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*575 SOCIAL POLICY CHOICES AND CHOICE OF LAW FOR COPYRIGHT INFRINGEMENT IN CYBERSPACE

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Introduction

If "[c]opyright was technology's child from the start," [FN1] the challenges of digitization and the Internet have persuaded some that it is now time for copyright to grow up, leave home, and expand its horizons. Conventionally understood to be a territorially-confined body of law, [FN2] copyright law must now operate in "cyberspace," [FN3] an environment which, it is said, knows no borders. *576[FN4] Tethered to its domestic environment, copyright law may no longer be able to lead a productive and effective life. Copyright must "globalize": a mature copyright law, one fit for the cyberspace era, may need to be able to spread across domestic borders, providing relief wherever copyright infringements occur.

In broad terms, this represents the view of a number of influential scholars who have been developing new choice of law strategies for copyright in the cyberspace era. [FN5] These strategies involve departure from copyright law's "territoriality premise." The territoriality premise reflects the fact that there is no such thing as a domestically enforceable international copyright law: instead, there is U.S. copyright law, German copyright law, Japanese copyright law, and so on, each applying to activities within each individual country's territorial borders. [FN6] Copyright's territoriality *577 premise is viewed by some scholars as unsuited to a world in which the Internet has rendered international borders permeable. [FN7]

Efficient global delivery of "sustained works of authorship" [FN8] in digital form brings new risks for copyright owners, as the "celestial jukebox" [FN9] comes closer to realization. [FN10] Referring to the possibilities for global exploitation of copyright material, both authorized and unauthorized, a leading commentator recently asked: "[I]f authors and their works are no longer territorially tethered, can changes in the fundamental legal conceptions of existing regimes for the protection of authors be far behind?" [FN11] Another has concluded that, in the cyberspace era, "[i]t no longer makes sense to localize the origin of [copyright] work[s], much less any conduct infringing [them], inside the territory of any one country. The work is created, and made virtually present, throughout the entire network all at once, transcending national boundaries." [FN12]

*578 The territoriality premise suggests that the appropriate choice of law for transnational copyright infringement ought to be the lex loci delicti: that is, the law of the territory in which the rights were infringed. [FN13] Some scholars now believe that this lex loci approach is unsustainable in the cyberspace era, in which copyright works may be distributed to and accessed by anyone with an Internet connection, situated anywhere in the world.

The alternative strategies that some scholars now advocate are described in this Article as "single governing law approaches." Their aim is to have one law govern all unauthorized uses of copyright material, wherever they occur, rather than a collection of different, territorially-confined copyright laws. Scholars who advocate these approaches wish to see choice of law for copyright infringement in the cyberspace era move "beyond territoriality" [FN14]: in appropriate circumstances, one nation's copyright laws might apply not only to activity within that nation, but to activities within other nations as well.

This body of scholarship is already finding a receptive audience. In a 1999 decision from within the Second Circuit, for instance, a district court held that unauthorized transmission of television programs to viewers in Canada implicated only U.S. copyright law, even though the public that received the broadcast was situated in a foreign territory. [FN15] With the encouragement of recent scholarship, decisions such as this [FN16] may be clearing the way for more general departure from copyright's territoriality premise in the cyberspace era.

Elsewhere, I have questioned whether extraterritorial application of U.S. copyright law is doctrinally sound. [FN17] In this Article, I attempt to distil some of the broader social policy issues that might be implicated if single governing law approaches were to ***579** receive more widespread endorsement. [FN18] Single governing law approaches may well achieve better global protection of copyright owners' economic interests than can be achieved by the territoriality premise's more fractionated approach. Departure from the territoriality premise may also promise more efficient global licensing of copyright material. [FN19] For these reasons, copyright industries are likely to be enthusiastic about the single governing law approaches, particularly if they would lead to the application of U.S. copyright law to defendants' activities in foreign territories. [FN20] Similarly, some users of copyright materials ***580** may appreciate the adoption of single governing law approaches to cross-border licensing of copyright material, if these strategies result in more streamlined approaches to international copyright clearance.

Efficient protection and licensing of copyright materials do not exhaust copyright's purposes, however. More broadly understood, copyright is an aspect of domestic information policy. Copyright accords rights to authors, but it also limits these rights so as to ensure that copyright continues to correspond with perceptions of the public good. Along with other branches of the law, such as First Amendment jurisprudence and the law of defamation, copyright law participates in determining what informational and cultural materials are available in society and at what cost. [FN21] While the shape of domestic copyright law is in part determined by an increasingly complex matrix of public international law obligations, [FN22] domestic copyright law is also a product of important domestic public policy choices touching on fundamental issues relating to availability of and access to significant parts of the materials of culture. [FN23] The issues raised by choice of ***581** law strategies designed for the cyberspace era are thus not confined to technical points of private international law doctrine; they also implicate a cluster of issues relating to copyright's role in the regulatory state [FN24] and the continued viability of copyright's contribution to domestic information policy. [FN25]

The significance of this point may be understood more clearly by taking seriously the possibility that other nations might adopt single governing law approaches. Consider the following scenario: A court in Territory X is seized of a copyright infringement action involving a defendant who uploads copyrighted material to an internationally available website. Adopting a single governing law approach, the forum determines that Territory X's copyright laws govern all infringements, wherever they occur. [FN26] In this case, however, assume that the copying and public distribution of the material are infringements according to Territory X's copyright laws, but these activities would not be infringing under U.S. copyright laws. The differences might be due to U.S. copyright law's more permissive approach to fair use. [FN27] Alternatively, some other specific statutory defense might have excused distribution in the United States, had U.S. copyright law applied. If the forum were to enforce this decision in a manner that would have an international effect--by, for instance, subjecting the defendant to contempt proceedings if the website is not shut down--this would be tantamount to allowing Territory X's copyright laws to override those of the United States. Use of this example is not meant to imply that domestic self-interest is an ***582** appropriate organizing principle in this analysis. However, the example may serve to focus more sharply the issue of what might be at stake for domestic copyright law if single governing law approaches for transnational copyright infringement are adopted. [FN28] Perhaps most usefully, the example may encourage the development of a degree of empathy for what it might mean for other jurisdictions if U.S. copyright law were applied extraterritorially.

Whether or not single governing law approaches produce desirable results should not be analyzed merely in terms of whether they would bring efficiency gains for copyright industries (and/or licensees of copyrighted materials). Devising a conflict of laws regime for cyberspace copyright infringement needs to be seen as a task that involves an important social policy choice, one that requires weighing the advantages of single governing law approaches--such as more efficient enforcement and licensing of copyrights--against the costs of allowing domestic copyright laws to be overridden by the copyright laws of other nations. It is copyright's role in domestic information policy that is put most at risk by choice of law strategies that would allow copyright laws to apply extraterritorially. As yet, however, an appreciation of copyright's role in domestic information policy has not much informed the work of advocates of single governing law approaches.

Part I of this Article describes in further detail copyright law's territoriality premise and its implications for choice of law in transnational copyright infringement. It then describes some of the alternative, "single governing law" approaches that have been advocated in recent scholarship. Part II considers single governing law approaches in the

light of copyright's role in the ***583** regulatory state. First, it discusses the utilitarian focus of Anglo-American copyright law. It then outlines some of the key areas in which differences exist between different domestic copyright regimes. Part III argues that copyright contributes in fundamental ways to the shape of domestic information policy, including in areas such as the nature of democratic governance and access to materials of culture. I suggest that an appreciation of this aspect of copyright law ought to inform our thinking about the kind of choice of law regime that is needed in the cyberspace era.

Single governing law approaches to copyright infringement in cyberspace are being taken seriously in both domestic and international fora. In addition to being the subject of numerous scholarly articles, they have also been advocated in a consultative paper prepared by Professor Ginsburg under the auspices of WIPO, one of the key administrators of international intellectual property agreements. [FN29] That such approaches may be taken seriously in international contexts also underscores the point that evaluation of these strategies needs to be both at doctrinal and policy levels. In this Article, I do not suggest that copyright law's contribution to domestic information policy is sufficiently important to dictate the retention of the lex loci approach as the governing principle for choice of law for copyright infringement in cyberspace. Ultimately, devising a sound choice of law regime for cyberspace may be as much a matter of political judgment as detached analysis. As yet, however, this endeavor has not been considered to raise any significant social policy questions at all, other than those related to achieving a more efficient choice of law regime for exploitation of copyright materials in cyberspace. Giving further consideration to some of the broader social policy issues implicated by single governing law approaches may assist in ensuring that the necessary policy judgment is better informed.

I Territoriality Challenged

Choice of law theories do not reflect universal or immutable ***584** truths. Instead, they are complex responses to a wide variety of influences: doctrinal, economic, philosophical, and practical. [FN30] For instance, the idea that power is localized within particular geographical boundaries would be largely unsustainable without the rise of the nation state. [FN31] New technologies and new geopolitical agenda are today changing the discourse that surrounds the notion of the nation state, and legal doctrines are coming under increasing pressure to adapt in a variety of contexts. This Part examines how choice of law for cross-border copyright infringement is adapting to the twin challenges of digitization and the Internet.

A. Territoriality of Domestic Copyright Laws

The United States Copyright Act of 1976 does not specify that the scope of the copyright owner's rights is confined to the United States. [FN32] For the most part, however, U.S. copyright statutes have been construed more or less consistently with the territoriality premise. [FN33] In general, copyright law is subsumed within the general principle, reaffirmed by the Supreme Court in EEOC v. Arabian American Oil Co., that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." [FN34] This principle reflects ***585** a multilateralist attitude toward international legal relations: the world is divided into zones of jurisdictional power which correspond to geopolitical locales under the control of individual sovereigns.

The Supreme Court addressed the territoriality of copyright law directly in its 1908 decision in United Dictionary Co. v. G. & C. Merriman Co., [FN35] in which it held that a U.S. copyright owner was not deprived of his copyright by the absence of a copyright notice on copies published abroad. The Court characterized the notice requirement as a "warning to the public" against copyright infraction. In the view of Mr. Justice Holmes, it was "unlikely that [Congress] would require a warning to the public against the infraction of a law beyond the jurisdiction where that law was in force." [FN36] The territoriality premise was recently reiterated by Justice Ginsburg in her concurring opinion in Quality King Distributors, Inc. v. L'Anza Research International, Inc., a case involving parallel importation of goods bearing copyrighted labels. Justice Ginsburg stressed that "[t]he rights granted by the United States Copyright Act extend no farther than the nation's borders." [FN37]

Copyright's public international law framework [FN38] is also premised on territoriality of domestic copyright

regimes. [FN39] Its "twin ***586** pillars" are "national treatment" and "minimum standards." In general terms, the former precludes individual nations from giving less protection to works either authored by foreigners or to works first published abroad, whereas the latter imposes public law obligations on domestic nations to ensure that their copyright laws comply with agreed minimum levels of protection. [FN40] The latter principle, often characterized by the phrase "upward harmonization," [FN41] describes an agenda of encouraging better and more uniform copyright protection across the globe. If domestic copyright laws ordinarily applied abroad, individual nations would need to be less concerned about the content of foreign laws and the protection they afford than they currently are. [FN42] It is in large part the applicability of foreign copyright laws within their respective territories (sometimes with less than desirable effects, insofar as copyright industries are concerned) that drives the upward harmonization agenda. [FN43]

The territoriality premise suggests that the lex loci delicti ***587** should be the governing law for copyright infringement actions. [FN44] The lex loci approach reflects a commitment to multilateralism. It supposes that the only copyright law that can be applied to infringing activity within a particular territory is that territory's own copyright law. That is, acts of infringement are only possible where rights exist; the laws that create the rights also govern their infringement. The lex loci approach requires identifying and applying, for each country in which the copyright had allegedly been infringed, each individual country's domestic law. [FN45] For instance, a defendant might be liable for unauthorized reproduction according to the laws of the territory in which copying occurred, but also be liable for unauthorized distribution under the laws of other territories. [FN46] This scission of various unauthorized acts according to the territories in which they occurred is reflected in the recent decision in Psihoyos v. Liberation Inc., [FN47] which concerned unauthorized copying of a photograph in Austria, and unauthorized distribution of the work in the United States. With respect to the unauthorized reproduction, the district court for the Southern District of New York noted that the plaintiff had not alleged any infringement under the U.S. copyright act. [FN48] However, the U.S. copyright statute did apply to the distribution of the work that occurred within the United States.[FN49]

The Second Circuit recently appeared to endorse the lex loci approach in a case involving unauthorized distribution in the ***588** United States of newspaper articles written and originally published in Russia. This was also the first appellate decision in which the issue of choice of law for ownership of copyright arose. Though the infringements occurred within the United States, the court held that U.S. law did not necessarily govern the question of determining ownership. That issue was to be referred to the law with the closest relationship with the property and the parties. Notwithstanding this, however, the court adopted a territorial approach to the question of infringement: though the works were created in Russia, they were infringed by unauthorized publication in the United States. [FN50] Hence, U.S. law applied to these infringements. [FN51] A handful of district court decisions have also held that there is no per se objection to the exercise of subject matter jurisdiction over foreign copyright laws, where the acts of infringement occurred abroad. [FN52]

B. Beyond Territoriality

Persisting with the lex loci approach may be more difficult to sustain in cyberspace, where copyright works may instantly be rendered globally available. In the cyberspace era, the lex loci approach may give rise to least three unique difficulties that do not arise to the same extent in the analog world. First, where copies are distributed globally, the lex loci approach gives rise to the "inevitable scenario" of requiring a court seized of an infringement action to apply a "multiplicity" of domestic copyright laws. [FN53] Courts may find the prospect of applying a vast range of different domestic copyright laws "daunting," [FN54] a problem that ***589** may impede efficient enforcement of copyright owners' rights. At least one U.S. court has found the prospect of applying the copyright law of only one foreign nation too burdensome to entertain. [FN55] More generally, the necessity to apply foreign copyright law seems to increase the risk that a case may be dismissed on forum non conveniens grounds. [FN56]

A second problem with the lex loci approach arises where the terminology used to describe infringing activities within particular domestic statutes does not adequately capture the kinds of unauthorized exploitation of copyright material that the Internet now makes possible. New technologies have often exposed gaps in the law that require courts to struggle with existing concepts until new approaches develop. [FN57] With respect to digitization and the Internet, courts, policymakers, and scholars have been struggling with the issue of whether statutory concepts such

as "public performance," "distribution to the public" and "authorization of copyright infringement" apply to even the most mundane Internet activity, such as making a file available for downloading, providing a hyperlink to a site that includes infringing materials, framing, or caching. [FN58]

***590** These problems may not be insurmountable, however. As others have pointed out, it should not be assumed that all litigants would put every possibly applicable law before the forum seized of the dispute. [FN59] Plaintiffs themselves are likely to be concerned with liability issues arising under the laws of some territories more than others. Thus they might invoke only representative jurisdictions, [FN60] following their own cost/benefit analyses focused on whether the possible rewards warrant the litigation expense involved in pursuing all of the potential infringements, wherever they took place. Professor Ginsburg has put forward another strategy, suggesting that courts might adopt a presumption that all laws implicated comply with Berne Convention norms, leaving it to individual litigants to prove variance. [FN61]

The definitional problem may also prove temporary. Within many domestic copyright law regimes and in international fora, much work is already being done to ensure that legal concepts encompass the exploitation of copyright works over the Internet. A recent instance is the October 1999 report of the Canadian Copyright Board, which presents a highly detailed analysis of the application of Canadian copyright law to the various ways that musical works may be distributed over digital networks. [FN62] Copyright's adaptation for the cyberspace era has also been a matter of concern for the World Intellectual Property Organization, whose 1996 Copyright Treaty includes in the bundle of rights comprising a copyright, the right to authorize distribution of a work "in such a way that members of the public may access these works from a place and at a time individually chosen by them." [FN63] With the encouragement provided by public international law, it may be anticipated that this will become an international standard. ***591** In turn, standardization of copyright law norms that accurately characterize the kinds of exploitation of copyright material that the Internet makes possible may serve to alleviate at least some of the "daunting" aspects of the lex loci approach.

A third problem may challenge more fundamentally the continued viability of the lex loci approach in the Internet era, however. Suppose that without the authorization of the copyright owner someone uploads a work of authorship onto a website in Territory A, where such an act does not constitute an infringement under Territory A's copyright law. Suppose also that public distribution of the work does constitute copyright infringement in Territories B and C. Assuming that personal jurisdiction over the defendant may be exercised in Territory B, the defendant would be liable according to the lex loci approach for copyright infringement under the laws of Territories B and C, but not A. Though application of the lex loci might legally segregate the infringer's activities by reference to individual domestic territories, in the Internet era it may be difficult to bracket off these activities from the rest of the world in fact. The availability of the work to websurfers in Territories B and C suggests that extraterritoriality of copyright law norms exists as a matter of brute reality, notwithstanding any qualms about the de jure extension of domestic copyright law across international borders. That is, the norms of Territory A's copyright law system may dictate whether a work of authorship may be made available without the copyright owner's consent within Territories B and C.

This is perhaps the key dilemma generated by the Internet for conflict of laws in the copyright context. Typically, distaste for the extraterritorial reach of domestic laws focuses on the issue of nation's laws overriding those of another; [FN64] yet, in the scenario just described, long before any litigation is initiated, it is Territory A's more permissive regime that trumps in fact.

1. Single Governing Law Strategies

That copyright's territoriality premise endures at all has been characterized by one scholar as "remarkable," given the availability ***592** of alternative approaches for ordinary torts. [FN65] Seeking to displace the lex loci approach, some commentators would subsume choice of law for transnational copyright infringement within the general "connecting factors" approach, akin to the approach which is familiar from the Restatement (Second) of the Conflicts of Laws. [FN66] Candidates for an applicable law for transnational copying cases include: the law of the country in which the defendant uploaded the work onto a digital network without authorization, [FN67] the law of the forum, [FN68] the law of the place of the origin of the work, [FN69] the law of the place of the allegedly

infringing party's "cyber-domicile," [FN70] the most protective of the possibly applicable laws, [FN71] and the law of the defendant's domicile or place of business. [FN72] Adopting any one of these approaches, ***593** a domestic court would not be required to apply multiple copyright laws in single proceedings. Instead, based on an analysis of connecting factors, the court could localize infringements in a single jurisdiction, and apply the law of that jurisdiction to the defendant's actions in their entirety, wherever they occurred, or wherever their effects were felt. Following application of one of these approaches, the governing law may transpire to be that of the territory in which at least some of the infringing activity occurred. In many instances, the place of the upload is also very likely to be the place where the work was "copied," and may also be a place where at least some unauthorized distribution to the public occurred. What distinguishes single governing law approaches from the lex loci approach, however, is that the governing law will apply to infringing activities that occurred in all other territories as well.

As part of this agenda, some scholars advocate adoption of the cascade approach to choice of law in the Internet context, [FN73] positing a line of substitute candidates for a single governing law in the event that the choice of law initially proposed provides inadequate copyright protection. In a relatively early examination of these issues, for instance, Professor Ginsburg proposed that, in the absence of any applicable treaty supplying a substantive rule, the law applicable to determine the existence and scope of the copyright protection ought to be the forum law, "if that country is also either the country from which the infringing act or acts ***594** originated; or the country in which the defendant resides or of which it is a national or domiciliary; or the country in which the defendant maintains an effective business establishment." [FN74] The cascade approach responds to the possibility that there may exist pirate nations whose laws only provide weak copyright protection. The cascade approach implies that, when fixing on an appropriate governing law for transnational copyright infringement, choice ought to follow upon choice, until the aim of ensuring efficient enforcement of copyright infringement is realized.

2. Giving effect to single governing law strategies

Discussing the policy concerns underlying recent efforts to devise choice of law theories for copyright infringement in cyberspace, one commentator notes: "[e]nforcement concerns undoubtedly have . . . the most prominent influence on copyright choice of law analysis." [FN75] This view is also reflected in Professor Geller's suggestion that the aim of choice of law rules for transnational copyright infringement should be to achieve greatest protection for the copyrighted work. [FN76] Similarly, in a series of lectures prepared for the Hague Academy of International Law, extracts from which appear in her WIPO consultative paper, Professor Ginsburg writes: "[T]he object of the choice of law is not ***595** simply to reduce the number of potentially applicable laws; it is, or should be, to identify the rule that will designate the country which is best placed to accord an effective international remedy." [FN77]

There are perhaps three levels at which single governing law approaches might be given practical effect. First, "localization" of transnational copyright infringement might be viewed as the logical extension or rationalization of existing strands of decisional law in which it has been held that U.S. domestic copyright laws may apply in some circumstances to unauthorized activities that occur both within the United States and within foreign territories. [FN78]

Secondly, single governing law approaches might be given effect in public international law instruments. In general, the public international law of copyright is either silent or unclear about many choice of law issues. The notorious instance of the latter is article 5(2) of the Berne Convention, which provides that "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed." This has been construed in distinctly contradictory ways. Some scholars find support for territoriality in article 5(2), [FN79] whereas others see the article as supporting application of a single law, most likely the lex fori, to govern all infringements. [FN80] With the encouragement ***596** of international agencies such as WIPO, the development of new choice of law principles that are broadly consistent with the kinds of "localizing" strategies reflected in single governing law approaches is quite foreseeable. Departure from territoriality might be permitted in special cases, or perhaps even mandated, particularly in cases involving transnational digital transmissions. A broadly comparable approach has been adopted in the satellite broadcasting context in the European Union Satellite Directive. [FN81] The Directive has been held out as model for the development of choice of law principles in the Internet context. [FN82] The Directive provides copyright owners a

right to authorize the distribution of copyright works via satellite broadcasting mediums, and localizes infringement of this right in the Member State in which the satellite signal is uploaded. The Directive also adopts a rudimentary cascade approach: where no use of an uploading station has been used in a Member State, the Directive deems the infringing act to have occurred in the Member State in which the defendant broadcaster has its principal place of business. [FN83]

A third level at which single governing law strategies might be given effect would be in the context of a wholesale departure from copyright's territoriality premise, possibly to be achieved by an entirely new public international law regime. The challenges of digitization and the Internet have prompted one commentator to suggest that international copyright needs to be "codified anew." [FN84] At this level, copyright protection may be perceived as a kind of supranational right. To this proposition, the response of a "territorialist" might be that, subject perhaps to public international law obligations, Territory B has a sovereign right to determine the scope of copyrights within its borders. An "extraterritorialist" might say, on the other hand, that Territory B ought not to impinge upon the rights of authors through its substantive copyright laws. This would come close to transforming copyright into a species of global right. [FN85] Perhaps the closest ***597** analogy may be that of an internationally-recognized human right. An author would "carry" her expectation that her works will be protected, just as, for example, we carry our right not be subject to torture, wherever in the world we go. Limitations that might be imposed by legal systems of individual nations would be viewed as inappropriate or overreaching expressions of domestic sovereignty. [FN86]

II Copyright and the Regulatory State

Single governing law strategies appear to imply that copyright owners' rights ought to be largely untrammeled by the mediating forces of the lawmaking powers of individual nations and that authors' rights ought to exist in a conceptual space beyond the restrictions that might be imposed by domestic legislative regimes, other than those imposed by the chosen law. Under a cascade approach, the chosen law is unlikely to be one that provides a level of protection that is considered by the forum to offer less than adequate protection. The scope of the rights that authors and entrepreneurs might enjoy in other territories would not depend upon the way the laws of those territories define the rights.

In much of the analysis accompanying the advocacy of single governing law strategies, a number of issues go unexplored. For instance, advocates of these approaches tend not (at least in writing on private international law issues) to consider the systemic characteristics of domestic copyright law or to reflect much on the domestic policies that different copyright law systems might serve. [FN87] This body of scholarship only rarely considers the possibility ***598** that a nation might have a sovereignty interest in the application of its own copyright laws within its own territory. [FN88] Seldom, if at all, is it acknowledged that differences in domestic regimes may be the result of deliberate domestic policy choices about how copyright law may best be shaped to serve the needs of different societies.

The proposed choice of law strategies would also create a private international law regime for copyright infringement that is out-of-step with the position that the international copyright law system has reached as a result of inter-governmental negotiations. [FN89] Public international law obligations in the intellectual property context are the product of complex, and often fraught, dealings between nation states. [FN90] A key reason why these instruments are difficult to negotiate is that the shape of domestic copyright laws frequently reflects important domestic policy agenda that concern the availability of materials of culture within different societies.

How seriously one regards these concerns may depend, at least in part, on one's perceptions of copyright law's principal functions within the nation state. If one sees copyright as a key component of domestic information policy, one might be chary about a choice of law regime that would lead to the policy choices that are reflected in the shape of a domestic copyright regime being rendered less effective through the application of foreign laws. On the other hand, if one considers copyright's principal purpose to be securing and enforcing the rights of authors, one may be likely to view more positively choice of law strategies that would allow one nation's law to apply in another nation's territory, if that leads to more efficient enforcement of copyrights. The latter view is also likely to be attractive if one's principal focus is facilitating efficient international transactions involving copyrighted materials.

In the Anglo-American tradition, at least, meaningful scrutiny of the issues distilled by emerging choice of law theories requires an appreciation of copyright's utilitarian focus. This objective may be well served by an appreciation of the struggle for legislative ***599** supremacy over the shaping of domestic copyright law that occurred both in the United States and in England. Additionally, it requires an appreciation of differences in domestic copyright laws.

A. Legislative Supremacy

In modern copyright jurisprudence, invocations of the public policy function served by copyright law are numerous. Though the Constitution speaks of "securing" [FN91] authors' rights, the Copyright Clause identifies the primary purpose of the congressional power to be "promot[ing] the Progress of Science and useful Arts." [FN92] Supreme Court decisions have emphasized that "[t]he monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit," [FN93] and that copyright law "makes reward to the owner a secondary consideration." [FN94] The House Committee Report on the 1909 copyright act reflects the same view, explaining that "the enactment of copyright legislation . . . is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served . . . by securing to authors for limited periods the exclusive rights to their writings." [FN95]

The dominance of utilitarian ideas in modern copyright jurisprudence was not achieved without struggle. In the Anglo-American tradition, part of that struggle concerned the supremacy of copyright legislation over common law rights. In the 1834 decision of Wheaton v. Peters, [FN96] the Supreme Court was required to consider whether common law copyright survived publication of a work without complying with statutory formalities. ***600** Rejecting this argument, the Court held that the law of Pennsylvania, where the plaintiff's work was published, did not recognize any kind of common law copyright for published works; if the plaintiff's work was to be protected at all, its protection was to be found in the terms of the copyright statutes. [FN97]

A more intense struggle over the supremacy of copyright legislation occurred in the Eighteenth Century English litigation that confronted the "literary property question," as the issue of the common law status of English copyrights became known. [FN98] Determined to ward off competition from rival presses on expiration of statutory time limits, English publishers sought to avoid the limits on the duration of copyrights imposed by the Statute of Anne. It was argued that the foundation of the rights of authors ***601** was "antecedent property," [FN99] which the statutory protection merely confirmed. This argument had received some success in the Chancery courts, [FN100] and eventually was endorsed by a majority of the Kings Bench in Millar v. Taylor. In Millar v. Taylor, Lord Mansfield led a majority of the Court [FN101] that held that the Statute of Anne was "no answer" to the plaintiff's claim and that the Statute did not delimit authors' common law rights. In Lord Mansfield's view, these rights were based "upon principles before and independent of that Act," [FN102] and it was sufficient for the rights of authors to be based on "the principles of right and wrong, the fitness of things, convenience, and policy, and therefore [on] the common law." [FN103] Notwithstanding the passionately expressed convictions of one of history's leading jurists, [FN104] the possibility of a common copyright right for published works, enduring outside of the statutory scheme was finally rejected by the House of Lords in the 1774 decision Donaldson v. Beckett. [FN105] There, the House of Lords determined finally that the Statute of Anne provided both the source of, and the limitations to, copyrights in published works. [FN106]

***602** These cases helped establish the principle that copyright represents a bargain between authors and society; the legal system will protect works of authorship, but authors' rights are subject to limitations on those rights that society may decide to impose. [FN107] Perhaps the most enduring principle that is derived from this history is that, subject to constitutional limits, copyright law is what legislatures say it is. Transposed to an international context, this principle means that a copyright is what domestic legislatures say it is.

Single governing law approaches are at odds with the dominance of the utilitarian, regulatory focus of modern Anglo-American copyright jurisprudence, to the extent that they would involve policy choices represented in a particular nation's copyright legislation and case law to be overridden by the laws of other nations. What was at stake in much of the 18th Century English litigation was copyright protection through time: whether the natural rights of authors provided a basis for copyright protection into the future, even though this was inconsistent with the

limits on copyright duration set by the Parliament. What is at stake today is geography: whether a private international law of copyright can be forged that protects copyright proprietors' interests in securing strong copyright protection in foreign territories, even though that protection might conflict with the legislation of those territories. Single governing law approaches imply that a copyright can stretch out across the globe, unmediated by the intervention of domestic laws, just as, for instance, plaintiffs involved in the literary property litigation assumed that their rights could expand across time, unaffected by the limitations imposed by the Statute of Anne. Their attempt to override the limits that domestic legislatures may impose on the ***603** scope of copyright protection thus seems to resurrect similar ideas about authors' rights to those that, in domestic law contexts at least, Wheaton v. Peters and Donaldson v. Beckett were thought to be put to rest.

B. Domestic Differences

Despite the upward harmonization agenda in public international law relations, many differences between domestic copyright regimes endure. Although the "pirate nation" haunts copyright choice of law discourse, [FN108] differences between domestic copyright laws are not necessarily due to a failure by individual nations to enact copyright laws at all. Rather, they may reflect deliberate policy decisions that individual nations may make from time to time about the character of their copyright laws.

1. Duration of copyrights

Almost all of the cases thus far in which U.S. courts have adopted a non- territorial perspective on transnational copyright issues have involved relatively clear cases of copyright piracy, rather than transformative uses of the plaintiffs' copyright works by the defendants. [FN109] Application of domestic copyright law to catch copyright piracy in foreign territories is probably the least objectionable departure from the territoriality premise. However, even in the piracy context, single governing law strategies may involve some overriding of domestic policy choices reflected in differences between different national copyright laws. Differences in the duration of copyright afforded by different nations' laws provide a particularly stark example.

With the passage of the Sonny Bono Copyright Term Extension Act, U.S. copyrights have received an extra twenty years of protection. [FN110] Two key policy agenda supported the extension. ***604** First, it was thought that adding twenty years to copyright terms would provide added protection to copyright owners. A second issue was the promotion of U.S. interests in international trade. [FN111] Within the European Union, the duration of many copyrights had been increased to life of the author plus 70 years in 1995.

The wisdom of the copyright term extensions in the United States and, indeed, their constitutional validity, have been seriously questioned. [FN112] For present purposes, however, what is important is that the recent extension of U.S. copyright terms represents a deliberate policy choice by legislators and policy makers as to the appropriate duration for copyrights. [FN113] Other nations have not made the same choices about the appropriate duration of copyrights. Whereas the copyright term in the U.S. and the European Union for many works is life of the author plus 70 years, for a number of countries it remains life plus 50 years. [FN114] For single governing law approaches to transnational copyright infringement, this might mean, for instance, that if a court decides that U.S. law governs all infringements, wherever they took place, a court may protect a work in a nation in which it has actually fallen into the public domain. The converse is also true, of course. As a result of a court deciding that the governing law is that of a country that provides for a shorter term, U.S. copyright owners may be deprived of copyright protection in some instances.

2. Defenses to copyright infringement

In the Anglo-American tradition, defenses to copyright infringement, particularly those that allow transformative uses by defendants, tend to reflect deliberate policy choices concerning the encouragement of creative activity by subsequent authors. ***605** Of the limitations on U.S. copyright owners' rights, the most venerable is the fair use defense, a "sweeping proviso" [FN115] that excuses conduct that otherwise would be infringing. [FN116]

Generally, Congress has delegated development of the fair use doctrine to the courts. [FN117] Some strands of judicial analysis have emphasized the role of fair use doctrine in furthering the broader social policy aims of copyright law. [FN118] Though the fair use doctrine, as it has been articulated by the Courts, is hardly a model of clarity, it is relatively well established that that the social purposes served by a particular use of a copyright work may be germane to determining whether any use is fair. For instance, the Second Circuit has said that whether the fair use defense applies may turn on whether distribution of the defendant's works "would serve the public interest in the free disseminationof information." [FN119] This point is also reflected in the emphasis that is placed on whether the defendant's use is "productive" of new "transformative" works that add generally to societal discourse, ***606** by adding something new of a different character from the original work. [FN120] Significantly, the codification of fair use principles in section 107 of the 1976 Act has also allowed fair use principles to be refined or altered by legislation if developments in case law are perceived to be inconsistent with socially or politically desirable ends. [FN121]

United States copyright law also includes a diverse collection of more specific types of permitted uses. Many of these, such as defenses for uses of copyright works for educational purposes, reflect political judgments about limitations that ought to be imposed on authors' rights for particular purposes that are considered to be socially or politically desirable. [FN122] If the laws of other nations are allowed to govern, in cases where U.S. defendants have taken advantage of specific defenses in the U.S. copyright statute that do not exist under the governing law U.S. citizens may be deprived of the social and political benefits of these defenses.

Within copyright's public international law framework, many decisions about limitations on the scope of copyright protection are treated, at least in part, as matters for domestic law. [FN123] With respect to permitted uses, for instance, public international law instruments tend--on their face--either to defer to domestic legislatures on the issue of their scope or to articulate the relevant mandatory rules in vague or opaque terms. Domestic legislatures may allow exceptions to the protections provided copyright works in "certain special cases [that] do not conflict with a normal exploitation of the work and do not unreasonably prejudice ***607** the legitimate interests of the [author]." [FN124]

Professor Netanel has reasoned that the key terms in this formulation are sufficiently vague to allow considerable room for divergence between domestic copyright systems. [FN125] Professor Netanel's analysis now needs to be viewed in the light of the recent panel decision of the World Trade Organization concerning section 110(5) of the US copyright act. [FN126] Deciding that section 110(5)(b), which concerns the ability of certain business establishments to re-transmit certain copyright works within their premises, was inconsistent with the obligations of the United States under the Berne Convention and the TRIPs Agreement, the panel decision is notable for beginning what may be a lengthy process of defining and refining the meaning of the terminology used in public international law instruments to describe the rights of individual nations to forge exceptions to the rights of copyright owners. However, not all scope for domestic differences has been expunged as a result of the panel decision. The panel specifically endorsed the proposition that minor exceptions to authors' rights might continue to be a matter for domestic laws. [FN127] Copyright's public international law framework does seem to tolerate (for now at least) fairly wide differences in approach in this area, ranging from the expansive U.S. model, which combines the broad principles of ß 107 with numerous more specific exceptions, to more the limited European models, which tend to carve out only very narrow exceptions. [FN128]

Of course, flexibility allowed individual societies in fashioningcopyright law may be abused; some limits on copyright owner's rights may result from pork-barrel lobbying, or political inertia. ***608**[FN129] Importantly, however, the way that modern domestic copyright law is structured provides some scope for the kinds of rights that comprise the copyright to be tailored to meet the needs of individual societies.

3. Scope of Protection

Different nations' copyright laws may differ on the scope of protection afforded to copyrights. In some instances, these are not due to capricious or accidental differences. For instance, a tension may be discerned between some English and U.S. case law relating to the scope of protection afforded to computer software. A leading English

intellectual property judge, Mr. Justice Jacob, recently discussed the Supreme Court's denial of copyright to an accounting ledger book in the foundational case of Baker v. Selden [FN130] and opined: "I doubt that would have happened here." [FN131] In the same case, his Lordship expressed doubts as to whether the "abstraction, filtration, and comparison" test for infringement of copyright in computer software, articulated by the Second Circuit in Computer Associates International, Inc. v. Altai, Inc., [FN132] represented the law in the United Kingdom. [FN133] ***609** The tension between the English Chancery division and the Second Circuit in the software context partly reflects different copyright law traditions: the critical cornerstone of U.S. copyright law, the idea/expression dichotomy, has never been unequivocally endorsed in the English copyright law tradition. [FN134] In addition, however, these differences appear to reflect different ideas about desirable levels of competitiveness in U.S. and British software industries.

Looking far ahead, a significant source of conflict in the copyright--or, perhaps more accurately, the "quasi-copyright"--context may arise in the fraught policy area of database protection. [FN135] It has been forcefully argued that proposed U.S. legislative initiatives that would provide copyright- like protection for collections of data may be held unconstitutional, and be struck down or limited in significant respects. [FN136] No comparable problems of a constitutional character provide a basis for challenging the protection of databases within the European Union under its 1996 Database directive, however. European Union ***610** member states have dutifully, if tardily, enacted complying regimes giving a sui generis property right in data. If this prognosis for U.S. database law proves accurate, there is a real possibility of there being two competing international norms for the protection of databases: the expansive European model, and a possibly much more limited U.S. regime. This example provides a useful reminder of the fact that, if United States law eventually provides a sui generis right to protection of database collections, that right may be perceived by other nations as inadequate. Any perceived inadequacies in U.S. protection of databases may have nothing to do with an intention to "pirate" foreign intellectual property. Rather, they may transpire to be a product of a particular exigency arising out of domestic circumstances. Future distinctions between U.S. and European approaches to database protection may be due to the U.S. Constitution itself.

III Copyright and Domestic Information Policy

An appreciation of the implications of adopting single governing law approaches to cross-border copyright infringement requires taking seriously the idea that choices about the shape of domestic copyright laws are important aspects of domestic social policy. [FN137] Copyright contributes most obviously to the shape of domestic information policy by encouraging authors to create new works, and entrepreneurs to invest in their dissemination. [FN138] To achieve this end, Congress sometimes expands the scope of copyright owners' rights, realizing that copyright owners' rights need to keep pace with new methods of exploitation if the incentives ***611** that copyright provides are to remain meaningful. [FN139] At the same time, limitations on the scope of authors' rights are not merely insignificant or irritating adjuncts to the copyright system. They provide the necessary scope for second- comers to create new works; they ensure that socially desirable uses of works, such as those involved in scholarly endeavor, may continue, and they help ensure that appropriate levels of competitive activity exist. As Professor Cohen puts it, decisions about how to shape domestic copyright laws reflect "first order social welfare choices about the sort of information society we want to have." [FN140]

Three aspects of copyright law seem particularly relevant to copyright law's broader sociopolitical significance. First, in a series of important articles, [FN141] Professor Netanel has argued that the principal purpose of copyright law is to promote democracy. Copyright law is, according to Netanel, "a state measure that uses market institutions to enhance the democratic character of civil society." [FN142] In Netanel's analysis, it achieves this in two main ways. The first is copyright's "productive" function: "Copyright provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations for democratic culture and civic association." [FN143] Copyright also promotes democracy in a structural sense, by nurturing a marketplace in which creative and communicative endeavor occurs "free from reliance on state subsidy, elite patronage, and cultural hierarchy." [FN144] Netanel argues that appreciation of copyright's democracy-promoting aspect should influence the development of copyright law norms and the interpretation of copyright laws, both domestically, [FN145] and within international fora. [FN146]

***612** A second aspect of copyright law that bears emphasis here is its relationship to freedom of expression. Though the Supreme Court concluded in Harper & Row Publishers, Inc. v. Nation Enterprises [FN147] that copyright is a constitutionally legitimate restriction on freedom of expression, it is a restriction all the same. [FN148] Copyright restricts what may be written, composed, and included on web pages. The district court for the Central District of California has recently held, for instance, that posting recent newspaper articles to a website and thereby encouraging public discussion and commentary of them is not protected by the fair use defense. [FN149] Copyright can inhibit the creation of an entirely new work that is based on other works if too much of the latter has been taken. The current state of U.S. copyright jurisprudence results in even highly creative uses of prior works being characterized as infringing. [FN150]

Though there is considerable debate surrounding the doctrinal and historical connection between copyright law and First Amendment jurisprudence, it is obvious that copyright law does constrain expression on an individual basis, notwithstanding the possibility that, as a system, it is productive of creative expression. [FN151] As Professor Waldron puts it, copyright law "inflict[s] burdens on certain individuals for the sake of the greater social good." [FN152]

Copyright's close connection with freedom of expression distills a third factor that is relevant to an appreciation of copyright law's significance. Drawing on the work of Joseph Raz, [FN153] Waldron ***613** also highlights the connection between copyright, expressive freedom and autonomy. Personal autonomy has to do with "people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives." [FN154] If self-expression is a critical component of self-actualization and autonomy, restrictions on freedom of expression, including those imposed by copyright law, need to be taken very seriously indeed. Professor Coombe's recent work suggests that these ideas may be taken further still. Drawing on the work of cultural theorist Mikhail Bakhtin, [FN155] Coombe argues that we are not detached consumers of informational products; instead we are constituted through a continual process of interaction with materials of culture. Copyright law, along with other controls on social discourse, may thus be deeply implicated in what it means to be human. [FN156]

Issue might be taken with each of the characteristics of copyright law briefly sketched here. With respect to Netanel's thesis, for instance, it may be useful to point out that for some nations, state patronage of creative endeavor may be seen as better enhancing and promoting democratic values, including the nurturing of diversity, than the rough-and-tumble of the marketplace. [FN157] Likewise, it does not necessarily follow from the restrictions copyright law imposes on expressive freedom that it should be more tolerant of unauthorized uses. As Waldron points out, authors are likely to argue that the integrity of their self-expression is compromised by free-riding by others. [FN158] The importance of copyright's contribution to individual autonomy, for example, cannot dictate any specific resolution of doctrinal controversies. Indeed, every rationale for copyright law that is put forward is highly contested. No single organizing principle--be it the promotion of creative endeavor, nurturing individual autonomy, self-expression, or self- actualization--can hope to ***614** precisely dictate the shape of particular parts of a nation's copyright laws.

However, this may be precisely the point. We know very little of an exact character about copyright law's ability to provide incentives for creative endeavor, the most widely accepted rationale for the copyright system. [FN159] We know even less about how copyright might serve democratic values or individual autonomy. Copyright law's contested character means that each society with a copyright law system is required to struggle constantly with the issue of how copyright law can continue to serve the public good, as societal values and technological contexts change. In the Anglo- American tradition, these struggles are likely to focus on the nature of the rights accorded and the limitations that might be imposed in order to serve other social agenda. Indeed, the history of property law generally is characterized by exactly these kinds of struggles. Law reform initiatives such as environmental controls, minimum wage regulation, and anti-discrimination measures, all indicate that, from time to time, societies have found universal or unmediated propertization intolerable. All such developments temper property rights in order to serve other, more compelling social policy agenda. As Mark Rose observes, "[a]ll forms of property are socially constructed and, like copyright, bear in their lineaments the traces of the struggles in which they were fabricated." [FN160]

In an important essay published in 1997, Professor Boyle highlighted the rudimentary character of the politics of intellectual property, arguing that current political awareness of the social implications of intellectual property law is

at the stage that the American environmental movement was at in the 1950s or 1960s. [FN161] Boyle argued that there are currently two impediments to the development of a social discourse and critique in the intellectual property context comparable to that achieved by the environmental movement. First, there is no theoretical framework against which the current state of--and proposed changes to--intellectual property laws might be scrutinized. [FN162] Secondly, ***615** there is no commonality of perceptions amongst the variety of diverse interest groups that are, and are likely to be, affected by the shape of the intellectual property regimes. [FN163] Indeed, until recently, there appeared to be relatively little public awareness of the broader societal implications of copyright laws.

This is changing, however. The scope of domestic intellectual property laws is rapidly becoming a matter of fierce political contest. There is a battle underway for the public's copyright consciousness. Signs of this were apparent in the 1995 Information Infrastructure Task Force Report. [FN164] Key parts of this Report focused on improving public understanding of the nature and importance of copyright. [FN165] The Task Force recommended, for instance, that copyright principles should be included in national civics curricula at all educational levels. [FN166] Recently, key copyright industries have initiated publicity campaigns, using advertisements in major newspapers aimed at raising awareness of the importance of copyright protection to commercial endeavor. [FN167]

There now exist politically-focused groups that are attempting to counter these ideas from contrasting political perspectives. The work of the Digital Future Coalition, a coalition of public interest and consumer groups, [FN168] is illustrative. [FN169] The Coalition ***616** managed to stall the enactment of the Digital Millennium Copyright Act for two years, during which it lobbied for and achieved a law that included more exceptions to the anti-circumvention measures than were originally intended. Similar struggles are currently taking place over the issue of database protection, [FN170] and the changes to the contractual regime for online delivery of informational products to be achieved by the Uniform Computer Information Transactions Act. [FN171]

By allowing one nation's copyright laws to override another's, single governing law approaches would wear away at the lineaments of political struggle represented in the shape of domestic copyright laws. It is too early to tell how the politics of intellectual property will play out, and whether, for instance, the same level of public concern will be achieved in the copyright context as has been achieved by environmentalist movements. What is important, however, there is now an emerging, if rudimentary, intellectual property politics, a politics that may influence the future shape of copyright laws in important, and possibly unforeseen, ways.

Extraterritorial application of copyright laws risks overriding domestic political choices, even before a politics of domestic copyright law has had a chance to emerge fully. This implies that new choice of law proposals need themselves to be understood as part of that politics. It also supports the conclusion that devising a choice of law regime for cyberspace copyright infringement needs to be understood as a matter of social policy as much, if not more than, a technical matter of private international law.

Conclusion

While gains in the efficiency of international enforcement (and licensing) of copyrights are important, so too is the continued efficacy of domestic policy decisions about how best to shape copyright laws for domestic circumstances. A broader appreciation of copyright's role in the regulatory state suggests that the task of ***617** forging choice of law rules for cyberspace copyright ought to be recognized as involving a key social policy choice, one that weighs the relative importance of efficient international enforcement and licensing against the significance of copyright law's contribution to domestic information policy. For the most part, however, single governing law advocates have ignored the broader social policy implications of their choice of law strategies, focusing instead on enforcement and more efficient licensing. Of course, it hardly bears emphasizing that copyright pirates also appear to be unconcerned about the international impacts of their actions, except to the extent that they might turn a profit.

The analysis undertaken in this Article should not be taken as trenchant opposition to the adoption of single governing law strategies. Rather, its aim has been to suggest that their adoption may raise more complex questions than simply the enforcement of copyright owners' rights, or, indeed, achieving a more efficient regime for cross-border licensing. In addition to these, obviously important policies, the task of devising an appropriate choice of law regime for copyright infringement in cyberspace requires acknowledging a number of other issues.

First, it may be helpful to acknowledge that most nations are not "pirate nations." Differences between domestic copyright regimes may reflect different policy considerations, many of which may touch on fundamental areas of life.

Secondly, threats to copyright owners' interests posed by digitization and the Internet need to be assessed accurately, taking into account the increased sophistication in access control measures that may allow copyright owners far greater control over the dissemination of copyright materials via digital networks than has been achieved in the past. As access controls increase in sophistication, the need for radically new choice of law regimes for cyberspace copyright may diminish.

Thirdly, a territorial approach to transnational copyright infringement is also likely to bring with it responsibilities for parties who wish (legitimately) to rely on differences in domestic copyright laws. This may require investment in technologies that ensure that material that is produced is only accessible within those nations in which their copying and dissemination is not infringing. Unless content providers make convincing attempts to limit the availability of their websites to websurfers elsewhere, ***618** seeking to shut their sites down in their entirety may be the only viable option.

Devising a choice of law regime for cyberspace is likely to be a complex task, from both doctrinal and social policy perspectives. Until the broader social policy issues that are involved in devising a choice of law regime for cyberspace are recognized, continuing with a multilateralist--indeed "cosmopolitanist"--approach to choice of law for transnational copyright infringement may be prudent. Application of the leges locorum delictorum may require domestic courts to confront and accommodate differences between domestic copyright regimes [FN172] and even to acknowledge that, in the copyright field, different nations may do some things differently--and, for now at least, may legitimately do so.

Much of copyright law's richness and fascination is its relevance to a wide variety of social and political aspects of human endeavor and experience. The territoriality premise helps ensure that domestic copyright laws continue to contribute to an individual society's engagement with these issues. As we struggle to adapt copyright law to the challenges of the cyberspace era, this point perhaps requires greater emphasis than it has thus far received.

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[FN1]. Paul Goldstein, Copyright's Highway: From Gutenbeurg to the Celestial Jukebox 27 (1994).

[FN2]. See, e.g., 3 Paul Goldstein, Copyright ß ß 16.0-.2 (2d ed. & Supps. 1999, 2000).

[FN3]. First coined, it seems, by science fiction writers, see, e.g., Mirrorshades: The Cyberpunk Anthology (Bruce Sterling ed., 1986), the term "cyberspace" is commonly understood as "shorthand for the web of consumer electronics, computers, and communication networks that interconnects the world." Jerry Kang, Information Privacy in Cyberspace Transactions, 50 Stan. L. Rev. 1193, 1195 (1998). A useful database of information about the extent of Internet use is available at http://cyberatlas.internet.com (last visited Feb. 14, 2000). It has been

estimated that, at the end of 1998, there were 150 million Internet users worldwide. Some estimates put the figure at 320 million for the end of 2000. See Computer Industry Almanac Inc., Over 150 Million Internet Users Worldwide at Year-end 1998, Press Release, at http:// www.c-i-a.com/199904iu.htm (last visited Feb. 14, 2000).

[FN4]. See, e.g., David R. Johnson & David Post, Law And Borders--The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367, 1370 (1996). Cf. Lawrence Lessig, Code and Other Laws of Cyberspace (1999).

[FN5]. See, e.g., Jane C. Ginsburg, The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World, 15 Santa Clara Computer & High Tech. L.J. 347 (1999) [hereinafter Ginsburg, Cyberian Captivity]; 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 (1997) [hereinafter Ginsburg, Without Borders?]; Jane C. Ginsburg, Comment, Extraterritoriality and Multiterritoriality in Copyright Infringement, 37 Va. J. Int'l L. 587 (1997) [hereinafter Ginsburg, Multiterritoriality]; Paul Edward Geller, Conflicts of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World, 20 Colum.- VLA J.L. & Arts 571 (1996) [hereinafter Geller, Conflicts]; Jane C. Ginsburg, Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure, 42 J. Copyright Soc'y U.S.A. 318 (1995) [hereinafter Ginsburg, Global Use/Territorial Rights]; Paul Edward Geller, The Universal Electronic Archive: Issues in International Copyright, 25 Int'l Rev. Indus. Prop. & Copyright L. 54 (1994) [hereinafter Geller, Electronic Archive]; see also Kai Burmeister, Jurisdiction, Choice of Law, Copyright, and the Internet: Protection Against Framing in an International Setting, 9 Fordham Intell. Prop. Media & Ent. L.J. 625 (1999); Andreas P. Reindl, Choosing Law in Cyberspace: Copyright Conflicts on Global Networks, 19 Mich. J. Int'l L. 799 (1998). For an alternative perspective, see Hanns Ullrich, TRIPs: Adequate Protection, Inadequate Trade, Adequate Competition Policy, 4 Pac. Rim L. & Pol'y J. 153, 160 (1995) (arguing that extraterritorial application of national intellectual property law distorts competition in the domestic marketplace).

[FN6]. See generally Graeme B. Dinwoodie, Affirmation of Territorial Limits of U.S. Copyright Protection: Two Recent Decisions, 14 Eur. Intell. Prop. Rev. 136 (1992). Professor Koumantos has forcefully argued the contrary position, that the principle of territoriality does not apply to domestic copyright law. Georges Koumantos, Private International Law and the Berne Convention, 24 Copyright 415 (1988). However, this view has not been endorsed by U.S. courts. See, e.g., Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1097 (9th Cir. 1994) (using the territoriality principle reflected in the Berne Convention). See infra text accompanying notes 38-43.

[FN7]. See, e.g., Reno v. ACLU, 521 U.S. 844, 851 (1997) ("Taken together, these tools constitute a unique medium--known to its users as 'cyberspace'--located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.").

[FN8]. Jane C. Ginsburg, Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace, 95 Colum. L. Rev. 1466, 1499 (1995) (coining the phrase "sustained works of authorship" for major musical works, books, films, paintings, etc.) [hereinafter Ginsberg, Cars on the Information Superhighway].

[FN9]. The term "celestial jukebox" anticipates a system of media delivery that allows the user to call up and download media materials such as books, films, musical and multi-media works at whatever time and in almost any place that she chooses. See generally Jane C. Ginsburg & Myriam Gauthier, The Celestial Jukebox and Earthbound Courts: Judicial Competence in the European Union and the United States Over Copyright Infringements in Cyberspace, 173 Revue Internationale du Droit d'Auteur 60 (1997). See also The National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49,025 (Dep't of Commerce Sept. 21, 1993) (analyzing the implications of future media delivery systems).

[FN10]. See Charles C. Mann, The Heavenly Jukebox, The Atlantic Monthly, Sept. 1, 2000, at 39. Similar issues are arising in the audiovisual field, as digital transmission of cinematic works via the Internet becomes increasingly viable. The scope of digital netcasting is likely to be limited only by the reach of the relevant networks. See, e.g., Sara Robinson, Multimedia Transmissions are Driving Internet Toward Gridlock, N.Y. Times, Aug. 23, 1999, at C1 (anticipating that "[i]n ten years, movies and commercial television might very well be carried over Internet channels"); Andrew Pollack, Show Business Embraces Web, But Cautiously, N.Y. Times, Nov. 9, 1999, at A1 & C6 (noting the proliferation of commercial websites currently offering short videos, animations, and games).

[FN11]. Ginsburg, Cyberian Captivity, supra note 5, at 348-49.

[FN12]. Geller, Electronic Archive, supra note 5, at 55-56.

[FN13]. Reindl, supra note 5, at 805.

[FN14]. This phrase is borrowed from Professor Geller. See Geller, Electronic Archive, supra note 5, at 55.

[FN15]. National Football League v. Primetime 24 Joint Venture, No. 96 Civ. 3778, 1999 U.S. Dist. LEXIS 3592 (S.D.N.Y. Mar. 23, 1999). Tellingly, the court cited with approval an influential article, Ginsburg, Multiterritoriality, supra note 5, which advocated expansion of extraterritorial copyright liability theories.

[FN16]. Primetime 24 Joint Venture was not, in a strict sense, an "extraterritorial" case, as the Court considered that the primary cause of action was localized within the United States. Liability theories that may be more readily characterised as "extraterritorial," which have found support in decisional law, are discussed in Graeme W. Austin, Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation, 23 Colum.-VLA J.L. & Arts 1, 8-11 (1999).

[FN17]. See id.

[FN18]. There has already been a rich debate in recent scholarship about which law should apply to unauthorized transmissions of copyright material effected via the Internet. See, e.g., Reindl, supra note 5. Some of the candidates for the applicable law that have been mooted in choice of law analysis are noted infra in the text accompanying notes 65-74. Doubtless, a stronger case may be made for some options than for others. However, because my primary concern here is to consider the implications of any departure from copyright's territoriality premise, I do not engage in this debate.

[FN19]. For the purposes of this Article, I assume that departure from the territoriality premise will bring efficiency gains for the enforcement and licensing of copyrights. This assumption may warrant further analysis, however. Single governing law approaches appear to be based on the assumption that determining a single law using, for example, a "connecting factors" analysis, is simpler for courts and individual parties than applying the law for each of the countries in which the work is to be, or, in the case of infringement actions, was, exploited. As any conflicts lawyer will attest, however, the connecting factors analysis is frequently difficult to apply in practice, one of the reasons why this aspect of U.S. conflicts jurisprudence has been resisted by some courts. See, e.g., Chaplin v. Boys [1971] App. Cas. 356, 391 (Eng. H.L. 1969) (where Lord Wilberforce opined: "If one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of justice."). The same efficiency assumption appears to underlie the attraction of single governing law approaches for international copyright transactions. For transborder copyright licensing, a particularly difficult issue is that of determining the law

governing ownership of the copyright work. See, e.g., Paul Edward Geller, Worldwide "Chain of Title" to Copyright, Ent. L. Rep., Oct. 1989, at 3. In Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82 (2d Cir. 1998), the first U.S. appellate decision to address this question, the Second Circuit adopted a lex situs approach to this issue, holding that the law with the "most significant relationship" to the work and the parties designated the copyright owner, even though that may not be the law that governs infringement. Once again, however, basing a determination of title to copyright works for all territories in which the work may be exploited on an evaluation of the law with the "most significant relationship" to the work and the parties may, in some instances, give rise to greater uncertainty than requiring a determination of ownership issues under the different laws of the territories in which commercially significant exploitation of the work is to occur. The latter approach may transpire to be simpler and more efficient, particularly in cases in which only a few jurisdictions are relevant to the work's commercial significance.

[FN20]. It might be anticipated that parties seeking less protection would be enthusiastic about adoption of single governing law approaches, if the chosen law was less protective than an otherwise applicable law. In reality, however, this result is likely to be avoided by adoption of the cascade approach. See infra text accompanying notes 73-74. "Inadequate" copyright laws are unlikely to be adopted as the chosen law. This raises the issue of whether "single governing law" approaches reflect genuine choices between potentially applicable laws. While U.S. courts have accepted, for instance, that the making of an unauthorized copy of a copyright work in the United States allows the court to reach profits made from the exploitation of the work in foreign markets, see Update Art, Inc. v. Modiin Publ'g, Ltd., 843 F.2d 67 (2d Cir. 1988), there is no indication in American copyright jurisprudence that a U.S. court would apply a foreign law, on the ground that an infringing copy had been made within the foreign territory, which copy facilitated further infringements in the United States.

[FN21]. See infra Part III.

[FN22]. The most venerable of these is the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (Paris Act 1971) (amended Oct. 2, 1979), S. Treaty Doc. No. 27 (1986), 828 U.N.T.S. 221 [hereinafter Berne Convention]. Most of the substantive articles of the Berne Convention were adopted by reference in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments--Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125 (1994), Annex 1C [hereinafter TRIPs Agreement]. An exception is art. 6bis of the Berne Convention, supra, which mandates protection of authors' moral rights. See TRIPs Agreement, supra art. 9.1.

[FN23]. Numerous commentators have discussed copyright's role in shaping information policy. A seminal article is David Lange, Recognizing the Public Domain, 44 Law & Contemp. Probs., Autumn 1981, at 147. Professor Litman has also discussed this characteristic of U.S. copyright law in recent work: Jessica Litman, Reforming Information Law in Copyright's Image, 22 U. Dayton L. Rev. 587 (1997); Jessica Litman, Copyright Noncompliance (Or Why We Can't "Just Say Yes" to Licensing), 29 N.Y.U. J. Int'l L. & Pol. 237, 251 (1997); Jessica Litman, Copyright and Information Policy, 55 Law & Contemp. Probs., Spring 1992, at 185 [hereinafter Litman, Information Policy]. Other recent scholarship includes: Rosemary J. Coombe, The Cultural Life of Intellectural Properties: Authorship, Appropriation and the Law 23 (1998); James Boyle, Shamans, Software, and Spleens: Law and the Construction of the Information Society (1996); James Boyle, A Politics of Intellectual Property: Environmentalism for the Net?, 47 Duke L.J. 87 (1997) [hereinafter Boyle, A Politics of Intellectual Property].

[FN24]. See infra Part II.

[FN25]. See infra Part III.

[FN26]. Assume for the purposes of this example that Territory X's laws have been applied on the basis that Territory X is the place of the defendant's business. Application of the law of the place of the defendant's business establishment has been put forward by Professor Ginsburg as a possible choice for the governing law. See Ginsburg, Global Use/Territorial Rights, supra note 5, at 338; infra text accompanying note 72.

[FN27]. For example, French copyright law provides only a narrow range of exceptions to the scope of copyright protection. See Loi relative au code de la propriet intellectuelle, Law No. 92-597 of July 1, 1992, translation at http://clea.wipo.int/lpbin/lpext.dll.

[FN28]. It might be objected that this Article adopts an "Anglo-American- centered" attitude in its emphasis on copyright's regulatory character. The characterization of copyright law as a detailed regulatory system, that includes numerous checks and balances directed at a public welfare agenda, might be more or less accurate in Anglo-American contexts; the position may be somewhat different within other copyright law traditions. See, e.g., Andre Francon, Protection of Artists' Moral Rights and the Internet, in 5 Perspectives on Intellectual Property 73 (Frederic Pollaud-Dulian ed. 1999) (discussing the importance of integrity of general principles in French copyright law). Accordingly, single governing law approaches might transpire to be less objectionable in some jurisdictions than in others. Even if analysis is confined to Anglo-American traditions, however, the possibility that single governing law approaches might be inconsistent with the nature and characteristics of copyright law in at least some jurisdictions suggests that some further scrutiny of their implications may be warranted.

[FN29]. Jane C. Ginsburg, Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks, WIPO Doc. No. GCPIC/2, Nov. 30, 1998, at http:// www.wipo.int/eng/meetings/1998/gcpic/doc/ gcpic_2.doc. (a condensed version of Professor Ginsburg, The Private International Law of Copyright in an Era of Technological Change, 273 Recueil des Cours 238 (1999)).

[FN30]. See generally Lea Brilmayer, Conflict of Laws (2d ed. 1995).

[FN31]. As Professor Richard Ford explains, while territoriality is partly associated with geopolitical power, it can also be understood as a discourse that facilitates understanding of the social world. Richard T. Ford, Law's Territoriality (A History of Jurisdiction), 97 Mich. L. Rev. 843, 855 (1999). As a number of scholars have suggested, the localization of legal power within a geographical zone itself depended on the rise of cartography. See, e.g., Nicholas K. Blomley, Law, Space, and the Geographies of Power (1994).

[FN32]. Cf. Copyright Designs and Patents Act, 1988, s.16(1) (U.K.) (providing that owner of copyright has the exclusive right to do a number of acts "in the United Kingdom").

[FN33]. See, e.g., Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088 (9th Cir. 1994) (en banc). Some provisions of the Copyright Act suggest that legislators had the territorial character of domestic copyright law in mind. See, e.g. 17 U.S.C. ß 203(b)(5) (1994) (providing that termination of a grant of copyright "in no way affects rights arising under any other Federal, State, or foreign laws").

[FN34]. EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filadro, 336 U.S. 281, 285 (1949)). The Arabian American Oil Co. Court also instructed courts to "assume that Congress legislates against the backdrop of the presumption against extraterritoriality [and that unless] there is 'the affirmative intention of the Congress clearly expressed,' [congressional legislation must be presumed to be] 'primarily concerned with domestic conditions.'" Id. (quoting Foley Bros., 336 U.S. at 285, and Benz v. Compania Naviera Hildalgo,

S.A., 353 U.S. 138, 147 (1957)).

[FN35]. 208 U.S. 260 (1908); accord, Twin Books Corp. v. Walt Disney Co., 83 F.3d 1162 (9th Cir. 1996).

[FN36]. G. & C. Merriman Co., 208 U.S. at 264; see also Ferris v. Frohman, 223 U.S. 424, 433 (1912) (holding English copyright law to apply only within British territories).

[FN37]. 523 U.S. 135, 154 (1998) (Ginsburg, J., concurring) (quoting Goldstein, supra note 2, ß 16.0).

[FN38]. In general, public international law instruments do not create substantive rights in domestic law. See, e.g., Berne Convention Implementation Act of 1988, Pub L. 100-568 ß 4(3), 102 Stat. 2855, 17 U.S.C. ß 104(c) ("No right or interest in a work eligible for protection under this title may be claimed by virtue of... the provisions of the Berne Convention...."). Referring to 17 U.S.C., the Act further provides: "Any rights in a work eligible for protection under this title that derive from this title... shall not be expanded or reduced by virtue of... the provisions of the Berne Convention...." Id.

[FN39]. See, e.g., Curtis A. Bradley, Territorial Intellectual Property Rights in an Age of Globalism, 37 Va. J. Int'l L. 505, 547-48 (1997) (arguing that "[t]he national treatment principle is needed precisely because each nation's intellectual property laws are assumed not to apply extraterritorially."). Some articles in the Berne Convention, supra note 22, expressly limit their effect within territorial confines. For example, art. 13(1) of the Berne Convention provides for compulsory licensing of musical works. Such reservations on copyright owners' rights are to apply "only in countries which have imposed them." See also the Preamble to the TRIPs Agreement, supra note 22, which requires parties to provide adequate standards and effective and appropriate means for worldwide enforcement of intellectual property rights, while "taking into account differences in national legal systems."
U.S. courts have confirmed that the principles of the Berne Convention are consistent with the territoriality of domestic copyright laws. See, e.g., Murray v. British Broadcasting Corp., 81 F.3d 287, 290 (2d Cir. 1996) ("The Berne Convention's national treatment principle insures that no matter where [the plaintiff] brings his claim, United States copyright law would apply to [infringements] in this country."); Creative Technology, Ltd. v. Aztech System Pte. Ltd., 61 F.3d 696, 700-01 (9th Cir. 1995) ("[T]he principle of national treatment implicates a rule of territoriality in which 'the applicable law is the copyright law of the state in which the infringement occurred, not that of the state of which the author is a national or in which the work was first published.'") (citing Subafilms, Ltd., 24 F.3d at 1097 (quoting 3 David Nimmer & Melville B. Nimmer, Nimmer on Copyrights ß 17.05, at 17-39 (1994))); Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1097 (9th Cir. 1994) ("The national treatment principle implicates a rule of territoriality."). The same conclusion has been reached in the trademark infringement context, with respect to the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883 (revised 1934) 53 Stat. 1748. See, e.g., Vanity Fair Mills, Inc. v. T. Eaton Co. Ltd., 234 F.2d 633, 640 (2d Cir. 1956) ("Convention not premised upon the idea that the trade-mark and related laws of each member nation shall be given extraterritorial application, but on exactly the converse principle that each nation's laws shall have only territorial application.").

[FN40]. See generally The International Bureau of Intellectual Property, The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986 (1986); see also Koumantos, supra note 6, at 418-19.

[FN41]. Keith Aoki, Considering Multiple and Overlapping Sovereignties: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet, 5 Ind. J. Global Leg. Stud. 443, 443 (1998).

[FN42]. Bradley, supra note 39, at 547-48.

[FN43]. See, e.g., Microsoft Corp., The Value of 1s and 0s, Press Release, at <http://www.microsoft.com/presspass/issues/10-18piracy.htm> (visited Oct. 22, 1999).

[FN44]. Joseph Beale was a leading proponent of what is described here as the "lex loci delicti" approach in American conflict of laws theory. See generally Joseph H. Beale, A Treatise on the Conflict of Laws (1935). Beale derived his emphasis on lex loci delicti from the doctrine of "vested rights," an approach which found expression in the American Law Institute's Restatement (First) of the Law of Conflict of Laws ß 378 (1934) ("The law of the place of wrong determines whether a person has sustained a legal injury.").

[FN45]. See, e.g., Hasbro Bradley, Inc. v. Sparkle Toys, Inc. 780 F.2d 189, 192-93 (2d Cir. 1985) (applying U.S. copyright law to infringements within the United States of a work not protected in its country of origin).

[FN46]. See, e.g., Playboy Enters., Inc., v. Sanfilipo, No. 97-0670-IEG (LSP), 1998 U.S. Dist. LEXIS 5125 (S.D. Cal. Mar. 25, 1998) (detailing the different types of infringing activity for which a defendant may be liable as a result of unauthorized copying and distribution of copyrighted works via the Internet). That different national laws might apply in cases of transborder infringement was recognized by The Canadian Copyright Board. See Statement of Royalties To Be Collected for the Performance or the Communication by Telecommunication in Canada, of Musical or Dramatico-Musical Works, Phase I; Legal Issues, Oct. 27, 1999, at 61 n.53 [hereinafter Statement of Royalties].

[FN47]. 96 Civ. 3609 (LMM), 1997 U.S. Dist. LEXIS 5777 (S.D.N.Y. Apr. 30, 1997).

[FN48]. Id. at *5 n.2.

[FN49]. Id. at *6.

[FN50]. Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82 (2d Cir. 1998). A further reason mentioned by the Court for the application of U.S. law was that the defendant was American. Id. at 91.

[FN51]. In a recent decision, the English Court of Appeal also adopted this approach in a case involving an allegation of infringement of copyright in architectural plans, by the construction of a building in The Netherlands. The English Court considered that infringement arising under Dutch copyright law was justiciable in an English forum. See Pearce v. Ove Arup Parnership Ltd., 1 All E.R. 769 (1999). It has yet to be seen whether the approach in Pearce marks a general departure from traditional jurisdictional rules, or whether the quasi-federalism of the European Union influenced the English Court of Appeal's analysis.

[FN52]. See, e.g., Frink Am., Inc. v. Champion Road Mach. Ltd., 961 F. Supp. 398 (N.D.N.Y. 1997); London Film Prods., Ltd. v. Intercontinental Communications, Inc., 580 F. Supp. 47 (S.D.N.Y. 1984); World Film Servs., Inc. v. RAI Radiotelevisione Italiana S.p.A., 97 Civ. 8627 (LMM), 1999 U.S. Dist. LEXIS 985 (S.D.N.Y. Feb. 3, 1999).

[FN53]. Reindl, supra note 5, at 808.

[FN54]. See Ginsburg, Global Use/Territorial Rights, supra note 5, at 322; see also Adolf Dietz, Copyright and Satellite Broadcasts, 20 Int'l Rev. Indus. Prop. & Copyright 135, 147 (1989) (making a similar argument in the context of transborder satellite broadcasting).

[FN55]. ITSI T.V. Prods., Inc. v. California Auth. of Racing Fairs, 785 F. Supp. 854, 866 n.20 (E.D. Cal. 1992) (stating that the exercise of subject matter jurisdiction over an alleged infringement of Mexican copyright law would "work an extreme hardship on the court in discerning and applying Mexican law"). But see London Film Prods., 580 F. Supp. at 50 ("[T]he need to apply foreign law is not in itself reason to dismiss or transfer the case.") (citing Manu Int'l S.A. v. Avon Prods., Inc., 641 F.2d 62, 67-68 (2d Cir. 1981)).

[FN56]. See, e.g., Murray v. British Broad. Corp., 906 F. Supp. 858 (S.D.N.Y. 1995), aff'd, 81 F.3d 287 (2d Cir. 1996). But see World Film Servs., 1999 U.S. Dist. LEXIS 985 (holding need to apply Italian copyright law not a ground for dismissal). In Murray, additional reasons accounted for the forum non conveniens dismissal, most relevantly the fact that much of the dispute involved contracts that were entered into in the United Kingdom.

[FN57]. See, e.g., the discussion in Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 213 (1995) [hereinafter Information Infrastructure Task Force] (observing that "[i]t is not clear under the current law that a transmission can constitute a distribution of copies or phonorecords of a work").

[FN58]. See, e.g., Playboy Enters., Inc. v. Webbworld, Inc., 991 F. Supp. 543 (N.D. Tex. 1997) (noting that website operator distributed copyrighted works by allowing users to download and print copies of electronic image files); Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503 (N.D. Ohio 1997) (noting that by moving copies of copyrighted works to a publicly available website, defendants effected an unlawful dissemination); Playboy Enters., Inc. v. Frena, 893 F. Supp. 1552 (M.D. Fla. 1993) (noting that unauthorized distribution was effected by operation of a publicly available bulletin board from which copyrighted works could be downloaded). But see Marobie-Fl., Inc. v. National Ass'n of Fire Equip. Distribs., 983 F. Supp. 1167 (N.D. Ill. 1997) (holding that passive routing by online service provider of copyright works not infringing). On the issue of hyperlinks, see eBay, Inc. v. Bidder's Edge, Inc. 100 F. Supp. 2d 1058 (N.D. Cal. 2000); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290 (C.D. Utah 1999).

[FN59]. See, e.g., Geller, Conflicts, supra note 5, at 598-99.

[FN60]. Id.

[FN61]. See Ginsburg, Without Borders?, supra note 5, at 174-75.

[FN62]. See Statement of Royalties, supra note 46.

[FN63]. WIPO Copyright Treaty, adopted by the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, Geneva, Dec. 2-10, 1996, art. 8 [hereinafter WIPO Copyright Treaty].

[FN64]. See, e.g., Mark P. Gibney, The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles, 19 B.C. Int'l & Comp. L. Rev. 297 (1996).

[FN65]. Reindl, supra note 5, at 804.

[FN66]. Restatement (Second) of Conflict of Laws ß 6(2) (1989). See, e.g., Burmeister, supra note 5, at 661-63.

[FN67]. See, e.g., Ginsburg, Cars on the Information Superhighway, supra note 8, at 1498 (discussing the advantages and disadvantages of this basis for choiceof applicable law); see also Ginsburg, Without Borders?, supra note 5; Reindl, supra note 5, at 833-36. As Reindl notes, the place of origin might include: where the alleged infringer is physically located; where the computer(s) he or she uses is located; or, in the case of corporate users, the place where the relevant business or other decisions about the use of the work were made. Reindl also argues that application of the law of the place of technical upload may be fortuitous. For example, the computer providing the technological means for dissemination may be quite remote from the place where the defendant made the business decision to use the work in the allegedly infringing way. Id. at 835.

[FN68]. The appropriateness of application of the lex fori is discussed in detail in Ginsburg, Without Borders?, supra note 5, at 165.

[FN69]. Koumantos, supra note 6.

[FN70]. See, e.g., Matthew P. Burnstein, Note, Conflicts on the Net: Choice of Law in Transnational Cyberspace, 29 Vand. J. Transnat'l L. 75, 96-97 (1996) (suggesting that the location of the allegedly infringing party's network provider to be an important connecting factor).

[FN71]. See, e.g., Francois Dessemontet, Internet, le Droit D'auteur et le Droit International Prive Rev. Suisse de Jurisprudence 285 (1996).

[FN72]. Reindl, supra note 5, at 852-53. Although Reindl sees localizing the infringement based on the defendant's place of business as the primary choice of law rule, other aspects of his analysis suggest that, in some cases, a range of different domestic copyright laws might apply to the defendant's actions. Reindl's summary of these points is as follows:

The conflicts analysis suggested... results in the following steps to determine which copyright law(s) apply to acts of exploitation on digital networks:

1. The defendant's residence or place of business generally determines the applicable copyright law;

2. a. If the defendant's unauthorized use of the copyrighted work was for commercial purposes, the plaintiff may also rely on the copyright laws of the countries in which the work was received;

b. If the defendant's unauthorized use of the copyrighted work was non- commercial, the plaintiff may rely on the copyright laws of only those countries in which the effects on his economic interests were substantial;

3. In cases 2(a) and 2(b), the defendant can avoid the application of foreign copyright laws by demonstrating that he could not foresee that the work's reception would have more than de minimis effects on economic interests in certain countries (Case 2(a)), or that the effects elsewhere on the right holder's economic interests would be substantial (Case 2(b)).

[FN73]. Id.

A broadly similar approach is suggested in the European Commission's Council Directive 93/83/EEC of 27 September 1993 On the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 1993 O.J. (L 248) 15, at http://

www.europa.eu.int/eur-lex/en/lif/dat/1993/en_393L0083.html (visited Feb. 14, 2001) [hereinafter Satellite Directive]. In the Satellite Directive, the primary choice of law rule is the law of the point of origin of the broadcast. However, where that law proves inadequate, a substitute applicable law is that of the headquarters of the uplifting entity if located within a Member State. See id.

[FN74]. Ginsburg, Global Use/Territorial Rights, supra note 5, at 338. For further analysis of "cascade" approaches to choice of law, see Geller, Conflicts, supra note 5; Reindl, supra note 5 at 830; Dessemontet, supra note 71.

[FN75]. Reindl, supra note 5, at 825. To be sure, to depict single governing law approaches in this way is to wield a fairly broad brush. For instance, this depiction does not account for the possibility that other policy agenda might underlie these approaches. For instance, in support of adoption of the lex fori, Professor Ginsburg has invoked the forum's interest in supervising parties domiciled within its jurisdiction. Ginsburg, Without Borders?, supra note 5, at 172. The supervisory principle has been invoked in, for example, American Rice, Inc. v. Arkansas Rice Growers Coop. Ass'n, 701 F.2d 408 (5th Cir. 1983); and Steele v. Bulova Watch Co., 344 U.S. 280 (1952). But see Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956) (explaining that, in Bulova Watch, the Supreme Court implicitly recognized that the "supervision" policy is less determinative where application of U.S. law would impugn the rights of foreign citizens). Likewise, the aim of ensuring predictability in international copyright relations has been put forward as an important policy factor that ought to impact on the choice of law governing law. See, e.g., Reindl, supra note 5, at 819-20. Given the current state of theorizing on this topic, however, and the candor with which the efficient enforcement has been characterized as the principal aim of the analysis, it is difficult to be convinced that policy agenda other than enforcement, and, perhaps, more efficient international licensing of copyright material, underlie this strand of choice of law analysis.

[FN76]. Geller, Conflicts, supra note 5, at 593.

[FN77]. Ginsburg, supra note 29, at *36 (citations omitted). The efficient enforcement agenda is reflected in the problems that their advocates highlight in their proposed approaches. For instance, some scholars have been concerned about the possibility that single governing law approaches may encourage defendants to locate their activities in nations that provide only weak copyright enforcement. This caveat was raised by the European Commission in its Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, COM(97)628 final at chap. 2 (noting that a "country of origin" approach may encourage copyright infringers to relocate their activities to piracy nations). It is this possibility that supports the idea that a cascade of alternative applicable laws might apply if one or more of the otherwise applicable laws transpires to be that of a "piracy haven".

[FN78]. See, e.g., Ginsburg, Multiterritoriality, supra note 5, at 600.

[FN79]. See, e.g., Henri Desbois et al., Les Conventions Internationales Du Droit D'auteur et des Droits Voisins 152 (1976).

[FN80]. Much of the controversy over the interpretation of art. 5(2) centers on whether the "country where protection is claimed" denotes the lex fori, or whether it denotes the law of the place for which protection is claimed (i.e., the law of the place of the infringement), which would imply a lex loci approach. The various interpretations of art. 5(2) of the Berne Convention, supra note 22, are discussed in Reindl, supra note 5, at 805-06.

[FN81]. See Satellite Directive, supra note 73.

[FN82]. Ginsburg, supra note 29 (suggesting that the Satellite Directive offers considerable support for the designating the law of the place of upload as the governing law).

[FN83]. Satellite Directive, supra note73 (creating an exclusive right for an author to authorize the communication to the public by satellite of copyright works).

[FN84]. Geller, Electronic Archive, supra note 5, at 69.

[FN85]. Professor Ginsburg appears to acknowledge this point in Ginsburg, Cyberian Captivity, supra note 5, at 354-55; see also Jane C. Ginsburg, International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?, 47 J. Copyright Soc'y U.S.A. 265 (2000).

[FN86]. Cf. Benjamin R. Kuhn, Comment, A Dilemma in Cyberspace and Beyond: Copyright Law for Intellectual Property Distributed Over the Information Superhighways of Today and Tomorrow, 10 Temp. Int'l & Comp. L.J. 171, 200-01 (1996) (suggesting that broad international acceptance of intellectual property standards will create a customary norm of international law).

[FN87]. The relevance of public policy issues in choice of law analysis has been the subject of considerable analysis. For instance, it has been noted that interest analysis "tends to inject public law notions into essentially private transactions and disputes." Peter Hay, Reflections on Conflict-of-Laws Methodology, 32 Hastings L.J. 1644, 1660 (1981). For the purposes of the present analysis, it is important to distinguish between the role of public policy questions within a particular methodology, and their role in deciding between different methodologies. Here, my concern is to demonstrate that the public policy significance of copyright law is relevant to determining the appropriate choice of law methodology.

[FN88]. Ginsburg, Cyberian Captivity, supra note 5, at 355.

[FN89]. See Bradley, supra note 39.

[FN90]. Whether or not they are freely negotiated is another matter entirely. See, e.g., Ralph Nader & Lori Wallach, GATT, NAFTA, and the Subversion of the Democratic Process, in The Case Against the Global Economy 92 (Jerry Mander & Edward Goldsmith eds., 1996).

[FN91]. But see, e.g., the Preamble of the Statute of Anne, 8 Anne c. 19 (1710) (Eng.) ("An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the Times therein mentioned.") (emphasis added). Appearing as counsel in Tonson v. Collins, 96 Eng. Rep. 180 (K.B. 1762), Justice Yates, as he later became, submitted that by "vesting" the copies in authors, the Parliament had indicated that the rights were "not therefore vested before". Id. at 186. On elevation to the King's Bench, Justice Yates made the same point in his dissenting judgment in Millar v. Taylor, 98 Eng. Rep. 201, 247 (K.B. 1769).

[FN92]. U.S. Const. art. 1, ß 8, cl. 8.

[FN93]. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

[FN94]. Mazer v. Stein, 347 U.S. 201, 219 (1954) (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)).

[FN95]. H.R. Rep. No. 60-2222, at 7 (1909).

[FN96]. 33 U.S. 591 (1834).

[FN97]. This conclusion prompted a strong dissent from Justice Thompson. With ringing echoes of John Locke, Justice Thompson objected: "The great principle on which the author's right rests, is, that it is the fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property...." Id. at 669-70. See generally John Locke, Two Treatises of Government 92 (Peter Laslett ed., 2d ed. 1967). Locke's "labor" justification for the existence of property rights was cited in argument by William Blackstone, who appeared as counsel in Tonson v. Collins, 96 Eng. Rep. 180 (K.B. 1761), one of the earliest English King's Bench decisions in which the question of the endurance of the common law rights of authors arose. For general discussion of Locke's contribution to copyright theory, see Alfred C. Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 Ohio St. L.J. 517, 546-47 (1990); see also Peter Drahos, A Philosophy of Intellectual Property 41 (1996). Though it is sometimes thought that Locke developed a theory of intellectual property, this belief is erroneous. See, e.g., Wendy J. Gordon, A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property, 102 Yale L.J. 1533, 1540 (1993). Indeed, Ronald Bettig postulates that aspects of Locke's political work indicate that he would have been antagonistic toward the prospect of monopolistic authors' rights. Ronald V. Bettig, Copyrighting Culture: The Political Economy of Intellectual Property 19-22 (1996).

As Professor Waldron and others have noted, natural rights ideas are "still heard in undertone" in American copyright law. See, e.g., Jeremy Waldron, From Authors to Copiers: Individual Rights and Social Values in Intellectual Property, 68 Chi.-Kent L. Rev. 842, 850 (1993); see also Yen, supra. They also played an important role in the origins of copyright law. They are to be detected, for instance, in James Madison's emphasis on copyright's status as a common law right in English law in his explanation of the Copyright Clause in The Federalist No. 43, at 279 (James Madison) (Isaac Kramnick ed., 1987). Natural rights ideas have also been explained in detail in recent scholarship, particularly in that of Professor Gordon. See, e.g., Gordon, supra. However, the influence of natural rights ideas does not detract from the point that, in the Anglo-American tradition, subject to constitutional limitations, copyright is a carefully delineated creature of domestic legislation.

[FN98]. See generally Mark Rose, Authors and Owners: The Invention of Copyright 67-91 (1993).

[FN99]. This is a phrase borrowed from the analysis by Justice Willes of the origin of common law property rights in Millar v. Taylor, 98 Eng. Rep. 201, 210 (K.B. 1769).

[FN100]. See, e.g., Tonson v. Collins, 96 Eng. Rep. 180, 184 (K.B. 1761) (citing Motte v. Falkner (1735); Walthoe v. Walker (1736); Tonson v. Walker (1739); Pope v. Curl (1741)). That the Chancery Courts had adopted this approach was frequently invoked in support of common law copyrights. See, e.g., Millar, 98 Eng. Rep. at 221.

[FN101]. Justice Yates's dissenting opinion in Millar was the first minority judgment delivered in the King's Bench under Lord Mansfield's leadership. Millar, 98 Eng. Rep. at 201. Lord Mansfield referred to this, id. at 250.

[FN102]. Id. at 252.

[FN103]. See id. (Lord Mansfield's speech).

[FN104]. Lord Mansfield is reported to have later adopted a more moderate position. In Sayre v. Moore, quoted in Cary v. Longman, 102 Eng. Rep. 138, 139-40 (K.B. 1801), he said: "We must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded."

[FN105]. 98 Eng. Rep. 257 (H.L. 1774).

[FN106]. The precise holding of Donaldson v. Beckett has generated much controversy. In Jeffreys v. Boosey, 4 H.L.C. 815, 823 (1854), the House of Lords cited the case as establishing that "no copyright in books existed at common law," a proposition that Gary Kauffman characterizes as "clearly false." See Gary Kauffman, Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents, 10 Colum.-VLA J.L. & Arts 381, 397- 402 (1986). However, Kauffman appears to base this conclusion only on the advisory opinions of the Lords Judicial, whose reasoning was reported at Donaldson, 98 Eng. Rep. at 257. Yet, as Howard Abrams explains, the decision of the Full House of Lords was 22 to 11 against the existence of a common law copyright that endured independently of the Statute of Anne. See Howard D. Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 Wayne L. Rev. 1119, 1164 (1983); see also Mark Perry, Acts of Parliament: Privatisation, Promulgation and Crown Copyright--is there a Need for a Royal Royalty?, 1998 N.Z. L. Rev. 493, 507- 09. A more complete report of Donaldson v. Beckett appears in The Literary Property Debate: Six Tracts 1764-1774 (Garland Publishing, Inc. ed., 1975).

[FN107]. Prior to the 1976 Act, common law copyrights for unpublished works were not subject to this deal in quite the same way. However, because common law rights were lost after publication, federal protection has always been relevant to the most commercially significant uses of most copyright works. See, e.g., 1 Goldstein, supra note 2, ß 3.2.2 (discussing the rationale for the loss of common law copyright protection at publication).

[FN108]. See, e.g., James Boyle, Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors, 66 U. Cin. L. Rev. 177, 184 (1997) (suggesting that much recent theorizing about international copyright relations is informed by a vision of the world in which "rampant info- kleptocracy undermines scientific and artistic development").

[FN109]. See, e.g., Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987 (9th Cir. 1998); Update Art, Inc. v. Modiin Publishers, Ltd., 843 F.2d 67 (2d Cir. 1988); National Football League v. Primetime 24 Joint Venture, No. 96 Civ. 3778, 1999 U.S. Dist. LEXIS 3592 (S.D.N.Y. Mar. 23, 1999).

[FN110]. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in sections of 17 U.S.C.).

[FN111]. See generally the discussion of the new legislation by Professor Ginsburg in Jane C. Ginsburg, Copyright Legislation for the "Digital Millennium", 23 Colum.-VLA J.L. & Arts 137 (1999).

[FN112]. The constitutional challenge to the new Sonny Bono Copyright Term Extension Act is discussed in

Ginsburg,id. at 173-75. But see Eldred v. Reno, 74 F. Supp. 2d 1 (D.D.C. 1999), aff'd, No. 99-5430, 2001 WL 127725 (D.C. Cir. Feb. 16, 2001).

[FN113]. For a recent illustration of the practical effect that these differences may have in the choice of law context, see Shaw v. Rizolli Int'l Pubs., Inc., No. 96 Civ. 4259 (JGK), 1999 U.S. Dist. LEXIS 3233 (S.D.N.Y. Mar. 19, 1999) (noting potentially material differences between U.S. and Italian copyright laws).

[FN114]. See, e.g., Copyright Act, R.S.C., ch. C-42, ß 6 (1985) (Can.) (stating copyright expires at the end of 50 years after the death of the author).

[FN115]. William W. Fisher III, Reconstructing the Fair Use Doctrine, 101 Harv. L. Rev. 1659, 1662 (1988).

[FN116]. "Fair use" began life as "fair abridgement" in Justice Story's decision in Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). See generally Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1105-6 (1990). The term "fair use" was coined in Lawrence v. Dana, 15 F. Cas. 26, 40 (C.C.D. Mass. 1869) (No. 8136). Justice Story's articulation of the relevant principles was as follows: "[I]n deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." Folsom v. Marsh, 9 F. Cas. at 348. Story's factors were adopted, with some modification, in 17 U.S.C. ß 107.

[FN117]. See, e.g., H.R. Rep. No. 94-1476, at 70: "Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." The relevance of the commercial character of the defendant's use of the copyright material is illustrative. See also Fisher, supra note 115, at 1672 (discussing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); and Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).

[FN118]. See, e.g., Acuff-Rose, 510 U.S. at 575 ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose...."); see also Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 996 F.2d 1366, 1375 (2d Cir. 1993) (noting that the Court has been "more solicitous of the fair use defense in works, which though intended to be profitable, aspired to serve broader public purposes").

[FN119]. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966); see also Leval, supra note 116, at 1107 ("Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.").

[FN120]. See, e.g., Acuff-Rose, 510 U.S. 569.

[FN121]. A recent instance is the addition, in 1992, of the final sentence in ß 107(4), which provides that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use", a measure that addressed publishers' perceptions that courts were reluctant to find fair use of unpublished works.

[FN122]. See generally Goldstein, supra note 1.

[FN123]. Notwithstanding the upward harmonization agenda pursued at the public international law level, domestic legal systems are given significant room to maneuver in the copyright field. Public international law instruments in the copyright field may not reach a particular issue, as is illustrated by the failure of the diplomatic conference leading to the WIPO Copyright Treaty to reach a concluded view on temporary digital storage of copyrighted works. Equally, they may not have anticipated some issues. For example, though article 10 of the TRIPs Agreement, supra note 22, requires that "[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention," neither TRIPS nor the Berne Convention, supra note 22, addresses directly the issue of non-literal copying of computer programs.

[FN124]. This wording is used in, inter alia, Berne Convention, supra note 22, at art. 9; WIPO Copyright Treaty, supra note 63, at art. 10; TRIPs, supra note 22, at art. 13.

[FN125]. Neil Weinstock Netanel, Asserting Copyright's Democratic Principles in the Global Arena, 51 Vand. L. Rev. 217, 279 (1998) [hereinafter Netanel, Democratic Principles].

[FN126]. World Trade Organization, Report of the Panel, United States- Section 110(5) of the U.S. Copyright Act, WT/DS160/R (June 15, 2000).

[FN127]. See, inter alia, the panel's specific endorsement of the proposition that "it should not be forgotten that domestic laws already contai [n] a series of exceptions in favour of various public and cultural interests and it would be vain to suppose that countries would be ready at this stage to abolish these... to any appreciable extent." Id. P 6.181.

[FN128]. See, e.g., Loi relative au Code de la propriet intellectuelle, Law No. 92-597 of July 1, 1992 (Fr.), translation at http:// clea.wipo.int/lpbin/lpext.dll (providing for a limited range of exceptions to copyright owners' rights).

[FN129]. An example is the withholding of a right of public performance from sound recordings. See 17 U.S.C. ß 106(4). Bills incorporating such a right were not enacted. See, e.g., H.R. 237, 96th Cong. (1979), which was due to the strong opposition of the American broadcasting industry; see also Barbara Ringer & Hamish Sandison, United States of America, in International Copyright and Neighbouring Rights 563 (Stephen M. Stuart ed., 2d ed. 1989). As a result of a 1995 amendment, copyright owners in sound recordings now have a right to perform the recording publiclyby means of a digital audio transmission. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104- 39, 109 Stat. 336. Despite this amendment, many commercially significant types of exploitation of sound recordings are not protected. See also 2 Goldstein, supra note 2, ß 5.7.

[FN130]. 101 U.S. 99 (1879).

[FN131]. Ibcos Computers Ltd. v. Barclays Mercantile Highland Finance Ltd., [1994] F.S.R. 275, 292.

[FN132]. 982 F.2d 693 (2d Cir. 1992).

[FN133]. Ibcos Computers, [1994] F.S.R. at 302. Nor is the Altai approach uniformly adopted in the United States.

But see Apple Computer, Inc. v. Microsoft Corp., 779 F. Supp. 133 (N.D. Cal. 1991) (noting that unprotected elements of computer software relevant to "substantial similarity" analysis).

The Berne Convention contains no international norms relevant to enduring controversies in the computer software field, such as the relevance of the idea/expression dichotomy or the protection of non-literal aspects of computer programs. This lack of binding international principles was part of the motivation behind the European Community Directive on the Legal Protection of Computer Programs and the more recent Directive on the Legal Protection of Databases. See generally Charles R. McManis, Taking Trips on the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology, 41 Vill. L. Rev. 207, 220-21 (1996).

[FN134]. Leading English copyright commentators, Sir Hugh Laddie, Peter Prescott Q.C., and Mary Vittoria Q.C. have questioned whether the idea/expression dichotomy is even to be considered part of English copyright law doctrine. See Hugh Laddie et al., The Modern Law of Copyright and Designs 61-66 (1995).

[FN135]. Under current U.S. law, copyright protection may be given for an original compilation of data, but not for the data itself. See, e.g., Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (noting that copyright protection may not be accorded to facts, but an original compilation may attract copyright protection as a compilation). The same principle applies in the European Union. See Council Directive 96/9, arts. 3.1-.2, 1996 O.J. (L777/20) (stating that copyright protection for databases exists by reason of selection or arrangements of their contents, but not extending to data). Under the European database directive, a sui generis right in data arises where the maker of the database has shown that there has been qualitatively or quantitatively a substantial investment in gathering, verifying, or presenting the data. See id. at arts. 7-11. Recent attempts to enact database legislation in the United States have adopted the sui generis approach. See, e.g., Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1998); The Consumer and Investor Access to Information Act, H.R. 1858, 106th Cong. (1999). In other jurisdictions, copyright theories may serve to protect data. See, e.g., Telecom v. Colour Pages Ltd., [1997] 3 N.Z.L.R. 142. United Kingdom copyright law also adopted this approach, prior to its implementation of the E.U. database directive in Copyright and Rights in Databases Regulations 1997, S.I. 1997, No. 3032. See, e.g., Waterlow Directories Ltd. v. Reed Info. Serv. Ltd., [1992] F.S.R. 409 (High Court of Justice (Eng.)).

[FN136]. Marci Hamilton, Database Protection and the Circuitous Route Around the United States Consitution, in International Intellectual Property and the Common Law World (Graeme W. Austin & Charles E.F. Rickett eds., 2000).

[FN137]. Cf. Stephen M. McJohn, Fair Use and Privatization in Copyright, 35 San Diego L. Rev. 61 (1998); Jessica Litman, Reforming Information Law in Copyright's Image, 22 U. Dayton L. Rev. 587 (1997); see also Hans Ullrich, Technology Protection According to TRIPs: Principles and Problems, in From GATT to TRIPs 357, 366-69 (Friedrich-Karl Beier & Gerhard Schricker eds., 1996) (noting the corollary between the principle of national treatment and the ability of individual nations to develop intellectual property laws in accordance with domestic policies).

[FN138]. See, e.g., 133 Cong. Rec. H1293-05 (daily ed. March 16, 1987) (statement of Rep. Kastenmeier):

While a relatively obscure discipline, copyright touches every American in their homes, schools, libraries, and workplaces. Determining the scope of a law which deeply affects how all of us may enjoy books, films, television programming, computer software, information products and services, music, and the visual arts requires great caution, particularly in a rapidly changing society such as ours that seeks both the free flow of information and the free marketplace.

[FN139]. In 1995, for instance, a new right to perform a sound recording publicly by means of a digital audio transmission was added to the bundle of rights comprising a copyright. See 17 U.S.C. ß 106(6) (added by the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336).

[FN140]. Julie E. Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management," 97 Mich. L. Rev. 462, 464 (1998).

[FN141]. See generally Neil Weinstock Netanel, Copyright and a Democratic Civil Society, 106 Yale L.J. 283 (1996) [hereinafter Netanel, Civil Society]; Netanel, Democratic Principles, supra note 125.

[FN142]. Netanel, Civil Society, supra note 141, at 288.

[FN143]. Id.

[FN144]. Id.

[FN145]. See id. at 364-386 (drawing on copyright's democracy promoting aspect in developing norms for doctrinal development).

[FN146]. See generally Netanel, Democratic Principles, supra note 125.

[FN147]. 471 U.S. 539 (1985); see also Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187 (5th Cir. 1979) (stating that obiter "free expression is enriched by protecting the creations of authors from exploitation by others").

[FN148]. This is, however, notwithstanding the Supreme Court's characterization of copyright as the "engine" of free expression. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985). See generally Eugene Volokh & Brett McDonnell, Freedom of Speech and Independent Judgment Review in Copyright Cases, 107 Yale L.J. 2431 (1998); Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. 147 (1998).

[FN149]. Los Angeles Times v. Free Republic, No. CV 98-7840 MMM(AJWx), 2000 U.S. Dist. LEXIS 5669 (C.D. Cal. Nov. 9, 1999) (tentative order by Judge Morrow).

[FN150]. See, e.g., Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (satirical use of Cat in the Hat characters infringing); Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (satirical use of Disney cartoon characters infringing).

[FN151]. See, e.g., Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979).

[FN152]. Waldron, supra note 97, at 862.

[FN153]. See, e.g., Joseph Raz, The Morality of Freedom 407-412 (1986).

[FN154]. Id. at 369.

[FN155]. See Tzvetan Todorov, Mikhail Bakhtin: The Dialogical Principle 60- 74 (Wlad Godzich trans., 1984).

[FN156]. Professor Coombe's ideas on this issue are elaborated in Coombe, supra note 23.

[FN157]. See, e.g., Henry M. Chakava, International Copyright and Africa: The Unequal Exchange, in Copyright and Development (Philip G. Altbach ed., 1995) (discussing the significance of regulation of publishing in some African nations).

[FN158]. Waldron, supra note 97, at 877 (citing David E. Shipley, Conflicts Between Copyright and the First Amendment After Harper & Row Publishers v. Nation Enterprises, 1986 BYU L. Rev. 983, 1042).

[FN159]. See generally Stewart E. Sterk, Rhetoric and Reality in Copyright Law, 94 Mich. L. Rev. 1197 (1996); Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281 (1970).

[FN160]. Rose, supra note 98, at 8.

[FN161]. Boyle, A Politics of Intellectual Property, supra note 23, at 108.

[FN162]. Id.

[FN163]. Id.

[FN164]. Information Infrastructure Task Force, supra note 57.

[FN165]. This may have both political and doctrinal significance. For instance, when applying the fair use doctrine in 17 U.S.C. ß 107, Courts have been concerned with the degree to which the defendant's conduct complies with custom. See, e.g., Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) (referring to the difference between a "true scholar and a chiseler who infringes a work for personal profit"); American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 924 (2d Cir. 1995) (referring to the relevance of the scientific community's "custom" of archiving photocopies of scholarly journals). Changing customary norms may thus affect the scope of the fair use doctrine, and hence the scope of the copyright. See also Fisher, supra note 115, at 1678-81 (describing the inherent vagueness of this factor).

[FN166]. In this aspect of its work, the Task Force focused on copyright's rights-protection aspects, arguing that concepts of copyright ought to be introduced at the elementary school level, it recommended, because children "can relate to the underlying notions of property--what is 'mine' versus what is 'not mine', just as they do for a jacket, a ball, or a pencil." Information Infrastructure Task Force, supra note 57, at 205. The Report did not discuss the possibility that children might suffer psychological damage resulting from this kind of indoctrination and that it might discourage spontaneity and creativity.

[FN167]. See, e.g., Microsoft Corp., supra note 43.

[FN168]. See A Description of the Digital Future Coalition, at http:// www.dfc.org/ dfc1/Learning_Center/about.html (visited Feb. 14, 2001).

[FN169]. Information about another such group, the Trans Atlantic Consumer Dialogue, an international forum of consumer lobby groups that has also been involved in international lobbying on intellectual property issues, is available in About TACD, at http://www.tacd.org/about.html (visited Feb. 14, 2001).

[FN170]. The Digital Future Coalition has also undertaken critical analysis of the issue of database protection. See http://www.dfc.org/dfc1/Active_ Issues/active_issues. html (visited Oct. 25, 1999).

[FN171]. See generally Jean Braucher, Why UCITA, Like Article 2B, is Premature and Unsound, at http://www.2bguide.com/docs/0499jb.html (visited Oct. 25, 1999).

[FN172]. An encouraging sign is the recent decision of a district court from within the Second Circuit in World Film Servs. Inc. v. RAI Radiotelevisione Italiana S.p.A., No. 97 Civ. 8627 (LMM), 1999 U.S. Dist. LEXIS 985 (S.D.N.Y. Feb. 3, 1999), which involved allegations of infringement of copyright under Italian law. The defendant's application to have the case dismissed on forum non conveniens grounds emphasized the need to apply Italian copyright law. Rejecting the application, the court observed: "There is no reason to believe that this Court will be unable to apply Italian copyright law as necessary." Id. at *26.

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