctrine is unpredictable and argues that it is being abused by U.S. federal courts in multiterritorial copyright suits, exacerbating the problem the Internet has caused copyright enforcement. The courts' liberal use of dismissals has forced copyright owners to bring separate claims in multiple fora, effectively terminating the claims due to the enormous costs of litigating in multiple countries. Foreign claim consolidation mitigates the problem of expensive, piecemeal remedies from individual national courts and allows copyright owners a more realistic method of enforcement.

*Judex tenetur imperii judicium suum.*¹

A court must decide a case over which it has jurisdiction.

When a copyright owner is faced with enforcing copyrights against a multinational infringer, the territorial nature of copyright law forces her to litigate each action separately in each respective country. The recent development of the Internet has exacerbated the problem.² Making copyrighted works available on the Internet can result in instantaneous, multinational infringements, forcing the copyright owner to bring enforcement actions in hundreds of countries. With a market that relies heavily on meaningful copyright protection, the United States has a

1. William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 *Tex. L. Rev.* 1663, 1709 (1992) (referring to usage of common-law maxim by critics of forum non conveniens).

2. Nua, one of Europe's leading online consulting businesses, estimates 100.5 million world-wide Internet users. It predicts 200 million by the year 2000. One hundred million documents now exist online, with expectations of 800 million by the year 2000. *Market Size: How Many People on the Net?* (visited Nov. 12, 1998) <<http://cyberatlas.internet.com/market/size/index.html>>.

By 2000, 46 million American consumers will buy online, creating a \$16 billion market, up from \$520 million in 1996. Some estimate that E-commerce totals could reach \$1.5 trillion. In 1997, 40% of U.S. businesses were involved in E-commerce and 63% in 1998. *CyberAtlas: The Retail and E-Commerce Segment: Market Forecast* (visited Nov. 12, 1998) <http://cyberatlas.internet.com/segments/retail/market_forecast.html>.

strong interest in the enforcement of copyrights. The increased use of the Internet for dissemination of copyrighted material by mega-corporations and small entrepreneurial companies heightens the U.S. interest in enforcement. Small to mid-sized software companies that cannot afford to protect their core assets in numerous countries around the world rely on U.S. courts to protect their interests. They are often faced with the difficult choice of staying out of the digital world at the risk of being excluded from an expanding market or investing in on-line marketing and distribution and assuming the legal risk. The wide-spread use of electronic commerce suggests that the copyright enforcement problem will only get worse.³

Many commentators are calling for a global solution to the inadequacy of the current intellectual property regime.⁴ Proposals include the harmonization of intellectual property law, the creation of intellectual property courts, and even cyberspace virtual magistrates.⁵ International agreements such as TRIPS,⁶ the WIPO Copyright Treaty,⁷ and the Berne Convention,⁸ and regional agreements like NAFTA⁹ and the European Community Trademark¹⁰ have worked to create minimum regional and international standards regarding copyright protection and uniformity of procedures. Although a step in the right direction, these agreements have done little to make the global enforcement process less onerous.

3. See Robert A. Cinque, *Making Cyberspace Safe for Copyright: The Protection of Electronic Works in a Protocol to the Berne Convention*, 18 *Fordham Int'l L.J.* 1258, 1269 (1995) (arguing that because technology computers use to view documents can just as easily be used to copy them, increased use of Internet threatens adequacy of current copyright enforcement mechanisms).

4. See, e.g., David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 *Stan. L. Rev.* 1367 (1996).

5. See *id.* at 1367, 1380–81.

6. See Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 18.06 (1998), available in *Agreement on Trade Related Aspects of Intellectual Property Rights* [TRIPS] (visited Nov. 15, 1998) <<http://www.wto.org/wto/intellect/1-ipcon.htm>>.

7. See Texts and Treaties Administered by World Intellectual Property Organization [WIPO], *WIPO Copyright Treaty* (visited June 1, 1998) <<http://www.wipo.org/eng/iplcx/index/html>>.

8. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971 (amended 1979), S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986), 828 U.N.T.S. 221 (available in <http://www.wipo.org/eng/iplcx/wo_ber0_.html> [hereinafter *Berne Convention*]).

9. North American Free Trade Agreement, Dec. 17, 1992, U.S.–Can.–Mex., 32 I.L.M. 289 [NAFTA]; see Nimmer & Nimmer, *supra* note 6, § 18.07.

10. See Alexander von Muhlendahl, *National Laws Cover Major Gaps in EC's Community Trademark Law* (visited Apr. 21, 1998) <<http://www.ipww.com/may96/p3national.html>>.

This Comment explores the option of consolidating claims based on foreign copyright law into one U.S. forum as a means of enforcing copyrights abroad and how the “wild card”¹¹ forum non conveniens doctrine acts as a barrier to the consolidation of multiterritorial claims.¹² Part I describes the current state of copyright protection under U.S. law and international agreements. Part II outlines the forum non conveniens doctrine and uses a typical multiterritorial copyright case to illustrate how the courts have struggled with the application of the doctrine in this context. Part III contrasts the United States’s expanding international copyright enforcement obligations with the narrowing of remedies in U.S. courts for copyright owners. Part IV describes how courts apply the forum non conveniens test to multiterritorial copyright claims and how courts have been too quick to dismiss these claims. Part V critiques the reasoning used by courts to dismiss multiterritorial copyright claims and argues that courts are misapplying the U.S. Supreme Court precedent of *Piper v. Reyno*.¹³ Finally, Part VI argues for a modification of the forum non conveniens balancing test for copyright cases that would give less weight to the “foreignness” of the claim and more weight to the U.S. interest in hearing the case. The Comment concludes that courts should recognize the convenience created by consolidation and weigh consolidation as a factor in the balancing test.

I. COPYRIGHT LAW IN THE UNITED STATES

A. *The Constitutional Foundation of U.S. Copyright Law*

Protecting copyrights has been an important federal interest since the founding of the United States. Article 1, section 8 of the U.S. Constitution provides that: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited

11. Commentators have identified forum non conveniens as a wild card in U.S. copyright jurisprudence. See Nimmer & Nimmer, *supra* note 6, § 17.05; Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 Va. J. Int’l L. 505, 580 n.372 (1997); 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, 173 (1997); Jane C. Ginsburg, *Extraterritoriality and Multi-territoriality in Copyright Infringement*, 37 Va. J. Int’l L. 587 (1997).

12. Multiterritorial claims are defined here as claims involving acts or parties located in multiple countries. Problems of personal and subject matter jurisdiction are beyond the scope of this Comment. See Ginsburg, *Extraterritoriality*, *supra* note 11, at 600–02 (discussing jurisdiction in copyright infringement case).

13. 454 U.S. 235 (1981).

Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”¹⁴ Acting on its enumerated powers, Congress drafted the first Copyright Act in 1790.¹⁵ After numerous revisions and amendments, the U.S. Copyright Act of 1976 stands as the current basis for U.S. copyright law.¹⁶ Although a domestic Act, the U.S. Copyright Act entitles foreign authors to some protection in the United States by extending copyright protection for works first published in the United States on or after January 1, 1978, regardless of the nationality of the author.¹⁷ For works published before 1978, a foreign author must be a national of a country that has a copyright treaty with the United States or have been domiciled in the United States.¹⁸ The Act limits protection to works infringed in the United States and does not extend any protection to qualifying works that are infringed outside of U.S. borders.¹⁹

B. International Agreements on Copyright

As copyright enforcement became recognized as a global problem, the United States joined two international agreements: the Universal Copyright Convention (UCC) in 1955 and the Berne Convention in 1989.²⁰ The UCC gave member country authors at least a minimum standard of copyright protection in all signatory countries and created a “national treatment principle” that all members must follow.²¹ The national treatment principle entitles member country foreign authors’ works the same level of protection as the forum would provide its own nationals.²² The Berne Convention, a multilateral copyright treaty created in Berne, Switzerland in 1886, has grown to include over 100 member nations.²³ The Berne Convention Implementation Act of 1988 amended

14. U.S. Const. art. I, § 8, cl. 8.

15. Act of May 31, 1790, ch. 15, 1 Stat. 124.

16. Nimmer & Nimmer, *supra* note 6 app. at 2.

17. 17 U.S.C. § 104(b)(2) (1994); *see also* Nimmer & Nimmer, *supra* note 6, § 5.05[B][2].

18. Nimmer & Nimmer, *supra* note 6, § 5.05[B][2][b].

19. *Id.* § 17.02[B].

20. *Id.* § 17.01[C][2][a].

21. *Id.* § 17.04[B].

22. *Berne Convention*, *supra* note 8, art. 5(3) (“Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this convention, he shall enjoy in that country the same rights as national authors.”).

23. Nimmer & Nimmer, *supra* note 6, § 17.04[B][1].

the U.S. Copyright Act to include protection for all “Berne works.”²⁴ Although similar to the UCC, the Berne Convention required its member countries to eliminate notice requirements for copyright.²⁵ Because the United States was reluctant to give up its notice requirements, it did not join the Convention until 1989.²⁶ The UCC was created after the Berne Convention as a more flexible alternative to include countries like the United States in some type of global copyright agreement.²⁷

Under the U.S. Copyright Act, as amended by the Berne Convention, all works published by nationals of Berne Convention countries on or before March 1, 1989, are entitled to copyright protection in the United States equal to that provided by U.S. copyright law.²⁸ Therefore, assuming that personal jurisdiction exists, a foreign national of a Berne Convention country may enforce her copyright in U.S. courts if the infringing act took place in the United States.

Although in the current international copyright regime copyrights are territorial and exist only within the borders of a particular country,²⁹ under article 5(2) of the Berne Convention, a territorial copyright receives automatic protection in all other Berne countries under “the laws of the country where protection is claimed.”³⁰ This has been interpreted as the law of the country where the infringing act took place.³¹ Although first published in another country, the copyright of foreign origin is conferred all the rights of a U.S. copyright under U.S. law when the infringement takes place within U.S. borders. The courts then treat the infringement as a violation of U.S. copyright law.³² If the copyright owner joins a related infringement of the same work that took place in a different Berne Convention country, the U.S. court will be required to

24. Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101, 104, 116, 205, 301, 401-11, 501, 504, 801 (1994)).

25. *Berne Convention*, *supra* note 8, art. 5(2).

26. *Nimmer & Nimmer*, *supra* note 6, § 17.02[B].

27. *Id.* § 17.01[B][1].

28. *Id.* § 5.05[B][2][c]; *see also* *Nimmer & Nimmer*, *supra* note 6, § 17.01[C][2][b].

29. *Igor Shoiket, Creative Technology, Ltd. v. Aztech System Pte, Ltd.: Using Forum Non Conveniens to Dismiss a Copyright Infringement Action Brought by a Foreign Owner of U.S. Copyrights*, 31 U.S.F. L. Rev. 505, 528 (1997).

30. *Berne Convention*, *supra* note 8, art. 5(2); *see also* *Nimmer & Nimmer*, *supra* note 6, § 17.08.

31. *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1097 (9th Cir. 1995) (en banc) (quoting *Nimmer & Nimmer*, *supra* note 6, § 17.05).

32. *See Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996); *see also Berne Convention*, *supra* note 8, art. 5(2).

apply to the additional claim the law of the place where the infringement occurred, rather than U.S. law.³³

In 1994, the United States accepted the GATT Uruguay Round Agreement on TRIPS.³⁴ The Agreement requires World Trade Organization (WTO) members to provide copyright protection to nationals of other member countries that is no less favorable than that afforded to their own nationals and requires compliance with the Berne Convention.³⁵ TRIPS also protects computer software programs, which were not expressly protected in the Berne Convention.³⁶ In addition, recently the World Intellectual Property Organization (WIPO) adopted the WIPO Copyright Treaty, which purports to supplement the Berne Convention and further harmonize copyright law.³⁷

II. THE FORUM NON CONVENIENS DOCTRINE

A. *The Basic Test: Gulf Oil and Piper*

Forum non conveniens is a judicially created doctrine that allows the judge, at her discretion, to dismiss a case on grounds of convenience to the parties and the court. When there is a more convenient forum in which to resolve a case, courts have two tools at their disposal. If the more convenient forum is within the federal system, a federal court may transfer the case at the request of the defendant to another federal court under 28 U.S.C. § 1404(a). When the more convenient forum is outside the federal system, for example in a foreign country,³⁸ the federal court may dismiss the case in favor of the foreign jurisdiction where it might have been brought using the forum non conveniens doctrine. In 1947, in

33. Shoiket, *supra* note 29, at 511.

34. Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (Dec. 8, 1994) (codified at 17 U.S.C. § 1101).

35. Nimmer & Nimmer, *supra* note 6, § 18.06[A][1]. The moral rights provisions of the Berne Convention are not incorporated into TRIPS. *Id.* § 18.06[A][2].

36. President Clinton's Submission to Congress of Documents Concerning Uruguay Round Agreements, 58 Fed. Reg. 67,263 (Dec. 20, 1993), available in 1993 WL 658200.

37. *WIPO Copyright Treaty*, Adopted at the Diplomatic Conference on Certain Copyright & Neighboring Rights Questions, Geneva, Switz., Dec. 1996 (visited Nov. 15, 1998) <<http://www.wipo.org/eng/diplconf/distrib/94dc.html>>; see generally *International Protection of Copyright and Neighboring Rights* (visited Nov. 15, 1998) <<http://www.wipo.org/eng/general/copyright/wct.html>>.

38. As a consequence of the federal venue statute, the federal doctrine of forum non conveniens only applies in cases where the alternative forum is abroad. *American Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994).

Gulf Oil Corp. v. Gilbert, the U.S. Supreme Court established factors to consider when determining whether dismissal on grounds of forum non conveniens is appropriate.³⁹ These standards were further refined in 1981, when in *Piper v. Reyno* the Court expanded upon the forum non conveniens factors and created a two-part inquiry for transnational suits.⁴⁰ Since 1981, transnational litigation has increased due to the growth in international trade, commerce, travel, and communication.⁴¹ This increase has forced courts to confront the forum non conveniens dilemma with increasing frequency.

In *Piper v. Reyno*, an airplane crashed in Scotland killing six Scottish nationals.⁴² The administratrix for the decedents' estates filed a wrongful death action in California court against the American aircraft and propeller manufacturers.⁴³ The defendants removed the case to federal court and then transferred to Pennsylvania using § 1404(a).⁴⁴ Then, seeking a forum non conveniens dismissal, the defendants argued that Scotland would be a more convenient forum.⁴⁵ The Supreme Court agreed and created the “*Piper Test*” for forum non conveniens dismissals.

Under the two-step “*Piper Test*,” a court should first determine whether an alternative forum exists. If an adequate alternative forum exists, the court then weighs the *Gulf Oil* factors to determine which forum would be more convenient for the litigants and the least inconvenienced by the litigation.⁴⁶ The *Piper* Court described an adequate alternative forum generally as one in which the defendants are amenable to process—that is, are willing to accept service and waive any foreign statutes of limitation—and provides an adequate remedy.⁴⁷ Aware that many plaintiffs seeking treble damages or large jury awards may be attracted to U.S. courts,⁴⁸ the Court was quick to qualify the term “adequate remedy.” An adequate remedy is any remedy provided by the

39. 330 U.S. 501, 508–09 (1947).

40. 454 U.S. 235 (1981); *see also* *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 491 (1998).

41. Reynolds, *supra* note 1, at 1665.

42. *Piper*, 454 U.S. at 238–39.

43. *Id.* at 239–40.

44. *Id.* at 240.

45. *Id.* at 241.

46. *See id.*; *see also* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506–07 (1947).

47. *Piper*, 454 U.S. at 255 n.22; *see also In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195, 203 (2d Cir. 1987).

48. *Id.* at 252 & n.18.

foreign forum unless the remedy “is so clearly inadequate or unsatisfactory that it is no remedy at all.”⁴⁹ Courts have consistently found that differences in judicial procedures such as lack of trial by jury,⁵⁰ changes in substantive law,⁵¹ unavailability of contingency fees,⁵² less sophisticated judicial system,⁵³ or increased financial burden on the plaintiff⁵⁴ were not reasons by themselves to render the foreign forum inadequate under the first prong of the *Piper* test.

Once it has determined that an adequate alternative forum exists, the court employs the second prong by balancing a series of private and public interest factors. This is referred to as the forum non conveniens balancing test. The Court in *Piper* articulated the following private interest factors for consideration:

[R]elative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.⁵⁵

Other issues to be considered include the location and language of witnesses and documents, translation costs, travel, adequacy of necessary procedures such as discovery, compulsory service of process, and binding third-party defendants through contribution or indemnity.⁵⁶

In contrast, the more nebulous public factors involve the general competing interests of the two fora:

the administrative difficulties flowing from court congestion; “a local interest in having localized controversies decided at home”; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of

49. *Id.* at 254.

50. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.3d 764, 768 (9th Cir. 1991).

51. *Piper*, 454 U.S. at 254.

52. *Murray v. British Broad. Corp.*, 906 F. Supp. 858 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 287 (2d Cir. 1996).

53. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987).

54. *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 514 (6th Cir. 1986).

55. *Piper*, 454 U.S. at 241 n.6 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)).

56. *Id.* at 259.

unnecessary problems of conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.⁵⁷

Some critics find the Supreme Court's guidance in *Piper* and later case law as to the application of the public factors vague by comparison to its reference to the more concrete private factors.⁵⁸

In deciding a forum non conveniens dismissal, district courts have broad discretion in balancing the above cited factors.⁵⁹ Nevertheless, courts are constrained by a presumption in favor of the plaintiff's choice of forum, established by the Supreme Court in *Piper*.⁶⁰ Although the Court held in *Piper* that a foreign plaintiff was not entitled to a presumption equal to that of a domestic plaintiff in her forum choice, later courts have interpreted *Piper* to mean that a presumption, albeit weaker, still applies to foreign litigants.⁶¹ Contributing to the broad discretion district courts enjoy, the *Piper* court defined the standard of review for forum non conveniens dismissals as a "clear abuse of discretion," giving "substantial deference" to the district court.⁶² Accordingly, such cases are rarely overruled on appeal.⁶³

B. *Forum Non Conveniens in Copyright Infringement Cases: The Fantasia Case*

Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney,⁶⁴ the "Fantasia case," illustrates how courts apply the *Piper* test to multiterritorial copyright claims. In the *Fantasia* case, the plaintiff brought copyright infringement claims against Disney for related infringements occurring in eighteen different countries.⁶⁵ The district

57. *Id.* at 241; see also *Gulf Oil*, 330 U.S. at 509.

58. See Reynolds, *supra* note 1, at 1683.

59. *Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1232 (2d Cir. 1996).

60. *Piper*, 454 U.S. at 255–56.

61. *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167–68 (2d Cir. 1991); see also *Manu Int'l S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 65, 67 (2d Cir. 1981).

62. *Piper*, 454 U.S. at 257.

63. See Reynolds, *supra* note 1, at 1686.

64. 934 F. Supp. 119 (S.D.N.Y. 1996), *rev'd in part*, 145 F.3d 481 (2d Cir. 1998).

65. *Id.* at 122. The action included infringements under the laws of Australia, Austria, Belgium, Britain, Canada, Denmark, Finland, France, Germany, Iceland, Italy, Japan, the Netherlands, New Zealand, Norway, South Africa, Spain, and Sweden. *Id.* at 122 n.1.

court dismissed the claims on forum non conveniens grounds.⁶⁶ Plaintiff Boosey & Hawkes's predecessor-in-interest was the late Igor Stravinsky, who composed "The Rite of Spring" for Disney's animated motion picture, "Fantasia."⁶⁷ Although Stravinsky's work was in the public domain in the United States, his copyrights were still valid in many other countries throughout the world.⁶⁸ In 1939, Stravinsky granted certain limited worldwide rights to Disney to make and distribute copies of "The Rite of Spring."⁶⁹ When Disney released Fantasia on video cassette in 1991, Boosey & Hawkes alleged that Disney engaged in unauthorized copying of the composition on video and sued for copyright infringement in eighteen countries not including the United States.⁷⁰

Under the *Piper* alternative forum test, the court concluded that although no one forum would be able to adjudicate all of the plaintiff's eighteen copyright claims, the courts of each nation respectively constituted adequate alternative fora.⁷¹ Next, applying the *Gulf Oil* factors, the court found that the balance tilted in favor of dismissal. First, the court was troubled by the need to apply foreign law and concluded that the courts of each nation were much more familiar with their own copyright laws.⁷² Second, the court cited to the Constitutional source of U.S. copyright law to deduce that the policy concerns behind foreign copyright laws were equally reflective of their national policies and should not be touched by U.S. courts.⁷³ Third, the court was concerned with the "undue burden on our judicial system," even though the plaintiff demonstrated that the sources of proof were ready for trial and the witnesses were available to testify.⁷⁴ The court also concluded that the nature of the evidence involved in a copyright infringement case was primarily documentary, and as such, easily transferable.⁷⁵ Therefore, transfer to the foreign forum would not cause an undue burden on the

66. *Id.* at 127.

67. Stanley Rothenberg, "Fantasia" on Videotape Conjures a Lawsuit: License for Musical Composition Disputed, N.Y. L.J., June 23, 1997, at 3.

68. *Boosey*, 934 F. Supp. at 125.

69. *Id.* at 121.

70. *Id.* at 121 n.1.

71. *Id.* at 125.

72. *Id.* at 124.

73. *Id.* (referring to U.S. Const. art. I, § 8, cl. 8).

74. *Id.*

75. *Id.* at 125.

parties.⁷⁶ Finally, the court noted that the plaintiff was a foreign citizen and did not have a U.S. copyright law claim.⁷⁷

On appeal, the Second Circuit reversed the dismissal of the foreign copyright claims.⁷⁸ The appellate court found that the district court did not properly apply the first prong of the *Piper* test when it failed to consider whether an alternative forum would be capable of adjudicating the copyright infringement actions.⁷⁹ Because the district court failed to determine whether Disney was subject to jurisdiction in any of the foreign courts and did not condition dismissal on Disney's consent to jurisdiction in those courts, the district court's analysis under *Piper* was insufficient to warrant a forum non conveniens dismissal.⁸⁰ However, the appellate court expressly declined to decide if it was necessary for the district court to ascertain whether a single alternative court would have jurisdiction over all eighteen claims.⁸¹ The *Fantasia* cases encompass the basic arguments concerning the forum non conveniens dismissal of multiterritorial cases. The inconsistent interpretation of those arguments in case law demonstrates the present uncertainty surrounding treatment of multiterritorial copyright cases under the forum non conveniens doctrine.⁸²

76. *Id.* The court never reconciled the inconsistency in stating that foreign copyright claims are burdensome on the courts and then relying on the ease of transfer of copyright-related evidence to dismiss the claim.

77. *Id.*

78. *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 481 (2d Cir. 1998).

79. *Id.* at 491.

80. *Id.*

81. *Id.* at 491 n.8.

82. "[F]orum non conveniens remains something of a wild card in obtaining dismissal of a [copyright] case filed in U.S. court." *Nimmer & Nimmer*, *supra* note 6, § 17.05.

Of five recent appellate decisions addressing multiterritorial copyright claims and forum non conveniens, two found a forum non conveniens dismissal improper. *See Boosey*, 145 F.3d 481 (reversing dismissal when foreign plaintiff sued U.S. defendant to enforce foreign copyrights); *Overseas Programming Cos. v. Cinematographische Commerz-anstalt*, 684 F.2d 232, 234–45 (2d Cir. 1982) (reversing dismissal when U.S. plaintiff sued foreign defendants to enforce U.S. copyrights). *But see Murray v. British Broad. Corp.*, 81 F.3d 287 (2d Cir. 1996) (affirming dismissal when foreign plaintiff sued foreign defendant to enforce U.S. and foreign copyrights); *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696 (9th Cir. 1995) (affirming dismissal when foreign plaintiff sued foreign defendant to enforce U.S. copyrights); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764 (9th Cir. 1991) (affirming dismissal when U.S. plaintiff sued foreign defendant to enforce U.S. and foreign copyrights). These cases do not show a consistent pattern based on the nationalities of the parties or the existence/absence of a U.S. copyright claim.

III. THE TREND OF LIMITED FORUM ACCESS FOR COPYRIGHT CLAIMS IN U.S. COURTS

Although multilateral treaties have moved toward enhanced global protection for copyrighted works, U.S. judicial interpretations of U.S. copyright law and civil procedure doctrines, such as forum non conveniens, have narrowed the protection afforded copyright owners in U.S. courts for conduct that occurred abroad. The district court's decision in the *Fantasia* case is typical of the treatment of international copyrights since 1995. A general trend of courts' reluctance to decide copyright cases with international elements began with *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, where the Ninth Circuit Court of Appeals denied the copyright owner relief under U.S. law for conduct that occurred abroad.⁸³ The court held that any extraterritorial application of U.S. law to conduct overseas would be contrary to the territorial nature of copyright law.⁸⁴ Looking for infringing conduct occurring within the United States, the court held that even if authorization of the infringing conduct originated in the United States, without an actual act of unauthorized copying within the jurisdiction of the United States there would be no violation of U.S. copyright law.⁸⁵ Although the court dismissed the U.S. claim, the court did not rule out the possibility of the plaintiff's ability to bring infringement actions under the laws of the applicable foreign countries in a U.S. court.⁸⁶

Likewise, district court cases reveal the same inconsistent pattern. *Compare* *Frink Am., Inc. v. Champion Road Mach., Ltd.*, 961 F. Supp. 398 (N.D.N.Y. 1997) (no dismissal when U.S. plaintiff sued Canadian defendant and there was no U.S. copyright claim), *and* *London Film Prods. Ltd. v. Intercontinental Communications, Inc.*, 580 F. Supp. 47 (S.D.N.Y. 1994) (no dismissal when British plaintiff sued U.S. defendant and there was no U.S. copyright claim), *with* *ITSI T.V. Prods., Inc. v. California Auth. of Racing Fairs*, 785 F. Supp. 854, 867 n.20 (1992) (dismissal when U.S. plaintiff sued Mexican defendant and there were U.S. and foreign copyright claims).

83. 24 F.3d 1088 (9th Cir. 1995) (en banc).

84. *Id.* at 1099.

85. The holding of *Subafilms* has not gone without considerable criticism. One district court commented:

[P]iracy has changed since the Barbary days. Today, the raider need not grab the bounty with his own hands; he need only transmit his go-ahead by wire or telefax to start the presses in a distant land. Under this [*Subafilms*] 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 difference.

Curb v. MCA Records, Inc., 898 F. Supp. 586, 595 (1995).

86. *Subafilms*, 24 F.3d at 1095 n.10.

In *Creative Technology, Ltd. v. Aztech System Pte., Ltd.*,⁸⁷ the scope of remedies available in U.S. courts was further narrowed, this time specifically for foreign parties. The Ninth Circuit dismissed twelve U.S. copyright claims on forum non conveniens grounds because the parties involved were foreign.⁸⁸ In dismissing the solely U.S. claims, the court was not concerned that the High Court of Singapore would need to apply U.S. copyright law to the U.S. claims.⁸⁹

When faced with a multiterritorial infringement, a copyright owner's options for enforcement have been greatly limited since *Subafilms*.⁹⁰ *Subafilms* eliminated the ability to apply U.S. law to conduct abroad, even if the infringement was orchestrated from within the United States. The court clarified that there could be no extraterritorial application of U.S. law, but left copyright owners hope by not limiting the justiciability of claims based on foreign law in U.S. courts. In later cases, however, whether pointing to the foreignness of the parties involved or the law to be applied, courts would cite to the illegal extraterritorial application of U.S. law to dismiss justiciable multiterritorial claims.⁹¹ Furthermore, under the *Fantasia* case and similar district court cases, once courts found the multiterritorial claims justiciable, the forum non conveniens doctrine became a common means of dismissing multiterritorial cases.⁹²

87. 61 F.3d 696 (9th Cir. 1995).

88. *Id.* at 703–04.

89. *Id.* at 702.

90. See *supra* note 83 and accompanying text.

91. *Murray v. British Broad. Corp.*, 81 F.3d 287 (2d Cir. 1996); *Creative Tech.*, 61 F.3d at 696; *Skelton Fibres, Ltd. v. Canas*, No. 96 Civ. 6031DLC, 1997 WL 97835 (S.D.N.Y. Mar. 6, 1997); *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 934 F. Supp. 119 (S.D.N.Y. 1996), *rev'd in part*, 145 F.3d 481 (2d Cir. 1998); see also Ginsburg, *Extraterritoriality*, *supra* note 11, at 588 (suggesting possible confusion between extraterritorial and multiterritorial claims).

92. See *Stewart v. Adidas A.G.*, No. 96 Civ. 6670, 1997 WL 218431 (S.D.N.Y. Apr. 30, 1997); *Frink Am., Inc. v. Champion Road Mach., Ltd.*, 961 F. Supp. 398 (N.D.N.Y. 1997); *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 942 F. Supp. 1265 (C.D. Cal. 1996); *ITSI T.V. Prods. v. California Auth. of Racing*, 785 F. Supp. 854 (E.D. Cal. 1992).

Professors Jane Ginsburg and Curtis Bradley agree that courts too often dismiss on forum non conveniens grounds. Bradley, *supra* note 11, at 579 n.372 (1997); Ginsburg, *Extraterritoriality*, *supra* note 11, at 588, 593–95, 599.

IV. FEDERAL COURTS' APPLICATION OF FORUM NON CONVENIENS TO MULTITERRITORIAL INFRINGEMENT CLAIMS

A. *The First Prong of the Piper Test: The Existence of an Adequate Alternative Forum*

The test developed in *Piper* is two-pronged. First, the court must evaluate whether an adequate alternative forum exists. Second, the court must balance the private and public factors pointing to the convenience of the court and the parties.⁹³

In multiterritorial copyright cases, the federal courts have applied the first threshold question of the *Piper* test very narrowly. District courts have reasoned in one of two ways when finding that the foreign forum is adequate. First, when confronted with a series of related infringements taking place in different countries, courts often conclude that each forum corresponding to each separate foreign claim is the "alternative forum," as in the *Fantasia* case.⁹⁴ In essence, twenty separate foreign fora constitute the "alternative forum." Courts have even gone so far as to say that if a foreign court were to allow the foreign copyright claim but decline to adjudicate the related U.S. copyright claim (which the U.S. court dismissed under forum non conveniens), the plaintiff would still have an adequate remedy under the *Piper* standard.⁹⁵

The second way courts have dealt with these claims is to assume that one of the foreign fora would be willing to consolidate the claims, including the U.S. claim, and award cumulative damages for all of the claims. In *Creative Technology*, the court dismissed twelve U.S. copyright claims.⁹⁶ The court reasoned that the remedy would be adequate because nothing should prevent the High Court of Singapore from subsuming the amount of damages incurred by the defendant's alleged pirating within the United States in the amount of damages awarded under the Singapore Copyright Act for the defendant's alleged infringing acts occurring in Singapore.⁹⁷ No U.S. court has found that the alternative of litigating in twenty different countries constitutes an

93. *See supra* Part II.A.

94. *Boosey*, 934 F. Supp. at 125.

95. *Creative Tech.*, 61 F.3d at 701.

96. *Id.* at 702.

97. *Id.*

inadequate alternative forum. In the recent *Fantasia* case, the Second Circuit expressly declined to address the issue when given the opportunity.⁹⁸

B. The Second Prong of the Piper Test: Balancing Public and Private Factors

Once a court finds that an alternative forum exists, the court then proceeds to balance the private and public interest factors to evaluate whether dismissal would “best serve the convenience of the parties and the ends of justice.”⁹⁹ In finding for dismissal, courts have emphasized the following elements of the cases.

1. The Need to Apply Foreign Law

The perceived difficulty of applying foreign law is one of the primary factors that courts emphasize in multiterritorial suits. Although it is well established that the need to apply foreign law is not alone sufficient to dismiss under the doctrine of forum non conveniens,¹⁰⁰ courts feel that they should be very “reluctant to enter into the bramble bush of ascertaining foreign law” without an urgent reason to do so.¹⁰¹ Noting the need to rely on foreign law experts and the obvious ability of foreign courts to better apply their own law, courts view the need to apply foreign law to part or all of a multiterritorial claim as a strong reason for dismissal.¹⁰² Some courts will only dismiss the foreign claims,¹⁰³ whereas others will dismiss all claims, including the U.S. claim, in favor of the foreign forum.¹⁰⁴ No court has considered how the increasing international harmonization of intellectual property law under the Berne Convention, the TRIPS Agreement, WIPO Copyright Treaty, and other

98. *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481, 491 n.8 (2d Cir. 1998).

99. *Murray v. British Broad. Corp.*, 81 F.3d 287 (2d Cir. 1996); *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947).

100. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 n.29 (1981).

101. *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1095 n.10 (9th Cir. 1995) (en banc).

102. See, e.g., *infra* note 129 and accompanying text.

103. *Stewart v. Adidas A.G.*, No. 96 Civ. 6670, 1997 WL 218431 (S.D.N.Y. Apr. 30, 1997).

104. *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696 (9th Cir. 1995).

regional and international agreements can work to facilitate the application of foreign law.

2. *The Nationality of the Plaintiff*

When a court dismisses multiterritorial copyright claims, the nationality of the plaintiff often plays a significant role. Unsurprisingly, claims brought by foreign plaintiffs are likely to be dismissed on forum non conveniens grounds.¹⁰⁵ The general rule is that a plaintiff's choice of forum should rarely be disturbed,¹⁰⁶ especially when the plaintiff chooses her home forum.¹⁰⁷ However, the presumption of convenience is weaker when a plaintiff is foreign.¹⁰⁸ Although the Berne Convention appears to guarantee foreign plaintiffs a forum to hear infringement claims that arise within the United States,¹⁰⁹ the Ninth and Second Circuits both have held that the Berne Convention does not prevent the dismissal of a copyright claim brought by a foreign plaintiff.¹¹⁰ They have also held that the Convention does not alter the rule that a foreign plaintiff's choice of forum should be accorded less deference.¹¹¹

In *Murray v. British Broadcasting Corp.*, the Second Circuit rejected the plaintiff's argument that his choice of forum must be accorded the same deference given domestic plaintiffs because of the Berne Convention.¹¹² Murray, a British national, brought a copyright infringement claim under U.S. and English law against the British Broadcasting Corporation for the unauthorized use and copying of a television character he created.¹¹³ The district court dismissed the case on the ground of forum non conveniens.¹¹⁴ On appeal, Murray argued that his choice of forum must be afforded the deference given domestic plaintiffs because the "national treatment" principle of the Berne

105. *Piper*, 454 U.S. at 255 n.23.

106. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

107. *Piper*, 454 U.S. at 255–56.

108. *Id.* at 256.

109. See *Berne Convention*, *supra* note 8, art. 5(3).

110. *Murray v. British Broad. Corp.*, 81 F.3d 287, 291–92 (2d Cir. 1996); *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 701, 703 (9th Cir. 1995).

111. *Murray*, 81 F.3d at 291–92; *Creative Tech.*, 61 F.3d at 701, 703.

112. 81 F.3d at 290.

113. *Id.*

114. *Murray v. British Broad. Corp.*, 906 F. Supp. 858 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 287 (2d Cir. 1996).

Convention mandates procedural opportunities identical to those accorded American plaintiffs alleging copyright infringement.¹¹⁵ The court reasoned that because there was no explicit language in the text of the Berne Convention that provided for “national treatment with respect to . . . having access to the courts of justice,” the Convention did not mandate equal access to the courts.¹¹⁶

Similarly, in *Creative Technology v. Aztech System Pte., Ltd.*, the Ninth Circuit held that the forum non conveniens rules were not affected by the Berne Convention.¹¹⁷ In *Creative Technology*, a Singapore based company brought an infringement action in U.S. District Court against another Singapore company alleging acts of infringement of its U.S. copyrights occurring within the United States.¹¹⁸ The district court dismissed all claims on forum non conveniens grounds.¹¹⁹ On appeal, the Ninth Circuit affirmed, reasoning that the doctrine of forum non conveniens is a part of U.S. law affecting both U.S. copyright owners and foreign copyright owners in U.S. courts.¹²⁰ The national treatment principle of the Berne Convention does not create immunity from a forum non conveniens evaluation.¹²¹

3. *The Burden on the Judicial System*

Courts also have reasoned that adjudicating multiterritorial copyright infringements places a burden on the judicial system that justifies forum non conveniens dismissal. One district court disregarded the fact that the witnesses were already present, the evidence already collected, and the case substantially ready for trial in the U.S. forum when it dismissed on forum non conveniens grounds, citing to the burden on the U.S. judicial system of adjudicating multiterritorial claims.¹²² Cases like this suggest that courts assume that foreign claims by definition are too burdensome on the judicial system.

115. *Murray*, 81 F.3d at 290.

116. *Id.* at 291.

117. 61 F.3d 696, 701 (9th Cir. 1995).

118. *Id.* at 699.

119. *Id.*

120. *Id.* at 701.

121. *Id.*

122. *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 934 F. Supp. 119, 124–25 (S.D.N.Y. 1996), *rev'd in part*, 145 F.3d 481 (2d Cir. 1998).

4. *The Nature of the Evidence*

Evidentiary issues form the basis of a number of the *Gulf Oil* factors.¹²³ Attempting to apply the factors to copyright infringements, courts have identified a general difference in the nature of evidence for copyright as compared to other causes of action. Courts have classified the evidence in copyright cases as primarily documentary in nature, and therefore easily transferable to other forums.¹²⁴ Under this reasoning, the evidentiary factors in copyright cases will always point to dismissal in a *forum non conveniens* analysis.

5. *The Importance of a U.S. Claim*

In addition to the nationalities of the parties, courts see the need to apply U.S. law as an important U.S. interest to consider in the *forum non conveniens* analysis. Courts often do not see a U.S. interest in the case if there is no U.S. copyright infringement and the case consists solely of multiple, related foreign infringements.¹²⁵ Even though the absence of a U.S. claim appears to be sufficient to cause a dismissal, the presence of a U.S. copyright claim does not prevent the court from dismissing the case. The Berne Convention guarantees that the courts of countries that adhere to the Convention will apply U.S. law to an infringement that took place in the United States regardless of the forum in which the case is being adjudicated.¹²⁶ Thus, courts have reasoned that because a foreign court would apply U.S. law to U.S. copyright claims, the U.S. interest in U.S. copyright law is not threatened by dismissal of U.S. claims.¹²⁷

6. *The Interests of Comity*

In the interest of comity,¹²⁸ courts often refrain from adjudicating claims based on foreign law.¹²⁹ Arguments of comity are often coupled

123. *See supra* note 55 and accompanying text.

124. *Boosey*, 934 F. Supp. at 125.

125. *See id.*; *see also* ITSI T.V. Prods., Inc. v. California Auth. of Racing Affairs, 785 F. Supp. 854, 866 n.20 (E.D. Cal. 1992).

126. *Berne Convention*, *supra* note 8, art. 5(2); *see also* Murray v. British Broad. Corp., 81 F.3d 287, 293 (2d Cir. 1996).

127. *Id.*; *see also* Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd., 61 F.3d 696, 702 (9th Cir. 1995).

128. The court defined comity as follows:

with a perception that copyright law is particular to each country and reflective of strong national policy decisions unique to each country.¹³⁰ Professor William Reynolds argues that because U.S. courts have the power to reach well beyond U.S. borders, courts should exercise responsible restraint in doing so.¹³¹ He further argues that among its means of exercising restraint, the courts may use the doctrine of forum non conveniens to decline jurisdiction and thus exude “judicial comity” rather than “judicial chauvinism.”¹³²

V. COURTS MISAPPLY THE FORUM NON CONVENIENS ANALYSIS DESIGNED FOR LOCALIZED TORTS TO TRANSITORY COPYRIGHT ACTIONS

A. *A Dismissal to an Alternate Forum Is an Effective Denial of the Claim*

Although courts dismiss claims with the intention that the claims will be filed in the alternative forum, statistics show that claims subject to a forum non conveniens dismissal are rarely ever filed in the foreign court. A survey conducted by Professor David Robertson found that although courts may assume that dismissal means that the cases will be litigated abroad, the reality is that few actually are.¹³³ Robertson reported that of the eighty-five cases dismissed by U.S. courts on forum non conveniens grounds during his study, only three actually resulted in a judgment by a foreign court.¹³⁴ Professor William Reynolds similarly noted that the practical consequence of dismissal is the effective termination of the

Comity is the . . . recognition which one nation extends within its own territory to the legislature, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency . . . [I]t is a nation’s expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.

Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (1971).

129. See, e.g., *ITSI T.V.*, 785 F. Supp. at 866 n.20 (stating that even if court had subject matter jurisdiction over plaintiff’s claim for violation of Mexican copyright law, court would decline jurisdiction on forum non conveniens grounds because of difficulty applying Mexican law).

130. See, e.g., *Boosey*, 934 F. Supp. at 124.

131. See Reynolds, *supra* note 1, at 1710.

132. *Id.*

133. David R. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,”* 103 L.Q. Rev. 398, 419 (1987).

134. *Id.*

litigation.¹³⁵ This reality is especially poignant for multiterritorial copyright claims. If plaintiffs are not likely to file their claims in one foreign forum due to a lack of resources, plaintiffs are even less likely to file in twenty different forums.

B. Considering Only the Burden of Applying Foreign Law Is a Misapplication of Piper

When dealing with multiterritorial copyright claims, courts demonstrate an almost irrational fear of foreign law. Acknowledging that the need to apply foreign law favors dismissal, the Supreme Court warned in *Piper* that this alone is not sufficient to warrant dismissal when a balancing of all relevant factors points toward retaining jurisdiction.¹³⁶ In *ITSI T.V. Productions, Inc. v. California Authority of Racing Fairs*, the district court cited to the need to apply Mexican copyright law as sufficient reason to deny the plaintiff's request to amend its complaint to include a Mexican copyright claim for infringing conduct that occurred in Mexico.¹³⁷ The court stated:

Even if subject matter jurisdiction did exist over plaintiff's claim for violation of Mexican copyright law, the court would decline to exercise jurisdiction on forum non conveniens grounds, . . . because exercise of jurisdiction over such a claim would work an extreme hardship on the court in discerning and applying Mexican law.¹³⁸

Although the forum non conveniens determination is usually a complicated balancing test, the hardship of applying foreign law was the only factor the court considered when it determined that allowing the plaintiff to include the foreign copyright claim would result in dismissal.¹³⁹ The court's application of the forum non conveniens doctrine in *ITSI T.V.* directly contravenes the Supreme Court's warning in *Piper*.

C. Comparing Foreign Law Is Different from Applying Foreign Law

Another mistake courts make when evaluating the hardship caused by adjudicating a foreign copyright infringement is failing to recognize the

135. See Reynolds, *supra* note 1, at 1689.

136. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 n.29 (1981).

137. 785 F. Supp. 854, 866 n.20 (E.D. Cal. 1992).

138. *Id.*

139. *Id.*

difference between *comparing* foreign law and *applying* foreign law. In *Piper*, the Supreme Court expressed concern about having to compare the rights, remedies, and procedures of various countries to determine whether an alternative forum was as favorable as the plaintiff's chosen forum.¹⁴⁰ In the interests of comity, a determination of which country's law is better or fairer is an improper judgment on the policy choice of another nation. However, applying the established law of various jurisdictions to a set of facts is something U.S. courts are not only very familiar with,¹⁴¹ but arguably more qualified to do than any other foreign judicial system because federalism forces them to apply various state laws.¹⁴² Moreover, if the foreign court disagrees with a decision made by a U.S. court applying the foreign law, it can still refuse to recognize the judgment if the plaintiff pursues assets in the foreign country. Thus, the foreign court reserves a partial, de facto veto power over any judgment it deems erroneous.¹⁴³

D. A Court Can Presume that Copyright Laws Are Similar

Because of the international harmonization of copyright law, courts can begin with the assumption that national copyright laws are generally the same or similar. Professor Ginsburg has argued that a presumption that copyright laws resemble each other may be appropriate in light of the fact that over 100 countries are members of the Berne Convention.¹⁴⁴ The Berne Convention, TRIPS, and the WIPO Copyright Treaty require minimum standards for their signatory members and prohibit procedural barriers, thus illustrating a collective global action toward the

140. *Id.*

141. See Bradley, *supra* note 11, at 577 (explaining that U.S. courts have long history applying foreign law).

142. See *infra* note 144 and accompanying text. The Berne Convention prevents member countries from having copyright laws that are outside the international norm. Therefore, foreign copyright laws are rarely so different from U.S. copyright laws that U.S. courts would have extreme difficulty understanding the foreign law. See generally *supra* Part I.B.

143. Most nations will recognize a U.S. judgment if personal jurisdiction was proper by its standards, service was accomplished through the Hague Convention, and the remedy does not offend public policy of the foreign nation. Professor John Haley, Transnational Litigation Lecture at the University of Washington School of Law (Feb. 5, 1998).

Hopefully, the creation of an international copyright regime will necessarily lead to greater recognition of foreign judgments and cooperative enforcement efforts.

144. See Ginsburg, *Copyright Without Borders?*, *supra* note 11, at 174–75.

harmonization of substantive copyright law.¹⁴⁵ Fear of the “bramble bush of ascertaining foreign law”¹⁴⁶ is quickly becoming an empty excuse in the copyright field.

E. The Choice of Law Analysis Is Unnecessary

In addition, the Berne Convention simplifies the choice of law analysis, making the application of foreign law less problematic. Under the territoriality principle of the Berne Convention, the law of the territory where the infringement takes place will always apply.¹⁴⁷ The court need only determine where the infringement occurred to perform the choice of law analysis. With over 100 Berne member countries already in agreement, the choice of law analysis should be straightforward in nearly all multiterritorial cases.¹⁴⁸ This unique aspect of copyright should draw special attention in the forum non conveniens determination and shift the balance toward retention of the claim rather than dismissal.

F. The “Lesser Deference to a Foreign Plaintiff’s Choice of Forum” Rule Is Contrary to the Berne Convention

The U.S. bias against foreign plaintiffs contravenes the spirit of the Berne Convention. Upon close examination of the intent and purpose of the Berne Convention, *Murray* and *Creative Technology* appear to have been wrongly decided. Dissenting in *Creative Technology*, Judge Ferguson argued that the majority failed to take into account the Berne Convention and the unique nature of copyright law when they found that foreign plaintiffs were not entitled to the same deference in forum choice.¹⁴⁹ First, under the Berne Convention, the principle of national treatment mandates that authors enjoy in other countries the same

145. See *supra* Part I.B.

146. See *supra* note 101 and accompanying text.

147. See *supra* Part I.B.

148. See Nimmer & Nimmer, *supra* note 6, § 17.05; see also Jane C. Ginsburg, *Ownership of Electronic Rights and the Private International Law of Copyright*, 22 Colum.-VLA J.L. & Arts 165, 167–68 (1998) (stating that Berne Convention “provides that the law of the country where protection is claimed defines what rights are protected, the scope of protection, and the available remedies; the treaty does not supply a choice of law rule for determining ownership”).

149. *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 705 (9th Cir. 1995) (Ferguson, J., dissenting).

protection for their works as those countries would provide to their own nationals.¹⁵⁰ Judge Ferguson pointed out that the majority's holding on forum non conveniens could be used to find virtually always that it is too inconvenient for U.S. courts to adjudicate copyright claims by foreign owners.¹⁵¹ In reaching their conclusion, the majority failed to take into account the Berne Convention's fundamental principle.¹⁵²

In *Murray*, the Second Circuit also held that the Berne Convention did not mandate procedural opportunities identical to those accorded American plaintiffs.¹⁵³ The court found evidence in recent U.S. bilateral treaties that if the United States intended to grant equal procedural opportunities to foreign nationals, explicit "access to courts" clauses must be in the treaty.¹⁵⁴ Because the Berne Convention did not contain such a clause, there was no mandate.¹⁵⁵ The court's reasoning is flawed in that it looked only to bilateral treaties in the last ten years to interpret the intent of the multilateral Berne Convention.¹⁵⁶ Multilateral treaties are different from bilateral treaties in that they cannot be analogized to the contract model of bilateral treaty interpretation.¹⁵⁷ Thus, although the United States may have substantial bargaining leverage in contract-like bilateral treaty negotiations with only one other party, the U.S. power to dictate treaty language in multilateral treaty negotiations is much weaker. The court's search for the purpose behind the multilateral Berne Convention (of which over 100 countries are members and which the United States did not join until 103 years after its promulgation) in recent U.S. bilateral treaties is misdirected.

G. *The Reasoning Behind the "Lesser Deference" Rule Is Outdated*

The presumptions behind the "lesser deference to a foreign plaintiff's choice of forum" rule should be rebuttable in a modern multiterritorial case. In addition to being contrary to fundamental Berne Convention

150. *Berne Convention*, *supra* note 8, art. 5. *See generally* Nimmer & Nimmer, *supra* note 6, § 17.01[B].

151. *See Creative Tech.*, 61 F.3d at 706.

152. *See id.*

153. *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996).

154. *Id.* at 291.

155. *Id.*

156. *Id.* at 291 n.1.

157. Jules L. Lobel, *Foreign Policy and the Courts*, 3 U.C. Davis J. Int'l L. & Pol'y 171, 174 (1997).

principles, the purpose behind this judicially-created assumption does not always apply in multiterritorial suits. In *Piper*, the Supreme Court established the lesser presumption for foreign plaintiffs out of concern for a potential flood of litigation by foreign citizens seeking large punitive and strict liability damages in the United States.¹⁵⁸ In *Gulf Oil*, the Court expressed concern that inconvenient forums were chosen to vex and harass defendants.¹⁵⁹ The presumption behind the rule was that if a plaintiff filed suit anywhere other than her home forum, the forum was chosen for reasons other than convenience.¹⁶⁰

In a worldwide infringement case, however, the assumption that the plaintiff's home forum is most convenient is too simplistic. A plaintiff's primary motive in choosing a U.S. court may be to simplify resolution of her claims by consolidating them in a single forum. This is particularly true when the defendant is a U.S. citizen with assets in the United States. If the court chooses to dismiss a claim brought against a U.S. defendant and the U.S. defendant's sole assets are in the United States, the plaintiff will still be required to file a motion in a U.S. district court after adjudication abroad to have the U.S. court recognize each of the foreign judgments. Without recognition in the U.S. court, the foreign damage award is worthless as to U.S. assets.¹⁶¹

Lesser deference to the foreign plaintiff's choice of forum should not mean no deference at all.¹⁶² Foreign plaintiffs may be effectively excluded from U.S. courts without any analysis of their motivations for choosing the United States as a forum. The foreign plaintiff should be allowed to rebut the presumptions behind the rule by showing practical and legitimate reasons for her forum choice such as: (1) a claim concerns U.S. copyright law, (2) the United States is the only forum where all of the copyright claims can be consolidated, (3) a U.S. judgment is the only means by which the plaintiff can effectively collect damages from the defendant, or (4) the plaintiff seeks to enforce an injunctive order against a U.S. defendant.

158. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981).

159. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

160. *Piper*, 454 U.S. at 255-56.

161. Admittedly, a case where the defendant is a foreign national whose assets exist solely in the foreign country and no injunctive relief is sought in the U.S. market should be dismissed and litigated in the foreign forum.

162. *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167-68 (2d Cir. 1991).

H. *The Evidence in a Copyright Infringement Case Is Different from that Used to Create the Piper Test*

The transitory nature of copyright causes of action¹⁶³ requires that the evidence be evaluated differently than local torts. The *Piper* test was developed around a fact pattern fundamentally different in nature than that one would find in a copyright case. The forum non conveniens doctrine developed from cases such as *Gulf Oil*, *Piper*, and *Bhopal, India*, involving accidents resulting from negligence: a warehouse explosion due to a gasoline leak,¹⁶⁴ an airplane crash,¹⁶⁵ and a gas leak at a chemical plant.¹⁶⁶ The factors in the forum non conveniens test were derived from distinctively localized torts. The evidence from an airplane crash or factory explosion would naturally focus around the accident site and include things such as physical evidence at the site, witnesses who were there when it happened, and evidence of someone's negligence that can be deduced from examining the accident site itself.

In contrast, a copyright infringement case involves primarily documentary evidence,¹⁶⁷ such as licensing agreements and versions of the original and copied works, that is not tied to a particular locale. One court has reasoned that the evidence in a copyright infringement can be primarily documentary and therefore easily transportable to the foreign forum if the U.S. court dismissed the case.¹⁶⁸ However, this argument equally supports retention of the case. If the evidence is primarily documentary, consolidation of related foreign copyright infringements into a U.S. court should not be extremely burdensome. The *Piper* factors were not created with this type of transitory cause of action¹⁶⁹ in mind, and case law fails to consider this significant difference in the nature of the evidence.

163. See Nimmer & Nimmer, *supra* note 6, § 17.03 (arguing that copyrights are transitory causes of action).

164. *Gulf Oil*, 330 U.S. at 502.

165. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 238 (1981).

166. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986).

167. *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 934 F. Supp. 119, 125 (S.D.N.Y. 1996), *rev'd in part*, 145 F.3d 481 (2d Cir. 1998).

168. *Id.*

169. See Nimmer & Nimmer, *supra* note 6, § 17.03.

I. *Because of Technological Advancements, No Forum Is Inconvenient*

Not only are typical fact patterns of modern copyright actions generally different from the cases that established the *Piper* balancing test, modern advancements in technology also have redefined the very meaning of convenience. In *Frink America, Inc. v. Champion Road Machinery Limited*, the court noted that “considerations of practical convenience must be evaluated, in light of the increased speed of travel and communication which makes . . . no forum, as inconvenient [today] as it was in 1947 [in *Gulf Oil*].”¹⁷⁰ While some argue that the shrinking global community calls for more judicial restraint,¹⁷¹ an equally strong argument compels courts to play a more active role in resolving disputes that cannot be confined within the borders of a single nation.

J. *Courts Are Unclear on How the Public Policy and Federal Interest in Copyright Protection Affect the Forum Non Conveniens Analysis*

In the *Fantasia* case, the court reasoned that there is a strong public policy behind U.S. copyright law based on the fact that protection is derived from the Constitution.¹⁷² The strong public interest behind copyright has been recognized by the Supreme Court:

The immediate effect of our copyright law is to secure a fair return for an “author’s” creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. “The sole interest of the United States and the primary object in conferring the [copyright] monopoly,” this Court has said, “lie in the general benefits derived by the public from the labors of authors.” When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.¹⁷³

There appears to be some confusion over what the strength of the federal interest behind copyright law means to the forum non conveniens analysis. Assuming the public interest behind the copyright laws in foreign countries is equally strong, the court in the *Fantasia* case

170. 961 F. Supp. 398, 403 (N.D.N.Y. 1997).

171. See Reynolds, *supra* note 1, at 1710.

172. *Boosey*, 934 F. Supp. at 124.

173. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (citations omitted).

reasoned that U.S. courts should refrain from applying foreign copyright law.¹⁷⁴ In stark contrast to this rationale, the Ninth Circuit in *Creative Technology* dismissed twelve U.S. copyright claims, concluding that it was perfectly appropriate for the Singapore High Court to apply U.S. copyright law.¹⁷⁵

K. The United States Has a Legitimate Interest in Adjudicating All Copyright Claims Brought by or Against U.S. Citizens

Regardless of whether a claim based on U.S. copyright law exists, the United States has an interest in the claim if either party is a U.S. citizen. If a U.S. citizen is the injured party, the United States has an interest in protecting its own nationals. If a U.S. citizen is the defendant, the United States has an interest in securing compliance by U.S. citizens with other nation's laws.¹⁷⁶ In *London Film Productions Ltd.*, the court reasoned that in order to ensure that foreign courts will require their nationals to comply with U.S. laws, U.S. courts should require U.S. citizens to comply with foreign laws.¹⁷⁷ The court's view represents a more progressive and practical attitude than what Professor Robertson referred to as the prevailing judicial attitude.¹⁷⁸ The court noted:

An unwillingness by this Court to hear a complaint against its own citizens with regard to a violation of foreign law will engender, it would seem, a similar unwillingness on the part of a foreign jurisdiction when the question arises concerning a violation of our laws by one of its citizens who has since left our jurisdiction. This Court's interest in adjudicating the controversy in this case may be indirect, but its importance is not thereby diminished.¹⁷⁹

174. *See Boosey*, 934 F. Supp. at 124.

175. *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995). "I am astounded when I read that it is not convenient to try an American copyright case in an American court for copyright infringement that takes place solely in America." *Id.* at 705 (Ferguson, J., dissenting).

176. *See London Film Prods. Ltd. v. Intercontinental Communications, Inc.*, 580 F. Supp. 47, 49 (S.D.N.Y. 1994).

177. *See id.*

178. According to Professor Robertson, the "prevailing judicial attitude is that the injuries done by American businesses to foreign nationals abroad are not America's problem." *See Robertson, supra* note 133, at 405.

179. *London Film*, 580 F. Supp. at 49.

Reciprocity in international legal affairs is an important U.S. interest that should not be overlooked.¹⁸⁰

To encourage reciprocity from foreign courts, it is important that the U.S. courts aid foreign litigants. Not only are treaties and conventions dependent on reciprocity, but many foreign laws are built around reciprocity requirements. For example, the German and Japanese statutes for enforcing foreign judgments require that a U.S. court would enforce a similar judgment if the situation were reversed in order for those countries to enforce the U.S. judgment.¹⁸¹ In the United States, the judicial assistance statute allows U.S. courts to order discovery to assist foreign litigation.¹⁸² This statute was enacted as a model to encourage other foreign courts to similarly assist U.S. litigants in gathering evidence abroad.¹⁸³ Contrary to perceptions of "judicial chauvinism," U.S. judicial conduct sets an example of judicial cooperation. United States courts should take an activist role in creating a cooperative model for global intellectual property enforcement in the courts.

VI. A MODIFIED BALANCING TEST FOR MULTITERRITORIAL COPYRIGHT CLAIMS

A. *Eighteen Different Fora Do Not Constitute an Adequate Alternative Forum*

Under the first prong of the *Piper* test, courts should re-think precisely what constitutes an adequate forum in a multiterritorial copyright dispute. The Second Circuit took the first step by requiring a more meaningful inquiry into whether the alternative forum would actually have jurisdiction;¹⁸⁴ however, courts should take that inquiry one step

180. See D.W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 Va. J. Int'l L. 295, 298 (1994) (stating that international law depends on political reciprocity).

181. Under the Japanese Code of Civil Procedure Article 200, a foreign judgment that has become final and conclusive shall be valid only upon fulfillment of the following conditions: (1) jurisdiction is not denied in laws or treaty, (2) defendant received service of notice by means other than public notice or has voluntarily appeared, (3) judgment is not contrary to public order or good morals, and (4) mutual guarantee of enforcement (reciprocity). Reciprocity is also required by the German courts. See *Bourroughs Corp. v. Chung* (Sup. Ct. 1983), 27 JAIL 119 (1984).

182. 28 U.S.C. § 1782 (1994).

183. "No country in the world has a more open and enlightened policy [on recognizing foreign judgments]." See *Societe Nationale v. U.S. Dist. Court, S.D. Iowa*, 482 U.S. 522, 531 n.13 (quoting *Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651 (1969)).

184. See *supra* note 78 and accompanying text.

further. In reality, eighteen separate fora do not actually constitute an adequate forum to “best serve the purposes of convenience of the parties and the ends of justice,”¹⁸⁵ because the odds are quite high that none of those claims actually will be litigated unless the plaintiff can find one forum that is willing to consolidate the claims.¹⁸⁶

Although a blanket rule requiring courts always to exercise jurisdiction over multiterritorial copyright claims is not appropriate, courts should nevertheless give significant weight to two considerations. First, a court should determine whether one alternative forum exists that can and will exercise jurisdiction over all of the claims. Second, a court should consider whether the plaintiff will have to bring an additional action for the recognition of the judgment in a foreign jurisdiction based on the remedy sought. These considerations would be particularly relevant to a damage award where there is a U.S. defendant whose primary assets are in the United States or a foreign defendant whose assets are in the foreign jurisdiction. If the relief sought is an injunction, a similar analysis is necessary.

B. The Public and Private Factors Established in 1947 Should Be Reevaluated

Applying a laundry list of factors created in 1947 will not bring about results suitable for the high-tech cases of the new millenium. Courts should give less weight to the factors that were tailored to the localized tort in *Gulf Oil*, such as access to proof and viewing of the premises. Instead, courts should concentrate on the actual factors that would make a copyright infringement trial “easy, expeditious, and inexpensive,” such as the court’s ability to consolidate claims between two parties in one forum or the court’s ability to provide the plaintiff with the remedy she seeks. If the case would be easy to try in a U.S. court, there should be no reason for a court to conclude that the private factors point to dismissal merely because the case does not solely involve a U.S. matter or because there is a need to apply foreign law. A case determining the foreign rights of foreign parties should not be adjudicated by U.S. courts. However, if there is a legitimate U.S. interest brought about by the nationality of a party or the nature of the rights to be enforced, a U.S. court should assert jurisdiction.

185. See *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947).

186. See *Robertson*, *supra* note 133, at 419.

As for the public factors, the court should place less emphasis on local interests, foreign law, conflicts of law, and familiarity with the law to be applied. Instead, the court should focus on the broader U.S., domestic, and global interests in the enforcement of copyrights. Copyright enforcement is clearly an international problem that cannot be addressed adequately by separate localized remedies. The international nature of copyright piracy requires that U.S. courts consider claim consolidation as a high priority in multiterritorial litigation.

C. *Consolidation of Claims Should Be a New Factor in the Forum Non Conveniens Balancing Test*

Consolidation of claims is not a novel theme in legal literature; however, it is a factor that is overlooked in the forum non conveniens analysis. Quoting the lower court decision, the Supreme Court in *Piper* stated, “[I]t would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses.”¹⁸⁷ When discussing the fact that the plaintiff could get a judgment in the United States and institute an indemnification or contribution action in Scotland against the other parties, the Court again found that “it would be far more convenient, however, to resolve all claims in one trial.”¹⁸⁸ Without a serious analysis of what forum can best resolve all the claims, courts have overlooked important language in the *Piper* decision that emphasizes claim consolidation.

As U.S. companies become increasingly dependent on the Internet,¹⁸⁹ they become vulnerable to worldwide infringements. Consolidation is an effective way to give small to medium-sized technology companies an adequate enforcement mechanism for their intellectual property rights as they venture out into the international world of electronic commerce. Courts should consider the strong U.S. interest in protecting the individuals and companies leading the United States into the world of transactions via the Internet.

187. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 243 (1981).

188. *Id.* at 259.

189. Of *Inc. 500*'s annual list of America's fastest growing companies, the computer industry had the highest percentage. In addition, the percentage of CEOs that used the Internet in 1991 was 3%. In 1995, that number grew to 70%. United States companies are increasingly becoming high-tech and reliant on the Internet. See *Inc. 500 Almanac*, *Inc. 500*, Oct. 22, 1996, at 15, 22–23.

D. *The “Ever Shrinking World” Calls for Action, Not Isolationism*

In describing the extent to which the laws of foreign nations have effect, Justice Story stated in his Conflict of Laws treatise, “The common law of both countries [United States and England] has been expanded to meet the exigencies of the times as they have arisen.”¹⁹⁰ Because of the widespread use of the Internet and electronic commerce, unauthorized acts of reproduction, distribution, public performance, or display of copyright works may occur in many countries at once.¹⁹¹ To meet the exigencies of the times, courts should adapt existing legal doctrines to changes in the global political order. Over 100 countries have chosen to join the Berne Convention, creating a global copyright regime working toward harmonization, minimum global standards, and national treatment of foreign plaintiffs. By joining the Berne Convention, these nations have acknowledged that copyright issues can no longer be dealt with entirely within the boundaries of a single nation. Traditional isolationist notions and a laissez faire approach to multiterritorial infringement claims leave copyright owners without a meaningful remedy.¹⁹²

VII. CONCLUSION

Conscious of the criticism about extraterritorial application of U.S. law,¹⁹³ courts are quick to dismiss copyright cases that they perceive would force them to exercise extraterritorial power. Professor Ginsburg cautions that courts may be “too quick to perceive ‘extra’-territoriality in claims that in fact allege multiterritorial infringements.”¹⁹⁴ If the adjudication of a copyright infringement does not require an extension of U.S. copyright law to acts outside U.S. borders, the court does not face an extraterritorial problem. However, the difficulty with multiterritorial

190. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (citing Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* §§ 23, 24 (8th ed. Little, Brown, & Co. 1893)).

191. See Ginsburg, *Copyright Without Borders?*, *supra* note 11, at 155.

192. Justice Blackmun commented that “a functioning system for solving disputes across borders serves many values, among them predictability, fairness, ease of commercial transactions, and stability through satisfaction of mutual expectations. These interests are common to all nations, including the United States.” *Societe Nationale v. U.S. Dist. Court, S.D. Iowa*, 482 U.S. 522, 531 n.13 (1987) (citations omitted).

193. See Bradley, *supra* note 11, at 546.

194. See Ginsburg, *Extraterritoriality*, *supra* note 11, at 588.

claims does not end there. If jurisdiction is otherwise proper, the courts move on to the forum non conveniens test, which remains something of a “wild card” for copyright claims in U.S. jurisprudence.¹⁹⁵

The danger of a standard test is that most cases will not fit neatly into the designated categories of analysis. The formulaic nature of the old forum non conveniens test has given it the reputation of a “wild card” in copyright cases.¹⁹⁶ When confronted with multiterritorial copyright claims, courts need to address the true U.S. interests involved. When evaluating the U.S. interest in hearing the case, the court should consider the importance of copyright protection to the U.S. market, the international nature of copyright, and the unique way in which copyrights can be instantaneously infringed via the Internet. Fear of foreign law, foreign parties, and foreign documents is no longer excusable in light of international agreement to work toward a global solution to the inadequacy of the international intellectual property regime. Not every case should be heard before a U.S. court. If the case is merely tangentially connected to the United States and after inquiry, the court is reasonably certain that the foreign forum will have personal jurisdiction over the parties and can address the claims as a whole, then the use of the forum non conveniens dismissal would be appropriate.

According to Professor Reynolds “[t]he American courts’ willingness to defer to the exercise of foreign jurisdiction not only shows the respect due other sovereigns, but is increasingly necessary in an ever-shrinking world.”¹⁹⁷ On the other hand, the ever-shrinking world allows copyrights to be easily infringed with no realistic means to enforce those property rights globally. If courts have the ability to adjudicate, they should not shirk their responsibility to exercise that authority. The forum non conveniens doctrine is an important judicial tool that must be used to steer claims that are merely tangentially connected to the United States to other more appropriate fora. Courts, however, must be careful not to misuse this tool as a means to avoid multiterritorial litigation merely because of its international nature.

195. Nimmer & Nimmer, *supra* note 6, § 17.05.

196. *See supra* text accompanying note 195.

197. Reynolds, *supra* note 1, at 1714.