Extraterritoriality and Multiterritorality in Copyright Infringement

Jane C. Ginsburg

Columbia Law School, jane.ginsburg@law.columbia.edu

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Extraterritorial application of U.S. law, as Professor Curtis Bradley demonstrates, is highly suspect, if not illegitimate, unless clearly authorized by Congress. The apparently "extraterritorial" character of much recent copyright litigation has led some U.S. courts to dismiss for lack of subject matter jurisdiction or on grounds of forum non conveniens when the cases present offshore points of attachment. As copyright commerce becomes increasingly inter-
national, some of these dismissals may be unwarranted. They also may be incorrect in their refusal to apply U.S. law or retain U.S. jurisdiction over the parties: the decisions may be too quick to perceive "extra"-territoriality in claims that in fact allege multiter- ritorial infringements. "Multi"-territorial copyright claims involve acts or parties located in more than one country, but do not necessarily require application of a single law—the forum's—to resolve the entire claim. This Comment will attempt to distinguish mul- titerritorial claims from classic extraterritorial claims.

A claim is not "extraterritorial" simply because it involves for- eign acts or parties. Extraterritoriality, in the negative sense the term has acquired, means the application of one country's laws to events occurring outside that country's borders. Coverage of acts that commence or take place in part within the borders of the country whose law is applied, however, is not "extraterritorial" in this sense. (Were it otherwise, no transnational tort claim could be adjudicated because the origin and impact of the harm would be in different countries.) Unauthorized acts of reproduction, public performance/display, or distribution of copyrighted works may occur in many countries at once, but a multiterritorial claim may be justiciable in U.S. courts, even if its resolution in whole or in part requires application of foreign copyright laws. As Professor Brad- ley emphasizes, U.S. courts should be more willing to apply foreign law.3

In this Comment, I identify a variety of copyright problems which, despite their international character, do not involve "extra- territorial" assertions of U.S. law. I further inquire when, given a genuinely "multiterritorial" claim, a U.S. court should retain jurisdic- tion over the entirety of the claim, and what law(s) it should apply.

934 F. Supp. 119, 125 (S.D.N.Y. 1996) (dismissing infringement claim on forum non conveniens grounds because claims arose under foreign copyright laws); Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 942 F. Supp. 1265, 1269 (C.D. Cal. 1996) (holding that defendant is not liable for damages "arising extraterritorially").

3. Bradley, supra note 1, at 577-78.
I. Extra? Territoriality

A. A Sample Scenario

Consider the following recent trademark infringement case.\(^4\) Does it pose a problem of extraterritoriality?

An Italian publisher, Tattilo Editrice, purveys *Playmen* magazine, a publication similar in appearance and content to *Playboy* magazine. Indeed, several years ago, *Playboy* obtained an injunction against the U.S. distribution of *Playmen*.\(^5\) *Playboy* was unsuccessful in its suit against *Playmen* in Italy, although it did obtain relief against Tattilo in other European countries.\(^6\) Recently, Tattilo opened a *Playmen* website, offering "*Playmen Lite*" images to all who accessed Tattilo’s homepage (located on its server in Italy), and "*Playmen Pro*" images to those who, in addition, faxed a credit card number to Tattilo in Italy. *Playmen* online is written in English, and Tattilo’s homepage was accessible in the United States. *Playboy* initiated a contempt action in the Southern District of New York, asserting that the online version of *Playmen* violated that court’s order prohibiting U.S. distribution of the magazine.\(^7\)

Assume that this had been a copyright infringement case rather than a trademark infringement case and that it had not arisen as a contempt proceeding. Would *Playboy*’s claim against Tattilo have demanded that the court resolve an "extraterritorial" copyright conflict? If the dissemination of "*Playmen Lite*" and "*Playmen Pro*" had been through "analog" media—the mailing of hard copies of the images into the United States—there would be no doubt that infringing acts such as unauthorized distribution were committed in, or directed toward, the United States. The Copyright Act’s section 602 importation right affords a useful parallel.\(^8\) Although some consider this provision to express Congress’ intent to apply

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4. The illustration is based on *Playboy Enter., Inc. v. Chuckleberry Publ’g, Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996) [hereinafter *Playboy III*].
6. See *Playboy I*, 486 F. Supp. at 423 (noting that Playboy “succeeded in preventing dilution of the mark by Playmen everywhere but in Italy, where a standard inconsistent with our law was applied to deny Playboy any protection”) (footnote omitted); see also id. at 423 nn.11-12 (citing cases from the United Kingdom, France, the former West Germany, and Italy).
U.S. law beyond our borders, I would, in fact, contend that nothing could be more hyperterritorial than the importation right. After all, this right proclaims, "I don't care how lawfully made that copy was wherever you obtained it, nor do I address what happens to that copy so long as it stays outside the United States; but, once you bring it here, it's our law that applies." Similarly, in *Playboy III*, the claim addressed transmissions of images that were received in the United States. It did not matter how lawful *Playmen* might have been at the point of origin of its creation or dissemination; in this country, Tattilo's transmission violated *Playboy*'s intellectual property rights. The defendant publisher may have implicitly conceded the intra-U.S. territorial nature of its activities, as it attempted to recharacterize its transmissions to fit U.S. law exceptions for private importation. Thus, Tattilo contended that it was not sending copies of *Playmen* into the United States; rather, U.S. consumers were taking a "virtual voyage" to Italy, where they acquired personal copies of the magazine, then brought them back home to the United States. The judge was not persuaded: "[t]hat the local user 'pulls' these images from Tattilo's computer in Italy as opposed to Tattilo 'sending' them to this country, is irrelevant. By inviting United States users to download these images, Tattilo is causing and contributing to their distribution within the United States."

Should the court have been more receptive to Tattilo's argument that the lawfulness of its acts at the Italian point of origin of the transmission should determine the legitimacy of making *Playmen* available to Internet users around the world? This seems a rather extrusive application of Italian law, insensitive not only to the impact of the transmission on the economic interests of copyright holders in the receiving countries, but also to the commission of violations of the intellectual property systems of the receiving

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9. See, e.g., Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1096 (9th Cir. 1995).
10. The Supreme Court has recently granted certiorari to determine the scope of the § 602(a) right. In particular, the Court will address whether U.S. copyright law bans all unauthorized private imports of U.S.-copyrighted works—whatever the country of manufacture—or whether it is limited to copies manufactured outside the United States. Lanza Research Int'l, Inc. v. Quality King Distrib., Inc., 98 F.3d 1109, 1113-17 (9th Cir. 1996), cert. granted, 65 U.S.L.W. 3798 (U.S. June 2, 1997) (No. 96-1470).
12. See 17 U.S.C. § 602(a)(2) (exempting importation of items for private use and not for distribution from copyright law).
14. Id. at 1044.
countries. In this respect, application of U.S. law to copies distributed in the United States is even less "extra"-territorial than is the well-recognized application of the forum's law in the context where the impact of a tort committed out of state is felt in the forum state. Compare the classic peripatetic boiler case: Although the consequences of the tort are felt in State B, where the boiler blows up, the wrongful conduct—the violation of the duty of care—takes place in State A, where the boiler was manufactured.\textsuperscript{15} By contrast, in a copyright infringement case, there may be no tort at the place of manufacture (the magazine is lawfully made in Italy), but the act of distributing copies of it in the United States is an independent violation of U.S. copyright law.\textsuperscript{16}

Does the Internet context of the *Playmen* case make application of U.S. law to U.S. downloads less territorially appropriate? Ironically, one could contend that distribution over the Internet reinforces the territorial claims of the United States (and other receiving countries). This is because, at least under U.S. and European Union copyright norms, receiving a work in the memory of one's computer, even the temporary memory of the computer, constitutes the making of a copy.\textsuperscript{17} As a result, another independent

\textsuperscript{15} See Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 434, 176 N.E.2d 761, 762 (1961) (upholding personal jurisdiction in Illinois and applying Illinois law where plaintiff injured in Illinois by safety valve manufactured by defendant in Ohio and incorporated into a hot water heater in Pennsylvania); see also Svendsen v. Questor Corp., 304 N.W.2d 428, 431-32 (Iowa 1981) (upholding personal jurisdiction in Iowa and applying Iowa law where plaintiff was injured in Iowa by the collapse of a pool table manufactured in Missouri).


act of copyright infringement in addition to distribution (assuming the copyright owner did not authorize receipt by U.S. users) will have been committed within the territory of the country where the downloading occurred. One might object that the downloader is not the defendant offshore website operator but the local computer user. Nonetheless, the offshore party is inciting or causing those copies to be made in the receiving countries, and thus would have committed contributory copyright infringement in the country of the download.\textsuperscript{18}

B. Other Recent Cases: Less "There" There than Meets the Eye

The \textit{Playmen} scenario, whether played out in analog or digital media, should be seen as a non-problem for the assertion of U.S. judicial power and the application of U.S. law with respect to transmissions or copies received in the United States.\textsuperscript{19} Some other recent copyright controversies presenting foreign points of attachment should also have been viewed as non-problems, at least for the exercise of the U.S. court’s judicial power (if not necessarily for the choice of U.S. law), but the courts that decided them had a different, more problematic, perspective. The cases fall into two categories: (1) foreign parties; and (2) foreign acts.

1. Non-U.S. Parties

U.S. copyrights can be owned by non-U.S. residents. Not only may a foreigner acquire a U.S. copyright by transfer from a U.S. author or copyright owner, but by virtue of international copyright

However, several commentators have questioned or even strongly criticized the proposition that receipt in a computer’s random access memory entails making a “copy.” See, e.g., Jessica Litman, The Exclusive Right to Read, 13 Cardozo Arts & Ent. L.J. 29, 40 (1994) (criticizing); David Post, New Wine, Old Bottles: The Evanscent Copy, Am. Law., May 1995, at 103, 103-04 (questioning); Pamela Samuelson, The NII Intellectual Property Report, Communications of the ACM, Dec. 1994, at 21, 22-23 (criticizing). But cf. Ira L. Brandriss, Writing in Frost on a Window Pane: E-mail and Chatting on RAM and Copyright Fixation, 43 J. Copyright Soc’y USA 237, 277-78 (1996) (distinguishing infringing copying—which may be accomplished by transitory perceptible access—from fixation in creating a work of authorship, which should require a more stable format).

18. One who knowingly induces another or furnishes the means for another to commit copyright infringement will be liable for contributory copyright infringement. See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996); Gershwin Publ’g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971). For a fuller discussion of contributory infringement as a basis for applying U.S. law to foreign actors, see Bradley, supra note 1, at 573-76.

19. In the actual case, the court was able to avoid questions of jurisdiction and choice of law because the case arose as a contempt proceeding, and the court stressed that it always has jurisdiction to enforce its orders. See \textit{Playboy III}, 939 F. Supp. at 1035-36.
agreements such as the Berne Convention,\textsuperscript{20} to which the United
States is a party, a foreigner from a treaty country who creates a
work of authorship abroad is automatically a U.S. copyright
owner.\textsuperscript{21} Thus, unauthorized copying in the United States of the
work of a foreign author (covered by an international copyright
agreement) violates that author's U.S. rights. Consequently, the
foreign author should be able to bring suit in U.S. courts to protect
her rights in the United States.

This was not so clear to two of three judges on a Ninth Circuit
panel who were persuaded that a claim by a Singaporean plaintiff
alleging infringement of a computer program in the United States
should be dismissed on \textit{forum non conveniens} grounds in part
because of the minimal U.S. interest in a dispute between foreign
litigants over a foreign-made product.\textsuperscript{22} But neither the nationality
of the parties nor the country where the work is manufactured
should be determinative, particularly when the claim alleges that
the infringement occurred in the United States. Had the plaintiff
sought to join claims addressing unauthorized copying or distribu-
tion in Singapore and other countries, there would have been a
stronger basis for the \textit{forum non conveniens} dismissal \textit{as to those
claims}. The claim, as stated, could not have been more territorially
focused on the United States. Indeed, the computer programs at
issue had first been published in the United States, and hence were
works of U.S. origin.\textsuperscript{23} The nationality or domicile or residence of
the parties should have been a red
\textsuperscript{24}
herring.

The Ninth Circuit majority insisted that it was not discriminating
against foreign copyright holders because the \textit{forum non con-
veniens} defense was equally applicable to U.S. copyright plain-
tiffs.\textsuperscript{25} The analysis turned not on nationality, contended the
majority, but on the availability of an alternative forum. What
made the High Court of Singapore a preferable alternative forum,
 apart from the parties' nationality? The majority manifested a per-

\begin{itemize}
\item \textsuperscript{20} Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as
\item \textsuperscript{21} See 17 U.S.C. § 104.
\item \textsuperscript{22} Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd., 61 F.3d 696, 704 (9th Cir. 1995).
\item \textsuperscript{23} Id. at 705 (Ferguson, J., dissenting).
\item \textsuperscript{24} This is all the more true because the Singaporean action adjudicated only local
 claims. See Aztech Sys. Pte v. Creative Tech., Ltd., 1996 SLR LEXIS 124, at *79
 (Singapore H.C. June 26, 1996). Thanks to Ted Sabety, Columbia Law School Class of
 1997, for research assistance regarding the Singaporean action.
\item \textsuperscript{25} See Creative Tech., 61 F.3d at 701.
\end{itemize}
haps uncharacteristically nonterritorial conception of the infringement at issue. Plaintiff's program was copied in Singapore, and the copies were shipped to the United States for distribution in the United States. Under a strictly territorial view, one act of infringement (reproduction) occurred in one territory (Singapore) and another act (distribution) occurred in another territory (the United States). The Ninth Circuit majority, however, preferred to emphasize the "source" of the infringement in Singapore: "[W]e are unable to conceive of a more effective means of protecting Creative's United States copyright interests than by shutting off the pipeline of infringing goods at the source." The majority pointed out that U.S. courts award worldwide damages when the initial infringing reproduction can be traced to the United States and speculated that Singaporean courts could do the same thing.

Without inquiring into Singaporean law, the majority assumed that Singapore afforded a forum in which the entire series of infringing acts, from their initiation in Singapore, to their culmination abroad, could be adjudicated, either under Singaporean law, or under a combination of Singaporean and U.S. law.

In asserting that its forum non conveniens analysis would have been the same had the plaintiff (and perhaps even the defendant) been U.S. nationals or residents, the majority appears to be pointing towards the forum of the "source" country of the infringement as the exclusive forum and law through which to adjudicate multiterritorial copyright claims. This is a very interesting idea that merits serious consideration. This notion, however, is belied by the Ninth Circuit's other decisions in this area and is in tension with other Circuits as well. Recall the Playboy case, for example: taking the Ninth Circuit at its word that the nationality of the plaintiff is not the key to forum non conveniens dismissal, application of the "source" country approach would have sent the action to Italy.
where no infringement would have been found. Indeed, application of the "source" country approach leads to the development of "copyright havens." Thus, the concept, if adopted, would require sufficient inquiry into the jurisdictional and substantive copyright norms of the "source" country to satisfy the U.S. court that the full series of allegedly infringing acts will in fact be fairly adjudicated, before the U.S. court enters a forum non conveniens dismissal. Finally, as we will see, the localization of the "source" of the infringement(s) may require rethinking.

2. Foreign Acts

a. Acts Initiated in the Forum, but Consummated Abroad

Professor Bradley has reviewed the distinction U.S. courts effect between copyright infringement claims alleging initial acts of copying in the United States that permit further acts of copying to be accomplished abroad and claims alleging the "authorization" or intellectual planning in the United States of acts of copying that are physically accomplished abroad. Although U.S. courts have retained jurisdiction over and applied U.S. copyright law to the former kind of claim, some courts, notably those in the Ninth Circuit, are more reluctant to do so in the latter context. This reluctance at first seems consistent with respect for the territorial nature of copy-

29. Cf. Aztech Systems, 1996 SLR LEXIS 124 at *79. In the Singaporean action, the court applied Singaporean law exceptions to copyright protection to find no infringement of plaintiff's program; however, in construing the Singaporean statute, the High Court looked to fair use and fair dealing cases from the United States and the United Kingdom.

30. The term was employed, if not coined, by the European Commission in its explanatory memorandum accompanying its Proposal for a Council Directive on the coordination of certain rules concerning copyright and neighboring rights applicable to satellite broadcasting and cable retransmission, COM(91)276 final at 4; it is the copyright equivalent of tax havens. The proposal itself is reprinted at 1991 O.J. (C 255) 3.

31. Although the Supreme Court has stated that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry," Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981), the Piper court further declared:

We do not hold that the possibility of an unfavorable change in law should never be a relevant consideration in a forum non conveniens inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.

Id. at 254-55. Thus, under Piper, the prospect of a less generous recovery abroad may not tip the balance against a forum non conveniens dismissal; however, the prospect of no recovery abroad, because the substantive standard of conduct is markedly lower than the U.S. forum's norms, may well counsel against dismissal.

32. See Bradley, supra note 1, at 524-26, especially nn.102-13.
right law. That is, there is no violation of U.S. copyright law if a work, including a work of U.S. origin, is copied without authorization in another country. There may be a violation of that country's copyright law, but—under this view—that has nothing to do with the competence of U.S. copyright law.

However, making legislative competence turn on the situs of the physical act of copying can be unduly formalistic. Consider the reaction of a federal district judge in Tennessee to the defendant U.S. record producer's assertion that it had committed no cognizable violation of U.S. copyright law when it exceeded the scope of its license from the copyright holder of the musical composition and authorized third parties to make and sell recordings in foreign territories for which the defendant had not acquired the rights:

[P]iracy has changed since the Barbary days. Today, the raider need not grab the bounty with his own hands; he need only transmit his go-ahead by wire or telefax to start the presses in a distant land. [The Ninth Circuit] ignores this economic reality . . . . Under [the Ninth Circuit's] view, a phone call to Nebraska [from the United States] results in liability; the same phone call to France results in riches. In a global marketplace, it is literally a distinction without a difference.33

The Tennessee federal court may have overstated its proposition, given that the same act that violates U.S. law might well violate French copyright law, so riches might not ultimately result there, either. On the other hand, the defendant could achieve a substantial practical advantage if a U.S. court, persuaded that U.S. law does not apply and that the laws of the countries where the physical copying occurred did apply, then dismissed the claim on forum non conveniens grounds remitting the plaintiff to sue in each of the countries where copying occurred.34 This could prove prohibitive for many plaintiffs. The problem could be alleviated if the court that rejected the U.S. copyright claim (assuming it otherwise has subject matter jurisdiction) applied the copyright laws of the countries concerned.35

But perhaps the court would be wrong in the first place to find no violation of U.S. copyright law simply because no physical copying took place here. After all, does it really make sense to retain jurisdiction and apply U.S. law to the full panoply of copying when a single copy was made here, and all the rest followed on abroad, but dismiss the claim when plaintiff alleges that defendant here devised and initiated a scheme to engage others to copy or distribute abroad? Perhaps courts should be less materialistic about identifying infringement, and recognize that intellectual acts of planning unauthorized acts of copying, public performance, or distribution also can be localized here in the United States.

Consider another recent decision from within the Ninth Circuit. In *Los Angeles News Service v. Reuters Television International*, the plaintiff filmed scenes from the 1992 Los Angeles riots that followed the acquittal of the police officers who had beaten Rodney King. Plaintiff authorized NBC to broadcast these scenes in the United States. Without plaintiff's permission, NBC also transmitted the film footage to the New York offices of foreign news organizations. Videotapes were made in New York City from these transmissions, and the footage from these videotapes was further transmitted to Europe and Africa. The court held that the transmissions from New York to Europe and Africa were not infringing acts completed within the United States, and thus were not cognizable under U.S. law. On the other hand, the videotapes made in

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For some courts the award of damages for infringements consummated offshore is justified because once an unauthorized copy is made in the United States, "[t]he 'work is thereafter impressed with a constructive trust so that the plaintiff is entitled to profits accruing from the exploitation of the work anywhere in the world.'" *Los Angeles News Serv. v. Reuters Television Int'l*, Ltd., 942 F. Supp. 1265, 1269 (C.D. Cal. 1996) (quoting 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 14.05, at 14-96 (1996)).

37. See, e.g., Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088 (9th Cir. 1994).


39. 942 F. Supp. at 1265.
New York did come within the scope of the U.S. Copyright Act, and statutory damages could be awarded for those two copies.\textsuperscript{40}

Had the court applied the "source" theory of infringement, plaintiff should have recovered for all acts, domestic or foreign, stemming from the initial unauthorized U.S. relay of the video to the foreign news services' New York offices, or at least from the unauthorized copying of that transmission onto videotapes. But not only did the court confine the U.S. ambit of the case to the two acts of copying onto videotape, its analysis indicates that if NBC had fed the footage to foreign broadcasters directly, rather than making videotapes first, there would have been no cognizable act of infringement in the United States.\textsuperscript{41} Thus, everything turns on the creation of a material copy within U.S. borders. This does not make sense. The economic impact is the same—usurpation of foreign markets—whether defendant first makes an unauthorized reproduction in the United States, then distributes or transmits abroad, or whether it disseminates the work in dematerialized form, such as a satellite feed, from the United States to points outside.

Again ironically, the Internet may come to the aid of those seeking a U.S.-made copy. If the U.S. actor makes copies available to foreign participants over the Internet, there will have been initial copying in the United States, when the U.S. originator of the offshore dissemination uploads the document to a U.S. server from which it will transit abroad. That is, to send a document via e-mail, the sender does not divest herself of "her" copy; she makes a new copy when she executes the command to attach to the e-mail the file containing the document. Of course, the e-mailer could just as easily avoid the United States by ensuring that copies are "sent" from a server outside the United States. This illustrates the problem with defining as the "source" of the infringement the place where \textit{physical} copies are made.\textsuperscript{42} It makes more sense to identify the place where the plan to engage in unauthorized dissemination

\textsuperscript{40} Although the videotapes were the source of the transmissions to Europe and Africa, plaintiff recovered no damages stemming from the initial U.S. copying because the court held that plaintiff had failed to submit admissible evidence as to damages, either territorial or "extraterritorial," and because plaintiff's claim for offshore damages arose under foreign law. See id. at 1274 & n.7.

\textsuperscript{41} See Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381 (9th Cir. 1995) (no U.S. infringement when diversion of satellite signal commenced in United States, but programs were received in Canada).

was devised, and then to consider the application of that country's law.

b. Acts Violating No U.S. Copyright

Assuming there are no U.S. copyright interests at stake, but further assuming the court has personal and subject matter jurisdiction, should the court dismiss on *forum non conveniens* grounds? In a recent decision involving worldwide videocassette rights to Stravinsky's *Rite of Spring*, recorded on the soundtrack to Disney's *Fantasia*, the Southern District of New York dismissed the action, remitting the plaintiff, a music publisher, to pursue its copyright infringement claims in each of the eighteen foreign countries where videocassettes of *Fantasia* were distributed. Because the U.S. copyright in the work had never been secured, there was no U.S. copyright claim. There were nonetheless substantial U.S. contacts to the litigation: defendant was a U.S. corporation and the contract in which Stravinsky granted rights to record the *Rite of Spring* onto the film soundtrack was signed in New York and governed by New York law. The court justified its *forum non conveniens* dismissal on the ground that the substantive copyright issues would best be tried in the countries whose domestic copyright laws would be called into play by the litigation.

I believe this is a weak basis for dismissal, especially when the United States probably was the only forum in which all eighteen copyright claims could have been adjudicated. Nor would the copyright issues necessarily have been better resolved in eighteen different proceedings. The substantive issue in the case was whether a 1939 contract authorizing recording of the music onto the film's soundtrack for exhibition of the film in theaters should be interpreted to authorize reproduction and public distribution of videocassettes of the film. The Southern District of New York could have heard proof on the resolution of the old license/new media issue under the laws of the eighteen countries at issue. Although other countries may resolve that issue differently, the issue under foreign law is no more elusive than it is under U.S. law. I believe this decision presents a very unfortunate precedent for an "Age of Globalism."

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44. Id.
II. Adjudicating Multiterritorial Copyright Claims in U.S. Courts

In cases like *Subafilms, Los Angeles News Service*, and *Boosey & Hawkes*, copyright owners alleged the commission of unauthorized acts of reproduction, public performance, or distribution in the United States and in many other countries. The interests of judicial economy should have favored adjudication of all those claims in a single forum. Where the United States was the nerve center for multiterritorial infringements—that is, when the defendant is a U.S. entity that has commenced or directed the commission of unauthorized copyright exploitation overseas—as was alleged in or at least appeared to be the case in all three controversies, it is more than appropriate for the court to retain jurisdiction over the entire action, even if it does not apply U.S. law to the entire action. Moreover, under jurisdictional principles in force abroad, the United States, as the defendant's home forum, may be the only forum in which it is possible to consolidate all the infringement claims.45

What law(s) should apply to a claim alleging infringements commencing in one territory, but culminating in many others? I would expand on the "root copy" approach to argue that if it is possible to localize in the United States the point from which the communication of the infringing work (whether or not in material form) becomes available to the public (wherever that public be located), then U.S. courts should apply U.S. law to all unauthorized copies, wherever communicated. Similarly, where the United States is the "nerve center" for foreign distributions, the domestic acts of planning and intellectually implementing the offshore acts should suffice to justify the application of U.S. law to the full series of acts.

Is this recommendation consistent with the conflicts rule of the Berne Convention, which directs application of the law of the country "where protection is claimed" to govern infringement actions?46 One can read that text to require distributive applica-


46. Berne Convention, supra note 20, art. 5(2).
tion of the laws of all of the countries in which infringing copies appear.\textsuperscript{47} Or one could contend that the "country where protection is claimed" is the forum country when that is the country from which the infringement originated, and which is best placed to accord an effective international remedy.\textsuperscript{48}

Where the defendant's contacts with the forum do not justify extensive application of U.S. law, and where the acts complained of lack a U.S. nexus, or (as in Boosey & Hawkes) there no longer is any U.S. copyright claim, the court should revert to traditional territorial approaches and apply the law of each country where the acts were committed. Copyright is a "transitory cause of action": so long as the court has personal and subject matter jurisdiction, it can, and in appropriate cases should, apply foreign copyright law.\textsuperscript{49}

But if the claim presents no question of federal copyright law, would a U.S. federal court have subject matter jurisdiction? So long as there is complete diversity of the parties, for example, a U.S. defendant and a foreign plaintiff,\textsuperscript{50} the federal court will be competent to adjudicate. But what if there is incomplete diversity? In the absence of a federal claim, the case would have to be brought in a state court. However, because U.S. copyright is exclusively federal subject matter jurisdiction,\textsuperscript{51} state courts may not be well-versed in copyright law, and thus may be particularly tempted to dismiss a claim presenting issues of foreign copyright law.

On the other hand, when a multiterritorial infringement action is initiated, there may be good faith allegations of U.S. as well as foreign infringements. Consider the Subafilms case. Plaintiff claimed that defendant had authorized the distribution of videocassettes both in the United States and abroad, in violation of the scope of the license. U.S. law certainly governed the U.S. distributions,

\textsuperscript{47} See Pierre-Yves Gautier, Du droit applicable dans le "village planétaire," au titre de l'usage immatériel des oeuvres, 1996 Recueil Dalloz Sirey (Chroniques) 131, 133.

\textsuperscript{48} Cf. Paul Edward Geller, Conflict of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World, 20 Colum.-VLA J.L. & Arts 571, 597 (1996) (making a similar argument, in the context of infringements for which a point of origin cannot easily be identified); Michel Vivant, Cybermonde: Droit et droits des réseaux, 1996 La Semaine Juridique [J.C.P.] I, No. 3969, at 401, 403 (noting competence of the law most likely to afford the "most appropriate means to erase the ill effects of the harmful activity").


even if it did not cover the foreign distributions. Suppose that in the course of the action, the claim that the U.S. distributions infringed the licensor's U.S. copyright failed. The U.S.-issued "authorization" to distribute abroad would not (in the Ninth Circuit's view) state a claim under U.S. copyright law; as a result, the federal court would be left with only the foreign copyright law claims. Suppose also that there was incomplete diversity between the parties. The federal court nonetheless has (and should exercise) discretion to retain the claim, even though the federal claim has dropped out.\textsuperscript{52} Judicial economy favors retaining an action with which the court has already gained some acquaintance, and which presents many of the same facts that would be adduced in actions abroad. More important, the United States still remains the forum with the most points of attachment to the litigation, and retaining the action is particularly desirable given the alternatives: remitting the action to a state court that may be ill-prepared to adjudicate it; or dismissing in favor of splintering the action among the courts of the several (or many more than several) countries where some portion of the infringing acts occurred.

\textsuperscript{52} See 28 U.S.C. § 1367 (1994) (stating that federal court has "supplemental jurisdiction" to hear state law claims related to the federal claim; if the federal claim fails, the court "may," but is not obliged to, dismiss the pendent state claims); United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (retaining jurisdiction over state labor law claims after failure of NLRA claim).