

The Law Applicable to Online Copyright Infringements in the ALI and CLIP Proposals:

A Rebalance of Interests Needed?*

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Abstract: The article discusses the problems of applicable law to copyright infringements online. It firstly identifies the main problems related to the well established territoriality principle and the *lex loci protectionis* rule. Then; the discussion focuses on the “ubiquitous infringement” rule recently proposed by the American Law Institute (ALI) and the European Max Planck Group for Conflicts of Law and Intellectual Property (CLIP). The author strongly welcomes

a compromise between the territoriality and universality approaches suggested in respect of ubiquitous infringement cases. At the same time; the paper draws the attention that the interests of “good faith” online service providers (such as legal certainty and foreseeability) have been until now underestimated and invites to take these interests into account when merging the projects into a common international proposal.

Keywords: applicable law; copyright; Internet; ALI; CLIP; ubiquitous infringement; territoriality

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1 Since the turn of the century, the law applicable to copyright infringements committed in electronic networks has become one of the most discussed topics in both the doctrine and the practice of copyright law. As online infringements are *per se* cross-border, private international law issues have also gained increasing attention, at least in the doctrine. However, in court practice their importance is still underestimated – few decisions thoroughly discuss jurisdictional questions, and even fewer mention issues related to applicable law. Yet when the courts have found answers to the still very problematic substantive law questions (e.g., indirect liability, copyright exceptions online), the attention toward international private law issues will most likely increase. Meanwhile, the rules of international private law need to be updated to the new demands of the online environment.

2 This paper will first give a short overview of the main problems of applicable law to copyright infringe-

ments. Apart from the general problems, attention will be focused on whose interests – those of right holders or users (potential infringers) – are favored by existing practice. Second, the paper will focus on how the identified problems are solved, in particular, whether the interests of parties are balanced in the two most recent proposals on jurisdiction, applicable law, and recognition and enforcement of judgments in intellectual property from the American Law Institute (ALI) and the Max Planck Group on Conflict of Laws in Intellectual Property (CLIP). The analysis will be limited to the issues related to copyright (not other intellectual property rights), applicable law (not jurisdiction), and infringements (not licensing); the sensitive initial ownership issue will be excluded from the scope of this paper.

A. Problem Identification

- 3 It is accepted in most countries that copyright (its existence, scope, duration, etc.) is limited to the territory of a particular country (the “territoriality principle”) and that copyright infringements are adjudicated under the law of the protecting country (the “*lex loci protectionis*” rule).¹ Both the territoriality principle and the *lex loci protectionis* rule, however, have numerous problems. To mention only a few: the territoriality principle, as a principle of substantive law, is agreed to be an ambiguous concept without any clear meaning,² its scope is more flexible than might be expected,³ and it seems to lose its ground in the context of ever more harmonized copyright laws and ever more globalized copyright commerce, especially on the Internet.⁴ *Lex loci protectionis*, as a rule of applicable law, is no less problematic. It has no clear source at the international level⁵ and is rarely found in national statutes.⁶ The Rome II Regulation⁷ codified *lex loci protectionis* for intellectual property disputes in the EU,⁸ but its scope remains unclear.⁹ It is further doubted whether the territoriality principle, as a substantive law principle, indispensably leads to the *lex loci protectionis* as an applicable law rule.¹⁰ Also, delimitation of *lex loci protectionis* from other applicable law rules – especially from the *lex loci delicti* rule – is not clear in either doctrine or court practice.¹¹
- 4 Most importantly, it is argued here that the application of the *lex loci protectionis* rule in online infringement cases has led to the imbalance of interests between right holders and users. When the content is made available over the Internet, *lex loci protectionis* allows the right holder to pursue the infringement under the law of each country where the work has either been uploaded or could be potentially accessed (in most cases, worldwide).¹² This enables right holders who have sufficient resources¹³ to identify and claim the most protective law in the case (“race-to-the-top” effect).¹⁴ Although formally the relief acquired under one country’s law should be limited to its territory, in practice it often has extraterritorial effects.¹⁵ Meanwhile the user (both an intermediary service provider (ISP) and a private consumer) who makes the works available online faces a threat to be sued under any law where the work can be accessed and thus should accommodate its conduct to (almost) each law worldwide. This causes great legal uncertainty and hampers the development of legitimate online businesses.
- 5 Recently, the courts have started applying the “market effect” doctrine, which was initially proposed by World Intellectual Property Organization (WIPO) for online trademark cases.¹⁶ It defines the infringement as occurring only in the countries where the conduct had a commercial effect.¹⁷ Its application to copyright cases, however, has been of little effect

until now. Although mere access to content in the country is no longer sufficient to claim an infringement under its laws, the courts are often satisfied with minimum connecting factors to establish sufficient connection to the forum country.¹⁸ Thus, online copyright infringement can still be found under multiple national laws, and the legal uncertainty problem is barely limited.

- 6 Moreover, despite the territorial nature of copyright, the remedies granted on the basis of a single applicable national law often have extraterritorial effects: a domestic injunction often leads to the overall shut-down of the website; damages are often calculated on the basis of overall access numbers regardless of where the access originates from. This may lead to problems of conflicting or overlapping remedies. For instance, an injunction granted under the law of one country may prevent conduct that is legitimate in another country (the conflicting injunctions problem).¹⁹ Alternatively, when the conduct is illegal in several countries and the courts grant damages independently from each other, the overall damage granted may eventually exceed the actual harm (the cumulative damage problem).²⁰ Certainly, the courts could try to limit the remedies to a specific country (e.g., by ordering the application of measures limiting geographical access to the website or calculating damages on the basis of local access figures). Even if this becomes ever more technologically possible and economically reasonable (which may take some time), it is questionable if such “reterritorialization” of remedies would be suitable in all cases. For instance, this would require right holders even in obvious mass-scale infringement (“piracy”) cases to prosecute the infringer separately under the law of each protecting country.
- 7 In sum, the territorial approach and the adherence to a strict *lex loci protectionis* approach, as currently applied in court practice, have led to an imbalance of interests between the parties – they allow the right holder to claim for infringement under the most protective law and, in many cases and despite the formal limitation by the territoriality principle, to obtain a remedy with extraterritorial effects. Meanwhile, Internet users (both ISPs and consumers) are subject to numerous applicable laws and face the problem of conflicting or overlapping remedies. It remains to be seen whether the recent proposals by the ALI and the draft CLIP proposals may help to reestablish the necessary balance of interests.

B. ALI and CLIP Proposals

- 8 After the Hague convention on rules of jurisdiction and recognition of judgments²¹ failed and only a much more limited Convention on Choice of Court Agreements²² could be agreed on, the American Law

Institute started working on the Principles on Jurisdiction, Applicable Law, and Recognition and Enforcement of Judgments in Intellectual Property (ALI Principles),²³ which were issued in 2008. In 2009 a preliminary draft of the European counterpart was made available by the Max Planck Group on Conflict of Laws and Intellectual Property (CLIP Proposal).²⁴ Neither of these has binding legal value;²⁵ instead, they both intend to provide guidelines for courts, legislative bodies, or international organizations on international private law issues in cross-border intellectual property disputes.²⁶ Taking into account that both projects involved numerous internationally recognized scholars from various countries, and they are the first international initiatives of such extent,²⁷ they may have a far-reaching international impact. Already today the academic debate in other major IP jurisdictions such as Japan is taking notice of both projects to gain inspiration for a possible amendment of domestic rules.²⁸

- 9 Although the ALI and CLIP proposals represent different traditions – common and continental law – they have resulted in rather similar sets of rules. As far as law applicable to copyright infringements is concerned, both proposals, first, retain *lex loci protectionis* as a main applicable law rule.²⁹ Both groups thereby reaffirm the remaining relevance of the territorial approach despite the ever-increasing globalization and international harmonization of copyright laws. The proposals also constitute the first attempts at the international level to explicitly formulate the *lex loci protectionis* rule and define its scope. Second, both proposals suggest similar “ubiquitous infringement” rules devoted to online infringements.³⁰ Third, they introduce a limited party autonomy principle in infringement cases.³¹ Such party autonomy has so far been rejected³² and thus should be welcomed as a step toward higher efficiency of proceedings in cross-border cases. However, the proposals differ on the very sensitive issue of initial ownership.³³ As another difference, the CLIP Proposal incorporates a modified market effect rule – the “*de minimis* rule”. It allows finding the infringement under the law of a specific state only when the defendant has “substantially acted” or his/her conduct has led to “substantial effects” or was directed to that state.³⁴ The ALI Principles, on the other hand, do not contain any similar explicit provision.³⁵
- 10 The following paragraphs will focus on whether the ubiquitous infringement rule proposed by the ALI and CLIP Groups reestablishes the balance of the interests between right holders and users. After an overview of the main features of the ubiquitous rule, more attention will be given to its applicability, the closest connection rule, and an exception to it.

I. Ubiquitous Infringement Rule: Main Features

- 11 In both the ALI and CLIP proposals, the ubiquitous infringement rule contains three main parts.³⁶ First, both proposals subject ubiquitous infringements to the “closest connection rule.” More specifically, the ALI Principles subject the ubiquitous infringement to the law or laws having a “close connection” to the dispute,³⁷ whereas the CLIP Proposal refers to the law having the “closest connection.”³⁸ Second, each proposal provides for an exemplary list of factors on which the “close/closest connection” basis is to be determined. The ALI Principles include broad criteria that appear to be neutral of the parties’ role as right holder or infringer, such as both parties’ residence, the pre-existing relationship between parties, the extent of both parties’ activities, and the investment of the parties as well as the place of the affected markets.³⁹ In a slightly different manner, the CLIP Proposal contains factors that are more infringer-oriented and slightly more narrowly defined.⁴⁰ Third, both rules provide for an exception to the closest connection test. Leaving aside slight differences in wording,⁴¹ both proposals essentially allow any party to prove that the law of another country connected to the dispute would lead to another solution that should be taken into account when determining the remedies. This exception allows parties to retreat back to the territorial approach and apply separate national laws when they contain provisions favorable to any of the parties (hereafter – “retreat to territoriality” exception).
- 12 The expected effect of the rule could be demonstrated by the following example. A defendant residing in Germany made available on a German-language website short extracts of a musical work belonging to the plaintiff residing in the US. The court applied German law as the law having the closest connection with the dispute (because the defendant resides in Germany, the defendant’s physical conduct took place in Germany, and the website targeted primarily the German market) and granted international relief based on German law. The defendant, however, proved that the use of short extracts of a work constitutes fair use in the US, and the court thus limited the remedies accordingly – the injunction and damages excluded activity in US territory.

II. Applicability

- 13 The first issue that deserves a closer look is the scope of application of the rule. Under the ALI Principles, the ubiquitous infringement rule “may” be applied when two conditions are met – when there is a “ubiquitous activity” and “when the laws of multiple States are pleaded.”⁴² Similarly, the CLIP Proposal stipulates that the rule “may” be applied in respect

of infringement occurring over “ubiquitous media” when the infringement “arguably takes place in every State where the signals can be received.”⁴³ This non-compulsory application of the rule and two cumulative requirements (ubiquitous conduct/media and worldwide/multiple-state infringement) may be of more significance than it may seem from the first glance.

1. Cumulative conditions: Ubiquitous conduct and worldwide infringement

14 First of all, it is questionable whether all online infringements would meet both conditions set in the ALI and CLIP proposals. The requirement of ubiquitous, or “instantaneous and worldwide,”⁴⁴ conduct/media was meant to exclude offline multi-state infringements from its scope.⁴⁵ However, one could wonder whether it could lead to the exclusion of some online cases. For instance, there are websites that limit access geographically, and thus they are not accessible worldwide.⁴⁶ Will they qualify as “ubiquitous conduct”? Also, the worldwide/multi-state infringement requirement suggests that the only cases that are covered are those where the violation of copyright is arguably occurring in each country worldwide (ALI – in multiple states). There will be numerous cases where such worldwide/multi-state infringement is not obvious – *e.g.*, because of a different scope of protection in different countries.⁴⁷ Also, when the case concerns Internet-specific uses (*e.g.*, thumbnails, search of snippets from books) whose (il)legality has not yet been clarified in many jurisdictions, the court is unlikely to assume “worldwide infringement.” Thus, the ubiquitous infringement rule is likely to apply only to obvious online infringement (“piracy”) cases.

2. “May,” not “shall”

15 Second, the use of “may” and not “shall” in the wording of the rule suggests that the ubiquitous infringement rule, even if all requirements are met, will not necessarily apply to online cases. This raises a question as to who may decide on the applicability of the rule – the court or (also) the plaintiff (normally the right holder). Neither of the proposals gives an explicit answer. However, it is likely that the rule will be applied only at the request of the plaintiff – if the right holder prefers to prosecute an online infringement in a single state, he/she shall not be prevented from doing so. Obviously, the right holder will request to apply the ubiquitous infringement rule only if it would lead to a more favorable solution than other rules.

3. Lex loci protectionis and de minimis rules: For online cases?

16 When the ubiquitous infringement rule is not applied (because any of two requirements is not met or because the right holder does not express a wish to apply it), the next question is what rule applies to online infringements in these cases. It seems that the *lex loci protectionis* and the *de minimis* provisions, as generally applicable rules, come into play.⁴⁸ As argued earlier, their application is generally more advantageous for the right holders – they can choose to claim the most favorable law and acquire the remedies which, despite a formally valid territoriality principle, may have extraterritorial effects in online disputes. For the users, this means that they could be sued under (almost) any law worldwide, and decisions adopted by several courts simultaneously may lead to conflicting or cumulative remedies.

17 As far as cumulative and conflicting remedies are concerned, neither proposal seems to suggest specific solutions to this problem.⁴⁹ Interestingly, the 2001 WIPO Recommendation on the use of signs online already devoted much attention to the extraterritorial effects of remedies.⁵⁰ In regard to the problem of multiple laws being applicable, as mentioned above, the courts have already tried to come to a certain limitation by applying only those laws where a significant (market) effect could be found. Could this problem be solved with the help of a similar *de minimis* rule as found in the CLIP Proposal?⁵¹ As discussed above, the market effect rule has not significantly limited the number of applicable laws – national courts easily establish at least a certain connection to the forum and apply domestic law. The *de minimis* rule, as formulated in the CLIP Proposal, seems to set an even lower threshold. First, it allows finding for infringement not only in the country where a significant *effect* is established but also where a significant *conduct* takes place. Thus, if the person uploaded content from country A to the website accessible only in country B (thus causing no direct effects in country A), the infringement could still be found in country A because the significant conduct – the uploading act – took place there. This is advantageous for the right holders as it helps to effectively prevent the action under the law of the country of conduct, in case the country of effects has weaker protection. For the user, however, it has consequences similar to those of the Bogsch theory: the conduct is subjected both to the law of the place of emission and to (numerous) laws of the place of reception. Second, even if both the conduct and effect in a specific country are *de minimis*, the court may derogate from the *de minimis* rule and still apply the law of that country “when reasonable under the circumstances of the case.”⁵² Initially this could have been justified, *e.g.*, in specific copyright cases where the violation of moral rights does not lead to any

identifiable economic effects on the market. However, after eliminating “economic” from the definition of the *de minimis* rule and introducing “place of conduct” as an additional connecting factor, it is questionable whether the exception is still needed for such or similar cases. As a result, the *de minimis* rule, when applied to exceptional online cases, is not intended to significantly decrease the number of multiple potentially applicable laws and is likely to cover only clear “overspill” cases.⁵³

- 18 Thus, because of a narrow application of the ubiquitous infringement rule, it is likely that a problematic *lex loci protectionis* will still apply to many online copyright cases; the *de minimis* rule, if compared to a traditional (market) effect rule, is even less likely to diminish its problems.

4. Secondary infringement: Unsolved issue

- 19 In addition, it is not clear how the ubiquitous infringement rule would be applied to secondary (or indirect) infringement, which is especially relevant in cases of ISP liability. Traditionally, the courts tend to subject secondary infringements to the law regulating the main (primary) infringement.⁵⁴ This practice becomes especially problematic in case of ISP liability. Normally, there are multiple primary infringements by Internet end users, which might be subject to different laws. It is thus not clear which “law of primary infringement” will be applied to the secondary infringement. Still, neither proposal clarifies whether secondary infringements “follow” primary infringements,⁵⁵ or whether they could be autonomously subject to the ubiquitous infringement rule.⁵⁶
- 20 Overall, the scope of application of the ubiquitous infringement rule seems to be rather narrow and not entirely clear. It is likely to be applied only when the plaintiff claims it – this choice is normally reserved for the right holder, unless the alleged infringer brings the case to court first (e.g., with an action for a declaration of non-infringement). Also, it is not clear whether all online cases will meet the two requirements of ubiquitous media/conduct and worldwide/multi-state infringement. If these requirements are not met, online infringement will be subject to the traditional *lex loci protectionis* rule, which tends to favor the right holder and may be a significant obstacle for worldwide Internet services, as it leads to the application of multiple laws and may result in cumulative or conflicting remedies and thus a regulatory “race to the top.” The market effect rule was supposed to limit the former problem; however, the *de minimis* rule, as suggested in the CLIP Proposal, is likely to have even fewer positive effects in regard to the multiple applicable law problem than could
- be expected from the market effect rule. In addition, the law applicable to secondary infringements remains unanswered in both proposals. Thus, it is unclear if and how the ubiquitous infringement rule will be applied in respect of ISPs, which have to deal mainly with secondary liability claims.

III. Close/Closest Connection Rule

- 21 The second issue worthy of consideration is the closest connection rule, a core of both provisions on ubiquitous infringement. It subjects the overall ubiquitous infringement to a single law with the closest connection. Closest connection is to be determined by taking into account all relevant factors – the ALI and CLIP proposals provide only an exemplary list of them.⁵⁷ With this rule, the ALI and CLIP Groups first sought to enable the application of a single law (universality approach) to all online infringement and to acquire worldwide remedies. Second, they intended to avoid the situation where the user moves to the country with the least protection (“forum shopping”), which would lead to the overall decrease of copyright protection (“race to the bottom”). These problems are normally associated with other doctrines that follow the universality approach.⁵⁸

1. Single applicable law: Not really?

- 22 With regard to the first goal, the application of a single law to the entire online infringement is generally advantageous both for the right holders and the users. For the former, it means the acquisition of worldwide remedies on the basis of a single law. For the latter, it eliminates the problem of multiple applicable laws and, simultaneously, the danger of cumulative or conflicting remedies granted under different laws.
- 23 However, it should be noted that the ALI Principles refer to “the law or laws of the State or States” instead of “a (single) law.”⁵⁹ The effect of this formulation is not entirely clear. First, such wording may merely mean that the court can also apply the law as invoked by a party under the “retreat to territoriality” exception.⁶⁰ However, this possibility is already implied by the exception itself. A specific reference to the exception in the closest connection rule seems both redundant and may even be contradictory.⁶¹ Second, it could mean that different issues (existence, scope, duration, remedies, etc.) may be subject to different laws (“*dépeçage*”). However, such *dépeçage* is possible when applying a similar rule found in the US Restatement of the Laws (Second), although it refers only to “a law.”⁶² Therefore, a third interpretation seems to reflect what the authors meant – if a dispute has a close connection

with more than one country, several laws are to be applied. The open wording of the provision is not surprising, taking into account the innovative nature of the rule. However, this weakens at the same time the potential effectiveness of a single law approach – it remains possible that several laws will apply, though it cannot be foreseen in what cases and which laws.

- 24 Furthermore, the ALI Principles refer to a “close” instead of the “closest” connection.⁶³ Many laws may have a “close” connection. It is likely that most courts that find sufficient grounds to establish jurisdiction over the dispute would also find that the law of the forum has a sufficiently “close” connection to the dispute.⁶⁴ This allows right holders, when choosing a court, to simultaneously choose the applicable law. Meanwhile, the users have to simultaneously adhere to all laws potentially connected to the dispute.

2. Exemplary list of connecting factors

- 25 As far as potential dangers of “forum shopping” or the “race to the bottom” are concerned, the close/closest connection rule doubtlessly eliminated them. The law with the close/closest connection is determined by taking into account all relevant factors; the exemplary factors are defined broadly, especially in the ALI Principles.⁶⁵ Thus, the potential infringers cannot manipulate the applicable law by changing their place of establishment or their online conduct, as those factors are not the only factors that determine the law applicable to the dispute.
- 26 On the other hand, an exemplary and non-mandatory list of factors contains a problem of legal uncertainty and lack of foreseeability for both parties. Right holders cannot exactly foresee which law the court will apply. However, as mentioned above, if only a “close” connection is required, the courts will most often apply forum law, and it is the right holder who normally chooses the forum.⁶⁶ The situation of users is more problematic. From the exemplary list of factors, they cannot foresee the law applicable to the dispute. Such legal uncertainty and lack of foreseeability hampers the development of legitimate online services, as well as a reduction of online piracy.⁶⁷ It is worth noting that in its early drafts, the CLIP Proposal contained a “defendant’s residence” rule.⁶⁸ However, it was suggested only as a “last resort” when the law with the “closest connection” cannot be determined, not as a default rule. It is thus doubtful whether it could have brought more legal certainty. In comparison, under continental tradition, torts are normally subject to specific and well-defined conflict rules, whereas the “closest connection” rule serves as an exception.⁶⁹
- 27 Thus, the closest connection rule is likely to facilitate the enforcement of ubiquitous infringements by formally enabling right holders to acquire worldwide relief under a single (most likely, forum) law. At the same time, the rule reduces the potential for “forum shopping” by users and the risk of a “race to the bottom” of copyright protection. Although such a single-law (or universality) approach could be generally advantageous for users (no multiple applicable laws leading to cumulative or conflicting remedies), the loose formulation of the closest connection rule (“law and laws” and “close connection”) and a merely exemplary list of broad connecting factors do not ensure the necessary degree of legal certainty and foreseeability in online cases.

IV. “Retreat to Territoriality” Exception

- 28 Finally, both proposals contain an exception to the closest connection rule. In short, any party may prove that the law of another state (than the one to which the law has the closest connection) provides a solution that differs from that obtained under the law(s) chosen to apply to the case as a whole; this differing law should be taken into consideration when determining the remedy.⁷⁰ With this rule, both the ALI and the CLIP Groups presumably intended to preserve the territorial interests of the states. Importantly, diverging national copyright laws may be raised only on the initiative of any of the parties and may influence only the remedies, not the liability issues. It is true that this exception “might lead to as much litigation over the content of foreign law as would serial application of the laws of each State for which protection is sought.”⁷¹ However, the legitimate interest of states to enforce differing territorial laws remains relevant in online disputes as well.
- 29 With regard to the interests of parties, it seems that the exception primarily serves the interests of the users. When a plaintiff (normally the right holder) requests worldwide relief under a single applicable law, the exception allows a defendant (normally the user) to invoke a law that leads to a different solution, obviously favoring the defendant. Defendants are currently able to dispute the applicability of the forum law in respect of uses originating in foreign countries, and courts are formally under the obligation to grant remedies limited to the territory of the country whose law is being applied (the territorial approach). However, defendants’ attempts to challenge jurisdiction over conduct originating abroad often fail,⁷² and courts sometimes apply the territorial approach loosely, leading to an extraterritorial effect of judgments based on a single law. The exception thus will not only allow challenge the application of domestic laws in respect of foreign conduct but will also provide defendants with an additional

possibility to claim foreign laws to make use of provisions favorable for them (e.g., on limited liability, scope of remedies). Also, this “retreat to territoriality” exception decreases the danger of conflicting or overlapping remedies. When the law different from the one applied by the court leads to different remedies, the court is obliged to take measures to avoid conflicting remedies (e.g., not to extend the injunction to a particular country).

- 30 The rule should thus be welcomed. Only two minor points deserve further consideration.

1. “Any party”

- 31 It may seem that the exception makes the situation of the right holder worse – he/she may not be sure which laws the defendant will invoke for its defense, a defense which is likely to prolong the court proceedings. On the other hand, as the rule refers to “any party,” a right holder could equally make use of the exception. For instance, if the court decides to apply German law as the law with the close/closest connection, the right holder may still claim statutory damages under the US law in respect of the US part of the infringement.

- 32 Equal treatment of parties to the dispute is generally understandable. The right holder, as an injured party, cannot be put in a less favorable position than the user who caused the injury.⁷³ On the other hand, the above analysis has shown that the ubiquitous infringement rule is more advantageous to the right holder in numerous aspects. For instance, the loose formulation of the close/closest connection rule and an exemplary list of flexible connecting factors are likely to lead to the application of forum law as “closely connected” to the dispute (and it is the right holder who chooses the forum). Furthermore, if a right holder is concerned that the court will find the closest connection to a law not favorable to him/her, he/she may choose to apply the *lex loci protectionis* instead, which would still lead to extraterritorial effects of the remedies in many cases. Thus, it could be disputed whether the right holder needs any additional guarantees proposed by the “retreat to territoriality” exception.

2. “Prove”

- 33 The last point concerns the term “prove.” Both proposals allow an interested party to “prove” that another law leads to a differing solution. Such formulation may be seen as shifting the burden of proof from the right holder to the user. Under the *lex loci protectionis* rule, it has been the right holder who has to prove that the infringement takes place in each relevant country. Under the ubiquitous infringement rule, the worldwide/multi-state infringement is as-

sumed, whereas the “retreat to territoriality” exception seems to set a duty for the defendant to prove that there is no infringement in certain countries (or that the liability is limited, less stringent remedies are available, etc.). Such shifting of burden might be reasonable in obvious “piracy” cases. However, it may be questionable in cases where the user is acting in good faith. Thus, it may be considered whether the wording “prove” should be changed to a more neutral term (such as “claim”). Then, the allocation of the burden of proof would be left to the discretion of courts in each particular case. Even if this were to weaken the position of the right holder, it may potentially strengthen the position of the user, whose interests have not been sufficiently taken into account in the current wording of the ubiquitous infringement rule.

C. Conclusion

- 34 The application of the territoriality principle and the *lex loci protectionis* rule to online copyright infringement cases has led to a distortion of the balance of interests between right holders and users. The current practice allows right holders to choose the most favorable law to claim for infringement and, despite the formally recognized territoriality principle, to obtain relief that often has extraterritorial effects. Meanwhile, users have to simultaneously adhere to multiple potentially applicable laws and face the danger of conflicting or overlapping remedies. Although the market effect rule, which is getting more popular in courts, may mitigate the negative effects, it does not seem to be a sufficient solution.
- 35 Both the ALI and the CLIP proposals, by developing a “ubiquitous infringement” rule, seek for a compromise between territoriality and universality. It is questionable, however, whether the balance of interests between right holders and users is properly defined. The ubiquitous infringement rule enables right holders to acquire, under a single applicable law, international relief in online cases. Also, the dangers of a single-law approach (such as “forum shopping” by users leading to a “race to the bottom” of copyright protection) have been eliminated by implementing a flexible closest connection rule with an open-ended list of connecting factors. In addition, if the right holders are unsure about applying the ubiquitous infringement rule (e.g., because it is uncertain which law will be found as having the “close/closest” connection), they are left with the possibility to opt for the application of the traditional *lex loci protectionis* rule – this rule has often allowed right holders to obtain national remedies with extraterritorial relief before, and this has not been effectively limited by any of the proposals. Finally, it is true that the efficiency of the court procedures may decrease if the users invoke another differing

law under the “retreat to territoriality” exception. However, this exception may be equally used by the right holder, *e.g.*, in order to obtain more extensive damages available in some jurisdictions.

- 36 The interests of the users – both ISPs and consumers – seem to cause more problems. Generally, the single applicable law is of interest for the users since it eliminates the problem of multiple potentially applicable laws as well as the danger of cumulative or conflicting remedies. However, the two cumulative conditions (ubiquitous conduct/media and worldwide/multi-state infringement) make it unclear to which online cases the rule may be applied. The uncertainty is increased further by subjecting the application of the rule to the choice of the plaintiff (right holder). It also remains undecided whether and how the ubiquitous infringement rule applies to secondary liability. Furthermore, the flexible close/closest connection rule does not allow users to foresee which law will be applied to the dispute. Thus, several laws that might have a connection to the dispute will still have to be taken into consideration when online business models are developed. Certainly, the “retreat to territoriality” exception may help users to partly defend their interests and diminish the danger of conflicting or cumulative remedies. However, it seems to transfer a duty of proof from the right holder on the user.
- 37 These issues could be further discussed when considering the possibility to merge ALI and CLIP projects into a single international proposal.

Annex

I. American Law Institute

Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes (American Law Institute Publishers, St Paul, MN 2008)

(ALI Principles)

[Extract]

§321. *Law of Laws to Be Applied in Cases of Ubiquitous Infringement*

When the alleged infringing activity is ubiquitous and the laws of multiple States are pleaded, the court may choose to apply to the issues of existence, validity, duration, attributes, and infringement of intellectual property rights and remedies for their infringement, the law or laws of the State or States with close connections to the dispute, as evidenced, for example, by:

- (a) Where the parties reside;
- (b) Where the parties’ relationship, if any, is centered;
- (c) The extent of the activities and the investment of the parties; and
- (d) The principal markets toward which the parties directed their activities.

Notwithstanding the State or States designated pursuant to subsection (1), a party may prove that, with respect to particular States covered by the action, the solution provided by any of those States’ laws differs from that obtained under the law(s) chosen to apply to the case as a whole. The court shall take into account such differences in determining the scope of liability and remedies.

II. European Max Planck Group on Conflicts of Laws in Intellectual Property

Principles for Conflict of Laws in Intellectual Property, Third Preliminary Draft of 1 September 2010, available at <www.cl-ip.eu> [Accessed on 10 September 2010]

(CLIP Proposal, Third Draft)

[Extract]

Article 3:603: Ubiquitous infringement

In disputes concerned with infringement carried out through ubiquitous media such as the Internet, the court may apply the law of the State having the closest connection with the infringement, if the infringement arguably takes place in every State in which the signals can be received. This rule also applies to existence, duration, limitations and scope to the extent that these questions arise as incidental question in infringement proceedings.

In determining which State has the closest connection with the infringement, the court shall take all the relevant factors into account, in particular the following:

- the infringer’s habitual residence;
- the infringer’s principal place of business;
- the place where substantial activities in furthering of the infringement in its entirety have been carried out;

the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety.

Notwithstanding the law applicable pursuant to paragraphs 1 and 2, any party may prove that the rules applying in a State or States covered by the dispute differ from the law applicable to the dispute in aspects which are essential for the decision. The court shall apply the different national laws unless this leads to inconsistent results, in which case the differences shall be taken into account in fashioning the remedy.

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- 1 The opposite “universality” principle and the corresponding *lex originis* rule is applied for copyright infringements in few countries (e.g., Greece, Romania, Portugal).
- 2 See, e.g., Wadlow, Christopher, Enforcement of Intellectual Property in European and International Law para. 1-22 (London Sweet & Maxwell 1998); Kegel, Gerhard & Seidl-Hohenveldern, Ignaz, *Zum Territorialitätsprinzip im internationalen öffentlichen Recht*, in Heldrich, Andreas & Henrich, Dieter & Sonnenberger, Hans-Jürgen, *Konflikt und Ordnung* 233-277, 234 (C.H. Beck'sche Verlagsbuchhandlung 1978).
- 3 E.g., US courts apply an exception to the territoriality principle on the basis of a so-called root copy approach: when an initial copy is made in the US, damages in respect of all copies subsequently reproduced abroad could be granted under the US law, see Geller, Paul Edward, *International Intellectual Property, Conflicts of Laws, and Internet Remedies*, E.I.P.R. 125, 129 (2000).
- 4 Cf. Schack, Haimo, *Urheber- und Urhebervertragsrecht* para. 98 (Mohr Siebeck 2007).
- 5 There is no agreement if it can be derived from Art. 5(2) of the 1886 Berne Convention for the Protection of Literary and Artistic Works, cf. Schack, supra note 3, p. 400 ff.; Drexl, Josef, *Europarecht und Urheberkollisionsrecht*, in Ganea, Peter et al. (eds.), *Urheberrecht. Gestern-Heute-Morgen* 461-479, 463 (Verlag C.H. Beck 2001).
- 6 E.g., it cannot be found in German, French, UK, or US statutes.
- 7 Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40-49.
- 8 Rome II Regulation, Art. 8.
- 9 It is not clear whether it covers only infringement-related issues (illegal acts, remedies) or also propriety-related ones (existence, scope, duration, initial ownership, transferability), see Leistner, Matthias, *The Law Applicable to Non-Contractual Obligations Arising from an Infringement of National or Community IP Rights*, in Leible, Stefan & Ohly, Ansgar (eds.), *Intellectual Property and International Private Law* (Mohr Siebeck 2009); Basedow, Jürgen & Metzger, Axel, *Lex loci protectionis europea*, in: Trunk, A. et al. (eds.) *Russia in the International Context: Private International Law, Cultural Heritage, Intellectual Property, Harmonization of Laws*. Festschrift für Mark Moiseevic Boguslavskij 153, 162 (Berliner Wissenschafts-Verlag 2004).
- 10 Drexl, Josef, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. Band 11: Internationales Wirtschaftsrecht Art. 50-245 EGBGB, para. 13 (Verlag C.H. Beck 2005).
- 11 Some seek to draw a clear distinction between the two rules, see Drexl, supra note 9, para. 12; others use the expressions “law of protecting country” and “law of the place where the infringement occurred” interchangeably, see Fawcett, James J. & Torremans, Paul, *Intellectual Property and Private International Law* 499, 501, 507 ff. (Clarendon Press 1998).
- 12 The so-called Bogsch theory.
- 13 E.g., major record companies, producers, publishers.
- 14 Certainly, the choice of right holder is limited by jurisdictional rules. However, they normally allow plaintiffs to sue under the law of the country of the “harmful event,” which would normally coincide with the “place of infringement,” see, e.g., Art. 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), *OJ L 12, 16.1.2001, p. 1-23*.
- 15 See text below; for more about the problematic of *lex loci protectionis* and remedies in multistate infringements, see Drexl, Josef, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. Band 11, *Intrnationales Immaterialgüterrecht (IntImmGR)* para. 277 et seq. (5. Aufl. Verlag C.H.Beck München 2010).
- 16 Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, adopted on September 24 to October 3, 2001 (hereinafter – 2001 WIPO Recommendation).
- 17 See 2001 WIPO Recommendation, Art. 2 (“the use of a sign on the Internet shall constitute use in a Member State for the purposes of these provisions, only if the use has a commercial effect in that Member State (...).”)
- 18 German courts set a rather high market effect threshold in trademark cases, see, e.g., German Supreme Court decision of 13 October 2004 – I ZR 163/02 *Hotel Maritime*, 5 GRUR Int. 433 (2005) (in a trademark infringement case, court found no sufficient connection to Germany, even though the website was in German and targeted *inter alia* German audience); the threshold in copyright cases, however, seems to be lower, see, e.g., Appeals Court of Jena decision of 27 February 2008 – 2 U 319/07 *Thumbnails*, MMR 408 (2008) (German law was applied on the basis that the defendant displaced the reconfiguration of the pictures into the thumbnails in the hit list of its search engine in Germany); confirmed by German Supreme Court decision of 29 April 2010 – I ZR 69/08 – *Vorschaubilder*, GRUR 628, para. 14 (2010) (international jurisdiction of German courts has been confirmed on the basis that “the thumbnails in a search engine of the defendant can be seen (also) in Germany”); Appeals Court of Munich decision of 28 July 2005 – 29 U 2887/05 *Heise Zeitschriften*, MMR 768 (para. 22) (2005) (the fact that the website was “available in German and was directed also to German users” was sufficient to establish the jurisdiction of German courts and apply German law); Appeals Court of Dresden decision of 5 December 2006 – 14 U 1735/06 *Internet-Videorekorder*, 5 GRUR-RR, 138, 139 (2007) (“The ‘virtual videorecorder’ was directed for the use of German Internet users”); Supreme Court decision of 21 September 2006 – 29 U 2119/06 *Haftung von eBay als Mitstörer für Urheberrechtsverletzungen*, JurPC Web-Dok. 124/2006, Abs. 1-76, 46 (the connection to the country is established when the service “is in German language and directed to domestic commerce”); Supreme Court decision of 2 March 2010 – VI ZR 23/09 (a mere Internet access is not sufficient for the establishment of jurisdiction in a personality case; rather, the objective connection to the country is needed); Appeals Court of Hamburg decision of 10 March 2010 – 7 W 5/10 (the website www.google.com has a sufficient connection to Germany if the link to it is provided on the website www.google.de).

- 19 *E.g.*, in the *National Football League* case the injunction of broadcasting in the US prevented the legitimate reception of signals in Canada, see *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2nd Cir. 2000) (USA); on the Internet, a private user condemned for sharing files under one law will have to abandon the activity overall, even if the conduct could be legal in some of the countries where the shared files had been accessed.
- 20 *E.g.*, in the *Sender Felsberg* case, collecting societies in Germany and France independently requested royalties for the same broadcasting conduct (even though there were no receptions by the public in Germany), see Supreme Court decision of 7 November 2002 - I ZR 175/00 *Sender Felsberg*, *GRUR Int.* 470 (2003) (Germany); on the Internet, a similar problem would arise if a website is made available in several countries and the website operator has to pay separate royalties to different national collecting societies.
- 21 For a preliminary draft of the Hague Convention on Jurisdiction and Enforcement of Judgments, see <http://www.state.gov/www/global/legal_affairs/991030_forjudg.html> [accessed on 2 July 2009]...
- 22 Hague Convention on Choice of Court Agreements, concluded on 30 June 2005, available on <www.hcch.net> [accessed on 10 December 2010].
- 23 American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes* (American Law Institute Publishers, St Paul, MN 2008).
- 24 European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), *Principles for Conflicts of Laws in Intellectual Property, Third Preliminary Draft of 1 September 2010*, available at <www.cl-ip.eu> [Accessed on 10 September 2010] (CLIP Proposal, Third Draft). In the meeting on 19-20 November 2010, the CLIP Group adopted the final CLIP Proposal; however, at the time of submission of this article for publication, it had not yet been made available to the public.
- 25 However, the ALI Restatements of Law are an important secondary source of law in US court practice; the ALI Principles have already been mentioned in, *e.g.*, *Fairchild Semiconductor Corp. v Third Dimension (3D) Semiconductor*, Decision of 10 December 2008 by District Court of Maine, Civil No. 08-158-P-H (USA); *City of New York v A-1 Jewelry and Pawn Inc.*, 247 F.R.D. 296, 337-338 (E.D.N.Y. 2007).
- 26 See CLIP Proposal, Third Draft, Preamble to Part 1; ALI Principles, § 102.
- 27 Similar projects have been developed in Japan and Korea; for a Japanese version, see Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property, available at <<http://www.tomeika.jur.kyushu-u.ac.jp/ip/proposal.htm>> [accessed 21 December 2009]; for a comparison of all three proposals, see Basedow, Jürgen, Toshiyuki Kono & Metzger, Axel, *Intellectual Property in the Global Arena: Jurisdiction, Applicable Law and the Recognition of Judgments in Europe, Japan and the US* (Mohr Siebeck 2010).
- 28 See, *e.g.*, Japanese Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property, a draft of October 2009 can be found in Jürgen Basedow et al. (eds.), *Intellectual Property in the Global Arena* 394-402 (Mohr Siebeck 2010); see also Shigeki Chaen, Toshiyuki Kono, Dai Yokomizo, *Jurisdiction in Intellectual Property Cases: The Transparency Proposal*, in: *id.*, p. 77 et seq.; Bariatti (ed.), *Litigating Intellectual Property Rights Disputes Cross-border: EU Regulations, ALI Principles, CLIP Project* (Padova 2010).
- 29 ALI Principles, § 301; CLIP Proposal, Third Draft, Art. 3:102.
- 30 ALI Principles, § 321; CLIP Proposal, Third Draft, Art. 3:603.
- 31 ALI Principles, § 302; CLIP Proposal, Third Draft, Art. 3:605.
- 32 It was explicitly prohibited in Germany and Austria and under the Rome II Regulation, Art. 8(3); for criticism, see Dickinson, Andrew, *The Rome II Regulation. The Law Applicable to Non-Contractual Obligations* para 8.54 (Oxford University Press 2008); Boschiero, Nerina, *A Commentary on Article 8 of the Rome II Regulation*, 9 Yearbook of Private International Law, 87, 107 et seq. (2007); Boer, Th. M., *Party Autonomy and Its Limitations in the Rome II Regulation*, 9 Yearbook of Private International Law 19, 26 (2007); in favor, see Basedow, Jürgen & Metzger, Axel, *Lex loci protectionis europea*, in: Trunk, A. et al. (eds.) *Russia in the International Context: Private International Law, Cultural Heritage, Intellectual Property, Harmonization of Laws. Festschrift für Mark Moiseevic Boguslavskij* 153, 160 et seq. (Berliner Wissenschafts-Verlag 2004); Buchner, Benedikt, *Rom II und das Internationale Immaterialgüter- und Wettbewerbsrecht*, 12 GRUR Int. 1004, 1008 (2005).
- 33 The ALI Principles adopt the universality approach, whereas the CLIP Proposal starts with the territoriality approach and allows territoriality exceptions only in certain cases, see ALI Principles, § 313; CLIP Proposal, Third Draft, Art. 3:201.
- 34 CLIP Proposal, Third Draft, Art. 3:602.
- 35 Interestingly, in the ALI Principles, a similar market effect rule was suggested in the Preliminary Draft as a main applicable law rule for intellectual property infringements (*i.e.*, instead of *lex loci protectionis*), see ALI Principles, Preliminary Draft, § 301(2), in Jürgen Basedow et al. (eds.), *Intellectual Property in the Conflicts of Laws 229-250* (Mohr Siebeck 2005).
- 36 See annex to this paper for the exact citation of articles.
- 37 ALI Principles, § 313 (1).
- 38 CLIP Proposal, Third Draft, Art. 3:603(1).
- 39 ALI Principles, 313 (1) (a-d).
- 40 See, *e.g.*, Art. 3:603(2)(a) (“infringer’s habitual residence”) or (b) (“infringer’s principal place of business”).
- 41 The second sentence of the CLIP Proposal provides a more complicated formula, which, however, seems to eventually lead to the same legal consequences as the formulation in the ALI Principles.
- 42 ALI Principles, §321(1).
- 43 CLIP Proposal, Third Draft, Art. 3:603(1).
- 44 Cf. ALI Principles, Discussion Draft, 2006, §321, available (for sale) at <www.ali.org> [accessed on 12 October 2009] (“instantaneous and worldwide”).
- 45 Interestingly, at the initial stage of the ALI Project, departures from the territoriality principle were proposed for all multi-state (not only online) infringements, see Ginsburg, Jane C., *Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted Through Digital Networks*, WIPO/PIL/01/2 of 18 December 2000, p. 11-12 available at <www.wipo.int> [accessed on 13 October 2009].
- 46 *E.g.*, some websites or content are not accessible in all countries because they are blocked by states (*e.g.*, Google, YouTube, and Wikipedia are not accessible in China) or by operators themselves (*e.g.*, eBay blocks the sale of Nazi memorabilia items in Germany in order to comply with German law).
- 47 *E.g.*, copyright protection lasts 50 years in some countries and 70 years in others; not all countries recognize the protection of performers’ rights, etc.
- 48 Alternatively, the parties are allowed to choose the applicable law; however, the choice is limited only to remedies, see ALI Principles, §302; CLIP Proposal, Third Draft, Art. 3:605.
- 49 The CLIP Proposal reiterates territoriality in respect of injunctions in Art. 2:601(1). It is doubtful, however, whether this will be sufficient – the article neither covers damages nor gives guidelines how the effect of the injunction should be limited territorially when the restriction of geographical access of the website is not feasible. Also, up to now courts have been

- bound by the territoriality principle but have often ignored it in online infringement cases.
- 50 2001 WIPO Recommendation, Arts. 13-15.
- 51 See CLIP Proposal, Third Draft, Art. 3:602: “De minimis rule: (1) A court applying the law or the laws determined by Article 3:601 shall only find for infringement if (a) the defendant has substantially acted or has taken substantial preparatory action to initiate or further the infringement in the State or the States for which protection is sought, or (b) the activity by which the right is claimed to be infringed has substantial effect within, or is directed to the State or the States for which protection is sought. (2) The court may exceptionally derogate from that general rule when reasonable under the circumstances of the case.”
- 52 CLIP Proposal, Third Draft, Art. 3:602(2).
- 53 *E.g.*, a website clearly targets only Lithuanian consumers (a website is provided in Lithuanian, the currency used is Lithuanian Litas); however, it has been accessed by two Lithuanians living in Germany. A German court could find that the infringement in Germany is *de minimis* and deny remedies under German law.
- 54 See Germany: German Supreme Court decision of 16 June 1994 – I ZR 24/92 *Folgerecht bei Auslandsbezug*, 11 GRUR, 798 (1994) (organization of the resale in Germany is not sufficient to establish the infringement under German copyright law; *i.e.*, the organization of resale is subject to the same law that regulates the resale itself); US: *Metzke v. May Dep’t Stores*, 878 F. Supp. 756 (1995) (USA) (offshore copying will infringe US law if the defendant knew or should have known that copies would be sold in the US); Denaro, James, *Choice of Law Problems Posed by the Internet and by Satellite Broadcasting*, 1(3) *Tulane Journal of Technology and Intellectual Property* 1, para. 51 (2000).
- 55 But see ALI Principles, §301, comment h (“facilitation of the infringement” is subject to the law of the primary infringement – the comment, however, concerns only *lex loci protectionis*).
- 56 In the present text of the CLIP Principles, there is a certain hint in Art. 3:601(2)(a). For further discussion, see Dinwoodie, Graeme B. & Dreyfuss, Rochelle & Kur, Annette, *The Law Applicable to Secondary Liability in Intellectual Property Cases*, 42 *New York University Journal of International Law and Politics* 201 (2010), available at SSRN: <<http://ssrn.com/abstract=1502244>> [accessed on 2 December 2009]. Just before the submission of this paper for publication, in its final draft adopted on 19-20 November 2010 (*supra* note 24), the CLIP Group for the first time formulated the rule for secondary infringements. However, it remains to be seen if it is maintained (and in which wording) in the final CLIP Principles.
- 57 The closest connection rule was inspired by the “most significant relationship” rule as found in §145 and §188(1) of Restatement of the Law (Second), Conflict of Laws 2nd (American Law Institute 1971); and §145 of Restatement of the Law (Third) of Foreign Relations Law of the United States (American Law Institute 1987).
- 58 One of them is a so-called emission theory, which subjects satellite broadcasting to a single law of the country where the signal is emitted; it was initially implemented in Art. 2(b) of 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, OJ L 248, 06.10.1993, p. 15-21. The other is a “country of origin” (or “country of establishment”) doctrine (*Herkunftslandsprinzip*), which subjects online conduct to a single law of the country where the service provider is situated; it was implemented in Art. 3 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1-17 (however, copyright and related rights are excluded from its scope, see Annex to the Directive).
- 59 The CLIP Proposal, Second Draft, Art. 3:201(1) also referred to “law or laws.”
- 60 See discussion below.
- 61 The “retreat to territoriality” exception allows taking into account a differing law only in respect of remedies; such a limitation cannot be found in the wording of the closest connection rule.
- 62 See Restatement of the Law (Second), *supra* note 52, §145, comment on Subsection (1)(d).
- 63 Cf. CLIP Proposal, Third Draft, Art. 3:603(1) (refers to the “closest connection”).
- 64 Such a practice currently prevails.
- 65 *E.g.*, ALI Principles, §321(1)(c) (“The extent of the activities and the investment of the parties”).
- 66 Interestingly, ALI Principles used to contain *lex fori* as a “last resort” rule, see ALI Principles, Discussion Draft, 2006, *supra* note 39, §321(2).
- 67 The connection between the development of legitimate online services and reduction of online piracy has also been highlighted by the Council of European Union, see Council Conclusions on the development of legal offers of online cultural and creative content and the prevention and combating of piracy in the digital environment of 20 November 2008, available at <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/educ/104198.pdf> [accessed on 17 May 2009].
- 68 See Art. V.3.(3) of CLIP, Possible Structure of the Principles, Draft of 2008 (unpublished).
- 69 Cf. Rome II Regulation, Art. 4.
- 70 See ALI Principles, §321(2); CLIP Proposal, Third Draft, Art. 3:603(3).
- 71 See ALI Principles, Reporters’ Notes, p. 156.
- 72 See, *e.g.*, District Court decision *Sonofon A/S (formerly DMT2 A/S) v IFPI Danmark*, ECDR 10, 16 (2009) (Denmark) (an Internet access provider was ordered by a Danish court to terminate access to the Pirate Bay website despite the fact that the persons behind the website were domiciled in Sweden).
- 73 Cf. Kegel, Gerhard & Schurig, Klaus, *Internationales Privatrecht* 725 (9. Auflage, C.H. Bech’sche Verlagsbuchhandlung 2004).