

# The Celestial Jam Session: Creative Sharing Online Caught in Conflicts of Copyright Laws

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☞ Collaboration; Conflict of laws; Constitutional rights; Copyright; Freedom of expression; Intranets; Online infringement; Privacy

*Let us suppose an intranet within which collaborators creatively recast a copyright work across diverse countries without consent. In unpacking this hypothetical, this article analyses approaches to conflicts of copyright laws relative to cross-border infringement. However, in the case in question, such laws enter into tensions with collaborators' fundamental rights of privacy and freedom of expression. To defuse such tensions while accommodating public policies, a court may decline to enjoin the more or less privately networked copying and communication of a claimant's work. But the court may award damages or profit shares by applying copyright laws country by country to markets on which the infringement has an impact.*

The internet provides us with new tools for creation. Networking allows us to create works while sharing them online, even globally.<sup>1</sup> But multiple laws, including copyright laws, risk entering into conflicts across the borders that the internet and some intranets straddle. Any conflict of laws can raise problems for authors who, collaborating online, draw their emerging work from another author's prior work without due consent. We shall here ask: how may courts best resolve conflicts of laws in such cases specifically? As hard cases, they will help us better understand conflicts of copyright laws generally.<sup>2</sup>

## Introduction

Consider jam sessions as illustrative of creative sharing. Such sessions began to be held before the middle of the last century. Musicians improvised in small groups, usually after hours in jazz clubs. These musicians competed with each other, often in drawing ever-differing versions from already existing works, for example from popular tunes. They also shared their works in progress in allowing each other to vary their own riffs, so that, together in any one session, their improvisations tended to constitute team works: the jams themselves! Jam sessions led to creative breakthroughs in jazz: notably, they gave birth to bebop in the 1940s.<sup>3</sup>

An astute American commentator has used the metaphor of the "celestial jukebox" to evoke the exploitation of works online.<sup>4</sup> Let us adapt this metaphor for our own purposes by speaking of the "celestial jam session" to signify the creative sharing of works online. Soon after its origins, the jam session started to shift away from being a purely private affair: some customers lingered on after the closure of jazz clubs to take in after-hours jam sessions that became quasi-public performances for aficionados.<sup>5</sup> Just as it became hard to distinguish between the private and public spheres for jam sessions in clubs, it has become even harder yet to do so for creation online. For example, more and more individuals increasingly collaborate in writing software within networked communities and in riffing on multi-player online games.<sup>6</sup>

Suppose that a group of collaborators online starts improvising on some prior work. Imagine our collaborators recasting this work into a further work within a more or less closed electronic network, effectively an intranet, which crosses the borders of a number of countries. At this point in our argument, let us leave provisionally undecided to what extent this intranet may be characterised as private or public for purposes of legal analysis. Assume, too, that our collaborators obtain no licence from any holder of copyright in the prior work which they are reproducing and communicating among themselves.<sup>7</sup> Our collaborators could be sued for infringing copyright within their border-crossing intranet. This suit would arguably be governed by laws of diverse countries, giving rise to conflicts of laws. We shall specify this hypothetical case in greater detail, and try to resolve resulting conflicts, as we proceed.

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<sup>1</sup> See Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006), Chs 4–5 *passim*

<sup>2</sup> For a framework analysis, see Paul Edward Geller, "International Copyright: The Introduction", §3[1], <http://www.internationalcopyrightguide.com/> [Accessed May 26, 2015] and in Lionel Bently (ed.), *International Copyright Law and Practice* (New Providence: LexisNexis, 2015), INT-47 to INT-74

<sup>3</sup> See Scott DeVeaux, *The Birth of Bebop: A Social and Musical History* (Berkeley: University of California Press, 1997), Ch 5; André Hodier, *Le B-A-Be du Bop* (Pertuis: Rouge Profound, 2003), Chs 2–3

<sup>4</sup> Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, rev. edn (Palo Alto: Stanford University Press, 2003), Ch 7

<sup>5</sup> See DeVeaux, *The Birth of Bebop* (1997), pp 204–207 For issues that may arise from fully public jam sessions, see Michael J. Madison, Brett M. Frischmann and Katherine J. Strandburg, "Constructing Commons in the Cultural Environment" (2010) 95 *Cornell Law Review* 657, 663

<sup>6</sup> See Benkler, *The Wealth of Networks* (2006), Ch 3; Dan Hunter and F. Gregory Lastowka, "The Laws of the Virtual Worlds" (2004) 92 *California Law Review* 1

<sup>7</sup> For an analysis of laws applicable to licences concluded within creative communities online, see Axel Metzger, "Transnational Law for Transnational Communities: The Emergence of a Lex Mercatoria (or Lex Informatica) for International Creative Communities" (2012) 3 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 361

## Copyright aims and cases

The metaphor of the celestial jam session dramatises creative sharing in cyberspace, where the thresholds of the private and public spheres are often unclear. Accordingly, as we shall soon see, it becomes all the harder to defuse tensions between the aims of copyright laws, as well as threats to privacy or comparable rights. In addition, networked collaboration can quickly and easily cross multiple borders of nation-states and, thus moving among jurisdictions, trigger conflicts of laws. How should we then legally analyse creative sharing online if it is subject to conflicts of laws, particularly where copyright infringement is claimed?

### Tensions in copyright aims

Let us start with tensions that endemically vex the very aims of copyright laws. Anglo-American copyright laws of the 18th century were to promote “the Encouragement of Learning” or “the Progress of Science”.<sup>8</sup> At the end of that century, the legislative record for the Revolutionary French laws of authors’ rights spoke of “[t]he most sacred, the most legitimate, the most unassailable and ... the most personal of all properties”.<sup>9</sup> In these Preambles to classic copyright laws, we find diverse aims, including the enhancement of culture with “learning” or “science”, as distinct from the assurance of “the most personal of properties”. Tensions are inevitable if only because culture grows as older works feed newer ones, but property in principle entitles earlier authors to restrain later authors from deriving works from their own.<sup>10</sup>

More basically, tensions might trouble the normative aim of assuring creative and communicative autonomy. Authors have freedoms, not only to create as the fancy strikes them, but to communicate their works to readerships or audiences they choose.<sup>11</sup> However, just as it is a matter of protecting the freedoms of authors who have already completed works, it is as much a matter of assuring the freedoms of authors who are still in the throes of elaborating works. Indeed, past authors of works, on

the one hand, may at times find themselves at odds with current authors *at work*, on the other hand, insofar as the latter are recasting prior works into further works. Without addressing the ensuing tensions, copyright law could not coherently meet its diverse aims. Rather, it has to defuse such tensions well enough to allow the feedback of older into newer works.<sup>12</sup>

The legislative record for the Revolutionary French laws gives this twist to such tensions: “Perfection in art emerges out of competition, which prompts emulation and which develops talent.”<sup>13</sup> Such competition is all the more keen as authors are free to create works as they see fit, even on the basis of prior works and even in communicating these with each other. Consider the example of the studies in oil in which Van Gogh imitated, albeit in a radically novel style, the wood-block prints which Hiroshige had originally made.<sup>14</sup> Van Gogh had himself hoped to form an association with other artists: imagine him collaborating with a few colleagues and, together with them, experimentally reworking images from his collection of Japanese prints.<sup>15</sup> This fictive scenario illustrates issues raised by tensions between copyright aims: in particular, should the law entitle any earlier author to have such a small group of later authors stopped from sharing her work, or should the law rather leave the group free to draw other works from this prior work?<sup>16</sup>

In such hard cases, we often see criteria of “copying” apply ambiguously as prior works are remade into further works and courts equivocate with regard to the ensuing tensions.<sup>17</sup> Treaty-makers and legislators have scrambled pertinent issues in formulating the right of reproduction in altogether open-ended terms, only to delimit it with increasingly cumbersome exceptions.<sup>18</sup> Shift to notions of making public, that is, of *représentation*, to use the French term, which originally referred to performances on stage: rights cast in such terms have since accommodated media from broadcasting to the internet.<sup>19</sup> However capacious any emerging right of communication or making available to members of the public may be, it

<sup>8</sup> UK Statute of Anne (8 Anne, c 19, 1710) and US Constitution, art 1, §8, cl 8 (1789), in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450–1900)*, under United Kingdom and United States, <http://copy.law.cam.ac.uk/cam/index.php> [Accessed May 26, 2015]

<sup>9</sup> Isaac René Guy Le Chapelier, *Rapport sur la Pétition des Auteurs dramatiques dans la Séance du Jeudi 13 janvier 1791* (Paris: L’Imprimerie Nationale, 1791), p 16, in *Primary Sources on Copyright*, under France, <http://copy.law.cam.ac.uk/cam/index.php> [Accessed May 26, 2015]

<sup>10</sup> See Paul Edward Geller, “Beyond the Copyright Crisis: Principles for Change” (2008) 55 *Journal of the Copyright Society of the USA* 165, revised and illustrated in “Copyright Principles: An Ongoing Inquiry”, [http://www.criticalcopyright.com/copyright\\_principles.htm](http://www.criticalcopyright.com/copyright_principles.htm) [Accessed May 26, 2015]

<sup>11</sup> See Immanuel Kant, “Von der Unrechtmässigkeit des Büchermachdrucks” (1785) 5 *Berlinische Monatschrift* 403, in *Primary Sources on Copyright*, under Germany, [http://www.criticalcopyright.com/copyright\\_principles.htm](http://www.criticalcopyright.com/copyright_principles.htm) [Accessed May 26, 2015]; and translated as “On the Wrongfulness of unauthorized publication of Books”, in Mary J. Gregor (ed and trans), *Practical Philosophy* (Cambridge: Cambridge University Press, 1996), p 29

<sup>12</sup> Compare Julie E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (New Haven: Yale University Press, 2012), Ch 4 (setting out a complex model of such tensions and feedback), with Paul Edward Geller, “Delimiting Intellectual Property: Distinct Approaches to Spillovers” in Andrzej Matlak and Sybilla Stanisławska-Kloc (eds), *Spory o własność intelektualną: Księga jubileuszowa dedykowana Profesorom Januszowi Barcie i Ryszardowi Markiewiczowi* (Warsaw: Wolters Kluwer Polska, 2013), p 293 at pp 301–303 (sorting out conceptual and legal methods for defusing such tensions and enabling feedback)

<sup>13</sup> Le Chapelier, *Rapport* (1791), p 9, in *Primary Sources on Copyright*, <http://copy.law.cam.ac.uk/cam/index.php> [Accessed May 26, 2015] For commentary, see Bernard Edelman, *Le sacre de l’auteur* (Paris: Seuil, 2004), pp 367–378

<sup>14</sup> For examples of these works, see “Ando Hiroshige, Van Gogh”, <http://www.hiroshige.org.uk/hiroshige/influences/VanGogh.htm> [Accessed May 26, 2015]

<sup>15</sup> For his project of an artists’ association, see Vincent van Gogh, *The Letters*, edited by Leo Jansen, Hans Luijten and Nienke Bakker (Amsterdam and The Hague: Van Gogh Museum and Huygens Institute, 2009), nos 616, 679, 695, 716 and 761, <http://www.vangoghletters.org/> [Accessed May 26, 2015]

<sup>16</sup> For further analysis, see Paul Edward Geller, “Hiroshige vs Van Gogh: Resolving the Dilemma of Copyright Scope in Remediating Infringement” (1998) 46 *Journal of the Copyright Society of the USA* 39

<sup>17</sup> Compare Abraham Drassinower, “Copyright is Not About Copying” (2012) 125 *Harvard Law Review Forum* 108 (critique of the notion of the “copy” in legal theory), with Geller, “Hiroshige vs Van Gogh” (1998) 46 *Journal of the Copyright Society of the USA* 39, 46–53 (critique of vacillating approaches to colorably infringing “copies” in copyright practice)

<sup>18</sup> See, e.g., Berne Convention art 9 (Paris Act 1971) (“right of ... reproduction ... in any manner or form” subject to exceptions “in certain special cases”); Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 art 5 (sundry examples of exceptions)

<sup>19</sup> See Bernard Edelman, *Droits d’auteur, Droits voisins: Droit d’auteur et marché* (Paris: Dalloz, 1993), pp 76–80

applies neither to transactions with oneself, for example, to whistling a tune all alone, nor to presentations within intimate circles.<sup>20</sup> Copyright tensions risk becoming more acute as collaboration slips out of clearly private groups into teams that co-ordinate within larger and arguably quasi-public networks, to which entry becomes increasingly available to all comers.<sup>21</sup>

### Commentary and cases on point

Let us turn to classic commentary and recent cases on point. A classic French commentator would have said that a jam session, if held only among colleagues in “a private and intimate gathering”, might not have called for any copyright sanctions or relief.<sup>22</sup> In addition, he would explain that any “copy made for the purposes of study escapes liability for infringement” even if, though not strictly private, it did not have “any commercial purpose” or cause “any serious harm to the author”.<sup>23</sup> Accordingly, while this analysis was predicated on the notion of any one author’s property right in principle exercisable against the rest of the world, it left this notion of property hard to apply in a range of cases that now arguably extends to some online sharing.<sup>24</sup>

Parallel cases in France, both heard at the level of preliminary relief, have raised such issues. In both cases Raymond Queneau’s work *Cent Mille Millions de Poèmes* was at issue: he had written this poetic work in detachable pieces that others could recombine into possibly millions of other poems, and defendants posted this work online. In one of these cases, the court found infringement, rejecting not only the defence of brief quotation, since defendants approached the “reconstitution in its entirety of the work by bringing together ‘successive quotes’” on their webpages, but also that of private copying, because “access was given to these pages without restriction” on the internet.<sup>25</sup> In the other case, where a team of researchers made the work at issue available on an intranet, the court found an “absence of infringement” given the researchers’ attempt to maintain the confidentiality of their webpages by equipping their

intranet with a firewall. The court concluded that the researchers were entitled to share “strictly personal pages” that, within their local intranet, were “intended for private use”.<sup>26</sup>

We shall return to our hypothetical collaborators recasting a work which, let us stipulate, another author had already created and made public.<sup>27</sup> Imagine, in particular, that our collaborators share this work within an intranet stretching from France to Germany and even to the United States. What law or laws should a court apply to our hypothetical case, given its French connections, along with connecting factors across the Rhine and the Atlantic? Real conflicts of laws may prove unavoidable in our case, if only because the second *Queneau* decision just cited does not represent settled law in France, leaving some intranet uses there quite possibly infringing.<sup>28</sup> By contrast, across the Rhine, under German copyright law, authors may not generally stop others from deriving further works from their own works, except in specified cases, but may exercise their rights against the exploitation of works derived from theirs.<sup>29</sup> Furthermore, to avoid constraining constitutionally protected artistic freedom, the German limitation of free utilisation and exception of quotation have both been construed to allow disseminating significantly transformed works.<sup>30</sup> Across the Atlantic, the US Copyright Act codifies the limitation of fair use in broadly equitable terms, allowing courts to excuse such uses.<sup>31</sup>

### Caught in conflicts of laws

We here enter a new theatre of conflicts of laws: the internet, down to some border-crossing intranets. We have ventured a hypothetical case of creative sharing within such a far-flung intranet. In our case, not only might thresholds between private and public spheres be blurred, but multiple national borders crossed. Here a court may have to cope not only with conflicts of laws in the field of copyright, but also with constitutional, equitable and related considerations arising in different

<sup>20</sup> See, e.g., France: Code de la propriété intellectuelle art. L. 122-5 (“Once a work has been disclosed, the author may not prohibit: (1) Private and gratuitous presentations [représentations] carried out exclusively in the family circle ...”)

<sup>21</sup> Such slippage can arise in collaboration online, as it can in quite different, but often-exempted, cases. See, e.g., *Società Consortile Fonografici (SCF) v Marco del Corso* (C-135/10) EU:C:2012:140, [2012] E C D R 16 (playing background music in offices); *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [2012] SCC 37 (Canada Supreme Court) at [27]–[29] (providing copies to students for study)

<sup>22</sup> Eugène Pouillet, *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation*, 3rd edn (Paris: Marchal et Billard, 1908), pp 785–786

<sup>23</sup> Pouillet, *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation* (1908), pp 601–602

<sup>24</sup> See, generally, Ysolde Gendreau, “À la recherche d’une propriété perdue” [2005] *Cahiers de Propriété Intellectuelle* 551, 575 (considering the notion of property only as “suggestive short-hand”)

<sup>25</sup> *Jean-Marie Queneau v Christian Leroy et l’Université Paris VIII*, Tribunal de grande instance, Paris, réf. du 5 mai 1997, [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=108](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=108) [Accessed May 26, 2015]

<sup>26</sup> *Jean-Marie Queneau v Jérôme Boue et le laboratoire d’automatique et d’analyse des systèmes du CNRS (LAAS)*, Tribunal de grande instance, Paris, réf. du 10 juin 1997, [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=107](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=107) [Accessed May 26, 2015], and translated in [2000] E C D R 343

<sup>27</sup> See text accompanying fn 7. Our supposition of a work already made public avoids issues that its author’s moral or privacy right to control disclosure could raise. See text accompanying fn 63. Suppose, too, that our team had licitly bought its original copy of the work at issue within the EU, even online. See *UsedSoft GmbH v Oracle International Corp* (C-128/11) EU:C:2012:407; [2012] E C D R 19 at [59]

<sup>28</sup> *Queneau v Boue*, Tribunal de grande instance, Paris, réf. du 10 juin 1997, [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=107](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=107) [Accessed May 26, 2015], and translated in [2000] E C D R 343. For the French judicial characterisation of the private versus public status of an intranet, see Stéphane Miannay and Jean-François Casile, “Nouvelles technologies de l’information et de la communication et anciens instruments de régulation: l’exemple d’Internet en France” (1999) 18 *Politique et Sociétés* 61, 76–80

<sup>29</sup> *Gesetz über Urheberrecht und verwandte Schutzrechte* §23. For analysis, see Adolf Dietz, “Germany”, §8[1][b][i], in *International Copyright Law and Practice* (2015), GER-106 to GER-107

<sup>30</sup> See, respectively, the *Asterix Persiflagen* and *Alcolix* decisions, BGH (Federal Court of Justice), March 11, 1993 [1994] G R U R 191 and 206, translated in (1994) 25 I I C 605 and 610; and the *Germania 3* decision, BVerfG (Constitutional Court), June 29, 2000 [2001] G R U R 149

<sup>31</sup> 17 USC §107 (2010). See, generally, Pamela Samuelson, “Unbundling Fair Uses” (2007) 77 *Fordham Law Review* 2537 (explaining the interests that this limitation is to accommodate)

legal systems. We shall sort out approaches to resolving simple conflicts between copyright laws before broaching more complex interactions among these and other laws.

### *Approaches to choice of law*

French commentators have aptly said of the classic European doctrine of conflicts of laws: “Into this French garden, certain American authors have intruded, driving bulldozers.”<sup>32</sup> To simplify much doctrinal history by elaborating this metaphor, we might say that this old European garden had been laid out according to stable rules, marked with fixed connecting factors and intended to survive the twists and turns of the cases. Certain US commentators, however, disturbed the old order in stressing that courts may favour local policies over any foreign policies in choosing between laws applicable to a case.<sup>33</sup> Across this old garden, now ploughed under, helter-skelter, we propose to trace a path to more coherent decisions by looking to policies, not locally, but globally.<sup>34</sup>

There is a spectrum of approaches to the choice of law in the field of copyright. These approaches may be distinguished by the degree of discretion that each would allow courts to exercise in resolving conflicts of copyright laws. At one end of the spectrum, a default rule, held to follow from the Berne-based treaty regime, has courts apply the law of each protecting country to infringement localised in that country.<sup>35</sup> In the middle of the spectrum, a so-called cascade rule leads courts to choose one law among many, for which distinct connecting factors are listed for each type of claim in some order of preference that, depending on the facts of a case, could change results, albeit somewhat predictably.<sup>36</sup> At the other end of the spectrum, the most discretionary approach would have courts apply the law of the country, or the laws of a few countries, with which the infringement in question would have some optimally close connection, as assessed with an eye to some volatile mix of connecting factors such as the *situs* of parties, of activities, of harm, etc.<sup>37</sup>

As a court moves toward this extremity of the spectrum, it could find itself with an increasingly embarrassing wealth of choices among arguably applicable laws.<sup>38</sup>

To complicate matters still more, laws other than copyright laws may well be implicated in creation online. In our hypothetical case, an author could sue on copyright in her work recast by others collaborating in a more or less closed intranet. In turn, these collaborators could invoke their privacy rights to be left alone within their intranet, as well as their freedom of self-expression. To start, relative to plaintiff’s copyright in any such case, we need to acknowledge the rather different doctrinal status of defendants’ claims to privacy and to freedom of expression: these are often grouped under the rubric of personality rights.<sup>39</sup> Further, the distinction between the private and public spheres might work out differently depending on a claimant’s perspective: private individuals forming nodes of a network may, under certain conditions, constitute members of the public for a copyright claimant, while these members may themselves assert their own privacy rights in other regards. Finally, let us recall the approaches which we just outlined to the choice of law in the field of copyright: the logic of these approaches is not necessarily the same as that which may reign in the field of personality rights. According to the default rule, copyright laws apply respectively country by country where infringement is localised, though other approaches could usurp this connecting factor with other factors.<sup>40</sup> For personality rights, applicable law, along with jurisdiction, gravitates toward the country of the person harmed, with other approaches pulling choice of law one way or the other.<sup>41</sup>

### *Resolving conflicts in our case*

To decide hard cases like our hypothetical case, it may prove necessary to subject choice-of-law analysis to policy considerations. However, any exception such as *ordre public*, based purely on local policy, would only obfuscate issues in our case insofar as it led to applying only *lex fori*.<sup>42</sup> It remains to be seen whether

<sup>32</sup> Yvon Loussouam and Pierre Bourel, *Droit international privé*, 3rd edn (Paris: Dalloz, 1988), p 195

<sup>33</sup> See Brainerd Currie, “Notes on Methods and Objectives in the Conflict of Laws” [1959] *Duke Law Journal* 171, reprinted in *Selected Essays on the Conflict of Laws* (Durham, NC: Duke University Press, 1963), p 177

<sup>34</sup> For our prior analysis, see Paul Edward Geller, “International Intellectual Property, Conflicts of Laws, and Internet Remedies” [2000] *E I P R* 125, updated in (2005) 10 *Journal of Intellectual Property Rights (NISCAIR)* 133

<sup>35</sup> See, e.g., *Aufeminin.com v Google France*, Cass (Supreme Court), 1st civ ch (France), July 12, 2012, nos 11-15 165 and 11-15 188 (confirming, pursuant to Berne art 5 2, the application of the law effective in the country where a work is made accessible and received)

<sup>36</sup> See, e.g., François Dessemontet, “Internet, le droit d’auteur et le droit international privé” (1996) 92 *Revue Suisse de Jurisprudence* 285, 291–292 (proposing, on the model of art 139 of the Swiss Federal Law on Private International Law (LDIP), this type of rule to govern how courts resolve conflicts of laws applicable to the infringement of copyright online)

<sup>37</sup> See Max-Planck Group for Conflict of Laws in Intellectual Property (CLIP), *Principles on Conflict of Laws in Intellectual Property* (December 1, 2011), art 3:603(2), [http://www.cl-ip.eu/\\_www/files/pdf2/Final\\_Text\\_1\\_December\\_2011.pdf](http://www.cl-ip.eu/_www/files/pdf2/Final_Text_1_December_2011.pdf) [Accessed May 26, 2015]; American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* (2007), §321(1)

<sup>38</sup> See, e.g., Paul Edward Geller, “Rethinking the Berne-Plus Framework: From Conflicts of Laws to Copyright Reform” [2009] *E I P R* 391, 392 (characterising the most discretionary approach here as “choice-of-law roulette”, given its chances of generating untoward results) Many courts, given discretion to choose between conflicting laws, would be tempted to apply only home law to the case at bar, prompting forum-shopping For the comparable effect of relying on local *ordre public*, see fn 42

<sup>39</sup> See Samuel D Warren and Louis D Brandeis, “The Right to Privacy” (1890) 4 *Harvard Law Review* 193; François Rigaux, “La liberté de la vie privée” [1991] *Revue Internationale de Droit Comparé* 539

<sup>40</sup> See text accompanying fn 35–38

<sup>41</sup> See, e.g., Switzerland, Loi fédérale sur le droit international privé du 18 décembre 1987 (LDIP) art 139 1(a) (applying, at the victim’s choice, the law of the country of his or her residence, insofar as the tortfeasor could foresee harm there); *eDate Advertising GmbH v X and Martinez v MGN Ltd* (C-509/09 and C-161/10) EU:C:2011:685; [2012] *E M L R* 12 at [48] (contemplating jurisdiction, inter alia, in the country of a victim’s “centre of interests”)

<sup>42</sup> If the application of *lex fori* were not favourable to the claimant considering suit in one jurisdiction, this party could shop for a more favourable law in another forum See Mathias Forteau, “L’ordre public ‘transnational’ ou ‘réellement international’ — L’ordre public international face à l’enchevêtrement croissant du droit international privé et du droit international public” (2011) 1 *Journal du Droit International (Clunet)* 3, 32

considerations of *ordre public international*, that is, of internationally compelling public policy, such as may be drawn from sources like treaties, among others, could furnish us with clues to globally more adequate solutions.<sup>43</sup> In the United States, a prior generation of commentators had already made progress toward such solutions in stressing the “international system” which, in the absence of any statutory provision, courts should above all respect in assessing any “significant relationship” as key to the choice of law.<sup>44</sup>

In the field of copyright, the pertinent “international system” is the treaty regime of which the Berne Convention forms the key instrument. By contrast, in the field of personality rights, no such internationally binding system provides any framework for resolving conflicts of laws.<sup>45</sup> In the European Union, the Rome II Regulation excludes from its own scope such conflicts of laws as apply to claims of “privacy and rights relating to personality, including defamation”.<sup>46</sup> Thus, in this regulation, even the exceptional clause concerning torts need not come into play to apply the law of the country with which, as appears “from all the circumstances of the case”, any violation of a pertinent personality right “is manifestly more closely connected” than with the country where harm might or does occur.<sup>47</sup> Indeed, any such a discretionary choice-of-law approach would only invite courts to measure the proximity of any tortious conduct with a given country by the risky calculus of some “mechanical counting of physical contacts”.<sup>48</sup> To issues of copyright infringement, a special Rome II provision for intellectual property compels applying “the law of the country for which protection is claimed”, as the Berne-based treaty regime seems to mandate.<sup>49</sup>

What to do in cases like our hypothetical case? The Berne-based default rule most often governs which copyright laws apply in cross-border cases, while no such treaty regime constrains the choice of law for personality rights.<sup>50</sup> In hard cases like ours, it is submitted, the analysis of policies motivating the *ordre public international*, to wit, the overall “international system”, should guide courts as they bring many applicable laws, albeit different in type, to bear on any specific result. Such a globally oriented policy analysis could in

particular help courts accord and then tailor remedies in order to achieve the “reasonable accommodation of the laws’ conflicting purposes” in most concerned countries.<sup>51</sup> Elsewhere we have amply illustrated how, in following the default choice-of-law rule for copyright in the light of global policy analysis, courts may focus relief on copyright infringement in many countries at once.<sup>52</sup> Such analysis seems indispensable to the technique recently proposed for courts to avoid “inconsistent results”, namely by taking account of “differences” among applicable laws “in fashioning the remedy”.<sup>53</sup>

Let us quickly survey rulings of the EU Court of Justice to set the stage for resolving conflicts of laws in our hypothetical case. It may be asked whether this court is moving toward the default rule of applying the copyright or related law of each country where access or reception, threatening or causing harm, can be localised. The court has contemplated applying the law “at least” of the country in which the local audience had been intentionally targeted online by unauthorised transmissions of protected data from another country.<sup>54</sup> Furthermore, the court later held that the “public targeted by” posting a work on a website effectively “consisted of all potential visitors to the site”, albeit “subject to any restrictive measures” limiting “free access” to any work at issue.<sup>55</sup> In our hypothetical intranet, with access technologically left open only to a limited group spread across specific territories, an EU court could apply the laws of the corresponding countries.<sup>56</sup>

## Remedial solutions

How then to adjudicate our hypothetical case? Here a team recasts another author’s previously disclosed work. The team does so in an intranet which extends from France into Germany and to the United States. Suppose that the author of the prior work sues all the members of this team for sharing her work within the intranet and across these borders. This plaintiff petitions a court for an injunction to stop the defendants’ reproduction and communication and asks for a monetary award to be levied against them. What law or laws should a court

<sup>43</sup> See Forteau, “L’ordre public ‘transnational’ ou ‘réellement international’” (2011) 1 *Journal du Droit International (Clunet)* 3, 14–20

<sup>44</sup> American Law Institute, *Restatement (Second) of Conflict of Laws* (1971), §6(2)(a)

<sup>45</sup> But see, e.g., the European Convention on Human Rights (1950) arts 8–10 (in appropriate cases in Europe, a source of law for arguments such as advanced below)

<sup>46</sup> Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40 art 1 2(g)

<sup>47</sup> Regulation 864/2007 art 4 3

<sup>48</sup> Symeon C. Symeonides, “Rome II and Tort Conflicts: A Missed Opportunity” (2008) 56 *American Journal of Comparative Law* 173, 198 (favouring inquiry into some “close” connection as a function of “overarching principles that permeate the rules”)

<sup>49</sup> Rome II Regulation art 8 1 The default tort rule of this regulation, set out in art 4 1, leads to the same result as long as the protecting country under art 8 1 is that where harm might or does occur. But see Edouard Treppoz, “La lex loci protectionis et l’article 8 du règlement Rome II” [2009] *Recueil Dalloz* 1643 (questioning to what extent Rome II and Berne provisions, in so many words, converge toward any such result)

<sup>50</sup> See text accompanying fnn 32–46 passim

<sup>51</sup> David Cavers, *The Choice-of-Law Process* (Ann Arbor: University of Michigan, 1965), p 64

<sup>52</sup> See Paul Edward Geller, “Conflicts of Laws in Copyright Cases: Infringement and Ownership Issues” (2004) 51 *Journal of the Copyright Society of the USA* 315, 337–355; Geller, “International Copyright: The Introduction”, §3[1][b][i]–[iii], <http://www.internationalcopyrightguide.com/> [Accessed May 26, 2015] and in *International Copyright Law and Practice* (2015), at INT-61 to INT-74

<sup>53</sup> CLIP, *Principles*, art 3 603(3)

<sup>54</sup> *Football Dataco Ltd v Sportradar GmbH* (C-173/11) EU:C:2012:642; [2013] 1 C M L R 29 at [47]

<sup>55</sup> *Svensson v Retriever Sverige AB* (C-466/12) EU:C:2014:76; [2014] E C D R 9 at [26]. See also *Pinckney v KDG Mediatech* (C-170/12) EU:C:2013:635; [2013] E C D R 15 at [39]–[42] (considering choice of law while deciding jurisdiction over cross-border infringement online, but not calling for “the activity concerned to be “directed to” the Member State in which the court seised is situated”), followed in *Pez Hejduk v EnergieAgentur.NRW GmbH* (C-441/13) EU:C:2015:28; [2015] E C D R 10

<sup>56</sup> For an analysis of technologically imposed territorial restrictions, see Marketa Trimble, “The Future of Cybertravel: Legal Implications of the Evasion of Geolocation” (2012) 22 *Fordham IP, Media & Entertainment Law Journal* 567

apply in deciding whether, and how, to grant such remedies? We shall differentiate analysis for injunctions, on the one hand, and for awards, on the other.

### *Enjoin or not across borders?*

For the sake of argument, assume that a court of an EU Member State takes jurisdiction over our case at least provisionally and that the plaintiff applies for an order to stop the defendants' online sharing at once.<sup>57</sup> The Berne-based default rule would have the court apply the copyright law in effect in each protecting country but, as we shall see, without automatically compelling the same injunctive relief across all such countries as may be found in our case. Rather differently, the most discretionary of choice-of-law approaches would lead the court to inquire into the law of a country, or the laws of a few countries, with which the cross-border infringement in question would have some optimally close connection. However, this alternative approach could find any such "close" connection uncertain in a case like ours, in which any *situs* of parties or acts pertinent to cross-border infringement could be a moving target within a distributed and interactive network.<sup>58</sup> In considering injunctions in hard cases, whether courts admit it or not, they tend to be influenced by public policies that they would better weigh both expressly and globally.<sup>59</sup>

In our hypothetical case, as we shall here argue, such a globally oriented policy analysis could justify declining to enjoin creative sharing online. Other hard cases, albeit free of conflicts of laws, suggest this model for defusing copyright tensions endemic in creative reworking.<sup>60</sup> Recall the laws in Germany and in the United States where some defendants, within our intranet, are recasting a plaintiff's work in which copyright is claimed. German law does not normally impose liability for deriving further from prior works, and some of its exemptions have been liberally construed to allow disseminating significantly transformed works, while US law may well excuse such dissemination as fair use.<sup>61</sup> Suppose that a French court, hearing the plaintiff's petition for a preliminary injunction and considering defences that German and US laws respectively provide, declined to prohibit creative sharing

in Germany and the United States, while it remained undecided whether or not to apply French law to stop such sharing online within France. To this French court, sitting in the jurisdiction which has traditionally styled itself as the "*mère des arts ... et des lois*", the mother of the arts and laws, would the prospect of such an injunction recall Solomon's proposal to cut a disputed baby in two? If the court barred defendants from making the plaintiff's work available only within France, it would preclude any French contribution to any brainchild that our networked cross-border project was to deliver. Such an injunction would effectively splinter online collaboration into pieces, impairing creative exchanges that internationally compelling policies, now emerging, would foster.<sup>62</sup>

Hence, in our intranet case, we propose the solution of refusing or hedging any injunction, but allowing the plaintiff to claim some monetary award. To delimit what is at stake in our case, consider the even harder cases in which a private party seeks to have the disclosure of personal information stopped, while the mass media seek to make such information public.<sup>63</sup> Tensions are less acute in our intranet case than in the mass-media cases: in our case, suit is brought for the more or less private sharing, via an intranet, of a work already made public; in the harder cases, private parties sue mass media for disseminating otherwise undisclosed personal matters to the public at large. Furthermore, tensions are more easily defused in our case: even if the court did not stop defendants from reproducing and communicating the plaintiff's work in their intranet, it need not leave the plaintiff without any effective recourse in the action. Monetary relief could still be sought against the defendants for their more or less private sharing of this work, while their release of any resulting derivative work to the public at large would remain an open issue.<sup>64</sup> By parity of reasoning, if a network were not tightly closed, but open to participants at large on loose conditions, a court could consider injunctive relief, especially if any eventual monetary award would be hard to enforce. In any event, in our case, the court may well require

<sup>57</sup> Focusing on choice of law, we blithely skip over multiple issues of jurisdiction in any EU Member State, starting with that of enjoining diversely located defendants. See, e.g., *Solvay SA v Honeywell Fluorine Products Europe BV* (C-616/10) EU:C:2012:445 (considering a provisional injunction against companies in different EU Member States, as sought in an action brought in one such state). A different analysis could apply to the jurisdiction of an EU court over US defendants and infringement. See, e.g., *Lucasfilm v Ainsworth* [2011] UKSC 39; [2012] 1 A C 208 (regarding US infringement).

<sup>58</sup> To localise some putative "closely connected" online infringement, a court could inquire into network hubs that effectuate the greatest number of illicit communications, but these need not be territorially or otherwise fixed points in a distributed and interactive network. See Albert-Laszlo Barabasi, *Linked: How Everything Is Connected to Everything Else and What It Means* (New York: Plume, 2002), Ch 5.

<sup>59</sup> See text accompanying fnn 42–44 and 50–53. For the locally biased origins of this analysis, which we here propose to globalise, see Currie, "Notes on Methods and Objectives in the Conflict of Laws" [1959] *Duke Law Journal* 171.

<sup>60</sup> See, e.g., the *Germania 3* decision, BVerfG (Constitutional Court), June 29, 2000 [2001] G R U R 149 (dissolving an injunction prohibiting publication, in order to allow for constitutionally guaranteed artistic freedom, but without precluding any monetary award, where one author included long extracts of another's works in a play without consent); *Abend v MCA, Inc* 863 F.2d 1465, 1479 (9th Cir. 1988) (US), affirmed, 495 U.S. 207, 236 (1990) (refusing to enjoin the showing of a classic popular film, but allowing some monetary award for the exploitation of a protected story adapted into the film).

<sup>61</sup> See text accompanying fnn 29–31.

<sup>62</sup> Compare Laurence R. Helfer, "Toward a Human Rights Framework for Intellectual Property" (2007) 40 *UC Davis Law Review* 971, 1006–1007 and 1011–1012 (treaty policies of "the free exchange and circulation of ... cultural expressions" and of "decentralized, open source collaboration models"), and Jerome H. Reichman and Ruth L. Okediji, "When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale" (2012) 96 *Minnesota Law Review* 1362, 1479 (policy of enabling "digitally integrated, field-specific [research] communities that span the world").

<sup>63</sup> See, e.g., *Von Hannover v Germany (No.2)* (40660/08 and 60641/08) (2012) 55 E.H.R.R. 15; [2012] E.M.L.R. 16 (weighing interests in restraining the use of photographs made in more or less private settings against those in freedom of publication).

<sup>64</sup> For proposed parameters of injunctive relief to stop the release of a creative derivative work to the public at large, see Geller, "Hiroshige vs. Van Gogh" (1998) 46 *Journal of the Copyright Society of the USA* 39, 59–63; Paul Edward Geller, "A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?" (2010) 57 *Journal of the Copyright Society of the USA* 553, 568–570.

defendants to show both that their intranet is equipped with an adequate firewall and that they are indeed creatively recasting the plaintiff's work.<sup>65</sup>

Proportionality criteria would support the solution just outlined. Such criteria are meant to subject legal measures to overriding laws, notably to laws of human rights.<sup>66</sup> In our hypothetical case, intranet participants could invoke such overriding laws to challenge any injunction of their creative sharing as disproportionately interfering with their interests in privacy and in self-expression. Decisions construing EU copyright directives have illustrated proportionality criteria by calling for limiting injunctive relief to avoid impairing European rights and freedoms.<sup>67</sup> Any impairment with which the refusal of an injunction could threaten the claimant's copyright interests would be more or less balanced out by allowing monetary relief. Any refusal to enjoin creative sharing online, based on European law, need not effectively conflict with US law excusing transformative use as fair use.<sup>68</sup>

### *Award money by territories?*

Let us turn to monetary awards. Damages can typically result from the loss of markets due to the infringement of copyright in a work or from the prejudicial reception of that work due to distorting it or to failing to attribute authorship. Profit shares can be claimed, for example, to the extent that a work derived from a protected work, albeit without authorisation, is marketed with success attributable to the creative materials taken from that prior work. Such markets and reception, and accordingly any eventual damages or profits, are spread across geographical space, where flesh-and-blood readers, auditors or viewers can access and enjoy the work. This space is territorially divided up into nation-states whose diverse copyright laws, absent any eventual transterritorial dispensation, remain in effect.<sup>69</sup>

A French decision is instructive here. In a case of cross-border infringement, the court assessed a monetary award for the markets of Sweden, of the Netherlands and of the United Kingdom in applying the laws of each of

these countries respectively.<sup>70</sup> The total amount of any such award at stake in our hypothetical case, however, risks being negligible as long as the intranet being used, while walled off from the public at large, includes only a small number of collaborators. In that event, if no injunction were granted and if the paucity of any eventual award discouraged further proceedings, the solution proposed here would correspond de facto to the second *Queneau* preliminary decision: effectively, no relief for the entire cross-border use in our case.<sup>71</sup> But monetary liability could increase in a case where infringement became broader in scope, for example, within a quasi-public intranet where an online game was being played, and even creatively varied, by numerous participants across borders.<sup>72</sup> In any event, in applying the laws territorially applicable to the case at bar to assess any monetary award, a court would have to confirm that protection was de jure available country by country.<sup>73</sup>

By thus looking to the overall readership or audience accessing the work at issue wherever it is protected, a court may finesse some problems that plague the private/public distinction online. Some tensions with personality rights may still remain unresolved, as seen in a case brought before the European Court of Human Rights, in which monetary sanctions and awards accorded in an action for copyright infringement were challenged as contrary to the "freedom of expression" which the European Convention on Human Rights recognises.<sup>74</sup> The French state argued that such an infringement action could not interfere with the defendants' expressive activities as long as the action were limited to "obtaining compensation for the impairments" to the plaintiffs' interests in any work at issue.<sup>75</sup> Apparently rejecting this argument, while accepting the trial court's assessment of such compensation in this case, the European Court of Human Rights contemplated the possibility that a monetary sanction or award could threaten human rights once it exceeded a disproportionate level.<sup>76</sup>

<sup>65</sup> This double-pronged burden of proof would preclude invoking the solution proposed here to oppose the prohibition of widespread duplicative file-sharing online. See, e.g., *Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v Sweden* (40397/12) February 19, 2013 ECtHR (rejecting a claim based on human rights to this end)

<sup>66</sup> Compare Orit Fischman Afori, "Proportionality — A New Mega Standard in European Copyright Law" (2014) 45 I I C 889 (favourably reviewing copyright case law on point), with Francisco J Urbina, "A Critique of Proportionality" (2012) 57 *American Journal of Jurisprudence* 49 (sceptically reviewing commentary on point)

<sup>67</sup> See, e.g., *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (C-70/10) EU:C:2011:771; [2012] E C D R 4 at [46]–[54] (precluding any open-ended order to filter an internet-service provider's transmissions, inter alia, if it could disproportionately impair the service provider's freedom to do business and its customers' privacy rights and freedom of information) But see Henning Grosse Ruse-Khan, "Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights" in Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar, 2015), pp 70–88 passim (comparing, in European case law, methods of balancing and harmonious construction with proportionality analysis)

<sup>68</sup> See, e.g., *SunTrust Bank v Houghton Mifflin Co* 268 F 3d 1257 (11th Cir 2001) (US) (vacating a preliminary injunction against a parody of *Gone With the Wind*)

<sup>69</sup> For further analysis, see Alexander Peukert, "Territoriality and Extraterritoriality in Intellectual Property Law" in Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Leiden: Nijhoff Publishers, 2012), p 189

<sup>70</sup> *SISRO v Sté Ampersand Software*, Cour d'appel, Paris, 4th ch., February 8, 2002, Expertises, no 259, June 2002, p 230

<sup>71</sup> *Queneau v Boue* Tribunal de grande instance, Paris, réf. du 10 juin 1997, [http://www.legalis.net/spip.php?page=jurisprudence-decision&id\\_article=107](http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=107) [Accessed May 26, 2015] What if any potential monetary award were de minimis for any specific country of reception, but not for the aggregate of protecting countries? See CLIP, *Principles*, art 3:602 While it may in some cases be permissible to discount some negligible impacts country by country in tailoring injunctive orders, a court risks ignoring network realities if it fails to count how such impacts add up for any overall monetary award

<sup>72</sup> For analysis of such large-scale interactive games, see Hunter and Lastowka, "The Laws of the Virtual Worlds" (2004) 92 *California Law Review* 1, 4–29 Of course, game rules, purportedly governing players' legal relations, could not supersede a non-player's claims for infringement

<sup>73</sup> For example, the trial court would have to determine, country by country, whether available rights restricted the acts committed, whether terms of rights had lapsed in the work at issue, whether exceptions applied to excuse liability, etc For further analysis, see Paul Edward Geller, "How to Practice Copyright Law Internationally in Perplexing Times?" (2013) 60 *Journal of the Copyright Society of the USA* 167, 185–196; Geller, "International Copyright: The Introduction", §3[2] to §5[4], <http://www.internationalcopyrightguide.com/> [Accessed May 26, 2015] and in *International Copyright Law and Practice* (2015), INT-74 to INT-208 passim

<sup>74</sup> *Ashby Donald v France* (36769/08) January 10, 2013 ECtHR at [26]–[29]

<sup>75</sup> *Ashby Donald v France* January 10, 2013 ECtHR at [30]

<sup>76</sup> *Ashby Donald v France* January 10, 2013 ECtHR at [34]–[44] passim

Remedial procedures, subject to *lex fori*, need not follow the choice of substantive laws.<sup>77</sup> Anomalies need not arise at the level of monetary liability to the extent that, from jurisdiction to jurisdiction, procedures for assessing monetary awards do not generate greatly varying results in similar cases. However, the United States allows statutory damages under its copyright law and jury findings in most civil cases, so that an American-style award could reach an exceptionally high level.<sup>78</sup> In principle, US copyright law would apply only to infringement localised in the United States, but a US court could have a jury assess an award for infringement subject to any law, domestic or foreign. In any event, a US award could prove unenforceable in a European defendant's home jurisdiction if it were there found to be disproportionate.<sup>79</sup>

## Conclusion

How, above the cacophony of laws, to let the celestial jam session resound? To this end, we have outlined an approach to defusing tensions between the aims of copyright laws, as well as to resolving conflicts among these and other laws.<sup>80</sup> As illustrated in our hypothetical case here, an author *of* a work already created risks finding her interests pitted against those of authors *at* work in creatively sharing her work. Courts then have to take account of authors' interests in relief for infringement, on the one hand, and of authors' interests in non-interference in their creative activities, on the other. It is submitted that these interests would be best accommodated, and conflicts of laws best resolved, by allowing monetary claims but by resisting calls to enjoin creative sharing.<sup>81</sup>

<sup>77</sup> See, generally, Olusoji Elias, *Judicial Remedies in the Conflict of Laws* (Oxford: Hart Publishing, 2001), Chs 1–6 passim (analysing gaps at the interface between remedies and choice-of-law rules)

<sup>78</sup> See, e.g., Markéta Trimble Landová, "Punitive Damages in Copyright Infringement Actions under the US Copyright Act" [2009] E I P R 108 (analysing how US awards may be punitive)

<sup>79</sup> See, e.g., *Schlenzka & Langhorne v Fountaine Pajot SA*, Cass (Supreme Court), 1st civ ch (France), December 1, 2010, no 09-13303, Bull civ 2010 I, no 248 (allowing the refusal to enforce a US punitive award found to be disproportionate)

<sup>80</sup> See text accompanying fnn 8–56

<sup>81</sup> See text accompanying fnn 57–79